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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A.1008/2017

Reserved on: 17th January, 2018
Decided on: 27th February, 2018

SANTOSH MALIK

..... Appellant

Through: Mr. Rakesh Kumar, Advocate.

versus

STATE (GOVT. OF NCT) & ORS.

..... Respondent

Through: Ms. Kusum Dhalla, APP for State/R-1
along with SI Karan Singh, P.S. Crime Branch.

Mr. Vishal Raj Sehjipal, Mr. Anwar A. Khan,
Mr. Sunil Sagar, Mr. Ghufraan Ahmad, Advocates
for R-2 to 5.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE I.S. MEHTA**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. The Appellant, who is the mother of the deceased, has filed the present appeal being aggrieved by the judgment dated 22nd March, 2016 of the learned Additional Sessions Judge (ASJ) 04 (North), Rohini Courts, Delhi in Sessions Case No.30/15 arising out of FIR No.78/10 registered at Police Station ('PS') Crime Branch (Bawana), acquitting Respondent Nos. 2 to 5 of the offences under Section 302/34 Indian Penal Code ('IPC').

2. Respondent Nos. 2 to 5 were charged with committing the murder of the Appellant's daughter Rashmi (the deceased) by shooting her with firearms outside her factory at No. N-12, Sector-8, DSIDC, Bawana on 6th April 2010 at around 6.30 pm. In the trial that ensued, Amandeep, the husband of the deceased was arrayed as Accused No.2 (A-2) and his elder brother Navdeep was arrayed as A-1. Pradeep, the brother-in-law of A-1 was arrayed as A-3. Kulbir, an associate of A-2, was arrayed as A-4. In the present appeal the accused A1 to A4 are the Respondent Nos. 2 to 5 respectively. The Appellant, who is the mother of the deceased appeared as Prosecution Witness (PW) No.2 in the trial.

3. While the State did not appeal against the acquittal of the accused, PW-2 filed Crl. L. P. No. 458 of 2016 in which, by an order dated 2nd November 2017, this Court granted her leave to appeal. Pursuant to the above order, A-1 to A-3 furnished their respective personal bonds and surety bonds before the Joint Registrar (Judicial) of this Court on 23rd November 2017. A-4 furnished his personal bond and surety bond on 12th February 2018.

Background

4. The background facts are that the deceased married A-2 on 13th April, 1996. Their two children are Master Kunal (PW-1) and Master Harsh. The case of the prosecution, as narrated by PW-2, is that A-2 the husband of the deceased, was having an illicit relationship with his sister-in-law, i.e. the wife of A-1. A-2 used to give the earnings from his factory at Peeragarhi to the said sister-in-law. He suffered losses of Rs.10 lakhs in his factory. A-2

was an alcoholic and there were frequent altercations between him and the deceased. In 2004, the mother of A-1 and A-2 expired. Prior thereto, A-2 and the deceased and their children were residing at Peeragarhi. After 2004, A-2 began residing with A-1 and his wife. Although the family property stood divided between A-1 and A-2 equally, A-2 was constantly seeking to transfer the property that made up his share to A-1 and there were quarrels between A-2 and the deceased over this.

5. PW-2 stated that at the request of the deceased, she had given the deceased money in order to discharge the liabilities incurred by A-2 in the running of the factory. The deceased thereafter established the factory at No.N-12, Sector-8, DSIDC, Bawana and was running its affairs. According to the prosecution, from April, 2009 itself A-2 began calling A-1, A-1's father-in-law and A-3 in order to threaten to kill the deceased if she did not hand over the charge of the finances to him.

6. Around 15th July, 2009, A-1, A-2, A-3 and the wife of A-1 gave beatings to the deceased on the issue of money. The deceased then called her mother (PW-2) who, with her husband Jagbir Singh (PW-3), came to the house of A-1 and tried to counsel them. A-1 to A-3 tried to manhandle PW-2 and PW-3. At that time, A-3 also beat the deceased outside the house and threatened to shoot her as she was alleging that his sister was having illicit relations with A-2. In August, 2009 a similar incident took place and the deceased had again called her parents. They visited the matrimonial house of the deceased and counselled the in-laws of the deceased that since "they have already been separated and have separate shares of property", they

should look after their respective families separately. At this, A-1 threatened that he could get the deceased killed on the road when she travelled any time thereafter.

7. On 23rd October 2009, A-3 and his accomplices attacked the deceased, while she was going to her factory on her scooty, with a rod. After she fell down they ran a tempo over her. She sustained serious injuries and gave a complaint to the police. This was noted down as D.D. No.11B at PS Bawana (Ex.-PW22/B) on 23rd October, 2009. This was followed by another report recorded as DD No.8B dated 23rd/24th October, 2009 at PS Bawana by ASI Manmohan Singh (PW-22) about his reaching Maharishi Balmiki Hospital, Pooth Khurd where the deceased, in an injured condition, was found admitted. He, however, could not record her statement because she was not in a position to give a statement. When PW-22 went again to the matrimonial house of the deceased after 3 or 4 days, she told him about her suspicion that her brother-in-law A-1 and his brother-in-law A-3 were behind the attack. She, however, declined to get her statement recorded.

