

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 04th August, 2009*
Judgment Delivered on: 10th August, 2009

+ **CRL.A.662/2008**

MED SINGH @ MEDU PEHALWAN ...Appellant
Through: Mr. R.P. Kasana, Advocate.

Versus

STATE ...Respondent
Through: Mr.Pawan Sharma, APP.

WITH

+ **CRL.A.646/2008**

BRIJESH MAWI ...Appellant
Through: Mr. Chetan Sharma, Sr. Advocate
with Mr. Neeraj Walia, Advocate.

Versus

STATE ...Respondent
Through: Mr. Pawan Sharma, APP.

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

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

INDERMEET KAUR, J

1. Both these appeals have been preferred against the impugned judgment dated 08.7.2008 whereby the appellants Med Singh and Brijesh Mawi had been convicted under Section 302 read with Section 34 of the IPC as also for the offence under Crl. A. No.662/2008 and Crl. A.No. 646/2008

Section 460 read with Section 34 of the IPC. Appellant Brijesh Mawi had additionally been convicted for the offence under Section 25 of the Arms Act.

2. The case of the prosecution as unfolded is that on 06.6.2001 H.C. Brij Pal PW-11 who was posted in PCR received an information at 10.35 PM from the Control Room that firing is taking place at Savitri Nagar near a sweet shop. He i.e. PW-11 alongwith his staff reached the said place where a crowd had gathered inside the STD Booth, blood was lying and some articles were scattered in broken condition. The STD booth belonged to Omiyo Das of Malik Communications. The injured i.e. Omiyo Das had already been removed to the hospital.

3. This information was passed on to the local Police Station which was recorded in D.D.No.15A and marked to SI Sudhir Sharma PW-24 who alongwith Const. Bajrang Bahadur PW-10 reached J-10 Savitri Nagar. Injured had already been removed to the AIIMS Hospital. On reaching there it was learnt that victim Omiyo Dass had been brought dead to the hospital.

4. Vicky Malik PW-1 was the witness to the occurrence. His statement Ex.PW-1/A was recorded wherein it was stated that on 06.6.2001 at about 10.20 PM when he i.e. PW-1 was sitting on the road outside their STD Booth and Sweet Shop at J-196, Savitri Nagar he noticed a white maruti car stop on the other side of the road; two men had alighted and they came towards the STD Booth and forcibly entered the booth; they started firing bullets at his maternal uncle Omiyo Dass; he i.e. PW-1 tried to

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intervene and brought a palta from his nearby sweet shop but his mama told him to run away and save his own life; blood was oozing out from injuries of his maternal uncle; he i.e. PW-1 ran towards his house no. 86B shouting for help; assailants had fled away. He i.e. PW-1 alongwith his younger brother Raj Kumar Malik PW-3 and other maternal uncle Ravi Kumar Dass PW-4 removed the injured to the hospital; out of the two assailants one was Satish Kumar who lives in Chirag Delhi; about 2½ years ago Satish Kumar had murdered his father and he had been acquitted about one month ago in that case; the second assailant was about 25-26 years of age and was well built and they both had murdered his uncle Omiyo Dass.

5. Endorsement Ex.PW-24/A was made on Ex.PW-1/A and the rukka was handed over to Const. Rakesh PW-16 pursuant to which the FIR Ex.PW-6/A was registered in the handwriting of H.C. Rangrav PW-6. Site plan Ex.PW-24/B was prepared. From the spot three live cartridges of 0.38 bore, one empty cartridge of 0.38 bore and four lead pieces of fired bullet were seized and sealed in separate pullandas with the seal of SKS and were taken into possession vide memo Ex.PW-1/B. One iron palta was also seized and sealed vide memo Ex.PW-1/G. The blood stained baniyan of Raj Kumar Malik PW-3 was also seized and sealed vide memo Ex.PW-1/F, blood stained earth and earth control were lifted from the spot vide memo Ex.PW-1/C besides pieces of glass of the counter which were taken into possession vide memo

Ex.PW-1/D. The STD Code Directory was taken into possession vide memo Ex.PW-1/E.

6. Crime Team was summoned and Ram Pal Singh PW-2 prepared his report Ex.PW-2/A. Const. Bharat Lal PW-7 took photographs of the scene of occurrence from outside as well as inside of Malik Communications; the reel is Ex.PW-7/A. Copy of the FIR was taken by HC Jagbir PW-8 and handed over to Elaka Magistrate as also to the Joint Commissioner of Police.

