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IN THE HIGH COURT OF DELHI

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Judgment Reserved on: 7.8.2009
Judgment Delivered on:31.8.2009

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Crl. APPEAL No.522/2005

NIWAS @ PATEL ...Appellant
Through : Mr.Rajesh Mahajan, Advocate.

versus

STATE ...Respondent
Through : Ms.Richa Kapoor, A.P.P.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

PRADEEP NANDRAJOG, J.

1. It was exact midnight i.e. 00:00 Hours of the intervening night of 28th February 2001 and 1st March 2001. It was 12:00 midnight. Gian Prakash PW-3 along with his friend Jyoti Prakash (hereinafter referred to as the 'Deceased') were proceeding to Mandir Kali Mata, Sainik Vihar. They were on a motor-cycle. Gian Prakash was driving the motor-cycle. Jyoti Prakash was on the pillion seat. The colony Sainik Vihar was barricaded by the residents i.e. as is usually seen in the

colonies in Delhi, for security purposes, gates with barricades, were installed/erected by the residents. Gate No.2 was one such gate at Sainik Vihar and during the night was manned by Anil Tiwari PW-4, employed as a chowkidar by the Delhi Sainik House Building Cooperative Society i.e. the society which had developed the colony Sainik Vihar. Gian Prakash entered the colony through the gate and unfortunately for him and the deceased, at the same time, a white coloured Fiat car was rashly reversed at the gate itself. The car nearly hit the motor-cycle. Gian Prakash and Jyoti Prakash lost balance and fell down from the motor-cycle. A verbal quarrel ensued between the occupants of the car, being four in number, and Gian Prakash and Jyoti Prakash. Gian Prakash left the spot to report the accident to the police and proceeded to the police picket Rani Bagh attached to PS Saraswati Vihar as the said police picket was nearby. He reported the accident at the police picket, which information was noted in DD No.41, Ex.PW-41/A at 12:20 in the midnight.

2. SI Nipun Kumar PW-41, Const.Lokender Singh PW-22, Const.Devender PW-14 and Const.Ajay Singh PW-38 left the police picket in the company of Gian Prakash and proceeded to gate No.2 Sainik Vihar. When they reached gate No.2 they found that Const.Sunil and Const.Balwan PW-35 were already at gate No.2 Sainik Vihar for the reason they had

left the police station Saraswati Vihar for night picket duty and proceeding to the picket where they had to be on duty, had to cross gate No.2 Sainik Vihar. Jyoti Prakash was found lying on the road with blood oozing from his ear.

3. The first act of the police officers was to rush Jyoti Prakash to a hospital so that medical aid could be given to him. Ravinder Singh PW-13 was driving in his Maruti van No.DL 2CJ 3719. He was flagged down. He took Jyoti Prakash in his van to Jaipur Golden Hospital. Gian Prakash, Const.Devender and Const.Balwan accompanied in the van. Const.Sunil and Const.Balwan remained stationed at the spot to guard the same. SI Nipun Kumar proceeded to the hospital in a different vehicle. In the meanwhile Anil Tiwari and Bhajan Singh PW-12 the President of the Delhi Sainik House Building Society also reached the spot because Anil Tiwari had left the spot to call Bhajan Singh.

4. At the hospital i.e. Jaipur Golden Hospital the doctor on duty declared Jyoti Prakash brought dead as per MLC Ex.PW-33/A. SI Nipun Kumar obtained a copy of the MLC of Jyoti Prakash and recorded the statement Ex.PW-3/A of Gian Prakash in which he stated that he was driving his bullet motor-cycle No.DEW 9238 with his friend Jyoti Prakash on the pillion seat and they were going to Kali Mata Mandir. At 12:00 in the night he reached gate No.2 Sainik Vihar near Punjab

National Bank when a white coloured Fiat car reversed in a rash manner nearly banging into his motor-cycle due to which he lost balance and the motorcycle fell. He rebuked the driver of the car. At which, two out of the four persons in the car who were sitting on the front seat came out of the car and a minor physical quarrel (jostling) ensued between them. He told the chowkidar at the gate, whose name he later on learnt was Anil Tiwari, to see that the car remains stationed at the spot till he summoned the police. He reached police picket Rani Bagh on his motor-cycle. When he returned to the spot in the company of the police he saw his friend Jyoti Prakash lying smeared with blood on the road. Blood was oozing from his ear. The chowkidar informed that the four boys in the car attempted to drive away at which his friend prevented them from fleeing and hence they shot his friend and drove away towards Mangolpuri. SI Nipun Kumar made an endorsement Ex.PW-41/B on the statement Ex.PW-3/A and dispatched the same for FIR to be registered at 3:00 AM, a fact so recorded in the endorsement Ex.PW-41/B. At the police station FIR Ex.PW-17/B was registered for an offence punishable under Section 302/34 IPC.

