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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 12.8.2013

CRL.A. No.172 /2009

SANDEEP @ DHILLU

..... Appellant

Through: Mr. Sandeep Sanduja, Advocate

versus

THE STATE NCT OF DELHI

..... Respondent

Through: Mr. Sunil Sharma, Additional Public
Prosecutor for the State

AND

+ CRL.A. No. 291/2009

KRISHAN @ SONU

..... Appellant

Through: Mr. M.S. Rohilla, Advocate

versus

THE STATE NCT OF DELHI

..... Respondent

Through: Mr. Sunil Sharma, Additional Public
Prosecutor for the State

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

JUDGMENT

KAILASH GAMBHIR, J.

1. By this order we propose to decide the two separate Criminal Appeals preferred by Sandeep and Krishan, both accused in FIR No. 781/2004 to challenge the judgment dated 31.1.2009 and order on sentence dated

7.2.2009 whereby both the appellants were convicted for committing the offence punishable under Section 302 IPC read with Section 34 IPC and sentenced to imprisonment for life with fine of Rs. 25,000/- each and in default, to undergo one year rigorous imprisonment.

2. The case in hand relates to the unfortunate murder of a person known as Ganesh who instead of participating in the celebration of birthday party of his wife met with a tragic end at the hands of the accused persons.

3. The case of the prosecution in brief is that on 26.12.2004 one Surender Soni went to the premises bearing No.B-1/35 Janakpuri, Delhi to handover the keys of the showroom to its owner. On the same day, in the adjoining house i.e. premises bearing No.B-1/34 Janakpuri, Delhi there was a birthday party of the wife of Ganesh being celebrated. At about 9.00 p.m. Ganesh asked his friend Anil Sharma to accompany him to Hari Nagar for collecting some amount of committee from another friend. At about 9.30 p.m. Anil and Ganesh returned back and stopped their car in front of their house. At that point of time they saw two boys coming on a motorcycle who stopped the motorcycle in front of House No.B-1/35 Janakpuri, Delhi and after getting down from the motorcycle they went inside House No.B-1/35 Janakpuri, Delhi. Thereafter, both the boys came out of the house and started running towards the motorcycle on being followed by Surender Soni

who raised alarm by shouting “*Pakado Pakado*”. One of those boys was having a bag in his hand. Those boys tried to flee on the motorcycle but at that point of time Anil Sharma and Ganesh tried to intervene. Ganesh came in front of the motorcycle. On this pillion rider Sandeep fired at Ganesh. The bullet hit on the neck of Ganesh due to which Ganesh fell down. Both the assailants fled on the motorcycle. The injured was removed to the hospital by Anil Sharma with the help of one Madan Shreshta firstly to Amar Lila Hospital then to DDU Hospital where Ganesh succumbed to his injuries. During investigation, the accused persons were arrested and they were produced for TIP. Accused Sandeep had refused to join the TIP while accused Krishan was identified by Anil Sharma. After completion of the investigation, chargesheet against the accused persons was filed. Both the accused persons were charged for the offence punishable under Sections 397/302/34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 28 witnesses. The statements of the accused persons were recorded under Section 313 Cr.P.C., wherein the accused persons denied the allegation of the prosecution as levelled against them in the evidence. The accused persons did not lead any evidence in their defence. Based on the prosecution evidence, both the accused persons were convicted under section 302/34 IPC. Both the accused

persons were sentenced to imprisonment for life along with fine of Rs. 25,000/- each. Feeling aggrieved by the order of conviction and the order on sentence, the appellants have approached this Court for assailing the finding of the learned Additional Sessions Judge.

5. We take up the appeal filed by the co-accused Krishan first before dealing with the case of accused Sandeep in Criminal Appeal No.172 of 2009 who had shot firearm at the deceased.

6. Addressing arguments on behalf of the appellant Krishan in Crl. A. No. 291/2009, Mr. M.S. Rohilla, submitted that both the accused persons were acquitted from the charges framed against them under Section 392 read with Section 34 of IPC and under Section 397 read with Section 34 of IPC as the prosecution witness, PW-1– Surender Soni, did not support the prosecution case that these accused persons had snatched the bag from him. Learned counsel for the appellant further submitted that PW-1 in his deposition before the court also deposed that the bag in question which was allegedly snatched by the accused Sandeep only contained keys and no money. Learned counsel for the appellant further submitted that the said PW-1 was the star witness of the prosecution and once he turned hostile, there was nothing left to implicate the present appellant for the alleged crime of robbery. Learned counsel for the appellant also argued that even

there was no recovery of any bag from either of the accused persons and therefore, one cannot connect the accused persons with the alleged offence of robbery.

