

\$~

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.A. 102/2013**

Judgment reserved on: 20th January, 2017
Judgment pronounced on: 24th January, 2017

MUKESH

...Appellant

Through: Mr. K. Singhal, Mr. Siddharth Mittal,
Ms. Vani & Mr. Prasanna, Advocates.

Versus

STATE

...Respondent

Through: Ms. Aashaa Tiwari, APP for the State.

+ **CRL.A. 401/2013**

RAVINDER

.....Appellant

Through: Mr. K. Singhal, Mr. Siddharth Mittal,
Ms. Vani & Mr. Prasanna Advocates.

Versus

STATE NCT OF DELHI

...Respondent

Through: Ms. Aashaa Tiwari, APP for the State.

+ **CRL.A. 562/2013**

VASU SHARMA @ BUNTY

.....Appellant

Through: Mr. Javed Alvi, Advocate.

Versus

STATE NCT OF DELHI

...Respondent

Through: Ms. Aashaa Tiwari, APP for the State.

+ **CRL.A. 563/2013**

PARVESH @ RIMPY

.....Appellant

Through: Mr. K. Singhal, Mr. Siddharth Mittal,
Ms. Vani & Mr. Prasanna, Advocates.

Versus

STATE NCT OF DELHI

...Respondent

Through: Ms. Aashaa Tiwari, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J.

1. Since the present appeals arise out of a common judgment, the same have been heard together and are being disposed of by a common judgment.
2. Present appeals arise out of a judgment dated 17.12.2012 and order on sentence dated 17.12.2012 passed by the Additional Sessions Judge in Sessions Case No. 60/10, by virtue of which all the appellants have been convicted under Section 302 read with Section 34 of the Indian Penal Code and sentenced to undergo imprisonment for life and to pay a fine of Rs. 20,000/- and in default of the payment of fine to further undergo rigorous imprisonment for one month. The appellant Vasu Sharma @ Buntty was further sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 20,000/- for the offence punishable under Section 25 and 27 of the Arms Act and in default of payment of fine to further undergo rigorous imprisonment for one month. Both the sentences in respect of the appellant Vasu

Sharma @ Bunty were ordered to run concurrently.

3. The brief facts of the case are as under:

“The formal indictment against the accused persons is that, on 19.07.2010, at about 2.00 pm in Gali no.2, near House No. 1716, J-Block, Bhalaswa Village, Jahangir Puri, Delhi, within the jurisdiction of P.S. Jahangir Puri, they all in furtherance of their common intention caused death of Bhim Singh by firing on his head. It has further been alleged that on the said date, time and place, accused, Vasu Sharma @ Bunty, was found in possession of a country made pistol, without any permit or licence. It has further been alleged that, on the said, date, time and place, accused, Vasu Sharma @ Bunty, used the country made pistol, in commission of murder, which was in his possession.”

4. After completion of the investigation, charge sheet for the offence punishable under Section 302 read with 34 of the Indian Penal Code was framed against all the four appellants. Charge for the offence punishable under Section 25 and 27 of the Arms Act was also framed against the appellant Vasu Sharma @ Bunty. All the appellants entered the plea of not guilty and claimed to be tried. The prosecution relied upon 36 witnesses in all, besides the exhibits produced during the trial. The statements under Section 313 of the Code of Criminal Procedure were recorded wherein all the appellants denied all the incriminating circumstances appearing in evidence against them and claimed to be falsely implicated. Six defence witnesses were examined by the appellants in their defence.

Common Arguments raised by the counsel for the appellants

5. Mr. K. Singhal, learned counsel appearing on behalf of the appellants Mukesh, Ravinder and Parvesh @ Rimpny submits that the impugned

judgment and order on sentence is based on conjectures and surmises and the trial Court has erred in reaching a conclusion of guilt against the appellants and not appreciated the evidence brought on record in the correct perspective. Counsel further submits that the case of the prosecution is based on the evidence of interested witnesses and there are material inconsistencies and improvements in their testimonies which render the entire case of the prosecution unreliable.

6. Mr. K. Singhal vehemently argued that there is a serious contradiction with respect to the place of occurrence. As per the case of the prosecution, the alleged place of incident was House No. J-1716, however it emerged from the PCR form Ex.PW14/A that the alleged place of incident was House No. J-1703 and not House No. J-1716. The said Ex.PW14/A was recorded by PW14 W/Ct. Sulochana, who categorically deposed that the call was received at 14:20 hrs from PW7 Harpal Singh Yadav and the place of occurrence was recorded as J-Block, House No. 1703. It is contended by the counsel for the appellants that copy of log book record dated 19.07.2010, Ex.DW5/A, further proved the place of incident as J Block, House No.1703. This submission was also corroborated by the testimonies of PW7 Harpal Singh Yadav (first informant), PW16 HC Raj Singh (PCR official), whose statement was recorded after one month from the incident i.e. on 19.08.2016, PW27 HC Mahender Singh (PCR official), PW28 Gulab Hussain (Police Official) and DW5 Ct. Surender Kumar.
7. It was further contended by the counsel for the appellants that the investigation in the present case was faulty as the Investigating Officer did not seize the blood stained clothes of the prosecution witnesses

