

* **HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 18.04.2009
Judgment delivered on: 27.04.2009

+ **Crl. Appeal No.974/2006**

ZAHID @ BALLU @ SALEEM Appellant
Through : Mr. K.B.Andley, Sr. Adv. with
Mr. M.Shamikh, Advocate

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, Advocate

Crl. Appeal No.1005/2006

SHAHID @ LAMBU Appellant
Through : Mr. K.B.Andley, Sr. Adv. with
Mr. M.Shamikh, Advocate

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, Advocate

Crl. Appeal No.29/2007

SAHIL @ ISRAEL Appellant
Through : Ms. Neelam Grover, Advocate

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, Advocate

Crl. Appeal No.30/2007

ABID & ANR. Appellants
Through : Ms. Neelam Grover, Advocate &
Mr. Zaved Hashmi, Advocate

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, Advocate

CORAM :-

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

PRADEEP NANDRAJOG, J.

1. Appellants Zahid @Ballu @Salim, Shahid @Lambu, Sahil @Israel, Abid and Pawan were charged with the offence of having entered into a conspiracy to commit murder of Udaivir and in pursuance thereof murdering Udaivir on 2.7.2000 at about 6:05 PM on the public street opposite House No.B-231 Old Seemapuri. Additionally, Sahil was charged with the offence of possessing a country made revolver without a licence i.e. the offence punishable under Section 25 of the Arms Act as also for the offence of having used the said firearm to cause firearm injury on Udaivir i.e. the offence punishable under Section 27 of the Arms Act. Shahid was charged with the offence of possessing a khukhri i.e. for the offence punishable under Section 25 of the Arms Act as also for the offence of having used the khukhri to cause injury to Udaivir i.e. for the offence punishable under Section 27 of the Arms Act. Abid and Pawan were charged with the offence of possessing a knife i.e. the

offence punishable under Section 25 of the Arms Act as also for the offence of having used the knife to cause injuries to Udaivir i.e. for the offence punishable under Section 27 of the Arms Act.

2. The case of the prosecution was that Zahid @Ballu @Salim, Shahid @Lambu, Sahil @Israel, Abid and Pawan entered into a conspiracy between the period 30.6.2000 to 2.7.2000 along with Furkhan for murdering Udaivir and in pursuance to the said conspiracy waylaid Udaivir when he was on the public street at B-Block Old Seemapuri, Sahil fired a shot at him from a country made pistol. In an attempt to save himself Udaivir started running and was chased by all accused. Shahid who was armed with a khukhri and Abid and Pawan who were armed with a knife each inflicted blows with their respective weapons on Udaivir who fell on the ground due to the assault. Two more shots with a country made pistol, one each by Sahil and Zahid were fired at him. The body of Udaivir which was lying face down was tossed over by Shahid who removed the mobile phone of Udaivir and all the accused fled.

3. It may be noted at the outset that Furkhan could not be arrested and hence his name was shown in column No.2 in the charge-sheet which was filed.

4. The process of law was set into motion when a telephonic message was received at the police control room by

Const. Asha PW-5 at 6:03 PM on 2.7.2000 about a man being shot near a school at B-Block, Old Seemapuri. The information was relayed to the police station Seemapuri as also to a PCR Van stationed at Apsara Border, a place nearby where the offence took place. ASI Balbir Singh PW-13 in-charge of the PCR Van received the wireless message from the police control room at 6:04 PM. At the police station the relayed message from the police control room was received at 6:05 PM as recorded in the DD Entry No.21A, Ex.PW-22/A.

5. ASI Balbir Singh PW-13 rushed to the place of the occurrence and found a male lying injured and a lady weeping next to him. He removed the injured to GTB Hospital along with the lady. Around the same time, since information had been received at the police station, SI Arun Kumar PW-24 accompanied by Const. Sohan Pal PW-16 left the police station for the spot where the incident had taken place and on reaching there were informed that the person injured had been removed in a PCR Van to GTB Hospital. Before the two could move on to the hospital, the Addl. SHO of the police station viz. Inspector Y.K.Tyagi PW-27 accompanied by Const. Rishiraj PW-17 and Const. Satender Kumar PW-25 reached the spot. SI Arun Kumar PW-24 and Const. Sohan Pal PW-16 remained stationed at the spot and the other police officers proceeded to GTB Hospital.