5. Being a case of murder, information was conveyed to Inspector Sachdev Dahiya PW-47 posted as the SHO of PS Saraswati Vihar. He left in the company of HC Vinod PW-19.

Both officers reached Jaipur Golden Hospital. The body of the deceased was seized and sent to Subzi Mandi Mortuary for autopsy. Sachdev Dahiya, SI Nipun and Gian Prakash thereafter returned to the spot where the crime was committed.

6. Blood on the road was lifted on cotton. Blood stained earth and control earth were lifted as recorded in the memo Ex.PW-3/B. Statement of Anil Tiwari PW-4 under Section 161 Cr.P.C. was recorded and the register Ex.PX maintained at the gate to note the vehicles entering the colony was seized as per memo Ex.PW-4/A. It may be noted that in the register Ex.PX an incomplete entry is made recording: "*MPT-75*".

7. At Subzi Mandi Mortuary Dr.Ashok Jaiswal PW-6 conducted the post-mortem on the body of the deceased on 1.3.2001 and opined that the cause of death was the brain injury caused due to the bullet which was fired at the ear of the deceased. The bullet Ex.P-1 was retrieved by him. He recorded that the injury caused by the firearm was a rifled one. Blood sample of the deceased as also the clothes of the deceased along with the bullet recovered and the post-mortem report Ex.PW-6/A were handed over by the doctor to the investigating officer who deposited the clothes, blood sample and the bullet in the malkhana.

8. The police had a problem since four unknown suspects had to be brought to justice.

9. In the course of investigation, Sachdev Dahiya the investigating officer learnt that a lady Poonam Kapoor PW-15 was waylaid near Richi Rich Restaurant Ring Road. Hoping to get some clues from her, he contacted her, who informed that in the intervening night of 28th February 2001 and 1st March 2001, at midnight, a boy tried to snatch her gold chain but could not do so as she offered resistance. The boy was chased by her brother who was with her but he managed to flee in a vehicle in which some persons were sitting. It is obvious that Sachdev Dahiya could hardly get any worthwhile lead.

10. As per the prosecution, breakthrough came when Deepak @ Deepu (Accused No.2) was arrested in FIR No.199/2001 PS Rohini and purportedly made a confessional statement to the investigating officer of said case, disclosing his involvement in the instant case as also the involvement of the appellant and two other co-accused namely Rakesh @ Andy (Accused No.3) and Vijay @ Pinak (Accused No.4). Said information was conveyed to Inspector Sachdev Dahiya who after obtaining the orders from the Court of the competent Metropolitan Magistrate took Deepak on police remand and formally arrested him. On 29.3.2001, he recorded the statement Ex.PW-26/A of Deepak. Ignoring the confessional,

and hence inadmissible part of Ex.PW-26/A, it may be noted that Deepak disclosed that the car in which all accused were travelling when the crime was committed belonged to Chiranji Lal, PW-16, and bore registration No.MPT 7503. That the car was borrowed from Chiranji Lal and returned to him on 1st March 2001 and that he could get the car recovered. He also stated that the weapon of offence used to commit the crime was purchased from one Kamal at Aligarh.

11. Appellant was arrested the next day i.e. on 30.3.2001. On interrogation his confessional-cum-disclosure statement Ex.PW-19/X was recorded. Ignoring the confessional, and hence inadmissible part of the statement, it stands recorded in Ex.PW-19/X that the car No.MPT 7503 belonged to Chiranji Lal and was returned to him on 1st March 2001 and that he could get the car recovered. He also stated that the weapon of offence used to commit the crime was purchased from one Kamal at Aligarh.

12. On 30.3.2001, the car Ex.P-10 bearing registration No.MPT 7503 was seized from the custody of Chiranji Lal whose place of residence was pointed out by the appellant as recorded in the pointing out-cum-seizure memo Ex.PW-16/A which records the seizure of the car.