who witnessed the incident and removed the deceased to the hospital. In the absence thereof, the presence of eyewitnesses at the spot and their version creates a serious doubt in the case of the prosecution. To substantiate his argument, learned counsel for the appellants has relied upon *State of Rajasthan Vs. Teja Singh* reported in **2001 (3) SCC 147**, wherein the Hon'ble Supreme Court in para 5 and 6 made the following observation:

“5. We have examined the evidence of the three eye-witnesses as also that of Iqbal Singh (PW-10), the Investigating Officer. We have also perused the evidence of Ram Pratap Sarpanch (DW-1) and we do not find any reason to differ with the finding of the High Court which sitting as the first court of appeal on facts, had every right to re-appreciate the evidence. In our opinion, the High Court, in that process, has not committed any error. As a matter of fact, the explanation put forth by the learned counsel in regard to the delay in the FIR reaching the court is not tenable because assuming that there were some court holidays that cannot be a ground for the delay in the FIR reaching the Magistrate, because requirement of law is that the FIR should reach the concerned Magistrate without any undue delay. We are of the opinion that the explanation given by the prosecution regarding the delay in the FIR reaching the Magistrate is neither convincing nor acceptable.

6. In regard to the next argument of the appellant's counsel that the High Court was wrong in assuming that other villagers were sitting with PWs 6, 7 and 9, assuming that it is an error even then there can be no doubt as could be seen from the prosecution case that other villagers whether sitting with PWs 6, 7 & 9 or not did rush to the scene of occurrence, therefore, it is clear that apart from the said eye-witnesses produced by the prosecution many other villagers would have atleast seen

*the last part of the occurrence including the escape of the accused and the accused not being strangers to those villagers could have easily identified by them. By not examining those independent witnesses, the prosecution has failed to produce the available independent corroborative evidence to support the evidence of interested witnesses, namely, PWs 6, 7 & 9 because of which the High Court was justified in drawing adverse inference against the prosecution. This lack of corroboration of the evidence of PWs 6, 7 & 9 coupled with the fact that PW-6 is admittedly a very old person having problems with his eyes makes it difficult to believe that he was really in a position to identify the accused persons. The evidence of the eye-witness PW-9 also becomes suspect because of the fact that though he was available in the village, his evidence was recorded only after 5 days of the crime for which the explanation given by the Investigating Officer is not at all satisfactory. **The presence of the third eye-witness i.e. PW-7, Amrao, is also doubtful because of the fact that even though she stated that she had lifted the body of the deceased which was bleeding and her clothes had become blood stained, the Investigating Officer failed to recover the said clothes giving room for a genuine complaint that her presence is also doubtful.** These factors coupled with the evidence of DW-I Ram Pratap who in his evidence has stated that when he was told about the incident these eye-witnesses did not mention the name of the accused persons to him, also makes the prosecution case doubtful. Therefore, in our opinion, the High Court was justified in not placing any reliance on the evidence of these 3 eye-witnesses without any independent corroboration.”*

8. The counsel for the appellants has fervently urged that there was unexplained delay in sending the copy of FIR to the Metropolitan Magistrate as required under Section 157 of the Code of Criminal Procedure. The counsel clarified that there is an admitted delay of

more than 17-18 hours in sending the copy to the concerned Metropolitan Magistrate, as per DD No. 24A, the copy of FIR was sent at about 4.35 PM on 19.07.2010 however, as per the endorsement made by PW6, the then Metropolitan Magistrate, he received it on 20.07.2010 at 10.00 AM. It was contended by the counsel for the appellants that there is nothing on record to show that the incident took place at the said spot and delay in filing the FIR defeats the testimonies of the eye witnesses.

9. Mr. Singhal argued that despite the place of incident being crowded, no independent witness was examined by the Investigating Officer which clearly pointed towards the faulty investigation. It was contended by the counsel for the appellants that all the witnesses were closely related to the deceased and as such no reliance could be placed on their testimonies.
10. To fortify his argument on this aspect, learned counsel for the appellants has relied upon ***Jandel Singh vs. State of Madhya Pradesh*** reported in ***2003 (9) SCC 110***, wherein the Hon'ble Supreme Court in para 8,12 and 13 made the following observation:

"8. Ram Gopal, PW1 went to the police station at Dabra and got the FIR recorded. Hukumsingh Yadav, SHO, Debra Police Station after recording the first information report came to the place of occurrence in the night itself. There is nothing on record to indicate that a copy of FIR was sent to the jurisdictional Magistrate as required under Section 157 of the Cr.P.C. Prosecution case is that the Investigating Officer could not carry on with the investigation at night due to darkness. Early in the morning the next day Panchnama of the dead body was prepared and dead body was sent for post-mortem. Dr.

