

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

+ **CRIMINAL APPEAL NO. 226/2000**

% **Reserved on:** 26th November, 2015
Date of Decision: 31st March, 2016

SARVESH KUMARAppellant
Through Mr. Aditya Vikram, Mr. Harsh Prabhakar and
Mr. Anirudh Tanwar, Advocates.

Versus

THE STATE (GOVT. OF NCT OF DELHI) ...Respondent
Through Ms. Aashaa Tiwari, APP along with Inspector
Ramesh Kumar, P.S. S.P. Badli.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K. GAUBA

SANJIV KHANNA, J.

The present appeal leaves a sense of disquiet and concern for we perceive there was an attempt to withhold exculpatory evidence and hide discontinuity in the prosecution version. The triteness was latent in the written records in the form of the police case diary, and is enmeshed in some of the answers given by the author, i.e., the Investigating Officer ASI Manchand. Unfortunately, this concavity and latency could not be depicted at the first stage.

2. We would accept the prosecution case that the deceased Raju had died an unnatural death as a result of burn injuries as is clear from the MLC, marked Exhibit PW-10/A, recorded at the Jai Prakash Narayan Hospital on 14th April, 1997 at 1.30 P.M. The post-mortem report by Dr A.P.Singh, dated 19th April, 1997, marked Exhibit PW-11/A, records that Raju had died four days after admission on 18th April, 1997 at 7.20 A.M. The cause of death was septicaemia consequent upon infected burn injuries. The injuries were ante-mortem in nature, and inflicted about 4 days back. Injury Nos. 1 & 2 were caused by a blunt object, and Injury No.3 was caused by burns due to fire. Scalp hair were duly sealed and sent for FSL examination to confirm presence of kerosene oil.
3. The primary question, which has to be answered is whether the injuries were self inflicted, or were perpetrated by the appellant-Sarvesh with his co-predators namely Pappu, Vinod, Rajender and Raju, who had allegedly poured kerosene oil on Raju and set him ablaze near the railway crossing next to the house of Sarvesh. The said Pappu, Vinod, Rajender and Raju have not been arrested and declared as proclaimed offenders. The judgment under challenge dated 20th November, 1999 convicts the present appellant-Sarvesh under Section 302 read with Section 34 of the Indian Penal Code,

1860 (IPC, for short). The order on sentence dated 22nd November, 1999 sentences Sarvesh to undergo life imprisonment, pay fine of Rs.500/- and in default undergo rigorous imprisonment for one month. Benefit of Section 428 of the Code of Criminal Procedure, 1973 would apply.

4. The prosecution case as per the charge sheet and as accepted by the trial court is primarily predicated on the dying declaration of Raju, marked Exhibit PW-1/B, implicating Sarvesh and the proclaimed offenders. For the sake of completeness, we would like to reproduce the dying declaration in entirety, which was recorded by ASI Man Chand (PW-9), the Investigating Officer on 14th April, 1997 and became the fulcrum of the FIR No. 292/1997, Police Station Samai Pur Badli. Raju subsequently expired after about 4 days on 18th April, 1997. In the four days, his statement was not recorded by the Sub-Divisional Magistrate. ASI Man Chand (PW-9) has stated that he had requested the Sub-Divisional Magistrate to record Raju's statement, but his request was orally rejected, an assertion rather ambiguous and debatable. It is strange, that PW-9 did not make the request in writing, knowing the sensitivity of the matter in light of its peculiar facts, as noticed and elucidated below. A rough English

translation of the dying declaration marked Exhibit PW1/B statedly recorded by ASI Man Chand (PW-9), would read:-

“I am residing at the address given above. I am a meat-seller at Azadpur Mandi. My marriage to Shobha d/o Ranjeet Singh two years back was organized by my brother Ram Kishan s/o Dhaniram. Shobha was previously married. On April 11, 1997, I and my wife had quarrelled as Shobha’s brother, Raju would come to my house again and again. I packed my articles and left. Today, I had gone with my brother Pammi and our (employee) Chotu to my brother-in-law’s house near the railway phatak, where Shobha was residing. Shobha and her brother asked me whether I had come to take Shobha. Shobha refused to return with me and had stated that I had died for her and she had died for me. I left the place and went outside, while my brother had stayed inside. When I was on the street outside, Sarvesh and Pappu came and met me. Pappu caught hold of me. Then, Sarvesh’s brothers Vinod, Rajender and Raju caught me and threw kerosene oil on me and set me ablaze. I ran and screamed and my brother, Pammi, took me to the hospital. The kerosene oil was in a plastic bag. My wife has two children from her previous husband who are residing with her.”