7. So far as the role of the appellant in the commission of offence punishable under Section 302 of IPC is concerned, learned counsel for the appellant laid much emphasis on his argument that as per the prosecution's case the appellant was only driving the motor cycle while his pillion rider, accused Sandeep had fired a gun shot at the deceased Ganesh when he came in front of the motor cycle at the time when the appellant and the co-accused were trying to escape after robbing PW-1's bag. The contention raised by learned counsel for the appellant was that the common intention under Section 34 of IPC cannot be attributed against the appellant Krishan so far as the murder of Ganesh was concerned, as the appellant had never had any common intention to commit the murder of Ganesh. Learned counsel for the appellant further argued that no evidence was produced on record by the prosecution to establish that the appellant Krishan had shared any common intention with the co-accused Sandeep to murder the said victim – Ganesh and at best the appellant could be attributed for having the common intention for committing the alleged offence of robbery.

8. Learned counsel for the appellant also argued that even as per the

prosecution, the appellant had not participated in any manner or committed any overt act in the commission of such offence of murder of Ganesh and therefore, the learned Additional Sessions Judge has committed grave illegality in connecting the appellant with the offence of murder.

9. Learned counsel for the appellant further argued that it is a settled legal position that a mere disclosure statement made by the accused is not admissible in the eyes of law in the absence of any recovery made by virtue of such disclosure statement and the appellant cannot be held guilty of committing the said offence of murder alongwith the co-accused merely on the basis of such disclosure statement.

10. Learned counsel for the appellant further argued that PW-4, on whose statement the FIR was recorded and who turned hostile later, was not under any pressure to give a contradictory statement in his cross-examination as he no where deposed that he was under threat or pressure to appear as a prosecution witness.

11. In support of his arguments, learned counsel for the appellant placed reliance on the following judgments:

1. ***Aizaz & Ors. v. State of U.P., 2008, Cri LJ 4374 SC***
2. ***Smt. Tripta v. State of Haryana, AIR 1993 SC 948***
3. ***Rama Shankar & Anr v. State of Haryana, AIR 1996 SC 3532***

4. *Balkar Singh & others v. State of Punjab, AIR 1994 SC*
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12. Opposing the present criminal appeal, Mr. Sunil Sharma, APP for the State argued that both the accused persons had shared common intention at the time of firing the gun shot on the deceased to commit the murder of the deceased Ganesh. Learned counsel also argued that both the accused persons came to the said premises with a view to commit robbery and both of them were fully prepared to meet any kind of eventuality including committing the murder of any person who tries to intervene. The contention raised by the learned counsel for the State is that it cannot be believed that the appellant Krishan was not aware or had no knowledge with respect to the co-accused Sandeep carrying a loaded pistol in his pocket. Learned counsel further argued that it is not the case of the appellant Krishan that he had met Sandeep by chance and therefore was not aware of his intention. Learned counsel further argued that the said incident of firing had taken place in the presence of accused Krishan and he did not make any endeavour to stop Sandeep from firing shot at the deceased. Learned counsel also argued that even the subsequent conduct of the appellant Krishan facilitates his own as well as Sandeep's escape and hence establishes their common intention in committing the act of robbery and

murder of Ganesh.

13. In support of his arguments, learned APP for the State placed reliance on a judgment of the High Court of Himachal Pradesh in the case of *Dheeraj Verma & Anr. v. State of Himachal Pradesh*, decided on 2.9.2009.

14. The short issue which we are confronting so far the case of the appellant Krishan is concerned is whether he had shared common intention with the co-accused Sandeep in committing the murder of Ganesh. The main contention raised by the learned counsel for the appellant was that the common intention on the part of Krishan under Section 34 IPC could be attributed only up to commission of the alleged offence of robbery but not thereafter. Learned counsel also raised contention that the prosecution has not produced on record any material or evidence to establish that the appellant had shared any common intention with Sandeep to carry out the murder of Ganesh. It is also the case of the prosecution that there wasn't any overt or covert act committed by the appellant Krishan in the commission of the said crime of murder by the co-accused Sandeep as Krishan was merely driving the motorcycle.