Dharampal katariya, PW3 conducted the post mortem at 9.00 O'clock the same day. In his opinion, Prakash died due to damage to the vital organ i.e. brain. That the injuries caused on the head of the deceased were sufficient to cause death in the ordinary course of nature.

12. Investigating Officer reached the spot at about 10.00 p.m. He did not carry the investigation further at night due to darkness. He did not make any effort to search for the accused though their houses were a few steps away from the place of occurrence. It is unbelievable that an Investigating Officer who is going for the investigation of a murder case at night would not carry a torch with him or try to procure some other source of light to carry on with the investigation. There were houses all around and could have easily arranged for some light. He had gone there in a jeep and if no other source of light was available he could have at least made search for the accused persons with the help of the headlights of the jeep. He did not send a copy of the first information report of the jurisdictional Magistrate. He kept silent as to what time the first information report was dispatched or received by the jurisdictional Magistrate. Defence tried to elicit this information by summoning Dak Book from the police station and examined Constable Satish Kumar Mishra as DW1 but the said witness did not bring the Dak Book and stated that the same was not traceable. In the requisition memo sent by the SHO to the hospital and in the post mortem, date and time of receipt of dead body has not been mentioned. Cumulatively all these facts put a doubt on the prosecution version and it leaves an impression that the prosecution has not come out with the truth. In all probability the commission of crime came to notice in the morning and thereafter the investigation started. If that be so, the presence of the eye witnesses becomes very much doubtful.

13. High Court has pointed out in its judgment that no specific injury which could cause death in the ordinary course of nature had been attributed to any of the appellants. The main accused with whom the deceased had litigation have already been acquitted in a subsequent trial. In the absence of any independent witness or any other corroborative evidence to support the version put forth by the two eye witnesses, which we find unsafe to rely upon, it would be unsafe to hold the appellants guilty of charges leveled against them."

11. Mr. Singhal has drawn attention of this court to the FSL/viscera report dated 18.02.2011 of the deceased which shows the presence of ethyl alcohol in the blood.

Arguments raised by learned Counsel for the appellant Vasu Sharma

@ Bunty

12. Mr. Javed Ali, learned counsel appearing on behalf of the appellant Vasu Sharma @ Bunty submitted that so far as recovery of country made pistol Ex.F-1 from the appellant Vasu Sharma @ Bunty is concerned, the prosecution's claim of recovering the country made pistol at the instance of the appellant Vasu Sharma is difficult to accept and not to be given any credence because the recovery thereof was rendered doubtful in view of the absence of any independent witness to the recovery thereof but also on account of a circumstance that the recovery of the country made pistol was effected from the house of the maternal uncle, that being so, if the recovery was effected from the place which is accessible to the residents of the house, it cannot be relied as an incriminating piece of evidence against the appellant.

13. To substantiate his argument, learned counsel for the appellant Vasu Sharma has relied upon ***Prem Singh Vs. State of Haryana*** reported in **(2013) 14 SCC 88**, wherein the Hon'ble Supreme Court in para 14 held as under:

“14..... the doubt and suspicion with regard to the bonafides of the recovery of the fire arms; the failure of the prosecution to establish the linkage between the weapons recovered and the bullets extracted from the body of the deceased are facts and conclusions that can be reasonably reached on the basis of the evidence and materials on record. If the aforesaid conclusions are possible to be reached and we are inclined to so hold, the same cannot be characterized as unreasonable or perverse so as to justify the interference made by the High Court.”

14. The counsel appearing for the appellant Vasu Sharma pointed out that there was no immediate motive for commission of such a serious offence in the facts and circumstances of the case and it shall not be proper to accept the motive alleged on behalf of the prosecution that as the appellant Vasu Sharma had a scuffle on 18.07.2010 with the servant of the deceased i.e. PW8 Rakesh and he gave beatings to him and when the deceased went before him and complained, the appellant threatened him to teach a lesson as he was supporting his servant.
15. It was also contended by the counsel for the appellant that from the report of the Ballistic Expert i.e. Ex. PW24/A, it could not be established that the deformed bullet recovered from the dead body which had hit the deceased was fired from the country made pistol recovered at the instance of the appellant.
16. The counsel further relied upon the view taken by this Court in ***Kishan***

Pal Vs. State reported in 2004 (2) JCC 1149, *Shabbir Vs. State* reported in 2007 (98) DRJ 137, *Abdul Sattar & Anr. Vs. State* reported in 2009 (4) JCC 3179, *Niwas Vs State* reported in 2010 (1) ILR (Del) 342, *Jaffar @ Raju Vs. State* reported in 2013 (2) JCC 1175 and *Kalicharan Vs. State* reported in 2015 (2) JCC 1304.