8. On 6th December 2009 A-3, with one more person armed with a revolver, followed the deceased, who was riding a scooty, near the factory, on a motorcycle. The deceased made a call to the police on 100 number and also lodged a complaint. The PCR Form dated 6th December, 2009 notes at 18:16 hours on 6th December, 2009 that the deceased had called to say that “*ek unknown motorcycle me 2 ladke baithe hain jo mera peechha kar rahe hain. Abhi mai chowk ke pass khari hoon. Jaldi se police bhej dijiye.*”

9. The deceased gave a hand-written complaint to the police on 31st

December, 2009 (Ex.PW2/A) in which she stated that on 23rd November, 2009 in the morning at 8 am when she was on her way to the factory, some people had attempted to kill her but the guards in the factory and some other people had saved her. In the same complaint, she referred to the earlier incident of 6th December, 2009. She now stated that the person who was driving the motor bike was none other than A-3, the brother-in-law of A-1, who had even earlier threatened to kill her.

10. It appears that on 5th January, 2010, in the presence of the SHO of PS Bawana, a settlement (Ex.PW-21/A) was reached between the deceased and A-1 which was countersigned by A-1. While admitting his involvement in the earlier incidents of harassment, A-1 undertook that there will be no occasion for the deceased to give any further complaint. DD No.34B (Ex.PW22/D) was accordingly drawn up on 5th January, 2010.

The incident of 6th April 2010

11. The immediate trigger for the murder of the deceased was the move by the deceased to file a civil suit on behalf of her two children, against A-1 and A-2. The plaint in the suit was prepared by Kamlesh Sabharwal, Advocate who was examined as PW-14. The deceased signed the plaint, affidavit and applications on the morning of 6th April, 2010.

12. The incident happened on 6th April, 2010. Information was received at PS Bawana from duty Constable Ayub Khan that the deceased had been admitted to the MV Hospital by her employee Ramesh and was declared by Dr. S.K. Aggarwal (PW-7) as brought dead. The information was recorded as DD No.38A and entrusted to SI Surender Singh (PW-30) who along with

SI Avdesh and Constable Deepak (PW-11) rushed to the hospital. PW-30 did not find any eye witness there. Leaving PW-11 at the hospital, PW-30 returned to the spot, got it inspected and photographed through the crime team. He then got the FIR registered through PW-11. The investigation was entrusted to Inspector H.S. Meena (PW-33).

Post mortem

13. The post-mortem of the deceased was conducted by Dr. Kulbhushan Goyal who noticed four injuries. The first was a bullet entry wound with inverted margins of size 1cm x 0.6 cm on the right side of the face. The second injury was a split laceration injury 3.5 cm x 3 cm, over the posterior side of the left parietal region just left of the midline which was an exit wound caused by a fire arm. Upon exploration, it was noted that the first injury ran obliquely upwards, medially and backwards fracturing the base of the skull right side anterior and middle fossa, entering into the cranial cavity and exited from the left parietal lobe joint to the left of the midline.

14. The third external injury was a lacerated punctured wound 1cm x 0.7 cm on the back of the left side of the chest. Dense tattooing was seen around the wound and scattered tattooing all over back of chest. The fourth injury was a bruised area 4 cm x 4cm on the front side of chest above the left of the costal margin. The opinion was that the cause of death was combined effect of cranio-cerebral injuries 1 and 2, shock, haemorrhage and respiratory distress consequent upon injuries to heart, lung and liver due to injury No.3. The post mortem which was conducted at 1 p.m. on 7th April, 2010 placed the time of death as being about 18 hours earlier.

Investigation

15. The crime team meanwhile had reached the spot and the crime team report was prepared and submitted. On the pointing out of Ramesh, an employee of the deceased, Inspector H. S. Meena (PW-33) prepared a site plan after which a black coloured ladies bag having Rs.21,500/-, articles like PAN card, bank pass books was produced by Ramesh. These too were sealed in a *pulanda*. The scooty bearing registration No.HR-10L-6803 which was driven by the deceased was lying on the road. It was seized. One empty cartridge was lying by the scooty. One 'lead' was also found at the spot and was also seized. Earth control was kept in a plastic container. The blood stained mud and ground was also kept in a plastic container. After returning to PS Bawana, PW-33 recorded the statement of Jagbir Singh (PW-3) and Santosh Malik (PW-2), the parents of the deceased.

