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IN THE HIGH COURT OF DELHI

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Judgment reserved on : 24.02.2009

Judgment delivered on: 18.03.2009

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CRL.A. No.461/2008

GAJRAJ

...Appellant

Through : Mr. Siddharth Luthra, Sr. Adv. with
Mr. Amit Bhardwaj, Mr. Sunil
Kumar and Mr. Mohd. Faraz

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

: PRADEEP NANDRAJOG, J.

1. On 23.07.2005 at about 18.25 P.M. DD Entry No.31A, Ex.PW-16/A, was recorded by the duty constable at Police Station Krishna Nagar that a dead body is lying in a house bearing Municipal No.F-9/33, Krishna Nagar, opposite Swaran Cinema.
2. This swung the police into action. ASI Udai Pal Singh PW-16, accompanied with Const. Surender Pratap PW-15, reached the spot. Simultaneously, other police officers, namely SI Mohinder Singh PW-5

and Inspector B.S.Dahiya PW-25, who had also received the information, reached the spot.

3. A dead body, which was later identified as that of one Harish Kumar (hereinafter referred to as the "deceased"), having bullet wounds on the head and abdomen was found, lying on a cot, in a room on the first floor of the said house.

4. Since no eye-witness was found present at the spot, Inspector B.S.Dahiya PW-25, made an endorsement, Ex.PW-25/A, on the copy of the DD Entry Ex.PW-16/A, and forwarded the same through Const. Surender Pratap PW-15, to the police station for registration of an FIR. PW-15 took Ex.PW-25/A to the police station and handed over the same to HC Murari Lal PW-2, who recorded the FIR No.297/05, Ex.PW-2/B.

5. At the spot, PW-25 prepared the site plan, Ex.PW-25/B, recording therein the place at point 'A' where the dead body was found. Blood was found staining the bed sheet which was spread on the cot where the dead body was lying. The said bed sheet was seized vide memo Ex.PW-25/C. Chance finger-prints were attempted to be lifted. (Vide report Ex.PW-5/A, PW-5 opined that no chance prints could be lifted from the spot.)

6. Const. Ompal Singh PW-6, from the crime team was summoned. 16 photographs, Ex.PW-6/1 to Ex.PW-6/16; negatives whereof are Ex.PW-6/17 to Ex.PW-6/32 were taken.

7. Since the deceased was found dead at the spot, his body was sent to the mortuary, Sabzi Mandi, where Dr.K.Goel PW-1, conducted

the post-mortem on 24.07.05 and gave his report, Ex.PW-1/A, which records that two external injuries were found on the person of the deceased; that the cause of the death was haemorrhagic shock consequent to injuries to blood vessels and abdominal viscera with element of cranio cerebral damage as a result of fire arm injuries, which were rifled; that both injuries caused by a fire-arm, were individually and collectively sufficient to cause death in the ordinary course of nature.

8. PW-1 recovered one bullet each from the left temporal and abdominal region of the body of the deceased. The clothes worn by the deceased; his blood sample on a gauze and his viscera was preserved. After the post-mortem the same i.e. the two bullets, the blood stained clothes of the deceased, his blood sample on a gauze and his viscera were handed over by PW-1 to Inspector B.S.Dahiya PW-25, and the same were seized vide memo Ex.PW-28/A.

9. During the course of investigation, Minakshi PW-23, the wife of the deceased disclosed that the deceased was having a sum of Rs.3,00,000/-, a licensed revolver and a mobile phone having number 9871879824 with him when he left Chandigarh on the day he was found murdered in Delhi. Inspector B.S.Dahiya PW-25, made inquiries and learnt that the said mobile number was being used in a handset having IEMI No.35136304044030. PW-25 put the said IEMI number under surveillance. The surveillance revealed that the SIM card having number 9818480558, which number is registered in the name of the accused, is being used in the said handset i.e. the handset with IEMI No.35136304044030. In fact the said SIM card i.e. of number

9818480558 was being used on the handset having IEMI No.35136304044030 a little after 19 hours of the dead body of the deceased being found.