7. Dr.T.Milo PW-9 had conducted the post-mortem on the body of the deceased on the following day i.e. 7.6.2001. Nine ante-mortem bullet injuries were noted; and four bullets had been extracted from the body which along with one cotton underwear, one cotton baniyan with tear, one long pant with tear along with the blood gauze of the deceased had been handed over to the Investigating Officer PW-24 SI Sudhir Sharma which had been taken into possession vide memo Ex.PW-10/A. The cause of death was opined as coma due to head injuries caused by fire. The dead body was thereafter handed over to the relatives of the deceased.

8. On 16.11.2001, SI Sudhir Sharma PW-24, formally arrested accused Satish in this case who had already been arrested by the Faridabad Police in FIR No.339/2004 Police Station G.R.P., Faridabad under Section 25 of the Arms Act. ASI Pyare Lal PW-14 posted in Police Station G.R.P., Faridabad, Haryana had joined investigation with SI Randhir Singh in that case. Accused Satish made his disclosure statement Ex.PW-24/D
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in the instant case and disclosed about the involvement of his other accomplices i.e. co-appellant Med Singh and co-appellant Brijesh.

9. On 3.12.2001, three sealed parcels had been received by Shri K.C.Varshney PW-21, Sr. Scientific Officer, FSL, Rohini, Delhi and vide his report Ex.PW-21/A, after examining the 8 bullets marked EB-1 to EB-8, which had been sent to him, he had opined that striation of riffling marks were present on exhibits EB-1, EB-3 to EB-8 and had been discharged through a standard .380" calibre firearm.

10. On 9.1.2002, SI Sanjeev Sharma PW-25, formally arrested appellant Med Singh in this case vide memo Ex.PW-25/B. He had already been arrested on 5.1.2002 by Police Station Ashok Vihar in a case under the Arms Act by SI Subhash and Const. Ramesh Chander PW-15; Med Singh was found in possession of a buttondar knife, investigation of that case had been handed over to ASI Desh Raj PW-5. Med Singh made a disclosure statement disclosing his involvement in the present case. He was put up for TIP before the court of Smt.Bimla Kumari PW-18 by SI Sudhir Sharma PW-24 but Med Singh refused to participate in the proceedings; said proceedings are Ex.PW-18/B and Ex.PW-18/C. The certificate of the concerned court is Ex.PW-18/E. No recovery was effected from appellant Med Singh.

11. On 24.1.2002, Sh.A.K. Srivastava, PW-23 had examined 6 parcels which had been sent to him sealed with the seal of MSL, Department of Forensic Medicine, AIIMS, New
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Delhi. His detailed biological and serological reports are Ex.PW-23/A and 23/B, respectively. As per Ex.PW-23/A human blood of 'A' group had been detected on the torn baniyan, underwear and pant and blood which was also the blood group of the deceased. On 28.1.2002, PW-21 had also examined this torn underwear and pant which had been sent to him by the Serology department, detailed report of which is Ex.PW-21/B.

12. On 12.8.2003, appellant Brijesh Mawi had been arrested by HC Rajiv Mohan PW-19 an officer of the Crime Branch in FIR No.575/2003, Police Station Malviya Nagar, under Section 307/183/353 IPC. On his interrogation he had disclosed his involvement in the present case and stated that he could get recovered the .38 revolver used by him in this case.

13. On the same day i.e. 12.8.2003 appellant led the police party comprising of SI Satish Kumar, ASI Ravinder and HC Rajiv Mohan, all officers of the Anti-Robbery Cell, Crime Branch to the second floor, F-4/64, Sector 16, Rohini and from the roshandan of the bathroom he took out a key and after opening the lock of the room he got recovered a .380 bore revolver from underneath a mattress lying on the floor which was containing four live cartridges. This revolver was taken into possession vide memo Ex.PW-1/C and sketch of the same was prepared vide memo Ex.PW-1/B.