13. On 30.3.2001, a second disclosure statement Ex.PW-19/Y of the appellant was recorded by the investigating

officer to the effect that the clothes which he i.e. the appellant was wearing at the time of the commission of the offence were hidden by him in his house and that he could get the same recovered. Thereafter, the appellant led the investigating officer to House No.B-241, Phase-I Budh Vihar, Delhi and got recovered a coat Ex.P-6/1 and a pant Ex.P-6/2 as recorded in the seizure memo Ex.PW-19/A.

14. When the appellant was in the police custody, on 31.3.2001, he suffered a serious head injury. As per the appellant the investigating officer brutally assaulted him to extract a forced confession to plant the recovery of the weapon of offence on him. He refused. He was hit on his head. As per the police, appellant attempted to commit suicide by banging his head on the iron bars at the lockup. FIR No.246/2001 under Section 309 IPC being Ex.PW-36/A was registered against the appellant.

15. On 1.4.2001 a third disclosure statement Ex.PW-41/C1 of the appellant was recorded by the investigating officer as per which nothing but a reiteration of the confession of the appellant was recorded.

16. On 4.4.2001 a fourth disclosure statement Ex.PW-41/C of the appellant was recorded by the investigating officer in which he disclosed that he could get recovered the weapon of offence which he had thrown at the rooftop of a shop in

Wazirpur Industrial Area. Appellant thereafter took the investigation officer to a shop at Wazirpur Industrial Area and pointed out the same as the one on the roof of which he had thrown the weapon of offence, a country made pistol. A pistol Ex.P-2 along with an empty/used cartridge Ex.P-3 and a live cartridge Ex.P-4 were recovered and seized as recorded in the seizure memo Ex.PW-41/D.

17. An application Ex.PW-11/O for test identification of co-accused Deepak was moved by the Investigating Officer on 29.3.2001. Vide proceedings Ex.PW-11/N, Deepak refused to participate in the TIP, alleging that the police had already shown him to the witness.

18. On 31.3.2001, vide application Ex.PW-11/A, the Investigating Officer sought to conduct the test identification of the appellant. Same day, the appellant refused to participate in the TIP as he alleged that the police had already shown him to the witness. The same was noted in the TIP proceedings Ex.PW 11/B.

19. Co-accused Rakesh @Andy and Vijay @Pinak were arrested in another case. Said information was made known to the police station Saraswati Vihar i.e. the place where the FIR pertaining to the instant case was registered.

20. SI Chander Pal Singh PW-45 received DD-11A regarding the production of co-accused Rakesh @Andy and

Vijay @ Pinak in another case. After obtaining production warrants for the two accused, they were formally arrested in the instant case on 18.1.2003.

21. On 18.1.2003 itself, SI Chander Pal Singh PW-45, moved an application Ex.PW-11/D for conduct of TIP of Rakesh. In the TIP proceedings Ex.PW-11/E, the witness Gian Prakash, wrongly identified Rakesh i.e. pointed out another person named Raju Singh and said that he was Rakesh.

22. On 31.1.2003 vide application Ex.PW-11/G request was made to conduct the test identification of co-accused Vijay. Witness Gian Prakash wrongly identified the accused Vijay in the proceedings, as recorded in Ex.PW-11/K. One Dharmender was identified as Vijay.

23. The blood stained clothes of the deceased, his blood sample and the bullet recovered from his body as also the coat Ex.P-6/1 and the pant Ex.P-6/2 recovered as recorded in the memo Ex.PW-19/A at the instance of the appellant and the country made pistol recovered at the instance of the appellant as per memo Ex.PW-41/D were sent for forensic examination i.e. to a serologist and a ballistic expert.

24. Shri A.K.Srivastava PW-2, a serologist gave reports Ex.PW-2/A and Ex.PW-2/B opining that the blood group of the deceased was 'A' and that human blood of same group was detected on the coat Ex.P-6/1.

25. Shri K.C.Varshney, Sr.Scientific Officer (Ballistic), FSL Malviya Nagar, PW-1, gave a report Ex.PW-1/A with respect to the bullet Ex.P-1 recovered from the body of the deceased, the country made pistol Ex.P-2 recovered pursuant to the disclosure statement of the appellant and at his instance as also the used cartridge Ex.P-3 and the live cartridge Ex.P-4 recovered along with the pistol. It may be noted here that the used cartridge i.e. the cartridge case Ex.P-3 was of 8 mm/.315" caliber and the same was the caliber of the live cartridge. The caliber of the pistol Ex.P-2 was reported to be .303"/.315". To quote from his report he opined as under:-

"1. The firearm country made pistol .303" / .315" bore marked exhibit 'F1' is designed to fire a standard .303" / 8 mm / .315" cartridge. It is in working in its present condition. Test-fire conducted successfully.

