

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

Reserved on: 5th July, 2013
% **Date of Decision:** 12th August, 2013

+ **CRIMINAL APPEAL NO.987/2011**

DHANANJAY SINGH CHAUHAN Appellant
Through: Mr.Sumeet Verma & Ms.Charu
Verma, Advocates.

Versus

THE STATE OF NCT OF DELHI Respondent
Through: Mr.Sanjay Lao, APP for State.

CORAM:
HON'BLE MR. JUSTICE P.K. BHASIN
HON'BLE MR. JUSTICE VED PRAKASH VAISH

VED PRAKASH VAISH, J:

1. By the present appeal, the appellant –Dhananjay Singh Chauhan seeks setting aside of the judgment dated 23rd May, 2011 and order on sentence dated 24th May, 2011 arising out of FIR No.346/2008, P.S. Connaught Place passed by the learned Additional Sessions Judge, New Delhi whereby he was respectively convicted for the offences under Section 302 of the Indian Penal Code ('IPC' for short) and Section 27 of the Arms Act and was sentenced to undergo imprisonment for life and to pay fine of Rs.1,000/- in default thereof to

undergo further imprisonment for 15 days under Section 302 IPC and
CRL.A. No. 987/2011

to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.500/-, in default to undergo rigorous imprisonment for seven days under Section 27 of the Arms Act. Both the sentences were ordered to run concurrently.

2. Briefly stated the case of the prosecution is that on 21st July, 2008, the appellant had gone to Mano Kanika Singh (PW-2) as he was in search of a job who introduced him to his security guard incharge. After 5.30 p.m., the appellant and PW-2 had gone out of their office and on their way, they had met with Sher Bahadur Singh (deceased) who accompanied them. Thereafter PW-2 and deceased planned to consume liquor and they went near Gopal Das Bhawan at the shop of Avinash Mishra (PW-8) where liquor was purchased and consumed by PW-2 and the deceased. It was also offered to the appellant. However, he refused stating that he does not take liquor. Tea was arranged for him and Avinash Mishra (PW-8). When they were consuming liquor, a police officer had come there and on seeing him, the deceased asked them to go to the basement. PW-2, the appellant and deceased went to the second basement and on the way they purchased pepsi and some namkeen for the appellant. There they sat on a bench lying in the basement. The deceased had got some steel glass (Ex.P3) in which he had poured wine with pepsi and mixed them

and offered the drink of wine and peps to the appellant and prepared two pegs one for PW-2 and other for himself. The liquor was consumed for 10-15 minutes. The appellant asked the deceased as to what he had mixed in the peps as he was feeling giddiness and demanded a glass of water from him. Altercation took place between him and the deceased which PW-2 pacified and asked them to sit peacefully. Thereafter PW-2 went to basement-I for bringing the water. When PW-2 was coming back, he saw that the appellant was grappling with the deceased. The appellant had his licensed revolver in his hand. In the meanwhile, he heard noise of fire and saw the deceased had fallen down. The revolver of appellant and the appellant also had fallen. PW-2 thereafter went to the basement-1 to inform about the incident to the Times Office Staff, who in turn informed the police.

3. Thereafter at about 10.00 p.m., the message on wireless was received that one person had shot at the Statesman Building, Barakhambha Road. Constable Jitender (PW-14) and HC Ranjeet Singh (PW-24) who were on patrolling duty reached there and found that number of persons were gathered at the main gate. The security guard Parshant Kumar (PW-21) stated that one person had been shot and the person who had shot was wandering with a pistol and the guard

and public persons had closed the way going towards the basement parking. The police officials reached the second basement parking and saw appellant roaming with a pistol in his hand. The appellant told the police officials that he had shot dead Sher Bahadur Singh and would also kill them (that is the police officials). HC Ranjeet Singh (PW-24) took out his service pistol and warned the appellant. The appellant was overpowered. Pistol (Ex.P6) was snatched from the appellant. The magazine (Ex.P7) was recovered from the pistol which contained three live cartridges.

4. On receipt of copy of DD No.30A (Ex.PW15/A), S.I. Rajiv Vimal along with Head Constable Sant Lal (PW-13) reached the second basement. Constable Jitender (PW-14) and HC Ranjeet Singh (PW-24) met him. The appellant was handed over to him and the pistol loaded with the magazine and a separate magazine (Ex.P8) handed over to S.I. Rajiv Vimal. The pistol, magazine loaded in it and the cartridges with it sealed in a pulandha and statement of HC Ranjeet Singh was recorded and an endorsement was made, ruqqa was sent for registration of the case. After completion of investigation, chargesheet was filed, trial commenced leading to passing of the impugned judgment and order on sentence.

