

CANADA / JUDGMENT

R. v. Grewall

2003 BCCA 441

COURT

British Columbia Court of Appeal

DECIDED

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2003BCCA0441 COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Grewall; R. v. Grewall; R. v. Toor, 2003 BCCA 441 Date: 20030801 Docket: CA027893; CA027902; CA027986 Docket: CA027893 Between: Regina Respondent And Ajit Singh Grewall Appellant

- and - Docket: CA027902 Between: Regina Respondent And Sukhjit Singh Grewall Appellant
 - and - Docket: CA027986 Between: Regina Respondent And Sandeep Singh Toor Appellant
Before: The Honourable Madam Justice Southin The Honourable Madam Justice Saunders
The Honourable Mr. Justice Thackray P. S. McMurray D. Gaffar Counsel for the Appellant,
Ajit Singh Grewall M. A. Nathanson Counsel for the Appellant, Sukhjit Singh Grewall A. F. P.
Brooks Counsel for the Appellant, Sandeep Singh Toor W. J. S. Bell Counsel for the
Respondent (Crown) Place and Date of Hearing: Vancouver, British Columbia 28th, 29th,
30th May, and 3rd June, 2003 Place and Date of Judgment: Vancouver, British Columbia 1st
August, 2003 Written Reasons by: The Honourable Madam Justice Southin Concurred in by:
The Honourable Madam Justice Saunders The Honourable Mr. Justice Thackray Reasons for
Judgment of the Honourable Madam Justice Southin:
- [1] These are appeals by the appellants, Ajit Singh Grewall, to whom I shall hereafter refer as the appellant Ajit, and Sukhjit Singh Grewall, to whom I shall hereafter refer as the appellant Sukhjit, from their convictions of the first degree murder of Baljit Kaur Grewall, the wife of the former and stepmother of the latter, and from their convictions for conspiracy to commit that murder, and by the appellant, Sandeep Singh Toor, from his conviction in the same killing of second degree murder. He was acquitted on the conspiracy count.
- [2] The learned trial judge, Mr. Justice Romilly, heard in the spring of the year 2000 a series of voir dires and made rulings thereon in May 2000.
- [3] Before the jury, the trial began on 13th September, 2000, and ended with the verdict on 27th October, 2000.
- [4] The principal events of this case took place in Surrey and Langley, British Columbia. Both (Langley is in fact in two parts, Langley City and Langley Township, but nothing turns on that oddity of local government) lie east of Vancouver in the lower Fraser Valley.

- [5] On the 19th April, 1998, the appellant Ajit and the deceased, who earlier that month had moved to 1975 - 232nd Street in Langley, had visited Narinder Ghag at 12202 - 63A Avenue Surrey. At about 9:30 or 9:45 p.m. they left in her new maroon Nissan Pathfinder. At approximately 10:00 p.m. the appellant Ajit knocked on the door of the Uppal residence at 14096 - 102A Avenue, Surrey. The Uppal residence is some miles more or less north of the Ghag residence.
- [6] Earlier that day, apparently at the appellant Ajit's request, his daughter Jatinder (stepdaughter to Baljit Grewall), aged about 20, drove her Mustang motor vehicle to the Uppal residence telling Mrs. Uppal that her father would need it later that day. Mr. Uppal did not see the Pathfinder but he did see the appellant Ajit drive off in the Mustang. At about ten minutes to eleven, give or take a few minutes, Mrs. Selman, who was driving down 232nd Street with her husband, noticed a sports utility vehicle drive into the middle stall of the carport at the Grewall house and park.
- [7] It is now necessary to shift the scene to a Chevron gas station at 122nd Street and 72nd Avenue in Surrey. According to the evidence at trial of Raminder Bhandher (before this Court the appellants sought to adduce, as fresh evidence, his recanting, in part, his trial evidence and I shall come to that application presently), he and the appellant Sukhjit had been driving about that evening in Sukhjit's white Ford Explorer. At the gas station, they met up with the appellant Toor driving also a white Ford Explorer. The appellants admitted at the trial that in that vehicle, registered in the name of Toor's father to which Toor had "use and access", was a hard wired cellular telephone. That cellular telephone and others figure prominently in the evidence.
- [8] The appellants Sukhjit and Toor then had a conversation, apparently out of earshot of Bhandher, and about 9:15 p.m. they left in the Toor Explorer. Bhandher was then left in charge of the appellant Sukhjit's Explorer which he thereafter drove about. The appellant Sukhjit had told him, not in Toor's presence, that he had a gun and he and Toor were going to do a "drug-jacking" in Langley but later, when Bhandher asked Sukhjit if he had gone to Langley, he said no, he went to White Rock. When he asked him subsequently whether he had shot his stepmother, he denied doing so.
- [9] At ten minutes to eleven, the appellant Ajit, then aged 49, telephoned 911 and, upon the call being transferred to the Langley detachment, reported that upon arriving home he found his wife "shot". Part of his conversation with the 911 operator was this: D2: "What time would she (Baljit) have gotten home, in the last hour?" Ajit: "No idea." D2: "No idea, but the two of you left at 8:00, you went into Surrey, she brought the truck back." Ajit: "Yes".
- [10] Baljit's daughter by her second husband, Jaspreet Kular, then 14, who was at home with the appellant Ajit's daughters by an earlier marriage, was a witness for the Crown.
- [11] When the police arrived at the scene, the appellant Ajit was standing in the driveway. A woman later identified as Baljit Grewall was lying just behind the Nissan Pathfinder which was parked facing forward in the middle stall of the carport. She had a large wound to her

mid-forehead, "her purse is on her arm, she is still holding a box of Tim Horton's donuts. There is a bag of groceries in her other hand; ... Two 9mm shell casings were located near the body." That night the police tested the appellant Ajit for powder residue on his hands. There was none.

- [12] Upon an autopsy being conducted, Mrs. Grewall was found to have been shot twice.
- [13] On 18th September, 1998, pursuant to a search warrant, the police seized at 12474 - 78A Avenue in Surrey, the residence of Joey Brar, then aged 19 or 20, a Nike backpack containing a 9mm gun, a silencer, ammunition, a white plastic goalie mask and three computer discs, which turned out to contain among other things some homework of the appellant Sukhjot's sister, Jatinder.
- [14] On 22nd September, the seized items were sent to the Royal Canadian Mounted Police forensic laboratory in Vancouver. In his report of 22nd October, the firearms expert identified the two shell casings found near Baljit Grewall's body as having been fired from the 9mm handgun seized on 18th September.
- [15] Mr. Brar told the police and testified at trial that the bag had been delivered to him late one night earlier in the year by a friend, the appellant Toor (known as "Sonny"), who was accompanied by the appellant Sukhjot. Toor had called Brar on the telephone some time before the two men arrived. They told Brar that the gun had been used in a "drug-jacking" and asked him to keep the bag. Telephone records disclosed a call from the appellant Toor's cellular telephone to the Brar residence at 11:01 p.m. on 19th April, 1998.
- [16] No one suggests that Mr. Brar had anything to do with the killing of Baljit Grewall or that he had, before the police came, an appreciation of the significance to the murder of the things in his possession.
- [17] Upon this evidence, coupled with the evidence of the killing itself, the Crown had a case to go to the jury that the appellant Toor and the appellant Sukhjot were guilty of the murder of Baljit Grewall. Whether there was a sufficient case to go to the jury on first degree murder I need not address but proof of possession of the murder weapon at a critical time is, in the absence of any explanation, powerfully persuasive of guilt.
- [18] I have begun this account of the evidence in this way for two reasons: first, because the recovery of the murder weapon is critical to the Crown's case and it appears that it might not have been recovered but for evidence obtained from certain communications intercepted pursuant to authorizations under s. 186 of the Criminal Code, authorizations which the appellants assert ought not to have been upheld by the learned trial judge; and, secondly, because many of the other grounds of appeal advanced in this case (none of which is founded on Charter considerations), even if they might be meritorious in a case without such hard evidence, lose force in a case with it.

