

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

% *Reserved on: 02.03.2023*
Decided on: 27.03.2023

+ **CRL.A. 662/2017**

AARIF

..... Appellant

Represented by: Mr. Kanhaiya Singhal, Ms. Prasanna and Mr. Udit Bakshi, Advs.

versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr. Utkarsh and Mr. Laksh Khanna, APPs for the State. Ins. Avnish Tyagi, PS Subzi Mandi Railway Station.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

POONAM A. BAMBA,J.

1.0 Vide this appeal, the appellant assails the judgment dated 01.05.2017 passed by Ld. ASJ, Pilot Court, North District, Rohini Courts, Rohini, Delhi, (“**impugned judgment**” in short), convicting the appellant/accused in FIR no. 32/2016, PS Shahbad Dairy, u/S. 302 Indian Penal Code, 1860 (**‘IPC’** in short) & Ss.25/27 Arms Act, 1959 (**‘Arms Act’** in short) and order on sentence dated 15.05.2017, whereby the appellant was sentenced to undergo rigorous imprisonment for life under Section 302 IPC with fine of Rs. 5,000/-,

in default to undergo simple imprisonment for a period of six months ; the appellant was also sentenced to under rigorous imprisonment for one year under Section 25 Arms Act, with fine of Rs. 1,000/-, in default to undergo simple imprisonment for a period of one month ; and the appellant was also sentenced to under rigorous imprisonment for one year under Section 27 Arms Act with fine of Rs. 1,000/-, in default to undergo simple imprisonment for a period of one month. All the sentences were to run concurrently.

2.0 Briefly stating, the prosecution case is that on 09.01.2016, at about 10.04 pm, a call was received by PW-6 W/Ct. Seema, wireless operator at CPCR from phone no. 9718977891 that, "*Shahbad Dairy Akare ki back side mein B-block H.No.13/21 near Peepal ka pedh yahan par caller ne dekha ki ek aadmi ke ser mein goli lagi hui hai, jo farash par padha hai*". Accordingly, PW-6 filled the PCR Form Ex. PW-6/A and flashed the message and also sent the same to the concerned Police Station. On receipt of this information in the Police Station Shahbad Dairy, DD no. 80-B/PW-5/A was recorded and the same was handed over to PW-5 ASI Ranveer Singh. PW-5 along with PW-23 Ct. Sandeep reached the spot, where they found blood on the north side and came to know that the injured had already been shifted to BSA Hospital by CAT Ambulance. In the meanwhile, one Ct. Yogender also reached there. After leaving him at the spot, PW-5 ASI Ranveer Singh and PW-23 Ct. Sandeep reached BSA Hospital, where injured Vinod was declared brought dead by PW-9 Dr. Shubham Shukla vide MLC Ex. PW-9/A. As no eye witness was found present

at the spot, PW-5 ASI Ranveer Singh made endorsement Ex. PW-5/B on the DD itself and sent the rukka through PW-23 Ct. Sandeep for registration of the FIR. In the meanwhile, PW-26 Insp. Avinish Tyagi (ATO at PS Shahbad Dairy), also reached there and on the directions of SHO, further investigation was assigned to PW-26. Thereafter, PW-12 ASI Ram Kumar, Incharge Mobile Crime Team along with PW-13 Ct. Anil (photographer) reached the spot, where blood was found lying and on the main road, a pair of hawai chappal was also found. Scene of crime was inspected and photographed vide photographs Ex. PW-13/A1 to A11. (negatives Ex. PW-13/B1 to B11) by the Crime team vide Report Ex. PW-12/A. An application Ex. PW-5/C for preservation of the dead body in the Mortuary of BSA Hospital was moved and PW-12 Ct. Nagraj was deputed for taking care of the dead body. From the search of the dead body, one black and brown colour purse, Rs. 300, some visiting cards and one black colour mobile phone make Micromax, were recovered, which were handed over by PW-5 to PW-26 Ins. Avinish Tyagi, who seized the same vide seizure memo Ex. PW-5/D. A pair of *chappals* of the deceased was also seized vide seizure memo Ex. PW-5/E.

2.1. On 10.01.2016, statement of eye-witness/PW-17 Tej Bahadur @ Gokul was recorded by PW-26 Ins. Avinish Tyagi, wherein PW-17 stated that on the intervening night of 9th and 10th January 2016, at around 10 pm, he was passing through the *shochalaya* of B Block and at the time of entering in the gali, he noticed Vinod (since deceased) and Aarif (appellant/accused), who were well-known to him,

quarreling on the issue of keeping the *katta* (country-made pistol) found by them. Suddenly, Aarif took out the *katta* from the right dub of his pants and put it on the *kanpati*/temple of the deceased/Vinod, but the deceased did not agree. On which, the appellant Aarif while stating that '*main tujhe khatam kar doonga, phir to katte ko main hi rakhunga*' fired a shot, which hit on the head of Vinod and he fell down on the spot. PW-17 ran after the appellant/accused shouting '*pakro-pakro*', but the appellant/accused succeeded in fleeing from the spot along with the *katta*.

2.2. Thereafter, PW-26 Inspector Avinish Tyagi lifted blood with the help of gauze piece from near electricity pole, blood stained soil and plain earth/earth control and put all of them in separate plastic containers, wrapped with doctor tape and sealed with the seal of AKT and then seized all the exhibits vide seizure memo Ex. PW-17/A. Site Plan Ex. PW-26/A was prepared at the instance of PW-17 Tej Bahadur @ Gokul. Case property was deposited in the *malkhana* and statements of witnesses were recorded.