Arguments raised by learned Counsel for the State

17. Ms. Aashaa Tiwari, Additional Public Prosecutor on the other hand defending the conviction and sentence recorded against the appellants by the trial court sought to maintain that the account of incident as narrated by the two eye witnesses coupled with the appellants being apprehended soon after commission of the crime and recovery of the weapon of offence clearly proved beyond doubt the complicity of the appellants. Ms. Tiwari submits that the inconsistencies in the statements of the eye witnesses and the anomalies pointed out by the learned counsel for the appellants with respect to the place of occurrence are not good enough to dislodge the impugned conviction and sentence. The counsel further submits that there are no major contradictions and improvements in the deposition of the witnesses warranting acquittal of the appellants and such improvements cannot be treated as an attempt to falsely implicate the appellants.
18. Counsel for the State submits that merely because a witness is related, his evidence cannot also be eschewed. The mere fact that the material witnesses are related to the deceased is no ground to discard their testimony inasmuch as they have no motive to falsely implicate the appellants and to let the real culprits go scot free. It is the duty of the Court to analyse evidence of such witnesses cautiously

and scrutinize the same with other corroborative evidence. It is further contended by the counsel for the State that there are minor contradictions in the testimonies which are not material in nature so as to rule out its evidentiary value completely. The counsel for the State further submits that the appellants had a motive to do away with the deceased inasmuch as the appellants wanted to teach the deceased a lesson for taking favour of his servant PW8 Rakesh.

19. We heard the learned counsel for both the parties and considered their rival submissions and perused the impugned judgment as well as the material available on record.
20. As is evincible, the entire case rests on the testimonies of the witnesses who are related to the deceased. Undoubtedly, it is true that relationship is not a factor to affect credibility of a witness. It is more often that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if a plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.
21. Before we deal with the rival submissions of counsel for the parties, we deem it appropriate to analyse the testimonies of some of the material witnesses in detail. The case of the prosecution rests on the testimonies of PW20 Dharambeer and PW21 Manoj Yadav, who are cousins of the deceased.
22. PW20 Dharambeer, one of the eye witness, in his examination-in-chief testified as under:

“On 18.07.2010, at about 11.00 PM, Bhim Singh told me

that at about 9.00 PM, his servant Rakesh had a scuffle (Jhagda) with Bunty @ Vasu Sharma, today present in the Court (correctly identified) and Bunty had given beatings to Rakesh. Bhim Singh further told me that when after closing his shop, he went to the shop of accused Bunty @ Vasu Sharma to convince him that he should not have beaten his employee Rakesh. On this Bunty said, "Tujhe Apne Naukar Ka Himayati Bankar Nahin Aana Chahiye Thaa, Main Tujhko Iskaa Sabak Sikhaoonga". Next day, i.e., on 19.07.2010, at about 2.00 PM, I alongwith my younger brother Manoj and cousin Bhim Singh were going to our house via J-Block and Bhim Singh was about fifteen steps ahead of us. When we reached in front of house no. J-1716, we noticed, all the four accused namely Bunty @ Vasu Sharma, Ravinder, Mukesh and Rumpy, present in the Court (correctly identified), coming from opposite side. After seeing Bhim Singh, accused Ravinder asked accused Mukesh and Rumpy that, "Pakad Lo Aaj Saale Ko, Aaj Iska Kaam Tamam Kar Dete Hain". Immediately, thereafter accused Mukesh and Rumpy caught hold of Bhim Singh and accused Vasu Sharma took out a Katta and fired a bullet on the left side of the head of Bhim Singh. Before we could proceed further, Bunty had already shot at the Bhim and thereafter pointed the Katta on us. In order to save ourselves, I alongwith Manoj ran in the streets of J-Block and raised alarm, "Bachao, Bachao", and people gathered there and thereafter, I and Manoj again reached at the spot. By that time, Anup also arrived there and Bhim was lying on the ground in injured condition, bleeding profusely and by that time, accused persons had already fled away. We hired an auto and I, Manoj and Anup removed Bhim Singh to BJRM Hospital. Doctor declared Bhim Singh dead. Police met us at the hospital and recorded my statement/complaint, same is Ex. PW20/A, signed by me at point A."