6. At the hospital Inspector Y.K.Tyagi PW-27 learnt that the injured, Udaivir Sharma who was admitted at 6:20 PM had died at around 7:30 PM. He obtained a copy of the MLC Ex.PW-15/A of the deceased which recorded three gunshot wounds and various stab wounds and lacerated wounds on the person of the deceased. Thereafter, on the copy of DD No.21A which copy he had taken along with him from the police station made an endorsement Ex.PW-27/A recording therein that no eye-witness could be located and that the crime team and a photographer should be sent to the place where the offence took place. The said endorsement was transmitted through Const. Satender PW-25 to the police station at 8:15 PM on 2.7.2008 for the FIR to be registered. At the police station the FIR Ex.PW-22/B was registered for the offence punishable under Section 302 IPC.

7. He seized the body and sent the same to mortuary for autopsy.

8. Returning to the spot Inspector Y.K. Tyagi PW-27 picked up blood, blood control earth and sample earth as recorded in the seizure memo Ex.PW-16/A. He found a bullet which he seized as recorded in the seizure memo Ex.PW-16/B, sketch whereof Ex.PW-16/D was drawn by him. He also picked up a used empty cartridge from the spot as recorded in the seizure memo Ex.PW-16/C, sketch whereof Ex.PW-16/E was

drawn by him. He prepared a rough site plan Ex.PW-27/C noting therein the spot where he saw a pool of blood and from where the blood and blood control earth was seized as also the spots where the bullet and the empty cartridge respectively were lifted by him.

9. Const. Rajesh Kaushik PW-18, a photographer reached the spot and took six photographs Ex.PW-18/A-1 to Ex.PW-18/A-6; negatives whereof are Ex.PW-18/A-7 to Ex.PW-18/A-12.

10. At the mortuary Dr.N.K.Aggarwal PW-14 conducted the post-mortem of the deceased and prepared the report Ex.PW-14/A recording therein the injuries which he noted, being as under:-

1. Firearm entry wound of 2 x 1.8 cm obliquely present over the left upper and outer aspect of face in front of left ear. Outer margin of the injury was 5 cms away from the outer angel of left eye, blackening was present all over the wound in inverted margins, the injury had gone upwards, backwards and inwards at a distance of 16.5 cms in the brain tissue and a distorted blood was recovered with fracture of skull. The injury has made a lacerated wound of 5 x 1 x 0.5 cm over middle back of head.
2. Firearm entry wound over head 5.1 cm was present over the outer, upper, middle aspect of right side of neck with tatooing present inner area of diameter 16 cms around over face and head. The injury had gone upward, inward and forward in between the muscles of neck and cutting the structure of neck

and came out by making of wound of 1 x 1 cms over outer middle front of left side of face. 7 cms out to left angle of mouth.

3. A firearm injury wound of 2.5 cmX2 cm over left side of back of chest. Firearm injury wound of 2.5 x 2 cms present over inner upper aspect of left side of back of chest just 0.5 cms away from midline, the injury had entered the left pleural cavity by fracturing the 2nd and 3rd rib at costovertebral junction. It had entered the upper lobe of left lung. Multiple pellets are recovered from the left pleural cavity and entangled in between the left lung tissue. Parts of empty cartridge case are also recovered from left side of pleural cavity.
4. Stab wound of 3 x 1 cm obliquely present over the upper outer aspect of back of left side of chest in post axillary line. The injury has gone upwards, inwards and forwards and entered into the left side of pleural cavity and ended by making a cut into the upper lobe of left lung.
5. Incised wound of 3 x 0.7 cm vertically present over upper middle aspect of left side of front of chest. Lower margin of the injury is 6 cm above the left nipple.
6. Incised wound of 4 x 0.7 cm vertically present 1 cm above the injury No.5.
7. Stab wound of 3.5 x 1.2 cm vertically present over lower, inner front of chest in the middle. The injury has gone just in between the muscles for a distance of 3.8 cm.
8. Stab wound of 1.5 x 0.5 cm obliquely present over right shoulder, 5 cm inner in the tip of right shoulder. The injury has gone inwards and slightly downwards for a distance of 6 cm in the neck, cutting structure in between.
9. Stab wound of 2 x 1.5 cm present over the upper middle front of left side of abdomen. The injury has gone upwards and inwards for a distance of 4.5 cm and came out in the inner middle front of abdomen by making a wound of 2 x 1.2 cm.