2.3. On 10.01.2016, PW-26 Insp. Avinish Tyagi also prepared inquest papers Ex. PW-26/B, brief facts Ex. PW-26/C of the dead body and after identification of dead body by Sonu and PW-18 Satya Prakash got the postmortem of the dead body conducted vide postmortem report Ex. PW-4/A and thereafter handed over the dead body to the relatives vide memo Ex. PW-26/E. After the postmortem, one card board box containing the clothes of the deceased, blood

sample in gauze piece and sample seals were handed over to PW-26, who seized the same vide seizure memo Ex.PW-21/A. After use, the seal was handed over to PW-17 and a memo Ex. PW-26/F was prepared in this regard.

2.4. On 11.01.2016, on receipt of secret information and on the pointing out by the secret informer and identification by PW-17 Tej Bahadur @ Gokul, the appellant/accused was apprehended and arrested from near Paanch Mandir, Shahbad Dairy vide arrest memo Ex.PW-17/B and his personal search was conducted vide memo Ex.PW-17/C. Aadhar card of accused (Ex. PW-25/Article 1), supplied by his mother, was taken in possession vide seizure memo Ex. PW-25/A. Disclosure statement Ex. PW-17/D of the appellant/accused was also recorded and on the pointing out of the place of incident by the appellant/accused, pointing out memo Ex. PW-17/G was prepared. Thereafter, pursuant to the disclosure statement, the appellant/accused led the police team to the drain (*nali*) in front of house No. C-22/46, Shahbad Dairy, Delhi and produced one country made pistol from garbage; on opening the same, the said pistol was found containing one empty cartridge. PW-26 prepared the sketch Ex. PW-17/E of the country made pistol and empty cartridge and measured the same and thereafter, same were sealed and seized vide seizure memo Ex. PW-17/F. PW-26 filled in the FSL form in this regard and prepared the site plan Ex. PW-26/G of place of recovery. The appellant/accused was got medically examined. PW-26 collected the ballistic expert report Ex.PX-1 and biological and DNA examination reports Ex. PW-

22/A and Ex. PW-22/B. On 05.04.2016, scaled site plan Ex. PW-16/A was got prepared through PW-16 Inspector Manohar lal. On conclusion of investigation, charge-sheet u/S 302 IPC and Sections 25/27 Arms Act was filed.

3.0 The prosecution in order to prove its case, examined 26 witnesses.

4.0 In his statement u/s 313 Cr.P.C, the appellant/accused denied all the incriminating circumstances put to him and stated that he was innocent and was falsely implicated in this case because of enmity between his mother and mother of the deceased due to *satta* business run by the deceased's mother. He further stated that he was not present at the spot at the time of alleged incident and did not shoot the deceased ; he came to know about the murder of the deceased only when he was called from his house and arrested. He further stated that no country made pistol and cartridge were recovered from him/at his instance and the same were planted by the police. He further stated that his signatures were obtained on some blank papers and the same were later manipulated against him. He also stated that the alleged eye witness PW-17 Tej Bahadur is a drug addict and gave a false statement against him at the instance of mother of the deceased who gave him money for purchase of drugs. The appellant/accused chose to lead defence evidence and examined DW-1 Amir, in his defence.

5.0. Ld. Counsel for the appellant/accused argued that while convicting the appellant/accused, Ld. ASJ has erred in placing reliance on the testimony of alleged eye-witnesses/PW-17 Tej Bahadur @ Gokul, who is a planted witness. This is clear from the facts that though the PW-17 Tej Bahadur claimed to be the eye-witness of the incident, neither did he make a call at 100 number nor did he inform any one about the incident, which is quite unnatural. In support, ld. counsel placed reliance upon the judgment in case of '**Chunthuram Vs. State of Chhattisgarh, Criminal Appeal no. 1392/2011**', wherein the unnatural conduct of a particular witness was dealt with. Ld. Counsel further argued that after his failed effort of chasing the appellant/accused, PW-17 claimed to have returned to the spot, but surprisingly, he did not meet either PW-1 Mewa Lal, or any of the police personnel or any family member of the deceased at the spot. PW-5 ASI Ranveer Singh has deposed that as no eye-witness was found at the spot, he made endorsement on the DD no. 80-B itself. Further, PW-1 Sh. Mewa Lal, deposed that at around 10.00 pm, he had come out of his house on hearing the sound of fire-shot (such as bursting of vehicle tyre) and saw one person lying with injury on his head under the electricity pole in front of his house, but he did not mention about the presence of PW-17 at the spot, which clearly show that PW-17 is a planted witness.

5.1. Ld. counsel for the appellant/accused also argued that even the last seen theory as reflected in the testimony of PW-2 Shashi Kant Pandey can hardly be believed. During his cross-examination, PW-2

admitted that he had come to the court on 16.11.2016 for his deposition with mother of the deceased, which shows that he is an interested witness. Further, PW-1 as well as PW-17 did not mention about the presence of PW-2 at the spot at that time, which itself shows that he was planted later on. It was further argued that during cross-examination, PW-2 stated that police arrived at the spot at around 10.05/10.10 pm, which is also false as presence of PW-2 does not find mention either in DD no. 80-B/ Ex. PW-5/A, Rukka Ex. PW-5/B and FIR Ex. PW-7/A.

5.2. Ld. Counsel also argued that falsity of allegations is made out even from the postmortem report Ex. PW-4/A, wherein 'Brief history as per IO' does not mention that the deceased was shot by his friend/the appellant/accused. Further, the prosecution even failed to prove the time since death, time of recovery of dead body and last seen ; even no efforts were made to lift finger prints from the alleged weapon/country made pistol, as has come in deposition of PW-26. These facts also create suspicion about the prosecution version.

