

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.A. 664/2014

Judgment reserved on 09.04.2015

Judgment delivered on 25.05.2015

JAVED ALI

.....Appellant

Through : Mr. Ramesh Gupta, Sr. Advocate with
Mr. Bharat Sharma, Advocate.

Versus

STATE

.....Respondent

Through : Mr. Feroz Khan Ghazi, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J.

1. Present appeal filed by the appellant under Section 374 read with Section 482 of Code of Criminal Procedure, is directed against the impugned judgment dated 29.04.2014 and order on sentence dated 05.05.2014 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No. 51/2014 whereby the appellant has been sentenced to undergo rigorous imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code with a fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for three years. The appellant has been further sentenced to undergo rigorous imprisonment for three years for the offence under Section 25 of Arms Act, 1959 and a fine of Rs.3,000/-

and in default of payment of the fine to undergo rigorous imprisonment for six months. The appellant has been further sentenced to undergo rigorous imprisonment for seven years for the offence under section 27 of Arms Act, 1959 and a fine of Rs.10,000/- and in default of payment of the fine to undergo rigorous imprisonment for one year.

2. Brief facts of the case, as noticed by the learned Trial Court, are as under:

“On 28.05.2006 at about 11:00 A.M .ASI Devi Ram received DD No-6, vide Ex.PW21/A. Thereafter, he along with Ct. Vijay Kumar reached at Metro Parking, Telephone Lane square, New Delhi where lots of blood was lying on the ground and two used magazine, two mobile phone, one mobile cover, one key ring, 13 used cartridges, 5 live cartridges were found lying. ASI Devi Ram came to know that the injured has been removed to the hospital by PCR van. Insp. Samsher Singh also received wireless message at about 11:25 A.M while he was on patrolling duty that one person has been shot dead at Telegraph Lane, Metro Parking and ASI Devi Singh and Ct. Vijay have been sent there. Ct. Brijesh , who was travelling in bus route no. 157 and when he got down from the bus at Gole market for going towards Shivaji Stadium on foot at 11:10 AM when he was passing through Bangla Sweets, he saw gathering there saying that one person had killed one person and he also reached in the crowd and accused was handed over to him with a bag.

2) Insp. Samsher Singh also reached near Gole Market and found some gathering near Bangla Sweets and found that accused was apprehended by PCR officers and one constable who was in civil dress namely Ct.

Brijesh Kumar and complainant Gopi Chand. At that time blood was oozing out from the head of Gopi Chand and some blood stains also appeared on the clothes of Ct. Brijesh Kumar and accused clothes were also having blood stained. Accused was produced by Ct. Brijesh kumar and complainant Gopi Chand to PCR official saying that he was trying to run away after firing. One country made pistol with its magazine was handed over to Insp. Shamsheer Singh by PCR official which was recovered from the accused. One leather bag of black color was also recovered from accused in which one more country made pistol with its magazine were found kept along with one plastic dibbi/small box containing seven live cartridges, one his election card, one buttondar knife and two small brass locks.

3) Insp. Shamsheer Singh took the accused, complainant and PCR staff to Telephone lane, Metro Parking near electric pole no. 27 where ASI Devi Ram and Ct. Vijay met and found blood was lying near pole no. 27 and 12 fired cartridges along with five live cartridges, two mobile phones, one mobile cover, two magazine in one magazine having three live cartridges, one plastic black ink pen, one led , one key ring lying on spot. Bullets marks were noticed at three places on the road at the 20 paces from electric pole No. 27 and one Wagon R bearing no. DL 2C AA 9697 was also parked which belonged to the deceased Dr. Rajesh Abbot. Deceased was removed to hospital and Insp. Shamsheer Singh reached in the hospital where the dead body was left in the supervision of duty constable of the hospital.