10. Stab wound of 2.5 cm x 1 cm obliquely present over inner upper aspect of gluted region. The injury has gone upwards and inwards for a distance of 5 cm in between the muscles.
11. Lacerated wound of 2.5 x 0.6 x 0.5 cm obliquely present over right middle aspect of head 4.5 cm away and upwards from the tragus of right ear.

11. The cause of death opined was the firearm injuries caused to the internal organs affecting the brain and the lung.

12. Along with the post mortem report Dr.N.K.Aggarwal handed over an underwear, a kurta, a pyjama which he had removed from the dead body as also blood sample of the deceased which he had taken on a gauze. Bullet pellets and a deformed bullet which he had recovered from the left side of the pleural cavity of the deceased, which were seized by Inspector Y.K.Tyagi vide seizure memo Ex.PW-25/A.

13. What appeared to be a blind murder on 2.7.2000 resulted in a break through the next day when Shahjad PW-6 and Kabir PW-8, residents of the area came into contact with the investigating officer and disclosed to him that the deceased had been attacked by the appellants and Furkhan. They narrated the role played by each accused. Their statements under Section 161 Cr.P.C. were recorded on 3.7.2000.

14. Shahid @Lambu, Sahil @Israel and Abid were apprehended by Inspector Y.K.Tyagi, SI Arun Kumar, Const. Satender and Const. Rishiraj on 8.7.2000 from Khajuri Red Light

as recorded in the arrest memos Ex.PW-27/G, Ex.PW-27/J and Ex.PW-27/H. Their personal search yielded a khukhri Ex.P-4 from the left *dub* of Shahid which was seized vide seizure memo Ex.PW-17/D, sketch Ex.PW-17/A whereof was drawn by Inspector Y.K.Tyagi. The personal search of Sahil @Israel resulting in recovery of a loaded country made pistol Ex.P-3 from the right *dub* which was seized vide seizure memo Ex.PW-17/E, sketch Ex.PW-17/B whereof was drawn by Inspector Y.K.Tyagi. A button actuated knife Ex.P-5 was recovered from the pocket of Abid which was seized vide memo Ex.PW-17/F, sketch Ex.PW-17/C whereof was drawn by Inspector Y.K.Tyagi.

15. The three were interrogated and their confessional statements were recorded. We need not note the contents of confessional statements inasmuch as the same are completely inadmissible in evidence as they admit of guilt. We note that no recovery were affected nor was a fact discovered by the police pursuant to the said statements made by the three.

16. Continuing with their efforts to apprehend the remaining accused viz. Pawan, Zahid and Furkhan, the investigation and related activities continued.

17. On 12.7.2000 SI Mukesh Kumar PW-10, a draftsman, was taken to the spot by Inspector Y.K.Tyagi under direction of whom the site plan to scale Ex.PW-10/A was prepared

identifying points 'A', 'B' and 'C' where blood sample was lifted; the cartridge was found and the spot where the bullet was found.

18. On 13.7.2000 the khukhri and the knife which were recovered from Shahid and Abid respectively were sent for opinion to Dr.N.K.Aggarwal PW-14 who, vide opinion Ex.PW-14/B opined that injuries 5, 6 and 7 noted in the post-mortem report were possible with the khukhri and that injuries 4 to 10 were possible with the knife.

19. On 12.9.2000 the country made pistol recovered from the person of Sahil along with the bullet recovered from the spot; the deformed bullet recovered from the pleural cavity of the deceased; the pellets recovered from the body of the deceased; the empty cartridge recovered from the spot where the crime took place were sent for ballistic opinion and as per report Ex.PW-30/A it was opined with reference to striation characteristics that both bullets were fired from the country made pistol and that the cartridge recovered from the spot had also been fired through the country made pistol. The report further records that the country made pistol has a bore of 0.315 inch and that the cartridge recovered could be fired from the said pistol. It was also opined that the two bullets i.e. the one recovered from the body of the deceased and the one

recovered from the spot corresponded to the bullet of 0.315 inch cartridge.

20. Three accused viz. Pawan, Zahid and Furkhan being not apprehended till 17.9.2000, a charge-sheet was filed against Shahid, Sahil and Abid. They were charged with the offence of having conspired along with co-accused to murder the deceased and in furtherance thereof to have murdered the deceased. They were also charged under the Arms Act as noted in para 1 above.