5. Before we advert to our reasons for doubting truthfulness of the dying declaration, as probably an incorrect version given by the deceased out of spite and anger on being spurned and rejected by one Shobha, sister of Sarvesh and wife of Rajender, we would like to refer to the testimonies of Shanti (PW-3), Santu (PW-4) and Pammi (PW-8). Shanti (PW-3), mother of deceased Raju, has testified that Raju had married Shobha about two years before the occurrence.

They were earlier residing at Khajoori and thereafter had shifted to Gopalpur. PW-3 had admitted to disputes and differences between the couple, and that resultantly Shobha had left with another boy for her village. Raju had also told her about his quarrels with Pappu and Raju, brothers of Shobha. (For convenience and to avoid confusion, Raju, brother of Shobha, shall be hereafter referred to as Raju-II). There was a dispute over money matters between Raju and Pappu, Raju-II and Shobha. To settle the dispute, Chotu and Pammi along with the deceased Raju had gone to the house of Sarvesh. PW-3 had subsequently learnt from Chotu that Raju had suffered burns and was admitted in a hospital. Noticeably, Shanti (PW-3) did not depose and state that Chotu had seen the occurrence and had identified Sarvesh as one of the perpetrators. In her cross- examination, on being specifically asked, PW-3 had responded that Chotu had simply told her that Raju had suffered burns. Shanti (PW-3) is, therefore, not an eye witness to the occurrence, but has deposed about the muddled relationship shared by Shobha and her family with the deceased Raju, and the disputes *inter-se*. In her cross-examination, Shanti (PW-3) has accepted that the deceased Raju used to beat Shobha, for she had concealed her previous marriage and that she was a mother of three children. PW-3 professed having spoken to the deceased Raju at 6

P.M. on April 14, 1997. At that time, Raju was in his senses, although he was in pain and crying. On enquiry, Raju had informed her that while Chotu and Pammi were made to sit at the house of Sarvesh, he was burnt by Pappu, Sarvesh, Vinod, Rajender and Raju-II. Doctors were present, when the police had interrogated and asked Raju. The doctor also signed the dying declaration. (In fact, the dying declaration has not been signed by any doctor). Raju was served liquor before the incident, but PW-3 had not stated this fact to the police when her statement was recorded. At a later point in her cross-examination, PW-3 denied that Raju had consumed liquor before visiting Shobha's house. PW-3 also denied that deceased Raju had beaten Shobha and then, out of anger, poured kerosene oil on himself and had set himself ablaze.

6. Santu @ Chotu who had alongwith the deceased gone to the house of Sarvesh has deposed as PW-4. PW-4 has also accepted that the relationship between Shobha and Raju had soured for there were frequent quarrels between the two regarding money. Shobha was sent to her village in Aligarh. Shobha had then taken some articles and money alongwith her. She returned after 10-15 days. At the time of occurrence, Shobha was staying with her brothers. As per PW-4, Raju, Pammi (PW-8) and PW-4 had been called to the house of

Sarvesh on April 13, 1997. At that time, Raju had taken with him, the mangal sutra, ear tops and anklets, which he had earlier given to Shobha. On 14th April, 1997, at about 11 A.M., once again Santu (PW-4), Pammi (PW-8) and Raju had gone to the house of Sarvesh. There, Shobha alongwith Sarvesh, and others namely Pappu, Raju II, Vinod and Rajender (proclaimed offender(s)) were present. Shobha had brought water for Pammi and Raju, but Raju had refused to drink water. Quarrel ensued. Raju and PW-4 had thereupon gone to a barber shop and then had stood near the railway crossing No. 8 at Samai Pur Badli. Sarvesh and four others, namely, Pappu, Raju-II, Rajender and Vinod (all proclaimed offenders) had surrounded Raju. Raju asked him, i.e., Santu (PW-4), to call Pammi (PW-8) from Sarvesh's house. PW-4 went to call Pammi and had returned with Pammi at about 12 noon. He had then seen Raju burning. He was surrounded by Sarvesh and his 'co-associates' (the reference is probably to Pappu, Raju-II, Rajender and Vinod). Raju had told PW-4 and PW-8 that he had been burnt by the five, who had poured kerosene oil on him and alighted a match stick. Pammi (PW-8) threw water on Raju to extinguish the fire and had informed the police, who had taken Raju to the Irwin Hospital. In his cross-examination, Santu (PW-4) has accepted that Shobha and Raju would