- [19] The Crown's theory was that the appellant Ajit, being in distressed financial circumstances and knowing he stood to come into a substantial inheritance from his wife, whom he had married in 1997, induced his son to do the killing. To that end, the appellant Ajit arranged to have Baljit arrive home that night just moments before himself thus providing the appellant Sukhjot with the necessary opportunity. The appellant Sukhjot persuaded the appellant Toor to drive him in Toor's father's white Ford Explorer to the scene of the murder and after the murder to return him to the Chevron gas station.
- [20] The first authorization is in the order of 15th May, 1998, made by Rowan J. pursuant to s. 186 of the Criminal Code which, after referring to the affidavit of Donald Adam sworn 14th May, 1998, continues in part thus: AND UPON BEING SATISFIED that it would be in the best interests of the administration of justice to grant the Application, AND THAT the other necessary requirements of Section 188(1)(b) of the Criminal Code have been met: AUTHORITY IS HEREBY GIVEN to Peace Officers in the Province of British Columbia and elsewhere in Canada, and to any other person acting under the direction of a Peace Officer for the purpose of investigating the offences hereinafter set out, to intercept communications upon the following terms and conditions:
- 1) The offences in respect of which communications may be intercepted are: 1.1 Murder, Contrary to Section 235 of the Criminal Code of Canada; 1.2 Accessory after the fact to murder, Contrary to Section 240 of the Criminal Code of Canada; 1.3 Conspiracy to commit any of the offences listed in paragraphs 1.1 and 1.2 inclusive, contrary to sections 465(a) and 465(c) of the Criminal Code.
 - 2) The types of communications which may be intercepted are: 2.1 "private communications"; and 2.2 "radio-based telephone communications; As those terms are defined in section 183 of the Criminal Code, and includes all oral communications and telecommunications.
 - 3) The identities of the persons that are known with respect to the offences set out in sub-paragraph 1 above and whose private communications are to be intercepted are: 3.1 Ajit Singh GREWALL Address: 1975-232nd Street, Langley, British Columbia, and 1088 Sumas Way, Abbotsford, British Columbia Occupation: Farmer 3.2 Surjit Singh GREWALL Address: 1088 Sumas Way, Abbotsford, British Columbia Occupation: Farmer 3.3 Sukjit Singh GREWALL Address: 1088 Sumas Way, Abbotsford, British Columbia and Vancouver Pre Trial Services Centre, 275 E. Cordova Street, Vancouver, British Columbia Occupation: Farmer 3.4 Karinber Singh TOOR Address: 6951-127 'A' Street, Surrey, British Columbia Occupation: None [Karinber Singh Toor is a brother of the appellant Toor.]
- [21] The reason for the reference to the Vancouver Pretrial Services Centre is that the appellant Sukhjot was by 15th May in custody on unrelated charges.
- [22] There then followed a list of places at which communications might be intercepted which included various cellular telephones.
- [23] No argument is made that the police went outside the terms of the authorization.

- [24] As a result of the authorization, evidence was obtained, described by Constable Adam upon an affidavit sworn 10th July, 1998, in support of a further authorization:
151. I have read the monitor's log entry and spoken to Constable GILL who listened to an intercepted communication, which occurred on TOOR's cellular telephone (604) 501-9165 on May 24th, 1998, commencing at approximately 14:51 hours. Sukhjit GREWALL was calling from Vancouver Pretrial Services Centre and the phone was answered by Sonny TOOR. The following conversation took place. Sukhjit GREWALL asks Sonny if "the thing" is still at that guy's house. Sonny: "It's around, yeah." Sukhjit: "Now what you do, get a file, get one with three (3) sides that will fit in there and file the inside, man." Sonny: "Okay." Sukhjit: "I'll tell you why later." Sonny: "I'll come and see you and we'll talk." Sukhjit then asks for Kenny TOOR, who comes on the line.
152. I have reviewed the conversation about the disposal of the "thing" referred to in paragraph 151. The "thing" is talked about again in paragraphs 160, 168 and 213. Sukhjit GREWALL in addition to instructing that it be "filed" instructs that it be "thrown in vinegar". I believe that the object being talked about is a firearm, based on the following:
- i) the secretive manner in which this article is being spoken of; ii) the reference to getting a three sided file and filing the inside, I believe is in order to destroy the ballistic characteristics of the barrel; iii) washing the article in vinegar which is acidic, will interfere with the ability to obtain fingerprints (and/or D.N.A. evidence); iv) the repeated instructions to get rid of the item coupled with the instructions to file inside it and wash/put it in vinegar also lead me to the belief that this weapon has been used in some significant crime requiring this extent of disposal. I believe it could very possibly be the murder weapon that Sukhjit GREWALL is attempting to have disposed of.
- [25] It is, I infer, that conversation which led the police to suspect the appellant Toor.
- [26] Thus, the question of the validity of the first authorization is one of utmost gravity not only for the appellants but also for the Crown.
- [27] As the affidavit in support (14th May, 1998) was 79 pages of double-spaced type, I cannot quote it in full. What comes out of it is evidence of: (1) animosity between the family of the appellant Ajit and the family of the dead woman (her brother had told the police that he suspected the appellant Ajit and his brother Surjit of the killing), her unhappiness in the marriage, his philandering, his distressed financial circumstances, his lack of grief at her death and the participation of the appellant Sukhjit in an unrelated crime; (2) traffic on the night of the 19th April, 1998, on the cellular telephone of the appellant Ajit:
95. I have reviewed the report of Cpl. WALKER who analysed the telephone data for cellular telephone number (604) 807-2625, registered to Ajit GREWALL and cellular telephone number 807-0874, registered to Sukhjit GREWALL. The analysis incorporates the time from 21:33 hours to the time of the 911 call at 22:49 hours.

- (604) 807-2625 (Ajit GREWALL) 2144 hours 807-2625 (AJIT) to 807-0874 (SUKHJIT) 24 secs. 2144 hours 807-2625 (AJIT) to 649-6149 (TOOR) 16 secs. 2145 hours 807-2625 (AJIT) to 857-8944 (1975-232nd St) 59 secs. 2204 hours 807-2625 (AJIT) to 807-0874 (SUKHJIT) 18 secs. 2205 hours 807-2625 (AJIT) to 649-6169 (TOOR) 27 secs. 2213 hours 807-2625 (AJIT) to 649-6149 (TOOR) 18 secs. 2225 hours 855-7922 (GILL) to 807-2625 (AJIT) 6 mins. 50 secs. 2249 hours 807-2625 (AJIT) to 911 12 min. 15 secs.
- (604) 807-0874 (Sukhjait GREWALL) 2133 hours 807-0874 (SUKHJIT) to 649-6149 (TOOR) 24 secs. 2141 hours 807-0874 (SUKHJIT) to 807-2625 (AJIT) 37 secs. 2144 hours 807-2625 (AJIT) to 807-0874 (SUKHJIT) 24 secs. 2203 hours 807-0874 (SUKHJIT) to 649-6149 (TOOR) 12 secs. 2204 hours 807-2625 (AJIT) to 807-0874 (SUKHJIT) 18 secs. 2205 hours 807-0874 (SUKHJIT) to 506-1248 (BRAR) 48 secs. 2222 hours 807-0874 (SUKHJIT) to 506-1248 (BRAR) 14 secs. The Toor cellular telephone was registered to Shamsher Singh Toor, the father of the appellant Toor.
- [28] On the issues arising on s. 186, Constable Adam deposed thus:
129. Conventional investigative procedures that have been tried and failed to obtain enough evidence to support charges in the murder for the murder of Baljit Kaur GREWALL include:
- i) witness interviews; ii) limited physical evidence from the forensic examination of the scene; iii) warrant searches of cellular telephone records; iv) warrant search of 1975 - 232 Street, Langley, B.C.;
 - v) neighbourhood enquiries for direct evidence from witnesses; vi) computer searches for similar offences in Langley area; vii) computer searches for similar offences and suspects; viii) interviews with Ajit GREWALL; ix) interview with Surjit GREWALL;
 - x) surveillance of principal suspects; xi) investigation and elimination of other suspects.
130. Although conventional Police methods are continuing in the investigation of the death of Baljit Kaur GREWALL, I believe that such methods alone are unlikely to succeed in obtaining evidence with respect to the involve-ment of the persons in the murder due to:
- i) cultural barriers; ii) language barriers; iii) limited potential for further physical evidence; iv) potential knowledge of Police surveillance methods by at least one suspect;
 - v) prospect of success of an undercover operation is low given the limited number of Indo Canadian operators, the tight knit nature of the Indo Canadian community; vi) witnesses who appear to be lying to the police have been encountered, and we are unlikely to get to the truth;
131. I believe Ajit Singh GREWALL, Surjit Singh GREWALL and Sukhjait Singh GREWALL and Karinber Singh TOOR are involved in the murder of Baljit Kaur GREWALL. I base my opinion on the review of the overall police investigation, including: the circumstances in which Baljit GREWALL ended up driving herself home, the inconsistent times that Ajit GREWALL's cellular telephone shows for the drive home, the narrow window of opportunity to commit

the murder; the presence of motive; the threat issued by Surjit GREWALL, the inconsistent statements of Ajit GREWALL, the cellular telephone calls surrounding the events leading up to the murder linking Sukhjot GREWALL, Ajit GREWALL, and the telephone I believe was used by Ken TOOR, the friendship and co-involvement in violent crimes by Sukhjot GREWALL and Ken TOOR, and the use of a 9 millimetre handgun in two of those offences, the looking for surveillance done by Sukhjot GREWALL the day after the murder, inconsistent actions and lack of remorse shown by Ajit GREWALL.