21. Before their trial could begin Zahid was apprehended in another case and on said information being received Inspector Narender Pal Singh PW-31, on 18.12.2000, obtained his custody by moving an appropriate application in the Court of the learned Metropolitan Magistrate. He was interrogated and his statement Ex.PW-31/B was recorded by Inspector Narender Pal Singh. We are not noting the contents of his statement as they are confessional of guilt and hence inadmissible in evidence. We note that no recovery was affected pursuant to the statement made by Zahid.

22. Pawan was arrested on 24.12.2000 as recorded in his arrest memo Ex.PW-29/E. His personal search yielded a knife from the right side pocket of his pant which was seized vide seizure memo Ex.PW-28/B, sketch Ex.PW-28/A was drawn by SI

Anand Prakash.

23. Needless to state supplementary charge-sheets were filed after Zahid and Pawan were arrested.

24. As noted herein above, Furkhan could not be arrested and till date remains a proclaimed offender.

25. We are not noting the testimony of all the witnesses who were examined at the trial, save and except the testimony of Shahzad PW-6 and Kabir PW-8 as also the testimony of ASI Balbir Singh PW-13 and the testimony of the initial investigating officer Inspector Y.K.Tyagi PW-27.

26. But, before noting their testimony we may note that during arguments of the appeal learned counsel for the appellants including Ms.Neelam Grover, learned counsel for Sahil conceded at the Bar that in view of the report Ex.PW-30/A of the ballistic expert viz. Shri K.C.Varshney PW-30, it stands conclusively established that the bullet which was recovered from the spot and the bullet which was recovered from the body of the deceased stand proved to be fired from the country made pistol which was found by the police on the person of Sahil when he was arrested. We hasten to add that learned counsel for Sahil urged during arguments in appeal that the country made pistol was planted on Sahil. We shall be dealing with the submission after noting the deposition of the four witnesses viz.

the two alleged eye-witnesses and ASI Balbir Singh PW-13 and Inspector Y.K.Tyagi PW-27.

27. PW-6 Shahzad deposed that he was a resident of F-16 Shahid Nagar and on 2.7.2000 at around 5:30 PM he was present at B-Block Old Seemapuri and saw Sahil @Israel also a resident of Shahid Nagar, firing a shot at Udaivir who was present in front of his room. On receiving the bullet injury Udaivir started running and was chased by 5/6 persons one of whom i.e. Shahid was having a khukhri in his hand and another named Abid was having a knife in his hand. Both inflicted blows with the khukhri and the knife on Udaivir who fell on the ground. Sahil again shot Udaivir. Zahid, another person present, shot with a desi katta at the temporal region of Udaivir. Shahid turned Udaivir upside as he was lying face down and removed the mobile phone. Pawan was present at the spot and was having a knife in his hand. He deposed that several public people gathered at the spot and he left the spot as he became perplexed being a poor man. The next day his statement was recorded by the police.

28. On being cross-examined Shahjad PW-6 denied that he used to treat the deceased as his brother. He denied that any criminal case was pending against him. He denied that it was within his knowledge that Udaivir was a police informer.

The witness was cross-examined with reference to the sequence of events to which he had deposed and nothing of substance has been brought out to discredit his statements in examination-in-chief.

29. Kabir PW-8 resident of House No.D-113, New Seemapuri deposed that he was present at B-Block, Mochi Wali Gali, Old Seemapuri at 5:30 PM on 2.7.2000. The accused and Furkhan were present. He knew them as they used to visit the office of the deceased where he was employed. Sahil fired a shot at Udaivir which hit him on the shoulder at which Udaivir started running and all accused as also Furkhan started chasing Udaivir. Shahid gave blows to Udaivir with a khukhri and Abid gave blows with a knife as a consequence whereof Udaivir fell on the ground. Sahil fired a second shot on Udaivir. Zahid also fired a shot thereafter on the temporal region of Udaivir. Thereafter, Shahid up turned the body of Udaivir and removed his cell phone and thereafter all accused ran away. He saw Shahzad present at the spot. Several people have gathered. That he did not speak there due to fear.

30. Kabir PW-8 was cross-examined. Nothing much of substance has been brought out in the cross-examination except that his statement that Shahid had removed a mobile phone from the pocket of Udaivir was not disclosed by him as

per his statement recorded by the police under Section 161 Cr.P.C.