15. In order to determine whether the criminal act was done in furtherance of a common intention, regard must be given not solely to a particular fact, but to all the facts and circumstances in a given case. There

exists no straight-jacket formula for applying the principles of common intention. Inference with regard to existence of common intention in committing a particular act must be drawn from the totality of the facts and circumstances of each case. For enjoining a constructive liability under Section 34 IPC on an accused for the criminal act done by the other, it is necessary to establish that such criminal act was done pursuant to a pre-arranged design. Undoubtedly, it is not possible to procure direct evidence to prove the intention of the accused sought to be convicted with the aid of Section 34, therefore, in most of the cases the intention of such a person is gathered from the relevant facts and circumstances surrounding a particular case.

16. In *Brijlal Pd. Sinha v. State of Bihar, 1998 5 SCC 699*, the Apex Court in the following Para held as under:-

"11. ...The liability of one person for an offence committed by another in the course of a criminal act perpetrated by several persons will arise Under Section 34 of the Indian Penal Code only where such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention will, of course be difficult to get and such intention can only be inferred from the circumstances. But the existence of a common intention must be a necessary inference from the circumstances established in a given case. A common intention can only be inferred from the acts of the parties. Unless a common intention is established as a matter of necessary inference from the proved circumstances the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should

establish, without any room for doubt that a meeting of minds and a fusion of ideas had taken place amongst difference accused and in prosecution of it the overt acts of the accused persons flowed out as if in obedience to the command of a single mind. If on the evidence there is doubt as to the involvement of a particular accused in the common intention, the benefit of the doubt should be given to the said accused person."

17. In *Suresh & Another v. State of U.P.*, (2001) 3 SCC 673, the Apex Court after referring to number of its earlier judgments held that *"it is difficult to conclude that a person, merely because he was present at or near the scene without doing anything more, without even carrying a weapon and without even marching alongwith the other assailants, could also be convicted with the aid of Section 34 IPC for the offence committed by the other accused."*

18. In *Dharam Pal & Ors. v. State of Haryana*, AIR 1978 SC 1492, this court laid down the following tests for Section 34 IPC to be applicable against the co-accused and held as under:-

"It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf.

A criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and

his companions who are sought to be constrictively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender."

19. Seeing the facts of the present case in the light of the legal principles discussed above, undoubtedly, appellant Krishan was not carrying any fire arm in his pocket at the time of commission of the offence and it was only the co-accused Sandeep who was carrying a pistol in his pocket. It is also an admitted fact that it was Sandeep alone who had fired a gun shot at Ganesh when Ganesh came in front of the motorcycle in a bid to stop and catch hold of both the accused persons. It is also an admitted fact that when accused Krishan turned the motorcycle towards the Central verge, it was at that point of time that the co-accused Sandeep brought out a pistol from his pocket and fired a shot at Ganesh, which gunshot ultimately resulted in the death of Ganesh. In *Arun v. State of Tamil Nadu*, AIR 2008 SC 1258, in circumstances identical to the facts of the present case, wherein one of the accused persons, A-4, had fired a gun shot and as a result caused death of

the person intervening to resist the act of robbery by A-4 along with the co-accused, the Apex Court while deciding the appeal in favour of the co-accused sought to be made liable for committing murder of the deceased with the aid of section 34 IPC, after taking support of the above authorities, observed that:-

"30. ...In the present case, the FIR shows that at about 9.15 P.M. the appellant and A-4 entered the house and stood there; on seeing them, the deceased got up from his chair and moved towards them "asking them who are they" whereupon A-4 shot the deceased causing bleeding injury due to which deceased fell down, the appellant and A-4 ran away towards the street. The contents of the FIR and the evidence of PW-1 and PW-2 read together make it clear that the appellant was not armed as erroneously held by the High Court. In the circumstances, it would be impossible to draw any inference that A-4 committed murder in furtherance of common intention shared by the appellant. In fact, neither there is any charge nor any evidence even as against A-4 that he shared common intention along with the appellant to commit murder of the deceased. There must be more than one person to share common intention to commit criminal act for attracting the applicability of Section 34 IPC. It is clear from the evidence that A-4 did not act conjointly with the appellant in committing the murder. If he did not act conjointly with the appellant, the appellant could not have acted conjointly with A-4.

31. On consideration of the evidence and the material available on record and in the light of the legal principles referred to hereinabove, it is clear that the accusations made against the appellant making him constructively liable for the criminal act of murder committed by A-4 with the aid of Section 34 IPC were not established."

