

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

Criminal Appeal No. 57 of 2011

District : Thane

Shailendrakumar Satyanarayan
Thakur,
Aged : 41 years,
R/o. Gurupuja Housing Society,
Evershine City, Vasai (E),
District : Thane,
At present in judicial custody and
undergoing the sentence imposed
upon him in Nashik Road Police .. Appellant
Station, Nashik. (Original accused)

versus

The State of Maharashtra,
At the instance of
Manikpur Police Station,
Vasai, Dist. Thane,
vide their F.I.R. No. 39
of 2007. .. Respondent

.....

*Mr. S.R. Borulkar, Advocate, instructed by
Mr. Manoj Patil, Advocate, along with
Mr. Nilabh Toshniwal, Advocate, for the
appellant.*

*Mr. H.J. Dedia, Addl. Public Prosecutor, for
respondent - State.*

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**CORAM : Smt. V.K. TAHILRAMANI &
A.M. BADAR, JJ.**

**Date of reserving the
judgment : 22nd December 2016**

**Date of pronouncing the
judgment : 10th January 2017**

JUDGMENT (*Per A.M. Badar, J.*) :

01. By this appeal, appellant / original accused is challenging the judgment and order dated 25.10.2010, passed by the learned Addl. Sessions Judge, Vasai, thereby convicting him of offences punishable under Section 302 of the Indian Penal Code as well as under Section 25(1)(a) read with Section 27 of the Indian Arms Act. For offence punishable under Section 302 of the IPC, the learned Addl. Sessions Judge had sentenced the appellant / accused to suffer life imprisonment and to pay fine of Rs. 5,000/-, in default of payment of fine, to undergo further imprisonment for 04 months and for offence punishable under Section 25(1)(a) read with Section 27 of the Indian Arms Act, he was sentenced to suffer

rigorous imprisonment for 05 years and to pay fine of Rs. 2,000/-, in default of payment of fine, to undergo further imprisonment for 02 months. The substantive sentences were directed to run concurrently.

02. Briefly stated, background facts are thus :-

(a) It is case of prosecution that appellant / accused Shailendrakumar Thakur and deceased Santoshkumar Sing were working with Khimji Builders. They used to go for work together. Deceased Santoshkumar Sing had advanced a hand loan of Rs. 2,00,000/- to appellant / accused Shailendrakumar Thakur. That loan was not repaid by the appellant / accused. When the money was demanded back, the appellant / accused used to issue cheques but they were never honoured.

(b) According to the prosecution case, on 31.01.2007, deceased Santoshkumar went to appellant / accused

Shailendrakumar for demanding back the money advanced as hand loan. Those were the days of campaigning for municipal elections and deceased Santoshkumar along with his friends such as PW 03 Amitkumar Sing, PW 06 Sudhavanshu Singh were campaigning for a candidate. As in the evening hours, deceased Santoshkumar did not join the campaign, they telephonically contacted him on his cellphone and found that deceased Santoshkumar was in company of appellant / accused Shailendrakumar.

(c) According to the prosecution, the money was not repaid by appellant / accused Shailendrakumar and as such at about 11.00 p.m. of 31.01.2007, they both boarded an auto-rickshaw plied by PW 01 Fulchand Yadav from the last stop of Evershine, Vasai. They both travelled in the auto-rickshaw of PW 01 Fulchand Yadav up to a Company at Sativali and then to Vasai Road Railway Station. As the last passenger train departed, they asked PW 01 Fulchand Yadav to take them to Dahisar Railway Station. Hence PW 01

Fulchand Yadav took the auto-rickshaw to his residential place for taking RTO papers. As it was a long journey, PW 01 Fulchand Yadav was then accompanied by his friend PW 05 Avdesh Yadav in onwards journey. PW 05 Avdesh Yadav then took charge of driving the auto-rickshaw and PW 01 Fulchand Yadav sat beside him on driver seat. According to the prosecution case, during journey of appellant / accused Shailendrakumar and deceased Santoshkumar in the auto-rickshaw, there was talk between them regarding demand of money and particularly the deceased was demanding back money from the appellant / accused. When that auto-rickshaw was on its way to Dahisar via Ahmedabad-Mumbai road, near Kamankhind, appellant / accused fired three shots from the firearm on deceased Santoshkumar. PW 01 Fulchand Yadav and PW 05 Avdesh Yadav jumped out of the auto-rickshaw and Shailendrakumar fell down from the auto-rickshaw. The appellant / accused then again fired one shot at deceased Santoshkumar.

(d) After this incident, PW 01 Fulchand Yadav and PW 05 Avdesh Yadav went to Chinchoti outpost and informed the incident to Police. Injured Santoshkumar was then admitted to Golden Park Hospital, Vasai, for treatment and the FIR lodged by PW 01 Fulchand Yadav was recorded resulting in registration of Crime No. 39/2007 with Manikpur Police Station, District Thane.