5.3. It was further argued that as per the prosecution case, the *katta* (country made pistol) was got recovered by the appellant from *nali*/drain of House no. C-22/46, Shahbad Dairy, Delhi, but no public person was joined at that time despite the fact that a temple is just a few steps away from the spot ; and as per PW-25, 4-5 public persons were present when the appellant/accused had produced the *katta*. Further, no mud/dirt was found on the said *katta* at the time of its production in the court, which also falsifies the prosecution version.

Further, the prosecution even failed to obtain ballistic report qua the alleged weapon and as such, an adverse inference under Illustration (g) of Section 114 of Indian Evidence Act, 1872, must be drawn.

5.4. Ld. Counsel also argued that during cross-examination PW-3 Sh Dhirendra Kumar Rai, official of CAT Ambulance, who shifted the injured/deceased to the hospital, stated that general public and one Sonu s/o Mahender Singh had shifted the body in the Ambulance, but said Sonu was not cited/examined as a witness which also raises doubt about prosecution story.

5.5. Ld. Counsel further argued that there was no enmity between the deceased and the appellant/accused and as such, there was no motive for the appellant/accused to commit such a heinous offence.

5.6. Lastly, Ld. Counsel made an alternate submission that it is not in dispute that the appellant/accused and the deceased were friends having no enmity ; both of them were in the habit of consuming *ganja* together and on the date of alleged incident, they were consuming hallucinating drugs and were not in their senses to understand the consequences of their acts/words. An argument broke out between them about keeping of katta/country made pistol found by them, which led to sudden fight leading to death of the deceased Vinod. Thus, at best, the appellant may be convicted for the offence punishable under Section 304 Part II of IPC and not under Section 302 IPC. In support, reliance was placed on the judgments in **Basdev v. State of Pepsu, AIR 1956 SC 488; Mirza Ghani Baig Vs. State of**

Andhra Pradesh (1997) 1 ALT (Cri) 483; Sham Timanna Gaikwad v. State of Maharashtra 2022 SCC Online Bom 1033; Ankush Shivaji Gaikwad v. State of Maharashtra (2013) 6 SCC 770; Krishan Monu v. State, 2014 SCC OnLine Del. 4615 and Jamil @ Jamir v. State 2018 SCC Online Del 6631.

6.0. *Per contra*, the Ld. Prosecutor argued that the prosecution case mainly rests on the testimony of eye witness PW-17, who deposed that in the month of January 2016, he saw both i.e., the appellant/accused and the deceased at the spot arguing to retain the *katta* found by them; and during said argument, the appellant took out the *katta* and fired at the deceased. It was further argued that testimony of PW-17 finds corroboration in the testimony of PW-2 Ram Singh, who deposed that he saw both, the deceased and the appellant/accused sitting on the wall near the toilet at around 9.45 pm, where the dead body of deceased was found at around 10.00 pm. Further, PW-1 and PW-2 have also deposed that on the date of the incident, at around 10.00 pm, they heard the sound of firing. Further, during his testimony, PW-17 explained that after firing a shot at the deceased, the appellant started running and PW-17 chased him but could not succeed; and when he returned, the injured had already been taken to the hospital. It is for this reason, PW-17 was not found at the spot by PW-1. Further, as there was no one at the spot, PW-17 went back home. The version of PW-17 that the appellant fired a single shot on the head of the deceased from a blank range, finds corroboration in the post-mortem report Ex. PW-4/A, wherein it is mentioned that one firearm wound

was found present over the occipital region and blackening was present on the entry wound.

6.1. It was further argued that contradictions regarding recovery of weapon of offence as pointed out by the Id. Counsel for the appellant/accused are minor in nature and do not vitiate the prosecution case and in this regard, reliance was placed on the judgment in *Leela Ram vs. State of Haryana (1999) 9 SCC 525*.

6.2. Learned Prosecutor also argued that at the time of recording the statement of the appellant/accused under Section 313 Cr.P.C, in response to question no. 31, the appellant stated that he was not present at the spot, which is contradictory to the testimony of PW-2 and PW-17, who saw the appellant with the deceased at the spot. Further, the appellant himself has failed to bring any evidence in support of his plea of alibi and contrary to the testimony of PW-2/PW-17 on record. Hence adverse inference is liable to be drawn against him in view of the judgment titled as '*Sahabuddin vs. State, (2012) 13 SCC 213*'

6.3. Learned Prosecutor further argued that by way of testimonies of PW-17 and PW-2 as well as by way of medical/forensic evidence, the prosecution has successfully proved the guilt of the appellant/accused. Thus, the Learned Trial court rightly convicted and sentenced the appellant/accused after duly taking into account the material on record. Therefore, this appeal deserves to be dismissed.

7.0 We have duly considered the submissions made by both the sides and have perused the record.

8.0 PW-17 Tej Bahadur @ Gokul testified that in the month of January 2016 at about 10 pm when he was returning to his house after performing his duties as a beldar, he passed through a *gali* which had a toilet in a dilapidated condition/khandar ;, he saw the appellant/accused and the deceased quarreling with each other in the said *gali* near the electric pole. He could hear the cause of the quarrel as he was just six to seven steps away from them; both of them were quarreling for taking possession of the country made pistol which was found by them from somewhere. The appellant/accused said “*katta mai rakhunga*” and the deceased said “*katta mai rakhunga*”. The appellant/accused kept quiet and took out the pistol from his pocket and told the deceased Vinod “*tuje katte ka maja chakhata hu*” and placed the country made pistol on his head and further told him “*tu nahi rahega to katta mera ho jayega*” and fired a shot. On which, the deceased fell down on the ground and the appellant ran away from the spot with the country made pistol. PW-17 has also testified that he chased the appellant/accused in the *gali* for long but the appellant disappeared. He could not trace him despite searching for him for about 10-15 minutes and when he returned to the spot, the deceased had already been removed to the hospital. Thereafter, he went home and later on came to know that the deceased Vinod had expired.