20. Thus, in the present case having similar set of facts, appellant Krishan cannot be enjoined with constructive liability for the criminal act of committing murder of the deceased by the accused Sandeep under section

34 IPC. The judgment *Dheeraj Verma (supra)*, cited by the learned APP for the State is not applicable to the facts of the present case. In *Dheeraj Verma (supra)*, the co-accused had participated in the offence of murder by supplying the cartridges to the main accused and with such help the main accused had reloaded the gun and in those facts the High Court of Himachal Pradesh took a view that both the accused had shared common intention to fire a shot at the victim. Distinguishing the facts of the case in hand with *Dheeraj's* case, there is no evidence brought on record by the prosecution that the appellant Krishan had any knowledge about the co-accused Sandeep being armed with a pistol. There is also no evidence on record that the accused Krishan's instigation had provoked Sandeep to shoot fire arm at the deceased. Mere fact that the appellant was driving the motorcycle in which the other co-accused was a pillion rider would not put him in the same category as that of the accused Sandeep in the absence of any cogent evidence to rope him for the said offence of murder. The appeal filed by the appellant Krishan is therefore allowed.

21. This brings us to deal with the appeal filed by Sandeep, who is the other accused. Facts need not be repeated except to state that this appellant was also acquitted from the charges of offence committed under Section

392/397/34 but was convicted for the offence punishable under Section 302/34 of IPC.

22. Mr. Sandeep Sanduja, Advocate appearing for the appellant raised manifold contentions to assail the findings of the learned Additional Sessions Judge, which as per the learned counsel for the appellant, are erroneous and based upon conjectures and surmises.

23. Addressing the arguments, Mr. Sanduja submitted that the learned trial court failed to appreciate that the disclosure statement of one Mukesh, to whom the accused Sandeep claimed to have handed over the weapon of offence in his disclosure statement placed on record as Ex. PW 21/A, was not proved in the trial of the present case and no recovery was affected pursuant to that disclosure statement. Learned counsel for the appellant also argued that Mukesh was arrested in FIR No. 542/2005 registered at Police Station Paschim Vihar, Delhi, but his arrest memo and personal search memos were not proved by the prosecution during the trial of this case. Learned counsel for the appellant further argued that PW-4, Anil Sharma was the prime eye-witness but he turned completely hostile and therefore the learned trial court wrongly placed reliance on his testimony to pass an order of conviction against the appellant. Learned counsel for the appellant

further argued that in his first statement based on which the FIR was registered, PW-4, Anil Sharma gave no description of any of the accused and rather his statement was silent about the exact description of the accused persons. Contention raised by the learned counsel for the appellant was that PW-4, Anil Sharma failed to disclose as to whether the assailants were Indian, Chinese, Sikh or Hindu, their age group, their height, etc. and in the absence of such description, the refusal of the appellant to participate in TIP proceedings cannot be held to be unjustified. Counsel further submitted that even the identification of appellant Sandeep during examination-in-chief of PW-4, Anil Sharma would not help the case of the prosecution.

24. The other contention raised by learned counsel for the appellant was that as per the prosecution case, PW-4, Anil Sharma took injured Ganesh in a car to the hospital and if that be the case, then the MLC, proved on record as Ex.PW-2/A should have revealed his name in the relevant column '*brought by*' but the said MLC suggests that the injured was admitted by PW-22, ASI Balbir Singh and PW-5, Madan Shreshta. Another contradiction brought out by learned counsel for the appellant was that PCR Form, Ex. PW 9/A, records '*kuchh log aaye mere bhai ko goli maar kar chale gaye*', while as per the prosecution case, two assailants came on motor

cycle when the incident in question had happened. Learned counsel for the appellant further argued that the said information given by PW-4, Anil Sharma was that some people had shot dead his brother while the admitted fact is that the deceased Ganesh was not the brother of PW-4, Anil Sharma. Learned counsel for the appellant further argued that even the registration number of the motor cycle that the assailants were riding was not disclosed. Learned counsel for the appellant further argued that Part IV of the PCR Form said that '*teen aadmi the*' and page 2 of the said Form states that PW-1, Surender Soni gave the bag to the servant Dev Shree and the assailants had snatched the bag from him but the prosecution failed to examine the said Dev Shree from whom the said bag was allegedly snatched by the assailants.