14. FIR No. 456/2003 under Section 25 of the Arms Act, Police Station Prahsant Vihar was accordingly registered against Brijesh Mawi. SI Satish Kumar has been examined as PW-1, ASI Crl. A. No.662/2008 and Crl. A.No. 646/2008

Ravinder Kumar has been examined as PW-2 and H.C.Rajiv Mohan has been examined as PW-3 in the said proceedings. Thereafter both the cases i.e. FIR No.438/2001, under Section 302/34 IPC, Police Station Malviya Nagar i.e. the present case and FIR No.456/03 under Section 25 of the Arms Act, Police Station Prashant Vihar were clubbed together by orders dated 01.4.2005 of the Additional Sessions Judge and proceedings were thereafter recorded in the main case i.e. in FIR No.438/2001. H.C. Rajiv Mohan was again examined in the said proceedings as PW-19.

15. SI Sanjeev Sharma PW-25 sought production warrant of Brijesh Mawi from the concerned court and formally arrested him on 19.8.2003 in this case vide memo Ex.PW-25/C; his disclosure statement Ex.PW-25/D was recorded and he pointed out the place of incident vide memo Ex.PW-25/E. On 28.3.2003 he had refused to join TIP.

16. On 28.8.2003 and again on 29.9.2003, Dr.P.Siddamabary PW-20 Junior Scientific Officer (Ballistic) CFSL, Chandigarh, received one sealed parcel and four sealed parcels respectively in the laboratory. Vide his report Ex.PW-20/B he had opined that the fired bullets mark B-1, B-3 and B-4 had been fired through a .38" revolver bearing no.25502 and they could not have been fired through any other firearm because every fire arm has its own individual characteristic marks. No opinion on the bullet mark B-2 was possible.

17. On 12.11.2003, Sh. Dipender Pathak PW-26 posted as Deputy Commissioner of Police, had accorded sanction for prosecution of appellant Brijesh Mawi @ Shekhar under section 39 of Arms Act for having been found to be in conscious possession of Webley .38 revolver with the four live cartridges; the said sanction is Ex.PW-26/A.

18. Accused Satish had died during pendency of trial and proceedings against him stood abated.

19. Both the co-appellants Med Singh and Brijesh Mawi pleaded innocence in their statements under Section 313 Cr.P.C. and stated that they have been falsely implicated in the present case; appellant Med Singh stated that he had refused TIP for the reason that his photographs had been taken in the Police Station and shown to the persons in the Police Station. Appellant Brijesh Mawi had stated that the revolver was falsely planted upon him.

20. Brijesh Mawi had produced two witnesses in defence. Vijay Gupta, DW-1 being a resident of ground floor of F-4/64, Sector-16, Rohini had deposed that on 11.8.2003 he alongwith Brijesh Mawi had been picked upon by the Crime Branch officer of R.K.Puram where they had been beaten; the second floor was under the occupation of his tenant Rajeev Chauhan who had been examined as DW-2; he has corroborated this version and has stated that the police had not come to their house at 2nd floor of F-4/64, Sector-16, Rohini either on 11.8.2003 or on 12.8.2003.

21. The Trial Judge had convicted both the aforestated appellants.

22. Qua Med Singh, eye witness Vicky PW-1 had deposed that he was the person who was sitting on the driver seat of the car from which two persons had alighted and fired on his maternal uncle Omiyo Das who had subsequently died. Testimony of PW-1 had been fully relied upon by the Trial Judge to hold that there was no reason as to why he would falsely implicate Med Singh and the description of Med Singh having been mentioned by PW-1 under section 161 Cr.P.C. and thereafter PW-1 correctly identifying Med Singh in the Court coupled with the fact that Med Singh had refused TIP for which an adverse inference has to be drawn against him, this evidence was held sufficient to nail appellant Med Singh.

23. Qua Brijesh Mawi, although PW-1 the eye witness had not identified Brijesh Mawi in the court, yet it had been held that recovery of the .38 revolver by the appellant which had been sent to the CFSL for examination alongwith fired bullets B-1 to B-4 and the report of CFSL having opined that bullets B-1, B-3, and B-4 had been fired from the said .38 revolver, it had been fully established by the prosecution that this was the same revolver which had been used to murder Omiyo Dass; thus the onus of the prosecution to connect Brijesh Mawi with the crime had been discharged.

