

#

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On: 25.04.2019
Judgment Pronounced On: 20.09.2019

CRL.A. 29/2017

ASHOK

.... Appellant

Versus

STATE

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Sunil Dalal , Mr. Devashish Bhaduria and
Mr. Jaskaran Singh Advs
For the Respondent : Ms. Radhika Kolluru, APP

CORAM:

HON'BLE MR JUSTICE SIDDHARTH MRIDUL
HON'BLE MS JUSTICE ANU MALHOTRA

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present appeal instituted under the provision of section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C') assails the judgment dated 09.11.2016 and the order on sentence dated 21.11.2016, rendered by learned Additional Sessions Judge (North-East), Karkardooma Courts, Delhi, in Session Case No. 44839/2015,

titled as 'State vs. Ashok & Ors.', emanating from F.I.R No. 257/2007 under section 302/120-B/34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') registered at Police Station – Khajuri Khas.

2. By way of the impugned judgment and order of conviction and order on sentence dated 09.11.2016 and 21.11.2016 respectively, the trial court convicted the accused Badal and Ashok as follows: -

The accused Badal was convicted and sentenced under the provision of Section 25 Arms Act to undergo rigorous imprisonment for 3 years with fine of Rs 25, 000/- and in default of payment of fine, sentenced to undergo further rigorous imprisonment for 1 year;

The accused Ashok (hereinafter referred to as 'the Appellant') was convicted and sentenced as under: -

- i. Imprisonment for life and fine of Rs 3, 00,000/- under the provisions of section 302, IPC. In default of payment of fine, he has been sentenced to undergo rigorous imprisonment for a further period of 3 years.
- ii. Rigorous imprisonment for 3 years and fine of Rs 25,000/- under the provisions of Section 25 Arms Act and in default

of payment of fine, he has been sentenced to undergo rigorous imprisonment for a further period of 1 year.

- iii. Rigorous imprisonment for 7 years and a fine of Rs 50,000/- under the provisions of Section 27 Arms Act and in default of payment of fine, he has been sentenced to undergo rigorous imprisonment for a further period of 2 years.

All the sentences have been directed to run *concurrently*. The benefit of Section 428, Cr.P.C, has been granted to the accused Badal, as well as, the appellant.

3. The case of the prosecution as elaborated by the learned Trial Court is briefly encapsulated as follow: -

“ In brief, the case of the prosecution was built on the edifice of the statement of PW1 Rani Ex.PW1/1 wherein she stated that she has seen the accused Ashok and Badal were being chased by PW-3 Baleshwar. PW-2 Meenakshi was a material witness. She had stated, in her statement under section 161 of the Cr.P.C, that she had seen the accused Ashok firing bullet at her sister Sarita and the accused Badal firing bullet at her nephew Master Abhishek. PW-3 Baleshwar, brother-in-law (sala) of the accused was also material witness. According to him, he was present at the scene of crime. In his statement under section 161 Cr.P.C, he stated that the accused Ashok fired at Sarita and accused Badal fired bullet at Master Abhishek and ran away and thereafter, he chased them and saw that they sat in a Maruti Car which was being driven by the accused Amit and accused Yogender@Chhotu was sitting near him. However, PW-1 Rani, PW-2 Meenakshi and PW-3 Baleshwar did not support the case of the prosecution.

On 02.06.2007 at 9.30 p.m, PW-18 Insp. Ramesh Dahiya arrested the accused Ashok near Toll Tax, opposite DLF, Loni vide arrest memo Ex. PW1/3. He interrogated him. He recorded his disclosure statement Ex.PW12/J. In his disclosure statement, the accused Ashok disclosed that he thrown country made pistol and cartridges in bushes on zero pusta road. PW-18 Insp. Ramesh Dahiya proved that the country made pistol Ex. P5, two live cartridges and one empty shell were recovered pursuant to disclosure statement of the accused Ashok.”

4. Upon completion of investigation, the charge sheet was filed against the appellant under Sections 302/120B/34 IPC, 1860 and under Sections 25/27 Arms Act, 1959; and charges were framed against the appellant under sections 302 IPC and section 25/27 Arms Act. The Appellant pleaded not guilty and claimed trial.
5. In support of its case, the prosecution examined 23 witnesses. The statement of the Appellant was recorded under section 313 Cr.P.C. In his statement under Section 313 Cr.P.C, the Appellant has denied firing the bullet at Deceased; and further denied making any disclosure statement, as well as, the recovery of the weapon of offence being effected at his instance. The Appellant chose not to examine any witness in his defence; and pleaded that he has been falsely implicated in the present case.
6. Broadly, the learned Trial Court has founded the conviction of the Appellant on the following grounds:

“91. The accused Badal has committed an offence under section 25 of the Arms Act for conscious possession of the country made pistol

Ex. P14 and cartridges Ex. P15(colly).

