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

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Date of Decision: 12.04.2018

% **CRL.A. 17/2018**

SAMEER @ MUSTAKIM

..... Appellant

Through: Mrs. Kavita Jha, Mr. Rajeev K Jha
and Mr. Vaibhav Kulkarni, Advocates

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP for the State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P. S. TEJI

VIPIN SANGHI, J. (ORAL)

1. The appellant has preferred the present appeal under Section 374(2) Cr PC to assail his conviction by the learned ASJ/ Pilot Court/ North District, Rohini Courts, Delhi in Sessions Case No.59263/2016 arising out of FIR 407/2016 under Section 302/201/34 IPC and Section 25 Arms Act registered at PS K.N.K. Marg by the impugned judgment dated 17.10.2017. The appellant also assails the order of sentence dated 25.10.2017, whereby he has been sentenced to life imprisonment for the offence punishable under Section 302 IPC with a fine of Rs.5,000/- – in default to undergo simple

imprisonment for six months, and rigorous imprisonment for one year for the offence punishable under Section 25 of Arms Act with fine of Rs.1,000/- , in default to undergo one month simple imprisonment.

2. There were two accused tried by the Trial Court, namely, Sunder Singh and the appellant Sameer @ Mustakim. The Trial Court acquitted the accused no.1 Sunder Singh, while convicting the appellant.

3. The case of the prosecution taken note of by the Trial Court in the impugned judgment reads as follows:

“1. On 13.05.2016 an information was received that a dead body is trapped in the net at Haiderpur Water Treatment Plant inside gate No. 2. DD No.13A in this regard was recorded. Police reached there and they found the holes of the firearm injury on the front as well as back left side of the chest of the body and also on the upper front side of the chest side and the ear. There were also scratch marks on the other parts of the body. One micro SIM of Idea was also found in the pocket of the pants on the dead body. It was put in the mobile phone of Ct. Siya Ram and one mobile No.9310780473 was found saved in the name of Naushad in that SIM. Naushad was informed and on the basis of the description he identified the dead body as of Umar @ Tahir. Post mortem on the dead body was got conducted. One bullet was recovered from the skull during post mortem. During investigation it revealed that Sunder and Sameer committed the murder and after murdering they threw the dead body in Bawana canal. Santro Car No. DL 7CA 0503 was recovered from their possession. In the Inspection of the car one bullet was recovered from the front left side seat. One shawl having blood stains was also recovered from the car. From the possession of accused Sameer @ Mustakim one firearm was recovered. As per the FSL report the bullet found in the body was fired from the fire arm recovered at the instance of Mustakim. The blood found in the was also found to

be of human origin and tallied with the DNA of deceased. After completion of investigation charge sheet was filed. Ld. MM after complying with the provisions of section 207Cr.PC committed the case to the Sessions Court as the offence State Vs. Sunder etc. punishable u/s 302 IPC is exclusively triable by the Sessions Court. Both the accused were charged for the offence punishable u/s 302 r/w 34 of IPC. Accused Sameer @ Mustakim was also charged for the offence punishable u/s 25 Arms Act to which they pleaded not guilty and claimed trial. Thereafter, the case was fixed for prosecution evidence”.

4. The charge framed by the Trial Court against both the accused reads as follows:

“

CHARGE

I Virender Kumar Bansal, do hereby charge you accused Sunder Singh son of Sh. Ranveer Prasad Verma and Sameer @ Mustkeen son of Sh. Alimuddin as follows:

That on 12.05.16 at about 12 mid night, near Narela Railway Phatak you both in furtherance of your common intention murdered Tahil @ Chottey by firing on him and thereby committed an offence punishable under Sec. 302 read with Sec. 34 IPC and within the cognizance of this court.

And I hereby direct that you to be tried by this court for the aforesaid offence punishable u/s 302 read with Sec. 34 IPC”.

5. A separate charge was framed against the appellant under Section 25 of the Arms Act, which reads as follows:

“

CHARGE

I Virender Kumar Bansal, do hereby charge you accused Sameer @ Mustkeen son of Sh. Alimuddin as follows:

That on 30.05.16 at about 6.30 PM in the Shastri Park

situated at Khajuri Chowk near power house within the jurisdiction of PS: Usman Pur you was found in possession of a country made pistol with magazine having four live cartridges and thereby committed an offence punishable under Sec. 25 Arms Act and within the cognizance of this court.

