

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

Date of Hearing: 16th May, 2011
Date of Decision: 31st May, 2011

+ **CRL.A.No.198/2011**

DHANANJAY SINGH BHADORIA ... APPELLANT
Through : Mr. Manish Vashisht, Advocate with
Mr. Sameer Vashisht Advocate.

Versus

STATE ... RESPONDENT
Through : Mr. Jaideep Malik, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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

J U D G M E N T

G.P. MITTAL, J.

1. The Appellant is aggrieved by the judgment dated 08.11.2010 and order on sentence dated 16.11.2010 in Sessions Case No.135/06/04 FIR No.349/2003 & Session Case No. 136/06/04 FIR No. 367/2003, which was disposed of by this common judgment whereby the Appellant was held guilty under various provisions of Indian Penal Code (IPC) and sentenced to undergo imprisonment which are extracted from Para 5 of the order on sentence hereunder:-

“Keeping in view the facts and circumstances of the case, convict Dhananjay Singh Bhadoria is awarded sentences as under:-

- (i) *Life imprisonment with fine of ₹ 10,000/- for offence under section 302 IPC in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for three months.*
- (ii) *Rigorous imprisonment for five years with fine of ₹ 5,000/- for offence under section 392 IPC in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for two months.*
- (iii) *Rigorous imprisonment for five years for offence under section 397 IPC in case FIR No.349/03.*
- (iv) *Rigorous imprisonment for three years with fine of ₹ 5,000/- for offence under section 201 IPC in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for two months.*
- (v) *Rigorous imprisonment for two years with fine of ₹ 5,000/- for offence under section 404 IPC in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for two months.*
- (vi) *Rigorous imprisonment for five years with fine of ₹ 10,000/- for offence under section 25/54/59 of Arms Act in case FIR No.349/03. In default of payment of fine, the convict shall undergo SI for three months.*
- (vii) *Rigorous imprisonment for seven years with fine of ₹ 10,000/- for offence under section 4/5 of Explosive Substances Act in case FIR No.367/03. In default of payment of fine, the convict shall undergo SI for three months.*
- (viii) *Rigorous imprisonment for five years with fine of ₹ 5,000/- for offence under Section 25/54/59 Arms Act in case FIR No.367/03. In default of payment of fine, the convict shall undergo SI for three months."*

2. The case of the prosecution is that deceased Naresh Kumar and PW-2 Shiv Kumar @ Bobby were partners in the perfumes and deodorant supply business in Ghaziabad. They suffered losses in the said business as a result of which Naresh Kumar (deceased) ran into debts. PW-2 and Naresh Kumar hired a premises No. H-128, Shivani Apartment, New Delhi for their residence and rented an office at Madhu Vihar through a broker Sant Ram. Naresh Kumar and Shiv Kumar were residing and carrying on business in Delhi under fake names, i.e. Raj Kumar and Rohit Sharma,

respectively. The intention of Shiv Kumar PW-2 and the deceased was involved in vehicle financing and thereafter to disappear with the cash entrusted by the intending car buyers.

3. PW-2 and the deceased knew the Appellant Dhananjay Singh and co-accused Shalender Kumar Singh @ Kapil (since deceased). According to the prosecution, the Appellant and Shalender Kumar Singh (co-accused) visited the deceased on a black Pulsar motorcycle, at his office (A-23, Madhu Vihar) on 06.09.1993 at 7:30 P.M. The Appellant and Shalender Kumar Singh had brought some sweets laced with intoxicating substance and offered them to PW-2 and the deceased. The deceased took a piece of sweet but PW-2 refused to do so as he was unwell.
4. According to prosecution version, the Appellant proposed to the deceased and PW-2 to go to Gurgaon to spend some time and have fun, to which the deceased agreed. In Gurgaon, all the four had whisky, beer and their dinner and by that time, the deceased Naresh Kumar got intoxicated. All the four made their way back from Gurgaon at about 1:00 A.M. on the night intervening 06-07.09.2003. After crossing ITO Yamuna Bridge at Shakarpur Check Post, the Appellant and the co-accused asked PW-2 to stop car as they wanted to urinate. The Appellant and the co-accused got down from the car whereas, PW-2 and the deceased remained seated in the car.
5. Upon returning to the vehicle, Shalender Kumar Singh @ Kapil came to PW-2's side and placed a knife on his throat demanding that he should hand over whatever he had (with him) at that time. PW-2, therefore, took out his purse from the back pocket of his trouser, which was snatched by Shalender Kumar Singh. It contained ₹ 1200/- in cash and certain ATM cards. In the meanwhile, PW-2 noticed the Appellant placing his country made pistol on the neck of the deceased (who was in an intoxicated state) and firing a shot at him. In the meanwhile, PW-2 pushed Shalender Kumar Singh away and he then ran towards Yamuna to save his life; he turned

back to see if the Appellant and Shalender Kumar Singh were chasing him. He, however, noticed that they sped away from the spot in the car with the deceased.