4) Crime team was summoned at the spot HC Ravinder Kumar took the photographs which are Ex.PW17/A1 to Ex.PW17/A3 and proficient Ct. Subhas lifted some chance prints from the spot which were later on sent to finger print bureau and SI HR Meena prepared the report which is Ex.PW13/A. IO prepared the sketch of

the recovered pistol as well as cartridges, magazines and knife which is Ex.PW12/H and Ex.PW43/A. IO prepared the sketch of two magazines along with live cartridges the same is Ex.PW43/B. IO prepared the sketch of 13 fired cartridges recovered from the spot, five live cartridges recovered from the spot which is Ex.PW18/F and 18/G. The sketch of button actuated knife was also prepared which is Ex.PW12/I. The case property was sealed with the seal of SS and the pistol recovered from his hand was taken into possession vide memo Ex.PW12/B and another pistol was recovered from bag vide memo Ex.PW12/A. 7 live cartridges recovered from the bag were seized vide memo Ex.12/C and two magazine with three live cartridges along with one lead of bullet was seized vide memo Ex.PW12/D. Five live cartridges were taken into possession vide memo Ex. PW18/A and 13 fire cartridges were seized vide memo Ex.PW8/B. IO also lifted the earth control, blood smeared soil, blood sample with the help of gauze from the spot and sealed with the seal of SS and taken into possession vide memo Ex.PW18/C . The bag was sealed with the seal of SS and taken into possession vide memo Ex.PW12/F. The button actuated knife was also taken into possession vide memo Ex.PW12/F. IO recorded the statement of eye witness Gopi Chand which is Ex.PW5/A, made his endorsement Ex.PW43/C and handed over the same to Ct. Vijay Kumar for registration of the case who went to PS and get the case registered. The copy of FIR is Ex.PW21/B which was delivered by Ct. Mahender to Ld. MM and Sr. Police officials. Site plan vide Ex.PW18/DA was prepared by Insp. Shamsheer Singh at the instance of complainant Gopi Chand. Accused Javed was arrested vide memo Ex.PW38/A and his personal search was conducted vide memo Ex. PW43/E. Accused was interrogated and his disclosure statement was recorded which is Ex.PW12/J. Accused disclosed that he was getting treatment from Dr Rajesh Abbot, Zaidi Dawakhana Paharganj and

given him Rs. 11,000/- and when problem could not be healed accused along with one Avdhesh Kumar arranged the weapons and killed the deceased.

5) After Completion of the investigation challan was filed in the court of Ld. MM. After committal proceedings, matter was send to the court of Sessions on 27.10.06 and charge for the offence punishable under section 302 IPC & 25/27 Arms Act was framed against accused by the ld. Predecessor to which accused did not plead guilty and claimed trial.”

3. The prosecution, in the course of the trial, relied upon the testimonies of 47 witnesses and also placed on record several exhibits. After the prosecution evidence, the learned Trial Court examined the appellant under Section 313 of Code of Criminal Procedure wherein he denied all the prosecution allegations leveled against him. He pleaded innocence and stated that he has been falsely implicated in the present case and opted to examine DW1 Hasmat Ali in his defence.
4. The learned Trial Court, after scrutiny of the evidence, held that the prosecution has proved the case against the appellant and accordingly convicted him for the offences and imposed the sentence as has been stated hereinabove.
5. Sh. Ramesh Gupta, Senior Advocate on behalf of the appellant contended that there were several material contradictions in the testimonies of the witnesses; that entire case of the prosecution is based on the testimony of PW5 Gopichand, who turned hostile; that other material witnesses i.e PW9 Dalip Kumar and PW12 Const.

Brijesh failed to support the case of the prosecution and also turned hostile; that there are several overwhelming inconsistencies and blemishes which are fatal to the version of the prosecution as they strike at the root of the case; that the case of the prosecution is based on circumstantial evidence but prosecution failed to prove the chain of the circumstances which led to the hypothesis of guilt of the appellant; that the circumstances and nature of the fact do not point towards the guilt of the appellant; that there are glaring contradictions and inconsistencies in the testimony of the material prosecution witness i.e. PW12 Ct. Brijesh and his testimony is not worthy of being relied upon; that the bag was not recovered from the possession of the appellant rather it was found lying on the spot; that there is no direct evidence against the appellant; that there is lack of legal evidence as no finger prints of the appellant were found on the alleged weapon of offence; that the evidence adduced by the prosecution is inadmissible in law and can not be relied upon to convict the appellant.

6. In support of his submissions, the learned counsel for the appellant relied upon ***Kali Ram V. State of H.P. : 1973 2 SCC***, wherein it has been held by the Hon'ble Supreme Court that:

25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the

*accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the Court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the Court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by report to surmises, conjectures or fanciful considerations. As mentioned by us recently in the case of **State of Punjab v. Jagir Singh [(1974) 3 SCC 227 : 1973 SCC (Cri) 886]** a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is *ex facie* trustworthy on grounds which are fanciful or in the nature of conjectures.*

26. *It needs all the same to be re-emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the*

accused. The Courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the Courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real. As observed on p. 3 of the book entitled The Accused by JA Coutts 1966 Edition, "When once it is realised, however, that the public interest is limited to the conviction, not of the guilty, but of those proved guilty, so that the function of the prosecutor is limited to securing the conviction only of those who can legitimately be proved guilty, the clash of interest is seen to operate only within a very narrow limit, namely, where the evidence is such that the guilt of the accused should be established. In the case of an accused who is innocent, or whose guilt cannot be proved, the public interest and the interest of the accused alike require an acquittal."