25. Learned counsel for the appellant also argued that the car in which PW-4, Anil Sharma claimed to have taken injured Ganesh to the hospital was not inspected and examined either by the Investigating Officer of this case or by the crime team. Learned counsel for the appellant further submitted that even the movement register of the ambulance through which the injured Ganesh was taken from Amar Leela Hospital to DDU Hospital was not proved on record. Learned counsel for the appellant also argued that the motor cycle which was used by the assailants was registered in the name

of one Surender Singh Bedi, but he was also not examined by the prosecution. Contending that no credibility can be attached to the scaled site plan dated 16.9.2005, proved on record as Ex.PW-14/A, learned counsel for the appellant argued that if the rough site plan dated 26.12.2004, proved on record as Ex.PW-28C, prepared at the spot of incident does not show existence of any electricity pole or light near the place of occurrence, then how come the scaled site plan gives the location of electricity pole near the place of occurrence. The contention raised by learned counsel for the appellant was that the prosecution failed to give any clarification with regard to the variation in the two plans which were made with the time gap of more than eight months.

26. Learned counsel for the appellant also submitted that PW-13, Ct. Jai Bhagwan, who first visited the site of the incident along with PW-28, SI Harinder Singh, clearly stated in his cross-examination that there was fog at the place of incident and with the existence of the fog at the spot, PW-4 Anil Sharma cannot be expected to have seen the faces of the assailants. Learned counsel for the appellant also argued that PW-13 in his examination-in-chief stated that after about half an hour of his reaching the spot, one Anil Sharma from the crowd told that he had witnessed the incident while PW-12, Ct. Jai

Veer in his testimony deposed that on his reaching the spot, Anil Sharma

Crl. A. Nos. 172 & 291/2009 Page 17 of 31

told that he had seen the incident. The contention of the learned counsel for the appellant was that there was a clear contradiction in testimonies of these two witnesses. Learned counsel for the appellant also argued that there are contradictions in the statements of PW-12, PW-22 and PW-28 with regard to some distinctive features of the site.

27. Learned counsel for the appellant also argued that the case of the prosecution was that the birthday of the wife of Ganesh was being celebrated in the house bearing No.B-1/34, Janakpuri on the date of incident and neither the wife of Ganesh nor anybody else came forward to join the investigation.

28. Based on these submissions, learned counsel for the appellant urged that since the prosecution has failed to prove its case beyond reasonable doubt, therefore, the order of conviction passed by the learned trial court, which is based on non-appreciation of relevant facts and misconception of the correct legal position, needs to be set aside.

29. In support of his contentions, learned counsel for the appellant has placed reliance on the following judgments:-

1. Bollavaram Pedda Narsi Reddy and Others v. State of Andhra Pradesh, (1991) 3 SCC 434

2. *Mahabir v. State of Delhi, AIR 2008 SC 2343*
3. *Sadhu Ram and Anr. v. State of Rajasthan, 2003 (2) RCR (Cri) 798*
4. *Anil Kumar @ Pintu v. State of Bihar(now State of Jharkhand), 2008(2) Crimes 139 (SC)*
5. *State of Madhya Pradesh v. Chamru @ Bhagwandas and others, 2007 Cri. L.J. 3509*
6. *State of Orissa v. Harachand Khilei & Ors., 2008 Cri.L.J. (NOC) 524 (ORI.)*
7. *Kamal D. Gujar v. State of Madhya Pradesh, 2008 Cri.L.J. (NOC) 532 (M.P.)*

30. Mr. Sunil Sharma, learned Additional Public Prosecutor for the State on the other hand supported the judgment of the learned trial court and canvassed for upholding the same. Learned Additional Public Prosecutor for the State also argued that the prosecution has successfully proved its case against both the appellants for the offence committed by them under Section 302 of IPC. Learned Additional Public Prosecutor also argued that in fact, the present case is an open shot case as the testimony of PW-4, Anil Sharma, an eye-witness of the said murder, is duly supported by the medical and the forensic evidence besides it duly corroborating the evidence led by the other prosecution witnesses.

31. We have heard learned counsel for the parties at considerable length and have also had an advantage of going through the trial court record.