6. According to the prosecution, PW-2 was in possession of mobile phone No. 56087690 belonging to the deceased, since Naresh Kumar was in an intoxicated state. PW-2 rang up PW-6 Madhvi, wife of the deceased Naresh Kumar at 2:00 A.M. on her mobile and informed her that the Appellant and Shalender Kumar Singh had taken away her husband Naresh Kumar with them in her husband's car. PW-2 searched for the deceased on the road but without success. On the information given by PW-2 Shiv Kumar, Amit Kumar brother-in-law of the deceased Naresh Kumar reached Maharajpur check post. They (PW-2 and PW-12 Amit Kumar) made a frantic search for Naresh Kumar, but without any success.
7. In the meanwhile, an unidentified dead body was noticed by PW-36 Inspector Ram Raj Singh, Additional SHO, Police Station Anand Vihar at 3:02 A.M. Inspector Ram Raj Singh gave an information through wireless to HC Satish Kumar, who in turn passed it on to Duty Officer HC Madan Kumar (PW-20) who recorded DD No.5-A (Ex.PW-20/A). Inspector Satyavir Singh (PW-47) SHO, Police Station AnandVihar reached the spot of recovery of the dead body where he met ASI Jai Prakash (PW-14) and Constable Ashok Kumar (PW-21). The SHO noticed the injuries on the dead body and on search (of the dead body), cash amounting to ₹ 115/-, three DTC tickets and an envelope Ex.PW-30/15 containing certain documents (of ICICI Bank) were recovered. The documents bore the name of Raj Kumar Sharma along with his address.
8. The SHO (PW-47) prepared a rukka Ex.PW-47/A on his personal observation and sent the same to PS Anand Vihar where FIR No.349/2003 was recorded.
9. The IO lifted blood stained earth, earth control and blood from the spot from where the dead body was recovered. These were converted into

separate pullandas and sealed with the seal of 'SVS'; other articles recovered from the dead body of Naresh Kumar were also seized. SI K.P. Rana (PW-52) was sent by the IO to 128, Shivani Apartment to make inquiries regarding identity of the dead body. On reaching flat No.128, Shivani Apartment, it was discovered that the tenancy of the premises was arranged by one Sukhbir Singh, a property dealer of the area. Sukhbir Singh reached the flat and was then taken by SI K.P. Rana to the spot, where the dead body lay.

10. PW-4 Sukhbir Singh identified the dead body to be of one Raj Kumar Sharma. PW-4 informed the IO that the deceased used to run shop No.2, A-23, Gali No.19, Madhu Vihar the tenancy of which was also arranged by him through a property dealer Sant Ram.
11. At about 8:50 A.M. the dead body was sent to the mortuary with the request to the autopsy surgeon to preserve it for 72 hours, by an application, Ex.PW-47/F. The IO along with other police personnel searched for the bullet.
12. The IO (PW-47) left for Madhu Vihar along with PW-4 Sukhbir Singh. He met one Sant Ram at Madhu Vihar, who claimed that he had arranged the shop to the deceased Raj Kumar who used to run "*Health Care Enterprises*" along with his brother Rohit.
13. According to the prosecution, at about 11:00 A.M. PW-2 Shiv Kumar reached the said shop and was identified by PW-1 Sant Ram as Rohit Kumar @ Bobby, (Shiv Kumar) brother of the deceased. Enquiries were made from Rohit Kumar, who appeared to be nervous. Shiv Kumar (PW-2) disclosed that he and his brother, i.e. the deceased were residing at the aforesaid address under a fake name and that the actual name of the deceased was Naresh Kumar and his own name was Shiv Kumar. PW-2 Shiv Kumar gave a detailed account of the incident to the IO.
14. On 08.09.2003 the dead body was identified by Jagbir Singh Sehrawat, the deceased's brother-in-law and Rajesh Kumar, his elder brother. The

inquest proceedings were held by the IO and autopsy on the dead body was performed by PW-5 Dr. K.Goel.

15. Dr. K.Goel found “an *oval shape lacerated, punctured wound of size 1.75 cm x 1.25 cm with abraded collar around*. The autopsy surgeon opined the cause of death to be *spinal shock consequent upon cervical vertebral and spinal cord injuries as a result of blast effect of fire arm. The mode of death was homicidal.*”
16. The IO searched for the Appellant and Shalender Kumar Singh. On 21.09.2003, at about 5:45 P.M. When SI Vinay Tyagi (PW-31) was present in industrial area, Patparganj, Anand Vihar along with SI Atul Tyagi, ASI Majid Khan, HC Nagender, Ct. Banvir, Ct. Sohanvir, Ct. Hari Om and others, he received secret information that one Dhananjay Singh, a desperate criminal involved in heinous crimes was present near the entry gate of ISBT Anand Vihar, on his black Pulsar Motorcycle bearing No.UP-16D-2299 and was in possession of illegal arms and ammunition. PW-31 SI Vinay Tyagi passed on this information to senior police officers and then proceeded to the place where Dhananjay Singh was stated to be available. He requested 4-5 passersby to join the raiding party, however, all of them refused. In the meanwhile, Sanjay Singhal a resident of Vivek Vihar, who was passing through that road in his Santro car was requested to join the raiding party, to which he agreed. At about 6:30 P.M. at the instance of a secret informer, the Appellant was apprehended. Upon interrogation, he disclosed his name to be Dhananjay Bhadauria. The Appellant was carrying a bag; and on opening it, two loaded country made pistols, i.e. 12 bore and .32 bore, nine live cartridges of 12 bore, one live cartridge of .32 bore and one sweet box on which, ‘*tasty sweet*’ was printed were found. The sweet box was opened, from which, six improvised crude explosive bombs were recovered, wrapped in khakhi plastic tape. Thereafter, the Appellant disclosed that the six bombs were crude explosives. The bomb disposal squad was requisitioned by flashing a message to District Control Room. At about 7:30 P.M. Inspector

Banwari Lal, along with his staff and the Crime team reached the spot and took photographs of all the crude bombs and defused them. The gun powder recovered from the defused bombs was weighed and kept in a plastic jar. The iron splinter and stones were kept in a separate transparent polythene bag and then kept in separate plastic jars. All the six jars with gun powder were marked as A to F and iron splinters and stones were marked as A1 to F1. It was discovered that the country made pistol of .32 bore, on checking contained a live cartridge. These too were taken into possession (after preparing a sketch) by memo Ex.PW-19/E. The Appellant was handed over to SI K.P. Rana by SI Vinay Tyagi for further investigation of the case.