5. Learned counsel for the appellant contended that judgment of the trial Court is erroneous to the extent that the trial Court has failed to appreciate the statement of the appellant under Section 313 Cr.P.C. in entirety. The statement under Section 313 Cr.P.C. cannot be read in an isolation or read selectively to draw inculpatory material against the appellant. Although, the trial Court has, on the basis of the statement of appellant, reached at a conclusion that the appellant was present on the spot with the licensed revolver, however, it has failed to take note of the fact that the appellant has also stated in his statement under Section 313 Cr.P.C. that besides him, two other persons had joined the drinking session. Further, besides the police officer, none of the public witnesses have supported the case of prosecution. PW-1 to PW-7 had not identified the appellant as the person who was the author of the crime or as the one who was wandering with a revolver in his hand after the crime had been committed. The only thing that had come on record is that some person was wandering with a revolver and in the absence of identification of the appellant as such a person, the presence of a third person cannot be ruled out. Also, the recovery of mobile phone and weapon of offence i.e. revolver from the appellant were also not firmly established. No fingerprints were obtained from the revolver by the investigating authorities. In the post mortem report of

the deceased, there is a mention of injuries on the body of the deceased caused by the blunt object. Learned trial Court has erroneously shifted the burden to prove the cause of such injuries on the appellant which in all circumstances rested on the prosecution. The bullet that was recovered from the body of the deceased was never sent to the Ballistic Expert (PW-33) and even in his report exhibited as Ex.PW-30/K, it is nowhere mentioned that the said expert had compared the bullet that has been recovered from the body of the deceased with the weapon of offence and only thing that he had inspected is that whether the weapon was in a firing condition and whether the recovered live cartridges could be fired from it or not.

6. Learned counsel for the appellant lastly contended that the appellant was otherwise also in a state of non-voluntary intoxication and without prejudice to his claim, even if it is to be presumed that he was the perpetrator of the crime, he should be given benefit under Section 85 and 86 of the IPC and even if it is to be presumed that the said offence was committed as a result of a fight between the deceased and the appellant, defence under the 4th Exception to Section 300 IPC was in all cases available to him.

7. Per contra, learned Additional Public Prosecutor for the State contended that from the statement of the prosecution witnesses and the

recovery from the spot and other circumstantial evidence, the occurrence of the crime by the appellant cannot be ruled out. Mano Kanika Singh (PW-2) in his examination-in-chief stated that the appellant and the deceased were grappling when he came back to the spot after taking water. The mobile phone recovered from the spot is traceable to the appellant. Further, PW-2 has also stated that only three glasses were prepared showing that at the time of the incident only three persons i.e. deceased, appellant and Mano Kanika Singh (PW-2) were present. He further contended that as per the reports of FSL, the bullet recovered tallied with the bullets on the body of the deceased.

8. Learned Additional Public Prosecutor for the State further contended that the state of intoxication of the appellant was not such that he was unable to understand the nature of the act what he was doing and its consequences as is evident from the fact that he took out the pistol and loaded it before shooting and soon after the incident he made his efforts to escape from the spot of occurrence from where he was apprehended.

9. We have considered the submissions advanced by learned counsel for the appellant and learned Additional Public Prosecutor for the State and carefully perused the material on record.

Circumstantial Evidence

10. The entire prosecution case rests on the circumstantial evidence and especially on the testimony of PW-2 who had last seen the deceased and the appellant together in a state of altercation and also as the said witness had mentioned later on he had seen them grappling when he was coming from basement-I after fetching water for the appellant. Although, in his cross-examination, PW-2 has denied the suggestion of the deceased and the appellant grappling with one another. That however in itself is not a material alteration.