(e) During the course of investigation, the spot Panchanama was recorded and four empty cartridges, one fired bullet, sample of blood found in auto-rickshaw as well as on the soil near auto-rickshaw came to be seized apart from other articles. The appellant / accused was arrested. On the basis of his disclosure statement, his clothes and the firearm came to be seized. While taking treatment at Golden Park Hospital, Santoshkumar succumbed to firearm injuries. Hence his dead body was subjected to post mortem examination. On completion of routine investigation, the appellant / accused was charge-

sheeted for offences punishable under Section 302 of the IPC and under Section 25 read with Section 27 of the Indian Arms Act.

03. After committal of the case and due trial, the learned Addl. Sessions Judge, Vasai, accepted evidence of the prosecution and held that the prosecution has successfully proved the charges. Accordingly, the appellant / accused was convicted and sentenced as indicated in opening para of this judgment.

04. We have heard Shri Borulkar, the learned Advocate for the appellant / accused at sufficient length. He argued that the FIR at Exhibit 14 is ante-timed and ante-dated as PW 01 Fulchand Yadav has stated that he had not signed any papers before 09.30 a.m. of 01.02.2007. The spot Panchanama was recorded from 07.30 a.m. to 09.30 a.m. of 01.02.2007 and the spot was shown by PW 01 Fulchand Yadav. However, he was at the Police Station till 11.30 a.m. of

01.02.2007. Therefore, evidence of PW 01 Fulchand Yadav as well as the spot Panchnama are doubtful. PW 07 Gopal Awhad, who reached the spot after the incident and who deposed that his superior officer came there after 01.30 a.m., has not disclosed presence of PW 01 Fulchand Yadav on the spot. According to the learned Advocate for the appellant, the spot was not guarded and it was left for alteration. The officer who recorded the FIR is not examined causing prejudice to the appellant as contradictions could not be proved.

05. The learned Advocate for the appellant by drawing our attention to the opening paras of chief examination and cross examination of PW 01 Fulchand Yadav as well as at the last line of chief examination of PW 05 Avdesh Yadav, argued that identification of the appellant / accused by these two witnesses is doubtful.

06. The learned Advocate for the appellant further argued that PW 01 Fulchand Yadav in his cross

examination has stated that the Police had not seized anything before him. The spot Panchanama at Exhibit 24 contains a recital that the dried blood was found in the auto-rickshaw as well as on the earth. He further argued that evidence of PW 01 Fulchand Yadav shows that three shots were fired in the auto-rickshaw and second bullet was fired by touching firearm to the chest of the deceased. However, empties were found in front portion of the auto-rickshaw and this belies the manner of assault disclosed by eye witnesses. The learned Advocate further argued that recoveries are also doubtful as PW 01 Fulchand Yadav has not supported the recitals in the spot Panchanama in that respect.

07. The learned Advocate for the appellant further argued that as seen from evidence of PW 12 Dr. Malkam Pestanji, no sooth, no powder or skin blackening was found on the person of the injured and therefore it cannot be said that shots were fired from the firearm from the point blank range. Our

attention was drawn to the report of the ballistic expert for submitting that shots were found to be fired beyond the powder range. With this, it was argued that evidence of eye witnesses is not reliable and manner as well as place of assault is doubtful. It was argued that report of ballistic expert shows that pistol was recovered but the Investigation Officer had identified it as the revolver. The ballistic expert was not examined. To buttress these propositions, reliance is placed on judgment of the Hon'ble Apex Court in the case of **Ram Narain Singh Jaggar Singh Vs. State of Punjab** [1975 AIR (SC) 1727] and in the case of **State of Uttar Pradesh Vs. Abdul Wahid** [2001 (4) Supreme 482].

08. The learned Advocate for the appellant further argued that time of occurrence as stated by the prosecution is also doubtful. PW 01 Fulchand Yadav has deposed that the incident took place at about 01.00 a.m. of 01.02.2007 and he reached Chinchoti Police Outpost at 01.30 a.m. He was there

for half an hour with Police and returned back after half an hour. Thereafter the injured was admitted to the hospital. As against this, certificate at Exhibit 75 issued by the Golden Park Hospital shows admission of Santoshkumar at 01.15 a.m. of 01.02.2007.

09. The learned Advocate for the appellant further argued that seized license was not proved by the prosecution. There was no blood on the weapon. The Investigation Officer has deposed that a revolver was seized whereas the seized weapon was a pistol. With this, the learned Advocate for the appellant argued that the prosecution has failed to prove the guilt of the appellant beyond all reasonable doubts and, therefore, he is entitled for acquittal.