24. On behalf of the appellant Med Singh, it has been argued that admittedly there is no recovery effected from him, he has not been named in Ex.PW-1/A which was the first statement of the eye witness pursuant to which the FIR had been registered; Crl. A. No.662/2008 and Crl. A.No. 646/2008

it was only in the supplementary statement of Vickey that it had figured that one other person was sitting in the driver seat of the maruti car from where two persons had got down and fired at the deceased; it is argued that no description of Med Singh had been given in this version of the witness; the witness PW-1 had come into witness box after a gap of more than two years and has identified Med Singh for the first in the court which is a useless identification as admittedly PW-1 the eye witness was not known to appellant Med Singh. It is argued that the refusal of TIP by Med Singh was for a valid reason as he had categorically stated that he had refused TIP for the reason that his photographs were taken in the Police Station Ashok Vihar and had been shown to the persons. Attention has been drawn to the cross-examination of ASI Desh Raj PW-5 wherein he has stated that photographs of Med Singh had been taken in Police Station Ashok Vihar. It is stated that in this circumstance there being a valid ground for appellant Med Singh to have refused TIP and the eye witness having identified Med Singh in Court after a lapse of more than two years and no description having been given by the eye witness Vickey in his statement under Section 161 Cr. P.C.; and eye witness admittedly not knowing Med Singh from before, such identification is a useless identification having no sanctity of law and appellant Med Singh could not have been convicted on this ground alone; he is entitled to benefit of doubt.

25. On behalf of the appellant Brijesh Mawi, it has been argued that Vickey PW-1 had not identified appellant Brijesh

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Mawi in the court; he is otherwise not a hostile witness and has attributed a specific role to appellant Med Singh but had omitted any role to co-appellant Brijesh; it is argued that testimony of PW-1 is otherwise reliable and reliance must also be placed on that part of his version wherein he had refused to identify Brijesh Mawi. It is stated that the solitary circumstance against appellant Brijesh Mawi i.e. the recovery of the .38 revolver is shattered in view of the defence adduced by him; attention has been drawn to the version of DW-1 and DW-2; it is argued that both these witnesses have categorically stated that the police had not come to the second floor of F-4/64, Sector-16, Rohini on either 11.8.2003 or on 12.8.2003; defence witnesses have to be given the same weightage as the witnesses of the prosecution and their testimony cannot be brushed aside lightly; Ex.PW-1/B the alleged recovery memo bears the signatures of the attesting witness Pradeep Rawat who has not been brought into the witness box which again makes this document a suspect. It is argued that the prosecution has failed to connect all the links in the chain of evidence to exclude the possibility of non-tampering of the exhibits i.e. the bullets which had been sent to CFSL for expert examination. Admittedly in this case there were eight bullets which had been sent to the CFSL in the first instance and this is clear in terms of the first report of the ballistic expert Ex.PW-21/A; thereafter after the arrest of appellant Brijesh Mawi and the alleged recovery of the .38 revolver at his instance, the .38 revolver with the four bullets had again been sent to CFSL for

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examination and this is evident from the subsequent reports of the FSL Ex.PW-20/A and Ex.PW-20/B which show that only four bullets had been sent for the second examination i.e. the bullets mark B-1 to B-4 and there is no explanation with the prosecution as to why the other four bullets had not been sent, the Malkhana Mohorar with whom these exhibits had been deposited in this intervening period had not been examined; Register No. 19 containing entries of the deposit and withdrawal of the said exhibits from the Malkhana and the road certificate vide which the said exhibits had been sent to CFSL has not been proved; these links in the chain of evidence having remained incomplete, there is every possibility that these exhibits had been tampered with and in the absence of positive evidence to the contrary, no reliance can be placed upon this circumstance.

26. Learned defence counsel had placed reliance upon judgment reported as Des Raj Alias Dass Vs. State 2000 I AD (Delhi) 945 and also another judgment of the Apex Court Palia Vs. State of Punjab 1997 SCC(Cri) 383 to substantiate his submission that in the absence of this link evidence the possibility of the sample being tampered cannot be ruled out, appellant is entitled to benefit of doubt and a consequential acquittal.

27. The star witness of this case is PW-1 Vicky who was the eye witness to the incident. He had on oath reiterated the version as set up by him in his statement Ex.PW-1/A which had formed the basis of the rukka. He has deposed that on 06.6.2001 at about 10.20 PM when he was sitting outside the STD booth and

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restaurant at J-196, Savitri Nagar, he saw a maruti car stop on the other side of the road; two men alighted from the car and came towards the STD booth; one of them was accused Satish and other was a man 5 feet 8 inches tall, well built and about 25 years in age. Both the said persons were armed with pistols; his maternal uncle Omiyo Dass who was running the STD booth was fired at by both the said persons. His uncle bent down to protect himself; the two men fired again; PW-1 i.e. Vicky rushed to bring an iron palta from his adjoining sweet shop to save his uncle who shouted at him "Bhag Ja"; his uncle had already been hit by bullets and he was bleeding; the appellant fled away from the scene; at that time PW-1 i.e. Vicky saw Med Singh (present in the court) sitting in the driver seat.