8.1 PW-17 also testified about the lifting of blood, blood stained earth and earth control from the spot and the same being taken into possession vide seizure memo Ex. PW17/A. PW-17 also deposed about joining the

investigation, apprehension of the appellant/accused in his presence from near Panch Mandir, Shahbad Dairy, Delhi, his arrest vide arrest memo Ex. PW17/B and recording of the appellant's disclosure statement Ex. PW17/D. PW-17 also deposed that pursuant to his disclosure, the appellant/accused led them to front of his house and produced country made pistol from the *nala*/drain; the said country made pistol was found with the used cartridge and was taken into possession vide seizure memo Ex. PW17/F and was converted into pullanda and sealed. The appellant/accused had also pointed out the place of occurrence vide pointing out memo Ex. PW17/G. PW-17 identified the appellant/accused in the court. He also identified the country made pistol and cartridge stating that they are the same as were got recovered by the appellant/accused.

8.2 In his cross examination, PW-17 stood by his testimony having witnessed the incident and also being part of recovery of pistol and seizure of other exhibits. PW-17 even described the vicinity of the place of commission of crime though he could not tell the house number in front of which the deceased was killed, he stated that there was no shop near the place of incident. He further stated that there was sufficient light on the spot. He categorically denied that he has deposed falsely against the appellant/accused at the instance of the deceased's mother as he (PW-17) is being supplied drugs/liquor by the deceased's mother for about last one month. PW-17 rather stated that when the appellant/accused pointed pistol on the head of the deceased, he had raised alarm; and that while he was chasing the appellant/accused who ran after shooting the deceased, he

even shouted “*goli maar di*” but none came out of the house. He also described what the accused/appellant was wearing at the time of the incident i.e., pants and shirt though he could not recollect the colour of the same. He also described that the deceased was wearing a black colour shirt at the time of the incident. It has also come in PW-17’s cross examination that the deceased was residing in the same *gali* in which he was residing and he knew him since childhood. He denied there being any quarrel between the deceased and his first wife and also with the second wife and that the relations between them were strained.

8.3 Thus, nothing of substance could be extracted in PW-17’s cross examination so as to dent his testimony of being an eye witness to the commission of crime by the appellant/accused and even regarding the arrest of the appellant/accused from near the Panch Mandir. He reiterated that he went to Panch Mandir along with the police, who had information about the presence of the appellant/accused there and at the time of his apprehension/arrest at about 3:30 pm, he was wearing pant and shirt, though he could not recollect the date of arrest and recovery of country made pistol at the instance of the appellant/accused. Regarding recovery of pistol Ex. P-1, he also stated that one police official had come to his house to call him and that there were only two police officials including the IO when the appellant/accused got recovered the country made pistol. He also stated that IO gave him one seal on the day of recovery which he had kept with him and had handed over the same to the IO, the next day.

9.0 Testimony of PW-17 with respect to apprehension of the appellant, his arrest, recovery/possession of country made pistol which was

recovered at the instance of the appellant, is corroborated by PW-25 and PW-26. PW-25 ASI Anil Kumar also deposed about joining investigation on 11.01.2016 and apprehension of the appellant/accused from near Panch Mandir, Shahbad Dairy pursuant to information provided by a secret informer and the appellant's arrest at about 3:30 pm vide arrest memo Ex. PW17/D and appellant's interrogation during which he made a disclosure statement Ex. PW17/D. PW-25 further deposed regarding the appellant leading them to a *nala*/drain in front of house number C-22/46 Shahbad Dairy and produced one country made pistol from garbage, on opening the same, it was found containing one empty cartridge. Sketch of the pistol and empty cartridge Ex. PW17/E was prepared by the IO and thereafter the said pistol and the empty cartridge were sealed with the seal of AKT and seized vide seizure memo Ex. PW1/F. PW-25 identified the country made pistol and one used cartridge in the court. PW-25 stood by his deposition in cross examination and categorically denied that no recovery was effected at the instance of the appellant and that the same was planted on him. On one hand, it was suggested to PW-25 that the recovered country made pistol was not washed before taking into possession, which he admitted. On the other hand, it was suggested to him that the country made pistol and cartridge were washed with water, which he denied.

9.1 In this regard, PW-26 also deposed on the same lines. He also stood by his version in cross examination and categorically denied that no katta/country made pistol was got recovered/produced by the appellant/accused and that the same was planted on him and that is why no dust or mud appeared on the white sheet on which its sketch Ex. PW17/E

was prepared; and that is why no public person was joined at the time of recovery. PW-26 stated that the said country made pistol was not washed with water or cleaned by cloth when it was recovered and further clarified that it was recovered from dry garbage lying in the *nali*/drain. He also stated that the country made pistol was old.

9.2. Regarding joining of public witnesses, PW-25 explained that though 4-5 public persons were present when the appellant/accused produced the weapon from the garbage but they did not join investigation despite asking of the IO. Even PW-26 clarified in his cross-examination that though public persons were present at the place of recovery of *katta* but none of them joined despite request, though, he admitted that no notice was issued to such public persons.

10.0 PW-2 Ram Singh has testified that in the intervening night of 9/10.01.2016 at about 9:45 pm, he was returning to his house after answering a call of nature/urinating in public toilet and saw that the deceased and the appellant were sitting together and talking with each other near the wall of the public toilet in the street. Both of them were taking drugs. He went back to his house and at about 10 pm he heard some noise in the street; on hearing the same, he came out and came to know from public persons that the deceased has been fired at. He also saw blood lying near the electric pole and came to know that the deceased had been removed to the hospital.