17. On 23.09.2003, the Appellant was taken to Moradabad by SI Udaiveer. He pointed out the place where the Santro car was abandoned by him and co-accused Shalender Kumar. It transpired that the Santro car had been seized by the police of PS Manjholi, District Moradabad as unclaimed property.
18. On 24.09.2003 a second disclosure statement (recorded as supplementary disclosure statement Ex.PW-30/G) was made by the Appellant stating that the *Katta* (country made pistol), his blood stained clothes, credit cards and the purse were concealed by him in his residence 13/63, Raj Nagar, Ghaziabad. Pursuant to the disclosure statement, the Appellant led the police party to his rented house, i.e. 13/63 Raj Nagar, which led to the recovery of one country made pistol (of .315 bore) from a box. The IO completed formalities regarding preparation of sketch and seizure of the country made pistol.
19. On 28.09.2003 on the basis of secret information co-accused Shalender Kumar was arrested from Karkardooma Court. (We shall not discuss the role of Shalender Kumar except where it is relevant for appreciation of the evidence against the Appellant as he expired during the trial and the proceedings against him were ordered to have abated).

20. Meanwhile, the Santro car No. HR-61-U-3265 was seized from the police of PS Manjhola. On 01.10.2003 one electrician Aslam Ali (PW-10) was called to the Police Station for inspecting the Santro Car. On opening the dashboard, from the lower side a bullet was recovered which was kept in a bag, sealed with the seal of 'VS' and seized by memo Ex.PW-10/A and PW-10/B. The exhibits were thereafter sent to the FSL. Some live cartridge (of .315 bore) were also sent to the CFSL for the purpose of test firing. PW-37 Mr. K.C. Varshney, Senior Scientific Officer (Ballistic)-cum-Chemical Examiner to the Govt. of NCT of Delhi gave report dated 04.02.2004 Ex.PW-37/A. The result of the examination is extracted hereunder:-

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

(2) The 8mm/.315" cartridge case marked exhibit 'ECI' is fired empty cartridge.

(3) The deformed bullet marked exhibit 'EBI' correspond to the bullet of 8mm/.315" cartridge.

(4) The 8mm/.315" cartridge from the laboratory stock was test fired through the country made pistol .315" bore marked exhibit 'FI', test fired cartridge case and recovered test fired bullet were marked as 'TCI' & 'TBI' respectively.

(5) The individual characteristic of firing pin marks present on evidence fired cartridge case marked exhibit 'ECI' and on test fired cartridge cases marked as 'TCI' were examined & compared under the Comparison Microscope Model Leica DMC and were found identical. Hence the exhibit 'ECI' has been fired through the country made pistol .315" bore marked exhibit 'FI' above.

(6) The individual characteristic of striations on evidence fired bullet exhibit 'EBI' and on test fired bullet marked as 'TBI' were examined & compared under the Comparison Microscope Model Leica DMC and were found identical. Hence the exhibit 'EBI' has been fired through the country made pistol .315" bore marked exhibit 'FI' above.

(7) *The exhibits 'F1' / 'ECI' & 'EBI' are firearm / ammunition as defined in the Arms Act 1959."*

21. The two country made pistols pertaining to FIR No. 367/2003 were found to be in working condition and the cartridges recovered were found to be live cartridges. The parts of the defused crude bomb were also examined by PW-50 Dr. A.K.Dalela, Junior Scientific Officer, CFSL, Chandigarh who gave his report Ex.PW-50/A. The result of this examination is extracted below:-

"Various laboratory tests such as colour tests and High performance thin layer chromatographic (HPTLC) analysis were carried out with exhibit – A to F and Exhibit A-1 to F-1 under reference. The results thus obtained have been analysed as given below:

Potassium ions, chlorate ions, arsenic ions, sulphide ions and aluminium have been detected in exhibit –A to exhibit-F and exhibit A-1 to exhibit F-1."

22. On completion of the investigation a charge for the offence punishable under sections 392,397,302,201 read with Section 34 IPC, 404 IPC and 25,54,59 of the Arms Act in Sessions Case No.135/06/04 (FIR No. 349/2003) was framed against the Appellant. In Sessions Case No.136/06/04 (FIR No. 367/2003) a charge for the offence punishable under Section 25 Arms Act and 4/5/6 of Explosive Substances Act in Sessions Case No.135/06/04 (FIR No. 367/2003) was framed against the Appellant.
23. The Appellant pleaded not guilty to the charges.
24. The prosecution, in order to establish its case examined 55 witnesses. The witnesses produced by the prosecution can be divided into six different sets.
25. PW-2 Shiv Kumar is an eye witness of the alleged commission of the murder by the Appellant and the co-accused on the night intervening 06-07.09.2003. PW-6 Smt. Madhvi and PW-12 Amit Kumar, (PW-6's brother) are the supporting witnesses in respect of the commission of