11. In **Sharad Birdhichand Sarda vs. State of Maharashtra**, (1984) 4 SCC116, it was held by the Supreme Court as under:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where

the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

Now we shall deal with all the incriminating circumstances one by one

Last seen

12. At this point, it is relevant to reproduce the testimony of Mano Kanika Singh (PW-2) who has deposed that he was working as Daftri in Statesman newspaper since 01.09.1985. Sher Bahadur Singh (deceased) used to work as Driver in their office. On 21.07.2008, at about 4.00 p.m., the appellant had visited him, who was resident of his home District Sultan Pur, U.P., since he was searching for a job and was introduced by him to his Security Guard (Incharge). After 5.30

p.m., he and the appellant were going outside the office where they met with the deceased who also accompanied them. Thereafter they went to the shop of one Avinash Mishra (PW-8) near Gopal Dass Bhawan. There he and the deceased, bought one bottle and a half bottle. He and Sher Bahadur consumed liquor at the shop of Avinash Mishra. Sher Bahadur offered liquor to the appellant also but he refused to consume it by saying that he does not take liquor. Then they arranged tea for the appellant and Avinash Mishra which they consumed. When they were consuming liquor, one police man came there on patrolling. On seeing the police officer, Sher Bahadur asked him to go with him to his department in the basement of Statesman Building. Later on all three of them went to the basement of Statement Building. There the deceased poured wine with pepsi and after offering the pepsi to the appellant, he prepared two pegs which were consumed by him and the deceased. After about 10-15 minutes, the appellant felt giddiness and demanded glass of water from the deceased. An altercation ensued between them which was pacified by him and later on he went to basement-I for taking water for the appellant. When he was coming back, he saw the appellant and the deceased grappling with each other and the deceased had a revolver in his hand. He heard the noise of fire and saw that the deceased fell down on the ground. The revolver of the

appellant also fell down and the appellant also fell down. Thereafter, he went to inform the Times Office staff who informed the police at 100 number. Police Officer came there. He along with police went inside basement-II and apprehended the appellant from there. In his cross-examination which was conducted on the same day i.e. 10th February, 2009, he denied the suggestion of enmity between the deceased and the appellant and also stated that when he reached the basement-II with the police, police lifted the revolver and took the appellant and the deceased with them. He further stated that the appellant was not in his senses.

13. Thereafter an application under Section 311 Cr.P.C. for further cross-examination of Mano Kanika Singh (PW-2) was moved and allowed on 05.03.2010. PW-2 was further cross-examined and in his cross-examination dated 22nd July, 2010, he denied the suggestion that the deceased and the appellant were grappling with one another. He also stated that he had gone inside the basement at the spot with the PCR officials. He also stated that some known person of the deceased also came to basement-II to consume liquor and was present with the deceased at that place when he had gone to fetch water. He also stated that the appellant was lying in the same condition as he was when he had gone to fetch water.

14. The law on 'last seen' evidence is well settled. This concept is applicable in cases where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. In the present case, as per the testimony of PW-2 who had last seen the appellant and the deceased together and the testimonies of PW-14 and PW-24 who had apprehended the appellant from the spot it can rightly be established that the appellant was last seen with the deceased shortly before the incident.

Apprehension of the appellant from the spot

15. Mahinder Kumar Puri (PW-1) has stated in his testimony before the trial Court that on 21st July, 2008, i.e. the date of the incident, he was working at basement office of the Statesman Building from 9.00 p.m. to 4.00 a.m. At about 9.30/9.45 p.m, he was present at the basement along with other staff, in the meantime, a person had entered into their basement office with a revolver in his hand and asked them the way to go out from there. He had also told them that he had murdered one person. He and other staff ran away outside the office due to fear. The mobile phone of that person fell down in their office which was handed over by him to the police. The police came there

and the said person was taken by the police whose name they came to know as Dhananjay. However, he failed to identify the appellant as that person. The mobile phone was seized by police vide memo Ex.PW1/A and mobile phone as Ex.P1. In his cross-examination on behalf of the appellant, he initially denied the suggestion of his handing over the mobile phone to the police. However, he reaffirmed it later on as a result of which he was called for re-examination where he again denied the suggestion of his handing over the mobile to the police.

16. Subash Sharma (PW-3) had deposed before the trial Court that in July, 2008 of which he does not remember the exact date, at about 9/10 p.m., he, Dallu and Himanshu were sitting in the basement-II where they pack the newspaper, one person had come with a small gun and asked them to tie Dallu with a rope. He failed to identify that person as he was frightened on seeing the gun. However, he stated that after some time police came and took that person with them. He was declared hostile and was cross-examined by learned Additional Public Prosecutor for the State. In his cross-examination, he again failed to identify the appellant and stated that he did not know whether the said person asked him the way for going outside and as to why he had told them to tie Dallu with rope.

