

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

Judgment reserved on: April 20, 2010
Judgment delivered on: July 02, 2010

+ **CRIMINAL APPEAL NO. 605/2009**
ARVIND KUMAR

....APPELLANT

Through: Mr. K.K. Manan, Sr. Advocate with
Mr. Sangram S. Saron, Advocate

Versus

THE STATE (N.C.T. OF DELHI)

.....RESPONDENT

Through: Mr. Lovkesh Sawhney, APP

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. Appellant Arvind Kumar has preferred this appeal against the impugned judgment dated 08.07.2009 of the learned Additional Sessions Judge in Sessions Case No.119/2005, FIR No.476/94 under Section 302 IPC, Police Station I.P. Estate holding him guilty and convicting him for the offence of murder punishable under Section 302 IPC as also the order on sentence dated 10.07.2009 in terms of which the appellant has been awarded sentence of rigorous

imprisonment for life and to pay a fine of Rs.25,000/-, in default whereof he shall undergo SI for further period of six months.

2. Briefly stated, the case of the prosecution is that on 28.12.1994 SI Shashi Bala was posted as Duty Officer in the Police Station I.P. Estate. Constable Mohd. Rashid (hereinafter referred to as the “deceased”) was on duty as Munshi Roznamacha. On the said day at about 5:45 pm, the deceased came to the reporting room and started talking on the telephone with someone. After 5-7 minutes, SI Shashi Bala (PW12) advised him not to keep the official telephone engaged as some urgent phone call may come. The deceased did not pay heed to the advice and continued to talk on telephone. At about 5:55 pm, SI Shashi Bala requested the appellant, who was posted as a Guard at the Police Station to ask the deceased to desist from continuing with his phone call. The appellant, on the request of SI Shashi Bala, came to the duty room and put his hand on the shoulder of the deceased and advised him to put an end to his call. The deceased, however, playfully pushed him while holding the muzzle of SAF Carbine of the appellant. The appellant tried to extricate his carbine and in the process, the chain with which the SAF was tied with the belt of the appellant got entangled with the trigger, which led to firing of five rounds that hit the deceased. ASI Ram Singh, who was present at the spot,

immediately rushed the deceased to LNJP Hospital where he was declared brought dead.

3. PW19 Inspector Inder Singh, Additional SHO, Police Station I.P. Estate, who was on arrangement duty at Vikas Bhawan, was summoned through wireless. On reaching the Police Station, he noticed blood lying in the reporting room. Five empty cartridges were found there, three were lying inside the reporting room and two empty cartridges were lying near the door of the reporting room. One empty automatic semi carbine and 15 live cartridges were lying on the table of the Duty Officer, four fire bullets were also lying in the interrogation room adjacent to the reporting room. He recorded the statement of SI Shashi Bala Ex.PW12/A, on basis of which formal FIR was registered at the Police Station under Section 304A IPC. Inspector Inder Singh got the spot of occurrence photographed. He also prepared the rough site plan Ex.PW19/B, on the basis of information supplied by SI Shashi Bala. He took into possession the above referred incriminating articles found in the duty room.

4. After recording the statement of SI Shashi Bala, Inspector Inder Singh went to the LNJP Hospital and collected the MLC of the deceased. At the Hospital, Duty Constable Balbir Singh handed over the personal belongings of the deceased to him, which were taken

into possession vide memo Ex.PW19/C. Inspector Inder Singh also recorded the statements of the witnesses, arrested the appellant and deposited the case property in the Malkhana.

5. On 29.12.1994, Inspector Inder Singh conducted inquest proceedings at the mortuary of LNJP Hospital and prepared the inquest form Ex.PW19/E. He also sent the dead body for post mortem and after the post mortem, dead body was handed over to Shaukat Ali, father of the deceased.

6. In the meanwhile, Shaukat Ali, father of the deceased, filed a complaint dated 29.12.94 to DCP, Central followed by a complaint dated 01.12.95 to the Commissioner of Police wherein he expressed the suspicion that his son Mohd. Rashid had been murdered in furtherance of a well-planned conspiracy. In view of the said complaint, investigation of this case was transferred to SIT Section of Crime Branch and the investigation was taken over by PW27 Inspector Ved Prakash, who recorded statements of witnesses during further investigation and got the scene of crime reconstructed and again photographed by the experts of CFSL, Chandigarh. Opinion of experts of CFSL, Chandigarh was obtained which ruled out the possibility of accidental fire from the SAF carbine.