2. The 8 mm / .315" cartridge marked exhibit 'A1' is live one and can be fired through .315" bore firearm.

3. The 8 mm/ .315" cartridge case marked exhibit 'EC1' is fired empty cartridge.

4. The bullet marked exhibit 'EB1' corresponds to the bullet of .303" cartridge.

5. The 8 mm / .315" cartridge marked exhibit 'A1' above was test fired through the firearm country made pistol .303" / .315" bore marked exhibit 'F1' the test fired cartridge case and recovered test fired bullet were marked as 'TC2' and TB2' respectively.

6. One cartridge of .303" from the laboratory stock was test fired through the country made pistol .303" /

.315" bore marked exhibit 'F1' above, the test fired cartridge case and recovered test fired bullet were marked as 'TC2' and 'TB2' respectively.

7. The individual characteristic marks present on evidence cartridge case exhibit 'EC1' and on test fired cartridge case exhibit 'TC1' were examined and compared under the Comparison Microscope Model Leica DMC. The firing pin marks present on exhibits 'EC1' and on 'TC1' were found identical. Hence exhibit 'EC1' has been fired through the country made pistol .303" / .315" bore marked exhibit 'F1' above.

8. The individual characteristic of striations present on evidence bullet marked exhibit 'EB1' and on test fired bullet marked exhibit 'TB2' were examined and compared under the Comparison Microscope Model Leica DMC and were found identical. Hence exhibit 'EB1' has been fired through the country made pistol .303" / .315" bore marked exhibit 'F1' above.

9. The exhibit 'F1' / 'A1', 'EC1', 'EB1' are firearm / ammunition as defined in the Arms Act 1959."

26. Being relevant, it may be noted here that deposing as PW-1, Shri K.C.Varshney stated that the cartridge of .303" which was test fired through the pistol Ex.P-2 and was used from the laboratory stock was retained in the laboratory. Further, the photographs pertaining to the striation i.e. individual characteristics on the bullet Ex.P-1 i.e. the bullet recovered from the body of the deceased and the test fired bullet referred to as Ex.TB-2 in the report were not forwarded with the report and hence are not a part of the judicial record.

27. To a reader of the judgment, with reference to the narratives herein above which throw light on the investigation conducted, it is apparent that against the four accused the

prosecution would be seeking to bring on record incriminating evidence in the form of testimony of Gian Prakash and Anil Tiwari to prove an altercation involving the four accused on the one side and Gian Prakash and deceased Jyoti Prakash on the other as also the fact that the appellant and co-accused Deepak refused to participate in the Test Identification Proceedings and lastly the fact that the weapon of offence was recovered pursuant to the disclosure statement of the appellant which got linked to the crime through the report of the ballistic expert as also that the coat got recovered by the appellant was stained with human blood of the same group as that of the deceased and that the appellant pointed out the residence of Chiranji Lal from where car No.MPT 7503 was recovered.

28. Anil Tiwari PW-4 as also Gian Prakash PW-3 were obviously the star witnesses of the prosecution. The next important witness was Chiranji Lal PW-16 who owned the car bearing No.MPT 7503. Further link evidence of the prosecution was the register Ex.PX in which an incomplete entry recording 'MPT-75' was entered.

29. Chiranji Lal PW-16 denied that the car in question i.e. bearing No.MPT 7503 was lent by him to the accused. He stated that the car was in no position to be driven on 28.2.2001.

30. Anil Tiwari PW-4 who was firstly examined on 26.10.2002 when the charge-sheet was filed only against the appellant and co-accused Deepak (co-accused Rakesh @Andy and Vijay @Pinak were not even arrested by then and hence their names were shown as proclaimed offenders in the charge-sheet) deposed that at 12:00 in the night he was on duty at Gate No.2 and heard noise of a car probably triggered due to a remote control device and he proceeded to the house where the car was parked to ask the owner to set it right. On the way back he heard an explosion and got frightened. He ran to the house of the President of the Society who told him to manage the gate. When he reached back to the gate he saw that a crowd had gathered. Anil Tiwari was declared hostile by the learned APP and was confronted with his statement recorded by the investigation officer wherein he had stated that when the deceased used his i.e. Anil Tiwari's ball pen to enter the number of the car i.e. MPT 7503 and had partially written the same in the register Ex.PX one of the four boys in the car who had an altercation with the deceased and PW-3, shot the deceased in the ear and all four sped away.