27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the

*miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on p. 157 of **The Proof of Guilt by Glanville Williams, 2nd Edn.**:*

“I dare say some sentimentalists would assent to the proposition that it is better that a thousand or even a million guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos.”

28. *The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of **Shivaji Sahabrao** as is clear from the following observations:*

“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 distinction between “may be” and “must be” is long and divides vague conjectures from sure conclusions.”

7. Learned counsel for the appellant further contended that there is lack of scientific as well as forensic evidence to corroborate the story of the prosecution; that the appellant has been falsely implicated in the present case and has not been convicted in a judicious manner. Thus, the impugned judgment is liable to be set aside.
8. On the other hand, Mr. Feroz Khan Ghazi, learned Counsel for the State opposed the appeal filed by the appellant. He argued that the prosecution has been able to prove the motive behind the crime as the appellant was taking treatment from the deceased for which he paid Rs.11,000/- to him and when he failed to get any relief, he killed the deceased. It is further argued that the present case is of circumstantial evidence and the prosecution has proved the entire chain of circumstances through evidence on record.
9. In support of his submissions, Mr. Ghazi relied upon ***S. Chenga Reddy & Ors. Vs. State of A.P. : 1996 (10) SCC 193***, wherein it has been observed :

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and as such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

10. We have heard the learned counsel for the parties and considered their rival submissions and perused the impugned judgment as well as the material available on record.
11. In order to deal with the contentions of both the parties, it would be appropriate to examine the testimonies of the material witnesses, more particularly the testimonies of PW5 Gopichand, PW9 Dalip Kumar and PW12 Ct. Brijesh, who were cited as eye witnesses by the prosecution.
12. PW5 Gopi Chand, when examined in court deposed that :

“xxxxxxxxxxxx. I saw that 2-3 persons were beating one person. Thereafter, so many public persons gathered there. Out of which two public persons started firing and injured fell down. The attackers ran away after throwing their weapons on the ground and entered the shop of Sweets.

xxxxxxx I cannot identify the persons who had attacked on deceased. xxxxxxxx I cannot identify the weapon. xxxxxxxx I was taken to PS and was put in lock up. xxxxxxxxxx and was thoroughly interrogated by the police. xxxxx I-card of Riksha was recovered from me. I saw in the police station two pistols and one knife lying on the bench. One black bag was also lying on the bench including other articles.

xxxxxxxxxx Thereafter, police gave me written paper and asked me to memorize. Thereafter, they asked me if I will not make such statement before the Magistrate, I will be implicated in this case.”

On being cross examined by learned APP, PW5 Gopichand deposed that :

“ I had signed the complaint Ex.PW5/A, bears my signature at point ‘A’ (objected by Ld. Defence counsel) Voluntarily (this statement was not given by me). Entire statement is read over to the witness but he denied the contents and stated that police had not reached the spot immediately after incident and nothing was lifted from the spot in my presence. It is incorrect to suggest that I named assailant as Javed who had killed Dr. Rajesh Abbot with the help of weapons which were recovered from the spot. It is also incorrect that voter card of accused was also recovered from the bag which he was having at the time of incident. It is also incorrect that Javed is the person who committed murder of Dr. Rajesh Abbot in my presence. It is also incorrect that my blood is lying on the clothes of deceased. It is correct that my shirt was seized by the police which was having blood stains. I can identify my shirt but due to lapse of time I cannot identify the weapons. It is incorrect to suggest that I voluntarily refused to identify the weapons as I am mixed up with the accused.

I do not remember whether I stated before the Magistrate in statement 164 Cr.PC that I saw one man was lying and one person aged 22-23 years was firing on him. When I saw this, that person was firing continuously, we started pelting stones and other persons also reached there and they also started pelting stones. He fired six bullets upon the lying person. I saw that bullet of one revolver had finished and he put the said revolver in black bag which was hanging in his neck towards front side, thereafter he took out a revolver from the right side of the pant and he

fired six rounds from the said revolver. He took out magazine from the bag and inserted the same in the weapon and fired again.