And I hereby direct that you to be tried by this court for the aforesaid offence punishable u/s 25 Arms Act”.

6. The prosecution examined several witnesses to establish the charges.
7. The prosecution could not establish the aspect of the deceased being last seen in the company of either, or both the accused. The prosecution also did not establish any motive for the crime. So far as the use of Santro Car No. DL 7CA 0503 is concerned, the Trial Court did not accept the version of the prosecution, i.e. that the same was allowed to be used by PW-3 Mukesh Kashyap the owner, by the accused Sunder – his relative, since PW-3 Mukesh Kashyap stated that he had not given his car to accused no.1. However, we may observe that the forensic examination conclusively established the fact that the deceased had been shot in the car, since the DNA samples lifted from the car matched with those of the deceased. One fired bullet was also recovered from the front left side seat, which too matched the weapon of the offence claimed to have been recovered from the appellant. The recovered weapon was connected with the crime, on account of the fact that one bullet got recovered from the skull of the deceased and it was established that the same had been fired from the recovered weapon.
8. Thus, all that the prosecution was able to establish was that the homicide of the deceased Umar @ Tahir had taken place inside the Santro Car No. DL 7CA 0503 belonging to Mukesh Kashyap, and that the offence

had been committed by use of the weapon claimed to have been recovered from the appellant.

9. The defence taken by the accused that his statement recorded under Section 313 Cr PC was that a country made pistol had been planted upon him at the office of the Special Cell. The entire recovery was false and a planted one, in the present case. He also stated that the car had been planted to fill up the lacuna in the case. He claimed that the lead had been planted by the police officials and, for that reason, no police official from the special staff had deposed that any of them ever saw any bullet lead, shawal or blood stains inside the Santro car. He claimed false implication in the case, which was the reason for no public witnesses being associated with the alleged recoveries. He claimed that the statements of the official witnesses are contradictory and inconsistent in nature, and same show the conduct of unfair investigation and false implication.

10. The submission of learned counsel for the appellant is that the Trial Court has believed the recovery of the weapon from the appellant on the premise that the three police witnesses PW-14, PW-25 and PW-26, who were witnesses to the recovery, had no reason to falsely implicate the appellant. Thus, this finding of fact is based on a presumption of bona fide and honest conduct of the recovery witnesses, who are police officers. She submits that, founded on the said finding of fact – which itself is based on a presumption, a further presumption cannot be raised – that since the weapon of offence was recovered from the appellant, the offence was committed by the appellant. Learned counsel submits that, in any event, mere recovery of the weapon of offence from the appellant could not have led to the

conclusion that the appellant had committed the murder of the deceased. In this regard, learned counsel has sought to place reliance on, firstly, the decision of the Supreme Court in *Musheer Khan @ Badshah Khan & Anr. v. State of M.P.*, (2010) 2 SCC 748 and, secondly, on *Abdulwahab Abdulmajid Baloch v. State of Gujarat*, (2009) 11 SCC 625.

11. In *Musheer Khan* (supra), in respect of cases based on circumstantial evidence, the Supreme Court observed:

“43. While appreciating circumstantial evidence, we must remember the principle laid down in *Ashraf Ali v. King Emperor* [21 CWN 1152 : 43 IC 241] (IC at para 14) that **when in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail.**

44. The next principle is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis except his guilt.

45. When a murder charge is to be proved solely on circumstantial evidence, as in this case, presumption of innocence of the accused must have a dominant role. In *Nibaran Chandra Roy v. King Emperor* [11 CWN 1085] it was held that **the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances.** It seems, therefore, to follow that whatever force a presumption arising under Section 106 of the Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.

46. The same principles have been followed by the Constitution Bench of this Court in *Govinda Reddy v. State of Mysore* [AIR 1960 SC 29 : 1960 Cri LJ 137] where the learned Judges quoted the principles laid down in *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952 SC 343 : 1953 Cri LJ 129] The ratio in *Govind* [AIR 1952 SC 343 : 1953 Cri LJ 129] quoted in AIR para 5, p. 30 of the Report in *Govinda Reddy* [AIR 1960 SC 29 : 1960 Cri LJ 137] are:

“5. ... ‘10. ... in cases where the evidence is of a circumstantial nature, the circumstances [which lead to the conclusion of guilt should be in the first instance] fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be [shown] that within all human probability the act must have been [committed] by the accused.

