

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

% **Reserved on : 21.09.2020**
Pronounced on : 02.11.2020

+ CRL.A. 419/2018 & CRL.M.(BAIL) 6459/2020

MUSTAKEEM @ BHURAAppellant

Through : Mr. Bipin Kumar Jha, Advocate.

versus

STATE (GOVT. OF NCT DELHI) Respondent

Through : Mr. Ashish Dutta, APP for the State

+ CRL.A. 466/2018

ARSHADAppellant

Through : Mr. R.P.S. Bhatti, Advocate.

versus

THE STATE GOVT. OF NCT OF DELHI Respondent

Through : Mr. Ashish Dutta, APP for the State

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

RAJNISH BHATNAGAR, J.

1. By this common Judgment, we dispose of the above mentioned two appeals which have been filed against the Judgment of conviction dated 16.02.2018 and order on sentence dated 27.02.2018 passed by the Addl.

CRL.A. 419/2018 & 466/2018

Page 1 of 41

Sessions Judge-03, (East), Karkardooma Courts, Delhi vide which appellant Mustakeem @ Bhura has been convicted U/s 302 IPC and 25 Arms Act and both the said appellants have been convicted for the commission of offence U/s 392/34 IPC, and U/s 411 IPC individually.

2. Appellant Mustakeem @ Bhura has been sentenced for life imprisonment and fine of Rs. 10,000/- for the offence U/s 302 IPC and in default of payment of fine, simple imprisonment for one month. He has also been sentenced for rigorous imprisonment for a period of 5 years and fine of Rs. 10,000/- for the offence U/s 25 Arms Act and, in default of payment of fine, simple imprisonment for one month. Further, both the appellants have been sentenced to rigorous imprisonment for a period of 5 years each and fine of Rs. 10,000/- each for the offence U/s 392/34 IPC and, in default of payment of fine, simple imprisonment for 6 months each. They have also been sentenced to rigorous imprisonment for a period of 2 years each and fine of Rs. 50,000/- each for the offence U/s 411 IPC and, in default of payment of fine, simple imprisonment for 3 months each.

3. Briefly stated, the facts of the case are that on 06.03.2011 DD No. 33-A was recorded at 20:21 hours at P.S. Shakarpur, Delhi that someone has been shot. Thereafter, another DD No. 36-A was recorded at 20:25 hours stating that in front of 13, Mangal Bazar, Main Road, one person has been murdered. DD No. 36-A was assigned to Sub Inspector Pradeep, who alongwith Ct. Pawan reached at the spot, where they found one red colour pulsar motorcycle bearing registration No. DL-5SZ-841, a helmet of black colour, two empty cartridge cases and one broken button. Blood was also

seen lying at the spot and many public persons had gathered there. Public persons revealed that injured has been removed to Dr. Hedgewar Hospital, Delhi by the PCR.

4. Since DD No. 33-A was assigned to ASI Pramod, so, he also alongwith Ct. Ajit reached at the spot. SHO alongwith ATO Inspector Kamleshwar Rao alongwith staff also came at the spot. No eye witness was found at the spot. Crime team inspected the place of occurrence, photographs of place of occurrence were taken and chance print were also lifted from the motorcycle and helmet. SI Pradeep alongwith ATO Inspector Kamleshwar Rao, Ct. Pawan and Ct. Ajit reached the hospital and collected the MLC of Atul Jain S/o Sh. Raj Kumar who was declared “brought dead” by the doctor. No eye-witness was found in the hospital.

5. On the basis of the MLC, inspection of the place of occurrence and DD No. 36-A, a case under section 302 IPC was registered. The investigation was assigned to Inspector ATO Kamleshwar Rao. In the hospital, ASI Chokhe Lal, in-charge of the PCR van, handed over one country made pistol having one empty cartridge case in its barrel, three empty cartridge case and one wrist watch to the investigating officer which were lifted by him from the spot. The dead body was sent to mortuary and IO returned to the spot. He prepared the site plan and seized two cartridges, one red colour pulsar motorcycle, a helmet of black colour and a button from the spot. Earth with blood sample was also lifted and the postmortem on the body of the deceased was got conducted. During the course of



investigation, it was found that the bag of the deceased which contained cash was missing, so section 397/34 IPC was also added in the case.