I do not remember whether I stated to the police that when, I started pelting stones upon that person, he started running. Some public persons also followed him along with me, thereafter he entered in Bangali Sweet Shop. We also entered in the shop and the shopkeeper pushed the said boy outside the shop. Later on we came to know the name of that person as Javed Ali. When he was pushed by the shopkeeper, thereafter he was apprehended by us. I gave blow of two stones on his head. Due to said injury blood coming out from his injuries and fell on my clothes. I took out the said boy from the shop, where a fatty policeman in civil clothes was standing. The policeman had taken the said revolver and bag from his possession, thereafter he again started beating Javed near Public Shochalaya and after 5 minute police officials reached the spot and police had recovered black bag which is having a plastic dibbies which containing the cartridge and revolver was also recovered from his possession and it was containing 2 live cartridge. From the bag one revolver and one button actuated knife was also recovered. Public was beating Javed Ali, one person had given helmet blow on his head. Thereafter, police had taken him to the police station after saving from us."

13. PW9 Dalip Kumar, another eye witness turned totally hostile and failed to support the case of the prosecution. He however, admitted that he was working in Bangla Sweets as Salesman for 4-5 years.

14. PW12 Ct. Brijesh, another eye witness gave contradictory statements regarding the identity, occurrence, recovery of pistol and bag containing pistol, live cartridges and other articles. He deposed :

“On 28.05.2006, I was going to Pandara Road from my house through the bus No. 157. I got down from the bus at Gole Market and going towards Shivaji Statium on foot. At about 11:10 a.m. I was passed through Bangla Sweets, I saw gathering there and they were saying that one person had killed one person. I had reached in the crowd. I had introduced myself to the police. The crowd had handed over to me one person and a bag. In the meantime the PCR Van had reached there. I had handed over the accused present in the Court to the PCR Van and he was asked to sit in the PCR. I tried to contact the control room to inform the police about apprehension of one person from the crowd but I could not inform the control room due to non answering from the control room. Thereafter, I had informed New Delhi Control Room on telephone No. 23361231 by telephone No. 9891261606 and thereafter abovesaid PCR reached there and thereafter the IO of this case reached there.

Gopi Chand son of Moti Ram was also found in injured condition from the crowd. The Gopi Ram and the accused Javed present in the Court and one bag which I had received from the public persons was handed over to IC PCR. Thereafter, IO reached. I along with the Gopi Chand and accused Javed and the IO reached at the spot in the PCR. When we reached at the spot at Telegraph square near pole No. 23, I noticed that blood was lying there. In the meantime the crime team members reached there.

At this stage now I recollect that one bag which was containing one plastic dibbi, seven live cartridges, one knife. I do not recollect about the other articles. The public persons had also handed over to me one more pistol but I cannot tell who had given me the pistol. The person who had given me the pistol was one of the persons from the crowd.

I tried to save the accused Javed from the public so my shirt was drenched in the blood from front and back. I had also handed over the shirt to the IO of this case during investigation. When we reached at the spot there was a PCR and the crime team. The crime team had collected the exhibits. Two empty magazines were also found from the spot. Three live cartridges were also found at the spot, 13 used cartridges were also found at the spot. One mobile, one pen and cover of mobile phone were also found at the spot. These articles were lifted from the spot and same were seized and IO prepared the sketch of weapons and ammunition and the weapon which was recovered from the bag was also converted into sealed pulanda after preparing their sketch. At the spot, I came to know that Dr. Rajesh Abbot injured has been removed to hospital. Car of the doctor bearing registration No. 2CAA-9697 Maruti Wagon R was also found near the spot. IO sealed all the pulandas with the seal of SS. Seizure memo of the pistol recovered from the bag is Ex.PW12/A which bears my signature at point 'A'. Seizure memo of pistol which was given by the public is Ex.PW12/B which bears my signature at point 'A'. Seven live cartridges recovered from the bag is Ex.PW12/C. Seizure memo of two magazine, there live cartridges and one lead is Ex.PW12/D."