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51. In *State, Govt. of NCT of Delhi v. Sunil* [(2001) 1 SCC 652 : 2001 SCC (Cri) 248] almost a similar contention has been negatived by this Court in para 19 of the Report. The learned Judges held: (SCC p. 661)

“19. ... recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code.”

In doing so, the learned Judges relied on a decision of this Court in *Transport Commr. v. S. Sardar Ali* [(1983) 4 SCC 245 : 1983 SCC (Cri) 827] . It may be true that the decision

in Sardar Ali [(1983) 4 SCC 245 : 1983 SCC (Cri) 827] was rendered in the context of the Motor Vehicles Act, but the propositions in SCC para 20, at p. 662 of the Report (Sunil case [(2001) 1 SCC 652 : 2001 SCC (Cri) 248]) are, if I may say so, based on sound logic.

52. *In para 20 of the report it was held, when discovery is made pursuant to any facts deposed by the accused, the discovery memo prepared by the investigating officer is necessarily attested by independent witnesses. But if in a given case, no witness is present or nobody agrees to attest the memo, it is difficult to lay down as a proposition that the discovery must be treated tainted or that the discovery evidence is unreliable. In such a situation, the court has to consider the report of the investigating officer who made discovery on its own merits.*

53. *In para 21, this Court further elaborated this principle by saying that when a police officer gives evidence in court about the discovery made by him on the strength of facts deposed by the accused it is for the court to believe the version, if it is otherwise shown to be reliable and it is for the accused to cross-examine the investigating officer or rely on other materials to show that evidence of police officer is unreliable or unsafe.*

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58. *So the objection of the defence counsel to the discovery made by the prosecution in this case cannot be sustained. **But the discovery by itself does not help the prosecution to sustain the conviction and sentence imposed on A-4 and A-5 by the High Court***". (emphasis supplied)

12. In *Abdulwahab Abdulmajid Baloch* (supra), the Supreme Court observed as follows:

37. *Be that as it may, we feel that **only because the recovery of a weapon was made and the expert opined that the bullet***

found in the body of the deceased was fired from one of the weapons seized, by itself cannot be the sole premise on which a judgment of conviction under Section 302 could be recorded. There was no direct evidence. The accused, as noticed hereinbefore, was charged not only under Section 302 read with Section 34 of the Penal Code but also under Section 302 read with Section 120-B thereof. The murder of the deceased was said to have been committed by all the accused persons upon hatching a conspiracy. This charge has not been proved.

38. The learned trial Judge himself opined that the recovery having been made after nine months, the weapon might have changed in many hands. In absence of any other evidence connecting the accused with commission of crime of murder of the deceased, in our opinion, it is not possible to hold that the appellant on the basis of such slander evidence could have been found guilty for commission of offence punishable under Section 302 of the Penal Code.

39. It is a matter of serious concern that despite the recovery of weapon the appellant had not been charged for commission of offence punishable under Sections 25 and 27 of the Arms Act. We have noticed hereinbefore the helplessness expressed by the learned trial Judge in this behalf. The learned Judge who had framed charges should have been more careful.

40. The learned Judge also, in our opinion, was incorrect in drawing a presumption of commission of offence punishable under Section 302 of the Penal Code by applying the provisions of Section 114 of the Evidence Act keeping in view the principle that the prosecution must prove its case beyond all reasonable doubt". (emphasis supplied)

13. The submission of learned counsel for the appellant is that the appellant had taken the defence that the recovery of the weapon had been planted upon the appellant. However, the Trial Court accepted the recovery of the weapon of offence from the appellant, on the premise that there was

no reason brought on record as to why the aforesaid three police witnesses would falsely implicate the appellant. Thus, a presumption was raised in favour of the prosecution that the said police witnesses acted bona fide, with honesty and deposed truthfully before the court. Learned counsel submits that the said finding of recovery of the firearm having been based on presumption of honest and bona fide conduct, a further presumption could not have been built upon the same. In any event, merely because the weapon of offence may have been recovered from the accused that, by itself, cannot lead to the definite conclusion that the accused had used it to commit culpable homicide of the deceased.