10. The learned Addl. Public Prosecutor supported the impugned judgment and order and argued that eye witness account of PW 01 Fulchand Yadav and PW 05 Avdesh Yadav is satisfactory. The post mortem

report shows blackening, burning as well as tattooing which shows that evidence of eye witnesses is truthful.

11. We have carefully considered the rival submissions and also perused record and proceedings including deposition of witnesses as well as documentary evidence placed on record. As we have noted that the learned Advocate for the appellant has mostly argued on alleged technical lapses allegedly committed during the course of the investigation, we deem it fit to place on record the legal position on this aspect crystallized by the Hon'ble Apex Court. Effects of lapses in investigation were examined by the Hon'ble Apex Court in the case of ***Dhanraj Singh @ Shera Vs. State of Punjab*** [2004 SCC (Cri.) 851] wherein relying on earlier decisions, it is held that *if the lapse or omission is committed by the investigating agency because of negligence, the prosecution evidence is required to be examined dehorse such omissions to find out whether said evidence is*

reliable or not. It is further held that if primacy is given to negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcing agency, but also in the administration of justice. In case of defective investigation, the Court has to be circumspect in evaluating the evidence.

12. Similarly, what is meant by 'reasonable doubt' and when the accused is entitled for benefit of doubt was considered by the Hon'ble Apex Court in the case of **Gangadhar Behera and others Vs. State of Orissa** [(2002) 8 SCC 381] and in paras 17 and 18 of the judgment, relying on several earlier decisions, it is observed thus :-

"17. Exaggerated devotion to the rule of benefit of doubt must not murture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law. (See Gurbachan Singh v. Satpal Singh (18)). Prosecution is

not required to meet any and every hypothesis put forward by the accused. (See State of U.P. v. Ashok Kumar Srivastava (19)). A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish [See Inder Singh v. State (Delhi Admn.) (20)]. Vague hunches cannot take the place of judicial evaluation.

"[A] Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. ... Both are public duties..." (Per Viscount Simon in Stirland v. Director of Public Prosecution (21) quoted in State of U.P. v. Anil Singh (22), SCC p. 692, para 17."

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.

18. In matters such as this, it is appropriate to recall the observations of this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (23) (SCR at pp. 492-93) : (SCC p. 799, para 6):

" The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community,

demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. ... The evil of acquitting a guilty person light-heartedly as a learned author (Glanville Williams in 'Proof of Guilt') has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. ... 'a miscarriage of justice may arise from the acquittals of the guilty no less than from the conviction of the innocent. ...'"

Even otherwise it is well settled that while appreciating the evidence of a witness, the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context, attaching importance to some technical error committed by the Investigation Officer not going to the root of the

matter would not ordinarily permit rejection of the evidence as a whole. The discrepancies which do not shake the basic version of the prosecution case can be discarded. The discrepancies which are due to normal errors of perception and observation should not be given importance. Similarly, error due to lapse of memory needs to be given due allowance. Thus, what is required to be kept in mind is definition of the term 'proved' found in Section 03 of the Evidence Act which requires only proof beyond reasonable doubt and not conclusive proof. Proof of mathematical precision is not the requirement in criminal trial. Keeping in mind these aspects, let us examine evidence adduced by the prosecution in order to bring home the guilt to the appellant / accused.

13. At the outset, death of Santoshkumar is not in much dispute. The appellant / accused has admitted inquest Panchanama dated 09.02.2007 which is at Exhibit 07. This admitted document shows that

Santoshkumar died at about 09.50 p.m. of 08.02.2007 at Golden Park Hospital, Navghar, Vasai. Recitals in the inquest Panchanama Exhibit 07 shows that deceased Santoshkumar was having injury of abrasion at head. Inquest Panchanama further shows that there was abrasion on the forehead and above right eye and that portion had turned blackish. The dead body was found to be having injury on right arm of 1 cm. diameter and surrounding skin was found to have turned blackish. Similarly, there was injury of round shape on elbow of right hand and surrounding skin was found blackish. PW 10 Dr. Gajanan Chavan of J.J. Hospital had conducted post mortem examination on dead body of Santoshkumar and the report of post mortem examination is at Exhibit 64. Evidence of PW 10 Dr. Gajanan Chavan shows that Santoshkumar died due to complication arising from firearm injuries. As per version of PW 10 Dr. Gajanan Chavan, two bullets were recovered from the dead body of Santoshkumar. One bullet was found in the brain matter whereas the another was found at the fecal matter of the rectum.

During autopsy, in all 13 injuries were noted on the dead body by PW 10 Dr. Gajanan Chavan. Our purpose will be served if five injuries noted in Column no. 17 are reproduced hereunder. Those are :-

(1) A surgical stitched wound 15 cm. long, placed vertically oblique over anterior abdominal wall on right side, starting from 4 cm. to the right and 4 cm. above the level of umbilions, extending upwards and medially.