92. According to post-mortem report Ex.PW8/B, a bullet recovered from the dead body of the deceased Sarita. PW22 Dr. Arvind Kumar, Autopsy Surgeon preserved the said bullet in a sealed parcel sealed with seal impression 'ÁK'. Pw-18 Insp. Ramesh Dahiya seizure the said parcel containing the said bullet alongwith sample seals vide memo Ex. PW12/H. On the same day, he deposited the said parcel in police *malkhana* vide entry at Sl. No. 1575 in Reg. No. 19. PW-17 HC Pramod kumar proved the relevant entry at Sl. No. 1575 in Reg. No. 19 Ex. PWW17/D.

93. On 02.06.2007 at 9.30 p.m, PW-18 Insp. Ramesh Dahiya arrested the accused Ashok near Toll Tax, opposite DLF Loni vide memo Ex. PW1/3. He interrogated him. He recorded his disclosure statement Ex. PW12/J. In his disclosure statement, the accused Ashok disclosed that he thrown country made pistol and cartridges in bushes on ZERO pusta road. PW-18 Insp. Ramesh Dahiya proved that country made pistol Ex. P5, two live cartridges and on empty shell were recovered pursuant to disclosure statement of the accused Ashok.

94. Relevant portion of his evidence is as under:

“Thereafter, accused Ashok led us to the bushes at a distance of 15-20 pace from the place of recovery of car and got recovered on country made pistol of .315 bore and two live cartridges from the bushes. I checked up the country made pistol and it was found containing one empty fired cartridges and thereafter, I took the measurements of the recovery country made pistol and the cartridges and thereafter, sketch Ex.PW12/M was prepared by me which bears my signatures at point B. Thereafter, the country made pistol & the cartridges (two live and one empty) were sealed in a cloth parcel and sealed with the seal of 'RK' and taken into possession vide seizure memo Ex.PW12/N which bears my signatures at point B.”

95. The defence did not elicit anything from his cross-examination which could render the purity or authenticity of recovery, seizure and sealing of the recovered county made pistol Ex. P5 and Cartridges Ex. P6 doubtful.

96. PW-12 SI Vikram Singh corroborated him as under:

“Thereafter, accused Ashok led us to Ram Park, U.P

ahead to Zero, Pusta, and got recovered one Maruti car 800 bearing registration No. DL 6 CF 2731. The said car was taken into possession vide seizure memo Ex. PW12/L which bears my signatures at point 'A'. Accused Ashok also got recovered one country made pistol of 315 bore and two live cartilages from the bushes which were at a distance of about 15-20 paces from the place of recovery of said Maruti car. Country made pistol was checked up and on checking, it was found containing empty cartridge(fired). I.O. then prepared the sketch of the country made pistol/katta and cartridges (two live and one empty) which is Ex. PW12/M which bears my signature at point 'A'. Thereafter, the said county made pistol and cartilages (two live and one empty) were sealed in a cloth *pullanda*, which was sealed with the seal of 'RK' and was taken into possession vide seizure memo Ex. PW12/N which bears my signatures at point 'A'."

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98. PW-18 Insp. Ramesh Dahiya deposited the recovered country made pistol Ex. P5 and cartridges Ex. PW6(colly) in police *malkhana* vide entry at Sl.No 1575 in Reg No.19. PW-17 HC Pramod kumar proved the relevant entry in Reg No.19 Ex. PW17/B. PW-15 Ct. Ajeet Singh taken the said sealed parcel in FSL on 20.7.2007 vide RC No. 63/21 Ex.PW17/G. He deposited the said sealed parcel in FSL vide acknowledgement Ex.PW17/H. The defence did not dispute that the sealed parcel was tampered in police *malkhana*.

99. According to PW-13 Dr. Puneet Puri, Ballistics Expert, the bullet 'EB1' recovered from the dead body of the deceased Sarita was fired from country made pistol Ex. P5 recovered at the instance of the accused Ashok.

100. Ballistics Report Ex. PW 13/A, on this aspect, has already been reproduced above. Relevant portion of the said ballistics report is under:

"(9) The individual characteristic of striation present on evidence bullet marked exhibit 'EB1' and on test fired bullet marked 'TB1' were examined and compared under the Comparison Microscope Model Leica DMC and were found identical. Hence exhibit 'EB1' has been discharged through the country made pistol .315 bore marked exhibit 'F1' above."

101. The accused Ashok, in his examination under section 313 of the

Cr.P.C., did not offer any explanation for possessing country made pistol Ex. P5 used for firing bullet recovered from the dead body of the deceased Sarita, as under:

“ **Question 63:** Whereas it has come in evidence against you that the bullet EB1 recovered from the dead body of Sarita was fired through country made pistol Ex. P-5 which was recovered from your instance and as such, you owe an explanation as to your knowledge regarding the said country made pistol Ex. P5 . What you have to say?