10. Since the use of the handset of the deceased by the accused was a strong suspicious circumstance against the accused, Inspector B.S.Dahiya PW-25, accompanied with Const. Sartaj Ahmad PW-17, Const. Devender PW-20 and HC Rajan Singh PW-21, went to the residence of the accused. Needless to state the said address was provided by the service provider i.e. Bharti Airtel with reference to the mobile number 9818480558 since this number was a post paid number in the name of the accused. The accused was arrested at 2.30 P.M. on 06.08.2005 as per arrest memo Ex.PW-13/A. PW-25 interrogated the accused in the presence of the said police officers, Yuvraj PW-12, the brother of the accused and Veer Singh PW-13, the father of the accused. The accused made a disclosure statement Ex.PW-17/A confessing his guilt and disclosed that he can get recovered the mobile phone of the deceased and the revolver with which he had caused the death of the deceased; that he had deposited a sum of Rs.9,000/- given to him by the deceased in his i.e. the bank account of the accused.

11. Pursuant thereto, the accused led the said police team consisting of Inspector B.S.Dahiya PW-25, Const. Sartaj Ahmad PW-17, Const. Devender PW-20 and HC Rajan Singh PW-21 to a box-bed in a room situated on the first floor of the house and got recovered a revolver from the box of the said bed. The said revolver was having two live and two spent cartridges in its chamber. The revolver and the

cartridges were seized vide memo Ex.PW-12/C. PW-25 prepared the sketch Ex.PW-12/A of the said revolver and the cartridges. Thereafter the accused got recovered three mobile phones, one of which was having IEMI No. 35136304044030. The said three mobile phones were seized vide memo Ex.PW-12/B.

12. The blood stained clothes, blood sample and viscera of the deceased were sent to a serologist for a serological test. Vide FSL reports, Ex.PW-29/X1 and Ex.PW-29/X2, it was opined that blood group of the deceased was 'B' and that human blood of 'B' group was detected on the bed-sheet seized at the spot and the clothes of the deceased.

13. The two bullets recovered from the body of the deceased; the revolver recovered at the instance of the accused and the cartridges found in the chamber of the said revolver were sent to a ballistic expert for his opinion. Vide report dated 18.05.2006 of the Ballistics Division of the FSL, it was opined that the revolver recovered at the instance of the accused is a .32" calibre firearm designed to fire standard .32" cartridge and is in a working condition; that the two spent cartridges found in the chamber of the revolver recovered at the instance of the accused have been fired through the said revolver; that the one bullet recovered from the body of the deceased has been discharged through the revolver recovered at the instance of the accused; that no opinion could be given in respect of the discharge of the other bullet recovered from the body of the deceased as the same is in a deformed condition.

14. Armed with the aforesaid material a charge sheet was filed accusing the appellant of having murdered the deceased; trespassing into the property of the deceased; and robbing the deceased. The charges were framed against the appellant for having committed offences punishable under Sections 302, 380, 404 and 452 IPC.

15. At the trial, apart from examining the afore-noted police officers who proved the receipt of the initial information, the police visiting the site of the occurrence, registration of FIR, recording of statements of witnesses during investigation, seizure memos, disclosure statement of the accused, photographs taken of the site, preparation of the plan of the site, the doctor who conducted the post-mortem of the deceased, the official from the FSL who prepared the FSL reports Ex.PW-29/A and Ex.PW-29/B, the wife of the deceased, a doctor who had treated the deceased, an official from the bank, an official from the cellular company, the father and the brother of the accused were examined.

16. Minakshi PW-23, the wife of the deceased, deposed that she and the deceased had shifted from Delhi to Chandigarh on account of a dispute between the deceased and his sister-in-law; that the deceased had returned to Delhi on 27.02.05 while she continued to reside at Chandigarh; that the deceased used to stay in the house of his cousin at Krishna Nagar during his visit at Delhi; that she had spoken to the deceased on telephone No. 9871879824 at around 12.00 P.M. and 3.00 P.M. on the date of the death of the deceased; that the deceased was having a mobile phone, a licensed revolver and a sum of Rs.3,00,000/- with him when he left Chandigarh.

17. Dr. Naresh Dang PW-4, deposed that certificate Ex.PW-4/A recording that the deceased was suffering from tuberculosis of hip joint was issued by him.