This wound was further surgically extended for another 12 cm. from its upper end, extending downwards and to left to reach a point 7 cm. to left and 13 cm. above the level of umbilions.

The meeting point of these two surgical wounds was located in midline of anterior abdominal wall, 15 cm. above the umbilions.

(2) A wound of entry of a bullet, located over upper third of anterolateral aspect of right arm, 12 cm. below the right shoulder, circular 1 cm. in diameter directed above downwards and medially. Evidence of

burning present. The wound could be traced to an exit wound of 1 cm. diameter located in the axilla (Right). The track was Haemorrhagic.

(3) A wound of entry over posterior aspect of right arm at its middle third, 18 cm. above the elbow joint, oval in shape, 1.2 X 1 cm. in size, directed above downwards and medially, evidence of burning present, evidence of tattooing present over an area of 4 X 3 cm. over the skin just lateral to this injury.

This wound was traced to an exit wound, over 1.3 X 1.1 cm., infected and located 1 cm. medial to and 1 cm. below the level of the wound of entry. [i.e. wound of entry & exit were separated by a distance of 1 cm.]

The bullet after emerging from the above exit wound, has reentered the body causing a vertically oblique entry wound 1 X 1 cm. in size, directed above downwards and with an abrasion collar of 2 X 1 cm. at its upper pole. This entry wound was located 14 cm. to left of midline and 5 cm. below the level of right nipple. It was

stitched and partly healed.

The bullet injury was further traced to have penetrated through right 7th inter costal space, perforated the right dome of diaphragm carrying a 2 X 1.5 cm. perforation, penetrated through the liver, mesentery to small intestine and walls of small intestine at a distance of 20 cm. & 25 cms. from the duodenojejunal junction, and was found lodged in the right adrenal gland. The injuries to the liver, mesentery and small intestines were surgically stitched. In its course, the bullet has also affected the lower margin of lower lobe of right lung which was contused and lacerated (1 X 0.5 cm.). The recovered bullet was yellow coloured, 1 cm. long and 1/2 cm. diameter at its base.

(4) Wound of entry over left supra scapular region, 7 cm. to left of midline of back and 3 cm. below the level of shoulder. It was oval, gaping, 1.2 X 1 cm. size, infected. There was no signs of burning, tattooing or singeing or blackening. The bullet has penetrated the lateral wall of esophagus at level of T1 vertebra. The

bullet has passed through the lumen of the gastrointestinal track and was traced and recovered from the fecal matter in the rectum. The bullet was discoloured black, was 1 cm. long and had diameter of 1/2 cm. at its base.

(5) A stitched wound, vertical, 8 cm. long over right side of occipital region of scalp. Its lower end was placed 6 cm. behind the right ear.

A wound of entry was merged with this stitched wound.

On reflecting the scalp, there was a circular 1 X 1 cm., defect of wound of entry into the skull bone (over right occipital bone). Corresponding meninges were torn, brain was lacerated. The track of the bullet could be traced to left parietal lobe. The brain substance in the track was necrotic and liquefied.

There was evidence of left frontoparietal craniotomy. Five burr holes were seen. The portion of the skull cap removed during craniotomy was seen loosely kept over the defect (size 6 X 5 cm.).

The bullet in the brain substance was removed surgically in the hospital by doing this craniotomy.

With this overwhelming evidence, the inescapable conclusion which can be drawn is death of Santoshkumar is proved to be a homicidal death.

14. According to the prosecution case, PW 01 Fulchand Yadav and PW 05 Avdesh Yadav are eye witnesses to the incident of murder of Santoshkumar by appellant / accused Shailendrakumar. We therefore, at the outset, propose to examine their evidence.

15. It is in evidence of PW 01 Fulchand Yadav that two passengers boarded the auto-rickshaw plied by him, at last stop of Evershine City at about 11.30 p.m. of 31.01.2007. Out of those two passengers, one passenger who was fat and having fair complexion was demanding money to the another passenger who was thin

and tall. By identifying appellant / accused Shailendrakumar PW 01 Fulchand Yadav then deposed that the money was being demanded to the appellant/accused by the co-passenger. Version of PW 01 Fulchand Yadav shows that he initially took those two passengers to a Company at Kandivali whereas they alighted from the auto-rickshaw and returned after 5 - 6 minutes to board it again. Then he took them to Vasai Road Railway Station but as the last train departed, they asked him to reach them to Dahisar Railway Station. As per evidence of PW 01 Fulchand Yadav then he took the auto-rickshaw to his house for fetching RTO papers. He also took PW 05 Avdesh Yadav with him for onwards journey. PW 05 Avdesh Yadav started driving the auto-rickshaw and he sat beside PW 05 Avdesh Yadav on the driver seat of the auto-rickshaw. As stated by PW 01 Fulchand Yadav, during the course of onward journey, both passengers were talking about money. The passenger who was demanding money from the co-passenger got a call on his cellphone and he informed the caller that the other