quarrel frequently, abuse each other and even had physical fights. PW-4 has accepted that Shobha would threaten and tell Raju that she would implicate him by consuming poison. On being questioned about the barber shop, PW-4 had stated that it was located about 100-150 paces from the house of Sarvesh, while the railway crossing was 100-150 yards away. PW-4 professed that Pappu was carrying a polythene bag of ½ /2 kg capacity with Kerosene oil, but he had not seen any match box. Noticeably, Santu (PW-4) does not state and profess that he had seen Sarvesh and others throwing Kerosene oil on Raju and alighting him. His examination and affirmation is predicated on what was stated and told to him by Raju. As per PW-4's version, he had not seen the actual occurrence. He implicates Sarvesh and four others by pre and post occurrence presence and conduct.

7. Pammi (PW-8) has also deposed about the happenings on 14th April, 1997. He, alongwith Raju and Santosh (PW-4), had reached the house of the appellant Sarvesh, where Raju and Shobha had fought. Therafter, Raju went outside the house and had reached the railway crossing, while Pammi (PW-8) remained inside and Santosh had gone to call Raju. According to PW-8, Santosh i.e., Santu (PW-4) had immediately cried out, that Raju had been caught by four persons

at the railway crossing. This witness has referred to four and not five persons. A lady had come to PW-8 and stated that someone was on fire. Pammi (PW-8) went outside and tried to extinguish the fire. He had called the police. At the hospital, Raju had told PW-8 that Rajesh and Rajender had set him on fire and had mentioned two other names, which PW-8 did not remember. In his cross examination, PW-8 had accepted that Neelam, sister-in-law of Shobha, aunt of Shobha, and Pappu were present at the house of Sarvesh. After Raju and Shobha had an altercation, PW-8 has accepted that Raju had proceeded outside with Chotu. After about half an hour, both of them had returned and thereafter the couple had quarrelled once again over money. Raju, to placate Shobha, had told her that she could bring her children with her, but Shobha refused and was adamant. Thereupon, Raju in anger, had left the house with Chotu. The said incident had taken place outside the jhuggi of Sarvesh. Pammi (PW-8), on cross-examination by the public prosecutor, claimed that his brother, (i.e., Raju) had told him in the hospital that he was set on fire by Raju-II, Pappu, Rajender, Vinod (all proclaimed offenders) and Sarvesh. In the same breath, Pammi (PW-8), brother of the deceased Raju, in his cross examination by the prosecutor had asserted that Sarvesh was innocent. For the sake of clarity, we would

like to reproduce the exact version given by Pammi (PW-8), when he was cross-examined by the Prosecutor:-

“....My brother Raju told me that he was set to fire by Rajender, Vinod, Pappu, Raju and Sarvesh after pouring kerosene oil. Hand of Raju had been burnt. My mother was also present at time of dying declaration, with Shobha. Site plan was prepared at my pointing out by police, on 18/4/97. In my opinion accused Sarvesh is innocent.”

8. We would at this stage notice, and evaluate the pertinent contradictions emerging from the testimony of the said witnesses, including Pammi (PW-8), brother of Raju. Pammi (PW-8) did not state that Raju and Santu (PW-4) visited the barber shop or that Santu (PW-4) had returned to Sarvesh's house to tell PW-8 that Raju had been cornered or surrounded and that he should come with him to save Raju. As per Pammi (PW-8), Santu (PW-4) was throughout with Raju and therefore an eye-witness, but Santu (PW-4) states that he had seen Raju being surrounded, but he was not present when Raju was set ablaze. PW-8, on the first occasion, claimed that Raju had stated that Rajesh and one Rajender had set him on fire. In the cross-examination by the Public Prosecutor, PW-8 clarified that two other persons were named by Raju, but PW-8 did not remember their names. On further cross-examination by the Public Prosecutor, PW-8 reiterated that Raju had left the house in anger, accompanied by PW-