10.1 PW-2 in his cross examination stated that there was no other person in the street where the appellant and the deceased were sitting. He however further stated that when he came out after hearing the noise,

many persons were present. He also stated that the police had arrived at the spot at about 10:05/10:10 pm. He categorically denied that he had not seen the appellant/accused and the deceased together and that he has deposed falsely at the instance of the deceased's mother though he admitted that mother of the deceased had come with him to court. He explained her presence as she is a neighbour. Thus, nothing of significance could be extracted in his cross examination to create doubt about his version.

11.0 PW-1 Mewa Lal who is also a resident of the area deposed that on the intervening night of 9/10 January, 2016 when he was watching TV at home, at about 10 pm he heard the sound of a fire shot which seemed like bursting of a tyre of a vehicle. On hearing the same, he came out of the house and saw one person was lying under the electricity pole in front of his house, with injury on his head and was bleeding from head. He made a call to police at number 100 from a mobile number 9718977891. Soon thereafter, CAT ambulance arrived and removed that person to hospital. His testimony also remained unimpeached as he stood by the same in his cross examination reiterating that he had heard the noise like that of bursting of a tyre at about 9:30-9:45 pm and was the first person to reach there and thereafter, many persons gathered there; and within 2-4 minutes he had made a call to the police on which PCR van arrived within ten minutes. After about four hours he came to know that the injured had died. His statement was recorded by the police.

12.0 The fact that PW-1 had made a call from the aforesaid number 9718977891 is corroborated by PW-6 W/Ct. Seema who testified that on

09.01.2016, she was posted at CPCR PHQ on channel no. 117 and at about 10:04 pm she received a call from mobile no. 9718977891 to the effect that “*Shahbad Dairy Akare ki back side mein B-block H. No. 13/21 near peepal ka pedh yahan par caller ne dekha ki ek aadmi ke ser mein goli lagi hui hai, jo farash par padha hai*”. She flashed the said message and also sent the same to the concerned police station and proved Form no. 1 Ex. PW6/A. Her testimony remained uncontroverted as she was not cross examined.

13.0 PW-3 Dhirendra Kumar Rai testified that on 09.01.2016, his duty was on CAT Ambulance N-7 and was already on another call of Shahbad Dairy Police Station. At about 22:23 hours, he received a call from another ambulance that behind B-13/21 behind Akhara, Shahbad Dairy somebody has received fire arm injury. On which, he reached there and noticed that the injured person was being brought outside. He took the injured in his ambulance to BJRM Hospital. In his cross examination he stated that when he reached and had parked his ambulance outside the *gali*, the PCR van with some police officials had already reached the spot. He categorically denied that the PCR van was not present there.

14.0 PW-9 Dr. Shubham Shukla, Medical Officer Casualty, Dr. BSA Hospital, Delhi has testified that on 09.01.2016 at about 10:36 pm Vinod S/o Mahender Singh was brought to the hospital by CAT ambulance with the alleged history of fire arm injury. Patient was unconscious and did not revive despite CPR and was declared brought dead at 10:45 pm on 09.01.2016 vide MLC bearing no. 0346//16 Ex. PW9/A. His testimony remained uncontroverted as he was not cross examined.

15.0 The fact that PW-6 had flashed that message and had also passed on the same to the concerned police station is also corroborated by PW-5 ASI Ranveer Singh who has stated that on the intervening night on 9/10th January, 2016 when he was posted at PS Shahbad Dairy and was on emergency duty, he received DD no. 80B Ex. PW5/A regarding a person lying on a floor with fire shot injury in his head at back side of Akhara, B block, house no. 13/21 near Peepal tree. He along with Constable Sandeep PW-23 reached the spot i.e., B-13/21 Shahbad Dairy near pole no. 37 to the west side wall of the toilet, where they found blood on the north side and came to know that the injured had been removed in CAT ambulance to BSA hospital. Meanwhile, constable Yogendra reached there who was left at the spot and he (PW-5) along with Constable Sandeep reached BSA hospital and came to know that the deceased/Vinod S/o Mahender was declared brought dead vide MLC no. 0346/16. He collected the said MLC and made his endorsement Ex. PW5/B and handed over the *rukka* to Constable Sandeep/PW-23 at 11:40 pm for registration of FIR. He (PW-5) requested for crime team and photographer at the spot. SHO directed him to hand over the investigation to Inspector Avinish Tyagi/PW-26, ATO.

15.1 PW-5's testimony also remained unimpeached. In cross examination, he categorically denied that he did not visit the spot and rather provided the timings of his leaving for hospital and then coming back to the spot and leaving thereafter.

16.0 The fact that PW-5 visited the spot pursuant to receipt of DD no. 80B/Ex. PW5/A along with PW-23/Constable Sandeep, is corroborated by PW-23 who has deposed on the similar lines. Nothing of significance

could be extracted in his cross examination so as to dent his testimony. He rather provided in his cross examination that the place of occurrence is within one kilometer from the police station. He also described the spot stating that there is a toilet and DDA park to the one side of the *gali* and on the other side of the *gali*, there are number of houses; and that the blood was found on the side of DDA park near the wall. He categorically denied that he never visited the spot or took *rukka* for registration of FIR and has deposed falsely.