7. We may note, at this stage, that in his complaint dated 29.12.94, Shaukat Ali, father of the deceased alleged that his son had been murdered, but he did not express his suspicion against the appellant. However, in his subsequent complaint dated 01.12.95 Shaukat Ali, father of the deceased disclosed that prior to the incident, he was told by the deceased that he happened to see the appellant and SI Shashi Bala in a compromising position due to which they were annoyed with him and they had threatened to kill him. He also alleged that the deceased told him that Shashi Bala, SI had also made objectionable advances to seduce him, which he repelled.

8. On the basis of the fresh evidence collected in the investigation conducted by the SIT, Crime Branch, the offence under Section 304A IPC was converted into the offence under Section 302 IPC and the appellant was charge sheeted and sent for trial. SI Shashi Bala was shown in Column 2 of the charge sheet for the reason that sufficient evidence as regards her involvement in the crime was not there.

9. The learned Additional Sessions Judge, on consideration of the charge sheet, charged the appellant for the murder of the deceased punishable under Section 302 IPC. The appellant pleaded not guilty to the charge and claimed trial.

10. In order to bring home the guilt of the appellant, the prosecution has examined 30 witnesses in all in support of its case. However, the witnesses material for the adjudication of this appeal are PW1 ASI Siya Ram, PW3 Nazir Ahmed, PW5 Zahir Ahmed, PW12 Shashi Bala, PW13 Head Constable Karim Baksh, PW17 SI Ram Singh, PW18 Saeed Ahmed, PW22 Shaukat Ali, PW24 Ms. Asha Dhir and PW25 Satbir Singh Sherawat. Before advertng to the rival contentions of the parties, we feel that it would be useful to have a look over the testimony of said witnesses.

11. PW1 ASI Siya Ram was Duty Officer, police station I.P.Estate on 28.12.1994 from 10:00 am onwards. He has stated that in the said morning, he took one SAF Carbine, 20 live cartridges and a chain from Constable Kartar Singh after he completed his sentry duty and handed over change of these items to the appellant Constable Arvind, who took over the sentry duty from Constable Kartar Singh. He also stated that at 12:05 pm on 28th December, 1994, he was relieved as Duty Officer by SI Shashi Bala (PW12) as he was directed by the SHO to go to the press area for official duty. When he returned back to the police station at about 06:20 pm, he came to know that Constable Mohd. Rashid has died due to firing by the appellant.

12. PW3 Nazir Ahmed is a witness of motive for the crime. He has stated that about 15 days prior to the occurrence, he was present at the house of his friend Mohd. Saeed, who is uncle of the deceased. He stated that on that day, deceased Mohd. Rashid told his uncle Mohd. Saeed (PW18) that he by chance had seen Shashi Bala (PW12) and the appellant behaving in an indecent manner at the police station and because of that they were annoyed with him and they had even threatened to kill him. PW18 Mohd. Saeed is the uncle of the deceased. He has also deposed to almost similar effect by stating that 13-14 days prior to his death, the deceased, who was the son of his brother-in-law, told him that he had by chance, seen the appellant and SI Shashi Bala (PW12) behaving in an indecent manner and because of that, they were nursing a grudge against him. PW18 further stated that the deceased also told him that SI Shashi Bala (PW12) had even tried to behave in an indecent manner with him but he resisted her advances by telling her that she was a senior officer and was not expected to behave in such a manner.

13. PW22 Shaukat Ali is the father of the deceased. He has testified that his son Abdul Rashid (deceased) was on leave from 17 to 21st December, 1994. During his leave, he stayed with him in the village. The deceased, during the short stay, had told him that he had by chance seen the appellant and SI Shashi Bala (PW12) in a compromising position at the police station and reprimanded them

that they should not indulge in such indecent activities in the office. He further stated that his son also told him that SI Shashi Bala (PW12) had even made indecent advances towards him which he resisted and told her that she being a senior should not behave in such a manner.