18. G.L. Nim PW-18, an official from State Bank of India, deposed that the accused was maintaining an account at Khuraji Khas branch of the said bank and that the passbook Ex.P-1 evidencing that the accused had deposited a sum of Rs.9,000/- in his bank account on 25.07.05 was issued to the accused in respect of his account with the bank.

19. R.K. Singh PW-22, an official from Bharti Airtel, deposed that mobile number 9871879824 was registered in name of one Shivani Aggarwal, r/o 1/2, East Krishna Nagar, Delhi and that mobile number 9818480558 was registered in name of the accused. He proved the call records Ex.PW-22/A and Ex.PW-22/B pertaining to the mobile numbers 9871879824 and 9818480558 respectively.

20. The call record Ex.PW-22/A pertaining to mobile number 9871879824 evidences that the said number was being used in a handset having IEMI No.350608101231170, on 10.07.05 and 11.07.05; that the said number was being used in a handset having IEMI No.351356304044030 between the dates 12.07.05 to 23.07.05; that two calls from Chandigarh were received by the user of the said number on 23.07.2005 at 12:04:06 and 14:22:30 respectively; that the said mobile number was used for the last time on 23.07.2005 at 15:27:52.

21. The call record Ex.PW-22/B evidences that the number 9818480558 was being used in a handset having IEMI No. 350608101231170 between the dates 06.05.05 and 23.07.05 except 10th and 11th July 2005; that the said number was being used in a handset having IEMI No.351356304044030 between the dates 24.07.05 and 02.08.05. (It is relevant to note that the deceased died on 23.7.2005 and the said handset was used on the SIM card of the deceased i.e. the SIM card pertaining to the mobile number 9871879824).

22. Yuvraj PW-12, the brother of the accused, deposed that on 06.08.2005, 10-11 police officials came to his house and had searched the first floor portion of his house. That thereafter he was taken to the police station where he signed certain papers under threat by the police officers. That nothing was recovered from his house or on the personal search of the accused.

23. Gajraj PW-13, the father of the accused, deposed that on 06.08.2005 he told the police officers who had come to his house that the accused resides in a room on the first floor of the house. That thereafter the police searched the room of the accused for a period of 15-20 minutes. That nothing was recovered from the house.

24. The accused, in his statement under Section 313 Cr.P.C. denied everything. He stated that one Sachin against whom he had filed a suit for permanent injunction, acting in connivance with the police officers, had falsely implicated him in the present case.

25. The accused did not lead any evidence in defence.

26. Holding that the call record Ex.PW-22/A evidences that two calls from Chandigarh were received on the mobile number 9871879824 in the afternoon of 23.07.2005, corroborates the testimony of the wife of the deceased who was staying at Chandigarh on 23.07.2005 that she had talked to the deceased over telephone in the afternoon of 23.07.2005, which in turn establishes that the mobile number 9871879824 was being used by the deceased on the date of his death; that the call records Ex.PW-22/A and Ex.PW-22/B establishes that the handset having IEMI No. 350608101231170, which handset was used by the accused on a regular basis, was used by the deceased on 10th and 11th July, 2005 and that this establishes that the deceased and the accused were in touch with each other; the call record Ex.PW-22/B evidences that the handset which was used by the deceased on the date of his death was in possession of the accused soon after the death of the deceased and that the same is a strong incriminating circumstance against the accused; that the prosecution has been able to establish that the handset which was used by the deceased before his death and the revolver which was the weapon of offence were recovered at the instance of the accused; that the accused has not been able to explain the deposit of Rs.9,000/- made by the accused in his bank account soon after the death of the deceased; that the FSL report establish that the revolver recovered at the instance of the accused was the weapon of the offence; that the post-mortem report of the deceased evidences that two successive injuries were inflicted by the accused on the person of the deceased which establishes that the deceased had an intention to kill the deceased; vide judgment and order dated 21.04.2008, the accused

has been convicted for committing offences punishable under Sections 302/404 IPC. However, holding that there is no evidence to establish that he accused had trespassed into the property where the deceased was found dead, the learned Trial Court had acquitted the deceased of charges under Sections 380/452 IPC. Vide order dated 28.04.08, the accused has been sentenced to undergo imprisonment for life and pay a of fine of Rs.50,000/-, in default, to undergo RI for three years for offence punishable under Section 302 IPC; RI for three years and pay a fine of Rs.5,000/-, in default to undergo RI for four months for offence punishable under Section 404 IPC.