murder of Naresh Kumar. PW-9 Rajnish Kumar, PW-30 SI Yogesh Kumar and PW-47 Insp. Satyavir Singh (IO) deposed about recovery of the pistol (Ex.P-4) alleged to have been used in the commission of murder and blood stained clothes of the Appellant. PW-29 SI Udayvir Singh, PS Majhola, Moradabad, PW-39 HC Giriraj Kishore Sharma, PS Majhola, Moradabad and PW-30 SI Yogesh Kumar are witnesses to recovery of the Santro car No. HR-61-U-3265 from PS Majhola. PW-10 Aslam Ali was engaged by the IO to remove the dashboard from the Santro car. He deposed about extraction of a bullet from the dashboard. PW-25 Constable G. Ganesh took photographs of the car, whereas PW-44 Dr. Rajender Kumar examined the car in FSL, Rohini. PW-5 Dr. K. Goel conducted autopsy on the dead body of deceased Naresh Kumar, whereas PW-19 Constable Banbir, PW-31 SI Vinay Tyagi, PW-42 SI Atul Tyagi, PW-52 Insp. K.P.Rana and PW-54, Sanjay Singhal public witness are in respect of apprehension of the Appellant on 21.09.2003 and recovery of .32 bore and .12 bore pistols, nine cartridges of .12 bore and six crude bombs. PW-52 Inspector K.P. Rana also recorded the disclosure statement Ex.PW-19/K of the Appellant.

26. On closure of the prosecution evidence, the Appellant was examined under Section 313 Cr.P.C. to enable him an opportunity to explain the incriminating evidence produced against him. The Appellant denied the prosecution's allegation and pleaded false implication. The Appellant took the plea that he was abducted by Ashwani @ Munna Pandit, Rahul Tyagi, Amit Goel, Chottey Lal Sharma, Gautam Tyagi, Gyanender Singh etc. and the accused in that case (i.e. the said persons) were arrested. Deceased Naresh Kumar was murdered by his abductors and he was handed over by them to the Special Staff SI Vinay Tyagi, who was related to the abductors. The Appellant was falsely involved in the case to demolish the case of his abduction. He deposed that PW-2 Shiv Kumar was also connected with Munna Pandit's gang.

27. The Appellant produced four witnesses in his defence.

28. DW-1 Sanjay Singh Bhadoria is the brother of the Appellant. He deposed about the abduction of the Appellant and lodging of FIR No.602/2003 at PS Kavi Nagar by him. He deposed that SI Vinay Tyagi is related to Rahul Tyagi, Jitender Tyagi and Saurabh Tyagi, who were accused in the said FIR. He deposed that the abductors murdered one person and his brother, Appellant was handed over to SI Vinay Tyagi from Kotdwar where he was confined by the abductors to demolish the FIR got registered by him.
29. DW-2 deposed that Pulsar motorcycle UP-16-D-2299 was registered in the name of one Mr. Raju Sharma resident of Sector 27, Noida.
30. DW-3 Constable Anil Kumar Sharma from PS Kavi Nagar, Ghaziabad proved registration of FIR No.602/2003 on the complaint of DW-1.
31. DW-4 Satrunjay Singh corroborated the testimony of DW-1 regarding the abduction of the Appellant.
32. On appreciation of evidence, the Trial Court believed the prosecution version and convicted the Appellant as stated earlier.
33. We have heard Mr. Manish Vashisht, learned counsel for the Appellant, Mr. Jaideep Malik, learned APP for the State and have perused the record.
34. It is argued by the learned counsel for the Appellant that conduct of PW-2 was unnatural. PW-2 did not inform the deceased's wife that her husband had been shot by someone or for that matter by the Appellant. It is unbelievable that PWs 2 and 12 instead of lodging a police report would roam around in search of the deceased.
35. The following contradictions were pointed out in the testimony of PW-2:-
 - (i) PW-2 could not mention the registration number of the black Pulsar motorcycle on which the accused persons had allegedly gone to the office of the deceased, on 06.09.2003.
 - (ii) PW-2 did not hand over the packet of sweets to the police which the accused persons offered to the deceased and himself (PW-2).

As per prosecution the sweets were laced with sedatives. The box of sweets was never recovered.

- (iii) PW-2 could not tell the name of the liquor shop/local *theka* from where they had allegedly bought whisky on way to Gurgaon.
- (iv) PW-2 could not tell the name of the restaurant situated on the ground floor of DT complex Gurgaon from where all four of them had purchased two bottles of beer and consumed food.
- (v) No bill of ₹ 500/- for the alleged consumption of beer and food could be produced on his (PW-2's) statement to the police; neither could the police produce any such document.
- (vi) PW-2 deposed that the co-accused Shalender Kumar had placed a knife on his throat but no injury or even a scratch was found on his person.
- (vii) PW-2 alleged that he handed over his ATM/credit cards to the accused persons but did not take any steps to get the same blocked from the concerned Banks. These cards were never used nor was any attempt by the accused to swipe it for any unauthorized appropriation of money.
- (viii) Moreover no deposition regarding the credit cards or ATM cards was made by PW-2 before the learned Trial Court.
- (ix) PW-2 deposed that the deceased was shot with a country made pistol by the Appellant but no blood stains were found on his clothes although he was sitting next to the deceased. This fact is established by Ex.PW-3/B.
- (x) The police met PW-2 during the day time at 11:00 – 11:30 A.M. and even at that particular time he did not tell them about murder of the deceased yet the police asked him about the deceased.