6. On the basis of the secret information, appellant Mustakeem @ Bhura was arrested and from his possession, robbed bag, cash amount of Rs. 70,000/- with some documents of deceased and one loaded country made pistol were recovered. Appellant Mustakeem @ Bhura disclosed that he had committed the crime in question alongwith Nadeem @ Nadda, Naushad @ Laddoo and Zaki Anwar on the basis of information provided by one Arshad (appellant herein in CrI. A. 466/2018). Accused Nadeem @ Nadda was arrested on the pointing out of appellant Mustakeem @ Bhura and Rs. 20,000/- as part of robbed cash was also recovered from him.

7. Accused Zaki Anwar and Arshad (appellant herein) were arrested under section 41(1) Cr.P.C. by the officials of P.S. Anand Vihar and they also disclosed about their involvement in the present matter and part of robbed amount was also recovered from them. Search of fifth accused Naushad @ Laddoo was made, but in vain. After the completion of the investigation, the challan was filed before the court of Metropolitan Magistrate for the offence punishable U/s 302/397/411/120-B/34 IPC and 27/25 Arms Act. After the compliance of formalities of Section 207 Cr.P.C, the case was committed to the Court of Sessions.

8. Vide order dated 17.09.2011, charge under Section 120-B IPC and U/s 392/120-B IPC was framed against all the four accused persons and further vide said order, accused/appellant Mustakeem @ Bhura and Nadeem @ Nadda were charged for the offence U/s 397 r/w section 120-B CrI.A. 419/2018 & 466/2018

IPC and U/s 302 r/w section 120-B IPC. Separate charges u/s 411 IPC were also framed against all the accused persons and charge U/s 27 Arms Act was framed against accused/appellant Mustakeem @ Bhura.

9. We have heard the Ld. APP for the state and Ld. counsels for the appellants and perused the records of this case.

10. On behalf of appellant Arshad, it is urged that he has been falsely implicated and there is not even an iota of evidence against the appellant except his disclosure statement which is not admissible in evidence. It is further urged that the prosecution has sought to connect the appellant with the offence on the basis that the appellant was in touch with the other accused persons from his mobile, and was providing details about the deceased, but the same could not be proved by the prosecution during the course of the trial. He further urged that the appellant has also been charged for the offence of criminal conspiracy, only on the basis of mobile calls but the Ld. Trial Court has acquitted the appellant of the charges of criminal conspiracy observing that the prosecution has failed to prove that the appellant has conspired with co-accused persons to commit the crime and has also not relied upon the call details records, which could not be proved. He further urged that the Ld. Trial Court has misdirected itself by placing reliance on the testimony of PW 11 Ct. Kuldeep Singh, who is a planted witness. He further urged that as per the prosecution Rs. 40,000/- were recovered from his house and only on the basis of this recovery, the Ld. Trial Court has convicted him for the offence U/s 392/34 IPC and U/s 411 IPC by applying the presumption U/s 114 (a) of the Indian Evidence Act.



11. The counsel for appellant Mustakeem has also made detailed submissions and has also vehemently argued that the reliance by the Trial Court on the testimony of PW 11 is wholly untenable. He also argued that the Ld. Trial Court failed to appreciate that PW 11 is a planted witness. He further argued that as per PW 11, he had met the police officials immediately after the commission of the crime at the spot but still he chose to keep quiet, though he claims himself to be witness of the incident, which clearly shows that the police had no clue about the assailants and only later on PW11-who was the beat constable of the area where the crime was committed, has been introduced as an eye witness. He further argued that the recoveries effected from the appellant are planted, and no public person was joined at the time of recovery from the appellant. He further urged that it is alleged against the appellant that he was carrying with him a black bag containing a pistol, documents of the deceased and Rs. 70,000/- but this recovery is nothing but a sham recovery which has been planted upon him after 11 days of the incident. He further urged that it is highly improbable that the appellant would be carrying with him the bag of the deceased and the documents which have no monetary or other value for the appellant and would incriminate the appellant in the crime. He further urged that the prosecution has failed to prove that the recovered weapon was used in committing the crime by the appellant. He further urged that the prosecution has failed to prove that on the date of the incident, the deceased was carrying a sum of Rs. 8 / 9 lakh. He further urged that the appellant and the other accused persons have been acquitted by the Ld. Trial Court for the offence of conspiracy, and the chain of circumstances in this case is not complete in CRL.A. 419/2018 & 466/2018