27. At the hearing of the appeal, learned senior counsel for the appellant assailed the impugned judgment on following 4 broad counts:-

A The evidence of the witnesses to the alleged recoveries effected at the instance of the accused is unconvincing.

B The evidence adduced by the prosecution relating to handset having IEMI No.35136304044030 does not connect the accused with the commission of the crime with which he is charged.

C The evidence adduced by the prosecution relating to the revolver allegedly recovered at the instance of the accused is seriously defective and therefore not sufficient either to conclude that the said revolver was the weapon of offence or that it was recovered at the instance of the accused.

D The prosecution has not been able to establish the motive of the accused for committing the murder of the deceased.

EVIDENCE OF WITNESSES TO THE RECOVERIES

28. Under this head, the gist of arguments advanced by the learned senior counsel was that there are serious contradictions in the evidence of the witnesses to the alleged recoveries effected at the instance of the accused. The contradictions pointed out by the counsel are being enumerated herein under:-

i. The first contradiction pointed out was regarding the number of cartridges present in the revolver which was allegedly recovered at the instance of the accused. Const. Devender PW-20, HC Rajan Singh PW-21, Inspector B.S.Dahiya PW-25, had deposed that two live and two spent cartridges were recovered from the chamber of the revolver recovered at the instance of the accused whereas Const. Sartaj Ahmad PW-17, had deposed that two live and one spent cartridges were recovered from the said revolver.

ii. The second contradiction pointed out was regarding the circumstances in which the police officers met the accused at his residence. Const. Sartaj Ahmad PW-17, HC Rajan Singh PW-21 and Inspector B.S.Dahiya PW-25, had deposed that the accused had opened the door of his house whereas Const. Devender PW-20, had deposed that the father of the accused had opened the door of the house.

iii. The third contradiction pointed out was regarding the presence of the family members of the accused in the house at the time of his arrest. Const. Sartaj Ahmad PW-17, had deposed that only the father and brother of the accused were present in the house whereas HC

Rajan Singh PW-21, had deposed that the father, brother, wife and two children of the deceased were present in the house.

iv. The fourth contradiction pointed out was regarding the place of recovery of the mobile phones. HC Rajan Singh PW-20, had deposed that nokia and samsung mobile phones were recovered from the pockets of the accused and panasonic mobile phone was recovered from underneath a mattress whereas seizure memo Ex.PW-12/B records that panasonic and samsung mobile phones were recovered from the pockets of the accused and nokia mobile phone was recovered from underneath a mattress.

v. The last contradiction pointed out was with reference to the place of the recovery of the revolver. Const Sartaj Ahmad PW-17 and Const. Devender PW-20, had deposed that the revolver was recovered from a box in the room on the first floor of the house; HC Rajan Singh PW-21, had deposed that the revolver was recovered from the double bed lying in a room on the first floor of the house; Inspector B.S.Dahiya PW-25, had deposed that the revolver was recovered from a box of the bed lying in a room on the first floor of the house.

29. In dealing with the said submission, it would be apposite to refer the undernoted observations of the Supreme Court in a recent decision in Criminal Appeal No.456/2002 Jayaseelan vs. State of Tamil Nadu decided on 11.02.2009:-

“.....As observed by this Court in State of Rajasthan v. Smt Kalki and Anr. (1981) 2 SCC 752, normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time,

due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted in Krishna Mochi and Ors. v. State of Bihar etc. AIR 2002 SC 1965 and in Sucha Singh v. State of Punjab AIR 2003 SC 3617. It was further illuminated in the Zahira H. Sheikh v. State of Gujarat AIR 2004 SC 346; Ram Udgar Singh v. State of Bihar (2004) 10 SCC 443 ; Gorle S. Naidu v. State of Andhra Pradesh (2003) 10 SCC 449; Gubbala Venugopalswamy v. State of Andhra Pradesh (2004) 10 SCC 120 and in Syed Ibrahim v. State of A.P. AIR 2006 SC 2908."