- (xi) PW-2 and the deceased Naresh Kumar were living under assumed identities and were duping people by luring them in the pretext of their being car financiers.
 - (xii) PW-2 failed to disclose about the disability of the deceased to drive the vehicle due to his left hand being in a plaster cast.
 - (xiii) PW-2 could not explain (and the Court failed to appreciate) that if he had met the Appellant for the first time on 06.09.2003, in his office how could he know about the FIR lodged at PS Kavi Nagar, Ghaziabad, U.P. in respect of the Appellant's abduction being a false report.
 - (xiv) The statement of PW-2 was not trustworthy as he has deposed that he had shown the police the restaurant where they had consumed beer; however, the statement of the IO PW-47 was that he did not take PW-2 to verify his version about purchase of liquor from near the border and the DT complex at Gurgaon.
36. It is argued that the prosecution failed to prove ownership of the mobile phone number No.56087690 from which the call was allegedly made to PW-6 Madhvi wife of the deceased. The conduct of PW-2 in not informing the police, though he was fully aware that the deceased was shot by the Appellant, was also unnatural.
37. It is submitted that the prosecution version regarding nabbing of the Appellant on 21.09.2003 on the basis of secret information and recovery of two country made pistols and explosive is suspect and doubtful. PW-4 Sanjay Singhal, who is alleged to be an eye witness to the arrest and recovery of the arms and explosive, did not support the prosecution version. Since the nabbing and arrest of the Appellant on 21.09.2003 is doubtful, the basis of the case was shaky and the Appellant is entitled to be acquitted.

38. It was strenuously canvassed before us that recovery of the country made pistols alleged to have been used in commission of the murder was recovered on 25.09.2003, four days after arrest of the Appellant which gives ample scope to the police to invent the story and plant the alleged recovery. Nobody from the vicinity was cited as a witness to the recovery. Even the landlord (of the premises) was not joined in the proceedings which makes the recovery highly suspect and unbelievable. It is submitted that in the circumstances, the Appellant is entitled to acquittal.
39. On the other hand, it is urged by the learned APP that since PW-2 and the deceased were carrying on business under assumed identities, PW-2 was scared to approach the police and, therefore, his conduct was not unnatural. The evidence produced by the prosecution is credible and reliable and no interference is called for in the order of conviction passed by the Trial Court.
40. PW-2 Shiv Kumar is the star witness of the prosecution. He testified that they (he and the deceased Naresh Kumar) suffered losses in deodorant and perfumes business in Ghaziabad and ran into debt. He and the deceased started the financing business under assumed names, i.e. Raj Kumar Sharma and Rohit Sharma.
41. PW-2 deposed that on 06.09.2003 he and Naresh Kumar were in their office at about 07.30 P.M. The Appellant Dhananjay with co-accused Shalender Kumar Singh went there on a black Pulsar motorcycle; co-accused Shalender Kumar Singh offered some sweets to the deceased and PW-2 as they had purchased a new car. The Appellant proposed that the deceased and PW-2 go to Gurgaon to have fun. At about 08.30 P.M. they all left for Gurgaon in the deceased's Santro XP car. PW-2 was in the driver's seat, the deceased was in the front seat whereas Appellant and co-accused were seated in the rear seat. They all had whisky, beer and then had their dinner at the D.T. complex. They were returning from Gurgaon at about 1:00 A.M. The Appellant and co-accused got down from the car

at ITO bridge near Shakarpur check post under the pretext of urinating. When they returned, co-accused Shalender Kumar placed a knife on the neck of PW-2 and asked him to hand over all his belongings; PW-2 was robbed of his ATM, credit cards and ₹ 1200/- in cash. PW-2 deposed that the Appellant shot the deceased with a country made pistol. PW-2 further testified that he managed to get out of the car and ran towards Yamuna. PW-2 called up the deceased's wife from the mobile phone No.56087690 of deceased Naresh Kumar (which was available with him) at 2:00 A.M and informed her that the Appellant and the co-accused took away her husband Naresh Kumar with them in her husband's car at about 2:00 A.M. on that day. The witness stated that at that time he did not inform deceased's wife that the Appellant had shot her husband. PW-2 also deposed that upon information given by him Amit Kumar (PW-12) brother-in-law of the deceased met him at Maharajpur check post. They both searched for Naresh Kumar on the roads on the assumption that the Appellant might have thrown him from the car.

42. PW-2 stated that the next day i.e. on 07.09.2003 he went to his office at Madhu Vihar where he met the police. He testified that he did not lodge any report with the police immediately after the incident on the night intervening 06-07.09.2003 since he was apprehensive of the police as he was living under a false name.

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43. To establish the offence of commission of murder by the Appellant, the prosecution relied upon :-
- (a) The testimony of PW-2 as ocular evidence,
 - (b) The recovery of country made pistol Ex. P-4 in pursuance of the disclosure statement Ex.PW-30/G, allegedly made by the Appellant,

(c) The recovery of Santro Car bearing No. HR-61-U-3265 from Police Station Manjhola, District Moradabad in pursuance of the disclosure statement Ex.PW-47/I;

(d) The recovery of deformed cartridge from the dashboard Ex.P-7 of the car by PW-10 Aslam Ali on 01.10.2003. The deformed bullet according to PW-37 K.C. Varshney's Ballistic Expert Report Ex.PW-37/A was fired from the Pistol Ex.P-4.