order to convict the appellant which the Trial Court has failed to appreciate. Both the counsel for the appellants have also contended that TIP of the appellants was not conducted which is also fatal to the case of the prosecution.

12. The counsel for the appellant Mustakeem has relied upon the following judgments:

- “(a) 2007 (2) JCC page 1249, reported as Hatti Singh Vs. State of Haryana.
- (b) 2003 ALL.L.J. 1414 (Supreme Court), reported as Salim Akhtar @ Mota Vs. State of Uttar Pradesh.
- (c) 199 (3) SCC 54, reported as Vijayan Vs. State of Kerala.
- (d) 2009 (11) SCC 625, reported as Abdul Wahab Abdul Majid Baloch Vs. State of Gujrat.
- (e) 2007 (3) SCC 755, reported as state of Goa Vs. Sanjay Tankran & Anr.
- (f) 2008 (11) SCC 645, reported as Inspector of Police, Tamilnadu Vs. Bala Prasanna.
- (g) 2008 (11) SCC 153, reported as State of Uttar Pradesh Vs. Punni & Ors.
- (h) 2008 (3) SCC 100, reported as K.T. Palinisamy Vs. State of Tamilnadu
- (i) 2007 (4) SCC 45, reported as State of Rajasthan Vs. Netrapal & Ors.
- (j) 2006 (10) SCC 182, reported as Sunny Kapoor Vs. State (U.T. of Chandigarh).”

13. On the other hand, it is urged by the Ld. APP for the state that there is no infirmity in the impugned judgment. He further urged that PW 11 is the eye witness of the incident and reliance on his testimony has been rightly placed by the Ld. Trial Court. He further urged that the recovery of the stolen property has been effected from the appellants after the commission of the crime, and the Ld. Trial Court has rightly applied Section 114 (a) of the Evidence Act in reaching to the conclusion of guilt. He further urged that the testimony of the prosecution witnesses finds due corroboration with the medical evidence.

14. In order to prove its case, the prosecution had examined 49 witnesses. First of all, what we observe from the impugned judgment is that the Ld. Trial Court has acquitted the appellants and other accused persons of the charge of conspiracy by observing as follows:

“The prosecution has not been able to prove its case against the accused persons for the charge U/s 120-B IPC as there are insufficient evidence as such all the accused persons namely Mustakeem @ Bhura, Nadedem @ Nadda, Zaki Anwar and Arshad are acquitted for the charge U/s 120-B IPC”.

15. This finding of the Ld. Trial Court has not been challenged by the prosecution and the Trial Court convicted each of the accused person as per the role played by them in the alleged commission of crime.

16. The Ld. Trial Court has mainly based the conviction on 3 points:

- (a) Testimony of PW 11 (eye witness)
- (b) Recoveries

(c) Presumption U/s 114 of the Evidence Act.

17. PW 11 Ct. Kuldeep is the star witness of the prosecution, whose testimony has been totally believed by the Ld. Trial Court while convicting the appellants. We will examine the testimony of this witness in depth in order to see if the conclusion reached by the Trial Court in treating PW 11 as an eye witness of the offence is correct or not, and whether any reliance can be placed on his testimony.