30. It is apparent that minor contradictions have to be ignored. The so-called contradictions are minor. How many persons were present in the house and who opened the door of the house are wholly irrelevant. Pertaining to the recovery of the mobile phone, we shall be dealing with the issue a little later.

31. The fifth contradiction pointed out by the learned senior counsel regarding the place of recovery of the revolver can be dealt with reference to the seizure memo Ex.PW-12/C which records that '*.....ek box ko khol kar ek adad revolver nikal kar pesh kiya....*', meaning thereby that the bed in question was a box-bed and the revolver was recovered from the box of the bed. It is clear that the witnesses to the said recovery had meant to depose that the revolver was recovered from the box of the bed and therefore, the afore-noted contradiction pointed out by the learned counsel is not a contradiction in a real sense but an ostensible one created on account of incorrect expressions used by the witnesses.

EVIDENCE RELATING TO MOBILE PHONE HAVING IEMI NO.
35136304044030

32. The most important piece of evidence brought on record by the prosecution to connect the accused with the commission of the crime was that the handset having IEMI No.35136304044030 was being used by the deceased just before his death as evidenced from the call record Ex.PW-22/A; that the said handset was in the possession of the accused soon after the death of the deceased, inasmuch as, call record Ex.PW-22/B evidences that the mobile number 9818480558, which number was registered in the name of the accused, was being used in the said handset with effect from 24.07.2005; the factum of the possession of the said handset by the accused is further reinforced by the fact that the said handset was recovered from his house at the instance of the accused. Thus, independent of the physical recovery of the handset at the instance of the accused, through the medium of the call details Ex.PW-22/A and Ex.PW-22/B, there is unimpeachable evidence that the mobile phone of the deceased came in possession of the appellant within 19 hours of the death of the deceased.

33. The learned senior counsel argued that the evidence pertaining to the call details is vitiated for the reasons (i) the call records Ex.PW-22/A and Ex.PW-22/B have not been proved in accordance with the law; (ii) the prosecution has not been able to establish that the mobile number 9871879824 was being used by the deceased soon before his death. On the contrary, there is evidence to show that the deceased had no connection with the said mobile number inasmuch as the said

number was registered in the name of one Shivani Aggarwal; (iii) the IEMI Nos. of the handset appearing in the call records Ex.PW-22/A and Ex.PW-22/B do not tally with the IEMI numbers recorded in the seizure memo Ex.PW-12/C, therefore, it cannot be said that the handsets allegedly recovered at the instance of the accused were the ones which were used by the deceased before his death.

34. While elaborating the submission that the call records Ex.PW-22/A and Ex.PW-22/B have not been proved in accordance with law, learned senior counsel argued that the contents of electronic record could be proved only in the manner prescribed by Sub-section (4) of Section 65B of the Evidence Act i.e. by issuance of a certificate signed by a person occupying a responsible position in relation to the operation of the computer or by a person responsible for the management of the calls recorded by the computer. Contention urged was that Ex.PW-22/A and Ex.PW-22/B, being the computer generated call details of two mobile phones, were not proved as required by law and hence could not be relied upon.

35. A similar contention was advanced before a Division Bench of this Court in the decision reported as State v Mohd. Afzal & Ors 2003 VII AD (Delhi) 1 and was repelled by the Court in the following terms:-

“276. The normal rule of leading documentary evidence is the production and proof of the original document itself. Secondary evidence of the contents of a document can also be led under Section 65 of the Evidence Act. Under Sub-clause "d" of Section 65, secondary evidence of the contents of a document can be led when the original is of such a nature as not to be easily movable. Computerised operating systems and support systems in industry cannot be moved to the court. The information is stored in these

computers on magnetic tapes (hard disc). Electronic record produced there from has to be taken in the form of a print out. Sub-section (1) of Section 65B makes admissible without further proof, in evidence, print out of a electronic record contained on a magnetic media subject to the satisfaction of the conditions mentioned in the section. The conditions are mentioned in Sub-section (2). Thus compliance with Sub-section (1) and (2) of Section 65B is enough to make admissible and prove electronic records. This conclusion flows out, even from the language of Sub-section (4). Sub-section (4) allows the proof of the conditions set out in Sub-section (2) by means of a certificate issued by the person described in Sub-section 4 and certifying contents in the manner set out in the sub-section. The sub-section makes admissible an electronic record when certified that the contents of a computer print out are generated by a computer satisfying the conditions of Sub-section 1, the certificate being signed by the person described therein. Thus, Sub-section (4) provides for an alternative method to prove electronic record and not the only method to prove electronic record." (Emphasis supplied)