31. ASI Balbir Singh PW-13, the in-charge of the PCR van which had reached the place of the occurrence when the police control room flashed the message to the van deposed that on 2.7.2000 he along with the PCR van were stationed at Apsara Border and received a message from the police control room at 6:04 PM informing about a shooting incident at B-Block New Seemapuri. He reached the spot and saw a person lying on the ground and a lady present by his side who was weeping. People had gathered at the spot. He took the injured named Udaivir to GTB Hospital. One empty cartridge lying near the body of the injured was lifted by him and at the hospital when the SHO of the police station met him he handed over the same to the SHO who instructed him to go back to the spot and that he did so and kept the empty cartridge at the same place where he had picked it up. He deposed that the wife of the injured had accompanied in the PCR van. He identified the cartridge Ex.P-1 as the one he had lifted and kept back at the spot.

32. On being cross-examined he deposed that the cartridge was lying about one foot away from the body of the injured Udaivir.

33. Inspector Y.K.Tyagi PW-27 deposed that on 2.7.2000

he was posted as the Addl.SHO PS Seemapuri and received DD No.21A when he was on patrolling duty and reached the place where the offence took place where he found SI Arun Kumar and Const. Sohan Pal. He proceeded to GTB Hospital and collected the MLC Ex.PW-15/A of Udaivir who was declared dead at 7:30 PM. He made the endorsement Ex.PW-27/A on copy of the DD entry 21A and sent the same through Const. Satender for FIR to be registered.

34. He deposed to the seizures effected from the spot and the recovery memos prepared in relation thereto as also the sketches drawn by him.

35. On being cross-examined he admitted that Munni, wife of the deceased met him at the hospital. He admitted that the head constable of the PCR van had lifted the used cartridge from the spot and had put it back at the same spot and it was thereafter he seized the same. We note that he could not answer the questions pertaining to the topology of the public street where from he claimed to have lifted the blood, the cartridge, blood, blood-stained earth and earth control sample.

36. The accused led defence evidence and examined Asan Mohd. DW-1 who just deposed that on 2.7.2000 when he was taking lunch at 2:00 PM he heard noise in the gali and on peeping through the jaali of his door he saw three outsiders

quarreling. Shahid DW-2 deposed that on 8.7.2000 five police personnel came to his house and picked up Abid. He deposed that Abid and he had gone to Jammu on 1.7.2000 and had returned to Delhi on 4.7.2000. Jamila PW-3 deposed that six years back at 4:30 PM she saw 10-20 people running towards Shahid Nagar. Shahjahan DW-4 deposed that on 3.7.2000 police officers came to her house and took away her son Shahid. Shahid DW-5 deposed that Zahid is his brother and was in jail in connection with some offence under the Arms Act.

37. Pertaining to the witnesses of the defence suffice would it be to record that we fail to understand the purpose of the deposition of DW-1, DW-3 and DW-5.

38. Vide impugned judgment and order dated 28.9.2006 the appellants have been convicted save and except for the charge under Section 27 of the Arms Act 1959 framed against them. We clarify that since appellant Zahid was not charged for any offence under the Arms Act, obviously the question of his being convicted for any offence under the Arms Act does not arise and indeed he has not been convicted for any offence under the Arms Act. The sentences imposed are to undergo imprisonment for life for the offence of having murdered Udaivir. Ignoring that the offence of conspiracy under Section 120-B IPC is a substantive offence, though convicted for the

offence of having entered into a conspiracy to murder Udaivir, the learned Trial Judge has not sentenced the accused for the offence punishable under Section 120-B IPC. For the offences punishable under Section 25 of the Arms Act Sahil has been sentenced to undergo imprisonment for three years and to pay a fine of Rs.5,000/-; in default of payment of fine to undergo simple imprisonment for three months. Shahid, Abid and Pawan have been sentenced to undergo rigorous imprisonment for one year for the offence punishable under Section 25 of the Arms Act and to pay a fine of Rs.3,000/- each; in default of payment of fine to undergo simple imprisonment for two months.