4. The hesitation and oscillation of PW-8 to name Sarvesh is apparent and perceptible. Initially, PW-8 had named only Rajender, husband of Shobha and one Rajesh, who was not charge-sheeted, but he had accepted that Raju had named others. Later, during cross-examination by the Public Prosecutor, PW-8 named all five, including Sarvesh, but then, almost in the same breath, stated that in his opinion Sarvesh was innocent.
9. Santu (PW-4) also does not state that he had seen deceased Raju being covered in kerosene oil or being set ablaze by the five perpetrators, including Sarvesh. He instead claims that he had seen Raju being surrounded by the five and, thereafter, saw Raju in flames. PW-4 had seen kerosene oil in a plastic bag being carried by Pappu (proclaimed offender).
10. This brings us to the testimony of ASI Man Chand (PW-9), who has referred to the MLC of the deceased, marked Exhibit PW-10/A, and the statement of the deceased marked Exhibit PW-1/B. The MLC records the patient's version that five persons poured kerosene oil on him and set him on fire near the railway crossing. PW-9 has referred to the statement of Raju which became the FIR, Exhibit PW-1/C. PW-9 avers that Raju was declared fit for statement and thereafter Exhibit PW-1/B was recorded. The mother and brother of Raju were

present when Exhibit PW-1/B was being recorded. Importantly, in his cross-examination, ASI Man Chand (PW-9) has accepted that while he was making inquiries at the place of occurrence, Sarvesh had appeared before him and had identified himself. Sarvesh had stated to PW-9 that he was working as a labourer with the contractor at the time of occurrence. In other words, Sarvesh was not present at his residence and place of occurrence at the relevant time. The relevant portion of PW-9's cross examination reads:-

“.....Accused told me that he was doing labour work with contractor. I can't say whether Sarvesh was working in PWD department. I can't say whether accused was doing his duty at the time of incident.....”

11. Sarvesh in his statement under Section 313 Cr.P.C. had specifically asserted that he was on official duty in the MCD Department at Shalimar Bagh at the time of occurrence and was not present at the place of occurrence. He denied having surrounded Raju. Sarvesh has averred that his attendance was duly recorded in the muster roll of the said date. At that time, J.E. Kaptan Singh of MCD was his duty officer.
12. The said Kaptan Singh (DW-1), has deposed that he was a Junior Engineer with MCD and had reached the site on 14th April, 1997 at about 10.30/11 A.M. Sarvesh was working there. DW-1 affirmed that

the duty hours were from 9 A.M. to 5 P.M. DW-1 had produced the attendance register marked Exhibit DW-1/A, to show that Sarvesh was on duty. In his cross-examination, DW-1 accepted that Sarvesh was a daily wager. DW-1 had remained at the spot for 15/20 minutes and had then left, and he did not return. DW-1 could not confirm whether Sarvesh had left the spot after his departure. This witness confirms that Sarvesh was not present at his house at about 10.30-11AM on 14th April, 1997, as he had seen him at the site.

13. Rajesh (DW-2), a co-worker with Sarvesh, affirms that in April, 1997, they were working for Kaptan Singh (DW-1). DW-2 could not affirm if Sarvesh was with them till 5 P.M., but he did state that he and Sarvesh had left the house at about 8 A.M that morning. Sanjay (DW-3) confirms that Sarvesh had come to work on 14th April, 1997 and had marked his presence at about 11.30 A.M. with other workers. The railway crossing No. 8 was at a distance of 2-3 kilometers from the place where DW-3 was working.

14. We have referred to the deposition of ASI Man Chand (PW-9) wherein he has accepted that Sarvesh had himself appeared and identified himself. Sarvesh had then stated that at the time of occurrence, he was working with the contractor. However, this fact was not verified by PW-9. Therefore, PW-9 could not state whether,

on April 14, 1997, Sarvesh was on duty at the time of the incident. This admission and accepted position has left us intrigued and perplexed. We are hesitant in accepting PW-9's version that he had not tried to ascertain the true facts and cross-check/verify the version given by Sarvesh. The version of Santu (PW-4) that he had seen five persons, including Sarvesh, suddenly appearing at the railway crossing, is also confusing and inexplicable for Rajender was a resident of Aligarh, and Vinod is his brother. In the police file written by ASI Man Chand on April 14, 1997, from 2.40 P.M. onwards, are equally puzzling and truculent as to the true and correct portrayal. These contemporaneous recordings could point and reflect that the assertion by Sarvesh could be correct and in fact, the truth. After recording the dying declaration which was converted into the FIR, ASI Man Chand (PW-9) had spoken to Pammi (PW-8) and his statement under Section 161 Cr.P.C. was recorded. On reaching the place of occurrence, PW-9 had met Constable Suresh Kumar (PW-5). PW-9 had then spoken to persons present at the spot and had met one Vinod, wife of Gulab Singh, who had joined the investigation. Vinod had stated that, at about 2.30 P.M., she was washing clothes in front of her house and nobody was present on the street. She had seen that one person had come from the side of the railway crossing, and had