15. On scanning the testimony of PW9 Dalip Kumar, we find that he failed to support the case of the prosecution and turned totally hostile.
16. Though PW5 Gopi Chand also turned hostile but he admitted that he had signed the complaint Ex.PW5/A as well as his statement Ex.PW5/B under Section 164 of the Code of Criminal Procedure. PW5 Gopi Chand admitted that the arrest memo of the appellant Javed Ali Ex.PW38/A was also signed by him. He further admitted that all the memos of exhibits i.e. Shirt Ex.P1, pistol Ex.P2, another pistol Ex.P3, magazine Ex.P4, another magazine Ex.P5, a black colour bag Ex.P6 and knife Ex.P7 were prepared in his presence. PW5 Gopi Chand deposed that after the incident he was taken to the hospital and was medically examined and thereafter he was detained in the lock up and after sometime the other boy from whose possession voter card was recovered was taken to the hospital for medical examination. He further deposed that thereafter police gave him written paper and asked him to memorize the same and if he failed to make the statement on the dictated lines before the Magistrate, he would be implicated in a false case. He further deposed that after 4-5 days they took him to the court and produced him before the Magistrate, where he made a statement before the Magistrate on the dotted lines. PW5 Gopi Chand when cross-examined deposed that :

“It is correct that statement 164 Cr.P.C. bears my signatures at point A.

Entire contents of statement recorded by Magistrate are read over to witness who stated that this statement was given by me as per directions of the police officials but in fact it is not my statement nor I have stated such facts before the police. Police compelled me to make such statement. Today I do not recollect what I had made before the Magistrate.

Xxxxxxx I did not make any complaint to the commissioner of the Police that innocent Javed is falsely implicated in this case and I was pressurized by the police officials to make the statement against the innocent person. Xxxxxxx Police arrived at the spot within 5 to 10 minutes of the incident.”

17. Even PW12 Const. Brijesh another material eye witness also turned hostile but in his testimony he stated that :

“I handed over the accused present in court to the PCR Van. Xxxxxxx Gopi Ram and the accused Javed present in the Court and one bag which I had received from the public persons was handed over to IC PCR. Xxxxxxx Now I recollect that one bag which was containing one plastic dibbi, seven live cartridges, one knife. I do not recollect about the other articles. The public persons had also handed over to me one more pistol but I cannot tell who had given me the pistol. The person who had given me the pistol was one of the persons from the crowd. xxxxxxxx The crime team had collected the exhibits. Two empty magazines were also found from the spot. Three live cartridges were also found at the spot, 13 used cartridges were also found at the spot.”

18. However, PW12 Const. Brijesh when cross-examined by learned APP deposed that :

“It is correct that one pistol was recovered from the hand of accused. Again said, there was lot of crowd and public was beating the accused, one other person whose name I came to know as Gopi, as well as myself, therefore, I can not say today that whether a pistol was recovered from the hand of accused Javed or not. Confronted with portion ‘A’ to ‘a’ of statement U/s. 161 Cr.PC of the witness which is Ex.PW12/PA, in which it is written that pistol was recovered from the hand of accused. Witness explains that he does not remember now as to whether the pistol was recovered from the hand of accused or not. It is correct that one bag was recovered but it was not in the neck of the accused but it was hanging on the shoulder of the accused. I do not remember as to whether any voter card was recovered from the bag or not but pistol and magazine and seven live cartridges were recovered from this bag.”

19. In the cross examination by the learned defence counsel, PW12 Const. Brijesh deposed that :

“When I reached the spot and when crowd handed over to me accused Javed and the bag, again said, bag was not handed over by the public to me, rather public was trying to put the said bag on the shoulder of accused Javed by shouting that Bag belongs to him (Javed). Then I took the bag.”

20. The law regarding hostile witnesses is well settled as laid down in catena of judgments discussed below :

In the case of ***Khujji vs. State of Madhya Pradesh, AIR 1991 SC 1853***, it was held that:

“The 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 but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.”

In another case of ***Sat Paul v. Delhi Administration 1976 Cri. L.J. 295***, it was observed that:

“Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto.”

The Hon'ble Supreme Court in the recent case of ***Rohtash Kumar v. State of Haryana, 2013 (7) SCALE 472*** has held that :

“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).”

Similarly, in the case of ***Gura Singh, Appellant v. State of Rajasthan, reported in AIR 2001 SC 330***, it was observed as follows :-

“11. There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in Bhagwan Singh v. State of Haryana, AIR 1976 SC 202 : (1976 Cri LJ 203), held that merely because the Court

gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. In Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170, it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.”