39. The reasoning of the learned Trial Judge is the testimony of PW-6 and PW-8 and the finding that their testimony inspires confidence. On the issue of Shahid being an interested witness, learned Trial Judge has noted that his interest was sought to be projected with reference to his treating the deceased as his brother, which has been held to be not proved by the learned Trial Judge. The interest of PW-8 sought to be projected with reference to his being an ex-employee of the deceased, has been rejected by the learned Trial Judge on the ground that PW-8 was not in the employment of the deceased when the incident took place. The plea of the appellants that the two witnesses were planted evidenced by

the fact that neither was available on the day when the crime took place and both mysteriously surfaced to inform the police and said information being recorded in the form of their statement under Section 161 Cr.P.C. on 3.7.2000 has been turned down by the learned Trial Judge, holding that the reason given by the two for not volunteering any information to the police soon after the incident i.e. being poor men, they got scared, has been accepted by the learned Trial Judge.

40. We find no reasons given by the learned Trial Judge to acquit Sahil for the offence punishable under Section 27 of the Arms Act as also why other co-accused who were charged with possessing the khukhri and knives which were recovered from their respective possession, have been acquitted for the offence punishable under Section 27 of the Arms Act.

41. It appears that the fact which has weighed with the learned Trial Judge to acquit Sahil for the offence punishable under Section 27 of the Arms Act is the fact that the used cartridge seized from the spot by Inspector Y.K.Tyagi was picked up by ASI Balbir Singh PW-13 who later on went back to the spot and kept it back at the spot where from he claimed having lifted the same i.e. the place of recovery of the used empty cartridge got tainted. We hasten to add that the learned Trial Judge has not expressly so recorded, this is what we read from the

judgment for the reason no cogent reasons have been given by the learned Trial Judge to acquit the accused persons for the offence punishable under Section 27 of the Arms Act and in particular qua Sahil.

42. As noted herein above, learned counsel for the appellants conceded that the report Ex.PW-30/A of the ballistic expert clinches the issue that the bullet which was recovered from the body of the deceased and the bullet which was recovered from the spot by Inspector Y.K.Tyagi PW-27 stand conclusively proved as being fired from the country made pistol which was recovered from Sahil when he was apprehended. Thus, whether the used cartridge which was lifted from the spot gets connected with the country made pistol or not becomes wholly irrelevant.

43. Unfortunately, the learned Trial Judge appears to have got influenced by the fact that ASI Balbir Singh picked up the used cartridge and when he wanted to hand over the same to Inspector Y.K.Tyagi at the hospital he was told to go back to the street and put back the same at the spot where from he had lifted the same. He did so and thereafter Inspector Y.K.Tyagi seized the same from the spot. No doubt, this stupid act by the two police officers has resulted in a slight taint being imparted to the exact spot where from the used cartridge was lifted. Had

Inspector Y.K.Tyagi taken possession of the used cartridge from ASI Balbir Singh at the hospital itself followed by ASI Balbir Singh's statement being recorded that he had handed over the used cartridge followed by Inspector Y.K.Tyagi going back to the spot with ASI Balbir Singh and recording a supplementary statement indicating therein, with reference to the rough site plan prepared by him, the spot where from ASI Balbir Singh picked up the used cartridge, the purity required by law to be maintained would have been ensured and there would have been no problem.

44. But, we note that save and except to put an omnibus question to PW-13 that he saw no used cartridge and hence picked up none from the spot, his testimony that he picked up a used cartridge from the spot and put it back at the same spot later on has not been subjected to any meaningful cross-examination and this lends assurance to his deposition which, needless to state stands corroborated by the deposition of Inspector Y.K.Tyagi PW-27.

45. Be that as it may, the two bullets i.e. the one recovered from the spot, purity of recovery whereof is not in doubt and indeed has not been questioned as also the purity of the recovery of the bullet from the body of the deceased and the fact that the two were fired from the country made pistol

recovered from Sahil conclusively establish that the bullet which hit the deceased was fired from the country made pistol in question and the one which was picked up from the spot was also fired from the same pistol.

46. The plea urged by learned counsel for the appellants and in particular by learned counsel for Sahil that the country made pistol was planted on Sahil is worthy of being noted and rejected for the reason before it could be planted there has to be evidence that the police came in possession thereof. A feverish plea was urged that it is possible that the assailants threw the country made pistol at the spot when they fled and the police lifted the same from the spot but did not record the said fact and later on planted the pistol on Sahil.

47. A factual foundation has to be laid before an argument based on a fact can be urged. We find that no suggestion has been made by the accused to Inspector Y.K.Tyagi PW-27 that he had picked up a country made pistol from the spot which he later on planted on accused Sahil.