set himself ablaze in front of Sarvesh's house. Once the fire engulfed him, he started shouting "I am burnt I am burnt (*jal gaya, jal gaya*)". Thereupon, several persons had gathered at the spot. Vinod had learnt that this person, who had set himself on fire, was the brother-in-law of Sarvesh and husband of Shobha. Brother of the said person had poured a bucket of water to extinguish the fire. Neelam, Shobha, Pappu and other ladies had arrived at the spot. Some persons had rushed to the police station and others had made a call at No. 100. Neelam had wrapped a blanket around the injured and he was then taken to the hospital in the PCR (van). Shobha, the brother of the person injured, and a third boy had accompanied him.

15. PW-9 had also interrogated Neelam, wife of Sarvesh Kumar about the occurrence. She had informed that Shobha was married to Rajender, resident of Aligarh. About two years back, she had left Rajender for a boy called Raju whom she married and the two had lived in a rented accommodation. On 11th April, 1997, Shobha had come to Sarvesh's house and had complained that Raju would beat her. She left Raju and had started residing with her mother. Thereafter, Shobha had started residing with them. Raju would visit them as he wanted that Shobha should return, but Shobha had refused. Raju on the second occasion had fought with Shobha. At that

time, Raju was drunk. Raju had made Shobha remove her mangal sutra, ear rings, nose pin and pajeb, as she had refused to go with Raju. To chide Shobha, Raju had proclaimed that she had died for him, and was henceforth, a widow. Neelam had tried to pacify the couple but was unsuccessful. Raju had left the place with the mangal sutra and other articles. In the evening, she had informed Sarvesh, her husband, about this incident. Sarvesh had then stated that if Raju would return, she should ask Shobha to go with him and give Rs.51/- for Raju, and a suit for Shobha. In the morning, her husband Sarvesh had left for duty at about 11.30 A.M. Neelam, Shobha and Pappu were at home when Raju, his brother Pammi and another boy had come. Shobha had served water but Raju had objected and did not even allow Pammi to drink water. Shobha had then taunted Raju, as to why he had come back when he had earlier proclaimed that Shobha had died for him. Both of them quarrelled. Raju then left and went outside. Pammi had stayed back to speak to Shobha and to request her to return to Raju. Shobha protested and had stated that Raju used to drink and beat her. Neelam had coaxed Shobha to go back and live with Raju. Shobha had proceeded to take bath and in the meanwhile, Neelam got busy. Neelam thereafter heard that someone had set himself ablaze. Neelam, Pammi and Shobha ran

outside along with Pappu. They saw one person was on fire outside their house. He was shouting. Pammi had poured a bucket of water and Neelam had put a blanket around him. The said person was Raju. Thereafter she, i.e., (Neelam), Pappu and Shobha ran to the police station and lodged a report. A police vehicle arrived at the spot and Shobha, Pammi and the third boy who was with them, took Raju to the hospital. Neelam's husband Sarvesh returned from duty at about 6 P.M. and was then informed about the said occurrence.

16. The police diary also records that ASI Man Chand (PW-9) had made enquiries about Sarvesh and that one person present at the spot came forth and identified himself as Sarvesh. PW-9 had interrogated him and made enquiries. The case file mentions the detailed version given by Sarvesh. We are not referring to it for it is inadmissible as per the bar of Section 25 of the Indian Evidence Act, 1872. We are also conscious and aware that the said versions of Vinod and Neelam are not "evidence", for the two have not deposed and made statements on oath, and their versions have not been tested. One option was to record their testimonies as additional witnesses in exercise of power under Section 391 of the Code. However, in the facts of the present case, keeping in view the time gap and also the uncertainty and doubt flowing from the testimonies of Pammi (PW-