18. According to PW 11, on 06.03.2011 which is the date of the incident, he was posted at PS Shakurpur and was on duty at Mangal Bazar as beat constable. According to him he was on patrolling duty in the area and when he reached at Maharaja Banquet Hall, Main Road, Mangal Bazar, he heard bullet noise at about 8-8:15 p.m. He has further deposed that he went towards the direction of firing and saw that 4 person were on a motorcycle. He tried to stop them but they took left turn and escaped on the motorcycle. He has further deposed that he chased the accused persons on foot but was not able to apprehend them. He has further deposed that he had seen the faces of the accused persons and identified them in the court during his deposition.

19. He further deposed that after the unsuccessful chase, he came back to the spot and came to know that 4 accused persons escaped on the motorcycle after firing on Atul Jain. According to him, he then tried to trace the accused persons on his motorcycle but they could not be traced, and he came back again to the spot. He has also deposed that he could not note down the

number of the motorcycle as its number plate was folded. He further deposed that thereafter, he went to the police station.

20. In his deposition, he has further deposed that on 07.03.2011, IO recorded his statement in the evening in the police station. Thereafter, he remained associated in the investigation with the IO on 16.03.2011, 17.03.2011 and 18.03.2011 when the accused persons were arrested and recoveries effected from them. He has deposed that on 16.03.2011, he was on his duty at Mangal Bazar and at 5:15 p.m. he received call from SHO PS Shakurpur, who asked him to reach P.S. Anand Vihar and also told him that accused persons wanted in this case were present in P.S. Anand Vihar, so he went there and met SHO of P.S. Anand Vihar who asked him to go to CBD ground near Cross River Mall to meet SI K.K. Sharma and thereafter, he joined investigation with SI K.K. Sharma. He identified one person Zaki who came at about 5:45 p.m. from Vivek Vihar side, as the same boy who was involved in the incident on 06.03.2011. He has deposed that secret informer who was also with them had disclosed the name of the accused as Zaki Anwar who was roaming nearby lake and was waiting for someone. He further deposed that at about 6:15 p.m. one more boy came in a TSR at about 6:15 p.m and he started talking with accused Zaki Anwar. Thereafter at about 6:45 p.m. both the accused started to move towards the road and on the signal given by SI K.K. Sharma both of them were apprehended. He proved their arrest memos as Ex. PW 11/A and Ex. PW 11/B. He further deposed that accused Zaki disclosed that he alongwith his associates namely Mustakeem @ Bhura and Nadeem @ Nadda and Naushad had committed

robbery after shooting a person in Mangal Bazar. As far as accused/appellant Arshad is concerned, PW 11 had deposed that accused Arshad disclosed that he had passed the information regarding money in the bag of the deceased to Zaki Anwar, Mustakeem @ Bhura, Nadeem @ Nadda and Naushad.

21. According to this witness, he again joined the investigation with SHO Shakurpur and at about 12 midnight of 16/17-03-2011 when officials of the crime team received a secret information that accused Mustakeem who was involved in the present case was about to leave Delhi by catching a bus from ISBT, Sarai Kale Khan, so they went there alongwith secret informer and positioned themselves near the flyover. According to him, IO had requested 6-7 persons to join the proceedings but none agreed and they left without disclosing their names and addresses. He further deposed that at about 12:30 p.m. appellant Mustakeem came from Ring Road side and at that time he was carrying a black colour bag. At the instance of secret informer, accused Mustakeem was over powered and PW 11 identified the accused as the person who had escaped from the spot on 06.03.2011. On checking the bag Rs. 70,000/-, DL of Atul Jain, copy of PAN Card and country made pistol were found in the bag. He further deposed that appellant Mustakeem made a disclosure statement Ex. PW 11/D-1, and he led the raiding party to the house of co-accused Nadda who was arrested. He further deposed that thereafter, accused Zaki Anwar, Mustakeem and Nadeem took them to the spot and pointed out the place of occurrence and the IO prepared the pointing out memo which is Ex. PW 11/I.



