

\$~R-40D (Part-A)

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

Reserved on: 5th October, 2015
% Date of Decision: 6th November, 2015

+ CRL.A. 1582/2014

ANIL KUMAR Appellant

**Through: Mr. Fieroze Ahmad and Mr. R S
Sharma, Advs.**

versus

STATE (GNCT OF DELHI) Respondent

Through: Ms. Aashaa Tiwari, APP

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

R. K. GAUBA, J:

1. On 04.07.2007, at about 03:25 PM Santosh Kumar son of Shiv Chander aged about 25 years, resident of 158, Lalita Park, Gali No.12, Laxmi Nagar, Delhi received firearm injury near bus stand, traffic light Mayur Vihar, Phase-I, Delhi and died on the spot. At the time of the incident, he was carrying a bag containing cash in the sum of Rupees Eight Lakh Sixty Five Thousand. The first information report (FIR) (Ex.PW1/A) was registered on the basis of statement (Ex.PW2/A) of Miraj Malik (PW2), resident of Toli Mohalla near Chand Masjid, Loni, Ghaziabad, U.P. with allegations to the effect that the appellant had waylaid the victim (the deceased) and after firing at him, had robbed

him of the bag containing the money and that he had been apprehended by the first informant (PW2), assisted by his companion Wahid Malik (PW9).

2. Two persons, including the appellant, were put to trial in the court of Additional Sessions Judge (East) in sessions case (No.84/2013) on the basis of the report under Section 173 of Code of Criminal Procedure, 1973 (Cr.P.C.), on the charge for offences punishable under Section 120B IPC read with Sections 392/397/302 of Indian Penal Code, 1860 (IPC) and Sections 392/397/302 IPC read with Section 34 IPC. The appellant faced additional charge for offences punishable under Sections 506 and 411 IPC, and under Section 27 of Arms Act. The other person sent up for trial is named Surender @ Sukkan (real brother of the appellant), his involvement in the crime allegedly having been brought out, on the disclosure made by the appellant, the role attributed to him mainly being that he had aided and abetted by taking the appellant to the scene of crime, on his motorcycle.

3. By judgement dated 20.09.2014, Surender was acquitted. The appellant, however, was held guilty and convicted for the offences punishable under Sections 302 IPC, 392 IPC read with Section 397 IPC and under Section 27 of Arms Act. By order dated 27.09.2014, the trial court awarded imprisonment for life with fine of Rs.5,000/- for offence punishable under Section 302 IPC, rigorous imprisonment for seven years and fine of Rs.3,000/- for offence punishable under Section 392 IPC read with Section 397 IPC and rigorous imprisonment for seven years with fine of Rs.2,000/- for offence punishable under

Section 27 of Arms Act. The order directed that in case of default in the payment of fine, the appellant would undergo further simple imprisonment for five months, three months and two months respectively. All the substantive sentences have been directed to run concurrently and benefit of Section 428 Cr.P.C. has been granted.

4. The appellant seeks to assail the judgment and order on sentence as above.

5. Santosh Kumar son of Shiv Chander was working as an office assistant under the control of Ghanshyam Pandey (PW15) employed as financial assistant with M/s V. M. Soft Vorex Technology Pvt. Ltd. and also working as a chartered accountant through firm named G. S. Pandey & associates at E-49, Jawahar Park, Laxmi Nagar, Delhi-92. The unchallenged testimony of this witness, and the deposition of Sohanvir (PW7), branch manager of Mahamedha Urban Bank Co-operative Ltd., has proved that the company (M/s V. M. Soft Vorex Technology Pvt. Ltd.) which had engaged the services of the deceased, had a bank account with the said bank in its branch at Sector-41, Noida, where PW7 was posted at the time as senior branch manager. On 04.07.2007, the deceased had been deputed by PW15 for going to the said bank for certain transactions including withdrawal of money. Two cheques (Ex.PW7/A and Ex.PW7/B) were carried and money withdrawn thereagainst from the account of the company. The cheques were issued in favour of “self” by the director, for and on behalf of account holder company, for cash payment of Rs.6 lakh and Rs.2.67 lakh respectively.

6. We may add here that PW7, the bank manager, in the course of his testimony, also referred to the statement of account (Ex.PW7/E) in respect of the bank account of the company from which the withdrawals were made but since he did not produce corresponding ledger of the bank nor supported the document by any certificate in terms of Banker's Books of Evidence Act or the certificate under Section 65-B of the Evidence Act, we exclude from consideration the said material. Be that as it may, in view of the evidence of PW7, based on the cheques (Ex.PW7/A and Ex.PW7/B) coupled with recovery of cash Rs.8.65 lakh from the bag seized at the spot, there can be no doubt as to the fact that the deceased had withdrawn the money, as stated by PW7 and PW15, and was carrying it with him, when he was shot dead at the date, time and place mentioned above.