17.0 Testimonies of PW-5 and PW-23 are corroborated by PW-7 HC Rajeev, who deposed that on 19.01.2016 (typographical error-correct date being 09.01.2016) while he was working as duty officer at PS Shahbad Dairy, at about 12:05 am, Constable Sandeep PW-23 brought *rukka* sent by ASI Ranveer Singh/PW-5. On the basis of the same, he recorded FIR no. 32/16 u/s 302 IPC Ex. PW7/A and made an endorsement Ex. PW7/B on the *rukka* and handed over the copy of FIR and original *rukka* to Constable Sandeep/PW-23 and also issued certificate u/s 65B Indian Evidence Act Ex. PW7/C. Testimony of PW-7 and registration of FIR has remained uncontroverted as PW-7 was not cross examined.

18.0 PW-25 ASI Anil Kumar deposed that in the intervening night of 9/10.01.2016 he was posted at PS Shahbad Dairy and being Beat HC was present in the area of B Block Shahbad Dairy. An information was received that one person has been shot and is lying in the back side of B Block, house no. 13/21 near Peepal tree. He reached the spot where he met Inspector Avinish Tyagi/PW-26. Exhibits i.e., blood with gauze, blood stained soil, earth control were lifted by IO PW-26 Inspector Avinish

Tyagi and sealed with the seal of AKT and were taken into possession vide seizure memo Ex. PW17/A.

19.0 PW-4 Dr. Vijay Dhankar testified that on 10.01.2016 while he was posted as Specialist & HOD Forensic Medicine at Dr. BSA Hospital, he conducted the post mortem of a male, Vinod son of Mahender Singh aged about 21 years, who was allegedly shot dead in Shahbad Dairy area on 09.01.2016 at about 10 pm vide Post mortem report Ex. PW4/A. The said report *inter alia* reads as under:

“Post Mortem examination conducted on :

Date: 10-Jan-2016 from 12.30 Hrs to 14.00 Hrs by Dr Vijay Dhankar and assisted by Surender Tanwar PM Technician.

I. CASE PARTICULARS:

FIR no. 32/16 Dated: 10-01-2016 PS Shahbad Dairy

Name of the Deceased: Vinod S/o Mahender Singh

R/O: B-9/21, Shahabad Dairy, Delhi.

Age: 21 years Sex: Male

.....

VIII. PROBABLY TIME SINCE DEATH

Within about one day. Body preserved in cold storage.

IX. EXTERNAL EXAMINATION

1. Firearm entry wound, measuring 10 cm x 7 cm x brain deep, present over the left temporal region of head. The margins are lacerated with blackening present at places.

2. Firearm exit wound, measuring 3 cm x 1.2 cm x brain present over the right side of occipital region on the back of head 8 cm above the mastoid process and 7 cm from the midline.

X. INTERNAL EXAMINATION

*a. **Head***

*On reflection of the scalp, effusion of blood was present beneath the scalp around the external injuries. **Skull was fractured beneath the external injuries with beveling** present on the inner side in the area beneath injury no. 1 and outer side beneath injury no. 2. **Blackening present on the bone** beneath entry wound. Multiple linear fractures radiating out from the fracture defect of the entry wound, present both in the vault and base of skull. The meninges were lacerated beneath the external injuries. No epidural hemorrhage was present. Diffuse thin layered Subdural hemorrhage was present all over the brain. Subarachnoid hemorrhage was present all over the brain. Brain parenchyma showed lacerated track connecting the entry and exit wounds. Brain weighed 1243 grams.*

.....

*f. **Track of Injuries***

1. The projectile entered the head through injury no. 1, penetrated the layers of scalp blowing them back and causing a laceration, fractured the skull bone, lacerated the meninges, entered the brain parenchyma in the left temporal lobe, exited the brain parenchyma on the right occipital lobe, lacerated the meninges, fractured the skull, pierced the scalp on the right side of occipital region of back of head and exited through injury no. 2.

XI. OPINION:

Death is due to cranio cerebral damage consequent to the gunshot injury over the head. All injuries are ante-mortem and fresh before death. Injury no. 1 to 2 were caused by a projectile discharged through some firearm. Injury no. 1 and 2 along with the corresponding internal injuries are sufficient to cause death in the ordinary course of nature.

19.1 Testimony of PW-4 and post mortem report/Ex. PW4/A remained uncontroverted as PW-4 was not cross examined. Thus, it stands proved that the deceased died of head injuries no. 1 and 2 caused by a projectile which penetrated the brain from left temporal lobe and exited the brain from the right side of occipital region, causing fracture in the skull; and

that both the injuries were ante mortem and fresh before death; the said injuries no. 1 and 2 with the corresponding internal injuries were sufficient to cause death in the ordinary course of nature.

19.2 Post mortem report corroborates the version of eye witness PW-17 having seen the appellant shooting the deceased in head with pistol.

Recovery of pistol

20.0 Testimony of PW-17 regarding the deceased being shot with the *katta*/country-made pistol is also corroborated by recovery of pistol Ex. P1 at the instance of the appellant/accused pursuant to his disclosure Ex. PW17/D, in his presence and that of PW-25 and PW-26, as discussed above. In view of their unimpeachable testimonies, recovery/production of country made pistol (which was found containing one cartridge) at the instance of /by the appellant/accused stood established

20.1 Learned counsel for the appellant/accused argued that the alleged recovery of the *katta*/country made pistol at the instance of the appellant is highly doubtful as firstly no public person was joined at the time of recovery despite the fact that a temple was just a few steps away from the spot; and as per PW-25's version, 4-5 public persons were present when the appellant/accused had produced the *katta*. Further, no mud/dirt was found on the said *katta* at the time of its production in the court, which falsifies the prosecution version. Further, the prosecution has failed to obtain ballistic report qua the alleged weapon and as such, an adverse inference under Illustration (g) of Section 114 of Indian Evidence Act

must be drawn. He also argued that no efforts were made to lift the finger prints from recovered country made pistol which is admitted by PW-20.