31. Needless to state, the testimony of Anil Tiwari hardly inculpated the appellant and his co-accused as Anil Tiwari did not identify them at all.

32. At the second stage after Rakesh @Andy and Vijay @Pinak were arrested and supplementary charge-sheet was filed, Anil Tiwari was re-examined on 15.9.2003. He changed his version a little by deposing that he saw four persons alighting from the car in the night when the deceased was shot, but added that he could not identify them because it was dark and hence he could not see the said four persons very properly. Anil Tiwari was again declared hostile and was confronted with his statement recorded by the investigating officer. He denied having said what was recorded therein.

33. Gian Prakash PW-3 was examined twice and on both occasions stated the facts disclosed and recorded in his statement Ex.PW-3/A and identified the appellant and the accused as the four boys with whom the altercation had taken place.

34. Needless to state, Gian Prakash had not claimed to have seen the actual shooting incident which, as per him had taken place when he had left the gate to go to the police picket and summon police help and by the time he returned with the police, his friend had been shot dead and the assailant had escaped.

35. We eschew reference to various witnesses of the prosecution who proved recoveries at the instance of the appellant and the disclosure statements (four in number)

made by the appellant. But would be referring to the credibility thereof while discussing the submissions made by learned counsel for the appellant.

36. The learned Trial Judge has held that the fact of Gian Prakash PW-3 having wrongly identified Rakesh @Andy and Vijay @Pinak during test identification proceedings rendered it unsafe to convict them on their being identified by Gian Prakash as two of the four boys who had an altercation in the night. There being no other evidence against Rakesh and Vijay, both have been acquitted.

37. Pertaining to Deepak, against whom the incriminating circumstances have been discussed, before discussing the incriminating evidence against the appellant, the learned Trial Judge has held that notwithstanding the conduct of Deepak in refusing to participate in the test identification proceedings was indicative of a guilty mind entailing an adverse inference and also his being identified by PW-3 as one out of the four boys present, it could not be said that Deepak had shared any common intention with the appellant who had fired the shot. Since the death of the deceased could be attributed to only one shot which was treated as having been fired by the appellant, the learned Trial Judge opined, in para 41 as under:-

“41. But it must be borne in mind that the charge against the accused Deepak is not for causing affray or using criminal force or committing assault. The charge against him is of having shared a common intention to murder. There is no eye-witness account of his having instigated or abetted the murder of Jyoti Prakash, leave alone of having shared a common intention to cause his death. There is no circumstantial evidence either against him to prove such a charge against him. Thus, even if the testimony of PW-3 is accepted that the accused Deepak had been the driver of the Fiat Car who had rashly reversed the car leading to the quarrel, there is nothing on the basis of which it could be concluded that he also had a hand in causing the death of Jyoti Prakash.”

38. Convicting the appellant, the learned Trial Judge has held that the car in question in which the four accused boys were travelling was got recovered pursuant to the disclosure statement of the appellant. The learned Trial Judge has further held that the country made pistol recovered at the instance of the appellant pursuant to his disclosure statement was proved to be the weapon of offence as per the report of the ballistic expert and it was proved by the report that the bullet recovered from the head of the deceased was fired from the firearm. That blood of the same group as that of the deceased was found on the coat got recovered by the appellant was another piece of incriminating evidence as the appellant failed to explain presence thereof on the coat. Lastly, the fact that the appellant had refused to participate in the test identification proceedings and was identified by PW-3

as one of the four boys with whom he and the deceased had an altercation was held to be further incriminating evidence. Thus, while acquitting the three co-accused, only the appellant has been convicted.

39. At the outset we may record that as per PW-3, he had not seen as to which out of the four boys with whom he and the deceased had an altercation, fired at the deceased. He has not even deposed that he saw a firearm in the hand of the person of any one of the said four boys. No eye-witness has deposed to have seen as to who fired the shot. Thus, anyone out of the four could have fired the shot. In this view of the matter, the learned Trial Judge ought to have first returned a finding as to who fired the shot and not in the manner the learned Trial Judge has done.