- [29] No suggestion was made to the court below and none has been made here that Constable Adam was an untruthful witness.
- [30] The thrust of the argument of the appellants is that the learned trial judge, in addressing the issue of the validity of the order of Rowan J., applied the test of "efficaciousness" enunciated by this court in *R. v. Araujo* (1998), 127 C.C.C. (3d) 315, rather than the correct test of "investigative necessity" as laid down by the Supreme Court of Canada in the *Araujo* appeal to that court: [2000] 2 S.C.R. 992, 2000 SCC 65.
- [31] Speaking for the court, LeBel J. said: 40 Nevertheless, this disagreement with the approach of the Court of Appeal does not mean that the appeal must succeed on this point. On the contrary, we must apply the proper test to the circumstances of the case at bar in order to ascertain whether its application would support the conclusion reached by the Court of Appeal. More precisely, the question is whether the factual circumstances revealed in the affidavit could have provided a sufficient basis for the issuance of the authorization.
- [32] Thus, even if the learned trial judge applied the wrong test on his ruling on the voir dire, the ultimate question for us is whether the "factual circumstances revealed in the affidavit could have provided a sufficient basis for the issuance of the authorization", that is to say, does the affidavit show that "other investigative procedures are unlikely to succeed", those words being understood in the manner set out in paragraph 28 of LeBel J.'s judgment.
- [33] From the whole of the affidavit I take these propositions: (1) the appellant Ajit had a powerful motive; (2) he was not the trigger man; (3) if, therefore, he was a principal, he had a confederate present at the time of the victim's arrival at home and somehow he had had to communicate with the killer as to when she would arrive home; (4) the appellant Ajit had a cellular telephone with which he made and received many calls that night; (5) if, therefore, he was a principal, it was probable he would communicate further with his confederate or confederates by telephone and if more than one they would communicate with him and each other.
- [34] No one put forward on the hearing of this appeal any rational suggestion as to what investigative techniques other than interception were likely to succeed. I am of the opinion that the evidence in support of this authorization met the standard required by law and I would therefore dismiss this ground of appeal in each appeal.

- [35] At this point it is convenient to address the appellants' application to adduce the "fresh evidence of Raminder Bhandher", frequently referred to below as "Mindy". Why the appellants Ajit and Sukhjot made such applications is unclear as the evidence in issue is a recantation only of evidence implicating the appellant Toor.
- [36] Bhandher, aged 22 at the time of trial, was a witness so unwilling that he had to be arrested in Calgary and brought back to Vancouver to testify. In October 1998 he had been arrested and charged with first degree murder arising out of the murder in issue here. I infer that he fell under suspicion because of cellular telephone records. After he gave, in accordance with the requirements of *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740, 19 C.R. (4th) 1, a sworn statement concerning his knowledge of the matter, the charge against him was dropped.
- [37] The learned trial judge twice in his charge to the jury invited the jury to listen to the tape recording of the testimony of the witness to whom he referred on one occasion as the "famous or infamous" Mindy. The jury, after they retired to consider their verdict, accepted the invitation.
- [38] At the trial, speaking of the night of the 19th April, 1998, the witness testified, after describing what he and the appellant Sukhjot had done earlier that day in the latter's white Ford Explorer: Q Any particular spot in the Newton area? A We drove to a gas station. Q Do you remember where that was located? A At 122nd Street and 72nd Avenue. Q I'm sorry? A 122nd Street and 72nd Avenue in Surrey. Q Surrey. Did you drive onto a gas station lot? A Yes. Q Now, again, do the best you can. Approximately what time would this be? A It was after 9:00 p.m. Q Did you park on that lot? A Yes. Q Did anyone arrive that was familiar to you? A Sonny. Q Sonny who? A Sonny Toor. Q The same Sonny Toor you'd seen earlier that day? A Yes. Q And was he driving the same truck? A Yes. Q Was there anyone else with him? A No, there wasn't. Q And were you parked when he arrived? A Yes. Q And when he came onto the lot, where did he go? A He got out of the vehicle. Q And did he do anything? A Him and Sukhjot were speaking amongst each other. Q So did Sukhjot get out of yours? A Yes, Sukhjot got out of the vehicle. Q And do you remember approximately how long they'd be chatting? A Probably after ten or fifteen minutes, I guess. Q Eventually it broke up, did it? A Yes. Q And what did Sukhjot do? A He left with Sonny. Q He left with him in what? A In the truck. Q Whose truck? A Sonny's Explorer.
- [39] Later he said that he returned to that Chevron gas station consequent upon a telephone conversation: Q And when you got to the Chevron station, what did you do? A I waited like -- I don't know. He was there right away pretty much, and him and Sukhjot -- him and Sonny showed up and then he jumped in the truck and we drove off. Q About what time would it be when Sukhjot came back, about? A After 11:30. Q This is all p.m., is it? A Yes.
- [40] He then described what he and the appellant Sukhjot did thereafter and said they ultimately arrived in Abbotsford where he went to sleep.
- [41] On an affidavit filed on this application, he deposes:

7. In fact, when I attended the Chevron station with Sukhjit Grewall I dropped him off and drove in his truck to various locations.
 8. I did not know and do not know whether Sundeeep Toor was at the Chevron station. However, I was informed that I was being charged with murder, had no experience with a criminal investigation of this sort and felt that it was in my best interests not to disagree with the police.
 9. During the interrogation often when I spoke, the police would interrupt me and tell me that I was not being truthful and that I knew more than I was telling them. By the time I gave my statement I was simply anxious to be released and to get home so that I could go to work.
 10. When I testified at the preliminary inquiry and at the trial, I was provided with a copy of my statement and told to review it. I therefore testified in a manner which was consistent with the statement I gave to the police during my interrogation.
- [42] He repeated this explanation of his evidence at trial and at an examination which was videotaped and was shown to the court on the hearing of these applications. In opposition to the applications, the Crown has filed the affidavit of Constable R. S. Stephenson to which were exhibited transcripts of the two interviews with the witness referred to in his affidavit, the latter of which is the so-called K.G.B. statement. By a subpoena, Mr. Bhandher was brought to the hearing of these applications and he was cross-examined on his evidence as given on the videotape. He said, in part: Q You're now saying, or you were saying on March 7th, 2003, that really you don't know whether or not Mr. Toor was there because you just dropped Sukhjit off and left right away? A Yes. Q So you're not saying that it was not Sonny Toor who picked him up that day, you're just saying you didn't see Sonny Toor? A I -- if Sonny Toor was there, I would have recognized him. Q All you're saying, though -- A I dropped him off, he left, and I drove off. That's it. Q So what you're saying, though, is that after you left, presumably, Sonny Toor could have arrived at that point, but you weren't there? A I -- I wasn't there. Q And likewise, what you're now saying, as of March 7th, is that when you went back to the Chevron station to pick up Sukhjit Grewall, you didn't see anybody else around, you just picked up Sukhjit and left very quickly; is that correct? A Well, it's a busy gas station. There's other vehicles there, but when I pulled up, Sukhjit was standing there and he jumped in the vehicle. Q He was waiting for you and jumped in the vehicle? A Yes. Q So you can't say, based on that information, who may have dropped him off earlier? A No, I can't. * *
- * Q So other than your change in your testimony about Sonny Toor, seeing him at the Chevron station and your interaction with him at the Chevron station, everything else you said in your trial evidence was correct? A Yes. Q So everything you've said about Sukhjit Grewall and his involvement that night and that day is correct? A Yes. Q And everything you've said about Ajit Grewall and any interaction you may have had with him on either the days before or the days after, that was all accurate, as well? A Yes.