16. On 8th April 2010, PW-3 along with PW-33 went to the factory premises and after searching in the drawers of the table, PW-3 found a letter in the writing of the deceased addressed to the SHO, which was duly seized. On 11th April 2010, PW-33 recorded the statement of Master Kunal (PW-1), the son of the deceased in the presence of PW-2 and other family members at their house in Sonapat. On 17th April, 2010, the papers regarding the civil suit filed by the deceased were collected by PW-33 from the lady advocate, Kamlesh (PW-14). The case papers were thereafter handed over by PW-33 in May, 2010 to Inspector Arvind Kumar (PW-34).

17. On 24th March, 2011, PW-34 went to the Government Girls Senior Secondary School at Alipur where PW-2 was a teacher. There, he met her

along with PW-1, who gave him a written statement (Ex.PW-1/B). He also recorded the statement of PW-1. On 23rd April 2011, A-1 and A-3 declined to undergo the NARCO and Polygraph test. The statement of PW-1 under Section 164 Cr PC was recorded on 2nd May, 2011. On 1st July 2011, A-1 and A-2 were interrogated and arrested. On 4th July, 2011, they were sent to judicial custody. On 9th July 2011, on receipt of secret information, PW-34 along with Ct. Rajesh overpowered A-3 at the Sanjay Gandhi Memorial Hospital, Mangol Puri. Kulbir (A-4) was got declared as proclaimed offender on 28th August, 2012. Further investigation of the case was entrusted to Inspector Anand Singh (PW-37).

18. On 8th September, 2012, PW37 received information regarding arrest of A-4 in some other case. PW-37, with the permission of the Court, arrested him on 10th September, 2012. On 12th September, 2010 a supplementary charge sheet was filed.

Charges

19. By the order dated 10th February, 2012 charges were framed against A-1, A-2 and A-3 for the offences under Section 302 IPC read with Section 120B IPC, Section 27 of the Arms Act and Section 201 IPC. By a separate order on charge dated 19th November, 2012, charges were framed against Kulbir (A-4) for the aforementioned offences and for the offence under Section 174-A IPC.

Defence of the accused

20. 37 witnesses were examined for the prosecution. In his statement under Section 313 Cr PC, A-1 denied the circumstances against him and stated

inter alia that he had been falsely implicated. He mentioned that the in-laws of A-2 had taken one Mr. Dildar and Mr. Mintoo to the Crime Branch on 3rd September, 2010 claiming that they were eye witnesses to the killing of the deceased. They, however, informed the IO that they were not eye witnesses and were not aware of the incident. He mentioned that on 24th March, 2012, PW-2 got a false statement recorded through PW-1 under Section 164 Cr PC.

21. A-2 also in his statement under Section 313 Cr PC accused PW-2 of preparing false evidence through PW-1 as she was demanding land and other property since April, 2010. A-3 took more or less the same stand. As far as Kulbir (A-4) is concerned, he too denied the circumstances put to him and claimed that he was falsely implicated.

22. On behalf of the defence, Israr Babu a Nodal Officer of Vodafone was examined as DW-1. He brought *inter alia* the Call Detail Records (CDRs) of two of the mobile phones used by A-3 as well as the Delhi location chart. In his cross examination he agreed that "We cannot say between whom, there were calls using the said mobile phones."

Impugned judgment of the trial Court

23. By the impugned judgment dated 22nd March, 2016, the trial Court came to the following conclusions:

- i) The testimony of PW-1 was shaky and not reliable. There was no satisfactory explanation as to why PW-1 chose to wait for 11 months after the date of incident to disclose the full facts. Despite the police officials

visiting PW-2 on several occasions, PW-1 did not disclose the incident of shooting or the threat extended to him by his aunt Guddi. Also PW-1 was found to have made improvements over his previous statement recorded before the learned MM under Section 164 Cr PC. He also appeared to be under the influence of PW-2, his maternal grandmother.

ii) PW-1 failed to explain why he did not immediately disclose the relevant fact either to the brother of his paternal grandfather or to any other family member/relative/villager on that very day, that is, 6th April, 2010. Under what circumstances did PW-1 return to his house after the incident has not been explained by the prosecution.

iii) PW-1 admitted that he had not accompanied his mother to the hospital. It was unnatural for a son whose mother had been shot dead not to get his mother shifted to the nearest hospital. The story given by PW-1 that he thought of going back to the factory premises after the deceased had dropped him off at the temple as he suddenly recalled that he had to purchase note books was unbelievable. It was held “A child of such a tender age is claimed to have reached the factory premises after covering such a long distance on his own is again something which does not inspire confidence and cannot be believed”.

iv) The non-examination of Ramesh who removed the deceased to the hospital also weakened the case of the prosecution. This was despite him being stated to be the key witness to the occurrence. The tea vendor in front of the factory was also not examined. PW-33 had admitted that till he remained the IO up to 31st May, 2010, he did not come across any of the eye

witnesses.

v) As regards the motive, it was held that the involvement of A-1 and A-2 was not forthcoming even as per the prosecution story regarding the incident dated 23rd October, 2009. The previous incidents, even if taken at face value, did not constitute motive strong enough to commit murder of the deceased.

vi) The evidence showed that the accused persons were not even found to be present at or near the place of occurrence at the time of incident. Why the CDRs were produced for the first time when Inspector Arvind Kumar (PW-34) was examined, even though they had been collected by the investigating agency during the course of investigation was not satisfactorily explained. The material documentary evidence in the form of CDRs, Cell IDs, location charts of SIM connection numbers which were being used by the accused persons were withheld from the Court of law.

vii) The so-called dying declaration did not satisfy the essential ingredients of Section 32 of the Indian Evidence Act. The non-recovery of the weapons of offence was also significant.