44. It may be noticed that PW-2 gave a detailed account how he along with the deceased, the Appellant and co-accused Shalender Kumar travelled to Gurgaon to have fun and how on their return journey, the Santro Car was stopped at ITO bridge near the police check post Shakarpur under the pretext of the Appellant and the co-accused getting down to urinate; the co-accused keeping a knife on PW-2's neck, robbing him of his valuables and the Appellant's firing a shot at the deceased's neck.
45. The version put forth appears to be too simple and straight forward to be believed by any Court. However, we find too many holes and improbabilities to rely on the same.
46. PW-2 deposed that he and the deceased were living and doing business in Delhi under a false name and their intention was to disappear after pocketing money (of gullible persons approaching them for financing vehicles or of the financiers). The explanation for not reporting the matter to the police is that if PW-2 approached the police, the cat would have been out of the bag, as PW-2's misdeeds would come out in the open and the police would have known about it, due to which they (the police) might have taken some action against him for the illegalities committed by him. The Appellant and co-accused Shalender Kumar were projected as dreaded criminals (as at the time of arrest of the Appellant on 21.09.2003 six crude bombs, two country made pistols, nine live cartridges of 12 bore and one live cartridge of .32 bore are alleged to have been recovered from him). It is improbable that the Appellant and the co-accused allowed PW-

2 to escape on foot while they were in possession of a Santro Car and were well aware that he (PW-2) witnessed commission of his partner's (Naresh Kumar) murder by them. The Appellant was armed with a pistol and as a natural conduct, (as any other criminal who had fired upon the deceased to rob him) he and the co-accused would not have allowed PW-2 to escape.

47. We would not attach much importance to the non-verification of the story (by the IO) by visiting Gurgaon, of the accused, PW-2 and the deceased having whisky and food by examining the concerned shopkeepers. But, we are not inclined to believe that there would not even be a scratch on PW-2's neck when the knife was placed on his neck by co-accused Shalender Kumar and he was robbed of his belongings i.e. cash and ATM cards.
48. Furthermore, if the Appellant and co-accused had robbed PW-2 of his three ATM cards, they would naturally first have asked for the PIN number of the cards, or else the ATM cards were worthless to them. Not only this, the natural course of human conduct would be the Appellant and the co-accused would have taken PW-2 to the nearest ATM center to withdraw the money, using the cards. No evidence was collected by the prosecution showing that the ATM cards were used to make any purchases or if PW-2 stopped all the transactions in respect of the robbed ATM card by informing the concerned Banks. The DD No. 5-A Ex.PW-20/A recorded in PS Anand Vihar clearly shows that an unidentified dead body was recovered at 03:02 A.M. on 07.09.2003. Obviously, the police would have tried to get a clue about identity of the deceased at the earliest to proceed further in the matter. Thus, according to the prosecution, PW-52 SI K.P. Rana first reached Shivani Apartment on the basis of some papers (containing the address of Shivani Apartment) recovered from the dead body of Naresh Kumar and then to Madhu Vihar on the basis of local inquiries made from PW-4 Sukhbir Singh.
49. Self preservation is the basic instinct of every human being. Therefore, one may not report the incident; one may not intervene in a quarrel

apprehending physical or other harm to oneself. The explanation given by PW-2 for not informing the police regarding the incident was that he apprehended harm to himself for doing business in a false name with illegal design. But, how long PW-2 could have concealed the murder of his partner Naresh Kumar is not borne out from his testimony. It is unbelievable that he merrily walked to his office at Madhu Vihar the next morning i.e. on 07.09.2003 at 11:00 A.M. where he was confronted by PW-47 Inspector Satyavir Singh (IO) and on inquiry the whole incident was disclosed by him to the said PW-47. This defies normal human conduct and it is very difficult to believe the story invented by PW-2. We are supported in this view by *Alil Mollah & Anr. v. State of W.B.*, (1996) 5 SCC 369; *Narsinbhai Haribhai Prajapati etc. v. Chhatrasinh & Ors.*, AIR 1977 SC 1753; *Sukhbir Singh & Anr. v. State of Punjab*, 2011 (4) AD SC 69. The Supreme Court in similar circumstances declined to rely on PW-3 an eye witness testimony and held: -

7. On his own showing PW 3 was an employee of the deceased. He was present, according to his testimony, when the deceased was assaulted by the appellants. He admits that after committing the crime the appellants and their associates fled away. The witness, however, not only did not raise any alarm when his master was being assaulted, he did not go near his employer even after the assailants had fled away to see the condition in which the employer was after having suffered the assault. According to him he got frightened and fled away to his home. He also admitted in his cross-examination that neither at his home nor in the village did he disclose what he had seen in the evening of 4th February, 1982 to anyone. Though in the morning of the following day, the witness went to the brick-fields of the deceased-employer and many of his co-employees were also present there, he admitted that he did not disclose the occurrence to anyone of them and went on to concede that even to the Manager of the brick-fields he gave the information about the occurrence only 2-3 days after the occurrence. His statement was recorded by the police on the next day in the afternoon. This conduct of the witness that he did not tell anyone about the occurrence till the next day appears to be rather unnatural and creates an impression that he had not witnessed the occurrence. The

witness however tried to take shelter on the plea that he was "frightened" and therefore till he appeared before the police, he did not pick up courage to inform anyone either in the village or in the brick-fields regarding the occurrence. This plea does not impress us....."