man has not given money and, therefore, the other man is being brought in the auto-rickshaw meaning thereby that the appellant/accused was being taken with him by deceased Santoshkumar. It is in evidence of PW 01 Fulchand Yadav that then he heard a loud bang and looked back. He saw that the appellant / accused had fired a bullet from the firearm at the co-passenger. As per version of PW 01 Fulchand Yadav, he jumped out of the auto-rickshaw. The auto-rickshaw stopped and the injured passenger fell down on the road. The appellant / accused alighted and again fired at the injured. He then went towards Vasai side. PW 01 Fulchand Yadav stated that they went to Chinchoti side, reached the Police Station and returned to the spot with Police. Police then took the injured to the hospital and he lodged report (Exhibit 14). This witness identified the appellant / accused as well as the firearm produced before the Court.

16. Cross examination of this witness shows that as both passengers were quarreling over money, he was

frightened and initially told both of them that he will not come with them but on their request, he continued the journey. As this evidence is coming on record from the cross-examination of PW1 Fulchand, there is no reason to disbelieve the same. This evidence throws light on mental condition of the witness as well as on motive of the crime in question.

17. Cross examination of PW 01 Fulchand Yadav reveals that Chinchoti Outpost was 3 - 4 Kms. away from the spot. He reached that Outpost at about 01.30 a.m. by walking with PW 05 Avdesh Yadav and narrated the incident. They were there for half an hour and then came back to spot in Police vehicle. He halted there for half an hour. PW 01 Fulchand Yadav has stated that he jumped out of the auto-rickshaw after hearing a loud bang for the second time. As per his version in the cross examination, he was at Manikpur Police Station till 09.00 a.m. and signed the document at 09.30 a.m. They left that

Police Station at about 11.30 a.m. of 01.02.2007. PW 02 Fulchand Yadav has stated that PW 04 Kamleshkumar Sing came to the Police Station at about 09.00 a.m. but Kamleshkumar Sing had not shown any photograph to him. In cross examination of PW 01 Fulchand, it is elicited that the second bullet was fired by touching the chest when both passengers were sitting in the auto-rickshaw and that the firing was from the short distance.

18. Evidence of PW 05 Avdesh Yadav, another eye witness, is consistent with PW 01 Fulchand Yadav so far as the incident of firing at the deceased by the appellant / accused is concerned. Evidence of PW 05 Avdesh Yadav shows that when he was plying the auto-rickshaw while PW 01 Fulchand Yadav was sitting beside him, out of two passengers in the auto-rickshaw, one passenger received a call on his mobile and he told the caller that as the amount is not paid, he is returning back with Thakur. Then as per version of PW 05 Avdesh Yadav, he heard a loud sound

and looked behind. Then he saw the passenger on right side was firing shot from the firearm on the passenger sitting on the left side of the auto-rickshaw. The passenger who sustained injuries fell down and another passenger again fired at him. In cross examination, PW 05 Avdesh Yadav has stated that he knows PW 04 Kamleshkumar Sing as they met at Manikpur Police Station, but before recording his statement, PW 04 Kamleshkumar Sing has not told anything to him.

19. Evidence of PW 01 Fulchand Yadav and PW 05 Avdesh Yadav to the effect that out of two passengers travelling in the auto-rickshaw in the night intervening 31.01.2007 and 01.02.2007, one passenger fired shots from the firearm held by him on the other passenger is not at all shattered in the cross examination of both these witnesses. Similarly, evidence of both these witnesses to the effect that there was a talk between both passengers and one passenger was demanding the money from the other

passenger is also not shattered in the cross examination. Both these witnesses in unison have stated that during the course of journey, the person demanding money had received a call on the cellphone and he informed the caller that as the money is not paid, the person not paying the money is being brought. This demand of money by one passenger to the another resulting in quarrel is cemented by the material brought on record from cross-examination of PW1 Fulchand.