- [43] The principles to be applied are found in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, and are so well known I need not quote them. To me, the critical issue here, to use the words of McIntyre J., is whether "the evidence [is] possessed of sufficient credibility that it might reasonably have been believed by the trier of fact?" Palmer was also a question of recantation. As I understand it, the question is not whether, had Bhandher at the trial denied the truth of his "K.G.B." statement and testified that Toor was not at the Chevron station that night, he would have been believed; the question is whether "the evidence tendered as to the validity of Bhandher's trial evidence [is] wholly unworthy of belief."
- [44] The importance of this evidence lies in its putting the appellant Sukhjit and the appellant Toor together in the appellant Toor's Explorer at about 9:15 or 9:30 p.m. and again at 11:30 p.m. from which the jury might infer that the two were together in the intervening time which encompassed the undoubted time of the murder.
- [45] But there is other evidence which supports that inference. At 10:03 p.m. the appellant Sukhjit's cell phone called the appellant Toor's cell phone. At 10:04 p.m. the appellant Ajit's cell phone called the appellant Sukhjit's cell phone. At 10:05 p.m. and again at 10:13 p.m. calls were made from the appellant Ajit's cell phone to that in the Toor vehicle. From all of this the jury could infer that the appellant Sukhjit called the appellant Toor to announce his arrival at the Chevron station, that the appellant Ajit called the appellant Sukhjit to announce that he and Mrs. Grewall had left the Ghag residence and, not getting him, called the Toor vehicle. Further support for the two men being together that night is found in the evidence of Brar. It is so, of course, that he could not remember the date with precision but since the weapon in the Nike bag was the murder weapon, it has to have been after the killing. The jury could infer from that that the delivery of the Nike bag took place late that same night.
- [46] Because of this evidence which lends support to the evidence which this witness gave at the trial, in my opinion the recantation is unworthy of belief and therefore I would dismiss the application to adduce further evidence. THE APPEAL OF THE APPELLANT AJIT
- [47] That this appellant had a motive is plain on the evidence. The Crown called a great deal of evidence as to his very substantial indebtedness and as to his prospects of inheritance from his wife. From the Crown's evidence of the events of the 19th April, the jury could infer that this appellant intentionally put his wife where she might be killed by someone else. One might call that evidence of opportunity. The Crown also called evidence of conversations on his part with an undercover officer, Cst. Da Silva, which the Constable understood - it was, of course, for the jury to decide whether the Constable's understanding was correct - as inviting the killing of the appellant Toor and as to the appellant's attempts to get a former mistress to take the blame for the killing.
- [48] Thus, the Crown's case against this appellant was founded on an entangling web of circumstances. No argument is made in this Court that the verdict was unreasonable.

[49] I will deal with the assertions of error seriatim, but not in the order which counsel made them.

1. The learned judge erred in admitting into evidence the written entries in a personal planner of the deceased.

[50] Here, of course, the question is the exception to the hearsay rule. The note in issue was described by the learned judge in his ruling in voir dire No. 3 on 18th September, 2000:

1. Abuse from his family
2. Lies all the time
3. I'm the only one providing financially
4. The whole family takes from me and calls me a bitch, slut
5. Hasn't given me any security only took from me
6. We don't live together as husband and wife, I'm treated as someone that he comes to have sex with. The only people he shows respect to are his wife and children and Brothers and nephew.
7. They phone me and verbally abuse me and when I phone back they hang up on me
8. Due to this relationship I have lost my family and friends and all my self respect in the community
9. Mentally he is killing me everyday piece by piece. I feel like taking my life because I cannot go on like this anymore, Because when I look in the mirror all I see is a bitch that has no write (sic) to live anymore
10. I really don't care about the money because I feel that I person that takes money from someone for the purpose of hurting someone that is trying to raise her children isn't worthy of anyone's love. I loved him unconditionally and he only used me for his purpose
11. I still can't say anything bad about him, I hope for his sake he makes a success of his farm even though his family doesn't deserve him
12. I know I have to let go if I want to raise my children and move far away and I hope it happens soon, cause I don't know how long I can go on like this
13. Paying for his children to go to the fitness club when he hasn't done anything for me or my children

[51] The thrust of this evidence is that this was not a happy but an unhappy marriage. It might be said to contradict the evidence of some other witnesses that the deceased and the appellant appeared to be a happily married couple. Having reviewed many authorities, the learned judge said:

- [36] Needless to say, I have reviewed all the law enunciated above. I have already found the necessity requirement to be met as no other evidence is available. With respect to the issue of reliability, there could be no doubt that the statements in the personal planner are not prior inconsistent statements being proffered to contradict the truth of the declarant's testimony at trial. I find the personal planner entry to be reliable because when Baljit made the statements she was disinterested, and the statements were made before any litigation was undertaken. In addition, Baljit Grewall was possessed of peculiar or special means of knowledge of the event. Thus, I find the personal planner entry to meet the criteria of reliability.
- [52] I would not have put the matter so. The learned judge might have said that only the parties to a marriage know with certainty whether the marriage is happy or unhappy. Thus, if one is dead, that spouse's writing is, in the absence of any reason why that spouse would lie, the best evidence on the point. This evidence was one more piece of the puzzle and the learned judge was right to admit it.
2. The learned judge erred in failing to properly instruct the jury with respect to the evidence of Cindy Chhokar.
- [53] Although her evidence was not essential to the Crown's case, nevertheless it was not so peripheral that it required no special comment. The question is whether the learned judge sufficiently instructed the jury.
- [54] The gist of her evidence was this: at one time she had been the appellant's mistress and had lent him \$10,000 which he had not repaid. He had told her when he was divorced from Baljit Grewall's immediate predecessor that he would never marry again and then he did. After the murder he said to her, "I have all the money I need, we can get married." At his instigation ("to keep him happy") she gave to the police an affidavit that Charn Deol, who also gave evidence for the Crown at the trial denying any involvement in the murder, had obtained the services of "two hit men" to kill Baljit Grewall: On the evening of April 19 1998, Charan Deol phoned me and asked me if I wanted to go for a drive. My daughter and myself were watching T.V., this was about 9:30 pm. I said okay my daughter had fallen asleep just before I left. Charan came over and picked me up shortly after that he also had picked up to other two men. One was black heavy built and the other man was a white man about 30-35 years old. We picked them up on No. 3 Road and New Westminster Highway at the corner. They sat in the back seat of Charan's car. They said hi I said hi also. Charan said to the two men are you both ready they said yes. I didn't know what that met [sic]. So we went out to the highway towards the highway 10. Churn kept on driving I said to him where are we going he said I am going to do away with Ajit and Baljit. I thought he was just joking I started to laugh. I just looked at him. So has we where going along this dark and long windy road. Charan had come to a full stop and let the both men out. Charan drove me around for about 45 minutes. Then we picked up the two men after 11:00 pm. Charan said did you has I said they said the job has been done don't worry. When we do a killing we do it right, not a trace will be found. Charan felt relieved. He said good job boys, you will be paid tomorrow. Then Charan drove

back to Richmond he let the two hit men back a No. 3 Road in Richmond. Then he dropped me off. Charan Deol phoned me after the funeral and yelled and was very upset asking me why I went to the funeral. Since the funeral Charan refuses to have anything to do with me.

- [55] That statement was false in all respects. She was arrested for the murder and was told by the police that if she did not tell the truth there would be difficulties, or words to that effect. She had made the false statement because she needed her \$10,000 and believed that if she did what the appellant wanted, he would repay her.
- [56] In cross-examination, she conceded that she had at one time thought about killing the appellant Ajit.
- [57] The thrust of the argument of Mr. McMurray, citing, of course, R. v. Vetrovec, [1982] 1 S.C.R. 811, is that Ms. Chhokar was an unsavoury witness or an accomplice and therefore her evidence required a "clear and sharp warning" paragraph. I agree with Mr. Bell for the Crown that:
75. ... There were sufficient concerns about her credibility that warranted specific comment in the jury charge. Whether the charge was sufficient in that regard can only be assessed by a review of the totality of what was said therein about credibility and the specific references to Chhokar's evidence.
- [58] The learned judge, dealing with witnesses generally, told the jury that a deliberate lie under oath may taint the entire testimony of a witness, that partiality is a factor in assessing credibility and that reasonable doubt applies to credibility. As to her testimony in particular, the learned judge noted that the witness had given prior inconsistent statements about her involvement in the killing and said that it was very dangerous to accept her trial testimony unless her explanation for the inconsistency was accepted.
- [59] Either this witness was guilty of the murder or she was simply a woman who had been duped by a man. At the trial, the appellants did not adduce in evidence, either by cross-examination or as part of their case, anything to support the proposition that she or Deol was a participant in the murder. To put her, because the appellant Ajit on her evidence had duped her, into the category "unsavoury", seems to me to go too far.
- [60] What sort of warning in the charge to the jury should be given on the evidence of a particular witness is a matter of discretion in part, I think, founded on the judge's own assessment of the credibility of the particular witness. Another judge might have said something different from what Romilly J. said. But that does not mean Romilly J. erred. I would not give effect to this ground of appeal.
3. The learned trial judge erred in admitting evidence of bad character against the appellant.
- [61] The evidence said to be such evidence is the appellant Ajit's conversations with the undercover officer which the jury could construe as an invitation to have the appellant Toor killed and the appellant Ajit's apparent lack of grief at his wife's death.