50. PW-6 Madhvi, deceased's wife was aware that her husband and PW-2 were staying and carrying on business in Delhi under assumed names. It is not believable that PW-2 would see the Appellant firing a shot at the deceased and would not disclose it to PW-6 (as is projected by PW-2). According to PW-2 he informed PW-6 that the deceased was abducted (by the Appellant and co-accused). PW-2 says he did not give any information to PW-12 Amit Kumar, brother-in-law of the deceased. However, PW-12 says that he received a telephone call from PW-2 on the night intervening 06-07.09.2003 that Dhananjay and Shalender Kumar had shot the deceased and taken away his Santro car.
51. PW-12 deposed that he asked PW-2 to reach Maharajpur check post. He (PW-12) reached there and PW-2 again narrated the entire incident to him. PW-2 testified that both of them searched for the dead body of Naresh Kumar but could not find it after which both went home. PW-12 Amit Kumar is an Advocate by profession. It defies all logic that he would not immediately take PW-2 to the police and report about the murder of his brother-in-law. On the other hand, PW-12 did not even accompany PW-2 to his office at Madhu Vihar to make further search or to inform the police. We are, therefore, not inclined to believe that the incident of a shot being fired at the deceased took place in the manner alleged by the prosecution.
52. According to the prosecution, the Appellant was arrested on 21.09.2003 at about 06:20 P.M. on the basis of secret information received by PW-31 SI Vinay Tyagi that a 'desperate criminal' involved in heinous crimes was present near the entry gate of ISBT Anand Vihar, on his Black Pulsar motorcycle bearing registration No.UP-16-D 2299 and was in possession of illegal arms and ammunition. According to PW-31 the Appellant was

apprehended and on his search, a black bag slung on his shoulder, two loaded country made pistols of 12 bore and 32 bore, nine live cartridges of 12 bore and one live cartridge of .32 bore and one sweet box containing six improvised crude explosive bombs were recovered.

53. According to the prosecution, the Appellant made a disclosure statement regarding his involvement in case FIR No.349/2003 and further investigation of the case was handed over to PW-52 SI K.P.Rana.
54. It is the case of the prosecution that PW-52 further interrogated the Appellant who made a confessional statement Ex.PW-19/K regarding commission of murder of Naresh Kumar and disclosed that he could help in recovering of the country made pistol (used in the commission of deceased's murder) from the house of his friend Rakesh at Lucknow. The Appellant also disclosed to enable recovery of the Santro car from Moradabad where it was abandoned.
55. The Santro Car was not recovered from the place it was alleged to be abandoned by the Appellant. It was seized by PW-29 SI Udayvir Singh from PS Manjhola where the same was deposited as 'abandoned'. This part of the disclosure statement regarding recovery of the Santro Car is not admissible in evidence as this fact was not discovered in pursuance of the disclosure statement.
56. What is intriguing is that after recovery of the car from PS Manjhola the Appellant, according to the prosecution did not stick to his first disclosure statement and made another disclosure statement Ex.PW-30/G (informing SI Yogesh Kumar) that his first disclosure statement (where he stated that he had concealed the country made pistol in the house of his friend Rakesh at Lucknow) was false and that in fact, the country made pistol and the articles belonging to the deceased were kept by him in his tenanted house at 13/63, Raj Nagar, Ghaziabad.
57. According to the prosecution, SI Yogesh Kumar returned to Delhi on the night of 24-25.09.2003 and the Appellant was kept in the lock up of PS

Vivek Vihar. On 25.09.2003 Inspector Satyavir Singh (IO), SI Yogesh Kumar (PW-30) and other police personnel reached house No.13/63, Raj Nagar, Ghaziabad in a private vehicle, where they met PW-9 Rajnish Kumar. The Appellant took out the house key from under a brick and opened the lock of house No.13/63, Raj Nagar, Ghaziabad and recovered one cream coloured shirt, a sky blue jeans apart from a leather purse with words 'RicoH' and five credit cards belonging to the deceased bearing the name Raj Kumar Sharma / R.K. Sharma and one country made pistol .315 bore. The IO completed the formalities of seizure of all the articles. It is strange that the IO preferred to join a chance witness Rajnish Kumar (PW-9) yet the landlord of the premises was not even questioned if the Appellant was really a tenant or residing in House No.13/63, Raj Nagar, Ghaziabad.

58. It is interesting to note that the Appellant instead of carrying the keys of the tenanted room with him (where he had kept illegal arms like country made pistol) would prefer to hide the keys under a brick. It is logic defying that the Appellant would keep the country made pistol (which was used by him earlier for commission of deceased's murder) and would carry other two pistols with him to Anand Vihar, ISBT where he was allegedly apprehended along with other ammunition. It is unbelievable and highly improbable that the IO would not make an attempt to either join the landlord at the time of the search or would not even examine him to confirm if the Appellant was really a tenant in the premises owned by him. In a similar case, circumstances leading to the recovery of incriminating materials was disbelieved by a Division Bench of this Court in *Smt. Saroj v. State*, 2003 (3) JCC 616 and *Rakesh v. State*, 2010 (2) JCC 1529. To say the least, the recovery of the country made pistol in the circumstances stated above is not reliable. We are, therefore, not inclined to believe the same.