7. The fact that Santosh Kumar (the deceased) died a homicidal death, as stated in the charge, has been proved by the prosecution through unimpeachable evidence. Prakhaya Singh (PW13), a journalist, resident of Sector-11, Noida, U.P., with a companion (camera person) was on her way in the area in question, at the time of incident and had reached near Mayur Vihar bus stop, when she saw one person lying in injured condition and a gathering of public persons, most of whom were beating another individual on the other side of the road. She learnt from the public persons that a firing incident had taken place. She informed the police on phone number 100. She had also seen a bag lying at the spot, which was seized by the police. Though the evidence of PW13 does not give the description or identity of the persons involved in the incident seen by her, the record of police

control room (PCR), as proved by HC Surender Pal (PW17) through the PCR form (Ex.PW17/A) confirms that she was deposing about the firing incident in which Santosh Kumar was fatally wounded.

8. The PCR form (Ex.PW17/A) shows that the information was received telephonically at 15:42 hours on 04.07.2007. It is this information which was passed on by PW17 from PCR to the console operator from where it eventually reached HC Kanwar Pal, the then duty officer, who recorded DD no.22A (Ex.PW21/A) thereupon in police station Mayur Vihar (hereinafter referred to as "*the Police Station*"). The DD entry was proved by ASI Krishan Pal (PW21) on the basis of original *roznamcha*. He also, similarly, proved copy of DD no.23A (Ex.PW21/B) logged by the duty officer at 15:43 hours, again on the basis of input routed through PCR, noting the fact that the person who had committed the murder near Samachar Apartment, Mayur Vihar, Phase-I had been apprehended.

9. The information received in the police station through aforementioned two DD entries was passed on by the duty officer to ASI K. P. Singh (PW27). PW27, accompanied by HC Mahesh Chand (PW10), set out for the place of incident. The evidence, *inter-alia*, in the form of DD no.24A (Ex.PW21/C) and DD no.27A (Ex.PW21/D) further shows that the said two police officers were followed to the scene of crime by Inspector Rajender Gautam (PW25) and SI (later inspector) Jaswant Singh (PW22).

10. According to the evidence of SI K. P. Singh (PW27) and HC Mahesh Chand (PW10), when they had reached the place of

occurrence, they found the victim lying there in an injured condition in a pool of blood. A crowd had gathered at the spot. The persons present at the scene included Miraj Malik (PW2) and Wahid Malik (PW9). It is the version of PW27 and PW10 that said two public witnesses had handed over the appellant to PW27 stating that he had been earlier apprehended at the spot along with a bag (Ex.P-4) and a pistol (Ex.P-1). The bag, on being checked, was found containing cash in the sum of Rs.8.65 lakh and pistol on being checked, was found containing cartridges (Ex.P-2 and Ex.P-3). Miraj Malik (PW2) is stated to have made the statement (Ex.PW2/A) which indicated it to be a case of robbery-cum-murder. It also mentioned that during the endeavour to overpower the assailant, the latter, while attempting to resist, had given a teeth bite on the person of Miraj Malik (PW2) and had also extended threats to the said witness and his companion (PW9). PW27 made his endorsement (Ex.PW27/A) and sent a *rukka* at 05:30 PM from the spot for registration of the FIR. On its basis, SI Shahid Khan (PW1) registered the FIR in the police station at 05:50 PM on 04.07.2007 with corresponding endorsement (Ex.PW1/B) on the *rukka*.

11. The evidence shows that while taking control of the scene of crime, PW27 had arranged for the victim to be taken to Lal Bahadur Shastri hospital, Khicharipur but even while he was busy recording the necessary proceedings, information reached him through the police station that the victim had died. Thus, the FIR was registered for investigation into offences punishable under Sections 392/397/506/324/302 IPC and under Section 25/27 Arms Act.

12. The pistol (Ex.P-1) with two live cartridges (Ex.P-2 and Ex.P-3) found loaded therein, were seized by PW27 through seizure memo (Ex.PW2/C), after their sketch had been prepared (vide Ex.PW2/D). The said seizure is confirmed by PW2, PW9 and PW10 through their respective testimonies. PW27 had also seized the bag alongwith cash in the form of currency notes of total value of Rs.8.65 lakh along with certain cheque-books and miscellaneous papers (collectively Ex.P-4) vide seizure memo (Ex.PW2/B), also in the presence of the aforementioned three witnesses, who have confirmed the said police proceedings, without any contest from the defence. Noticeably, both the said seizure memos make it clear that the firearm with ammunition and bag containing the currency notes with miscellaneous papers were handed over to the investigating officer by Miraj Malik (PW2)

13. In the wake up of registration of the FIR, *inter-alia*, for offence of murder investigation was taken over by Inspector Saravjeet Singh (PW26). In addition to the other investigative steps requisite for the scene of crime in terms of the normal police procedure, the investigating officer (PW26) collected blood sample and earth control from the place where the deceased had fallen after being gunned down (vide memo Ex.PW10/A), attested by HC Mahesh (PW10). He prepared a rough site plan (Ex.PW26/A) showing the general layout of the roads at the place and the location where the dead body had been found, this exercise later supplemented by scaled site plan (Ex.PW18/A) prepared by HC Sonu Kaushik (PW18), draftsman. The scaled site plan (Ex.PW18/A) gives the location of the different

witnesses at the time of the firing, also showing the location of the place where the appellant is stated to have been apprehended.