22. According to him, the accused persons also got recovered their clothes which according to them, they were wearing at the time of crime. He identified the case property which consisted of black colour check shirt, greenish check pant belonging to appellant Mustakeem, one blue jean and one red shirt with cream stripes belonging to accused Nadda. PW 11 also identified one black colour bag which contained Rs. 70,000/- as that of deceased. He also identified original driving licence of Atul Jain, photocopy of PAN Card of Atun Jain and photocopies of income tax return of assessment year 2008-2009 and 2009-2010 alleged to have been recovered from appellant Mustakeem. He also identified one country made pistol and one empty cartridge which according to the prosecution were recovered from the possession of appellant Mustakeem. He also identified currency notes of Rs.20,000/- alleged to have been recovered from accused Nadeem. He also identified the recoveries made from appellant Arshad which consisted of one mobile phone Nokia and two bank slips in unsealed condition which according to this witness were recovered from the personal search of appellant Arshad.

23. This witness was duly cross examined by the Ld. defence counsels.

24. We have thoroughly gone through the examination-in-chief and cross examination of PW 11 and we have no hesitation to say that by no stretch of imagination PW 11 can be said to be an eye witness of the incident which took place on 06.03.2011 at about 8-8:15 a.m. Our reasons for saying so are being discussed herein below.

25. There is no dispute to the fact that PW 11 Ct. Kuldeep Singh was the beat constable of the area and on the date of the incident he was on duty. It is also an undisputed fact that PW 11 had not seen any one firing at Atul Jain (since deceased). His role starts from the stage when the alleged culprits were making good their escape. It is also a fact emerging from the testimony of PW 11 that on the date of the incident, he was having his mobile phone and wireless set.

26. Before proceeding any further, we must not forget that PW 11 is a police official who has received police training before joining the police force, so keeping this in mind, we have to analyze his testimony. According to PW 11, he had tried to stop 4 persons who were escaping on the motorcycle. The time of the incident is around 8:15 p.m. on early March (6th March) and it was night time, PW 11 had only a very brief encounter with the persons who were escaping on the motorcycle. So in such a short period of time, it is very difficult for anyone to remember the faces of 4 persons at a go and that too when he claims to have seen them at night time on the road. In his statement U/s 161 Cr.P.C. recorded on 07.03.2011, PW 11 has not given any description/facial features in regard to any one of the person escaping on the motorcycle what to talk of 4 persons. According to this witness, he chased the motorcycle for about 50-60 yards but he nowhere states that he had seen the faces of the persons, who were escaping on the motorcycle while he was chasing them on foot, and there is nothing in his testimony to suggest that the persons on the motorcycle were looking back at him while they were making good their escape. According to PW 11 he



had tried to trace the accused persons on his motorcycle, but we fail to understand why he did not alert the other beats of his area when, according to his testimony, there were other 11 beats in the said area.

27. PW 11 has stated in his cross examination that after the accused persons escaped from the scene of crime, he came back to the spot but strangely enough, he made no call at No. 100, or to the SHO, or to any other Sr. Officer though he was carrying with him his mobile phone and wireless set. PW 11 further stated in his cross examination that he came back to the spot at about 8 / 8:15 p.m. after giving a chase to the accused persons and remained there for about 2 to 4 minutes and at the spot, from public persons, he came to know that 4 persons had fired at Atul Jain and thereafter they ran away after snatching his bag. So, as per PW 11, he came to know about the snatching of black bag from deceased Atul Jain from public persons. Therefore, this statement of his is nothing but hearsay, and it is not his case that he had seen any of the accused persons escaping on the motorcycle with black bag from the spot. Had it been so, he would have deposed the same in his examination-in-chief. In his entire examination-in-chief, he has not uttered a single word that the accused persons ran away after snatching a black bag from deceased Atul, or that he came to know about this fact from the public persons who had gathered at the spot. Therefore, the inference is that he has not even seen the black bag which - according to the prosecution, deceased was carrying with him at the time of the incident. PW 11 has further deposed that he had remained at the spot for about 1 / 1½ hours. It is worthwhile to mention here that during this period crime team, SHO and