24. Accordingly, all the accused were acquitted of the charges framed against them.

25. This Court has heard the submissions of Mr. Rakesh Kumar, learned counsel for the Appellant, Mr. Vishal Sehjpal, the learned counsel for the Respondents No.2 to 5 and Ms. Kusum Dhalla, the learned APP for the State.

Appeal against acquittal

26. Before discussing the evidence on record, in light of the conclusions of the trial Court and the submissions of the learned counsel for the parties, it is necessary to examine the scope of the appellate power in the context of a challenge to an order of acquittal.

27. In ***Sheo Swarup v. King Emperor 1934(36) Bom LR 1185***, the Privy Council observed as under: (IA at p. 404):

"...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the Accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

28. In ***Bhagwan Singh v. State of M.P. (2002) 4 SCC 85***, the Supreme Court held:

"The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the Accused and the other to his innocence, the view which is favourable to the Accused should be adopted. Such is not a jurisdiction limitation on the appellate court but Judge-made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether all or any of the Accused has committed

any offence or not...”

29. In *Chandrappa v. State of Karnataka (2007) 4 SCC 415* the principles were summarised thus:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions' 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

Evidence of PW-1

30. This is a case based on circumstantial evidence. While the son of the deceased Master Kunal (PW-1) did not state that he actually saw any of the accused with the deceased or shooting her, he saw them leave the place where she was shot soon after he heard the sound of two gun shots. He saw them leave with firearms and flee on two motorcycles. If true, this is a strong circumstance that would link the three accused to the crime.

31. One of the main reasons for the trial Court not to believe PW-1, was on account of inordinate delay of 11 months in his coming forward to speak to the police about what he actually saw. In this context, the sequence of events needs to be carefully examined.

32. PW-1 was 14 years old at the time his evidence was recorded. Initially, his statement was recorded by the police on 6th April, 2010 but did not mention anything about the roles of A-1 to A-3 in the commission of the crime. It is not in dispute that after the killing of his mother, PW-1 and his younger brother started living with their maternal grandparents, PW-2 and PW-3, at Sonapat in Haryana. PW-2 noticed that PW-1 remained aloof, was not sleeping properly during the night, was not doing his home work and was not paying attention to studies. He underwent treatment from a doctor at Sonapat. PW-2 who was herself trained in child psychology used to divert his attention to get him out of the shock of losing his mother.

33. On 18th February 2011, the son of PW-2, i.e., the brother of the deceased got married and this helped PW-1 come out of his trauma somewhat. His exams also got over on 15th March, 2011. PW-2 states that on 20th March, 2011 while lying in bed, she was remembering the deceased and wondering aloud within the hearing of PW-1 as to who had killed her daughter. That prompted PW-1 to disclose to her that he had, in fact, gone to the factory on the day of the incident before which he had gone to the temple with his mother as it was a Tuesday on which day he used to keep a fast. He told PW-2 about his seeing A-1 to A-3 leave the scene of occurrence soon after he heard two gun shots.

34. PW-2 called up the IO the following day and informed him what PW-1 had disclosed to her. The IO advised PW-2 to bring PW-1 to the school in Delhi on 24th March, 2011. After recording his oral statement, the IO requested PW-1 to give the statement in his own handwriting. The hand written statement of PW-1 dated 24th March, 2011 is Ex.PW-1/B.

35. In his hand written statement, PW-1 mentioned that Sushila was the wife of his *Tau*, Navdeep (A-1), and that Pradeep (A-3) also stayed with them. His mother was running the factory at N-12, Sector-8, DSIDC, Bawana and his father Amandeep (A-2) was not doing any work. He was constantly drinking and having quarrels with his mother. He mentioned that Sushila would visit his house often and stay there when his mother was away at the factory. His father used to then ask the children to leave. He mentioned about the threats given to the deceased by his father and about the quarrels that A-1 and A-2 would often have with her. He also mentioned the incident

about his mother being beaten up and the attempt to have the Tata 407 truck run over her and how his mother told him that A-3 was also present at that time. He also mentioned about the instances where two men with revolvers pursued his mother and how his mother had told him that one of them was A-3 and the other she did not recognize.