48. A firearm which gets connected to a bullet recovered from the body of the deceased is extremely incriminating qua the person from whom the firearm is recovered unless he is able to satisfactorily explain his not being connected with the firearm when the crime took place. A firearm used as a weapon of

offence establishes conclusively the presence of the firearm at the scene of the crime and since a firearm cannot move by itself, the owner or the possessor thereof must explain the circumstance under which the firearm reached the place of the occurrence and in the absence of any such explanation it would be permissible for the Court to presume that the owner or the possessor of the firearm was the offender.

49. We thus hold that the prosecution has successfully established that the country made pistol recovered from the possession of Sahil was the weapon of offence used to fire the shot at the chest of the deceased. We say so for the reason the bullet has been recovered from the pleural cavity of the deceased. This in turn proves that Sahil was present at the spot and had fired on the deceased.

50. It is no doubt true that PW-6 and PW-8 have surfaced the next day and have told the police about the appellants and Furkhan being the assailants. It is normally expected that an eye-witness would meet the police at the place of the occurrence more so when the police arrives at the scene of the crime within minutes of the crime being committed. But, merely because a witness, due to fear, chooses not to come forward and volunteer immediate information, and does so later on would not mean that such witness cannot be believed. If it is

shown satisfactorily to the Court that indeed, the witness was under fear, the testimony of said witness can surely be considered and if corroborated by other evidence, the same would be sufficient to sustain a conviction.

51. Merely because a witness is related to a deceased would not make the witness an interested witness. A witness is an interested witness who has a motive i.e. an interest to secure a false conviction. In the decision reported as AIR 1953 SC 364 Dilip Singh & Ors. vs. The State of Punjab it was observed as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

52. What more proof would a court require of the fear struck by the appellants while murdering Udaivir other than the fact that in spite of the murder being committed in broad

daylight (5:30 PM) on a public street and there being shops abutting the street, nobody volunteered as an eye-witness. The diabolic manner in which Udaivir was murdered is evidenced by the post mortem report which shows that Udaivir was shot thrice; one shot fired in the temporal region, the second around the neck and the third on the back of the chest. He had as many as eight stab wounds. The doctor has opined that at least two sharp edged weapons were used to cause the injuries on Udaivir. Such kind of murder where the victim is shot at, chased; repeatedly stabbed and shot at twice over again is bound to strike fear in the mind of the onlookers and therefore we find that the evidence on record does not rule out that PW-6 and PW-8 did not volunteer any information due to fear. The fact that the wife of the deceased was found crying at the spot being consoled by none also establishes that nobody ventured to volunteer anything. As per the testimony of PW-6 the deceased was shot just outside his room. Obviously, the people in the vicinity were known to the deceased. Yet, none came forward to tell anything to the police. PW-6 and PW-8 are men of humble origin and like the others would obviously be too scared to tell anything to the police soon after the incident.

53. Why did they volunteer information the next day? It is natural for somebody to pose the question. Such a question

is not easy to be answered, but it is not that it has no answer. It does happen and especially when one sees a murder committed in a diabolical manner that one gets fear stricken and the tongue refuses to speak. As time passes by and the conscience starts telling the brain to speak, the tongue performs the function required to be performed. The mind gets strength and the legs volunteer up to the police and the tongue speaks the truth so that the conscience is at rest.

54. Now, when on 3.7.2000 PW-6 and PW-8, gave graphic details to the investigating officer of how Udaivir was murdered on 2.7.2000 how on earth they could attribute the role of shooting to Sahil unless they had seen him do so. It is important to note that by 3.7.2000 neither Sahil nor any other accused was apprehended. The fact that the country made pistol recovered from the person of Sahil when he was arrested on 8.7.2000 stands established as the weapon of offence used with which the deceased was shot at is a subsequent confirmation of a fact told by PW-6 and PW-8 to the police and so strong is the subsequent confirmatory fact that it lends assurance to the Court that PW-6 and PW-8 had seen the incident for the reason what they told to the police has been found to be correct and corroborated at least with reference to the role of Sahil.

55. If the two spoke the truth qua the role of Sahil, we see no reason to disbelieve the two with reference to their testimony qua the others. It is not out of place to note that both of them had told the police that Shahid had used a khukhri and indeed three stab injuries have been held attributable to a weapon of offence akin to the khukhri. It has to be kept in mind that unlike firearms, sharp cutting objects can at best be opined to be as the ones with which injuries noted on the person of a deceased can be caused and by their very nature it can never be opined that the injuries have been caused only by that particular weapon of offence.