20. The question which falls for consideration is whether both these witnesses namely PW 01 Fulchand Yadav and PW 05 Avdesh Yadav were in a position to identify the appellant/accused as the passenger in the auto-rickshaw who fired shots from the firearm on co-passenger Santoshkumar. Though the prosecution has conducted test identification parade, wherein it is alleged that both these witnesses have identified the appellant, the learned trial Court has rejected the evidence regarding the identification parade as

it was belatedly conducted without adherence to the guidelines issued by this Court found in the Criminal Manual. We do not find any perversity in rejection of that evidence regarding the identification parade. However, it needs to be stated that the dock identification is the substantive evidence and evidence of identification in the parade conducted by the prosecution can be used only as a corroborative piece of evidence. Evidence of the identification in a parade is primarily for assisting the investigator in order to check whether the investigation is proceeding in a right direction. In the case in hand, the appellant / accused as well as the injured had boarded the auto-rickshaw plied by PW 01 Fulchand Yadav at about 11.30 p.m. of 31.01.2007. Then PW 05 Avdesh Yadav joined them and the journey continued at least up to 01.00 a.m. of 01.02.2007. There were halts during this journey. PW 01 Fulchand Yadav was frightened because of quarrel between the appellant and the deceased over money and therefore he took PW 05 Avdesh Yadav with him for reaching then to Dahisar

Railway Station. It is thus clear that there was ample opportunity with PW 01 Fulchand Yadav and PW 05 Avdesh Yadav to see both co-passengers traveling in their auto-rickshaw. Because of hot discussion regarding demand of money between those passengers, they were naturally remembered by PW 01 Fulchand Yadav and PW 05 Avdesh Yadav who had an occasion to see both of them for a fairly long period of time. Even in the FIR at Exhibit 14, PW 01 Fulchand Yadav had given detailed description of both passengers who travelled in his auto-rickshaw. There is no cross examination of PW 01 Fulchand Yadav on the aspect that the description of passengers travelling in his auto-rickshaw mentioned in the FIR is not correct. Similarly, the substantive evidence of PW 01 Fulchand Yadav regarding description of the deceased and the appellant / accused who were travelling in his auto-rickshaw on that fateful night remained unshattered in the cross examination. The diabolic murder was committed in the auto-rickshaw in presence of PW 01 Fulchand Yadav and PW 05 Avdesh Yadav during ongoing

journey by the appellant / accused by firing shots from the firearm. Such brutal incident gives long lasting impression of the accused as well as the victim in the mind of the eye witnesses enabling them to recollect features of the perpetrator of such crime, when required. therefore, we do not see any infirmity in the identification of the appellant / accused as the person who fired shots from the firearm on the deceased.

21. We have noted the argument of the learned Advocate for the appellant / accused that the FIR is anti-timed as it was registered at 03.00 a.m. of 01.02.2007 whereas PW 01 Fulchand Yadav has stated that he signed the document at 09.30 a.m. of that day. However, it needs to be kept in mind that PW 01 Fulchand Yadav is rustic person who earns his livelihood by plying an auto-rickshaw. He does not know intricacies of timing of the FIR and signing of documents. His chief examination was partly recorded on 01.01.2009 i.e. about two years after the

incident. The trial was then adjourned to 15.01.2009. Without any progress on that day, it was adjourned to 29.01.2009. Then on 29.01.2009 evidence of PW 01 Fulchand Yadav was again recorded partly. Thereafter remaining evidence of this witness came to be recorded on 12.02.2009. In the wake of this prolong recording of evidence for days together, PW 01 Fulchand Yadav was not expected to know and recollect the sequence of events which took place prior to two years. His understanding and capacity are relevant factors on this aspect. No capital can be made of the material brought on record from his cross examination to the effect that he was at the Police Station up to 09.00 a.m. or 11.30 a.m. of 01.02.2007 because what PW 01 Fulchand Yadav conveyed by this, admission is that he was with Police up to 11.30 a.m. of 01.02.2007. This does not mean that he did not went out of the Police Station and particularly to the spot with the police during this period. Ultimately he has stated that he accompanied Police to the spot during the intervening period.

Therefore, it cannot be said that recitals in the spot Panchanama that PW 01 Fulchand Yadav had shown the spot are incorrect or that there was no occasion for PW 01 Fulchand Yadav to go to the spot in the intervening period. These minor discrepancies are of no assistance to dislodge truthful account of murderous assault by the appellant / accused on the deceased given by PW 01 Fulchand Yadav and PW 05 Avdesh Yadav. Similarly, the FIR at Exhibit 14 can be read as a whole in the evidence and by a bare reading, we may find contradictions in it, if any. As against this position, the statement recorded under Section 161 of the Code of Criminal Procedure, 1973, cannot be read by the Court unless the contradictions are proved therefrom. PW 01 Fulchand Yadav was concerned with showing the spot to the Police and he was not concerned with whether Police recovered and seized anything from the spot. Hence, no undue importance can be given to his statement that nothing was seized before him from the spot. Ultimately on this aspect, evidence of the

Investigation Officer and Panch witness will prevail. In the light of this discussion, we hold that evidence PW 01 Fulchand Yadav and PW 05 Avdesh Yadav is trustworthy and worth placing reliance. It is not open to doubt or suspicion as both of these witnesses have consistently deposed about the mode and manner of assault by firearm by the appellant / accused on deceased Santoshkumar. No overbearing importance can be given to the timing of recording of the FIR when these two eye-witnesses are found to be witnesses of the truth.