- [62] The learned trial judge admitted the evidence of the appellant's lack of emotion under the rubric "post-offence conduct indicating a consciousness of guilt". I shall also do so and therefore under this allegation of error shall limit myself to the conversations with the undercover officer, which he also dealt with under that rubric.
- [63] The learned judge had addressed this question generally in a ruling delivered 26th May 2000 on voir dire No. 1.
- [64] At p. 33 of that ruling, after an extensive review of authorities which bore not only on Constable Da Silva's evidence concerning Toor but also on other matters which the learned judge ruled inadmissible, the learned judge said:
- [60] The situation is different, however, with respect to the statements regarding Toor. They can be linked to the accused's, Ajit's, participation in the alleged plot to murder Baljit Grewall. I find that these statements are admissible under the rubric of post-offence conduct. I find that the potential probative value of these statements outweigh their prejudicial effect.
- [65] Thus, the learned trial judge did not directly address the question of whether this evidence of Constable Da Silva was inadmissible as evidence of "bad character". I am quite unable to see why he should have done so. All evidence implicating an accused in the crime with which he is charged is, by its nature, evidence of "bad character". It does not cease thereby to be inadmissible. I would not give effect to this ground.
- [66] On this point, the learned judge made no error.
4. The learned judge erred in failing to caution the jury as to the limited purpose for which evidence of bad character could be used.
- [67] Here, counsel for this appellant says:
48. In admitting the evidence of the deceased's personal planner, the Trial Judge found that the entries were suggestive of bad character on the part of the Appellant. He found that the potential prejudicial effect of the evidence was low and could be adequately remedied by a limited instruction to the jury. (Appeal Book Vol. 13 p. 2234)
49. The Trial Judge also admitted evidence of the Appellant's attempts to implicate Chhokar and Deol in the murder and to silence Toor as a potential witness as evidence of post-offence conduct.
50. It is submitted that this evidence is also evidence of bad character in that it suggests that the Appellant is a bad person who has a propensity to falsely accuse people of serious crimes and who tries to eliminate potential witnesses against him. As such, it is submitted that the Trial Judge should have given the jury a limiting instruction on the use to be made of this evidence. No such instruction was given when the Trial Judge instructed the jury on this evidence. (Appeal Book Vol. 2 p. 936-9) * * *

53. It is submitted that the Trial Judge was required to give the jury a limiting instruction to the effect that they could not use evidence of bad character to conclude that the Appellant was more likely to have committed the offences charged. (See *R. v. B. (F.F.)* (1993), 79 C.C.C. (3d) 112 (SCC))
54. It is submitted that the evidence relating to attempts to implicate Chhokar and Deol in the murder, to silence Toor as a potential witness, and the entries in the deceased's personal planner all had the potential for a strong prejudicial effect on the jury. As such, it is submitted the Trial Judge had an obligation to give the jury a clear instruction on the limited use of such evidence. He did not do so.
- [68] In my opinion, the authority cited by counsel is not to the point. The evidence in issue there was of similar acts.
- [69] I agree with counsel that the evidence was prejudicial as, indeed, all the evidence adduced by the Crown was prejudicial, but was directly relevant to the issues in this case. The evidence listed was not in my view evidence of bad character unrelated to the offence charged. The evidence went to the very heart of the Crown's case and such evidence, even if it might be said to show bad character, is what a murder trial is all about. I would not give effect to this ground of appeal.
5. The learned judge erred in his instructions to the jury with respect to post-offence or after the fact conduct.
- [70] The learned judge's charge on this aspect was this: I start by cautioning you that no one item or even the items taken collectively, itself or themselves, establish guilt. The item only constitutes an item of evidence which, when weighed together with all the other evidence, may establish guilt. This post-offence conduct evidence is simply a piece of circumstantial evidence for you to weigh when determining whether the Crown proved the accused, Ajit Grewall's, guilt beyond a reasonable doubt. It should not be viewed in a vacuum, but should be assessed like all other circumstantial evidence. To find guilt based on this evidence, it must be consistent with the accused, Ajit Grewall's guilt and inconsistent with any other rational conclusion. * * * I have to tell you that with respect to this evidence of post-offence conduct, you should reserve your final judgment about the meaning of the accused, Ajit Grewall's, post-offence conduct until you consider all the evidence in the normal course of your deliberations. At the end of the day, you may draw whatever permissible inferences you choose from the evidence you heard. You should keep in mind that people react differently to grief and tragedy. There was evidence that a meeting between the family of Baljit, the Kondolays, and Ajit was held after the death of Baljit and that at that meeting Charn Deol humiliated Ajit in front of the Kondolays. It is quite possible that the humiliation of the accused in front of the Kondolays may have motivated the accused, Ajit Grewall, to try to frame Charn Deol for his wife's murder. I caution you that even if you find Ajit's post-offence conduct was motivated by a feeling of guilt, that feeling might be attributable to some other criminal act apart from the offence set out in the Indictment. These matters are important

when deciding how much weight, if any, you may choose to give to Ajit Grewall's post-offence conduct when deciding his guilt or innocence. Again, I remind you that these items do not prove guilt and are only capable of strengthening the Crown's case. In addition, the particular item of evidence must relate to the charges, including lesser and included offences before the Court. In the end, the particular item of evidence must be capable of tending to prove that the accused acted in a manner consistent with the conduct expected of a guilty person knowing that he had acted unlawfully and without a valid defence to the charges before the Court. I have to stress that as a matter of law with respect to the charge of first degree murder evidence of after-the-fact conduct by Ajit Grewall is equally consistent with his committing manslaughter or second degree murder. Accordingly, the evidence of after-the-fact conduct does not support a finding of planning or intent to kill Baljit Grewall. Finally, I want to instruct you as to the limited use of this after-the-fact conduct in determining Ajit Grewall's culpability in this murder. I tell you as a matter of law that this after-the-fact conduct evidence has no probative value against Ajit Grewall unless you are satisfied that the after-the-fact conduct reflected by those acts were with respect to the killing of Baljit Grewall and not some other conduct.

[71] The learned judge concluded this portion of the charge with a reminder that when dealing with circumstantial evidence, the jury must take all the evidence together and determine whether the evidence is consistent with guilt and inconsistent with any other reasonable explanation, and that they should be cautious when basing a verdict of guilty on such evidence.

[72] In my opinion, a reading of the whole of the charge, assuming as we must that the jury grasped its import, shows no error of the kind asserted.

[73] The appellant Ajit raises two further issues:

1. Did the learned trial judge err in instructing the jury to find facts first and then base their verdict on the facts they found?
2. Did the learned trial judge err in his instructions to the jury regarding the differences between first degree murder, second degree murder and manslaughter in response to a question from the jury?

[74] As to these issues, counsel for the appellant Ajit stood upon the submissions made by other counsel and I shall therefore address them hereafter. THE APPEAL OF SANDEEP SINGH TOOR

[75] The Crown's case against this appellant was not as strong as that against the others in that he had no personal motive and was not related to the appellant Ajit. It was founded on:

1. his remark on the telephone to his mother, when he was in custody charged with the murder, that he only drove the car;

2. Brar's evidence that the appellant Toor, who had telephoned him late one night, then came to his house with the appellant Sukhjit who left with Brar a bag containing a gun - that gun turned out to be the murder weapon;
3. a cellular telephone call from the Toor cellular telephone to the Brar residence at 11:01 on the night of the murder;
4. the appellant Sukhjit's intercepted remarks to the appellant concerning "the thing" that was left with the Powell River guy (Brar);
5. Bhandher's evidence that the appellant Toor and the appellant Sukhjit were together the night of the murder both before and after it took place;
6. cellular telephone records showing calls on the night of the 19th April 1998 from the cellular telephone of the appellant Ajit to a cellular telephone (604-649-6149) registered in the name of the father of this appellant. As I have already noted, it was admitted by all the appellants that the father owned a 1995 White Ford Explorer of which this appellant has use and access "into which that cellular telephone was hardwired". The calls took place at 9:44 p.m., 10:05 p.m. and 10:13 p.m. By 10:49 p.m., Baljit Grewall, according to the appellant Ajit's 911 call, had been shot.

[76] No one of these pieces of evidence in and of itself is sufficient to found a conviction but each enhances each other piece. Of course, one could speculate that this appellant was not in the Ford Explorer at the time of those telephone calls - that he had lent it to his friend, the appellant Sukhjit - or that if he was in it, it was nowhere near the scene of the murder but, if so, why did he say to his mother, "I only drove the car" and why did he accompany the appellant Sukhjit, whenever the event was, to Brar's house on the occasion of the murder weapon being entrusted to Brar for safe-keeping?

[77] I will deal with the errors alleged seriatim.

1. The learned judge erred in his instruction to the jury with respect to Raminder Bhandher.

[78] It is in the context of that evidence that the learned trial judge's charge on the evidence of Bhandher putting both men in a Ford Explorer, both before and after the times of those telephone calls, must be weighed.

[79] That point must be made because it is not correct to approach the judge's charge as if Bhandher's evidence were discrete. This case was like a jigsaw puzzle. One piece of such a puzzle looks like nothing at all. It is only when all the pieces are fitted that the picture becomes apparent.