21. Applying the law to the facts of the case, the mere fact that PW5 Gopi Chand and PW12 Const. Brijesh have been declared hostile is not sufficient to discard their testimonies altogether and that part of the testimony which supports the case of the prosecution can be read in evidence.
22. From the testimonies of PW5 Gopi Chand and PW12 Const. Brijesh, the prosecution has been able to prove the presence of the appellant at the spot. PW12 Const. Brijesh also proved the recovery of the articles from the spot and deposed “*I recollect that one bag which was containing one plastic dibbi, seven live cartridges, one knife. I*

do not recollect about the other articles. The public persons had also handed over to me one more pistol but I cannot tell who had given me the pistol. The person who had given me the pistol was one of the persons from the crowd.” 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.

23. The case of the prosecution is further supported by the postmortem report Ex.PW10/A prepared by PW10 Dr. Shraban Kumar Naik, Lady Harding Hospital, Asstt. Professor, Department of Forensic Medicine who conducted the postmortem over the dead body of the deceased and opined that :

“The cause of death was due to shock and haemorrhage as a result of multiple firearm injuries from rifle firearms from distant range. All the injuries are antemortem in nature, all the injuries together and external injury number 2, 3, 4, 5 and 6 with their corresponding internal injuries individually fatal in ordinary course of nature.”

24. Regarding motive, the case of the prosecution is that the appellant was taking treatment of sexual problem from the deceased for which he paid Rs. 11,000/- to the deceased and on being not satisfied of treatment and in order to take revenge for the same he committed the murder of the deceased. This version of prosecution is supported by the testimony of PW1 Gauri Abot, wife of the deceased who in her testimony deposed that the appellant was taking treatment from her husband i.e. the deceased.

25. We agree with the observation made by the learned trial court that the appellant had a motive to do away with the deceased as he was not satisfied with the treatment given by the deceased. In the case of ***Udaipal Singh v. The State of Uttar Pradesh*** AIR 1972 SC 54, it was held that :

“In cases where only circumstantial evidence is available at the outset one has to normally start looking for the motive and the opportunity to commit the crime. If the evidence shows that the accused having a strong motive had the opportunity of committing the crime and the established circumstances on record considered along with the explanation, if any, of the accused, excluded a reasonable possibility of any one else being the real culprit, then the chain of evidence can be considered to be so complete, as to show that within all human probability, the crime must have been committed by the accused. He may, in that event, safely be held guilty on such circumstantial evidence. It was further held that if the explanation of the accused is found to be absurd, it should be held to be inconsistent with the innocence of the accused and incapable of any other hypothesis than that of the guilt of the accused.”

26. With regard to the contention raised by the counsel for the appellant that finger prints were not found on the alleged weapon of offence (pistol) and there is lack of scientific as well as forensic evidence to corroborate the story of prosecution, it would be useful to peruse the testimony of PW45 Sh. K. C. Varshney, Asstt. Director, Ballistic Division, FSL, Rohini, New Delhi who in his testimony deposed that on 19.06.2006, ten sealed parcels were

received in the FSL, Rohini, New Delhi in case FIR No. 212/2006, Police Station, Mandir Marg, New Delhi. He further deposed that after examination of those parcels he found that the pistols were in working conditions. He further deposed that he examined deformed bullets and fired cartridges and found that the same were used from the same pistol examined by him and thereafter he prepared his detailed report Ex.PW45/B.

27. In our opinion we agree with the view taken by the learned trial court which is reproduced as under :

“However, it is note worthy to observe that bag in question was also found having pistol, cartridges, knife, election card vide Ex.PW12/A, PW12/C, PW12/D (seizure memos of arms and ammunition) and PW12/F (seizure memo of knife) and Ex.PW18/A (seizure memo of cartridges) and this factum indicates that weapon of offence was within the acquisition of accused Javed Ali. Apart from this it has also come on record that deceased suffered bullet injuries from the pistols in question vide deposition of PW45 K C Varshney who stated that the deformed bullets and fired cartridges were used by the same pistol vide his detailed report Ex.PW45/B. The pistols were found within the acquisition of accused. Therefore the tests as laid down in the above quoted judgments are met out. Therefore, there is no scope that the bullets were not fired from the pistols in question.”