59. The Santro Car No. HR-61-U-3265 was recovered from PS Manjhola on 24.09.2003 and was brought to Delhi the same night. PW-47 IO and other

police officers were aware that Naresh Kumar's murder was committed in that car. The IO preferred to get the car photographed by PW-25 Constable G. Ganesh only on 29.09.2003. These photographs could have been taken on 25.09.2003 or at the most on 26.09.2003 in the Police Station where the car was kept. The car could have been inspected by the IO and other police officers (at the time of recovery) on 24.09.2003 or immediately thereafter in Delhi to find out if there was any hole in the dashboard. In fact, the piercing hole by bullet in the dashboard would have been apparent to even a layman. The IO, however, summoned a mechanic PW-10 Aslam Ali only on 01.10.2003 who pulled out the dashboard and extracted a deformed cartridge alleged to have been fired from the pistol Ex.P-4. As stated earlier country made pistol Ex.P4 and one deformed bullet were sent to the Ballistic Expert PW-37 K.C. Varshney, who by his report Ex.PW-37/A after test firing gave a report that the deformed cartridge Ex.P-5 recovered from the dashboard was fired from the pistol Ex.P-4. We are not inclined to believe the recovery of the cartridge from the dashboard by PW-10 on 01.10.2003 because of the delay of seven days. Also, the hole caused by a fired cartridge was too prominent in a dashboard to go unnoticed by the discerning eyes of several police officers including the IO.

60. The prosecution had collected evidence in the form of call records of phone number 9818524955 and 56087690 which showed that there were some communication between these two numbers six times on the night intervening 06-07.09.2003. Though, the prosecution has not produced any evidence to show who were subscribers of the said two telephone numbers; yet we are inclined to believe that some talks might have taken place between PW-2 and PW-6 Madhvi, the deceased's wife. This talk could have been regarding abduction of the deceased by Dhananjay as is sought to be proved through PW-2 and PW-6 or by any other person. In the circumstances narrated earlier, we are not inclined to believe that a shot was fired at the deceased by the Appellant on 07.09.2003 at 2:00

A.M. near the check post, Shakarpur as is the case of the prosecution. It may be true that the deceased was taken away by the Appellant. Admittedly the deceased was found dead at 3:02 A.M. vide DD No.5-A, Ex.PW-20/A. However, the Court cannot make any alternative case of the deceased being last seen alive in the company of the Appellant, as it would be only in the realm of speculation. Moreover, the Appellant did not have any opportunity to meet such a case. A reference can fruitfully be made to *Bhagirath v. State of M.P. 1976 (1) SCC 20* where the Supreme Court held as under:-

“The prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. Nor can the Court, on its own, make out a new case for the prosecution and convict the accused on that basis.

When the substratum of the evidence given by the eyewitnesses examined by the prosecution was found to be false, the only prudent course, in the circumstances, left to the Court was to throw out the prosecution case in its entirety against all the accused.”

A similar view was taken later by the Supreme Court in *Suchand Pal v. Phani Pal, 2003 (11) SCC 527*.

61. In view of the improbabilities/ contradictions pointed out coupled with the discrepancies mentioned in para 35 of this judgment it is not established beyond all reasonable doubt that the deceased was shot at by the Appellant and thus, he could not have been held guilty of murder. The impugned judgment and order on sentence, therefore, cannot be sustained.

FIR No.367/2003

62. Turning to the Appellant's arrest in case FIR No.367/2003 and recovery of one black bag containing two loaded country made pistols of 12 bore and 32 bore, nine live cartridges of 12 bore and one live cartridge of .32 bore and one sweet box containing six improvised crude explosive bombs, apart from the official witnesses, the prosecution examined PW-54 Sanjay

Singhal. He deposed having joined PW-30 SI Vinay Tyagi and PW-42 SI Atul Tyagi and accompanied them to ISBT Anand Vihar. After sometime, one person identified as the Appellant reached there with a black coloured bag. On opening the bag, 3-4 sweet boxes were found. One pistol like weapon was recovered. After sometime, other officials arrived. He deposed that he could not tell what was kept in those sweet type boxes. The witness was allowed to be cross examined by the Public Prosecutor for the State. He denied having made the statement Ex.PW-54/A to the police. The witness denied that the country made pistol was recovered from the “*dub*” of the pant of the Appellant. He denied that on opening the bag nine cartridges and one loaded *katta* was recovered in his presence. He also denied that one sweet box contained six plastic balls which were country made bombs. The witness further denied that the bomb detection team was called in his presence or that photographs of the articles kept in the sweet boxes were taken.

63. In many cases, witnesses turn hostile for variety of reasons. Thus, if a public witness turns hostile, it is not necessary that the official witnesses are to be painted as unreliable and their testimonies are to be discarded. However, as we have stated earlier the conduct of the various police officers including the IO in recording successive disclosure statements and shifting the place of recovery to the place of their choice as per their convenience does not inspire any confidence. SI Yogesh Kumar’s and Inspector Satyavir Singh (IO) omission to notice the hole created by the bullet in the dashboard of the Santro Car till the dashboard was opened and the used bullet was retrieved from the dashboard by PW-10 etc make us skeptical about the recovery of two country made pistols, six crude bombs and nine cartridges to be suspect and incredible. The Appellant is in custody for about the last eight years and even if he had been convicted under Section 25 Arms Act, 1995 or under Section 4 and 5 of Explosive Substances Act, 1884 he would not have been sentenced to imprisonment for more than the period already undergone by him. However, in the

circumstances mentioned above, it would be highly unsafe to rely upon the testimony of the witnesses with regard to the recovery of arms and explosives on 21.09.2003 at about 6:20 P.M. at ISBT Anand Vihar.

64. We are of the opinion that the Appellant is entitled to the benefit of doubt. For the above reasons, the Appeal has to succeed, we allow the same. Accordingly we set aside the judgment and order of the Trial Court and acquit the Appellant of the charge framed against him. He is hereby ordered to be set at liberty.

Crl. M. (Bail) No.236/2011

65. In view of the above, this application has become infructuous, the same is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MAY 31, 2011
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