Ans. I do not know.

Question 64: Whereas it has come in evidence against you that you were in the exclusive and conscious possession of the country made pistol Ex. P-5 and two live cartridges and one fired cartridge Ex. P6 (colly) which are fired arms and ammunition under the Arms Act. You owe an explanation as to your possession as well as knowledge of the said country made pistol and live cartridge and fired cartridge. What you have to say?

Ans. I do not know. ”

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XXXX.....XXXXX.....XXXXX.....XXXXX
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106. Since the accused Ashok has not given any explanation for possessing country made pistol Ex. P5 used for firing bullet recovered from the dead body of the deceased Sarita, this court has no hesitation in reaching to the conclusion that he is the author of the crime and fired bullet at the deceased Sarita with country made pistol Ex. P5. Accordingly, the accused Ashok is convicted under section 302 IPC and 27 of the Arms Act 1959.

107. PW-21 Sh. Jaspal Singh, DCP, North- East proved sanction order Ex. PW21/A for the prosecution of the accused Ashok under section 25 of the Arms Act for possessing fire arm and ammunition in contravention of section 3 of the Arms Act, 1956 as required under section 39 of the Arms Act, 1959. Accordingly, the accused Ashok is convicted under section 25 of the Arms Act, 1956. The accused Badal is also convicted under section 25 of the Arms Act, 1956. ”

7. Learned counsel appearing on behalf of the appellant urged that the appellant has been falsely implicated in the case, as there are numerous

discrepancies and contradictions in the story of the prosecution; consequently, the same cannot be relied upon; moreover, the prosecution has failed to prove its case against the appellant beyond a reasonable doubt, on account of the following circumstances :-

- i. That PW-1 Rani, who was the main eye-witness in the present case, turned hostile in court, whilst deposing contrary to her previous statement recorded under Section 161 Cr.P.C, against the appellant;
- ii. That in addition to PW-1, PW-2 & PW-3 also, turned hostile in court, contrary to their statements recorded under section 161 Cr.P.C, belying the case of the prosecution;
- iii. That the prosecution has failed to established the motive for the appellant to commit the present offence.
- iv. That no explanation has been given by the prosecution, *qua* the suspicious circumstances in which the recovered country made pistol and bullets, were retained by the police for a period of 1 month, and also, the condition of the same;
- v. That the prosecution has further failed to provide any explanation regarding the questionable circumstance in which PW-1 allegedly signed the arrest memo, as well as,

her presence at the time of arrest of the appellant, at the toll tax plaza;

8. Learned counsel appearing on behalf of the appellant, has placed reliance on the following judgments in support of his contentions: -

- a) **Rameshwar Singh v. State of Jammu & Kashmir**, AIR 1972 SC 102;
- b) **Mukesh @ Girdi v. The State (GNCT) of Delhi**, Crl.A.773/2003 decided on 02.11.2009;
- c) **Abdulwahab Abdulmajid Baloch v. State of Gujarat**, 2009 (11) SCC 625;
- d) **Dudh Nath Pandey v. State of Uttar Pradesh**, 1981 (2) SCC 166;
- e) **Hatti Singh v. State of Haryana**, 2007 (12) SCC 471;
- f) **Nafis v. State NCT of Delhi**, 2011(2) JCC 1403 ;
- g) **Sameer @ Mustakim v. State**, Crl.A. 17/2018, decided on 12.04.2018

9. *Per contra*, Ms. Radhika Kolluru, learned Additional Public Prosecutor appearing on behalf of the State submitted that, since the factum of recovery of the weapon of offence - from the appellant at his instance - had been established, along with, the linking of the bullet recovered from the body of the deceased with the weapon of offence, employed in the commission of the crime in question;

therefore the impugned judgment of the Trial Court does not warrant any interference and must be upheld in its entirety; and further, whilst supporting the impugned judgment contended that there was no tampering of the evidence supervening, particularly in the light of the testimonies of PW18 Insp. Ramesh Dahiya and PW17 HC Parmod Kumar.

10. Lastly, Learned Additional Public Prosecutor submits that, the appellant failed to avail of the opportunity available to him while recording his statement under Section 313 Cr.P.C, to explain these incriminating circumstances against him, thereby leading inescapably to the only conclusion, the one establishing the guilt of the appellant in the commission of the crime. In order to support this contention, the learned Additional Public Prosecutor placed reliance upon the following judgments: -

- a) ***Gulab Chand v. State of M.P.***, (1995) 3 SCC 574;
- b) ***Madan Lal v. The State of Punjab***,
AIR 1967 Supreme Court 1590;
- c) ***Willie (William) Slaney v. State of Madhya Pradesh***,
AIR 1956 SC 116;
- d) ***Rameshbhai Mohanbhai Koli and others v. State of Gujarat***, (2011) 11 SCC 111;
- e) ***Mahabir Singh v. State***, CrI.A. 498/2007, decided on

31.03.16.