14. The investigating officer arrested the appellant through formal arrest (Ex.PW10/B), after personal search (vide Ex.PW10/C) both attested by Miraj Malik (PW2) and HC Mahesh (PW10), at 07:00 PM on 04.07.2007 in the police station where he had been taken in due course. Noticeably, in the course of his statement under Section 313 Cr.P.C., the appellant had admitted not only his presence at the spot at the relevant point of time but also the fact that he had been taken from there to the police station at which place, per the documents mentioned above, he was arrested.

15. The victim having died as a result of the firearm injuries received, steps were taken for his dead body to be subjected to post-mortem examination awaiting which it was guarded in the mortuary of Lal Bahadur Shastri hospital by Constable Neeraj (PW11). After identity being confirmed by Shiv Chander Kamat (PW5) and Ram Chander Kamat (PW6), the father and cousin brother respectively of the deceased through their respective statements (Ex.PW5/A and Ex.PW6/A respectively), it was subjected to post-mortem examination by Dr. Mukta Rani (PW3) in the mortuary of the hospital on 05.07.2007.

16. The autopsy doctor (PW3) has proved her report (Ex.PW3/A). According to her evidence, the post-mortem examination had revealed the following ante-mortem injuries :-

(i) Firearm entry wound over upper outer front of left arm of size 1 x 1 cm, circular placed 8 cm below tip of left shoulder. It is surrounded by an abrasion collar as shown in the diagram in post-mortem report. The bullet after piercing the skin, subcutaneous tissue and muscles of left arm has entered the upper back of left side of chest and was found lodged in the space between outer end of left clavicle and spine of scapula. There was no blackening, tattooing or singeing around the wound. The wound was directed upwards, inwards and backwards.

(ii) Firearm entry wound of size 1 x 0.7 cm oval shaped present over outer middle front of left side of chest placed 15 cm below outer end of left clavicle and 5.5. cm to left of left nipple. The bullet has penetrated the left chest cavity after piecing the skin, subcutaneous tissue of left rib cage and then the fifth rib on left side where a hole of size 0.6 x 0.5 cm was found. The bullet had then entered left pleural cavity and then anterior surface of upper lobe of left lung where a wound of size 1.5 x 1 cm and through and through the left lung was found. The bullet then entered the pericardial cavity and then heart by piercing lateral wall of left ventricle where wound of size 2.5 x 1.5 cm was found placed 4 cm above open. The bullet then entered interlubar area between middle and lower lobe of right lung where a wound of size 1.5 x 1 cm was found. Then it entered the intercostals muscle of fifth rib where a wound of size 1 x 0.7 cm was seen and the bullet was found lodged under inferior angle of right scapula over back of chest. Direction of wound was backwards, upwards and from left to right. There was no blackening, tattooing or singeing around the wound.

17. In the opinion of autopsy doctor, death had occurred as a result of haemorrhage and shock consequent upon the firearm injuries to chest via the second above noted injury. Both the injuries had been produced by projectiles of rifled firearm fired from a distant range. The second above noted injury, in particular, was found to be sufficient, in ordinary course of nature, to cause death.

18. During the post-mortem examination, autopsy doctor (PW3) recovered two bullets found lodged inside as noted in the context of the two injuries mentioned above. The autopsy doctor would describe the dimensions of the said bullets as 1.3 x 0.8 cm and 1.3 x 0.7 cm with their base as 0.8 x 0.8 cm. She depicted the size and dimensions of the two bullets through diagram in the post-mortem examination report.

19. The autopsy doctor had also taken off the clothes from the dead body, they including shirt, trousers with belt, vest, underwear, handkerchief, pair of socks and pair of shoes, besides the personal effects (brown colour purse containing Rs. 4265/-, PAN Card of the deceased, small diary red colour, three cheques of State Bank of India, 4-5 counter foils and certain other papers.) While the clothes of the deceased as described above along with sample of the blood and the two bullets recovered from the dead body (Ex.PW26/F) were handed over to the investigating officer (PW26) vide memo (Ex.PW26/F), the personal effects of the deceased purse, cash, PAN card etc. were seized vide memo (Ex.PW11/A).

20. The autopsy doctor (PW3) noted that the shirt of the deceased was blood stained and bore the following cut marks :-

- (i) One hole 1.2 x 0.8 cm over outer part of left sleeve in its upper part placed 9 cm below scam of left shoulder.
- (ii) Another hole size 0.8 x 0.5 cm placed 19.5 cm below left shoulder lying 5.5 cm outer to left pocket.