28. This is the role which has been attributed by the eye witness to appellant Med Singh. PW-1 had also identified the four bullets sealed with the seal of KCV/FSL contained in a glass bottle with a seal of AIIMS on the cap as also another set of four fired bullets produced from an envelope sealed with the seal of KCV/FSL.

29. In his cross-examination, he has admitted that he did not know Med Singh before the incident; he has stated that in his statement Ex.PW-1/A he had not mentioned that Med Singh or any person was sitting on the driver seat of the maruti car. It has also come in his cross-examination that even in his second statement recorded under Section 161 Cr. P.C. Ex.PW-1/H there is no mention of PW-1 having seen any person in the driver seat of

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any maruti car. It was only in the third statement which was confronted to the witness Ex.PW-1/DA that there is a mention by the witness that while he was running he saw a man sitting in the driver seat of the maruti car.

30. SI Sudhir Sharma PW-24 has admitted that he had recorded three statements of Vicky. It has come in the categorical version of Vicky PW-1 that it was only in his third statement Ex.PW-1/DA before the Investigating Officer that he had mentioned that while he was running he saw a man sitting on the driver seat of a white maruti car; no detailed description or features of the said person had also been given; from this version what can be made out is that Vicky only had a fleeting glance of the person sitting in the driver seat of the said maruti car who was allegedly Med Singh. Incident had admittedly taken place at 10.00 to 10.20 PM when the sun had set and it had become dark. The vehicle i.e. maruti car was parked on the other side of the road. This is the categorical version of PW-1; as per the site plan the width of the road is 13 paces i.e. about 10 feet approximately. Vehicular traffic was moving; visibility was poor for the reason that it being night time coupled with the fact that the vehicle in which Med Singh was allegedly sitting was at a distance of more than 10 feet away from him; Vicky could thus have seen the said person only for a fleeting moment; at that time he was running from the scene of occurrence and obviously in a perplexed and confused state of mind.

31. It is in this background that we shall now consider the circumstance of the refusal of TIP by the appellant and identification of Med Singh by Vicky in the Court after a lapse of more than two years.

32. Smt. Bimla Kumari, M.M., PW-18 had deposed that on 10.1.2002 an application had been filed before her for holding TIP of appellant Med Singh vide Ex.PW-18/A but on that day and also on the subsequent days i.e. 14.1.2002 and 18.1.2002 TIP could not be held. On 19.1.2002 appellant Med Singh had been produced before PW-18 but the appellant had refused to participate in the TIP proceedings stating that he had been shown to the witness by the police who had taken his photographs when he was in Police Station Ashok Vihar. The report of refusal in the handwriting of Med Singh is Ex.PW-18/C; a perusal of which endorses this deposition of PW-18.

33. In this context statement of ASI Des Raj PW-5 is relevant. He had arrested Med Singh on 5.1.2002 at Police Station Ashok Vihar in a case under Arms Act. In his cross-examination this witness had admitted that he had taken photographs of Med Singh for preparing his dossier. It has thus been established that appellant Med Singh had been photographed in Police Station Ashok Vihar on 5.1.2002 i.e. prior in time to his arrest in the present case.

34. The refusal of Med Singh to participate in TIP was thus for a valid reason; this explanation also finds mention in the statement of Med Singh under Section 313 Cr. P.C. Formal arrest
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of Med Singh in the instant case was made on 9.1.2002. TIP proceedings had been held before the court of PW-18 on 19.1.2002. TIP had been refused on the ground that his photographs had been taken in police station Ashok Vihar on 5.1.2002 and shown to the witnesses; this explanation of the appellant is adequately substantiated by the testimony of PW-5; refusal to participate in the TIP was thus for a plausible and cogent reason. In these circumstances no adverse inference can be drawn against appellant Med Singh for not having participated in the judicial TIP.