14. PW13 Head Constable Karim Baksh, as per the case of the prosecution, reached at the spot of occurrence immediately after the firing. He has testified that on 28.12.1994, he had gone to the office of ACP Karol Bagh in connection with some departmental inquiry. He returned back to the police station I.P.Estate at about 05:15 pm. When he reached at the police station, he saw the appellant at the gate on sentry duty. SI Shashi Bala (PW12) was standing near the appellant and appellant was either putting or removing the rounds in the magazine of SAF. When he enquired from SI Shashi Bala as to why she was standing at the gate, she responded that she was just talking with the appellant. Thereafter, he went to the room of Duty Officer where he saw the deceased talking on telephone. He requested the deceased to record his arrival at the police station in the relevant daily diary. The deceased told him that he was busy in making a call as his mother was to be operated upon in RML Hospital on the next day and requested him to make the arrival entry in the register himself. The witness further stated that then he went to make his arrival entry in the

'roznamcha' (Daily Diary). While he was recording his arrival entry, he heard a cry and sound of firing of bullet at the same time. On hearing the cry "*Mujhe bachao*", he rushed towards Duty Officer room. On reaching there, he found the deceased lying on the chair and blood oozing from his neck, back and his hand. Other staff members including Constable Ram Kishore and ASI Ram Singh also came there. He further stated that Constable Arvind Kumar and SI Shashi Bala (PW12) were also present in the room and the appellant Arvind was saying "*Madam, aapne ye kya karwa diya, mere toh bache barbad ho jayenge*" and upon this, SI Shashi Bala (PW12) replied "*Tum phikr mat karo, main bhi tumhare saath hun, court tak tumhara saath doongi*". He stated that at that time, SAF Carbine was in the hand of the appellant. ASI Ram Singh and Constable Ram Kishore rushed the deceased to JPN Hospital. As per PW13, at the spot of occurrence, the SAF and cartridges were seized by Head Constable Rajender Singh from the appellant. On instructions of senior officers, the spot was got photographed and investigation proceeded. PW13 identified the SAF Ex.P1, bullets Ex.P2 and barrat cap Ex.P3.

15. PW12 Shashi Bala was posted as Duty Officer, Police Station I.P. Estate at the relevant time. She has testified that on 28.12.1994 at about 5:45 pm, the deceased, who was on duty as Roznamacha Munshi, came to her room and started making a phone call while

sitting on a chair across the table. He continued with the call for 5 or 7 minutes. She advised him to cut short his call and not to keep the phone of duty officer's room engaged but the deceased continued with his phone call. At about 5:55 pm, she requested the appellant who was posted as Sentry to ask the deceased to put down the phone. On this, the appellant came to the duty room and asked the deceased to leave the phone. The deceased jokingly caught hold of the SAF of the appellant. When the appellant tried to extricate the SAF from the grip of the deceased, in that scuffle the SAF got entangled with the chain attached to the belt of the appellant. As a result, accidental fire from the SAF took place and the deceased was hit with the bullets on his neck and chest. PW12 Shashi Bala further stated that the firing occurred accidentally because of negligence of the appellant who had not kept the SAF in proper mode. According to this witness, one public witness Naseem and Inspector Sherawat of CISF were also present at the time of incident and they helped in shifting the deceased to the hospital. She has proved her statement which she made at the spot to the Investigating Officer Inder Pal as Ex.PW12/A.

16. PW17 SI Ram Singh (retired) is a hostile witness and he has not supported the case of prosecution. In his cross-examination on behalf of the appellant, he stated that on 28.12.1994 at about 05:45 pm, he was passing through the reporting room of police station I.P. Estate. He saw the deceased making a telephone call and the

appellant was telling him to put down the phone. He further stated that the deceased brushed aside the suggestion of Constable Arvind (appellant) and there was a scuffle and all of a sudden, bullets were fired from SAF of Constable Arvind and hit the chest and neck of the deceased. He further stated that he stopped a private vehicle at the road and in the said vehicle, he took the deceased to the hospital where he was declared dead.

17. PW25 Satbir Singh Sherawat, Assistant Commandant, CISF Unit has also supported the version of SI Shashi Bala (PW12) regarding the accidental firing in the scuffle resulting in fatal injuries to the deceased.