21. During cross-examination of the autopsy doctor (PW3), questions were raised as to the possible distance from which the two

projectiles which had hit the deceased had been fired. Whilst expressing inability to explain as to why there had been no blackening, tattooing or singeing around the wound, she conjectured that the firing may have taken place from a distance of about 30-60 cm.

22. The medical opinion about the distance from which the pistol had been fired may be a little hazy, but there can be no dispute over the fact that Santosh Kumar had received the firearm injuries on the date, time and place mentioned by the prosecution. The victim had been found lying in the injured state and picked up from there by the police in the presence of public witnesses and rushed to the hospital but he died before he could be medically helped. Given the nature of injury suffered, it is vivid that the person who had used the firearm intended to cause the death. In these circumstances, the prosecution has proved that the death of Santosh Kumar was a case of murder.

23. The prosecution has proved, again through such evidence as is indisputable, that the pistol (Ex.P-1) is the personal property of the appellant, acquired by him lawfully against a valid arms license No.608/DM/97. It emerges from the trial court record that the appellant had earlier served in armed forces from where he had been discharged. On his request, the said firearm described as IOF make 0.32 inches pistol registration no.RP-123673 had been issued to him on 22.03.2006, by Gun and Shell Factory, Ministry of Defence, Government of India, Cossipore, Kolkata. This fact was proved, without any contest from the appellant, by S. P. Sen Gupta (PW24), Works Manager of the said Gun and Shell factory, affirming his earlier report (Ex.PW24/A) given to the investigating officer on 30.07.2007.

24. The investigation brought out that, during the relevant period, the appellant was living as a tenant in the property of Hari Shankar Shukla (PW14) in Chirara, Gali no.3, Sector-44, Noida UP. On 08.07.2007, the investigating officer (PW26) took a search of the tenanted premises in the presence, amongst others, of Hari Shanker Shukla (PW14). He found besides cash amounting to Rs.4020/- (collectively Ex.PW14/P-1), a magazine of .32 bore calibre containing 16 live cartridges (collectively Ex.PW14/P-2). The landlord (PW14), and the investigating officer (PW26), have proved the said seizure effected through house search memo (Ex.PW14/A). During the cross-examination of PW14, the appellant took the position that he had never lived as tenant in the said premises, also suggesting to him that no such seizure was effected in his presence. But, at the stage of his statement under Section 313 Cr.P.C., the appellant took a diametrically opposite stand and claimed that he had actually been arrested from the said house of PW14 where he had been living as tenant and it was at that stage that police had taken over from him his licensed pistol, its cover, cartridges and some documents. Thus, the appellant himself lent assurance to the testimony of PW14 and PW26 about the magazine containing 16 live cartridges of .32 bore (collectively Ex.PW14/P-2) to be his property and seized from his house. Notwithstanding this statement, the prosecution version regarding recovery of the 16 live cartridges we believe should be accepted.

25. It is the case of prosecution that the investigation had shown that the deceased, after withdrawing money from Sector-41, Noida branch of the bank of PW7, was returning to the office of company in Jawahar

Park, Laxmi Nagar, Delhi by a three wheeler scooter (TSR). It is stated that investigation had brought out that the TSR in question was one bearing registration no.DL-1RD-3507, which was plied during those days by Ajmat Ali (PW19). Going by the evidence of Inspector Saravjeet Singh (PW26), he was able to zero in on the TSR and its driver (PW19) only on 07.07.2007. He seized the TSR in the presence of HC Rish Pal Singh (PW12) vide formal seizure (Ex.PW12/A). PW19, on his part, has confirmed in his testimony that the deceased was travelling in his TSR at the time of he being fired at its services having been availed by the victim at about 03:00-03:30 PM from near bus stand, Sector-49, Noida, U.P., for going to Laxmi Nagar, Delhi. But, the defence pointed out that the investigating officer has not explained, as to how the use of this vehicle, as the means of transportation by the deceased during the fateful journey had come to be unravelled. The TSR is not shown to bear tell-tale signs of firing at the victim, or the resultant bleeding injuries suffered therefrom, while travelling in it. Be that as it may, we reserve for later, the scrutiny of the evidence of Ajmat Ali (PW19) about his version of the sequence of events.

26. As noted at the beginning, according to the prosecution case presented to the trial court, the interrogation of the appellant had brought out the involvement of his brother Surender @ Sukkan and the motorcycle bearing registration No.UP-25N-9877 in the crime. Though, Surender @ Sukkan was arrested and the motorcycle seized, no further evidence confirming the role attributed to him could be gathered. He has been acquitted by the trial court and the said result of

the trial has not been challenged by the State. Thus, the evidence on this score, adduced primarily through Yogesh Kumar (PW20) and HC Virender Singh (PW23) is rendered irrelevant for present purposes.