23. PW20 Dharambeer in his cross-examination stated as under:

“We ran upto about 500 yards from the spot and also raised alarm. I do not know, if the house numbers are in ascending order or descending order from that side. We returned to the spot within 2/3/4 minutes and public also gathered there as we raised alarm. My clothes were also raised with blood. I had not changed my clothes on the way to BJRM. IO had not taken my blood stained clothes. Police did not seize the wearing clothes of Manoj and Anoop. Vol. The entire clothes of Manoj were stained with blood. I was having mobile number 9811044517 and 9212444517 at the time of incident. I did not call accused Ravinder from my mobile phone on 19.07.2010.

xxx xxx xxx

I own a maruti car 800 bearing no. DL 8 CH 2472. My car was at home on 19.07.2010. Mukesh and Ravinder were not having any arm. Neither I nor Manoj tried to apprehend Ravinder or Mukesh as Vasu Sharma pointed the katta towards us. We neither noted down the number of the TSR nor the name of the driver. We even did not give the description of the driver of the TSR to the police. It is correct that I did not inform the PCR or any other person about the incident from my mobile. Vol. I was perplexed after the incident. It is correct that Bhim Singh was not removed to hospital in the car.

xxx xxx xxx

It is correct that on the main road, there are shops on both the sides. It was not weakly off for the shops on that day, but I do not know, if all the shops were opened.”

24. PW21 Manoj Yadav, another eye witness to the incident deposed on similar lines as PW20 Dharambeer. The cross-examination of PW21 reads as under:

“....My clothes were strained with blood, when I along with Dharambir and Anoop removed Bhim to BJRM Hospital. I did not hand over my blood stained clothes to the police as the IO did not ask me to hand over my clothes.

xxx xxxx xxx

Dharambir was having a car maruti 800 at the time of incident. Bhim or his family members were not owning any car and Bhim is having a two-wheeler scooter. I was having mobile number 9212780497 at the time of incident. I did not make any call in the PS or in the Police Control Room from my mobile phone. I do not know the number of the TSR or the name of the driver.”

25. After reading the testimonies of the eyewitnesses as mentioned above, we are of the view that there is ample room to doubt whether PW20 and PW21 had actually witnessed the occurrence. Both the aforesaid two witnesses had not bothered to make a call to concerned police station or Police Control Room despite having mobile phone with them. Also, PW20 and PW21 did not inform the family members of the deceased. The aforesaid facts casts a serious doubt with regard to the presence of PW20 and PW21 at the scene of occurrence
26. PW23 Anoop Singh, brother of the deceased Bhim Singh testified in his examination-in-chief that he heard sound of a gun shot in the street and when he came outside his house, he saw crowd in the street and found his brother Bhim Singh lying on the ground in a pool of blood. PW23 Anoop Singh in his cross examination stated as under:

“Ques. You told the doctor that when I reached the spot, I found my brother lying in a pool of blood and you also told the doctor that you do not know how he sustained the

gun shot?

Ans. I told this fact to the doctor. Vol. But on the way to the hospital, Dharambir and Manoj told me that Bunty fired on Bhim Singh.

It is wrong to suggest that Manoj and Dharambir did not accompany me to the hospital or that they did not tell me anything as they did not accompany me. Police met me in the hospital, but I cannot say, if those police officers were from the PCR. Those police officers asked me as to how it had happened and I told them that I do not know as I was not on the spot.

xxx xxx xxx

There were 150 to 200 persons in the street, when I reached. Some persons known to me were also present in the street. I did not tell the name of any person to the IO, who were present in the crowd, when I reached there. ”

27. The lack of any credibility of the three main witnesses relied upon by the prosecution during the trial casts a serious doubt with respect to the case of prosecution. The testimony of PW23 depends upon the version told by PW20 and PW21 and did not witness the actual incident. The presence of the third witness i.e. PW23, Anoop Singh Yadav, is highly doubtful because of the fact that even though he stated that he along with PW20 and PW21 had removed the deceased which was bleeding and their clothes had become blood stained, the Investigating Officer failed to recover the said clothes giving room for a genuine complaint that their presence is also doubtful. Therefore, this lack of corroboration of the evidence of PWs 20 and 21 coupled with the fact that apart from the above said witnesses produced by the prosecution many other people from the crowd would have at least seen the last part of the occurrence including the escape of the

appellants and the appellants not being strangers to those people could have been easily identified by them. By not examining those independent witnesses, the prosecution has failed to produce the available independent corroborative evidence to support the evidence of interested witnesses. Moreover, the driver of TSR was neither examined by the prosecution nor blood was lifted from the TSR hired by the eyewitnesses for removing the deceased to the hospital. The Crime team report, Ex.PW19/A, conspicuously do not make any mention about the name of appellants which creates a doubt with regard to the presence of the appellants.

28. As far as the submission with respect to the delay in sending the copy of FIR to the Metropolitan Magistrate is concerned, we do not find force in this argument and are of the considered view that the special report was sent to the Magistrate in accordance to Section 157 of the Code of Criminal Procedure within reasonable time.
29. So far as the submission with respect to the contradiction in the place of occurrence is concerned, it would be necessary to discuss the relevant testimonies of PCR officials who reached the spot at the first instance.
30. PW16 HC Raj Singh in his examination-in-chief testified as under:

“On 19.07.2010, my duty was on Commander-36, PCR Van, from 8.00 AM to 8.00 PM. On that date, at about 2.29 PM, I received call from control room, that at J-Block Jahangir Pur, at House No.1703, incident of firing had been taken place, injured has been sent to hospital. I reached the spot within four/five minutes. About 100-150 public persons were already present there. I was told by the public persons present there that Bhim Singh had

been shot at by his neighbourer Bunty and Bhim Singh had already been removed to BJRM Hospital. On the spot, SHO of PS Mahindra Park and PS Jahangir Puri were present. Control room again directed me to went to the spot. There I alongwith PCR van reached BJRM Hospital.”