17. Constable Jitender (PW-14) has, in his testimony, stated that on 21st July, 2008, he along with H.C. Ranjeet Singh (PW-24) were on patrolling duty and were present in their beat. At about 10.00 p.m., they received a message on wireless set that one person had shot at Statesman Building, Barakhambha Road. Thereafter they reached there where they found many persons gathered at the main gate of Statesman Building and public persons and security guard told them that one person was shot and the person who had shot was wandering with a pistol and thereafter they reached second basement parking where they saw the appellant roaming with a pistol in his hand. The appellant told them that he had shot dead Sher Bahadur (deceased) and would also kill them. However, HC Ranjeet Singh (PW-24) warned him after taking out his pistol. They overpowered him, pistol was also snatched from his hand, from his search another magazine was also recovered which contained three live cartridges. In the meantime, PCR arrived at the spot and the injured Sher Bahadur was taken over by PCR van to the hospital. Thereafter S.I. Rajiv Vimal arrived at the spot along with his staff and the recovered pistol and magazine were handed over to him. In his cross-examination also he has stated that the appellant was apprehended from the basement. He denied the suggestion of a pistol lying on the ground near the bench and affirmed

that the pistol was recovered from the appellant which was handed over to S.I. Rajiv Vimal. He also denied the suggestion that the appellant was lying near the bench on the ground or that he was under the influence of liquor or that he was unconscious.

18. The statement of Constable Jitender (PW-14) finds corroboration from the statement of HC Ranjeet Singh (PW-24) who has also deposed that the appellant was found roaming inside the basement with a pistol in his hand and that he told him and PW-14 that he had fired at Sher Bahadur (deceased) and proceed further he would have fired at them also. The factum of his apprehension, snatching of the pistol and the recovery of magazine from the pocket of the appellant is also confirmed from his testimony. S.I. Rajiv Vimal along with the staff reached at the spot and he handed over the custody of the appellant with the snatched pistol, cartridges and magazine to SI Rajiv Vimal who checked the snatched pistol and on opening the snatched pistol, it was found containing three live cartridges. S.I. Rajiv Vimal recorded his statement which is Ex.PW15/A and got the case registered. He has proved the pistol .32 bore as Ex.P6, one magazine inside the pistol Ex.P6 and is given exhibit as Ex.P7, another magazine exhibited Ex.P8 and three live cartridges, three empty cartridges and three leads as Ex.P9/1 to 9 collectively. He had also proved the bottle

containing liquor as Ex.P1, empty plastic bottle as Ex.P2, steel glass Ex.P3, coin of Rs.5/- as Ex.P4 and coin of Rs.2/- as Ex.P5. He was cross-examined at length but nothing incriminating could be elicited.

19. PW-14 and PW-24 have, both, in their testimonies stated that they had apprehended the appellant from the basement-II with a revolver in his hand and also that the appellant had informed them about him having murdered Sher Bahadur (deceased). The appellant had also threatened to kill them. Initially PW-1 had also in his testimony stated that one man with a gun had come at his office and asked him the way to go out of the office. PW-3 had also in his statement stated that one person had come with a gun and asked him to tie Dattu with a rope. However, both these witnesses have failed to identify the appellant as that person and have also retaliated from their respective stands.

20. In **Tahir vs. State (Delhi) (1996) 3 SCC 33**, the Hon'ble Supreme Court has held:-

“6. Mr. D.D. Thakur, the learned senior counsel appearing for the appellant, submitted that PW 4 to PW 7 on whose evidence the conviction has been recorded were all police officials and in the absence of any independent witness to corroborate them, it was not safe to rely upon their testimony to sustain the conviction of the appellant. We cannot agree. In our opinion no infirmity attaches to the testimony of police officials, merely because they belong

to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent, evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the credit worthiness of the prosecution case.”

21. Further, the Hon’ble Supreme Court in **Bhagwan Singh vs. The State of Haryana**, (1976) 1 SCC 389, has held:-

“8. We have carefully perused the evidence of Jagat Singh, who was examined in the trial after more than a year of detection of the case. The prosecution could have even avoided requesting for permission to cross-examine the witness under section 154 of the Evidence Act. But the fact that the court gave permission to the Prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. We are satisfied in this case that the evidence of Jagat Singh, but for whose prompt assistance the case would not have seen the light of day and whose statement had immediately been recorded by the D.S.P., is amply corroborated by other evidence mentioned above to inspire confidence in his testimony. Apart from that the fact of recovery of the gold coins in the pocket of the appellant gave a seal of finality to the truth of the charge against the appellant. If Jagat Singh had accepted the bribe he would have been guilty under section 161 I.P.C. There is, therefore, clear abetment by the appellant of the offence under section 161 I.P.C. and the

ingredients of Section 165A I.P.C. are established against him.”