40. Before discussing the evidence against the appellant, by treating the appellant as the one who has fired the shot, incriminating evidence against Deepak has been considered. The approach is patently faulty.

41. Be that as it may, we have to discuss the evidence held incriminating against the appellant, notwithstanding the faulty approach adopted by the learned Trial Judge.

42. Recoveries of firearms pursuant to the disclosure statement of a person in police custody if linked with the crime is evidence of highly incriminating nature for the reason the

disclosure statement of the said person and the recovery of the firearm at his instance requires an inference to be drawn against the maker of the statement of being responsible for secreting the said weapon and unless he explains as to how he got knowledge of the place where the weapon of offence was recovered, the Court would be fully justified in attributing authorship of the use of the weapon to him. We clarify that this process of logical reasoning is premised on the fact that by independent evidence the weapon in question is linked to the offence. The confessional statement that the same was the weapon of offence and was used by the maker of the statement is inadmissible in evidence being hit by Section 24 to Section 26 of the Evidence Act.

43. Before we discuss the evidentiary worth of the report of the ballistic expert, we would be failing if we do not note that as held in the decision reported as AIR 1956 SC 56 Nathu vs. State of U.P. that prolonged custody immediately preceding the making of the confession is sufficient, unless it is properly explained, to stamp it as involuntary. In said case, the confessional statement was recorded on the fourteenth day of the custody. Further, in the decision reported as 2008 (1) CRIMES 191 (SC) Sattatiya @Satish Rajannakartalla vs. State of Maharashtra piecemeal disclosure statements were held to be highly suspect unless explained satisfactorily. In

said case the disclosure statements were made piecemeal on three dates i.e. on 3.10.1994, 5.10.1994 and 6.10.1994. Another decision may be noted being 2002 (2) SCC 426 State of Haryana vs Ram Singh wherein same set of witnesses to the arrest, disclosures and recoveries was held to be indicative of the falsity thereof. The reason is obvious it would be a strange and hence a suspicious circumstance that same set of witnesses were conveniently available to the Investigating Officer on different dates when the investigation was on.

44. In the instant case we note that the witnesses to the four disclosure statements made by the appellant on three different days i.e. on 30.3.2001 (2 disclosure statements), 1.4.2001 and 4.4.2001 are the same i.e. SI Nipun Kumar and SI Vinod Kumar with the difference that in the last disclosure statement there is only one witness namely SI Nipun Kumar. The witnesses to the recovery of the coat and the pant as recorded in the seizure memo Ex.PW-19/A are once again, SI Nipun Kumar and SI Vinod. The witness to the recovery of the country made pistol as recorded in the memo Ex.PW-41/D is SI Nipun Kumar. Further, the four disclosure statements being spread over six days are required to be viewed with suspicion qua the voluntariness thereof. The fact that the appellant suffered a serious head injury while in police custody on 31.3.2001 in respect whereof he alleges that the investigating

officer had brutally assaulted him and the investigating officer alleges that the appellant attempted suicide is another important fact to be considered for the reason the possibility of the appellant being forced to confess cannot be ruled out. At this stage we may note that the appellant has been acquitted of the offence punishable under Section 309 IPC i.e. the Sessions Trial pursuant to FIR No.246/2001 has resulted in the prosecution not being able to establish that the appellant attempted to commit suicide.

45. Under the circumstances we hold that the disclosure statements Ex.PW-19/X, Ex.PW-19/Y, Ex.PW-41/C1 and Ex.PW-41/C do not inspire confidence and being not explained as to why they were recorded piecemeal, the same have to be viewed with suspicion. Since the clouds of suspicion have not been removed, in that, nothing has been shown to us by the prosecution wherefrom we can independently gather that the same inspire confidence, we hold that the evidence relatable thereto would be tainted evidence. The prosecution would not be entitled to the fruits of such a poisoned tree.