11. We have heard counsel appearing on behalf of the parties, and examined and appreciated the entire evidence on record.
12. Having heard the learned counsel on either side, and after going through the material available on record, we proceed to consider the contentions raised by them in seriatim. The first and foremost contention raised by the learned counsel appearing for the accused-appellant is with regard to the credence to be attached to the testimonies of the hostile witnesses.
13. In the present case, since, PW-1 Rani, PW-2 Meenakshi and PW-3 Baleshwar turned hostile; it would be necessary and appropriate to examine and weigh the evidentiary value of the testimony of the hostile witnesses. The Hon'ble Supreme Court of India in the case of ***Govindaraju v. State***, reported as (2012) 4 SCC 722, whilst holding that the evidence of a hostile witness ought not to stand effaced altogether, and that the same can be accepted on a careful scrutiny, to the extent found dependable, and duly corroborated by other reliable evidence available on record, observed as follows.:

"36. It is also not always necessary that wherever the witness turned hostile, the prosecution case must fail. Firstly, the part of the statement of such hostile witnesses that supports the case of the prosecution can always be taken into consideration. Secondly, where the sole witness is an eyewitness who can give a graphic account of

the events which he had witnessed, with some precision cogently and if such a statement is corroborated by other evidence, documentary or otherwise, then such statement in face of the hostile witness can still be a ground for holding the accused guilty of the crime that was committed. The court has to act with greater caution and accept such evidence with greater degree of care in order to ensure that justice alone is done. The evidence so considered should unequivocally point towards the guilt of the accused."

14. In this regard, it is pertinent to point out that, in the case of *Mrinal Das v. State of Tripura*, reported as (2011) 9 SCC 479, the Hon'ble Supreme Court of India has held as under:

" 67. **It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible.** The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness, normally; it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent; he supported the case of the prosecution. **The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.**

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69. It is well settled that in a criminal trial, credible evidence of even hostile witnesses can form the basis for conviction. In other words, in the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence"

15. Therefore, the legal position that obtains is that, the evidence of a hostile witness remains admissible, and is available for a Court to rely on the dependable part thereof, as found acceptable and duly corroborated by other reliable evidence, available on record. Whether the testimony of a hostile witness subject to scrutiny may be relied or nullified would depend on the circumstances of each case. It could be used for corroboration or be corroborated and relied upon or nullified for availability of better evidence. [**Ref. Koli Lakhman Bhai Chanabhai v. State of Gujarat, (1999) 8 SCC 624**].
16. In this regard, we consider it just necessary and appropriate to extract the translated initial statement (*Rukka*) of PW1, Rani, who was present at the scene of crime as recorded by PW12, SI Vikram Singh, vide memo Ex.PW1/1, as follow: -

" xxx.....xxx.....xxx

Statement of Smt. Rani w/o Sh. Mool Chand R/O Ambey Colony, 15 foota Road, Chauhan Patti, PS Khajuri, Delhi, Age 40 years, Ph. No. 9811116845.

Stated that I am residing alongwith my family at the afore-state address on rent. I am a resident of Village Rasulpur, P.O Khaurja, District Balandshahar, U.P. My husband Sh. Mool Chand is missing since 4 years. I married my elder daughter Sarita to Sh. Chhavi Lal, a resident of Village Nagla, near *Kot ka pul*, Dadri, U.P before three years. My elder daughter sarita had a 1^{1/2} year old son namely Abhishek. She was in family way. Since 7-8 dayss, my

daughter Sarita came to my afore-said house. Before 4-5 months. I became acquainted to one person namely Baleshwar at the time of purchase of a plot. He started visiting my house. We became friends. He used to give me commission in account of sale and purchase of plots. He used to help me monetarily. Before one month, Suman wife of Baleshwar had suspicion on our friendship. One day when I went to village of Baleshwar for collecting money, wife of Baleshwar abused (*bura bhala kaha*) me. I asked her to make her husband to understand but Baleshwar kept on visiting my house. Before 10-12 days, Ashok, brother-in-law (*sala*) of Baleshwar come to my house and asked me to put an end to relationship with Baleshwar and threatened to kill me. Baleshwar kept on visiting my house. On 01.06.2007 at about 6.00 p.m., Baleshwar and my younger daughter Minakshi were present with me in my house. My elder daughter Sarita was lying outside the house on a cot with his son Abhishek. After some time, Baleshwar went to near the main door of the house. At once, there was sound of firing of gun-shot. Immediately, I came out. I saw that my daughter Sarita had sustained bullet injuries on her chest near her neck and the child Abhishek had gun shot injuries on his chest and hand. Blood was emanating. Baleshwar was chasing the said two boys. One of them was Ashok, brother-in-law (*sala*) of Baleshwar who was already know to me. Both of them managed to escape by sitting in a white Maruti Car which was at some distance. Baleshwar returned and told me that the second boy was Badal who was already known to me. 2-3 boys were also sitting in the said car. Baleshwar knew them. Ashok and Badal in association with his other associate caused murder of my daughter Sarita and child Abhishek by firing bullets. Legal action be taken. I have heard statement. It is correct"