22. A similar view was taken with respect to the testimony of hostile witness in **Gura Singh vs. State**, (2001) 2 SCC 205.

23. In the light of the judgment of Supreme Court in **Bhagwan Singh’s** case (*supra*), **Tahir’s** case (*supra*) and **Gura Singh’s** case (*supra*) and the statement of these witnesses read together are sufficient to hold that the appellant was present on the spot and that he was apprehended with his pistol. Only because, the witnesses so stating about the appellant’s apprehension from the spot are police persons, their statements cannot be wiped out or stated to be made out of interest when in material points it stands corroborated with the statements of PW-1 and PW-3.

Ruling out of the presence of a third person from the spot of incident

24. Learned counsel for the appellant has relied upon statement of PW-2, who has, in his cross-examination dated 22nd July, 2010 and also the statement of the appellant under Section 313 Cr.P.C. stated that besides the deceased and the appellant other accused persons were also present with them at the time of incident. However, the statement of PW-2 was made much later in time and for the first time only in his cross-examination dated 22nd July, 2010. There is no mention of a

third person either in his statement under Section 161 Cr.P.C. or in his examination-in-chief or first cross-examination dated 10th February, 2009. Also PW-2 has not mentioned the name of such a person, only a statement to an effect that some known person of the deceased had come to the basement-II to consume liquor. Also the said statement was made by PW-2 in an answer to a question which was beyond what was permitted by the Court under Section 311 Cr.P.C. which was only to the extent of place of incident and no other aspect as per order dated 5th March 2010. The statements of PW-2 and also of the deceased with respect to this fact cannot be relied upon as also from the recovery of one steel glass, one liquor bottle one-fourth filled and a bottle of water etc. from the spot of incident, the presence of third person cannot be deduced. The statements of both PW-2 and the appellant with respect to this aspect is vague as no indication as to a particular person is made and so also the statement made quite late in time.

Medical evidence and FSL report

25. In the instant case, homicidal death is not disputed. Moreover, Dr.S.K. Nayak (PW-19) who conducted the autopsy on the body of the deceased on 22nd July, 2008 has proved the post mortem report (Ex.PW19/A). As per the post mortem report, the cause of death is

cranio cerebral injuries as a result of fire arm injuries to the head, shot from rifle fire arm.

26. So far as the contention that the injury was not caused from the weapon of the appellant, perusal of the FSL report dated 29th May, 2009 (Ex.PW30/K) shows that when the individual characteristics of firing pin mark and breech face marks present on evidence fired cartridge cases marked as exhibits 'EC1' & 'EC2' and on test fired cartridge cases marked as 'TC1' to 'TC3' were examined and compared under the comparison microscope model Leica DMC and were found identical. Hence exhibit 'EC1' & 'EC2' have been fired through the pistol 7.65 mm caliber marked exhibit 'F1' above. Thus, from the FSL Report it is clear that the cartridges recovered from the spot of incident were fired from the appellant's weapon.

Mens rea

27. So far as the intention of the appellant to cause death is concerned, nothing is brought on record to indicate that the appellant actually had an intention to kill or cause the death of the deceased and this intention cannot be imputed lightly on him. However, as per the report of post mortem (Ex.PW19/A), the cause of death is stated to be cranio cerebral injuries as a result of firm arm injuries to the head, shot

from rifled fire arm. All the injuries were ante mortem in nature and fresh in duration before death. External injury No.3(a) could have been caused by a shot from rifled fire arm from close range whereas external injury No.3(b) could have been caused by shot from rifled fire arm from distant range. External injuries No.3(d), (e) and (f) could have been caused by hard and blunt trauma. Both external injuries No.3(a) and 3(b) were fatal in ordinary course of nature by their internal injuries. Viscera was preserved to rule out alcohol intoxication.