46. Pertaining to the recovery of the car bearing No.MPT 7503 we may note that Gian Prakash PW-3 has identified the same in which the four boys with whom he and the deceased had an altercation were travelling in. But, the

whereabouts of the said car were disclosed to the investigating officer by co-accused Deepak on 29.3.2001 as his disclosure statement Ex.PW-26/A records that the said car belonged to Chiranji Lal PW-16 and was borrowed from him and after the crime was committed was returned to him on 1.3.2001. He also disclosed that he could get the car recovered. A fact already disclosed to the investigating officer cannot be re-disclosed and rediscovered and made admissible under Section 27 of the Evidence Act. Thus, the learned Trial Judge has clearly erred in using the first disclosure statement of the appellant and the recovery of the car pursuant thereto as incriminating evidence against the appellant.

47. The coat Ex.P-6/1 found to be stained with human blood of the same group as that of the deceased is a recovery made on 30.3.2001 i.e. after 30 days of the crime. Under the circumstances, the detection of human blood of the same group as that of the deceased on the same is suspicious. In this connection we may note that while deposing as PW-47, Inspector Sachdev Dahiya did not utter a word of having recorded the disclosure statement Ex.PW-19/Y nor did he utter a word that the appellant told him that the coat and the pant which he was wearing at the time of the commission of the offence could be got recovered by him. SI Nipun Kumar PW-41, the stated witness to the disclosure statement, has also

not deposed a word about the disclosure statement or that the appellant told the investigating officer that he could get recovered the coat and the pant worn by him at the time when the crime was committed. We note that the said disclosure statement has been proved by SI Vinod Kumar who has not signed the same as a witness. We note that only his name has been written thereon. We may clarify here that the investigating officer has deposed to the recovery of the coat and the pant but not to the disclosure thereof. That apart, where other evidence fails Courts have never sustained convictions on the basis of blood stained clothes recovered pursuant to the disclosure statements as sufficient evidence wherefrom the guilt of the accused can be inferred. See the decisions reported as: (i) Narsinbhai Haribhai Prajapati vs Chhatrasinh & Ors. AIR 1977 SC 1753, (ii) Prabhu vs. State of U.P. AIR 1963 SC 1113 and (iii) Vidya Sagar vs. State of U.P. 1977 SCC (Cri.) 286.

48. Pertaining to the fact that the appellant refused to join in the test identification proceedings, the reason given by the appellant, as recorded in the test identification proceedings is of being shown to the witnesses. We note that after he was arrested, the appellant was taken out from the police lock up for recovering the car from Chiranji Lal as also for effecting recoveries of the clothes. This was on 30.3.2001.

The request for conducting test identification proceedings was made on 31.3.2001. Ignoring the reason given by the appellant, since the appellant was taken outside from the police lock up and there is no evidence that his face was kept muffled, there is every possibility of the appellant being shown to the witness and thus, in the facts of the instant case, refusal by the appellant to participate in the test identification proceedings cannot be used as indicative of his attempt to conceal himself.

49. The last evidence, which if proved, would be fairly incriminating is the report of the ballistic expert i.e. Ex.PW-1/A. The contents of the report and the testimony of PW-1, in brief, have been noted by us in paras 25 and 26 above show that the pistol got recovered pursuant to the disclosure statement of the appellant was of bore .303" / .315" i.e. was capable of firing a bullet of bore .303" and .315". It is apparent that the figure .303 is less than the figure .315. It is apparent that the bullet of bore .303 would be narrower than a bullet of bore .315. It is apparent that a barrel of bore .315 would be oversized for a bullet of bore .303.

50. What is the effect thereof?

51. In the book '*Firearms in Criminal Investigation and Trials*' by B.R.Sharma, at page 113 it has been opined that when a firearm is discharged, the cartridge case comes in

contact with the firing pin, the breech face, the extractor, the ejector and the chamber. The projectiles come in contact with lead and barrel. All these parts of a firearm are made of steel. During their manufacture they undergo processes like cutting, hammering, reaming, grinding, filling and polishing. Various tools are used in their manufacture. The surface profiles of the tools used continue to change due to wear and tear as the tools act on steel. The finished surface profiles of firearms after undergoing such operations are, therefore, never alike even when the two surfaces are made with the same set of tools, one after the other. Consequently, all firearms, even the two barrels of the same firearm, show complete individualities. When a cartridge is fired and the bullet comes in contact with the relevant parts of the firearm, a negative profile of the surface gets imprinted on the projectile. Thus, a firearm can be identified in respect of the fired ammunition even when the firearm is recovered after a long time. Thus, the bore size of a firearm assumes importance. If a bullet does not house properly in the barrel of a firearm, the negative profile of the surface of the barrel is not clearly imprinted on the projectile.