36. In the decision reported as State v Navjot Sandhu @ Afsan Guru (2005) 11 SCC 600 the Supreme Court affirmed the afore-noted view of this Court in the following terms:-

".....It may be that the certificate containing the details in sub-section (4) of Section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 and 65."

37. In view of the afore-noted dictum of law, we find no merit in the submission of the learned senior counsel that the call records Ex.PW-22/A and Ex.PW-22/B have not been proved in accordance with law.

38. With reference to the submission that the prosecution has not been able to establish that the deceased was using mobile number

9871879824 in the handset having IEMI No.35136304044030 particularly when the said number was registered in the name of one Shivani Aggarwal, it would be relevant to note the testimony of Minakshi PW-23, the wife of the deceased, who was residing at Chandigarh on the day the deceased died. She categorically deposed that she had talked to the deceased two times over telephone in the afternoon on 23.07.05. The call record Ex.PW-22/A which evidences that two calls from Chandigarh were received on the mobile number 9871879824 in the afternoon of 23.07.2005 lends sufficient corroboration to the case of the prosecution that the deceased was using the said number in the handset having IEMI No.3513630404430 on the date of his death. It is not unusual in India to conduct one's affairs in a most un-officious manner. Friends using mobile phones of their friends, relatives of their relatives and inter se even acquaintances are not unknown in India.

39. With reference to the argument relating to IEMI numbers not tallying pertaining to the last digit of the numbers, it is relevant to note that the first fourteen digits of the IEMI Nos. written in the seizure memo tallies with the first fourteen digits of the IEMI Nos. recorded in the call records Ex.PW-22/A and Ex.PW-22/B. The controversy pertains to the last digit recorded in the seizure memo when the handset was recovered and the last digit recorded in the call details provided by the service provider.

40. The same question arose before the Supreme Court, in the decision reported as State (NCT of Delhi) v Navjot Sandhu 2005 Cri

L.J. 3950. At page 4026, the Supreme Court dealt with the said issue as under:-

“One more point has to be clarified. In the seizure memo (Ext. 61/4), the IMEI number of Nokia phone found in the truck was noted as ...52432. That means the last digit '2' varies from the call records wherein it was noted as ...52430. Thus, there is a seeming discrepancy as far as the last digit is concerned. This discrepancy stands explained by the evidence of PW 78 - a computer Engineer working as Manager, Siemens. He stated, while giving various details of the 15 digits, that the last one digit is a spare digit and the last digit, according to GSM specification should be transmitted by the mobile phone as '0'.....”

41. In view of the decision in Navjot Sandhu's case (supra), we hold that the factum of the fifteenth digit of the IEMI Nos. recorded in the seizure memo Ex.PW-12/C and the call records Ex.PW-22/A and Ex.PW-22/B not tallying is of no consequence.

EVIDENCE RELATING TO REVOLVER

42. Under this head, learned senior counsel argued that the evidence adduced by the prosecution relating to the revolver allegedly recovered at the instance of the accused is seriously defective for the reasons (i) prosecution has not been able to establish that the revolver allegedly recovered at the instance of the accused belonged to the deceased; (ii) Inspector B.S.Dahiya PW-25, had falsely deposed regarding the seizure of the license Ex.PW-25/E pertaining to the revolver in the name of the deceased; (iii) the prosecution has not led any evidence to establish that the room from which the revolver was recovered was in the exclusive possession of the accused; (iv) prosecution has not been able to conclusively establish that the revolver recovered at the instance of the accused

was the weapon of offence inasmuch as the second bullet recovered from the body of the deceased did not match with the said revolver; (v) the prosecution has not been able to establish that the said bullets were the ones which were recovered from the body of the deceased bullets which were examined by the FSL for the reason the bullets examined by the FSL were not shown to the doctor who had conducted the post-mortem.