27. Before we take up, for consideration, the evidence given by the witnesses of the sequence of events (PW2, PW9, PW13 and PW19), we may note that various exhibits gathered during the course of investigation, including the bullets recovered by the autopsy doctor from the dead body and the magazine with 16 cartridges (Ex.PW14/P-2) seized from the house of appellant and the pistol (Ex.P-1) with the bullets (Ex.P-2 and Ex.P-3) found lodged in it at the time of seizure, were sent to the Forensic Science Laboratory (FSL) on 14.09.2007 through Constable Vijay Kumar (PW16). The FSL gave its reports (Ex.PW25/A and Ex.PW25/B). It is the latter report (Ex.PW25/B) dated 21.08.2008 of the Senior Scientific Assistant (Ballistic) which is of great import. The material part reads as under :-

- (a) The pistol 7.65 mm calibre marked exhibit 'F1' is designed to fire a standard 7.65 mm cartridge. It is in working order in its present condition. Test fire conducted successfully.*
- (b) The spare magazine marked exhibit 'M1' is a magazine of pistol 7.65 mm calibre like exhibit 'F1'.*
- (c) The 7.65 mm cartridges marked exhibits 'A1 to 'A18' are live ones and can be fired through 7.65 mm calibre firearm.*
- (d) The bullets marked exhibits 'EB1 & EB2' corresponds to the bullet of 7.65 mm cartridge.*
- (e) The 7.65 mm cartridges marked exhibits 'A1 & A2' were test fired through the pistol 7.65 mm caliber marked exhibit 'F1' above, the test fired cartridge cases marked as 'TC1 & TC2'*

and the two recovered test fired bullets marked as 'TB1 & TB2' respectively.

(f) The individual characteristics of rifling marks present on evidence bullets marked exhibits 'EB1 & EB2' and on test fired bullets marked as 'TB1 & TB2' were examined and compared under the Comparison Microscope Model Leica DMC and were found identical. Hence exhibits 'EB1 & EB2' have been discharged through the pistol 7.65 mm caliber marked exhibit 'F1' above.

(g) The exhibits 'F1'/'A1 to A18', 'EB1 & EB2' are firearm/ammunition as defined in the Arms Act, 1959.

28. Prakhaya Singh (PW13) had a limited role to play. She was just passing by and happened to be at the place of occurrence when she saw a crowd of persons roughing up an individual who had been apprehended. She noticed the injured victim lying on the spot. She had also noticed a bag lying there, which was later seized by the police. She only heard from the crowd that firing incident had taken place. She herself had not seen the occurrence. She only informed the police by making a call to the PCR. Her evidence does confirm the incident but not the identity of the assailant. The defence points out that in her testimony, this witness would not mention the presence of any TSR at the spot. This, to us, cannot mean that the deceased had not taken TSR as the mode of transportation. As would be noted below, the TSR driver admitted he had rushed away from the spot soon after the firing.

29. Ajmat Ali (PW19) has narrated, as to how his TSR has been engaged by the deceased for journey from Sector 49, Noida to Laxmi Nagar and about he having taken the route of Sector-37 and Sector-44, Noida. He deposed about the incident having taken place when his

TSR was stationary at the Mayur Vihar red (traffic) light. He stated that as he was moving, traffic light turned green, a person come from behind and fired at the passenger travelling in his TSR. He stated that the passenger was hit and though he had raised alarm no person immediately came up to help. He, however, added that two boys had come and the offender was apprehended across the road. He stated that he had felt frightened and, thus, had left the spot with the TSR and gone home to Noida. He stated that the assailant was wearing a helmet and refused to identify the assailant as the person who had fired at the passenger travelling in his TSR.

30. It does appear odd that investigating agency has not spelt out clearly, as to how it came across information that the deceased was travelling in the TSR of PW19. No evidence pertaining to the period before Ajmat Ali (PW19) was contacted by the IO on 07.07.2007 shows any specific input having been received about the description of the TSR leading the investigating officer to the door of PW19. Yet, there is a ring of truth in the testimony of PW19. He speaks about not only the firing incident but also about the point of origin of the journey undertaken by the deceased after having withdrawn money from the bank, as indeed about the role of two young persons who had eventually helped apprehending the assailant at the spot. Be that as it may, since PW19 does not connect the appellant with the crime, his testimony is not of much use to the prosecution save for helping piece together the sequence of events.

31. Miraj Malik (PW2) and Wahid Malik (PW9) were the most important witnesses on whose testimony, the prosecution had placed

heavy reliance. It is these two persons, described as chance witnesses, who happened to be at the scene moving together on their motorcycle in the direction of Noida via Akshardham. According to the FIR, based on the statement (Ex.PW2/A) attributed to Miraj Malik (PW2), the firing took place within their presence, sight and hearing. Miraj Malik (PW2) statedly had told the investigating officer that he had seen the appellant running away with pistol and the stolen bag containing cash in his hand. He had pursued and apprehended him with the help of Wahid Malik (PW9), even at the risk of being threatened by the appellant with the same firearm. It was stated in the FIR that the appellant, in order to come out of the clutches of Miraj Malik (PW2), had given him a teeth bite on his right hand but, with the help of other public persons, he was eventually overpowered and handed over with the weapon of offence and the stolen property to SI K.P. Singh (PW27).