36. On 6th April, 2010, when PW-1 returned home after school with his younger brother, his mother was still there. PW-1 was observing a fast since it was Tuesday. At around 5 p.m. when his mother was leaving for the factory, he informed her that he too needed to go to the temple. Although his mother initially refused, she dropped him at the Hanuman Mandir at Bawana asking him to return home after. After he finished praying at the temple, PW-1 suddenly recalled that he had to buy some notebooks and he, therefore, went to the factory as it was his mother who would buy him notebooks. When he approached the factory and the *gali* (lane) leading to the main gate, he heard two bomb blast like noises. Before he could realize what had happened, he saw his father, his *Tau* (A-1) and A-3 running away with firearms in their hands. He started shouting '*kya hua kya hua*' (what happened) and he started pursuing them. Then he saw that two motorcyclists were waiting on the main road and the three escaped on these bikes. He kept chasing them till they went out of sight. When he returned to the factory one labourer told him that his mother had been shot. PW-1 then fainted. He did not remember when he regained consciousness. When he returned to the factory, he found the scooty lying there and a lot of blood on the ground. He was weeping when he returned home. He found only his grandfather and his younger brother Harsh there and no one else. In the morning his Aunt

Sushila came and he disclosed to her what he had seen. Thereafter, he started living with his grandmother (PW-2) in Sonapat.

37. On 2nd May 2012, PW-1's statement was recorded under Section 164 Cr PC before the learned MM. In the said statement, PW-1 more or less stuck to the same version. On the crucial aspect of what happened on 6th April, 2010 (wrongly mentioned as 2011), he stated that after he had distributed *prasad* at the temple, he remembered that he needed to buy some notebooks for school and, therefore, he went to the factory and since his mother would get him his note books. He again mentioned that he heard two bomb like explosions and then saw A-1, A-2 and A-3 running away with revolvers in their hands. They too had noticed him. He pursued them. He noticed two motorcycles on the road. The three of them then sat on the motorcycles and sped away. He ran after them for a while and then returned to the factory. When he reached the auto stand one person there informed him that his mother had been shot. PW-1 then fainted.

38. Therefore, on the crucial aspect of what happened as far as the incident on 6th April, 2010 is concerned, PW-1 was consistent. He also mentioned certain other instances of past threats given to his mother and the attacks on her.

39. At this juncture it is necessary to examine the legal position as regards appreciation of the evidence of child witnesses. In ***Dattu Ramrao Sakhare v. State of Maharashtra (1997) 5 SCC 341*** the Supreme court held:

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words

even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereto. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

40. The trial Judge is expected to approach the evidence of a child witness with caution but if there is a ring of truth and it does not appear to be a tutored version, it can reasonably form the basis of a conviction. The Supreme Court in *Nivrutti Pandurang Kokate v. The State of Maharashtra (2008) 12 SCC 565* explained the legal position thus:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

41. It will be recalled that the trial Court disbelieved PW-1 mainly for the reason that he did not disclose the above details in the first instance when

the police recorded his statement on 11th April, 2010. It is understandable that on that date, five days after the incident, the child was under severe trauma. Even though he was staying with his grandparents soon after the incident, the shock of seeing his own father run away with a revolver along with his brother and A-3 and soon after to be told that his mother was shot must have affected PW-1 quite badly. It is entirely plausible that he was perturbed and not in the right frame of mind to narrate to the police all that he had seen. He did not even narrate these facts even to his own grandmother at that time. 5 days after the incident was not long enough to bring PW-1 out of his trauma.

42. While in Court, PW-1 deposed that he heard A-1 and A-3 tell his mother in a threatening matter that “*dharti ache se denge*” but he did not disclose these facts before the learned MM. However, in the context of the consistent version of PW-1 in regard to what he saw on 6th April, 2010 these cannot be termed as major contradictions or material improvements so as to discredit PW-1. There was no need for PW-1 to falsely implicate his own father and uncle. No doubt, in this case, PW-1 was delayed in coming out with the truth but, as already noticed, there appears to have been a valid justification for his initial reluctance in naming his own father and uncle as being involved in the crime.

43. The trial Court has adverted to the fact that when he came to the learned MM to give a statement on 16th May 2012, PW-1 was accompanied by his grandmother. This again should not come as a surprise because after the incident, PW-1 was living with his grandmother and was still a child.

Although the trial Court has referred to his improvements in relation to the incidents of October and December, 2009 and 5th April, 2010, the trial Court has failed to note that as regards the sequence of events on 6th April, 2010, PW-1 was consistent throughout viz., his written statement dated 24th March 2011, his statement before the learned MM more than a year later on 16th May 2012 and then again in Court.

44. The non-placing on record of any medical document about his feeling giddiness or undergoing trauma was asking for the impossible. Nobody should be expected to produce a medical document only to prove that he fainted upon hearing the news that his mother had been shot. This was a natural reaction and not unusual for an 11 year old child who was obviously very deeply attached to his mother.