43. Elaborating the argument that the evidence led by the prosecution does not establish that the revolver allegedly recovered at the instance of the accused belonged to the deceased. Learned counsel for the appellant drew the attention of the court to the arms and ammunition license Ex.PW-25/E possessed by the deceased which showed that the deceased was possessing two arms bearing Nos.35866 and A-7440. He argued that the fact that the seizure memo Ex.PW-12/C does not record the number of the revolver recovered at the instance of the accused coupled with the fact that Inspector B.S.Dahiya PW-25, had deposed that he can neither affirm nor deny that the license Ex.PW-25/E pertains to the said revolver seized vide memo Ex.PW-12/C establishes that the said revolver did not belong to the deceased.

44. We need not examine whether or not the prosecution has been able to establish that the revolver which was recovered at the instance of the accused belonged to the deceased, for the reason, the incriminating circumstance against the accused is not that the said revolver belonged to the deceased, but that the said revolver was the weapon with which the accused had caused the death of the

deceased. It was an additional circumstance that the revolver belong to the deceased and an inference of guilt against the accused would be reinforced if he could not explain as to how he came to possess the revolver. The FSL report dated 18.05.2006 has conclusively established that the said revolver was the weapon of the offence inasmuch as it has been opined in the report that one bullet recovered from the body of the deceased was fired through the said revolver. It is immaterial whether the said revolver belonged to the deceased or not.

45. Learned senior counsel further argued that the evidence on record establishes that Inspector B.S.Dahiya PW-25, had falsely deposed to the effect that he had seized the license Ex.PW-25/E of the deceased at the spot in view of the fact that no seizure memo was prepared in said respect and that none of the police officials who were present at the spot had deposed to the said effect.

46. Nothing much turns on the argument of the counsel that Inspector B.S.Dahiya PW-25, had falsely deposed that he had seized license Ex.PW-25/E at the spot. The said license was a piece of evidence which could establish that the revolver recovered at the instance of the accused belonged to the accused. However, the said evidence has become superfluous for the reason whether or not the revolver recovered at the instance of the accused belonged to the deceased has no bearing on the guilt or innocence of the accused in view of the fact that it has been established beyond doubt that the said revolver was the weapon of the offence.

47. Elaborating the argument pertaining to possession of the room in which the revolver was recovered, the counsel argued that the witnesses of the prosecution had deposed to the effect there is no evidence to show that the deceased was in exclusive possession of the room from where the revolver was allegedly recovered at the instance of the accused. Several persons were residing in the said house and therefore any of the person residing in the house can be deemed to have been in the constructive possession of the said room. In such circumstances, the accused could not be connected with the recovery of the said revolver.

48. With regard to the afore-noted argument, it would be most relevant to note the testimony of Veer Singh PW-13, the father of the deceased. PW-13 had deposed that he had told the police officials who had come to his house that the accused resides in a room on the first floor of the house and that the said officials had searched the room of the accused for a period of 15-20 minutes. The room wherefrom the revolver was recovered was situated on the first floor of the house. Therefore, the testimony of Veer Singh PW-13, establishes that the room from which the revolver was recovered was in the exclusive possession of the accused.

49. With regard to the argument that the second bullet recovered from the body of the deceased did not match with the revolver recovered at the instance of the accused, it be noted that the FSL report dated 18.05.2006 records that no definite opinion could be rendered with regard to the second bullet recovered from the body of the deceased as the same is in a deformed condition. The counsel is

not right in arguing that the said bullet did not match with the revolver recovered at the instance of the accused. There is a world of difference in saying that no opinion could be rendered that the bullet was discharged from a particular firearm or not and that the bullet was not discharged from a particular firearm.