32. Both Miraj Malik (PW2) and Wahid Malik (PW9) do substantially confirm the sequence of events but were not supportive of the prosecution case on the identity of the person apprehended by them. They denied that appellant was the person who had been overpowered or handed over to the police.

33. According to Miraj Malik (PW2), when he with Wahid Malik (PW9) had reached the place, they had found the dead body lying on the road side and number of people giving beating to a person. He stated that he had also joined in the beating and later handed over the person to the police. It is during cross-examination that he admitted that the stolen bag was also handed over to the police, though, denying

that he had been given teeth bite on his right hand by the appellant. He conceded that he had been taken for medical examination for the injury suffered and had explained the reasons for the said injury to the doctor. He admitted that he had given the statement (Ex.PW2/A) to the police and further the fact that he had even been interviewed by the electronic media.

34. Similarly, Wahid Malik (PW9), broadly confirming the facts stated by Miraj Malik (PW2), turned out to be a hesitant witness and denied that he had any role to play in the assailant being apprehended. Though confirming that he was signatory to the seizure memo of the pistol with bullets and bag containing cash (vide Ex.PW2/B and Ex.PW2/C), he claimed that he had remained present near the motorcycle, while it was Miraj Malik (PW2) who had gone towards the place of occurrence.

35. According to his version in the statement (Ex.PW2/A), Miraj Malik (PW2) had received the teeth bite injury in the course of grappling with the appellant at the spot. He was taken for medical examination and aid to Lal Bahadur Shashtri hospital by SI Anant Kumar (PW4). The medical examination was conducted in the said hospital by Dr. Sushil Kumar (PW8). According to the MLC (Ex.PW8/A), Miraj Malik (PW2) had suffered a teeth bite over right forearm besides superficial red abrasion over base of left finger. This part of the evidence only confirms what was mentioned in the FIR about the sequence of events leading to the teeth bite injuries suffered by Miraj Malik (PW2).

36. It was the case of the prosecution that the appellant also had a bank account in the same bank from where the appellant had withdrawn money, as an employee of the company of PW15. It was stated that the appellant was also present in the branch of the bank for certain transaction vis-a-vis his account, when the deceased had withdrawn the huge cash and it was upon such withdrawal coming to his notice that he had conspired and planned to commit robbery. Though PW7 proved the pay-in-slip (Ex.PW7/D) and cheque (Ex.PW7/C) alongwith the statement of account (Ex.PW7/F), in absence of further material it cannot be said that the bank account to which the said documents pertain is one held by the appellant. There is no evidence led otherwise showing the presence of the appellant in the bank at the time of withdrawal of the money by the deceased.

37. It is the submission of the appellant that PW2 and PW9 having not been supportive of the prosecution case as to the identity of the person they had helped apprehend, benefit of doubt must go to the appellant as his version that he was picked up merely on suspicion cannot be discarded. It was submitted that the evidence of PW27 about the appellant being handed over to him by Miraj Malik (PW2) cannot be believed or acted upon.

38. SI K. P. Singh (PW27) is a police officer, who in discharge of his duties had reached the scene upon initial input received through PCR being handed over to him. He did not have any personal enmity against the appellant. He did not know the appellant from before. He had no reason to prepare a false record, particularly about the identity of the person, who had been handed over to him by the public persons

present at the scene of crime, which would include the first informant Miraj Malik (PW2). There is no reason to treat his testimony with distrust. In fact, failure of Miraj Malik (PW2) and even Wahid Malik (PW9) to support is questionable and does not merit acceptance.

39. We reject the submission by quoting the following observations of the Supreme Court in *Pramod Kumar vs. State (GNCT) of Delhi*, AIR 2013 SC 3344 :-

“...The witnesses from the department of police cannot per se be said to be untruthful or unreliable. It would depend upon the veracity, credibility and unimpeachability of their testimony. This Court, after referring to State of U.P. v. Anil Singh, State, Govt. of NCT of Delhi v. Sunil and another and Ramjee Rai and others v. State of Bihar, has laid down recently in Kashmiri Lal v. State of Haryana that there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trustworthy, the court can definitely act upon the same. If, in the course of scrutinising the evidence, the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle that quality of the evidence weighs over the quantity of evidence”.
(emphasis supplied)

In our opinion, refusal of PW2 and PW9 to identify the appellant as the person apprehended at the spot by them cannot create any doubts as to the prosecution case to such effect. The appellant, as noted

earlier, has admitted his presence at the spot at the time of the incident. He claimed that he was taken from there to the police station and “falsely” arrested. His admission to above effect lends assurance to the word of PW27 about he being apprehended upon his custody being handed over by the public witnesses.