17. PW1, Rani, who was the main eye witness turned hostile, therefore her testimony cannot be relied upon wholly, but her initial statement, Ex.PW1/1 is considered appropriate in so far as it is reliable and contemporaneous and corroborated by other evidence on record for

establishing the commission of offence.

18. We consequently, hold that the testimonies of PW-1, PW-2 and PW-3, as available on record who had subsequently turned hostile in court, can be relied in the present case, to the extent to which they are dependable; and corroborated by the evidence, to prove the commission of the offence alleged against the appellant, and that the same are not effaced entirely or altogether.

19. Another contention urged by the learned counsel appearing on behalf of the appellant was that, since the prosecution's witnesses had turned hostile, the prosecution was not able to establish the motive for the commission of offence by the appellant, and that therefore, in absence of a strong motive, the appellant cannot be held guilty of the charges framed against him.

20. In this regard, it is observed that PW-1, Rani, in her initial statement, Ex. PW1/1, as well as, her statement under section 161 Cr.P.C, given to the police, has categorically attributed a motive for the commission of the murder and that she has seen the accused firing at the deceased; but in her statement under section 164 Cr.P.C, she has denied the same.

21. Even otherwise, the Hon'ble Supreme Court of India, in ***Sukhpal Singh vs. State of Punjab***, reported as 2019 (3) SCALE 271, held that the

inability of the prosecution to establish motive in a case of the circumstantial evidence is not always fatal to the prosecution case. The relevant observations are elaborated as follows: -

“14. We are not inclined to place any reliance on appellant’s version that the gun was actually surrendered by him and making use of the gun, a shot was fired and he has been implicated particularly as he has not proved that he has been placed under suspension. Furthermore, in fact, P.W.15 has denied the allegation that the bullet was sent after firing. The only inevitable conclusion we can reach is that the gun was recovered from him and the bullet which has been found to have caused the fatal injury to the deceased and which was recovered from the body of the deceased has been fired from the appellant’s gun.

15. The last submission which we are called upon to deal with is that there is no motive established against the appellant for committing murder. **It is undoubtedly true that the question of motive may assume significance in a prosecution case based on circumstantial evidence. But the question is whether in a case of circumstantial evidence inability on the part of the prosecution to establish a motive is fatal to the prosecution case. We would think that while it is true that if the prosecution establishes a motive for the accused to commit a crime it will undoubtedly strengthen the prosecution version based on circumstantial evidence, but that is far cry from saying that the absence of a motive for the commission of the crime by the accused will irrespective of other material available before the court by way of circumstantial evidence be fatal to the prosecution. In such circumstances, on account of the circumstances which stand established by evidence as discussed above, we find no merit in the appeal and same shall stand dismissed.”**

22. Motive does assume great importance, but to say that the absence of motive would dislodge the entire prosecution story is giving this one factor an importance which is not due. Motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy. (*Ref. Ujjagar Singh v. State of Punjab, (2007) 13 SCC 90*).

23. Learned counsel appearing on behalf of the appellant, further urged that the circumstances in regard to the recovery of weapon of offence, recovered by the police officer, in the present case, are suspicious and distrustful. On the contrary, learned APP whilst asserting that there was no tampering of evidence, invited our attention to the testimonies of PW18, Insp. Ramesh Dahiya and PW17, HC Pramod Kumar. Learned APP further submitted that a conjoined reading of the testimonies of PW 18 & PW 17 would, conclusively demonstrate that no tampering of evidence, *qua* to the recovery of weapon of offence, could be inferred.

24. In this behalf it is observed that, the country made pistol Ex.P5, used as weapon of offence was recovered by the police at the instance of the appellant vide memo Ex.PW12/N on 02.06.2007. In our considered view for the proper adjudication of the present appeal, we find it just and necessary to extract the testimony of the PW18, Ins. Ramesh Dahiya, in this regard as follows: -

“ xxxx.....xxxx.....xxxx.....