35. Test identification parade is held by the police for the purpose of enabling the witnesses to identify the persons who are concerned in the offence; it is well settled that when the appellant person is not previously known to the witness concerned then identification of the appellant by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on the right lines; it not only ensures that the memory of the eye witness regarding identity of the appellant is tested but also ensures that the person arrested is the real culprit.

36. PW-1 Vicky had come into the witness box on 01.8.2003. Offence is of 06.6.2001; PW-1 had seen Med Singh in the Court for the first time after a lapse of more than two years; he has stated that Med Singh was not known to him earlier; even as per his own version on oath in Court he had allegedly seen Med Singh on 6.6.2001 i.e. more than two years ago in the driver
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seat while he was running; these admissions coupled with the version that in the first two statements of Vicky recorded before Investigating Officer there is no mention of any person sitting in the front driver seat of the maruti car as also the refusal of TIP by Med Singh having being adequately explained and PW-1 then seeing Med Singh for the first time in court after a gap of more than two years when Med Singh was not known to him earlier, it cannot be said with certainty that Med Singh was the same person who had been seen by PW-1 on the day of the incident; it is thus not safe to place reliance upon his testimony which is accordingly discarded.

37. Admittedly there is no other role attributed to appellant Med Singh. In these circumstances, we think it is a fit case where appellant Med Singh is entitled to a benefit of doubt and a consequential acquittal. He is accordingly acquitted of the charge leveled against him.

38. Qua the role of appellant Brijesh Mawi, the star witness PW-1 had refused to identify appellant Brijesh Mawi in the court. PW-1 on oath deposed that appellant Brijesh Mawi was not amongst the two persons who had come to attack his maternal uncle Omiyo Dass and he was not present there at the time of incident.

39. Incident is dated 6.6.2001, appellant Brijesh Mawi was arrested on 12.8.2003 by the Crime Branch of R.K.Puram in a connected case i.e. in FIR No. 575/03 for offences punishable under Sections 306/183/353 IPC and under Section 25 of Arms Crl. A. No.662/2008 and Crl. A.No. 646/2008

Act. On the same day in the presence of SI Satish Kumar, ASI Ravinder and HC Rajeev Mohan, Brijesh Mawi had got a .38 bore revolver having four live cartridges recovered from the second floor of F-4/64, Sector-16, Rohini, Delhi from underneath a mattress. These witnesses have been examined as PW-1, PW-2, PW-4 in FIR no.456/2003, Police Station Prashant Vihar in the proceedings conducted before the Magistrate i.e. before that case had been ordered to be clubbed with the present case.

40. SI Satish Kumar PW-1 had deposed that Brijesh Mawi after disclosing his involvement in the present case had led the police party to first floor of F-4/64, Sector-16, Rohini, Delhi the residence of his associate Vijay Gupta. They were taken to the second floor and after taking out the key from the ventilator of the bath room Brijesh Mawi opened the door of the adjoining room and from underneath a gadda he took out one revolver which was lying in a polythene. The revolver was loaded with four live cartridges and it was the make of R.Webbly & Sons with figures 25502 inscribed upon it. In his cross-examination, this witness has reiterated the version as set up in his examination in chief; he had admitted that public persons had not been joined at the time of recording the disclosure statement of the appellant; owner of the kothi, Vijay, was standing at the gate of the kothi at that time. He denied the suggestion that the revolver had been planted upon the appellant.

41. ASI Ravinder was examined as PW-2. He has corroborated the version as set up by SI Satish Kumar. In his
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cross-examination, he had stated that the statement of Vijay Lal was not recorded in his presence; he reiterated that the revolver had been taken out from underneath the gadda.

42. To the same effect is the version of HC Rajiv who has been examined as PW-3. He has reiterated that Brijesh Mawi after taking out the key from the ventilator of the bath room had with the same key opened the adjoining room from where underneath the gadda, a revolver containing four live cartridges was recovered in a polythene. This witness was again re-examined by Sessions Judge as PW-19. This version on oath has also been perused which was fully corroborative of his earlier version; learned defence counsel has also not been able to point out any discrepancy.

43. Ex.PW-1/C is the recovery memo of the said revolver which is attested by SI Satish as also by ASI Ravinder at points A and B and reiterates the ocular version as given by the said witnesses. Ex.PW-1/B is the sketch of the said revolver. Unfortunately, learned defence counsel had not gone through the file as the recovery memo pointed by him Ex.PW-1/B was related to FIR no.438/01 which is a recovery dated 7.6.2001 and totally unconnected with this recovery; it is not the case of the prosecution that any Pradeep Rawat had attested this document; as such his non-examination is of no relevance; this argument of learned defence counsel is a misreading of the facts.