31. PW27 HC Mahender Singh in his examination-in-chief testified as under:

“On 19.07.2010, I was posted at North West Zone, PCR, as HC. On that day, my duty was on Commander-34 PCR van as In charge from 8.00 AM to 8.00 PM. On that day, on receiving call at about 2.58 PM, from control room regarding firing at J Block, Jahangir Puri, at house no.1703, I along with staff and PCR van reached the spot within five minutes of receiving the call. There, I came to know that injured had already been shifted to the hospital and the persons who had collected there told me that earlier a scuffle (Jhagda) had taken place. SHO Jahangir Puri, SHO Mahendra Park and ACP Jahangir Puri along with staff has also reached the spot. About 100 persons had collected there near the house of Bhim. I passed on this information to the control room at about 3.34 PM. ”

32. PW28 DHG Gulab Hussain in his examination-in-chief deposed as under:

“On 19.07.2010, I was posted as DHG in PS Mahendra Park. On that day, I was on duty from 9.00 AM to 5.00 PM. On that day, between 2.00 to 2.30 PM, on receiving DD No. 15A regarding “Jahangir Puri H. No. 1703, Ek Ladke Ko Goli Mari Hai, Jisko Hospital Le Gaye Hai”, I along with PSI Kaptan reachd at J Block i.e the spot at about 3.00 to 3.30 PM. A crowd was there, as the police staff of PS Jahangir Puri was also there and the area was of PS Jahangir Puri, as such I alongwith PSI Kaptan came back to PS Mahendra Park ”

33. After reading the above mentioned testimonies, it has emerged that the place of occurrence where the alleged incident took place was House No. J-1703 rather than House No. J-1716 and was wrongly relied upon by the prosecution.
34. So far as the recovery of alleged weapon of offence i.e. the country made pistol is concerned, the testimonies of PW31 HC Rajender Singh and PW33 Insp. Subhash Chand assume importance. Recovery of firearm pursuant to the disclosure statement of a person in police custody if linked with the crime, is evidence of a highly incriminating nature for the reason that the disclosure statement of the said person and the recovery of the firearm at his instance requires an inference to be drawn against the maker of the statement of being responsible for concealing the said weapon and unless he explains as to how he got knowledge of the place where the weapon of offence was recovered. The Court would be fully justified in attributing use of the weapon to him. We clarify that this process of logical reasoning is premised on the fact that by independent evidence the weapon in question is linked to the offence. It is also true that the confessional statement that the same was the weapon of offence and was used by the maker of the statement is inadmissible in evidence being hit by Section 24 to Section 26 of the Evidence Act.
35. PW31 HC Rajender Singh, who was a police witness to the recovery of country made pistol in his examination-in-chief testified as under:

“On 01.08.2010, I again joined the investigation of the present case. On that night, at about 1.00 AM, I alongwith IO and accused Vasu Sharma in custody left

PS Jahangir Puri and reached PS Bawana at about 2.00 AM, from there SI Sumit of PS Bawana also joined the investigation and thereafter accused Vasu Sharma led us to the house of his maternal uncle namely Ishwar @ Leelu s/o. Sat Narain, at village Sultan Pur Dabas, at about 2.30 AM. Accused Vasu Sharma entered the said house of his maternal uncle and from one single bed/Deewan, which was lying in the corner of inner room of the house, he took out one country made pistol/Katta, which was found wrapped in a newspaper and produced the same before the IO.”

36. PW33 Inspector Subhash Chand in his examination-in-chief deposed as under:

“On the next day i.e. 31.07.2010, accused Vasu Sharma was interrogated in the midnight and his disclosure statement was recorded vide Ex. PW31/D, bearing my signature at point B. in his disclosure statement, he disclosed that he can get recovered the country made pistol from the house of his maternal uncle namely Ishwar, resided at Village Sultanpur Dabas (Objected to by Ld. Defence Counsel). In pursuance of his disclosure statement, in the intervening night of 31.07.2010-01.08.2010, at about 1.00 AM, we left the PS and reached PS Bawana. We lodged DD entry in respect of our arrival there at PS Bawana and then local police SI Sumit also joined in the investigation. Then we proceeded to Village Sultanpur Dabas to the house of Ishwar Singh, maternal uncle of Vasu Sharma. Accused Vasu Sharma led us to an inner room at ground floor of that house and opened a wooden box (Diwan) and lifted a country made pistol wrapped in a newspaper and produced before me. I prepared sketch of the country made pistol vide memo Ex. PW31/E, attested at me point B.”