14. On the other hand, the submission of Mr. Katyal, the learned APP is that since the factum of recovery of the weapon of offence from the appellant had been established, it was for the appellant to explain under what circumstances, and when he had acquired the same. He further submits that the chain of incriminating circumstances in this case was complete inasmuch, as, not only the weapon of offence has been recovered from the appellant – which had been scientifically established to have been used in the commission of the crime in question, but the car in which the offence was committed has also been conclusively identified, and the appellant and the co-accused Sunder Singh were also found in the said car at the time when they were apprehended.

15. Mr. Katyal further submits that the appellant failed to avail of the opportunity available to him while recording his statement under Section 313 Cr PC, and to explain these incriminating circumstances, thereby leading to the only conclusion of guilt of the appellant in the commission of

the crime. In support of his submissions, Mr.Katyial has sought to place reliance on *State of West Bengal v. Mir Mohammad Omar & Ors.*, (2000) 8 SCC 382. He particularly relies upon the following passages from the decision:

“30. The abductors have not given any explanation as to what happened to Mahesh after he was abducted by them. But the learned Sessions Judge after referring to the law on circumstantial evidence concluded thus:

“On a careful analysis and appreciation of the evidence I think that there is a missing link in the chain of events after the deceased was last seen together with the accused persons and the discovery of the dead body of the deceased at Islamia Hospital. Therefore, the conclusion seems irresistible that the prosecution has failed to establish the charge of murder against the accused persons beyond any reasonable doubt.”

31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the

truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.

35. During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.

36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as

follows: “When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference”. (emphasis supplied)

16. He also relies upon ***State of Maharashtra v. Suresh***, (2000) 1 SCC 471, and in particular para 26 thereof, which reads as follows:

“26. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act”.

17. Mr. Katyal also places reliance on ***Rameshbhai Mohanbhai Koli & Ors. v. State of Gujarat***, (2011) 11 SCC 111 to submit that, in similar

circumstances, the Supreme Court upheld the conviction of the accused. He submits that the false plea taken by the accused – that the recovery was planted upon him, is itself an incriminating circumstance.

18. Having considered the submissions of learned counsels, perused the impugned judgment and examined the evidence brought on record and referred to by the learned counsels, we are of the view that the conviction of the appellant under Section 302 IPC cannot be sustained. The case was based on circumstantial evidence. The body of the deceased had been recovered upon receiving information on 13.05.2016 vide DD No: 13A that a dead body was trapped in the net at Haiderpur Water Treatment Plant inside gate No.2. The holes caused by firearm injury on the front as well as back left side of the chest of the body, and on the upper front side of the chest side and the ear were found. The said injuries were found to be the cause of death of the deceased. There were some scratch marks on the other parts of the body as well. One micro SIM of Idea was located in the pocket of the pant of the deceased, and with the aid of the same, Naushad PW-4 was reached, who identified the body of the deceased as that of Umar @ Tahir. On a secret information received on 30.05.2016 that two persons involved in 'a' murder case would come in the Santro car in question, the two accused were apprehended from the said car and the pistol was allegedly recovered from the appellant. The said pistol/ fire arm was eventually found to be the one used in the murder of the deceased. Thus, the recovery of the pistol from the appellant is claimed to have been made at least seventeen days after the use thereof for causing the death of the deceased.

19. As aforesaid, apart from the said recovery of the fire arm from the appellant – which too was made after considerable lapse of time from the date of death of the deceased, and the fact that the appellant was found to be occupying the Santro car along with the accused Sunder Singh at the time of their apprehension, there is no other incriminating circumstance established by the prosecution to connect the appellant with the death of the deceased.

20. In view of the limited circumstanced proved in the case, to uphold the conviction of the appellant under Section 302 IPC, the court would have to presume that he had intentionally fired upon the deceased with the pistol in question – with the intention to cause his death, only because he was found in possession of the fire arm used for the offence, and he was found in the car in which the offence had taken place.

21. We are afraid that we cannot jump to that conclusion in the absence of proof of other incriminating circumstances which could be said to have completed the chain and led to the only conclusion of the guilt of the appellant.

22. As observed by the Supreme Court in *Musheer Khan* (supra), in a case where there is conflict between presumption of innocence and any other presumption, the presumption of innocence must prevail. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused. The inculpatory facts should be incapable of explanation upon any other reasonable hypothesis, except his guilt.