44. Version of DW-1 is suspect; as he was admittedly a college friend of Brijesh Mawi; on 12.8.2003, he had been
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interrogated and beaten by the police; he was admittedly in a separate room. What was Brijesh Mawi doing on the said day i.e. 12.8.2003 was not known and neither deposed to by this witness. DW-2 alleged to be a tenant of DW-1 had admitted that he does not have rent receipt for the month of June, 2003 to substantiate his submission that he was a tenant of DW-1 and a resident of F-6/64, Sector-16, Rohini i.e. the place of recovery. To a specific question put to Brijesh Mawi under Section 313 Cr.P.C. that he had got the aforestated recovery effected from the second floor of F-4/64, Sector 16, Rohini, Delhi, the ground floor of which was in occupation of Vijay Gupta, the landlord, there is no denial by the appellant that he was not a tenant of Vijay Gupta on the second floor. This defence of the appellant at this stage is clearly sham.

45. In our view, the recovery of the .38 revolver at the instance of Brijesh Mawi stands proved by the prosecution.

46. Sh.K.C.Varshney, PW-21 Sr.Scientific Officer, FSL, Rohini had deposed that on 3.12.2001, three sealed parcels were received at his office at Malviya Nagar; parcels no.1 and 2 were sealed with the seal of SKS and parcel no.3 was sealed with the seal of Department of Forensic AIIMS New Delhi. Parcel no.2 contained three .380 inch cartridges, .380 cartridges case, two bullets and two deformed bullets and the said bullets were marked EB1 to EB4. Parcel no.3 contained four bullets marked as EB5 to EB8. Parcel no.2 was the parcel containing the four bullets which had been retrieved by SI Sudhir Kumar Sharma from the spot and that is how they bore his seal of SKS. Parcel
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no.3 contained the remaining four bullets i.e. the bullets which had been handed over by Dr.T.Milo PW-9 to the Investigating Officer PW-24 i.e. which had been retrieved from the body of the deceased; that is how this parcel bore the seal of Department of Forensic AIIMS New Delhi.

47. PW-21 in his report Ex.PW-21/A had opined that the aforestated bullets marked EB1 to EB8 corresponds to .380 inches cartridges and striation of rifling marks were present on Ex.EB1, EB3 to EB8 and had been discharged through a standard .380 calibre fire arm. Ex.PW-21/A duly recites that all the three parcels were sealed as per the specimen seal. This witness had been cross-examined on the manner of firing from the aforestated weapon but no cross-examination had been effected as to whether the parcels which had been received by him in FSL were duly sealed or not or whether there was any scope of the tampering of the said exhibits.

48. Dr.P.Siddambary, PW-20 Junior Scientific Officer, CFSL, Chandigarh had deposed that on 28.8.2003 while posted at CFSL Chandigarh a sealed parcel having seal of SK was received in the laboratory containing one .38 revolver bearing no.25502 and four cartridges related to case FIR No.456/2003, Police Station Prashant Vihar under Section 25/54/59 of the Arms Act. His report Ex.PW-20/A shows that the exhibits had been received with the seal intact and tallying with the specimen seal and had opined that the .38 revolver bearing no.25502 was in a working condition. This version of PW-20 is corroborated by the version of Crl. A. No.662/2008 and Crl. A.No. 646/2008

the Investigating Officer SI Sajjan Singh of FIR No.456/2003, Police Station Prashant Vihar who had been examined in the court as PW-7. SI Sajjan Singh deposed that he had sent the exhibits to the laboratory through Const.Mukesh Kumar who has corroborated this testimony when he had come into the witness box as PW-4. Ex.PW-21/A also recites that the mode of receipt of the said exhibits is through Const. Mukesh Kumar.