18. PW24 Ms. Asha Dhir, Assistant Director, Ballistic, CFSL is another important witness. She examined the weapon offence and has proved her reports Exhibits PW24/A to Ex.PW24/E. In her cross-examination, she explained that she had received five queries from the Investigating Officer during the period with effect from 13.01.1995 till 20.12.1995. In her opinion, the possibility of simultaneous cocking and pressing of trigger of 9 mm Carbine, registration No. 15220710 i.e. the SAF after entangling with the same chain resulting in fire is ruled out. This implies that according to the report, the theory of accidental fire is not plausible. Other

witnesses examined by the prosecution are formal in nature, who participated in the investigation at one stage or the other.

19. The appellant, when examined under Section 313 Cr.P.C. claimed that he was innocent and explained that the deceased had sustained fatal injuries because of accidental firing of the SAF due to scuffle and snatching of the SAF by the deceased. In his defence, the appellant examined Sh. V.N.Sehgal, Ex-Director (CFSL), CBI, New Delhi (DW1). He stated that despite taking precautions, accidental firing can take place and a possibility of accidental firing increases if the fire arm gets entangled in buttons of the shirt or a chain etc. This witness, however, stated that since he had not examined the fire arms, he was not in a position to say if the report of Ex.PW24/E is totally incorrect. For the same reason, he showed his inability to give an opinion as regards the reason for pushing of lever of the gun.

20. Before we advert to the rival contentions, we note that it is undisputed that on the fateful day the appellant was on Sentry duty at P.S. I.P. Estate and the weapon of offence i.e. SAF Carbine was in the charge of the appellant. It is also undisputed that the deceased sustained bullet injuries as a result of fire from the aforesaid SAF Carbine in the duty officer room of the Police Station and as a result of those injuries, he expired. As per the prosecution, the appellant has deliberately fired the SAF carbine resulting in fatal injuries to the

deceased, whereas the defence of the appellant is that he, on the asking of PW12 SI Shashi Bala, had gone to the duty room to advise the deceased to disengage the telephone but the deceased caught hold of the muzzle of his carbine and when he tried to extricate the carbine from the hold of the deceased, in the scuffle the chain which was attached to his belt got entangled with the SAF Carbine resulting in accidental firing of 5 bullets from the SAF carbine, which bullets hit the deceased and the injuries proved to be fatal.

21. Learned counsel for the appellant has assailed the impugned judgment on the ground that it is based upon improper appreciation of evidence. He took us through the evidence on record and the impugned judgment and pointed out that the learned Additional Sessions Judge has returned the finding of the guilt of the appellant on the basis of circumstantial evidence, ignoring the fact that PW12 SI Shashi Bala and PW25 Coy. Codr. S.S. Sherawat of CISF who, as per the case of the prosecution, had witnessed the occurrence, did not support the theory of intentional firing and categorically stated that the SAF Carbine of the appellant was accidentally fired during the scuffle when the appellant was trying to extricate his SAF Carbine from the grip of the deceased. Learned counsel further submitted that perusal of the impugned judgment would show that the learned Trial Court, while returning the finding of guilt, has been influenced by the opinion of ballistic expert PW24 Asha Dhir

Ex.PW24/E wherein she has ruled out a possibility of accidental fire from the SAF Carbine in this case. Learned counsel submitted that the learned trial Judge has committed a grave error in accepting said report, ignoring the eye witness account given by PW12, SI Shashi Bala and PW25 Coy. Codr. S.S. Sherawat as well as the testimony of DW1 V.N. Sehgal who retired as Director CFSL and who stated that accidental fire from a firearm is possible if it gets entangled with button of a shirt or chain etc. Learned counsel submitted that other factors which contribute to the finding of conviction are the motive for crime purportedly established by the testimony of PW3 Nazir Ahmed, PW5 Zahir Ahmed, PW18 Saeed Ahmed, PW22 Shaukat Ali and the evidence of Res-gestae provided by the testimony of PW5 Zahir Ahmed and PW13 Karim Baksh. Learned counsel submitted that even the aforesaid evidence of motive and Res-gestae is not reliable.

22. Learned counsel for the State, on the other hand, has argued in support of the impugned judgment and submitted that the learned Trial Court has rightly relied upon the testimony of the witnesses of motive as well as res-gestae and the expert opinion, which conclusively establish the guilt of the appellant. Thus, he has urged us to dismiss the appeal.