other police officials were also present at the spot. PW 11 also stated in his cross examination that he had seen the accused persons escaping on motorcycle from a distance of 10 steps. The testimony of PW 11 further becomes doubtful because when he came back to the spot, crime team, SHO and other police officials were present there, but he failed to inform the SHO, crime team officials and other police officials about the incident. His not coming forward and not informing the Sr. police officials about the incident further creates doubt about his presence at the spot and the incident as narrated by him. It was for PW 11 to inform Sr. police officials about the incident as stated by him later on. His prompt information and disclosure about the identity of the assailants would have gone a long way in catching the assailants while they were on the run soon after committing the crime, and the message about the incident could have been flashed in a timely manner. However, for the reasons best known to him, he kept quiet and went to his home. This conduct of PW11- who is a member of the police force is most unusual and unpalatable, to say the least. According to PW 11 on 07.03.2011, in the morning he went to the police station, made his arrival entry and joined his duty at 10:00 a.m. but, even then, he does not inform any police officer in the police station or any other Sr. police official that he had witnessed the incident which took place on 06.03.2011. The explanation given by him is that he only wanted to tell the incident to the SHO who was not present in the police station, which does not inspire confidence. Nothing has been placed and proved on record that any effort was made by PW 11 to contact the SHO. This stony silence on the part of PW 11 further makes us to believe that it was a blind murder case, which

CRL.A. 419/2018 & 466/2018 Page 15 of 41

was not witnessed by PW11 and his keeping quiet for more than a day and waiting for the SHO only suggests that he alongwith SHO wanted to deliberate upon the incident and to look for the ways to crack the case. Otherwise, we see no reason for this conduct of PW 11.

28. Now let us see what the SHO who has been examined as PW 47 has to say in this regard in order to further examine the reckless and negligent conduct of PW 11, who claims himself to be the eye witness of the incident, or at least of the four accused fleeing on motorcycle. We have gone through the relevant part of the testimony of PW 47 ACP Ravinder Kumar Sharma, who on the date of the incident i.e. 06.03.2011 was posted as SHO PS Shakarpur. He has deposed that on 06.03.2011, he was posted as SHO PS Shakarpur. He got the information about the murder of one Atul Kumar and during investigation, he came to know that a sum of Rs. 8.5 lakh was looted from him. He has further deposed that he got instructions from Sr. Officers to work jointly with SOS Crime Branch in order to solve the case. Very cleverly, this witness has not stated anything in regard to the incident of 06.03.2011. He has only deposed what we have mentioned above. Otherwise, in his entire examination in chief he is totally silent about the proceedings which took place on 06.03.2011 and 07.03.2011. However, in his cross examination he stated that he reached the spot at about 8:30 p.m and at that time PW 45 Inspector Amleshwar Rai was also present there, but Ct. Kuldeep, PW11 was not noticed by him, and Ct. Kuldeep had not met him on the date of the incident. He further stated that PW 11 had met him on the next day after lunch in the police station which is in total



contradiction to what PW 11 has stated. According to PW 11, he had met the SHO and other Sr. Officers at the spot, but did not disclose anything to them. PW 11 has stated that when after chasing the accused persons on his motorcycle, he came back to the spot, he met SHO i.e. PW 47 and other Sr. officials which is in total contradiction to what PW 47 has stated about meeting with PW 11 on 06.03.2011.

29. It is also worthwhile to note that PW 21 ASI Chokelal, and other PWs i.e. SI Pradeep Kumar, SI Naveen Kr. Ct. Sandeep, SI Pramod Kumar and Ct. Pawan Kumar state that they all were present at the spot during the same time when, according to PW 11, he was also present there but all the witnesses say that no eye witness met them at the spot, though according to the self proclaimed eye witness PW 11, he was always there. Despite such a huge presence of police officials, PW 11 remained a silent spectator and went home which is again very strange behavior on his part. According to PW 21 SI Chokelal, when he reached the spot, he found one person lying unconscious in the pool of blood having bullet injury. According to him, one motorcycle was lying at the spot, one country made pistol and three empty cartridges were also lying there, but none of this has been mentioned by PW-11.