52. A loose fitted bullet would obviously result in having imperfectly marked imprints.

53. It was urged by learned counsel for the State that the testimony of PW-1 and his report has not been assailed

during cross-examination and since the report clearly and unequivocally opines that the bullet recovered from the body of the deceased was fired from the country made pistol recovered at the instance of the appellant, the issue has to be treated as closed against the appellant.

54. In a serious charge, as that of murder, where the life and liberty of an accused is at stake, technical and doctrinal approach to problems has to be eschewed and the matter has to be approached with prudence keeping in view the fact that a fact is treated to be proved, as defined in the Evidence Act, when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Expert evidence is admissible under Section 45 of the Evidence Act and is treated as relevant evidence. But, the same is nothing more than evidence and this means that a Court has to evaluate the same as evidence and not treat it as conclusive proof of the subject matter to which the opinion relates. For treating it as binding, the Court would be delegating its judicial function. In the decision reported as 1999 (7) SCC 280 State of H.P. vs. Jai Lal & Ors., in para 18 it was observed as under:-

“18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.”

55. A somewhat similar paradox was faced by the Supreme Court in the decision reported as AIR 1978 SC 1511 Modan Singh vs. State of Rajasthan. There was a hiatus in the bore of the firearm and the bullet which was referred for opinion. The ballistic report which initially wayward, finally concluded that the suspected bullet was fired from the firearm. The expert was not cross-examined by the defence on his opinion as to how could he conclusively so establish. The Supreme Court noted that no question was put to the ballistic expert as to how could he give a conclusive opinion because of the fact that the barrel of the pistol was loose and could house bullets of even a lesser bore. Notwithstanding that the expert testimony was not even challenged during cross-examination, the Supreme Court held that it cannot with certainty be said that the firearm in question was used to commit the crime. In the decision reported as AIR 1957 AP 758 In Re.Kodurthimma

Reddi & Ors. (Prisoners), while discussing the evidentiary worth of a ballistic report and opinion and testimony of a ballistic expert it was highlighted that the test cartridge and the data generated therefrom on basis whereof the opinion was penned should be sent to the Court.

56. The reason is obvious. It is the primary duty of the Court to see the photographs of the striations marks generated on the suspect and the sample/test bullet and then form an opinion.

57. As noted by us, in the instant case neither the photographs generated showing the striations marks nor the test bullet was sent to the investigating officer and hence were not produced in Court.

58. In this connection it assumes of some importance that as per the doctor who conducted post-mortem on the body of the deceased, the bullet injury on the deceased was a rifled injury meaning thereby the weapon of offence had a sufficiently long barrel with spiral groove, for only then could the bullet spin and as a result of the spinning bullet hitting the body, rifled injury resulting there from. Country made pistols or for that matter even pistols generally have short and smooth barrel and cannot result in a rifled injury. The sketch Ex.PW-41/D-1, is unfortunately not drawn to scale, but shows a barrel akin to a small snout i.e. a short barrel.

59. Thus, the appellant would be entitled to the benefit of a doubt even with respect to the report of the ballistic expert.

60. The destination of our decision is a happy destination for the appellant and his industrious lawyer. We wish to put it on the judicial record that Shri Rajesh Mahajan, learned Amicus Curiae rendered valuable assistance in the appreciation of evidence and researched well on firearms. The zeal and passion required for the underprivileged in legal aid matters was amply demonstrated by the young lawyer.

61. Thus, the only evidence we have on record against the appellant is the testimony of PW-3 as per whom the appellant was one of the four boys with whom an altercation took place. But who fired the shot is not known. The three co-accused have been acquitted and the State has not challenged the said finding. It may be noted in Court, the said three co-accused were identified as present at the spot with the appellant. The reason for acquitting Deepak is that from the evidence it could not be said that the four boys shared a common intention and hence only said boy who actually fired the shot must suffer the consequences of his act. Since there is no evidence that the appellant fired the fatal shot he is entitled to parity with Deepak who has been acquitted.

62. The appeal is allowed. Impugned judgment and order dated 31.5.2005 convicting the appellant for the offence of murder and possession and using a firearm is set aside. The appellant is acquitted of the charge framed against him.

63. Copy of this judgment be sent to the Superintendent, Central Jail, Tihar for compliance as the appellant would be required to be set free, if not in custody in some other case.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

AUGUST 31, 2009
Dharmender