[80] Under this head, counsel for this appellant makes three points: the Vetrovec warning, the "K.G.B." instruction, and prior consistent statements.

[81] As to the first:

(a) Vetrovec Warning

58. Defence counsel sought an unsavoury witness warning with respect to Raminder Bhandher. The Crown suggested an instruction that his evidence should be treated with care. Transcript, pg. 1213, line 6 to pg. 1214, line 26; pg. 1286, line 41-47
59. The Learned Trial Judge, however, provided only the following warning in his charge: In dealing with the issue of credibility, you should treat the issue of Mindy with a great deal of care. Remember that in considering the evidence of this witness, you can accept all of his evidence, some of his evidence, or none of his evidence. That is entirely up to you. I also remind you that the issue of credibility is for you, and you alone, to decide. Transcript, pg. 1357, line 44 to pg. 1358, line 5
60. Objection to the charge on this point was made by the defence. Transcript, pg. 1443, line 1-29
61. The instruction in the case at bar lacked the basic elements of a warning regarding an unsavoury witness such as Bhandher. First, such an instruction should tell the jury why they received that instruction. Therefore the Learned Trial Judge in this case had to review that Bhandher was arrested as a possible accomplice. Second, the instruction should refer to any motive for the witness to be untruthful. Here, Bhandher provided a statement that resulted in his release from custody. As to present motivation to be untruthful, Bhandher had maintained his evidence from his original statement out of a motive not for the truth but in order to avoid a prosecution for perjury if he changed his evidence. Also, Bhandher had a criminal record. As well, Bhandher agreed that he had been, under oath, "careless with the truth." Lastly, the jury had to be told that it would be dangerous to act on Bhandher's evidence unless they found support for his evidence in other parts of the case. In the case at bar, Bhandher agreed he had been given information by Cst. Gill that dovetailed with other parts of the Crown's theory. That specific caution was not given to the jury.
62. Finally, the jury was not assisted as to what other evidence might have been supportive of Bhandher in order that they could weigh that evidence against whatever supportive evidence they might have expected.
63. None of the guidance to the jury was provided by the Learned Trial Judge. In no way could the warning in this case be characterised as the "clear and sharp" warning essential to a proper caution. The jury would treat the crucial evidence of Bhandher with care in any event. They required assistance on how exactly care should be exercised in analyzing this evidence.
- [82] The Crown concedes that the evidence of this witness was sufficiently important to its case and displayed sufficient concerns about that witness's credibility that some comment to the jury was necessary.

- [83] But the Crown says that this appellant errs when he suggests that the learned trial judge provided "only the following warning" in the charge as set out in paragraph 59 of the appellant's factum.
- [84] The Crown says there was a great deal more in the charge that bore on the evidence of the witness Bhandher and gives these references [counsel's references to "A.B." should actually be to the transcripts]:
- a) a deliberate lie under oath may well taint the entire testimony of a witness [A.B., Vol. 9, p. 1300 (25 - 29)],
 - b) partiality is a factor in assessing credibility [A.B., Vol. 9, p. 1301 (21 - 25)],
 - c) reasonable doubt applies to credibility [A.B., Vol. 9, p. 1302 (14 - 24)],
 - d) Bhandher gave prior inconsistent statements about the date (March 1 vs. April 19) [A.B., Vol. 9, p. 1341 (6 - 17)],
 - e) Bhandher lied under oath about his conviction for money smuggling [A.B., Vol. 9, pp. 1341 (18 - 23), 1357 (21 - 38)],
 - f) it is very dangerous to accept the trial testimony of Bhandher if his prior sworn statements are inconsistent with his trial testimony, unless his explanation for the inconsistency is accepted [A.B., Vol. 9, p. 1345 (17 - 30)],
 - g) inconsistent stories given under oath, indicate the witness does not take a solemn oath very seriously [A.B., Vol. 9, p. 1345 (31 - 35)],
 - h) a criminal record, particularly for dishonesty may detract from credibility [A.B., Vol. 9, pp. 1352(27) - 1353(25)],
 - i) reluctance to testify may detract from credibility [A.B., Vol. 9, p. 1353(26 - 34)],
 - j) whether Bhandher was threatened or coerced into testifying or even just regurgitating what he had been told by the police, and Bhandher's reaction to those suggestions in cross-examination were matters to be considered [A.B., Vol. 9, pp. 1353(34) - 1354(15), 1357(17 - 20)],
 - k) whether Bhandher was confused or wrong about the date of the events he described was crucial [A.B., Vol. 9, pp. 1355(27) - 1356(3)],
 - l) there were matters that might provide corroboration for parts of Bhandher's testimony, such as the recorded cell-phone calls to 218-1531 on April 19, 1998, the close temporal proximity of a call from Ajit's cell-phone to Sukhjit's cell-phone and the next call from Ajit's cell-phone to the Toor cell-phone, and the testimony of Charn Deol confirming the meeting at the hot-dog stand on April 20, 1998 [A.B., Vol. 9, pp. 1355(7 - 26), 1357(38-44)],

- m) as a matter of law, the police must warn witnesses about perjury when taking a K.G.B. statement [A.B., Vol. 9, pp. 1356(4) - 1357(16)],
 - n) the jury should treat his evidence "with a great deal of care" [A.B., Vol. 9, p. 1357(44 - 46)]. [emphasis of counsel]
- [85] Passages from the judgments of the Supreme Court of Canada germane to this issue, *R. v. Vetrovec*, supra, and *R. v. Bevan*, [1993] 2 S.C.R. 599, are often referred to as if the facts of those cases give no guidance in these matters. But the facts are not irrelevant. In *R. v. Vetrovec* the appeals of the accused were dismissed. In *R. v. Bevan*, both appellants had testified in their own defence. There was essentially no case against either without the evidence of Belmont as to incriminating statements made to him by both appellants and that of Dietrich who resided with the appellant Griffith at the time of the murder as to what he observed and did at the instigation of someone at the house concerning a motor vehicle allegedly used in the murder.
- [86] Bhandher was not a witness of impeccable character, not the least because he tried to avoid giving evidence and because he knew when he gave his statements to the police that they considered him implicated in the murder. His recantation to which I have already adverted might be said to reinforce the proposition that he was a witness of doubtful reliability. But his evidence was enhanced, as I have shown, by other evidence. The learned judge's charge and the arguments of counsel made it clear beyond doubt to the jury that his evidence implicating this appellant was both critical and questionable and, of course, there was no contrary evidence.
- [87] Had his evidence been the only evidence connecting the appellant Toor to the murder, the manner in which the learned judge dealt with this evidence might be found to be insufficient but it was not the only evidence.
- [88] I am not persuaded the learned judge failed to apply the principles in the two leading authorities properly in the context of this case.
- (b) "K.G.B." Instruction
- [89] Counsel puts the matter thus in his factum:
64. Bhandher was cross-examined as to whether he was afraid to change things from his October 6, 1998 statement because of a fear that he would be charged with perjury if he did so. Bhandher agreed with that suggestion. Transcript, pg. 921, line 30 to pg. 922, line 9
65. The Learned Trial Judge used Bhandher's motive on the stand to testify, to what the defence said amounted to a script, as a basis for an instruction that the prior statement in fact had enhanced reliability. The Learned Trial Judge said as follows: ... For the out-of-court statement to be admissible, however, this hearsay evidence, and that is exactly what it is, must be made under circumstances which provide sufficient guarantees of trustworthiness. You see, the courts have recognized the serious dangers of the introduction of hearsay

evidence without proper safeguards. These dangers include:

- (1) The lack of opportunity for the Court to observe the demeanour of the witness at the time the statement was made, and;
 - (2) The lack of cross-examination. In order to overcome these dangers, the Courts have suggested certain safeguards which are necessary to make the hearsay evidence reliable and, therefore, admissible. These include:
 - (1) The witness should be warned about possible prosecution for perjury, and;
 - (2) The interview or proceedings should be videotaped. Now there are others, but those are the two that I think are important with respect to this issue. I point this out to you to tell you that as a matter of law the witness from whom a KGB statement is taken must be warned about possible prosecution for perjury if the police or the Crown wish to use the statement for its truth at trial. Transcript, pg. 1356, line 28 to pg. 1357, line 16
66. The Crown never wished to use the statement for its truth at trial. This instruction by the Trial Judge was completely unnecessary and not based on the cross-examination of Bhandher. It had the prejudicial effect to the defence that it:
1. Gave Bhandher's earlier statement a trustworthiness when the witness' trustworthiness was central;
 2. Gave a stamp of approval to how the police dealt with Bhandher when that was a hotly contested issue in the trial;
 3. Deflected the jury's attention from the real point of the cross-examination: did Bhandher have a motivation other than the truth for his evidence.
67. In short, the digression into the KGB rationale was irrelevant and prejudicial. Objection was taken to this portion of the charge. Transcript, pg. 1443, line 17-35
- [90] But counsel has omitted the passage leading to the learned judge's remarks: Mindy was cross-examined fully by two defence counsel, not all, two, on his previous statements made under oath. You will recall that two of these statements were referred to as KGB statements. You will recall that I told you a little about these types of statements during the trial. Defence counsel also submitted that Constable Gill fed Mindy with information that he wished to hear. They submitted that Constable Gill placed fear into him by arresting him for first degree murder and they threatened him with perjury. In view of this line of cross-examination, I should tell you exactly what a KGB statement is. It is simply, as I told you before, an out-of-court statement made under oath by a witness to be introduced into court at trial for its truth. These statements could be admitted for their truth in a trial in the event that the witness does not bother to show up for trial, as was almost the case here, or if the witness changes his evidence at trial.