28. In **Virsa Singh vs. State of Punjab**, *AIR 1958 SC 465*, the Hon'ble Supreme Court has held: -

“14. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 “thirdly”;

15. First, it must establish, quite objectively, that a bodily injury is present;

16. Secondly, the nature of the injury must be proved; these are purely objective investigations.

17. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

18. Once these three elements are proved to be present, the enquiry proceeds further and,

19. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.”

29. It is clear from the aforesaid passages that the act which results in death should be as a result of injury which was intended and the said injury should be sufficient in ordinary course of nature to cause death for a conviction to fall under Clause 3 of Section 300 IPC.

30. In such a case, it cannot be said that the appellant had no intention to cause that bodily injury to the deceased which had lead to his death. Nature of injury 3(a), gun shot from a close range on a vital part by a rifled fire arm indicate that the appellant did have an intention to cause that injury on the head, a vital part although may not have been sufficient to prove that the appellant intended that the deceased should die. Furthermore, the appellant has also caused another injury i.e. injury No.3(b) that too on the head of the deceased. In such a case, it would not be improper to state that the appellant did not have an intention to cause that particular injury which was actually found on the body of the deceased.

31. As per the judgment of the Supreme Court in **Virsa Singh's** case (*supra*), if a case is to fall under Section 300 'thirdly', it is necessary for prosecution to just prove that the appellant intended to cause bodily injury which had actually resulted the death of that person even though he may not have intended to cause death or had no knowledge that the said injuries would lead to death. As we have already observed that the nature of the injuries in the present case itself direct towards the intention of the appellant to cause these very injuries and further the observation in the post mortem report that the two injuries were fatal in nature squarely brings the present case under Section 300 'thirdly' of IPC.

Defence of intoxication and fourth exception to Section 300 IPC

32. Lastly, the contention of learned counsel for the appellant that the appellant should be given a benefit of Section 85/86 IPC that is involuntary intoxication or Fourth exception to Section 300 IPC too does not find favour with us. For taking the benefit of exception, the onus is on the party who claim such benefit to prove the circumstances which may bring his case under the said exception which the appellant in the present case has failed to discharge. Mere an allegation of such circumstances is not sufficient. Furthermore, from the statements of PW-14 and PW24 who have stated to have apprehended the appellant

with gun and also that he threatened to kill them. It cannot be said that the appellant was in such a case that he did not know the nature of his act or that what he was doing was wrong or contrary to law to bring his case under the exception under Section 85/86 IPC. Furthermore, it is the case of the appellant himself that there was no fight between him and the deceased. Further for availing the benefit of the fourth exception to Section 300 IPC, it is not just sufficient to prove the existence of a fight rather the fight should be of such a nature that the accused should have lost his power of self control. In the present case, no such circumstances have been brought forth by the appellant to bring his case within the said exception.

Other Circumstances

33. It was contended by the learned counsel for the appellant that the FIR was registered at the instance of a police officer and not at the instance of any independent witness and especially on the instance of PW-2. We would like to observe that in the cases of a cognizable offence or on an information received by the police officer of the occurrence of such an offence, it is mandatory on his part to register an FIR. However, in certain cases post the information is given to the police none of the witnesses present on spot come forth and get the same registered. In such a case where the duty is cast upon the police

to register the FIR where none of the persons are forthcoming, no infirmity can be found if the police suo motu registers the FIR.

34. It held by the Supreme Court in **Superintendent of Police, CBI vs. Tapan Kumar Singh**, (2003) 6 SCC 175:

“20. It is well settled that a First Information Report is not an encyclopedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eye-witness so as to be able to disclose in great details all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence.....”

35. Therefore, in view of aforesaid judgment, it is not material whether the FIR was registered at the instance of a police officer or an independent person. Thus, this contention of learned counsel for the appellant is devoid of merit.

Conclusion

36. As per the above circumstances all taken together point clearly towards the guilt of the appellant insofar as he was last seen in a state of altercation and later on grappling with the deceased, recovery of his gun and the indication from FSL report that the cartridges were fired

from his gun, statements of PW-14 and PW-24 stating his apprehension from the spot with the weapon recovered and also to an extent from the statements of PW1 and PW3, the hostile witnesses.

37. In the light of the aforesaid discussion, the appeal fails, deserves to be dismissed and the same is hereby dismissed. The judgment dated 23rd May, 2011 and order on sentence dated 24th May, 2011 are upheld.

(VED PRAKASH VAISH)
JUDGE

(P.K. BHASIN)
JUDGE

August 12, 2013
gm