32. In all criminal matters, the two important issues that are to be tested are; first, that whether the alleged offence at all was committed and if the answer to this is in the affirmative, then second, who had committed such an offence. So far as the first issue is concerned, rarely there arises any dispute or controversy, as sooner or later the fact of commission of offence comes to the knowledge of the police. The main difficulty arises in finding out an answer to the second issue i.e. who had committed the offence. It is the prosecution that is enjoined upon such a task of searching out the actual assailant of the crime. While the law requires establishing a prima facie case for charge-sheet purposes, the law for conviction is that the guilt should be proved beyond a reasonable shadow of doubt. The standard of proof required to prove a person guilty of an offence is remarkably high in Indian Courts. The prosecution has to prove all the incriminating facts and circumstances against the accused and then has to persuade the court that the said circumstances unmistakably point out fingers at the guilt of the person sought to be implicated. This task becomes onerous in the light of various hurdles coming in the way of our prosecution wing. One of the difficulties faced by the prosecution is that our investigating machinery is

not fully equipped with the modern technology and sophisticated equipments to carry out the investigation in a scientific manner. Attention may also be drawn to another legal impediment that even the voluntary confession of an assailant made before the police is not acceptable as such in the criminal jurisprudence. Another hardship faced by the prosecution is of the witnesses turning hostile. It has been rightly observed by the **Committee on Reforms in Criminal Law System headed by Justice Malimath**, Vol. I at Pg 51, that *“Nothing shakes public confidence in criminal justice delivery system more than the collapse of the prosecution owing to witnesses turning hostile and retracting their previous statements”* Such impediments faced by the prosecution lead to appalling consequences. As a result of such handicap, the actual criminals/assailants get acquitted while the innocents suffer the punishment for the acts which they never committed. It is a settled principle of criminal jurisprudence that unless otherwise proved, the person facing the criminal trial must be deemed to be innocent. The philosophy behind this cardinal principle of law is ***"It is better that ten guilty persons escape than that one innocent suffer"*** as expressed by the English jurist **William Blackstone** in his seminal work, ***Commentaries on the Laws of England***, published in the 1760s.

33. Adverting to the facts of the case at hand, it is not in dispute that the deceased Ganesh was murdered on the evening of 26.12.2004 and he had received a gun shot at his neck. As per the MLC Report proved on record as Ex. PW 2/A, the deceased had received a gun shot injury and when he was brought to the DDU Hospital, he was having entry wound at junction of lower and middle one-third of right sternocleidomastoid muscle. The injured was initially brought to Amar Leela Hospital in an unconscious state. Then when he was brought to DDU Hospital, he did not respond to the treatment and ultimately succumbed to injuries at 2.55 a.m. PW-7 has conducted the post mortem and as per the Post Mortem Report, proved on record as Ex. PW-7/A, the death was opined to be caused due to hemorrhage shock as a result of fire armed injury in the right side of the neck of the deceased. The prosecution thus has successfully proved on record the death of Ganesh due to fire armed injury on his neck. The occurrence of the incident thus cannot be of any dispute and it is also not in dispute that the said crime was committed by the assailants while they were on the motor cycle.

34. As per the case of the prosecution, the motor cycle was being driven by Krishan, co-accused and appellant Sandeep was the pillion rider and Sandeep had fired the shot on Ganesh when Ganesh came in front of the motor cycle so as to stop the appellants from fleeing from the spot after

CrI. A. Nos. 172 & 291/2009 Page 22 of 31

committing robbery. The bullet was fired by Sandeep at the neck of deceased Ganesh, as a result of which the deceased fell down there and then, and thereafter taken to the hospital by PW-4, Anil Sharma after he had called the PCR. The appellant cannot dispute the presence of PW-4, Anil Sharma at the spot of incident as admittedly, it is Anil Sharma, as per PCR form proved on record as Ex.PW-9/A, who had lodged the report on 26.12.2012 at about 9.28 p.m. It is thus preposterous on the part of appellant to allege that PW-4, Anil Sharma is a witness planted by the prosecution. Mere fact that in the MLC, the name of Anil Sharma was not recorded would not prove that he was not present at the spot or was not an eye witness to the incident. We also do not find any merit in the contention raised by learned counsel for the appellant that there are discrepancies in the recording of the first information given by PW-4 to the PCR which records that *'kuch log aaye mere bhai ko goli maar kar chale gaye'* as in fact Ganesh was not the brother of Mr. Anil Sharma, since no ordinary man can be expected to remain in normal senses finding his close family friend being murdered for no fault of his and give an apposite statement in such a haywire situation. There can also be misrecording of message by the PCR at given times. The appellant however cannot dispute the fact that the PCR

has correctly recorded the name of the informant as Anil Sharma and this by itself proves the factum of presence of PW-4, Anil Sharma at the spot.