[91] That passage, in my opinion, puts a wholly different complexion on the impugned passage. As it was the defence which opened up the subject of the statement in issue and as the Crown did not seek to tender it at trial, I am unable to see that any harm came from this, with all due respect to the learned judge, unnecessary, disquisition on the law.

(c) Prior Consistent Statements

[92] The impugned passage under this head is this: It may assist you in this aspect of the matter if you approach this by posing these questions. First, is the witness' prior account contradictory of his or her present testimony? In determining that you should consider any explanation offered to explain any apparent inconsistency. If you find no such inconsistency or contradiction, consistency you may find, may tell in the witness' favour. [emphasis of counsel]

[93] Objection was taken to this portion of the charge.

[94] To this the Crown replied:

74. The purpose of instructing juries that a prior inconsistent statement may be used for assessing the credibility of a witness[s] trial testimony confirms a matter of common sense and logic. When a witness's credibility is challenged by the suggestion of prior inconsistencies, but those inconsistencies are not established, the corollary that his/her credibility is not thereby challenged is ineluctable. The impugned passage, "consistency you may find, may tell in the witness' favour" was part and parcel of the charge on inconsistent statements and merely expressed that corollary.

75. In the case at bar, the inconsistencies between the trial evidence of Bhandher and his previous out of court statements were kept constantly in the forefront. Cross-examination was lengthy in that regard, closing addresses by counsel focussed on the issue, and the learned trial judge's charge repeatedly reminded the jury of the controversy. Judge Romilly's invitation to have Bhandher's evidence re-read in total further highlighted the matter. The jury will not have taken the impugned "consistency comment" out of its context, and misinterpreted it as an invitation to seize on minor matters of consistency between Bhandher's trial evidence and out of court statements and use them to bolster his credibility.

[95] I agree with the Crown and would not give effect to this ground of appeal.

2. The learned judge erred in his written preliminary and final instruction to the jury in requiring them to find facts first then to base their verdict only on the facts they found.

[96] This is a submission that the learned judge committed what is known as a Miller error (*R. v. Miller* (1991), 68 C.C.C. (3d) 517 (Ont.C.A.)) which, as counsel points out correctly, is nothing but an application of *R. v. Morin*, [1988] 2 S.C.R. 345.

- [97] It is worth remembering that Morin having been acquitted, the Crown appealed to the Ontario Court of Appeal which, Cory J.A. dissenting, allowed its appeal and ordered a new trial. On Morin's appeal to restore the verdict of the jury, Sopinka J. referred to the evidence, at 353: Although a detailed review of the evidence is neither necessary nor, in the circumstances, desirable, a few brief extracts will serve to make the issues more intelligible. The Crown relied, *inter alia*, on the following evidence:
- (i) hair embedded in tissue on a silver chain around the deceased's neck was analyzed scientifically and found to match the hair of the appellant; (ii) several hairs in the appellant's car were similarly matched with the hair of Christine Jessop. The appellant denied that Christine Jessop was ever in his car; (iii) certain fibres and animal hairs found at the murder scene were matched with fibre and animal hairs found in the appellant's car or residence; (iv) statements alleged to have been made by the appellant to one Hobbs, an undercover officer, from which an inference of guilt might be drawn and appellant's demonstration in the Whitby jail in May 1985 of how he repeatedly stabbed his victim;
 - (v) the appellant's admissions and inculpatory statements to two cell-mates, Leyte and May, in the Whitby jail. The appellant disputed the significance of the expert evidence relating to the samples of hair and fibre. The evidence of Hobbs, Leyte and May was forcefully attacked on the grounds of inaccuracy and lack of credibility. The appellant also put forward an alibi defence, the gist of which was that after leaving work he went shopping and did not return home until after Christine Jessop disappeared.
- [98] In the Supreme Court of Canada, the appellant did not dispute that it is misdirection to instruct the jury to apply the standard of reasonable doubt to individual pieces of evidence.
- [99] We now know, however, from the Kaufman Inquiry conducted after Morin was convicted in the new trial, that the hair and fibre evidence was worthless and Morin was innocent. Thus, when the learned trial judge said to the jury on the first trial: It seems to me that this evidence does not go beyond proving that Christine could have been in the Honda motor vehicle and that the accused could have been at the scene of the killing and, of course, that is not proof beyond a reasonable doubt. [See [1988] 2 S.C.R. 345 at 355.] he was giving the evidence more credit than it deserved.
- [100] In my opinion, although I appreciate to say so is contrary to authority binding on me, there can be, albeit only rarely, a case in which a discrete piece of evidence is so central to the Crown's case - its keystone - that unless the jury is persuaded beyond a reasonable doubt that the evidence is true, it ought not to convict and it ought to be told so.
- [101] In the case at bar, the evidence of the forensic expert rises almost to that level of importance.
- [102] To return to the point at hand, both in Miller and in the later authority of the Alberta Court of Appeal, *R. v. Chan* (1989), 52 C.C.C. (3d) 184, there was conflicting evidence. As the Alberta Court of Appeal remarked, at 187, in a case where the accused had testified: The

jury's duty is to convict only on acceptable credible evidence. The difficulty arises in a case where the evidence conflicts, and the jury may not feel confident in making a "black and white" decision accepting or rejecting some evidence. It might find itself in the grey area of reasonable doubt about the conflicting testimony. Often the general charges on reasonable doubt would suffice, but not here. A direction to act on accepted evidence gives serious difficulty to a jury which ends with a reasonable doubt about credibility.

[103] In the case of this appellant there is no conflicting testimony. He called no evidence and there were no conflicts within the Crown evidence. Prior inconsistent statements of some of the Crown witnesses not adopted by them at trial are not the equivalent of conflicting testimony. Counsel did not draw our attention to any conflicting testimony which ought to have been considered by the jury on the ultimate issue but which, following this instruction, may have been improperly put out of consideration.

[104] That being so and whatever might be said about this instruction in a different case, I would not give effect to this ground of appeal in the case of this or the other appellants, neither of whom called evidence.

3. The learned judge erred in his instruction to the jury as to the difference between murder and manslaughter.

[105] Baljit Grewall was shot twice at close range with a 9mm pistol. There was no air of reality to manslaughter as a possible verdict against this appellant on the evidence before the jury.

[106] He was either guilty of murder, whether as an aider or abettor or as the shooter, or he was not guilty either of first degree murder or any included offence.

[107] To return a verdict of manslaughter, the jury, having decided that this appellant and the appellant Sukhjit were together that night, would have had to engage in speculation, without a shred of evidentiary foundation, as to what the appellant thought was the venture upon which he and the appellant were embarking when they left the Chevron gas station.
THE APPEAL OF THE APPELLANT SUKHJIT

[108] The Crown's case against this appellant was the strongest of the three because of the Nike backpack, which the jury could easily infer from the computer discs belonged to the Grewall family, and its contents, one of which was the murder weapon, and for his possession of which there was in the evidence no innocent explanation.

[109] Although in his factum Mr. Nathanson, who was not counsel at the trial, submitted that the verdict was unreasonable and not supported by the evidence, he did not pursue this ground in oral argument. There is no merit in it.