8) and the Investigating Officer ASI Man Chand (PW-9), and to some extent of Shanti (PW-4), we do not feel it would be appropriate and correct to follow and take this recourse. Failure and lapses in police investigation can fall in two categories. Irregularities and failure in the given facts proved and established could be insignificant and immaterial. These are cases where the evidence on record is credible and trustworthy. The Court can rely and base its judgment and findings without compelling hesitation or doubt. The second category, would be cases where lapses and faults are significant and material for in the given facts, they dent and negate the prosecution version or the evidence on record. These failures prevent and obstruct the court from pronouncing a fair and just decision. (See *C.Muniappan v State of Tamil Nadu* (2010) 9 SCC 567, *Ganga Singh v State of M.P.* (2013) 7 SCC 278 and *Surajit Sarkar v State of West Bengal* (2013) 2 SCC 146). The present case falls in the second category, for the police investigation, had raised doubts as to the truthfulness of the dying declaration made by Raju. ASI Man Chand (PW-9)'s failure and lapse in investigation, affects the credibility of the prosecution case. In the present case, prosecution should have ascertained and led evidence to rule out Sarvesh's absence at the place of work. Vinod's version, which was

at variance with the dying declaration, did require consideration and due verification, to rule out possibility of an innocent person being implicated. The Supreme Court in *Sidhartha Vashisht alias Manu Sharma versus State (NCT of Delhi)*, (2010) 6 SCC 1 has elucidated on the role of the Public Prosecutor and his duty of disclosure under Section 24 of the Code to observe that the prosecution must be couched in fairness, not only to the Court and to investigating agency, but to the accused as well (we would, however, record that the Public Prosecutor in this Court has been fair). If an accused is entitled to legitimate benefit, it should not be scuttled or concealed even if the defence counsel had overlooked it. Reference was made to *Shiv Kumar versus Hukam Chand*, (1999) 7 SCC 467, *Hitendra Vishnu Thakur versus State of Maharashtra*, (1994) 4 SCC 602 and *Zahira Habibulla H. Sheikh versus State of Gujarat*, (2004) 4 SCC 158. In *Manu Sharma* (supra), and it has been observed:-

“**199.** It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society.

200. In *Kashmeri Devi v. Delhi Admn.* [1988 Supp SCC 482 : 1988 SCC (Cri) 864 : JT (1988) 2 SC 293] it has been held that the record of investigation should not show that efforts are being made to protect and shield the guilty even where they are police officers and are alleged to have committed a barbaric offence/crime. The courts have even declined to accept the report submitted by the investigating officer where it is glaringly unfair and offends basic canons of the criminal investigation and jurisprudence. *Contra veritatem lex nunquam aliquid permittit*: implies a duty on the court to accept and accord its approval only to a report which is the result of faithful and fruitful investigation. The Court is not to accept the report which is *contra legem* but (*sic*) to conduct judicious and fair investigation and submit a report in accordance with Section 173 of the Code which places a burden and obligation on the State Administration. The aim of criminal justice is two-fold. Severely punishing and really or sufficiently preventing the crime. Both these objects can be achieved only by fair investigation into the commission of crime, sincerely proving the case of the prosecution before the court and the guilty is punished in accordance with law.

201. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation. These well-established principles have been stated by this Court in *Sasi Thomas v. State* [(2006) 12 SCC 421 : (2007) 2 SCC (Cri) 72] , *State (Inspector of Police) v. Surya Sankaram Karri* [(2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225] and *T.T. Antony v. State of Kerala* [(2001) 6 SCC 181 : 2001 SCC (Cri) 1048] .

202. In *Nirmal Singh Kahlon v. State of Punjab* [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523] this Court specifically stated that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution of India. We have referred to this concept of judicious and fair investigation as the right of the accused to fair defence emerges from this concept itself. The accused is not subjected to harassment, his right to defence is not unduly hampered and what he is entitled to receive in accordance with law is not denied to him contrary to law.

203. It is pertinent to note here that one of the established canons of just, fair and transparent investigation is the right of defence of an accused. An accused may be entitled to ask for certain documents during the course of enquiry/trial by the court. Let us examine the extent of this right of an accused in light of the statutory provisions and the manner in which the law has developed under the criminal jurisprudence. To understand this concept in its right perspective we must notice the scheme under the provisions of Sections 170 to 173 of the Criminal Procedure Code. All these provisions fall under Chapter XII of the Code which deals with information to the police and their powers to investigate.”