22. PW 02 Gulab Yadav and PW 11 Anil Labade, API, have proved the spot Panchanama Exhibit 24. Evidence of PW 02 Gulab Yadav - Panch witness shows that there were blood stains on the rear seat of the auto-rickshaw as well as on the soil near the auto-rickshaw. As per his version, one empty cartridge was found below the driver seat of the auto-rickshaw apart from one bullet. Duly proved spot Panchanama at Exhibit 24 shows that on left side of the auto-

rickshaw in the middle of the driver seat and the back seat, there was dried blood. On the backrest of the driver's seat, from back side, there were stains of dried blood. On the left side floor of the driver's seat, there was dried blood. Two empty cartridges and one fired bullet was found in the auto-rickshaw. One empty cartridge was found lying near the auto-rickshaw whereas one empty cartridge was found lying at some distance of the auto-rickshaw. By this spot Panchanama these articles apart from blood stained pair of sandal, sample of blood found in the auto-rickshaw and outside the auto-rickshaw as well as sample of soil came to be seized.

23. Evidence of PW 01 Fulchand Yadav and PW 05 Avdesh Yadav is gaining full corroboration from evidence of PW 03 Amitkumar Sing and PW 06 Sudhavanshu Sing. Evidence of these two witnesses shows that it was the time of municipal election and deceased Santoshkumar was participating in the

campaign with them. As per version of PW 03 Amitkumar Sing, on 31.01.2007 at about 06.00 p.m., he contacted deceased Santoshkumar telephonically to ascertain his whereabouts. At that time, Santoshkumar told this witness that he has gone to appellant / accused Shailendrakumar for demanding money. Even in cross examination, PW 03 Amitkumar Sing has stated that since one year he was knowing that deceased Santoshkumar had given money to appellant / accused Shailendrakumar. Similarly, PW 06 Sudhavanshu Sing on finding that deceased Santoshkumar is absent from the campaign on 31.01.2007, ringed him at about 11.30 p.m. As per version of PW 06 Sudhavanshu Singh, at that time, deceased Santoshkumar told him that as soon as appellant / accused Shailendrakumar pays money, he will come back. Cross examination of this witness shows the reason for calling Santoshkumar by him. For the last 4 - 5 days, they all were busy in canvassing for municipal election and deceased Santoshkumar used to be with them in that campaign.

Thus, evidence of PW 03 Amitkumar Sing and that of PW 06 Sudhavanshu Sing goes to show that at about 06.00 p.m. and 11.30 p.m. of 31.01.2007, the deceased was in company of the appellant / accused. This evidence fully corroborates version of PW 01 Fulchand Yadav and PW 05 Avdesh Yadav. PW 04 Kamleshkumar Sing is younger brother of deceased Santoshkumar. His evidence shows that deceased Santoshkumar had given an amount of Rs. 2,00,000/- to the appellant / accused and the same was not being refunded by the appellant / accused. This evidence coupled with evidence of other witnesses shows a strong motive with the appellant / accused to eliminate deceased Santoshkumar. It appears that the appellant/accused did not want to repay the debt due to deceased Santoshkumar.

24. According to the prosecution case, weapon of offence and clothes worn by the appellant / accused at the time of commission of offence were seized on the basis of his disclosure statement. PW 08 Pravin

Raut is a Panch witness to this recovery. He has turned hostile. The prosecution therefore resorted to the evidence of PW 11 Anil Labade, the then API of Manikpur Police Station who proved the disclosure statement and the resultant recovery of weapon and clothes of the appellant/accused. As per version of PW 11 Anil Labade, the appellant / accused had made a disclosure to produce the revolver and clothes worn by him at the time of the incident. PW 11 Anil Labade, Investigation Officer, has stated that accordingly the appellant / accused had produced those articles from behind his house and those were in a bag. Accordingly, PW 11 Anil Labade, Investigation Officer, has prepared memorandum of statement of the appellant / accused as well as the recovery Panchanama (Exhibit 49). At this juncture, it is apposite to quote paragraphs 23, 24 and 25 from judgment of the Hon'ble Apex Court in the case of **Rameshbhai Mohanbhai Koli and others Vs. State of Gujarat** [2011 AIR SCW 378] which reads thus :-

“Evidence of Investigating Officer

23) An argument was advanced about reliance based on the evidence of investigating officer. This Court in [State of U.P. vs. Krishna Gopal and Another](#), (1988) 4 SCC 302 has held that courts of law have to judge the evidence before them by applying the well recognized test of basic human probabilities. Prima facie, public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case. [vide [State of Kerala vs. M. M. Mathew & Anr.](#), (1978) 4 SCC 65)]

24) In [Modan Singh vs. State of Rajasthan](#), (1978) 4 SCC 435, it was observed that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was expressed in [Mohd. Aslam vs. State of Maharashtra](#), (2001) 9 SCC 362. In [Anter Singh vs. State of Rajasthan](#), (2004) 10 SCC 657, it was further held that even if panch witnesses turn hostile, which

happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated.