35. We also do not find any merit in the submission of the learned counsel for the appellant that the disclosure statement of Mukesh in FIR No. 542/05 was not proved in the trial of the present case. The case file of FIR No. 542/05 was placed before the learned trial court which contained the said disclosure statement of Mukesh. It is pertinent to mention here that the prosecution in the present case has duly proved on record the disclosure statements of the appellant Sandeep, as Ex. PW-11/A in case of FIR No. 522/05 and Ex. PW-21/A in the present case, wherein he had clearly stated that the pistol used in the crime was handed over by him to Mukesh and he can get the same recovered from Mukesh. It may be noted that pursuant to such statements, the pistol was in fact recovered from Mukesh when arrested in FIR No. 542/05, as per the depositions of PW-19, ASI Kamal Singh investigating the case FIR No. 542/05 and PW-28, Inspector Harender Singh investigating the present case. Such evidence regarding the recovery of pistol affected on the basis of the discovery statement in case FIR No. 522/05 cannot be overlooked by the court on the ground that such statement was made by the accused in another case. The Apex court in the

case of *State of Rajasthan v. Bhup Singh, (1997) 10 SCC 675*, while
Crl. A. Nos. 172 & 291/2009

holding that it is immaterial whether the discovery statement is made by the accused in the same case or a different one, observed that:-

"13. The High Court sidestepped the evidence regarding recovery of pistol and the statement of the accused which led to it on the mere ground that the pistol was recovered in connection with another case. That other case was registered on 9.7,1985 as Crime 116 of 1985 against the respondent and he was arrested on 22.7,1985 in connection therewith. PW12-SHO of Raising Nagar Police Station has deposed in this case that when respondent was questioned he told him that the pistol was wrapped in a bag and was buried near his house. When respondent was taken to that place he disinterred Article 4 - pistol and handed it over to the police.

14. It is clear from the above evidence that PW12 discovered the fact that respondent had buried Article 4 - pistol. His statement to the police that he had buried the pistol in the ground near his house, therefore, gets extricated from the ban contained in Section 25 & 26 of the Evidence Act as it became admissible under Section 27. The conditions prescribed in Section 27 for unwrapping the cover of ban against admissibility of statement of the accused to the police have been satisfied. They are : (1) A fact should have been discovered in consequence of information received from the accused; (2) He should have been accused of an offence; (3) He should have been in the custody of a police officer when he supplied the information; (4) The fact so discovered should have been deposed to by the witness. If those conditions are satisfied, that part of the information given by the accused which led to such discovery gets denuded of the wrapper of prohibition and it becomes admissible in evidence. It is immaterial whether the information was supplied in connection with the same crime or a different crime. Here the fact discovered by the police is not Article 4 - pistol, but that the accused had buried the said pistol and he knew where it was buried. Of course, discovery of said fact became complete only when the pistol was recovered by the police."

Be that as it may, even the factum of recovery of the pistol pursuant to the disclosure statement made by Sandeep i.e. Ex. PW-21/A in the present case

very well supplements the case of the prosecution. Thus, no weightage can be attached to the above argument raised by the counsel for the appellant also.

36. We also do not find any merit in the submission of learned counsel for the appellant that PW-4, Anil Sharma gave no description of the assailants in his statement made to the Investigating Officer and hence the identification of the assailants by PW-4 would be of no value. It is true that PW-4, Anil Sharma did not mention about the physical features of the assailants i.e. whether they were tall or short, thin or hefty, etc. in his statement before the police, but it also true that he clearly mentioned in his statement that if the assailants were brought before him, he would be able to identify them. Undeniably, the description of such persons by an eye witness could have led more credence to his first version to the police but mere absence of such description alone would not raise doubts on the correctness of such statement to the police. It is a settled legal position that the corroborative evidence of an eye witness cannot be discarded merely because of some contradictions in his deposition. *While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise*