On 2.6.2007, I along with SI Vikram Singh, HC Sompal & Ct. Naresh left the police station in search of the accused persons. When we reached at G Block Sonia Vihar at about 9.20 p.m, I received secret information that accused Ashok was standing near Toll Tax. Thereafter we immediately proceeded to Toll Tax and on reaching there, accused Ashok present in the court who was standing there was apprehended at the instance of secret informer. Accused Ashok was

interrogated. In the meantime, Rani also reached there and she identified accused Ashok. Thereafter accused Ashok was arrested vide arrest memo Ex. PW-1/3 which bears my signatures at point B. His personal search was also conducted vide personal search memo Ex PW-12/K which bears my signature at point B. Thereafter accused Ashok was interrogated and during the said course, he made disclosure statement Ex. PW- 12/J which bears my signatures at point B. Thereafter accused Ashok led the police party to Rama Park on Khajoori Pushta Road and from there he got recovered Maruti car no. DL-6CF-2731 of white color. The said car was taken into possession by me vide seizure memo Ex.PW 12/L which bears my signature at point B. Thereafter accused Ashok led us to the bushes at a distance of 15-20 paces from the place of recovery of car and got recovered one country made pistol of .315 bore and two live cartridges from the bushes. I checked up the country made pistol and it was found containing one empty fired cartridge and thereafter I took the measurements of the recovered country made pistol and the cartridge and thereafter sketch Ex.PW-12/M was prepared by me which bears my signatures at point B. Thereafter the country made pistol & the cartridges (two live and one empty) were sealed in a cloth parcel and sealed with the seal of RK and taken into possession vide seizure memo Ex.PW-12/N which bears my signatures at point B. Thereafter accused Ashok led the police party to the spot i.e in front of house of Rani, Ambe colony, Chauhan Patti, Delhi and pointed the spot. Pointing out the memo Ex.PW18/D was prepared by me in this regard which bears my signatures at point A and signatures of accused Ashok at point X. I recorded the statement of Rani & SI Vikram singh. The case property was deposited with the MHCM and the accused was put in the lock up.

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XXXXXXXX by Sh.Rakesh Kochar, Id. Counsel for all the accused.

When I reached at the spot on 01/06/2007, I found a crowd present there. I had not found the person, who had informed the PCR regarding the incident. I had not asked any public person to join the proceeding at the spot and I had not specific reason for not joining them. All the memos prepared at the spot on that day were in the hand

writing of SI Vikram. It is incorrect to suggest that I was not present at the spot or that no documents were prepared by me at the spot or that I had not visited the spot at any point of time. We remained at the spot for about 2 hours. It is wrong to suggest that all the memos were prepared later on in the Police Station. The spot was not a thickly populated area.

I had not joined the employees of the Toll tax, near khajoori Pusta road in the raiding party on 02/06/2007. It is wrong suggest that the accused Ashok was falsely implicated in the case. I did not put any mark of identification on the recovered katta and cartridges from Ashok after recovery and before seizure. We reached at the place of recovery at about 9.20 p.m. The area was dark at that time. I prepared the seizure memos while sitting inside the official vehicle. It is correct that I had not obtained the signature of any public person on the seizure memos. It is wrong suggest that nothing was recovered from the accused Ashok or that the Katta, cartridges and the car were planted against the accused. It is wrong suggest that I had not arrested the accused Suman.

It is wrong suggest that accused Badal and Amit were falsely implicated in this case or that no disclosure statement of the accused persons were recorded by me. It is correct that I had not taken the photographs of katta and cartridges recovered from the accused Badal. It is correct that I had not put any specific mark on the recovered katta and cartridges prior to its seizure. It wrong suggest that the katta and cartridges were planted against the accused Badal.

It is wrong suggest that complainant Rani had not given any statements to me or that her statement was fabricated by us. I had deposited the pulanda on 02/06/2007 at about 11.15 p.m and also deposited the pulanda on 25/08/2007 at about 10.30 p.m in the malkhana.

At the time of the arrest of the accused Ashok, we did not offered our search to him. It is wrong suggest that nothing was recovered from the accused Ashok and Badal or that all the kattas and cartridges were planted against them or that all the documents were prepared later on I am deposing falsely.”

25. Learned Additional Public Prosecutor also urged that, no tampering of evidence occurred and the authenticity of the testimony of PW18 was

corroborated by the testimony of HC Pramod Kumar (PW17). Therefore, we consider it necessary and appropriate in this regard, to extract the testimony of PW17 is extenso as hereunder:

“On 1.6.2007, I was posted at PS Kjhajoori Khas as MHCM. On that day Ins. Ramesh Dahiya had deposited five clothes parcels duly sealed with the seal of RK and one cot (Charpai) with me and I made entry I register No.19 at Srl. No 1572. Photocopy of the said entry on record is Ex. PW-17/A.