28. The lapse on the part of the Investigating Agency with regard to non-examination of finger prints on the alleged weapon of offence (pistol) and lapse regarding identification of blood on the clothes of the appellant reflects the casual and callous attitude of the

Investigating Agency in carrying out its most solemn duty of conducting fair, honest, flawless and scientific investigation into the crime. However, it is settled law that the defective investigation by itself cannot be a ground for acquittal as laid down in the case of **Ram Bihari Yadav Vs. State of Bihar, AIR 1998 SC 1850**, wherein Hon'ble Supreme Court held that :

“If primacy is given to the omissions or lapses by perfunctory investigation by the investigating agency, the faith and confidence of people would be shaken not only in law enforcing agency, but also in the administration of justice. It is true if on account of any lapse doubts are created in prosecution case, the accused would be entitled to the benefit of that doubt. But, if the prosecution is able to establish its case beyond reasonable doubt against the accused inspite of lapses, the accused cannot be acquitted because of the lapse on the part of investigating officer.”

In the case of **C. Muniappan v. State of T.N., (2010) 9 SCC 567**, it has been held by the Hon'ble Supreme Court that:

“55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the

prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.

Similar view was taken by the Apex Court in the case of ***Sunil Kundu v. State of Jharkhand, (2013) 4 SCC 422***, wherein it was held that :

“29...It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the depreciable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored....”

In another case of ***Hema v. State, (2013) 10 SCC 192***, it was observed by the Apex Court that:

“18. It is clear that merely because of some defect in the investigation, lapse on the part of the investigating officer, it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions, etc. it is the obligation on the part of the court to scrutinise the

prosecution evidence dehors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth.”

29. On the basis of the law discussed above, we are of the opinion that in the case of defective investigation, the court has to circumspect in evaluating the evidence, but it would not be right in acquitting an accused person solely on account of the defect by the Investigating Agency.
30. The case of the prosecution hinges on circumstantial evidence and undoubtedly, it is for the prosecution to prove its case beyond any reasonable doubt and inference of guilt is to be cogently and firmly established and all circumstances must unerringly point towards the guilt of the accused and all the links in the chain of events must connect the accused with the crime. The circumstances from which the conclusion of the guilt is to be drawn ‘must’ or ‘should’ and not ‘may be’ established.
31. The law regarding circumstantial evidence is no longer res integra and the settled law has been discussed in a recent ***Appeal No. 486 of 2010 titled Raja Vs. State of Haryana decided on 10.04.2015 by Hon’ble Bench comprising of Hon’ble Mr. Justice Dipak Misra and Hon’ble Mr. Justice N. V. Ramana***, wherein it has been observed :

“7.....When a case rests on circumstantial evidence, the Court has to be satisfied that the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; those

*circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. [See **Padala Veera Reddy v. State of A.P. : 1989 Supp (2) SCC 706**]*

8. In *Balwinder Singh v. State of Punjab : 1995 Supp (4) SCC 259*, it has been laid down that:

....the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond a reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence, the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, howsoever strong they may be, to take the place of proof.

9. From the aforesaid it is clear as day that the Court is required to evaluate the circumstantial evidence to see that the chain of events have been established clearly

and completely to rule out any reasonable likelihood of the innocence of the accused. Needless to say whether the chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted [See Ujjagar Singh v. State of Punjab : (2007) 13 SCC 90].”

32. In ***Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh : 1953 Cri L.J. 129***, it was observed thus:

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

33. In the case of ***Sharad Birdhichand Sarda v. State of Maharashtra , 1984 (Cri.) L.J.1738*** wherein while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(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.”

34. On careful analysis of entire evidence adduced by the prosecution, we are of the view that the presence of the appellant at the spot stands established from the testimonies of eye witnesses PW5 Gopi Chand and PW12 Const. Brijesh. The prosecution has also proved the motive of the appellant to cause the death of the deceased.
35. From the preceding discussion, we may also conclude that the prosecution has succeeded in establishing the sequence of circumstances which can be called conclusive in nature and there is no unbroken chain leaving a gap of missing links and such circumstances are consistent with the hypothesis of the guilt of the appellant. In the background of such a scenario, we find that the

said circumstantial evidence conclusively establishes the guilt of the appellant.

36. For the reasons stated above, we find no infirmity in the judgment passed by the learned trial court and we see no reason to interfere with the same. The conviction of the appellant under Section 302 of the Indian Penal Code and Sections 25/27 of Arms Act is upheld.
37. The appeal therefore fails and is dismissed.
38. The copy of this order be sent to the Superintendent Jail.
39. The lower court record be sent back.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

MAY 25, 2015/sc