40. In our view, PW2 and PW9 have turned dishonest for some ulterior reasons. In the given facts and circumstances, the version given by Miraj Malik (PW2) in his statement (Ex.PW2/A) contemporaneously recorded was the truthful account. He had suffered teeth bite marks which could not have been inflicted but for he being directly involved in apprehending the assailant. In the FIR, he had described the appellant as the person who had robbed the deceased of the bag containing cash after having fired at him. Due to his reluctance, eye witness account has suffered but has not negated and dented the prosecution version. Appellant’s presence at the scene coupled with the evidence of PW27 that it was PW2, and no one else, who had handed over to him the appellant alongwith firearm and the bag containing cash must be believed.

41. From the evidence led by the prosecution, as summarized above, the following facts can be held proved beyond all doubts :-

- (i) On 04.07.2007, Santosh Kumar (the victim), working as an office assistant in M/s V. M. Vorex Technology Pvt. Ltd. was sent by his superior Ghanshyam Pandey (PW15), financial assistant of the company, to Mahamedha Urban Bank Co-operative Ltd., *inter-alia*, for

withdrawing money against two cheques (Ex.PW7/A and Ex.PW7/B);

(ii) The victim, after withdrawing money against the aforementioned cheques, was returning, carrying the cash Rs.8,65,000/- (Rupees Eight Lakh Sixty Five Thousand) in a bag (Ex.P-4), travelling in three-wheeler scooter No.DL-1RD-3507 (TSR), driven by Ajmat Ali (PW19), having engaged it from Sector-49, Noida for journey upto Laxmi Nagar, Delhi, taking the route of Sector-37 and Sector-45 Noida, reaching the traffic light at Mayur Vihar, Phase-I at about 03:25 PM;

(iii) When the TSR driven by Ajmat Ali (PW19), carrying the victim as a passenger, started moving on traffic light turning green, the victim was shot at, and injured, and his bag containing money (Ex.P-4) snatched from his hand, in the course of which the victim fell out of the vehicle;

(iv) In the wake of the aforementioned sequence of events, upon the noise of firing being heard and the commotion that ensued immediately thereafter, the attention of Miraj Malik (PW2), who was present at the scene with his companion Wahid Malik (PW9), was drawn and PW2, with the help of public persons present there, rushed to the scene and apprehended the appellant, who at that stage was holding the bag (Ex.P-4) containing money that had been snatched from the hand of the victim;

(v) In the course of scuffle with Miraj Malik (PW2) and public persons, the pistol (Ex.P-1) fell down on the road from the hands of the appellant;

(vi) Upon information being given by Prakhaya Singh (PW13), a journalist on her way from the area to Sector-11, Noida, from her mobile phone to police control room (PCR) at 03:42 PM, it was passed on to the police station Mayur Vihar where it was logged vide DD no.23-A (Ex.PW21/B) at 03:43 PM and the matter entrusted to SI K. P. Singh (PW27);

(vii) When SI K. P. Singh (PW27), accompanied by other police officials, reached the place of occurrence, he found the victim, lying in injured condition in a pool of blood and arranged for him to be immediately sent to the hospital but he died during transit before medical aid could be arranged;

(viii) The appellant, alongwith pistol (Ex.P-1) and bag (Ex.P-4), was handed over to SI K. P. Singh (PW27) by Miraj Malik (PW2);

(ix) Simultaneous to the handing over of the custody of the appellant, pistol (Ex.P-1) and bag (Ex.P-4), Miraj Malik (PW2) also gave his statement (Ex.PW2/A) indicating that he had seen the appellant, running away immediately after firing, with the stolen bag (Ex.P-4) holding the pistol (Ex.P-1) in his hand, and about the appellant having been apprehended and overpowered at the spot, also stating that in

his endeavour to get away from his clutches, the appellant had given a teeth bite on his (PW2's) right hand;

(x) The pistol (Ex.P-1), upon being checked by PW27, was found to contain two live cartridges (Ex.P-2 and Ex.P-3) and was seized vide memo (Ex.PW2/C);

(xi) The bag (Ex.P-4), upon being checked by PW27, was found to contain currency notes of total value of Rs.8,65,000/- (Rupees Eight Lakh Sixty Five Thousand), with sundry papers (collectively Ex.P-4) and was seized vide (Ex.PW2/B);

(xii) Miraj Malik (PW2) was medically examined against MLC (Ex.PW8/A) which confirmed that he had suffered a teeth bite injury on his right forearm, in addition to superficial abrasion over base of left finger;

(xiii) The post-mortem examination on the dead body of the victim conducted by Dr. Mukta Rani (PW3) in the mortuary of Lal Bahadur Shastri hospital on 05.07.2007, vide autopsy report (Ex.PW3/A), revealed that he (the victim) had received two firearm injuries, one penetrating the left chest cavity damaging, amongst others, the left lung;

(xiv) Two bullets, each having caused the two firearm injuries, were found lodged inside the body of the victim and, recovered during autopsy, were handed over to the investigating officer;