On 02.06.2007, Ins. Ramesh Dahiya also deposited with me one cloth parcel duly sealed with the seal of RK, with me and I made entry in this regard in registered No. 19 at Srl.No.1575. Photocopy of the said entry on record is Ex. PW-17/B.

On the same day, Ins. Ramesh Dahiya has also deposited with me one Maruti car bearing registration no. DL-6C-F-2731, and I made entry on the above said serial number 1575 and photocopy of the said entry on record in Ex. PW-17/C.

Ins. Ramesh Dahiya also deposited with me six pullandas and two sample seals duly sealed with the seal of AK and I made entry in register no.19 in this regard at Srl. No. 1575 and photocopy of the same on record is Ex.PW-17/D.

On 25.8.2007, Ins. Ramesh Dahiya had deposited with me one cloth parcel duly sealed with the seal of RK and I made entry in register no. 19 at Srl. No. 1723 and photocopy of the said entry on record is Ex. PW-17/E.

On 20.07.2007, four parcels i.e, plastic jar containing four wads of 12 bore, one parcel containing country made pistol and two live cartridge and one fired cartridges and one bottle containing pallets recovered from the dead body of Abhishek and one sealed bottle containing bullets recovered from the body of deceased sarita, were sent vide road certificate no. 63/21 through Ct. Ajit Singh to FSL Rohini. I made entry in register no.19 in this regard and photocopy of the same is Ex. PW 17/F. Photocopy of Road certificate no. 63/21 on record is Ex. PW17/G. On the same day Ct. Ajit Singh handed over the acknowledgement to me regarding depositing the above said articles in FSL rohini. Photocopy of the same in Ex.PW17/H.

On 7.09.2007, one cloth parcel duly sealed with the seal of RK

containing country made pistol and two live and one fired cartridge was sent to FSL Rohini vide road certificate No. 90/21 through Ct. Sanjeev to FSL Rohini. I made entry in register no 19 in this regard and photocopy of the same is Ex.PW17/J. Photocopy of Road certificate no 90/21 on record is Ex. PW17/K. On the same day Ct. Sanjeev handed over the acknowledgment to me regarding depositing the above said articles in FSL Rohini. Photocopy of the same in Ex. PW-17/L.

On 20.07.2007 I sent 10 parcels and two sample seals of AK were sent vide road certificate no. 64/21 through Ct . Ajit Singh To FSL Rohini. I made entry in registered no19 in this regard and photocopy of the same is already Ex. PW17/F. Photocopy of road certificate no. 64/21 on record is Ex.PW17/M. On the same day Ct. Ajit Singh handed over the acknowledgment to me regarding depositing the above said articles in FSL Rohini. Photocopy of the same is Ex. PW17/N.

On 25.09.2007, I received four pullandas duly sealed with the seal of FSL, one FSL result and one sample seal of FSL through Ct. Ajeet and I made entry in register no. 19 in this regard. Photocopy of the same is Ex. PW17/O.

On 28.01.2008, I received FSL result and three envelope parcels duly sealed with the seal of FSL and I made entry in register no. 19 in this regard. Photocopy of the same is Ex. PW17/P.

On 21.11.2007, I received 8 envelope parcels, one FSL result and one plastic katta, through HC Hukam Singh I made entry in register no.19 in this regard and photocopy of the same is Ex. PW-17/Q.

On 13.9.2007, car was released to AS Aggrawal on the direction of learned MM and I made entry in registered no. 19 photocopy in which is Ex. PQ 17/R.

Till the time, the case property and sample parcels remained in my custody, the same were not tampered with in any manner.”

26. As is axiomatic, in the present case, the weapon of offence was recovered at the instance of the accused-appellant himself, from a place which only he would have been aware of, and subsequently upon the recording of his disclosure statement vide memo Ex. PW12/J, in the

presence of PW18 Insp. Ramesh Dahiya. In establishing the guilt of the accused, time factor, is important, particularly in the facts and circumstances of the present case.