*the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. (Ref. **State of U.P. v. M.K. Anthony, AIR 1985 SC 48**). Also, the testimony of PW-4, Anil Sharma so far his initial statement made to the police and his examination-in-chief is concerned, the same remains totally trustworthy and of unimpeachable character. This eye-witness had also identified the present appellant who was present in court on the date of his examination-in-chief. This witness had also deposed that he was receiving threats from the accused persons to not to depose against them and a complaint to this effect was also lodged by him in the Police Station. This witness was not cross-examined by the accused persons on the date of recording of his examination-in-chief on 23.5.2006 and was later cross-examined on 19.7.2006 after a gap of more than one year when in his cross-*

examination he had contradicted his earlier statement by saying that “*he saw the assailant from left side and it was dark at the time of incident*”. He further deposed that he had told to the Investigating Officer that he was not confirmed about the identity of the accused persons as he had seen their shadows only. This change in the stand of the witness has to be viewed in the background of the threats received by him from the side of the accused persons and also the time gap in between his examination-in-chief and cross-examination. It is a settled legal position that even the evidence of a hostile witness need not be rejected in totality but can be accepted by the courts after finding due corroboration and considering the same with care and caution. Here, it would be apt to refer to the following observations of the Hon’ble Supreme Court in the recent case of *Rohtash Kumar v. State of Haryana*, 2013 (7) SCALE 472:-

“19. It is a settled legal proposition that evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and cross examined him. The evidence of such witnesses cannot be treated as effaced, or washed off the record altogether. The same can be accepted to the extent that their version is found to be dependable, upon a careful scrutiny thereof.

20. In State of U.P. v. Ramesh Prasad Misra and Anr. : AIR 1996 SC 2766, this Court held, that evidence of a hostile witness would not be rejected in entirety, if the same has been given in favour of either the prosecution, or the accused, but is required to be subjected to careful scrutiny, and thereafter, that portion of the evidence which is consistent with the either case of the prosecution, or that of the defence, may be relied upon. (See

also: C. Muniappan and Ors. v. State of Tamil Nadu :AIR 2010 SC 3718; Himanshu @ Chintu v. State (NCT of Delhi) : (2011) 2 SCC 36; and Ramesh Harijan v. State of U.P. : AIR 2012 SC 1979).

Therefore, the law permits the court to take into consideration the deposition of a hostile witness, to the extent that the same is in consonance with the case of the prosecution, and is found to be reliable in careful judicial scrutiny."

37. In the facts and circumstances of the present case PW-4, Anil Sharma did not turn hostile as he was not cross-examined by the prosecution, but there were variations in his statements given in examination-in-chief and cross-examination. Although he took some contradictory stands when cross-examined by the counsel for the appellant, but as already discussed above, the said contradictions on the part of PW-4 have to be examined in the background of the threats received by him from the accused persons. The threats extended by the accused persons when the said witness was under examination by the court, in fact further strengthens the case of the prosecution against the present appellant. The judgments cited by the appellant in this context would be of no help to the case of the appellant. Another instance further strengthening the case of the prosecution and going against the appellant is the factum of appellant Sandeep refusing to participate in the Test Identification Parade. In this context, reliance may be placed on the judgment of the Hon'ble Apex Court in ***Prem Singh v. State***

of Haryana, 2011 (10) SCALE 102, wherein it has been observed that

"13. ... it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-Appellant had reason to do so, especially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case."

38. So far as the other minor contradictions and discrepancies pointed out by learned counsel for the appellant are concerned, the case of the prosecution cannot be discredited on the basis of such minor inconsistencies as the same stands on a firm footing based on the testimony of the eye witness, PW-4 and duly supported by the other prosecution witnesses, medical and forensic evidence. We also cannot lose sight of the fact that PW-4, Anil Sharma was a natural witness who had gone to celebrate the birthday of his friend's wife and he had no enmity with the appellant so as to falsely depose against him and prove him guilty.

39. Thus, taking into consideration all the facts and circumstances of the present case, we do not find any illegality, perversity or infirmity in the finding of the learned Trial Court as far as the conviction and sentence u/s

302 IPC awarded to appellant Sandeep is concerned. As a result, the appeal
Crl. A. Nos. 172 & 291/2009

filed by the accused Sandeep challenging the order of conviction and sentence dated 31.1.2009 and 7.2.2009 respectively is dismissed and the order of the Learned Trial Court is upheld. So far as the appeal filed by the accused Krishan is concerned, the same is allowed and the order of conviction and sentence dated 31.1.2009 and 7.2.2009 respectively qua Krishan is set aside.

KAILASH GAMBHIR, J.

INDERMEET KAUR, J.

AUGUST 12, 2013

pkb