37. In the instant case, we note that the appellant Vasu Sharma @ Bunty made three disclosure on three different dates i.e. on 27.07.2010,

30.07.2010 and 31.07.2010. *Firstly*, the appellant Vasu Sharma made disclosure to PW32 ASI Ishwar Dayal that he can get recovered the country made pistol from Panipat, *secondly*, the appellant made disclosure before PW33 Insp. Subhash Chand, Investigating Officer, that the country made pistol is at Panipat. Finally, the appellant Vasu Sharma stated that he can get recovered the country made pistol from the house of his maternal uncle namely Ishwar at Sultanpuri. Pursuant thereto, the weapon of offence was recovered. We may notice that the three disclosure statements being spread over five days are required to be viewed with suspicion qua the voluntariness thereof. Under these circumstances, we hold that the disclosure statements Ex.PW32/A, Ex.PW31/C and Ex.PW31/D do not inspire confidence and being not explained as to why they were recorded in piecemeal, the same have to be viewed with suspicion. Since the clouds of suspicion have not been removed, in that, nothing has been shown to us by the prosecution wherefrom we can independently gather that the same inspire confidence, we hold that the recovery of the country made pistol if any would be of no consequence and evidence relatable thereto would be tainted evidence. We have also found that no person of the house was joined at the time of recovery of country made pistol. Moreover, the bullet recovered from the dead body did not match with the country made pistol recovered at the instance of the appellant Vasu Sharma.

38. As far as the medical evidence is concerned, PW12 Dr. K. Goyal conducted the post mortem of the deceased on 19.07.2010, his detailed report is Ex. PW12/A and deposed in his testimony as under:

"On external examination, there was one lacerated punctured wound with inverted margins of size 3 X 1.5 CM, just 1.5 CM above and 1 CM behind the left ear over left temporal region. Surrounding hairs showed burning and singeing with blackening around the wound. On exploration, there was 3 X 1 CM hole in left temporal bone underneath the injury with chipping at internal plate of the bone with bruising. Blackening also seen at margins of hole. Track showed cherry red discolouration. Also, there was radiating fissure fracture line from the hole towards left occipital bone about 8 CM long. The dura was found torn at left temporal area. The injury track continued through left temporal lobe, both parietal masses and exists through right temporal lobe, torn the dura, made a hole in right temporal bone and a bullet was recovered in same area at exit hole of right temporal bone. Scalp tissues of right temporal area was not pierced. Exit hole in right temporal bone was about 4 CM above the right ear. Subarachnoid hemorrhage was seen over both temporals. Blood clots seen over base at middle fossa around the pons. Further, there was fissure fracture line transfers over base of skull middle cranial fossa connecting both holes of temporal.

Opinion:

All injuries were antemortem in nature caused by fire arm, which was rifled. Range of fire arm was within blast effect range. Cause of death was cranio cerebral injuries, as a result of fire arm injury. Fire arm injury was sufficient to cause death in ordinary course of nature. Time since death was less than four hours."

39. Perusal of the post mortem report reveals that the cause of death was cranio cerebral injuries, as a result of fire arm injury. Fire arm injury was sufficient to cause death in the ordinary course of nature. It is also proved vide Ex.PW36/A, FSL/viscera report dated 18.02.2011 the

presence of ethyl alcohol in the blood of the deceased.

40. Yet, another circumstance running counter to the prosecution version is the Scientific evidence. PW24 Sh. Punit Puri, Senior Scientific Officer (Ballistic), FSL Rohini, gave a report Ex. PW24/A with respect to the deformed Bullet Ex. EB-1 recovered from the body of the deceased, cartridge case Ex. EC-1 recovered from the spot and a country made pistol Ex. F-1 recovered pursuant to the disclosure statement of the appellant Vasu Sharma @ Bunty. It may be noted here that PW24 opined that the cartridge case Ex. EC-1 was a fired empty cartridge and had been fired through the country made pistol Ex. F-1 as the individual characteristics of firing pin marks present on evidence cartridge case Ex. EC-1 and on test fired cartridge cases marked as TC-1 and TC-2 were found identical, when examined under the comparison microscope. The caliber of the country made pistol Ex. F-1 was of 8mm/.315 caliber. To quote from his report Ex. PW24/A he opined as under:

“(1) The country made pistol .315” bore marked exhibit ‘F1’ is designed to fire a standard 8 mm/.315” cartridge. It is in working order in its present condition. Test fire conducted successfully.

(2) The 8mm/.315” cartridge case marked exhibit ‘EC1’ is a fired empty cartridge.

(3) The deformed bullet marked exhibit ‘EB1’ correspond to the bullet of 8mm/.315” cartridge.