20.2. It is a settled position of law that non joining of a public witness is not always fatal. In *Kripal Singh Vs. The State of Rajasthan (2019) 5 SCC 646*, the Hon'ble Supreme Court noted :

“17. The submission of the learned senior counsel for the Appellant that recovery has not been proved by any independent witness is of no substance for the reasons that in the absence of independent witness to support the recovery in substance cannot be ignored unless proved to the contrary. There is no such legal proposition that the evidence of police officials unless supported by independent witness is unworthy of acceptance or the evidence of police officials can be out rightly disregarded.”

20.3. In the instant case, in view of the categoric testimony of PW-17, PW-25 and PW-26, non-joining of public witnesses does not per se wipe out the recovery. More so, as PW-25 and PW-26 have explained that though 4-5 public persons present at the time of recovery of weapon, were asked to join investigation, they refused. Thus, non-joining of a public witness in the instant case, does not impact the credible testimony of the prosecution witnesses.

20.4 Examination report of Ballistic Division, FSL, Rohini, Ex. PX-1 on record has been admitted by the appellant/accused and inter alia records:

“2. DESCRIPTION OF ARTICLES CONTAINED IN THE PARCEL (S)/EXHIBIT (S)

<i>Parcel No.</i>	<i>No. & Seal Impression</i>	<i>Description of Exhibit(s) contained in parcels(s)</i>
01.	09 AKT	One sealed cloth packet contained one country made pistol of 8mm/.315” bore marked as exhibit ‘F1’ and one empty cartridge case of 8mm/.315” caliber marked as exhibit ‘ECI’ in the laboratory.

RESULTS OF EXAMINATION/OPINION

(1) The exhibit marked ‘F1’ is a firearm as defined in Arms Act. It is a country made pistol, capable of chambering and firing standard 8mm/.315” caliber ammunition.

(2) One 8mm/.315” cartridge received for test firing was chambered and successfully test fired through exhibit country made pistol marked ‘F1’ in the laboratory. Hence, it is opined that exhibit country made pistol marked ‘F1’ is in normal working order.

(3) The physical examination of exhibit ‘ECI’ shows that it is an empty cartridge case of standard 8mm/.315” caliber and is a part of ammunition as defined in Arms Act, 1959.

(4) No opinion be given whether the exhibit empty cartridge case marked ‘ECI’ is fired through the exhibit country made pistol marked ‘F1’ or not, due to the absence of percussion cap.”

20.4.1 From the above report/result of the examination, it is clear that the cartridge 8mm/.315 was successfully test fired through the recovered

pistol. However, no opinion could be given whether the empty cartridge case was fired through the said pistol due to the absence of the percussion cap. Thus, it is not that the ballistic opinion was not sought but the same could not be rendered due to the said reason.

20.5. As far as lifting of finger prints from pistol is concerned, merely because no finger prints from the recovered *katta*/country made pistol were taken, does not wipe out the ocular and other evidence including medical evidence which has come on record.

21.0 In his statement under Section 313 Cr.P.C (Question no. 31) the appellant has stated that he was not present at the spot at the time of the incident. But no such defence of *alibi* was put to any of the prosecution witnesses. Nor was any evidence led by the appellant/accused to prove his absence from the spot, except producing his cousin brother Amir/ DW-1. DW-1 in his deposition simply stated that the appellant/accused used to leave for work at 07/08 a.m. and used to return about 06/07 p.m.; and on 09.01.2016, he had returned home on 06/07 p.m. However, no such suggestion was put by the appellant/accused to any of the witnesses. Testimony of DW-1 hardly inspires any confidence. Thus evidently, a false plea of alibi was taken by the appellant/accused at a belated stage. Same amounts to another incriminating circumstance against the appellant.

22.0 Learned counsel for the appellant/accused also vehemently argued that despite allegedly witnessing firing by the appellant/ accused, PW-17

Tej Bahadur did not call at number 100 nor did he inform the deceased's family members; the said conduct is very unnatural. Further, though he claimed to have returned to the spot, he did not meet either PW-1 Mewa Lal or any police officials. It was argued that PW-5 ASI Ranveer Singh has deposed that as no eye-witness was found on the spot, he made endorsement on the DD no. 80-B itself. Even as per report Ex. PW12/A/Crime Team Report, no eye witness was present at the spot. Same clearly shows that PW-17 Tej Bahadur @ Gokul is a planted witness. In support, ld. counsel placed reliance upon the judgment in case of '*Chunthuram Vs. State of Chhattisgarh, Criminal Appeal no. 1392/2011*',

22.1 As has come on record that PW-17 chased the appellant/accused who ran from the spot after firing at the deceased; and despite chasing/searching for him for 10-15 minutes, the appellant/accused could not be nabbed/traced and that when PW-17 returned to the spot, he found that the deceased had been removed to the hospital on which he went back home. PW-17's action of chasing the appellant/accused when he ran after shooting instead of waiting to call number 100 is quite natural. Further, his version that he chased the appellant/accused for about 10-15 minutes and when thereafter he returned he did not find the deceased, further explains why he could not find PW-1 at the spot, as by that time the body had been removed as has also come in the testimony of PW-1 and police witnesses. For the same reasons, non-appearance of PW-17's name in Ex. PW12/A is also hardly of any consequence. The said testimony when read with the testimony of PW-1/Mewa Lal and other prosecution witnesses, not

finding PW-1/Mewa Lal at the spot by PW-17, is not out of place. PW-17's testimony is rather quite natural, cogent, consistent and inspires confidence. Suffice it to state that as per PW-17, at about 10 pm, when the appellant/accused shot on the head of the deceased, and ran, PW-17 ran after him, as noted above. Thus, there was no occasion for PW-1/Mewa Lal finding PW-17 at the spot, when he came out after hearing the gun shot. Thus, the judgment in *Chunthuram's case (supra)* as relied upon by the appellant, which dealt with unnatural conduct of a particular witness, is of no assistance to him.