45. The trial Court also thought it unnatural that PW-1, whose mother had been shot, would not stay back at the scene of crime or make an effort to get his mother shifted immediately to the hospital. One should visualize what was happening at the spot. PW-1 heard gunshots and then noticed A-1, A-2 and A-3 run away with revolvers. He was still confused whether he should go after them because at that stage he did not know that his mother had been shot. It is only when he returned to the spot that he was informed that his mother had been shot. Therefore, it was not unnatural that the child, on seeing his father and his uncle run away with A-3, and not knowing that his mother had been shot, thought first to go after them to find out why they were running away. When he returned to the spot he was told that his mother had been shot and on hearing this he fainted. This again is not surprising.

The Court, therefore, does not consider it at all unnatural that PW-1 did not accompany his mother to the hospital.

46. As regards the distance between the factory and the temple, his explanation that he realized he had to purchase notebooks and, therefore, had to meet his mother, is plausible. Also, he was around 11 years old and capable of reaching the factory premises on his own.

47. According to the trial Court, the entire episode of PW-1 hearing the gunshots and then chasing the assailants would have taken more than half an hour. According to the trial Court, there was nothing on the record to say that PW-1 tried to enter the factory premises to seek the help of any worker. Here the trial Court is re-constructing the sequence of events whilst overlooking what was actually deposed to by PW-1. He did not say that he had met Ramesh but just that he met with a worker who might not have been Ramesh.

48. The non-examination of Ramesh, according to the trial Court, has weakened the case of the prosecution. But this Court is not inclined to come to that conclusion. While Ramesh would have certainly helped the prosecution in a big way as he was with the deceased, however in his previous statement Ramesh stated that he was inside the factory when he heard the gunshots and then came out to notice the deceased lying in a pool of blood. Therefore, it is not clear whether Ramesh would have helped the prosecution as far as the ocular evidence is concerned.

49. The evidence of PW-1, therefore, became critical to the entire case. The

Court is satisfied on carefully examining the testimony of PW-1 that he is a natural and truthful witness who has withstood rigorous cross-examination by the accused. The Court is not persuaded that his deposition is tutored or that, under pressure from his grandmother, he has falsely implicated A-1 to A-3. It must have taken a lot of courage for this young boy to speak the truth about the involvement of his own father and uncle in the murder of his mother.

50. Yet, as explained by the Supreme Court in the decisions noted hereinbefore, the testimony of a child witness has to be viewed with care and caution. The Court should ordinarily look for corroboration from the other materials on record. In other words, it is not safe to base a conclusion regarding the guilt of the accused solely on evidence of a child witness. The Court is also conscious that in its appellate jurisdiction, while testing the correctness of a judgment of acquittal, it should remember that "there is double presumption in favour of the accused." First, the presumption of innocence and secondly, the presumption of innocence being further "reinforced, reaffirmed and strengthened by the trial court."

Previous attacks on the deceased

51. The incidents of attacks on his mother as recalled by PW-1 stand corroborated by the records available with the police, which have already been referred to. To recapitulate, there are contemporaneous records of the incidents of October, November and December 2009 and importantly the compromise in the PS between the deceased and A-1 on 5th January 2010. These have been proved on record without any contradiction. The police

officials involved in the noting of the DD entries have been cross-examined but the accused have been unable to show either that those incidents did not take place or that the accused were not involved in those incidents.

52. The handwritten complaints of the deceased and the DD entries are a contemporaneous record of the events. They specifically named A-3, whose enmity with the deceased was on account of the ongoing feud between her on the one hand and A-1 and A-2 on the other. It does not require too much imagination to join the dots and see that A-1 to A-3 were acting in concert. These complaints constituted relevant evidence under Section 8 of the Indian Evidence Act (IEA). While the handwritten letter of the deceased which was found in the factory premises at the instance of PW-3 after the incident, may not *stricto sensu* be a dying declaration, her earlier handwritten complaints to the police form very much part of the record. Their relevance to the case of the prosecution and their fully corroborating the oral testimonies of PWs 1 to 3, has somehow been missed by the learned trial Court.

53. The trial Court failed to note that the repeated complaints made to the police by the deceased, as and when she was attacked, did not speak of random, isolated incidents but pointed to concerted and repeated attempts by the accused to eliminate her. The link between these incidents and the ultimate death of the deceased was completely overlooked by the trial Court. This, in the considered view of the Court, is a serious error in the impugned judgment.

Evidence of PW-2

54. Corroborating PW-1, is the deposition of PW-2. The Court finds that there is not much discussion in the judgment of the trial Court about the evidence of PW-2 which provides a valuable insight into the motive for the commission of crime.

55. PW-2 herself was party to many of the altercations and attacks that took place on her daughter in her presence. She was privy to the daily happenings in the life of her daughter. Apart from paraphrasing what she deposed in para 11 of the impugned judgment, there is no in-depth analysis by the trial Court of her deposition, particularly in the context of motive for the commission of crime.