56. It is true that the two eye-witnesses have used a different language to describe the incident and there are minor variations in what they have stated. But, it has to be noted that the two have substantially deposed facts in harmony with each other. Both have said that Sahil was the one who initiated the assault by firing a shot at Udaivir and that Udaivir started running and was chased by all the accused. Both have stated that Shahid had a khukhri in his hand with which he stabbed Udaivir and Abid had a knife in his hand with which he stabbed Udaivir. Both have stated that thereafter Sahil fired a second shot at Udaivir followed by a third shot fired at him by Zahid. Both have stated that Zahid fired the shot in the temporal

region of Udaivir. Both have said that thereafter Shahid turned over the body of Udaivir and removed a mobile phone from his pocket. The difference in their deposition is that PW-6 has said that Pawan was having a knife in his hand but PW-8 has only referred to the presence of Pawan and his chasing Udaivir when other co-accused chased Udaivir. The further difference is that PW-8 has specifically referred to the presence of Furkhan but PW-6 has made a general statement that 5/6 accused were present.

57. Since Furkhan was a proclaimed offender and hence was not sent for trial, it is possible that PW-6 thought that while deposing he has to describe the role played by the accused present in Court and hence did not make a reference to Furkhan.

58. The minor variation in the testimony of the two witnesses pertaining to whether Pawan simply chased the deceased along with the co-accused or when he did so, he had a knife in his hand is not of a nature which discredits the two witnesses.

59. In the decision reported as 1987 (3) SCC 747 State of U.P. vs. Dan Singh & Ors. it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. The reason is

obvious, where a large number of accused, as in this case six in number have participated in an assault, and witnesses deposed after a considerable gap of time, it would be difficult for each to remember the exact sequence of events and the role played by each accused. In the decision reported as 2003 Cri.L.J. 41 (SC) Gangadhar Behera & Ors. vs. State of Orissa the fact that some of the witnesses did not specifically attribute any definite role to some of the accused persons and deposed in an omnibus manner was held not to be factor to discredit the presence of said witnesses or the clear and cogent testimony of the others.

60. That the investigating officer could not answer the questions pertaining to the topography of the street where from the blood of the deceased; blood stained earth and control earth as also a used bullet and a used cartridge were lifted does not lead to the conclusion that the investigation was tainted or that no such recoveries were effected from the place in question.

61. The photographs Ex.PW-18/A-1 to Ex.PW-18/A-6 tell their own story. The photographs and in particular the photograph Ex.PW-18/A-1 shows the gate of the house abutting the place on the street where the blood was lifted. We note that Const. Rajesh Kaushik PW-18 has deposed that he took the six photographs at House No.B-231 Old Seemapuri. PW-18 has not been cross-examined at all. Thus, the testimony of PW-18 and

the graphic details in the six photographs conclude the place where the crime was committed. Indeed, it is the place deposed to by PW-6 and PW-8.

62. Pertaining to the witnesses of defence, as noted herein above we fail to understand the purpose of deposition of DW-1, DW-3 and DW-5 whose testimonies neither deal with the presence or absence of any accused persons at any place when the crime was committed. Pertaining to the testimony of DW-2 we find that he has made a bald statement that from 1.7.2000 till 4.7.2000 he and Abid had gone to Jammu, without giving any proof thereof. His testimony that on 8.7.2000 Abid was picked up from the house is nothing but a statement made to help their brother. We note that Inspector Y.K.Tyagi PW-27 who had arrested Abid has not even been suggested that he had picked up Abid from Abid's house. Similarly, DW-4 the mother of Shahid who has deposed that the police took away her son on 3.7.2000, has obviously spoken a lie inasmuch as Shahid was apprehended on 8.7.2000 and was produced before a Magistrate the next day. Had he been arrested on 3.7.2000, obviously he would have remained in illegal custody of the police till the day he was produced before the Magistrate and in said event his parents would have raised a hue and cry, which they did not do so; obviously he was not arrested on 3.7.2000.

63. Before concluding we may note that there is clinching evidence against Sahil which requires his conviction for the offence punishable under Section 27 of the Arms Act, but in the absence of any cross appeal by the State, we leave the issue at that.

64. We find no merit in the appeals which are dismissed.

(PRADEEP NANDRAJOG)
JUDGE

(ARUNA SURESH)
JUDGE

April 27, 2009
Dharmender