17. The Supreme Court in *Manu Sharma* (supra) also referred to Sections 170 and 172 of the Code to observe that it was mandatory to maintain a diary under the Chapter where the investigating officer had to enter day-to-day proceedings in the investigation carried out and mention time of events, his departure, returning back and closing of the investigation. The place/places he had visited and the statements recorded. The criminal court is empowered under sub-section (2) to Section 172 to send for the diaries and they can be used

in the court not as evidence but to aid any such inquiry or trial. Sub-section (3) thus stipulates that the accused and his agents are not entitled to call for such diaries or see them, but where a police officer uses them to refresh his memory or the court uses them for the purpose of contradicting the police officer, then Section 161 or Section 145 of the Evidence Act would apply. On the importance of police diaries, it was observed:-

“**214.** Usefully, reference can also be made to the judgment of this Court in *Shamshul Kanwar v. State of U.P.* [(1995) 4 SCC 430 : 1995 SCC (Cri) 753 : AIR 1995 SC 1748] wherein this Court while issuing direction for requiring the State to make a general hearing in terms of Section 172 of the Code clearly stated that it was mandatory for the police officer-in-charge to maintain the diary in terms of the said provision and there is jurisdiction in the Criminal Code to call such diaries and make use of them not as evidence but only to aid such inquiry or trial. It is generally confined to utilise the information therein as foundation for the question put to the witnesses, particularly, to the police witnesses where the police officer has used the entries to refresh his memory or if the court uses them for the purpose of contradicting such police officer then provisions of Sections 161 or 145, would be applicable. The right of the accused to cross-examine the police officer with reference to the entries in the general diary is very much limited in extent and even that limited scope arises only when the court uses the entries for the aforesaid purposes. The investigating officer has a right to refresh his memories and can refer to the general diary. The court has power to summon the case diary in exercise of its powers and for the purposes stated. The accused is vested with the power of making use of the statements recorded during investigation for the purposes of contradiction and copies thereof the accused is entitled to see in terms of Section 207 of the Code. (See *State of Kerala v. Babu* [(1999) 4 SCC 621: 1999 SCC

(Cri) 611] and *State of Karnataka v. K. Yarappa Reddy* [(1999) 8 SCC 715 : 2000 SCC (Cri) 61] .)

215. As is evident from the consistently stated principles of law that right of the accused in relation to the police file and the general diary is a very limited one and is controlled by the provisions aforesaid. But still the accused has been provided with definite rights under the provisions of the Code and the constitutional mandate to face the charge against him by a fair investigation and trial. Fairness in both these actions essentially needs to be adhered to.”

18. It is, therefore apparent, right from the beginning, that there was a second version that Sarvesh was not present at the place of occurrence and had gone for work. Sarvesh had not absconded and in the evening had introduced himself when ASI Man Chand had asked if Sarvesh was present. Noticeably, the PCR van driver, Head Constable Kanahiya Lal, who had taken deceased Raju to the hospital has not been examined. His name figures in the MLC marked Exhibit PW-10/A, as a person who had brought the deceased Raju to the hospital.
19. In view of the aforesaid, we have no hesitation in recording our finding that the case against Sarvesh is not proven beyond reasonable doubt and is instead, rather weak. His presence at the spot is contra indicated and would be highly doubtful. In fact, the Investigating Officer had accepted that he had failed to conduct inquiries and investigate the facts stated by Sarvesh. This is indicative and points

towards his misgivings and quandary. It is obvious that he was aware of the version given by Vinod and Neelam, whose statements were not filed with the chargesheet. The appeal, therefore, must succeed and the judgment under challenge should be set aside.

20. We, for the reasons indicated, set aside the judgment dated 20th November, 1999 convicting appellant Sarvesh. We notice that the appellant Sarvesh was released on suspension of sentence vide order dated 28th August, 2002 and is absconding. Non-bailable warrant for his arrest and appearance has been issued and proceedings under Sections 82 and 83 have been initiated. In view of our findings, the non-bailable warrant would be cancelled and further proceedings under Sections 82 and 83 shall not be taken. Copy of this judgment will be sent to the trial court.

(SANJIV KHANNA)
JUDGE

(R.K. GAUBA)
JUDGE

MARCH 31st, 2016
VKR/ssn