23. In order to appreciate the contention of the appellant that the learned Additional Sessions Judge has committed a grave error in giving circumstantial evidence precedence over the eye witness account of the occurrence given by SI Shashi Bala and Inspector S.S. Sherawat, one must keep in mind the background of this case. Admittedly, this is a case in which a Police Constable was killed in the Police Station due to firing from SAF Carbine, which was in the charge of the appellant. The question for determination is whether the firing took place accidentally or deliberately? The FIR in this case was registered in the first instance on the basis of the statement of SI Shashi Bala under Section 304A IPC. Perusal of the FIR Ex.PW4/A reveals that it was registered at 07:12 pm on 28.12.94 vide DD No.15A on the basis of rukka Ex.PW19/A sent to Duty Officer by the first Investigating Officer Inder Singh at 07:10 pm. The incident, admittedly, took place at about 05:55 pm within the Police Station. As per the testimony of the Additional SHO, Inspector Inder Singh, on the fateful evening at about 06:00 pm, on receipt of the wireless message, he reached at the Police Station where he recorded the statement of SI Shashi Bala. In the cross-examination, he stated that he reached the Police Station within 3/4 minutes of the receipt of wireless message. This means that he must have reached the Police Station by sometime around 6:05 pm. That being the case, it remains unexplained as to why it took almost an hour for

registering the FIR despite of the fact that the incident had taken place within the Police Station in the duty officer room. This unexplained delay is clear indication that statement Ex.PW12/A of PW12 is a result of deliberation to save the police from the embarrassment which the news of commission of murder within the police premises would have caused.

24. Further, the story put forth in the statement of SI Shashi Bala Ex.PW12/A is belied by the testimony of PW13, Head Constable Karim Baksh. He has categorically stated that on 28.12.94, he returned back to Police Station I.P. Estate after attending an inquiry in the office of ACP Karol Bagh and he noticed the deceased talking on telephone in the room of the duty officer. He also stated that he requested the deceased to record his arrival entry in the daily diary. The deceased, however, told him that he was busy on telephone and requested him to go and himself make an entry of his arrival in the daily diary. Thus, he went to the room in which daily diary register was kept to make the entry and while recording the arrival entry, he heard the cry of *Mujhe Bachao* and firing of SAF. On this, he came to the duty officer room and found the deceased lying on the chair with bullet injuries. Appellant Arvind was saying to Shashi Bala *"Madam aapne yeh kya karva diya, Mere to bache barbad ho jayenge"* and on this SI Shashi Bala replied *"tum phikr mat karo may bhi tumhare saath hu, court tak tumhara saath dunga"*. From the

above version of Head Constable Karim Baksh, the complicity of SI Shashi Bala in an effort to save the appellant is established. The above said utterance on the part of appellant Arvind Kumar, immediately after the occurrence, is a relevant fact under Section 6 of the Indian Evidence Act as a part of res-gestae and definitely points towards the guilt of the appellant. Not only this, the above utterance on the part of SI Shashi Bala, even if it falls short of establishing her complicity in the act of shooting the deceased, shows her soft corner for the appellant which explains as to why she has given a distorted version in her statement Ex.PW12/A made to the Investigating Officer as well as in her testimony in the court.

25. Learned counsel for the appellant criticised the testimony of PW13 Head Constable Karim Baksh for the reason that his statement under Section 161 Cr.P.C. was recorded at a very late stage on 22.03.95 and there is no explanation for that unreasonable delay. It was also submitted that if Head Constable Karim Baksh is a truthful witness, there ought to have been his arrival entry in the daily diary maintained at the Police Station. Since the prosecution has failed to place on record even a copy of the said arrival entry, the presence of PW13 at the spot of occurrence as claimed by him is highly doubtful. Learned counsel thus submitted that it is unsafe to rely on his testimony, particularly when there is no independent corroboration to his version.

26. We are not convinced with the above argument for the reason that on perusal of the Trial Court record, it transpires that original daily diary register "B" of Police Station I.P. Estate was filed in the court on 10.01.2001 as is apparent from the trial court proceedings dated 10.01.2001 wherein it is, inter alia, recorded:

"It is submitted by Inspector Arora that the record as mentioned in the application filed today has been traced and brought in the court. Let the record be kept in the court in safe custody which consists of three registers. Police officers summoned today are discharged."