(xv) During search of the premises in the property of Hari Shanker Shukla (PW14) in Chirara, Gali no.3, Sector-44, Noida U.P., taken on rent by the appellant, amongst others, a magazine of 0.32 bore calibre, containing 16 live cartridges (collectively Ex.PW14/P-2), was seized on 08.07.2007;

(xvi) The pistol (Ex.P-1) of 0.32 bore had been acquired by the appellant on 22.03.2006 against a valid arms licence No.608/DM/97 from Gun and Shell Factory, Ministry of Defence, Government of India, Cossipore, Kolkata; and

(xvii) The pistol (Ex.P-1), two cartridges (Ex.P-2 and Ex.P-3), found loaded inside at the time of the seizure, alongwith magazine containing 16 live cartridges (Ex.PW14/P-2) and the two bullets recovered from the dead body during autopsy were sent to Forensic Science Laboratory (FSL), where the same were examined and it was found, as per report (Ex.PW25/B), that the individual characteristics of rifling marks on the bullets recovered from the dead body were identical to those found on the test fired bullets used with the pistol (Ex.P-1).

42. It is noticed that the trial court had framed charges under two heads. One head of charge was for the offence of criminal conspiracy punishable under Section 120-B IPC, the particulars mentioned therein indicating its object to be the commission of the offences of robbery (Section 392 IPC), also invoking its aggravated form (Section 397 IPC)

since the offender had used a deadly weapon, as indeed of murder (Section 302 IPC). Against the backdrop of factual matrix brought before the trial court, this was the correct approach at the stage of framing of charge. But the second head of the charge relating to substantive offences clearly was not properly framed. While articulating the particulars, prosecution case about existence of a criminal conspiracy was lost sight of. Mandate of Section 218 Cr.P.C., requires a separate charge to be framed for every distinct offence. Thus, the charge against the appellant and his brother (A-2) of having committed offences punishable under Sections 392/397/302 IPC attributing both having shared the common intention (Section 34 IPC) was not correct. The clubbing of the charge for three distinct offences under one common head was also not proper.

43. But then, the above noted errors have not caused any prejudice to the appellant. The charge of criminal conspiracy has failed as complicity of the co-accused Surender @ Sukkan (A-2) could not be proved. In fact, there is no evidence showing the involvement of any individual other than the appellant in the entire sequence. Thus, there could not be an occasion for the appellant to have shared the criminal intention with anyone else. The averments in the prosecution case, and the import of the evidence on which they were founded, had clearly spelt out the direct involvement of the appellant in waylaying the victim, firing at him and snatching of the bag, all in the course of the same transaction. Therefore, the error in the charge did not result in the appellant being misled or in occasioning failure of justice, within

the meaning of Section 215 Cr.P.C. Exercise of care while framing a charge would curtail and negate such arguments.

44. The learned counsel for the appellant has placed reliance on *Imamuddin v. State of U.P.*, 2009 CrL. L.J. 4477 (Allahabad), to argue that the ballistic expert's report must be viewed with suspicion because the exhibits having been sent by the investigating officer in September, 2007 were examined with inordinate delay on or about 21.08.2008. We do not find any substance in the submission. The case of *Imamuddin* decided by the division bench of Allahabad High Court is distinguishable on facts. The prosecution in that case had failed primarily for the reason that the evidence as to the recovery of firearm itself was found not to be worthy of reliance. In the case at hand, there is no disputing the factum of recovery of the pistol, or it being the property of the appellant held against a valid arms license. The delay on the part of the FSL in examining the exhibit cannot be fatal to the prosecution case.

45. The case was brought to the court by the prosecution depending, *inter-alia*, on the eye witness account of Miraj Malik (PW2) and Wahid Malik (PW9). The fact that PW2 and PW9 have failed to support the accusations to the extent of they being witnesses to the firing or snatching of the bag by the appellant or his identity does not prove fatal to the prosecution case. The facts and circumstances which have been proved, as noted above, form a chain so complete that there can be no escape from the conclusion that the offences of murder and snatching of the bag containing money were committed by the appellant and no one else. The fact that the two bullets recovered from

the dead body were found to have been discharged from the licensed pistol of the appellant unerringly points to his involvement. He has admitted his presence at the spot. The evidence cogently shows that the pistol was also found in his possession at the spot. He has failed to account for the possession of the pistol at the scene of crime. The prosecution has proved that the bag (Ex.P-4) containing Rs. 8,65,000/- lakh (Rupees Eight Lakh Sixty Five Thousand), which had been withdrawn from the bank only sometime before the incident, was being carried away by the appellant. He has failed to give any account for possession of the stolen property, on the close heels of the firing causing fatal wounds on the person of the deceased.

46. In view of above facts and circumstances, we find no error in the impugned judgement and order on sentence.

47. The appeal is devoid of merits and is, therefore, dismissed.

48. The appellant be informed through Superintendent, Central Jail with copy of this judgment being made available to him.

R. K. GAUBA
(JUDGE)

SANJIV KHANNA
(JUDGE)

NOVEMBER 06, 2015
SS