23.0 Ld. counsel for the appellant/accused further argued that even the last seen theory as reflected in the testimony of PW-2 Ram Singh can hardly be believed as during his cross examination PW-2 Ram Singh admitted that he had come to the court on 16.11.2016 for his deposition with mother of the deceased, which shows that he is an interested witness.

23.1. It has come in the testimony of PW-2 Ram Singh that the deceased was his neighbour. Thus, there is nothing unnatural about the deceased's mother accompanying PW-2. Even otherwise his testimony inspires confidence when read in conjunction with testimony of other witnesses and other material on record.

24.0 Learned counsel for the appellant/accused also argued that the presence of PW-2 Ram Singh at the spot is doubtful as neither PW-1 nor PW-17 mention about him, which shows that he was planted later. During

cross-examination, PW-2 stated that police arrived at the spot at around 10.05/10.10 pm, which is also false as presence of PW-2 does not find mention in DD no. 80-B Ex. PW-5/A, Rukka Ex. PW-5/B and FIR Ex. PW-7/A. Merely because there is no mention of presence of PW-2 in *rukka* or the FIR does not in any manner create doubt about his otherwise creditworthy testimony. For the same reasons, we find no force in the contention of the learned counsel for the appellant/accused that the appellant/accused was falsely implicated later on because even the post mortem report Ex. PW4/A in 'Brief history as per IO' does not mention that the deceased was shot by his friend or appellant/accused.

25.0. Learned counsel also argued that although during his cross examination PW-3 Dhirendra Kumar Rai, official of CAT Ambulance who shifted the injured/deceased to the hospital stated that general public and one Sonu S/o Mahender Singh had shifted the body in the Ambulance. Said Sonu was not cited as a witness in the present case, which also raises doubt about prosecution story. Mere non joining of the said public person as a witness does not in any manner impact the prosecution case which has been proved vide testimony of the aforesaid witnesses and medical evidence.

26.0 Learned counsel further argued that the prosecution has failed to prove motive on the part of the appellant/accused to kill the deceased with whom he had no enmity. He submitted that motive assumes significance in cases like the present one which are based on the circumstantial

evidence. Needless to mention that it has come in the testimony of PW-17/Tej Bahadur/an eye witness that the appellant/accused and the deceased were quarreling with each other for keeping the katta/country made pistol which was found by them. On which, the appellant/accused had shot the deceased saying “*tu nahi rahega to katta mera ho jayega*”. The same itself points towards the reason of the appellant/accused shooting the deceased dead. Even otherwise, non proving of motive is not always fatal to prosecution case. In ***Jafel Biswas and others Vs State of West Bengal 2018 SCC OnLine SC 2011*** Hon’ble Apex Court observed that when there is definite evidence proving an incident and eye witness account prove the role of the accused, absence in proving of the motive by the prosecution does not affect the prosecution case. Reference in this regard was made to judgment in ***State of Haryana Vs Sher Singh, (1981) 2 SCC 300*** wherein it was observed as under:

“10. The prosecution is not bound to prove motive of any offence in a criminal case, inasmuch as motive is known only to the perpetrator of the crime and may not be known to others. If the motive is proved by prosecution, the court has to consider it and see whether it is adequate.”

27.0 Lastly, the Learned counsel for the appellant argued that it is not disputed that the appellant/accused and the deceased were friends having no enmity between them; both were in the habit of consuming *ganja* together and on that fateful day, they were consuming a hallucinating drug and were not in their senses to understand the consequences of their acts/words. A sudden argument took place between them on the finding

one *katta*/country made pistol, on the issue of keeping the same, which led to sudden death of deceased Vinod. Thus, at the maximum, the appellant may be convicted for the offence punishable under Section 304(II) of IPC and not under Section 302 IPC. In support, Ld. Counsel placed reliance on case law as noted above.

27.1 In view of the above evidence, it has come on record that a sudden fight ensued between the appellant/accused and the deceased when each of them claimed to keep the country made pistol found by them ; and in that argument, the appellant/accused used the said *katta*/country made pistol and shot at the deceased. Thus evidently, there was no pre meditation on the part of the appellant to kill the deceased. Considering the facts and circumstances in entirety, the case of the appellant/accused falls in Exception 4th of Section 300 IPC and not under Section 302 IPC.

28.0. In view of the above, conviction of the appellant is modified from Section 302 IPC to Part 1 of Section 304 IPC. In view of the evidence on record, the appellant's conviction u/Ss. 25/27 Arms Act does not call for any interference.

29.0 Considering the facts and circumstances of the case in entirety, we are of the considered opinion that for offence punishable under Part I of Section 304 IPC, sentence of 10 years shall meet the ends of justice. Accordingly, sentence of the appellant is reduced from life imprisonment to a period of 10 years with fine of Rs.5,000/-, in default to undergo simple imprisonment for a period of one month. As far as sentence u/S. 25 and S. 27 Arms Act are concerned, same do not call for any interference. All the sentences shall run concurrently.

30.0 Appeal is disposed of, accordingly.

31.0. Copy of the judgment be uploaded on the website and be also sent to the Superintendent Jail for updation of record and intimation to the appellant.

POONAM A. BAMBA)
JUDGE

(MUKTA GUPTA)
JUDGE

MARCH 27, 2023/g.joshi