56. In her cross-examination, PW-2 consistently maintained that there were several occasions between October 2009 and the ultimate death of her daughter, when she was attacked by or at the behest of the accused. The recording of a settlement in the police station on 5th January 2010 is by itself a clinching piece of evidence. The tempers were running high and the accused were desperate in their attempt to get the deceased out of the way. That settlement document (Ex.PW-22/D) is a clear pointer that the deceased was under tremendous pressure to agree to a compromise despite the murderous assault on her by the accused. The tipping point of course was the deceased signing the papers on 6th April 2010 for the civil suit regarding her children's share in the property. The evidence of PW-14, the lawyer Kamlesh, is proof of that move, which precipitated the murderous assault on the deceased.

57. It was sought to be suggested by learned counsel for the accused that PW-2 and her husband (PW-3) sought to produce two persons, i.e., Dildar and Minto who turned out to be false witnesses, and that there was a clear attempt by PW-2 and PW-3 to mislead the investigation and falsely implicate the accused.

58. PW-2 has been cross-examined on this aspect. She clearly denied the suggestion that she took them to the office of crime branch to introduce them as eye witnesses. In any event, neither Dildar nor Minto was cited as a prosecution witnesses. It is possible that PW-2 was given to believe that they were in fact eye witnesses to the incident. The Court does not find it to be such a serious issue so as to discredit the entire prosecution evidence. There is hardly anything that has emerged from the cross-examination of PW-2 or PW-3 that persuades the Court to disbelieve their testimonies on the core part viz., the ongoing feud between the accused and the deceased and the circumstances that led to her death. Here again the Court is conscious that PW-2 and PW-3 are interested witnesses and that their evidence is to be approached with caution and with corroboration being sought from other materials on record. In the considered view of the Court, their evidence passes that test of corroboration.

59. To conclude this discussion, the Court is satisfied that the testimonies of PWs 1, 2 and 3, are corroborated by the material on record, not only from the police complaints but even from the MLC of the deceased for the incident of October 2009 which more than adequately proved the truth of their testimonies. The Court is of the view that the conclusion reached by the

trial Court is not a possible view from any angle and is not sustainable in law.

Plea of alibi not established

60. In order to prove that they were not at the scene of crime on 6th April 2010, the defence examined Israr Babu (DW-1), the alternate Nodal Officer, Vodafone Mobile Services. Although the location of the mobile phones may have been at the respective houses, DW-1 correctly pointed out that this did not show that the accused were carrying mobile phones at the time of crime. This, therefore, by itself was insufficient to prove the alibi of the accused. In discussing this evidence, the trial Court again has gone by the fact that since the CDRs, cell Ids, location chart of SIM connection numbers used by the accused persons were intentionally withheld from the Court by the investigation, the said evidence could not be looked into. On the other hand the trial Court failed to discuss the deposition of DW-1 which might have helped to fill up this gap in the case of the prosecution. The burden of proving alibi was on the accused. In the considered view of the Court, they failed to discharge that burden.

61. The fact that the three accused were absconding after the incident has not been made much of by the trial Court. It has been observed that three accused were shown to have been arrested on 1st July 2010 whereas they were always available for investigation. The fact remains that even PW-1 took his time to speak the truth and therefore, nothing much turned on this solitary fact. However, what is telling is that A-2 did not turn up for the funeral of his own wife, which has been spoken to by both PW-2 and PW-3,

and has not been discredited in the cross-examination. This was another strong circumstance to show that all was not well between A-2 and the deceased. This again was overlooked by the trial Court.

Law relating to circumstantial evidence

62. The law in relation to circumstantial evidence is well settled. In ***Sharad Birdhichand Sarda v. State of Maharashtra 1984 (4) SCC 116***, the Supreme Court explained that a case based on circumstantial evidence should satisfy the following tests:

- “(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
- (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
- (3) The circumstances should be of a conclusive nature and tendency.
- (4) They should exclude every possible hypothesis except the one to be proved, and
- (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

63. In ***Ram Avtar v. State 1985 Supp SCC 410***, the Supreme Court explained that:

“...circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of

circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.”

64. In *State of Tamil Nadu v. Rajendran (1999) 8 SCC 679*, the Supreme Court held:

“... the law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused.”

65. In *Brajesh Mavi v. The State (2012) 7 SCC 45*, the Supreme Court explained:

“From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime.”