23. In our view, the aforesaid test is not met in the facts of the present case. The recovery of the weapon of offence – even if accepted to have

been made from the appellant, it does not follow that it is he, who used the same to commit the culpable homicide, much less the murder of the deceased. There are innumerable other hypothesis, which could explain the recovery of the pistol in question from the appellant, and which would not point conclusively to his guilt in the commission of the murder of the deceased. The deceased could have been shot in the Santro car, using the recovered pistol by the co-accused Sunder, or by any other person; he could have shot himself in the said car with the recovered weapon and the appellant may have found the pistol in the Santro car while riding in it with the co-accused Sunder after taking a lift from him, or with someone else, and he could have kept the same; some one – who may have either committed the offence, or found the pistol after the same had been used to cause the death of the deceased, may have given the pistol to the appellant either as a gift, or for consideration. Any number of other possibilities could realistically be visualised. Pertinently, neither of the accused is shown to have been acquainted with the deceased, or even with one another. Neither of them has been shown to have any motive to commit the murder of the deceased either individually, or collectively. The accused has the right to remain silent, and it is for the prosecution to establish the guilt of the accused beyond all reasonable doubt. The weakness in the defence of the accused cannot lead to the inference of his guilt.

24. In *Musheer Khan* (supra), the Supreme Court noticed *Nibaran Chandra Roy vs. King Emperor* - (11 CWN 1085), where it was held that the fact that the accused person was found with a gun in his hand immediately after the gun was fired, and a man was killed on the spot from

the said fire, may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. The position is the same in the facts of the present case. In fact, the weapon of offence (assuming that the death of the deceased was indeed an “offence”, committed by another human being), was recovered at least 17 days after its use. Even if the forensic evidence is to be accepted, which establishes the use of the fire arm recovered from the appellant for causing the death of the victim, it cannot be said that the said circumstance, coupled with the circumstance that the Santro car – in which the shots were fired from the pistol on the deceased was being driven by the co-accused Sunder and the appellant was also occupying the said car, leads to the only conclusion of guilt of the appellant, or that the facts established are consistent only with the guilt of the appellant. It cannot be said that the established facts taken note of herein above, exclude every other hypothesis, except that of guilt of the accused. It cannot be said that the chain of evidence is complete in the present case, since there is no evidence to establish that the deceased was ever seen, much less last seen with the accused; in the car in question, and; that the accused had any motive to commit the offence. It is not even established that either of the accused was even known to the deceased. The decision in *Abdulwahab* (supra) is also squarely attracted in the facts of the present case.

25. The decisions relied upon by Mr. Katyal, in our view, are of no avail in the circumstances of the case. In *Mir Mohammad Omar* (supra), the facts of the case were materially different. It had been conclusively

established as a fact – on the basis of several eye-witness statements, that the deceased had been abducted by the accused. The dead body of the deceased was recovered shortly thereafter. It was in this background that the Supreme Court raised the presumption of guilt of the accused in the commission of the murder of the deceased. However, in the present case, the recovery of the weapon of offence has been established by raising a presumption of bonafide and honest conduct on the part of the police officials, since the accused was not able to establish any motive for his false implication. In ***State of Kerala Vs. M.M. Mathew***, (1978) 4 SCC 65, the Supreme Court, inter alia, observed:

“3. ... prima facie public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case.”

26. Since the finding of recovery of the weapon of offence from the accused is founded upon the said presumption, in our view, a further presumption could not be built upon the bedrock of such a finding. A presumption can be drawn only from facts – and not from other presumptions – by a process of probable and logical reasoning. [see ***Suresh Budharmal Kalani @ Pappu Kalani Vs. State of Maharashtra***, (1998) 7 SCC 337].

27. Pertinently, the appellant in his defence had repeatedly claimed false implication and the planting of the weapon upon him. Therefore, to say that he should have explained the circumstance in which he had acquired the weapon of offence would not be fair. The defence taken by him was much

broad in its scope inasmuch, as, he never admitted to have been in possession of the weapon of offence. Apart from the testimony of the three police witnesses, i.e. PW-14, PW-25 and PW-26 – who were the witnesses to the recovery of the weapon of offence, there was no other independent evidence brought on record to establish the recovery of the weapon of offence from the accused. Pertinently, the accused is facing another trial for recovery of the weapon of offence in FIR 32/2016 registered at PS Special Cell. We are informed that the said trial is in progress.