27. The above three registers include daily diary register "B" maintained at Police Station I.P. Estate containing entries w.e.f. 15.12.94 till 05.01.95. On perusal of this register, it transpires that as per DD No.20B dated 28.12.94 recorded in this register, Head Constable Karim Baksh had departed for the office of ACP Karol Bagh for attending departmental inquiry against SI Sher Singh at 10:30 am in the morning. Further perusal of this register reveals that the arrival entry of Head Constable Karim Baksh at the Police Station is recorded at 5:30 pm in the evening vide DD No.43-B, which is in the hand of the Head Constable. These entries do corroborate the version of Head Constable Karim Baksh and give an assurance that he is telling the truth. Further, his version is also corroborated by PW5 Zahir Ahmed who in his testimony claimed that on the relevant day he had visited Police Station I.P. Estate to meet

the deceased along with his maternal uncle Abdul Khalid. They reached there at about 5:45/6:00 pm and before they could enter the Police Station, they heard noise of firing. He further stated that on entering the Police Station, he found the deceased lying on the chair. The appellant and a lady officer were also present there and he heard appellant saying "Madam, aapne isko to marwa diya ab mera kya hoga" and the lady officer assured that she would help him upto the High Court. Thus, we find no reason to disbelieve the testimony of Head Constable Karim Baksh. Once it is established that immediately after the occurrence, the appellant was heard saying to SI Shashi Bala "*Madam aapne yeh kya karwa diya, Mere to bache barbad ho jayenge*", it can be safely inferred that the occurrence - by no means- could be accidental and it was an act of deliberate firing.

28. The next circumstance taken against the appellant by the learned Additional Sessions Judge is the expert opinion Ex.PW24/E given by the ballistic expert Ms. Asha Dhir (PW24). She is Assistant Director, Ballistic, CFSL Chandigarh. She testified that she is M.Sc. Honours in Physics and has been trained at NICFS Delhi, BARC Bombay and FSL Rajasthan. She also stated that she had examined hundreds of cases relating to Ballistic and submitted her reports and she claimed herself to be expert in Ballistics. She has proved the reports prepared by her of Ballistic examination of the SAF Carbine

and the material seized from the spot Ex.PW24/A to Ex.PW24/E. Perusal of her opinion Ex.PW24/E reveals that as per this witness, the possibility of simultaneously cocking and pressing of trigger of 9 mm Carbine Regd. No.15220710, marked A, after entangling with the same chain resulting in fire is ruled out. It is on the basis of this opinion, coupled with his own examination of weapon of offence, the learned Trial Court came to the conclusion that this is a case of deliberate firing and not an accidental firing.

29. Learned counsel for the appellant submitted that the learned trial Judge has fallen in grave error in relying upon the reports of Ms. Asha Dhir (PW24) which are contradictory in nature. In support of this contention, he drew our attention to the testimony of Shri V.N. Sehgal, Retired Director of CFRSL wherein he stated that he had seen the reports Ex.PW24/D dated 26.04.95 and PW24/E dated 22.12.95 and that both reports are not similar and convey different meaning. He also deposed that despite of taking precautions, a possibility of accidental fire from a firearm cannot be ruled out and the possibility of accidental fire increases if the firearm is entangled in a button of a shirt or chain, etc. Learned counsel argued that the learned trial Judge has fallen in error in relying upon the testimony of Ms. Asha Dhir ignoring the expert opinion of DW1 Shri V.N. Sehgal, who retired from the esteemed position of Director, CFSL, CBI.