The chain of proved circumstances

66. From the above discussion, it is possible for this Court to conclude that the prosecution has firmly established and proved beyond reasonable doubt the following circumstances in the present case that form a complete chain and each link has also been proved by the prosecution beyond doubt:

- (i) The deceased was initially running the factory at Peeragarhi and A-2 and she were having a troubled marriage. A-2 was an alcoholic and was also having an extra-marital relationship with his sister-in-law. He also ran up huge losses in the running of the factory.
- (ii) After the death of his mother, despite he and A-1 having their separate shares in the property, A-2 was insistent on giving the earnings from the factory and his share to A-1. This led to serious disputes between him and the other two accused on the one hand and the deceased on the other.
- (iii) The deceased borrowed money from her mother, PW-2, and after clearing the earlier debts of PW-2 established and ran the factory at Sector 8, DSIDC, Bawana.
- (iv) There were concerted attempts of attacks on the deceased by A-3, the brother-in-law of A-1 and his associates. There was an incident of July 15th, 2009 when the three accused along with Sushila, the wife of A-1 gave beatings to the deceased on the issue of money. When the deceased called her parents i.e. PW-2 and PW-3, the accused abused her in front of them and even manhandled PW-2. On that occasion, A-3 also gave beatings to the deceased outside the house and threatened that he would shoot her as she was naming his sister, i.e. the wife of A-1, in her allegations against her husband.
- (v) Again in August 2009, a similar incident took place when PW-2 was

called by the deceased and she counselled A-1 and A-2 to look after their respective shares and upon that A1 threatened that he could get the deceased killed on the road.

- (vi) The third incident is of 23rd October, 2009 when A-3 with his accomplices attacked the deceased as she was going to her factory. DD No.11B was registered at PS Bawana in relation thereto. The MLC of the deceased showed that she was admitted in the hospital with the injuries.
- (vii) On 5th January, 2010, there was a written compromise at PS Bawana signed by the deceased and A-1 in the presence of PW-22 on the basis of which DD No.34B was prepared.
- (viii) The deceased gave a reminder to the police on 31st December, 2009 about her earlier complaint given on 6th December, 2009 about two boys on a motorcycle chasing her. The evidence of PW-14 proves that a suit was filed on 7th April, 2010 for which the papers were signed by the deceased in her presence on 6th April, 2010 and this resulted in a quarrel between the deceased and the accused.
- (ix) PW-10 who was running the factory at N-14, Sector-I, DSIDC, Bawana after hearing the noise of a blast came out of the factory and an employee of factory no.12 run by the deceased told him that somebody had shot the deceased and she was bleeding. When he reached there he found the deceased bleeding and he took her in his car to the Maharishi Balmiki Hospital, Pooth Khurd. She was declared

brought dead.

- (x) The post-mortem report proved that she died of the gunshot injuries to her head and the death was homicidal.
- (xi) The evidence of PW-1 proved that he saw A-1, A2 and A3 flee from the spot with firearms soon after he heard the two gun fire shots, get on to two motorcycles. He chased them for a while and when he returned to the spot, he was told that his mother had been shot. PW-1 fainted.
- (xii) The mobile CDRs only showed that the mobile phones of the three accused may have been at their respective homes but not that they themselves were carrying their mobile phones with them throughout. Therefore, the plea of alibi of three accused was not proved although the burden was on the accused.
- (xiii) A-2 did not attend the funeral of his wife, the deceased.

67. The Court is of the view that the above proved circumstances point unerringly to the guilt of A-1 to A-3 and that no other conclusion is possible. The manner in which the trial court has misread or omitted material pieces of evidence has already been discussed extensively in this judgment. The impugned judgment giving benefit of doubt to A-1 to A-3 is, therefore, unsustainable in law and is to that extent set aside.

Conclusion

68. However, as far as Kulbir (A-4) i.e. Respondent No.5 is concerned, no clear evidence regarding his role in the crime has come forth. Therefore the impugned judgment giving him the benefit of doubt is left undisturbed. Likewise with the weapons of the offence not having been recovered, the acquittal of the accused for the offence under the Arms Act is also left undisturbed.

69. Consequently, the Court sets aside the impugned judgment of the trial Court to the extent of acquitting Respondent Nos. 2 to 4 i.e. A-1, A-2 and A-3 guilty of the offence under Section 302 read with Section 34 IPC and convicts them for the said offence. The acquittal of A-4 i.e. the Respondent No.5 for the said offence and the acquittal of all the accused for the offence under the Arms Act are left unaltered.

70. Turning now to the sentence, in the facts and circumstances of the present case, each of the Respondent Nos.2, 3 and 4 i.e. A-1, A-2 and A-3 are hereby sentenced to imprisonment for life with a fine of Rs.20,000/- each and in default of payment of fine, to undergo further simple imprisonment for a period of six months.

71. The appeal is disposed of in the above terms. The bail bonds and surety bonds of the Respondent Nos. 2, 3 and 4 are hereby cancelled and they are directed to surrender forthwith to serve out the sentence awarded to them. The benefit of Section 428 Cr PC will be extended to A1, A2 and A3. If they do not surrender on or before 7th March 2018, the SHO of the concerned PS will take steps to immediately have them arrested and jailed for serving out

the sentence.

72. The bail bond and surety bond of A-4 (Respondent No.5) are hereby discharged. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 27, 2018

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