50. Even otherwise, assuming that the second bullet recovered from the body of the deceased did not match with the revolver recovered at the instance of the accused the same would be of no consequence for the reason the fact that the other bullet recovered from the body of the deceased was fired from the said revolver is sufficient to conclude that the said revolver was the weapon of the offence. The reason why the second bullet could not be linked to the revolver in question is that it was found to be deformed. It is apparent that the bullet got deformed due to hitting a bone in the body of the deceased after it had entered the body. Thus, merely because on account of it getting deformed, the bullet could not be linked to the weapon of offence does not discredit the opinion of the forensic expert pertaining to the first bullet which is conclusively linked to the fire arm in question.

51. Pertaining to the argument that there is no evidence to show that the bullet examined by the FSL were the ones which was recovered from the body of the deceased, it would be relevant to note the evidence of HC Sushil PW-10 and Const. Illiyas PW-22.

52. PW-10 had deposed that he was posted as Malkhana Moharrar at the relevant time. That the pulanda containing amongst others the bullets recovered from the body of the deceased was handed over to

him by Inspector B.S.Dahiya PW-25. That he had handed over the said pulanda to Const PW-22, for depositing the same in the FSL. That there was no tampering with the said pulanda till the time the same remained in his possession. This witness was not subjected to any cross-examination by the defence.

53. PW-22 deposed that he had deposited the pulanda containing the bullets in question with the FSL and had not tampered with the same till it remained in his possession. No suggestion was given to the said witness that he had tampered with the pulanda containing the bullets in question.

54. No evidence otherwise was led by the defence to show that the pullanda containing the bullets in question was tampered with.

55. In such circumstances, it can safely be held that the prosecution has been able to establish that the bullets examined by the FSL were the ones which were recovered from the body of the deceased and therefore the non-examination of the doctor who had conducted the post-mortem by the prosecution regarding the recovery of the bullets from the body of the deceased is not fatal to the case of the prosecution.

MOTIVE OF THE ACCUSED

56. The last submission advanced was that the motive sought to be established by the prosecution was that the deceased was frustrated with his life as he was suffering from a life-threatening disease and that he had induced the accused to cause his death. Counsel argued that the prosecution has neither been able to

establish that the deceased was frustrated with his life nor that he was suffering from a life-threatening disease. The only evidence brought on record shows that the deceased was suffering from the tuberculosis of the hip joint which is a curable disease. Counsel argued that the case is based on circumstantial evidence and in such cases motive is an important link in the chain of circumstances to connect the accused with the commission of the crime. The counsel further argued that the absence of the motive becomes all the more damaging for the case of the prosecution as the evidence on record establishes that the deceased was having enmities with quite a few persons.

57. We need not labour on the last submission advanced by the learned counsel for the appellant save and except note the decision of the Supreme Court reported as Mulakh Raj v Satish Kumar & Ors 1992 CriLJ 1529 wherein it was observed as under:-

“....It is true as contended for the appellant that the evidence on record is not sufficient to arrive at an immediate motive to commit the crime and the case depends on circumstantial evidence. But in circumstantial evidence also when the facts are clear it is immaterial that no motive has been proved. Men do not act wholly without motive. Failure to discover the motive of the offence does not signify the non-existence of the crime. The failure to discover motive by appropriate clinching evidence may be a weakness in the proof of the prosecution case, but it is not necessarily fatal as a matter of law. Proof of motive is never an indispensable factor for conviction. In *Alley v. State of U.P.* [MANU/SC/0102/1955](#) this Court held that where there is clear evidence that the person has committed the offence, it is immaterial where no motive for commission of the crime has been shown. Therefore, even in the case of circumstantial evidence, absence of motive which may be one of the strongest links to connect the chain would not necessarily become fatal provided the other circumstances would complete the chain and connect the accused with the commission of the offence, leaving no room for reasonable doubt, even from the proved circumstances.....”

58. The appeal is sans any merit. However, on the question of sentence we feel that the order imposing sentence requires a little correction. As noted above in para 26, in default of payment of fine for the offence of murder, the appellant has been directed to undergo RI for three years which we feel is excessive. We modify the sentence maintaining the fine and directing that in default the appellant shall undergo RI for a period of six months for the offence punishable under Section 302 IPC.
59. The appeal is dismissed. However, the order of sentence is modified as per the proceeding para.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

March 18, 2009
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