30. We do not find merit in the above contention of learned counsel for the appellant. No doubt, DW1 Shri V.N. Sehgal retired as Director CFSL, CBI, but this does not mean that he is an expert on ballistics. Therefore, we find no infirmity in the approach of the learned trial Judge in giving precedence to testimony of PW24 Ms. Asha Dhir, who deposed about her credentials as ballistics experts over the testimony of DW1 Shri V.N. Sehgal. Otherwise also, the witness in his cross-examination submitted that he had not examined the weapon of offence i.e. SAF Carbine pertaining to this case, so, he was unable to say definitely as to what was the reason for pushing of lever or if there was any pushing of lever or not. On perusal of the reports of Ms. Asha Dhir Ex.PW.24/D and Ex.PW24/E, we do not find any contradiction in these reports. In the report Ex.PW24/D, Ms. Asha Dhir in response to additional query No.5 has, inter alia, opined that the firearm under reference can be cocked by entangling with the chain provided, if the change lever is not at 'S' (safety) position. If the trigger is pressed in cocked condition, it will fire and in the report Ex.PW24/E in answer to the additional query, she has opined "the possibility of simultaneously cocking and pressing of trigger of 9 mm Carbine Regd. No.15220710, marked A, after entangling with the same chain resulting in fire is ruled out". On bare reading of these two opinions, we find no contradiction in

the same. Therefore, we find no reason to discredit the opinion given by the Ballistic Expert PW24 Asha Dhir.

31. The learned trial Judge while dealing with this aspect of the matter also summoned and examined the weapon of offence and after his inspection of the weapon, he, inter alia, observed thus:

“104. It is in order to reach the truth that, as mentioned above, I summoned the SAF specifically to study the placement of chain vis-à-vis the other components of the weapon. As described above, firing has to precede cocking of the gun by pulling behind the cocker, which requires considerable force to pull; firing also precedes shifting of the flat lever knob from position S to position R or thereafter to the position A, on which the SAF was found at the time of ballistic examination; and firing precedes pulling the trigger. All the three movements, viz. Cocking, shifting the lever and triggering are required to make the SAF fire.

105. The irresistible conclusion reached after my through examination of the weapon of offence is that the alleged entangling of chain during the alleged scuffle between the accused and the deceased could not between the accused and the deceased could not have led to all the three movements, so as to make it fire accidentally. For, as described above pulling behind the cocker requires considerable strength; knob of the lever is flat and not a protruded one in which the chain could get entangled; and the trigger being inside the C shaped cover over it, even the trigger could not get entangled. In any case, simultaneous movement of all the three said components by entangling is absolutely impossible. When at ease, i.e. not in alert position, as the present case was, lever of the SAF is always at the safety point S and finger of the person carrying the weapon is never on the trigger so even if it is assumed that the chain somehow pulled the cocker, it remains unexplained as to under what circumstances lever knob was shifted from S to R and then to A position, Shifting of the lever knob and pressing of the trigger could not at all have occurred accidentally by entangling.

106. Even the ballistic expert in her report Ex. PW24/E opined that simultaneous cocking and triggering after entangling is ruled out. I fail to find any substance in the defence argument that clause 5 of ballistic report Ex. PW 24/D contradicts the report Ex PW24/E. For, clause 5 of report Ex.PW24/D simply expresses possibility of cocking by entangling, “proved if the change lever is not at S (safety) position”, whereas report Ex.PW24/E rules out the possibility of simultaneous cocking and triggering.

107. Then, as per clause 4 of the ballistic report Ex. PW 24/D, with the lever at position A (which happened in the present case) the SAF could fire if it was cocked and trigger was pressed and it could go on firing as long as the

trigger remained pressed. The expression of the continuous firing upon the trigger remaining pressed would be very relevant in the light of four rounds that hit within a small area of neck of the deceased, in the sense that the accused did not remove his finger from the trigger immediately after the first round.

108. In fact, reliance of the defence on presence of all the bullet wounds being within a small area of the neck to show accidental firing goes against it. For, had it been an accidental firing upon scuffle followed by entangling of the chain of the SAF, firing would have been scattered all around the deceased, and not just localized to a small area of his neck.

109. Further, a very important aspect, ignored by both the sides during arguments was the bullet injury found on hand of the deceased. **Entry of this bullet wound no. 5, as per post mortem report Ex.PW 29/A is on the back of the right hand** of deceased. As per defence case, firing took place upon entangling of the chain when the deceased caught hold of the muzzle of the SAF. If the deceased caught hold of the SAF by its muzzle with his right hand, no bullet injury on his right hand would have been possible and if he held the SAF at the mouth of the muzzle, the entry wound on right hand would have been at front and not at back of the hand. If the deceased had been holding the telephone receiver with his right hand and caught hold of the muzzle with left hand, the bullet that passed through his hand would have blasted the phone receiver also and would have caused an entry wound around ear of the deceased, regarding which there is no evidence. Even as per clause 3 of the ballistic report Ex. PW 24/C the bullet injury on hand of the deceased was caused by firing at an angle different from the angle at which other injuries were caused. Injury on the back of the right hand of the deceased fails to fit in the defence theory of accidental firing”.