(4) Two 8mm/.315” cartridges from the laboratory stock were test through the country made pistol .315” bore marked exhibit ‘F1’ above, the test fired cartridge cases were marked as ‘TC1’, ‘TC2’ and the two recovered test fired bullets were marked as ‘TB1’ and ‘TB2’ respectively.

(5) The individual characteristics of firing pin marks present on evidence fired cartridge case marked exhibit 'EC1' and on test fired cartridge cases marked as 'TC1' and 'TC2' were examined and compared under the Comparison Microscope Model Leica DMC and were found identical. Hence the evidence fired cartridge case marked exhibit 'EC1' has been fired through the country made pistol .315" bore marked exhibit 'F1' above.

(6) The individual characteristics of striations present on evidence deformed bullet marked exhibit 'EB1' are insufficient for comparison and opinion whether it has been discharged through the country made pistol .315" bore marked exhibit 'F1' above or not.

(7) The exhibits 'F1' / 'EC1' & 'EB1' are firearm/ammunition as defined in the Arms Act. 1959."

41. In a serious charge, as that of murder, where the life and liberty of an accused is at stake, technical and doctrinal approach to problems has to be eschewed and the matter has to be approached with prudence, keeping in view that a fact is treated to be proved, as defined in the Evidence Act, when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Expert evidence is admissible under Section 45 of the Evidence Act and is treated as relevant evidence. But, the same is nothing more than evidence and this means that a Court has to evaluate the same as evidence and not treat it as conclusive proof of the subject matter to which the opinion relates. For treating it as binding, the Court would be delegating its judicial function. In the decision of *State of H.P. v. Jai Lal and Ors.*, reported

in **1999 (7) SCC 280** in para 18 it was observed as under:

“18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.”

42. Adverting to the facts of the case in hand, we have observed that PW24 Sh. Punit Puri in his examination-in-chief categorically deposed that the deformed bullet, Ex. EB-1 recovered from the dead body correspond to the bullet of 8mm cartridge and no further opinion could be given, whether the deformed bullet Ex. EB-1 had been discharged through the country made pistol Ex. F-1 or not due to insufficient data.
43. After reading the testimony of PW12 coupled with the detailed report Ex. PW24/A, we have found that no linkage could be established between the bullet recovered from the dead body and the firearm allegedly recovered at the instance of the appellant Vasu Sharma. Hence, the evidence on record falls far short of proving that the fatal shot had been fired by the appellant Vasu Sharma @ Buntty from the country made pistol (Ex. F1) recovered at his instance. Thus, the appellants would be entitled to the benefit of a doubt even with respect to the report of the ballistic expert.

44. So far as the argument with respect to the defective investigation is concerned. It would be appropriate to analyse the settled position of law on this aspect. In *Dhanaj Singh vs. State of Punjab* reported in *AIR 2004 SC 1920*, the Hon'ble Supreme Court laid down the principle that an accused cannot be acquitted on the sole ground of defective investigation; to do so would be playing into the hands of the Investigating Officer whose investigation was defective by design. The relevant para is as under:

“5. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.”

45. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellants for a serious offence of murder unless supported by other cogent evidence. It is a well settled principle that when the direct testimony of the eye-witnesses corroborated by the medical evidence fully establishes the prosecution version, failure or omission on the part of the Investigating Officer cannot affect credibility of the prosecution version.
46. The stand of the appellants relate essentially to acceptability of evidence. Even if the investigation is defective, in view of the legal principles set out above, that pales into insignificance when ocular testimony is found credible and cogent. In the present case, the testimonies of the interested witnesses of the deceased do not inspire

confidence as they are in contradiction with the Scientific evidence and the version given by the police officials before us. Undoubtedly, the testimonies of the interested witnesses can be relied upon only if there are other evidence supporting the case of the prosecution.

47. It is well settled that suspicion, howsoever grave, must not be allowed to take the place of proof. In criminal trial, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the oral evidence adduced against an accused person is fully unsatisfactory and prosecution seeks to rely upon their testimonies, the presumption of innocence which is the basis of criminal jurisprudence assist the accused and compels the court to render the verdict that the charge is not proved against him and so, he is entitled to the benefit of doubt. That is precisely what has happened in these appeals. We are of the considered view that the prosecution has failed to establish the guilt of the appellants which could link the appellants with the crime.
48. In the face of infirmities and inconsistencies as noticed above, the finding of conviction against the appellants as recorded by the trial court cannot be held to be well founded and on the strength of its evidence on record, the prosecution cannot claim to have succeeded in bringing home the guilt to the appellants beyond reasonable doubt. Consequently, the impugned conviction and sentence are liable to be set aside. The appellants shall be released forthwith, if not required to be detained in any other case.
49. Trial Court Record be returned.

50. Copy of this decision be sent to the Superintendent- Central Jail, Tihar for updating the jail record.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

JANUARY 24th, 2017
//