27. The Hon'ble Supreme Court of India in **Gulab Chand** (*Supra*) while noting the importance of time factor vis-à-vis recovery of incriminatory articles from an accused, held that: -

“ 4. It is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced. It has been indicated by this Court in *Santhanakrishnan v. State of Rajasthan*, AIR (1956) SC 54 that no hard and fast rule can be laid down as to what inference should be drawn from certain circumstances. **It has also been indicated that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder.** A note of caution has been given by this court by indicating that suspicion should not take the place of proof. It appears that the High Court in passing the impugned judgment has taken note of the said decision of this Court. But as rightly indicated by the High Court the said decision is not applicable in the facts and circumstances of the present case. The High Court has placed reliance on the other decision of this Court rendered in *Tulsiram v. State*, AIR (1954) SC 1. **In the said decision, this court has indicated that the presumption permitted to be drawn under Section 114, illustration (a) of the Evidence Act has to be read along with the 'important time factor'.** If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case. In the instant case, it has been established that immediately on the next day of the murder, the accused Gulab Chand had sold some of the ornaments belonging to the deceased and within 3-4 days, the recovery of the said stolen articles was made from his house, at the instance of the accused. Such

close proximity of the recovery, which has been indicated by this Court as an "important time factor", should not be lost sight of in deciding the present case. It may be indicated here that in a later decision of this Court in *Earabharappa v. State of Karnataka*, [1983] 2 SCC 330, this Court has held that the nature of the presumption and illustration (a) under Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. In our view, it has been rightly held by the High Court that the accused was not affluent enough to possess the said ornaments and from the nature of the evidence adduced in this case and from the recovery of the said articles from his possession and his dealing with the ornaments of the deceased immediately after the murder and robbery a reasonable inference of the commission of the said offence can be drawn against the appellant. Excepting an assertion that the ornaments belonged to the family of the accused which claim has been rightly discarded, no plausible explanation for lawful possession of the said ornaments immediately after the murder has been given by the accused. **In the facts of this case, it appears to us that murder and robbery have been proved to have been integral parts of the same transaction and therefore the presumption arising under illustration (a) of Section 114 Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments.** We therefore do not find any reason to interfere with the impugned decision of the High Court and accordingly this appeal fails and is dismissed."

28. In the present case, the prosecution has been able to establish that the incident occurred on 01.06.2007, and immediately thereafter on 02.06.2007, recovery of weapon of offence, was made at the instance of the accused subsequent upon his disclosure statement, vide memo Ex. PW12/J. The recovery has been made in a reasonable time factor

and no unreasonable large period is present between the time of the incident and the time of the recovery of the weapon of the offence. There is further no material or evidence to suggest that the accused was falsely implicated in the present case.

29. Lastly, the learned counsel appearing on behalf of the appellant alleged that the prosecution was unable to establish the questionable circumstances in which PW-1, Rani, signed the arrest memo Ex. PW1/3, as well as, her presence at the toll tax plaza.

30. In this regard, it is well settled law that, courts cannot start with a presumption that police records are untrustworthy. As a proposition of law, the presumption should be the other way around, that official acts of the police have been performed regularly, which is a wise principle of presumption and recognized even by the legislature. Hence, when a police officer gives evidence in Court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the Court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or any other material, to show that the evidence of the police officer is either unreliable, or at least unsafe to be acted upon in a particular case. [Ref. *State Govt. Of Nct Of Delhi vs Sunil And*

Another, reported as ***(2001) 1 SCC 652***

31. In the present case, the appellant has not been able to demonstrate that, the record provided by the police officer, in relation to the present case, is unreliable or at least unsafe to be acted upon.
32. In this behalf, it would be necessary to observe that the Hon'ble Supreme Court of India in the case of **Surender @ Babli v. State (NCT) of Delhi**, reported as **(2011) 15 SCC 546**, overruled the decision of this Court in the case of *Mukesh @ Girdi v. The State (GNCT) of Delhi*, Crl.A.773/2003 decided on 02.11.2009; wherein the Hon'ble Supreme Court of India set aside the decision in *Mukesh @ Girdi*, with the observation that, the recovery of the weapon of the offence was in serious doubt; consequently, the judgment cited by the appellant, namely, ***Mukesh @ Girdi*** (*supra*) does not apply in the facts of the present case, as, we do not find any serious doubt on the recovery of the weapon.
33. In light of the facts and circumstances of the present case, and in view of above cited decisions, it is considered apposite to observe that the testimony of the hostile witnesses is not rejected in toto.
34. The appellant did not give any plausible explanation to the incriminating circumstances proved against him, nor did he examine any

witness in his defence to establish his presence at some other specific place at the time of occurrence. The conviction of the appellant is consequently based upon fair appraisal of the evidence and no interference is called for.

35. In view of the foregoing, we find ourselves in agreement with the findings returned by the trial court, which in our considered view, do not warrant any interference or modification. Therefore, the judgment and order of sentence dated 09.11.2016 and 21.11.2016, respectively, are upheld and the present appeal is accordingly dismissed. However, there shall be no order as to costs.

36. The Trial Court Record be sent back forthwith.

37. A copy of this judgment be communicated to the appellant through the Superintendent, Tihar Jail and also be sent for updation of the records.

SIDDHARTH MRIDUL, J.

ANU MALHOTRA, J.

SEPTEMBER 20, 2019

dn/ad