25) This Court has held in large number of cases that merely because the panch-witnesses have turned hostile is no ground to reject the evidence if the same is based on the testimony of the Investigating Officer alone. In the instant case, it is not the case of defence that the testimony of Investigating Officer suffer from any infirmity or doubt. [Vide Modan Singh's case (supra) Krishna Gopal's case (supra) and Anter Singh's case (supra)]“

It is thus clear that even if Panch witness to recovery turns hostile, the same can be proved by the evidence of the Investigation Officer. In the case in hand, we do not find any infirmity in the evidence of the Investigation Officer to disbelieve recoveries at the instance of the appellant / accused vide Panchanama Exhibit 49. It is thus seen that the firearm and clothes are recovered at the instance of the appellant / accused. The recovery was not from

the open space but it was from behind the house of the appellant / accused. Cross examination of PW 11 Anil Labade, Investigation Officer, shows that there was a compound wall to that building and back side of that building from where the recovery was effected was not an open space. It was from within the area surrounded by the compound wall.

25. Evidence of PW 11 Anil Labade, Investigation Officer, shows that seized articles including the firearm were subjected to the ballistic examination as well as chemical analysis. Report of the ballistic expert shows that recovered empties and bullets were fired from the pistol seized at the instance of the appellant / accused. Clothes seized at the instance of the appellant / accused were found to be stained with blood of "B" Group which appears to be that of deceased Santoshkumar. Thus, this evidence incriminates the appellant / accused in the crime in question and corroborates the version of both eye witnesses.

26. Relying on the judgments in the case of **Ram Narain Singh Jaggar Singh** (*supra*) and in the case of **State of U.P. Vs. Abdul Wahid** (*supra*), evidence of eye witnesses is sought to be discredited. In the case of **Ram Narain Singh Jaggar Singh** (*supra*), the Hon'ble Apex Court has held that where the evidence of eye witnesses is totally inconsistent with the medical evidence or the evidence of the ballistic expert, it is a most fundamental defect in the prosecution case and can discredit the entire case. In the case of **State of U.P. Vs. Abdul Wahid** (*supra*), it was observed that absence of blackening, tattooing and scratching give rise to the inference that the firing took place from some distance and not from the close quarters as has been deposed by witnesses. However, these observations are not of any assistance to the case of the appellant / accused. No doubt, report of the ballistic expert shows that bullets were fired from beyond the powder range of the weapon but inquest Panchanama (Exhibit 07), post mortem report (Exhibit

64) do show that there was blackening of the skin. Evidence of burning and tattooing was found to be present. Even PW 12 Dr. Malkam Pestanji in his cross examination has stated that he had noted skin blackening. This evidence as such shows that bullets were fired from a short distance and as such there is no reason to disbelieve version of two independent eye witnesses namely PW 01 Fulchand Yadav and PW 05 Avdesh Yadav who are totally disinterested witnesses having no concern either with the deceased or with the appellant / accused.

27. Noting of dried blood in spot Panchanama cannot be given any overbearing importance as coagulation is the property of the blood and what is reflected is coagulation of blood in the auto-rickshaw of PW 01 Fulchand Yadav. Similarly, we do not find anything abnormal at place of occurrence and seizure of articles to discredit the prosecution case. Referring to the firearm as revolver by the Investigation Officer instead of naming it as pistol

is also of no assistance to dislodge truthful and trustworthy evidence of eye witnesses. Ultimately, the ballistic report shows that the bullets were fired from the very same firearm which was recovered at the instance of the appellant/accused. The appellant/accused has failed to show that he was holding valid pass or licence for possessing that firearm. If he was really having it, then it was a fact especially known to him. Therefore, in view of provisions of Section 106 of the Evidence Act, it was for the appellant/accused to show that he had a licence to possess the seized firearm. This was not done by the appellant/accused.

28. In the result, we are unable to persuade ourselves to accept contention of the learned Advocate for the appellant / accused that the prosecution has failed to prove its case beyond reasonable doubt. We hold that the learned trial Court has rightly convicted and sentenced the appellant / accused.

29. The appeal as such is devoid of merit and same is dismissed.

(A.M. BADAR)
JUDGE

(Smt. V.K. TAHILRAMANI)
JUDGE

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