49. PW-20 has further deposed that on 29.9.2003 one sealed parcel having seal of CFSL Delhi as also seal of Additional Sessions Judge was received in the CFSL through Const. Sudhir Kumar which contained four separate parcels; the first envelope contained four fired bullets marked B-1 to B-4. He had examined the parcels of both the cases i.e. FIR No.456/2003, P.S. Prashant Vihar as also of the present case on 06.11.2003 and 28.11.2003. As per the report Ex.PW-20/B, it had been opined that the crime filed bullets marked B1, B-3 and B-4 had been fired through the .38 revolver bearing no.25502 mark A and could not have been fired through any other firearm as every firearm had its own individual characteristic mark. The seal of the Additional Sessions Judge on the parcel is answered in the version of PW-1 who had identified these exhibits in Court on oath on 01.8.2003 when they were again re-sealed with the court seal i.e. of the Additional Sessions Judge.

50. This witness was also subjected to cross-examination but no cross-examination had been effected on the point as to whether the parcels/exhibits when received in the CFSL were

duly sealed or not or whether the seal could have been tampered with. Ex.PW-20/B further recites that the date of the receipt of the parcel was 29.9.2003 which is corroborated by the version of SI Sanjeev Sharma PW-25 who has on oath deposed that on 26.9.2001 exhibits of this case had been sent to Chandigarh for matching with the exhibits recovered in FIR No.456/2003, Police Station Prashant Vihar.

51. It is relevant to point out that a report of a government expert is admissible under Section 293 of the Cr. P.C.; in this case both the experts from the CFSL i.e. PW-21 K.C. Varshney and PW-20 Dr. P. Siddambhari had come into the witness box and there was ample opportunity with the defence counsel to have tested the credibility of these witnesses qua the tampering/non-tampering of the sealed parcels which had been received by them in their laboratory, no such cross-examination had been effected. Even in his version under section 313 Cr. P.C. when this report i.e. Ex.PW-20/B had been put to the appellant there was no such submission; the submission now made before this court that there was a possibility of the tampering of the exhibits and non-production of the road certificates creates a doubt is a weak strategy adopted by the defence counsel and has no basis or foundation. Investigating Officers SI Sudhir Kumar PW-24 and SI Sanjeev Sharma PW-25 had also not been cross-examined on this score.

52. The judgments relied upon by the learned defence counsel are both distinguishable on their own facts; in the first CrI. A. No.662/2008 and CrI. A.No. 646/2008

case the failure of the prosecution to testify on the safe custody of the exhibits was the ground for giving benefit of doubt to the appellant which is clearly not so in the instant case; the second was a case where no opinion of the expert had been obtained and thus the ratio of that judgment would not apply to these facts.

53. Prosecution, in our view, has been able to establish that the .38 revolver which had been recovered at the instance of appellant Brijesh Mawi was in a working condition; it had been duly sealed and sent to the CFSL for its expert opinion who after examination of the said firearm together with the four bullets B-1 to B-4 (which had been retrieved from the spot) had opined that bullets B-1, B-3 and B-4 were fired from the said firearm and could not have been fired from any other firearm because every firearm has its own individual characteristic mark. The earlier report Ex.PW-21/A has also examined these four bullets i.e. B-1 to B-4 and had opined that the striation of rifling marks were present on Ex.B-1, B-3 to B-8 and had been fired through a .380 calibre firearm; at that stage the CFSL did not have this .38 revolver 25502 but the striation of rifling marks had been noted on these bullets B-1, B-3 and B-4. This first opinion dated 28.2.2002 had subsequently been corroborated in the second report Ex.PW-20/B dated 28.11.2003.

54. These circumstances as elicited above qua Brijesh Mawi form a complete chain and all the links are closely interwoven with one another to nail him; it has been established by the prosecution that the .38 revolver which had been got
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recovered by Brijesh Mawi was the weapon of offence in this case and had been the cause of death of the deceased Omiyo Dass; thus, conclusively establishing that Brijesh Mawi had used this weapon to kill Omiyo Dass.

55. The evidence gathered has also established that Brijesh Mawi had an accomplice; Satish had been identified by the eye witness but the proceedings against him had stood abated on his death. The offence under Section 406 of the IPC i.e. of lurking house trespass is however not made out. Appellant Brijesh Mawi is held guilty for the offence under section 302/34 IPC as also for the offence under Section 25 of the Arms Act.

56. In view of the aforesaid discussion, the appeal of the appellant Med Singh is allowed. His bail bond and surety bond are discharged. Appeal of appellant Brijesh Mawi is dismissed. His bail bond and surety bond are cancelled. He shall surrender forthwith to serve the remaining sentence.

(INDERMEET KAUR)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

August 10, 2009
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