28. In *Suresh* (supra), which was a case of rape and murder of a minor girl, the dead body had been recovered on the pointing out of the accused. He had stated in his disclosure that the dead body had been kept concealed in the field. He had offered to take the police to the spot, and produce the same. It is in this background that in para 26 of the judgment, as extracted herein above, the Supreme Court observed that if the accused declined to tell the criminal court the basis of his knowledge about the concealment, then the presumption that he had concealed the dead body would be well justified. However, in the present case, the appellant never admitted that the weapon of offence was indeed recovered from him. It is not the case of the prosecution that first his disclosure statement was recorded, and on that basis the recovery of the pistol in question was made from the place pointed out by the appellant, in the presence of independent public witnesses. Moreover, even in *Suresh* (supra), the presumption raised was only to the limited extent that the accused had concealed the dead body. The Supreme Court did not raise the further presumption that because the dead body had been concealed by the accused, therefore, he should be presumed to have

killed the deceased. There was other independent circumstantial evidence of “last seen”; of the medical doctor opining that the rapist would have sustained injuries on his male organ; of the accused having suffered injuries on his male organ, and also on his elbow joints – which were opined to have been caused around the time of the incident, and; of the presence of human blood and semen on the underclothes of the accused when he was arrested on the day following the incident, to return the finding of guilt of the accused. Consequently, the decision in **Suresh** (supra) does not advance the submission of Mr. Katyal.

29. The decision in **Rameshbhai Mohanbhai Koli** (supra) is also of no avail for the reason that the recovery of weapon of offence had been made at the instance of the appellants/ accused in the presence of independent witnesses. There were several eye-witnesses to the offence – 8 of them, as the offence took place in broad day light on a public street. Though the eye-witnesses had turned hostile, their initial statements were believed, as the Court also found that they had been influenced. The accused persons included a sitting MLA of the ruling party in the State. In this background, the Supreme Court observed that the evidence in the case convincingly establishes that the respective places where from the recoveries were effected were exclusively within the knowledge of the appellants, and the same could not have been effected by the investigating agency in the absence of the disclosure statements made by the appellants. The Supreme Court also noticed and appreciated other circumstantial evidence, viz., the recovery of blood stained seat of the motor cycle used by one of the accused to flee from the scene of offence; the matching of the blood group of the

deceased with the blood stains on the said motor cycle, and; recovery of a loan application of one of the accused from the place of occurrence with blood stains of the deceased.

30. As noticed herein above, in the present case, the weapon of offence is claimed to have been recovered from the accused himself, and not from the place which he only would have been aware of after recording his disclosure statement in the presence of independent public witnesses.

31. We have consciously extracted hereinabove the charge framed by the learned ASJ under Section 302 read with Section 34 IPC against the appellant and the co-accused Sunder Singh. The prosecution has not established even one of the ingredients of the said charge conclusively against the appellant, let alone all the ingredients thereof. There is no evidence to show that the incident took place on 12.05.2016 at 12 midnight; there is no evidence to show that the occurrence took place near Narela Railway phaatak; there is no evidence to show that the two accused, including the appellant, entertained the intention to murder the deceased Tahir @ Chhote, much less the common intention to do so; there is no evidence to show that the appellant, or the co-accused fired upon the deceased and thereby committed the offence punishable under Section 302 read with Section 34 IPC. It is not even established that the appellant was possessed of the firearm in question on the date, and at the time when the occurrence took place, or that he was with the deceased with, or without, co-accused when the occurrence took place. Thus, the entire charge falls to the ground.

32. For all the aforesaid reasons, we set aside the impugned judgment and acquit the appellant of the offence under Section 302 IPC. However, we make it clear that our judgment shall not come in the way of the Trial Court arriving at its own conclusions on the basis of the evidence led before it, in case FIR No.32/2016 registered at PS Special Cell. The appellant be set at liberty forthwith, if not required in any other case.

33. The appeal stands allowed in the aforesaid terms.

VIPIN SANGHI, J

P.S.TEJI, J

APRIL 12, 2018

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