[110] I turn then to his other points:

1. The charge to the jury was so lengthy and confusing as to amount to an error of law.

- [111] The charge was long. It took two full days to deliver but, as the trial judge remarked, this was six trials in one. Thus, the learned trial judge was under an obligation to make it very clear to the jury which parts of the evidence were admissible against which accused. That sort of thing sometimes takes a great deal of time.
- [112] Counsel described what happened about the charge thus:
33. The trial evidence was presented to the jury over the course of seventeen days. Much of the evidence revolved around the Crown's theory that Ajit Grewall had a financial motive to kill his wife. After counsel had completed their final submissions to the Jury, the Learned Trial Judge provided counsel with a 190 page draft of his charge to the jury and invited counsel to comment on it prior to him presenting it to the jury. Three full days out of the presence of the jury were spent while counsel made objections and submissions in relation to the proposed charge. It is respectfully submitted that counsel were burdened with the monumental task of correcting numerous evidentiary and legal errors contained in the draft charge. Both the extraordinary delay between the closing addresses and jury deliberation, as well as concern about "over-charging", were raised by the defence at the time. Transcript, Vol. 8, p. 1162, ll. 1 to 6, p. 1195, ll. 41 to 45 [emphasis of counsel]
34. Initially, the Learned Trial Judge indicated that he intended to provide the jury with a written copy of his charge, which they would be able to refer to during their deliberations. Defence counsel objected to this, and evidence was presented on the issue of the number of adults in Canada who are functionally illiterate. An inquiry into the literacy of the jury was not conducted, but as a compromise, the Learned Trial Judge retrieved the written charge from the jury prior to the commencement of deliberations. Transcript, Vol. 8, p. 1183, l. 11 to p. 1184, 1.17 Facts and Figures, Appeal book, Vol. 6, p. 900
- [113] As to all this, I have read the charge in its entirety. While some of it is repetitious, that in itself is not reversible error. Nor is it reversible error for a judge, having misspoken himself, as the judge did on occasion, to correct himself. As for the "burden" on counsel of a "monumental task", I do not consider that counsel doing his duty is properly characterized as a "burden".
- [114] Counsel says the charge was "devoid of logic and flow and had the opposite effect of confusing and complicating the case." Certainly, this charge might have been differently constructed but there is no rule of law as to how a charge should be constructed. The important point is that it contains neither error of law nor misstatement of the evidence.
2. The lengthy delay between the defence closing address to the jury and the commencement of deliberations infringed on the appellant's right to a fair trial.
3. The defence theory of an alternate conspiracy was not put to the jury.
- [115] These two points are conveniently considered together.
- [116] What counsel says is:

41. While it is conceded that scheduling and other issues during the course of a trial may result in a short delay between a closing address and a case going to the jury, it is respectfully submitted that the extraordinary delay between these events in this trial was avoidable and had the effect of destroying the Appellant's right to a fair trial and nullifying the effectiveness of counsel's closing address. This prejudice was amplified by the failure of the Learned Trial Judge to include any reference in his charge to the defence theory of an alternate conspiracy.
- [117] As I understand the reference in the last sentence of this passage, it is to this submission in counsel's address to the jury: Another thing, helping people after the offence has happened doesn't make you guilty of the offence. You could be charged with an accessory after the fact, obstruction of justice, other criminal charges. These people may well be facing those charges later, but that's not what they're charged with here and you don't have to deal with that here. You know, if you think at the end of the day that Toor and my client were hiding this gun for somebody, that doesn't make them guilty of this charge or these charges. But it could make them guilty of other charges; obstruction of justice or accessory after the fact, or something like that, but not these specific charges. Your job's to deal with these charges.
- [118] In counsel's words, "This theory was vital to Sukhjot's defence and was a common theme throughout the cross-examinations of Crown witnesses during the trial".
- [119] He notes, also, that the defence raised an objection to this omission from the charge but the learned trial judge did not address it.
- [120] In my opinion, counsel was asking the jury to speculate. There was nothing in the evidence to warrant the jury thinking that this appellant and Toor were accessories after the fact. Such a proposition requires an "an air of reality" founded in the evidence, not in mere speculation.
- [121] As to delay nullifying the addresses of counsel, I have read them and read the charge to the jury with this point in mind. It appears to me that the learned judge reminded the jury of the principal parts of those addresses.
- [122] For example, on the question of the gun, counsel for the appellant Sukhjot said in part: It's important that you get the evidence straight in regards the gun. The Crown called an expert who had some unfortunate accidents with this gun. The expert said that cartridge cases, those are the copper cases that surround the bullet that contain the powder, that those casings were -- two of them were found at the scene of the crime and they came from the gun that's in front of you. The expert did not say that the bullet or bullets that killed the unfortunate lady came from the gun. He didn't say that. He said the cartridge cases had been used in that gun. It's circumstantial evidence, and the judge is going to tell you about that and how you apply circumstantial evidence. Remember the fellow said, "I tested it with the silencer on it and I blew the end off the silencer and then when I went to get the bullet, it went down the drain?" He never did say to you that the bullet or bullets that killed the woman came from the gun. So, you have to ask yourself, "How did the cartridge cases get

there? Did they get there on the 19th of April? Did they get there from the gun on another date? Did somebody leave them there and give the gun to somebody else and ask them to hide it? You ask yourself those questions and if you've got answers for them, based on the evidence, apply the answers. I don't know the answers to those questions. As I said earlier, we may never know who killed this unfortunate woman. That's not your job.

[123] The learned judge in his charge reminded the jury of this submission: Mr. Gibbons suggested there was no evidence from the expert, Barry Alexander, that it was a bullet from the gun that was found at Joey Brar's that killed Baljit Grewall. You will recall, however, that Barry Alexander testified that in his opinion the shell casings that were found at the scene of the murder of Baljit were fired from the gun that was found at the home of Joey Brar. You will also recall that when Mr. Alexander was being cross-examined by Mr. Gibbons about the bullet as opposed to the shell casings being fired from the gun, the following exchange took place: Q: The cartridge cases at the scene were in that pistol at one time or the other? A: They were in that pistol and fired from that pistol. Q: You can't tell us anything about the bullets? A: I can say that the bullets I received were fired from this type of barrel, a polygonal barrel, but not specifically from this gun. Q: You can't tell us when they were fired, can you? A: I know they were fired just shortly before the victim died. The expert witness then testified that the bullet fragments he was given could be compared by him but he could not identify them.

[124] I would not give effect to either of these grounds.

4. The jury's question seeking clarification with respect to the difference between murder and manslaughter was not dealt with appropriately by the learned trial judge.

[125] The jury's question was, "We would like the legal clarification of the requirements of murder one, murder two and manslaughter."

[126] I agree with counsel that the course adopted by the learned judge in re-reading much of his charge in answer to the question was probably not helpful to the jury.

[127] The difficulty, however, was in the question, which was of a breadth not to admit of a short answer in a case in which three accused were charged, only one of whom was the principal offender. One can speculate because of the request to hear Bhandher's testimony again, that what the jury was wrestling with was what its verdict should be in the case of the appellant Toor. But it did not say so, and, as it is not thought appropriate for a judge to question a jury with a view to determining what aspects of the evidence are at the root of a question, I would not give effect to this ground.

[128] On behalf of this appellant, counsel adopted the arguments put forward by the appellant Sandeep Toor both on the matter of the evidence of Raminder Bhandher and on the so-called Miller error.

- [129] For the reasons which I gave on that appeal, I would not give effect to these grounds. THE APPLICATION OF R. v. KIENAPPLE
- [130] The final point on this appeal is whether the principle of R. v. Kienapple (1974), [1975] 1 S.C.R. 729, ought to have led to a conditional stay of one of the charges in the indictment.
- [131] The learned trial judge delivered his ruling on this point on the 9th January 2001.
- [132] Having referred to many of the authorities relating to, in the circumstances of this case, highly technical points with no practical implications, the learned judge said:
- [59] ... it should be noted that conspiracy to commit an offence is a separate and distinct offence from the commission of the substantive offence itself. The two offences do not constitute the same delict and there is no overlapping between the two offences since the agreement, which is the essence of the conspiracy charge, necessarily precedes the commission of the substantive offence. Because the elements of the offences are different, the doctrine of res judicata has no application to the case at bar. See R v. Beeman (1978), 40 C.C.C. (2d) 76 (B.C.C.A.); leave to appeal refused, (1979), 45 C.C.C. (2d) 383 (S.C.C.).
- [60] As I have already stated, in relation to conspiracy and substantive charges, the general rule is that they constitute distinct offences. Thus, differing verdicts in respect of conspiracy and the substantive charges are not in themselves inconsistent. Multiple convictions may be registered, notwithstanding that the offences arise from the same circumstances, where the offences are legally distinct: McDonald v. The Queen (1959), 126 C.C.C. 1 (S.C.C.); Koury v. The Queen, supra.

Conclusion

- [61] After considering all of the law enunciated above, I am of the view that the charge of first degree murder and the charge of conspiracy to commit murder are two distinct offences. The rule against multiple convictions is therefore not violated by sentencing the accused on both the first degree murder charge and the conspiracy to commit murder charge.
- [133] I am not persuaded that the learned trial judge erred in this ruling. I would therefore not give effect to this ground of appeal.
- [134] It follows that I would dismiss all the appeals. "The Honourable Madam Justice Southin" I Agree: "The Honourable Madam Justice Saunders" I Agree: "The Honourable Mr. Justice Thackray"

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