32. We find no infirmity in the above approach adopted by the learned trial Judge in ruling out possibility of accidental firing of SAF Carbine as projected by the defence.

33. Learned counsel for the appellant submitted that as per the charge sheet, the deceased had by chance seen the appellant and SI Shashi Bala (PW12) indulging in indecent behaviour in police station and for that reason, the appellant was annoyed with the deceased and nursing a grudge against him. This, according to the prosecution, is the motive for crime. Learned counsel submitted that the prosecution,

in order to prove the motive, has examined PW3 Nazir Ahmed, PW18 Saeed Ahmed and PW22 Shaukat Ali, father of the deceased. He submitted that their testimony is not worthy of credence for the reason and that the story of motive appears to be an afterthought and as a result of deliberation. In support of this contention, learned counsel drew our attention to the complaint statement Ex.PW22/DC dated 29.12.1994 purported to have been made by PW22 Shaukat Ali to the SHO, I.P.Estate wherein, though he has expressed a suspicion that his son might have been murdered in furtherance of a well-conceived plan, but he did not raise any suspicion against the appellant nor he made a whisper of above referred motive on the part of the appellant and SI Shashi Bala (PW12). Learned counsel submitted that the story of the above referred motive surfaced for the first time when PW22 Shaukat Ali submitted a second complaint in the office of the Commissioner of Police, Delhi on 01.02.1995 wherein, Shaukat Ali (PW22) claimed that prior to his death, his son Mohd. Rashid (deceased) had told him that he had seen the appellant in compromising position with SI Shashi Bala (PW12) in police station and because of that reason, the appellant was nursing a grudge against him. According to learned counsel for the appellant, this circumstance in itself, raises a strong suspicion that the story of motive put forth by PW22 Shaukat Ali is the result of due deliberation and afterthought. He submitted that PW3 Nazir Ahmed and PW18 Saeed Ahmed are also not worthy of credence because they are interested witnesses, PW18 Saeed Ahmed being relative of the

deceased and PW3 Nazir Ahmed being the friend of Saeed Ahmed (PW18). He further submitted that their version is also suspect because there is an unexplained delay in recording of their statement under Section 161 Cr.P.C.

34. There appears to be some substance in this contention of learned counsel for the appellant and, in view of the circumstances pointed out by him, we do not find it safe to rely upon the testimony of PW3, PW18 and PW22 pertaining to the motive for crime. Otherwise also, the motive projected by the prosecution is not so strong which may impel a person to kill someone.

35. At the same time, we are of the opinion that the failure of the prosecution to firmly establish the motive however, is not so significant as to reject the prosecution case. Of course, in a criminal trial, motive plays a significant role to arrive at a just decision but it is not always that the prosecution may get evidence of motive. Therefore, failure of prosecution to prove the motive would not lead to a conclusion that the appellant is not guilty of the offence. If there is other convincing evidence on record to establish the guilt of the accused, the finding of conviction can be returned. In our aforesaid view, we draw strength from the decision of the Supreme Court in the matter of **Ganeshlal V. State of Maharashtra**, 1992 Cr.L.J. 1545, wherein it was held thus:

“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. The 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”.

36. Further, in the matter of **Mulakh Raj Vs. Satish Kumar, 1992 SCC (Cri.) 482**, it has been held as follows:

“Undoubtedly in cases of circumstantial evidences motive bears important significance. Motive always locks up in the mind of the accused and some time, it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case”.

37. In view of the above enunciated position in law, absence of a motive is of no avail to the appellant.

38. In view of the above discussion, we find no reason to interfere with the impugned judgment and conclude that the learned trial Judge has rightly convicted the appellant for the murder of the deceased under Section 302 IPC on the strength of the circumstantial evidence referred to above. Thus, we find no merit in the appeal.

39. The appeal is dismissed accordingly.

AJIT BHARIHOKE, J.

JULY 02, 2010
pst/akb

A.K. SIKRI, J.