30. Now, again coming back to the testimony of PW 11, according to him he came back to the spot after chasing the assailants and remained at the spot for about 2 to 4 minutes initially. We are really amazed at the inhuman approach of this witness in not helping the injured by removing him to the hospital, and not caring for his life. He even does not speak in his



examination in chief that he saw the injured lying at the spot and bleeding, and also keeps quiet about the other articles lying at the spot as deposed by PW 25 SI Chockelal. The first reaction of PW 11 should have been to help the injured to remove him to the hospital as done by the other police officials who later on arrived at the spot. This unnatural behavior of PW 11 and his not disclosing about the articles lying at the spot, further strengthens our belief that he is not an eye witness of the incident, or of the accused fleeing from the spot, and he has only been planted for the sake of solving this blind murder case.

31. One strange thing after another has happened in this case. This witness PW 11 reaches the police station on 07.03.2011 at about 10 a.m. and makes no efforts to meet the SHO (PW 47), who according to him, was not present in the police station but this is in total contradiction to what PW 47 SHO has stated. According to PW 47 (SHO), Ct. Kuldeep, met him about lunch time and disclosed about the incident and the identity of the accused persons who escaped on motorcycle. It is evident from the testimony of PW 11 that on 07.03.2011, he had not met the SHO and his statement was recorded by PW 45 Inspector Amleshwar Rai in the evening i.e. around 8:00 p.m. No reprimand, and no action was taken on the part of the SHO against PW 11 for not reporting the incident promptly.

32. Now let us see, what PW 47 ACP Ravinder Kumar Shamra - who on 06.03.2011 i.e. the date of the incident, was posted as SHO PS Shakarpur has to say in this regard. We must not forget that it is not a simple case. A life has been lost and the casual manner in which the investigation has been



carried out in this case is to be depreciated. The question below was put to PW 47 during his cross examination, and his answer shows his casual approach in such a serious offence.

Q. It is put to you that whether any explanation is called from Ct. Kuldeep that why he did not share this important information whole night or any explanation regarding the negligence is called from him?

Ans. First of all, there was no negligence on the part of Ct. Kuldeep and he had made his efforts to convey the information personally to me and he could not succeed to meet me as I was not available in the PS due to above said reasons already mentioned. Secondly, in the mortuary we generally keep switched off the mobile phones as it appears to be very ugly.

33. PW 47 has stated in his cross examination as follows:

“He had not made any call but he had informed me in person after lunch that he had seen 4 accused persons while fleeing away from the spot after committing the crime on motorcycle.”

34. The following question was put to this witness in his cross examination:

“Q. I put to you that what steps were taken by you after you came to know from Ct. Kuldeep that he saw the incident?

Ans. I had shared this information with my senior officers and directed the IO to examine him and get recorded his statement. Further, efforts were made to get any clue about the accused persons while deploying

secret sources and informers on the basis of description of accused persons disclosed by Ct. Kuldeep.”

35. He has further stated in his cross examination that on 06.03.2011, he remained at the spot for about 2½ -3 hours and during this period he did not notice Ct. Kuldeep, which is in total contradiction to what constable Kuldeep has said.

36. PW 45, who is the initial IO of this case has stated that on 06.0.3.2011 Ct. Kuldeep did not meet him till he remained at the spot. He has further stated that at the first time he visited the spot at 9:00 p.m and remained there for about 20-25 minutes and thereafter he again came back from the hospital at about 12 midnight and remained at the spot till 3:00 p.m. and on these occasions, Ct. Kuldeep had not met him. It is pertinent to mention here that with slight efforts from the side of constable Kuldeep, he would have been able to meet the senior officers who were present at the spot, and it was quite natural that when a murder has taken place, senior officials were bound to be present at the spot and PW 11 cannot be believed that he would not be aware of this as a policeman.

37. According to the SHO PW 47, he came to know about the assailants identity at the police station from constable Kuldeep at around lunch time but, quite strangely, the SHO keeps quiet, does not record the statement of constable Kuldeep, nor he sends Ct. Kuldeep to PW 45 Inspector Amleshwar Rai (IO) for recording his statement-who was present in the mortuary, and was getting the postmortem done. There was no impediment for PW 45 in recording the statement of constable Kuldeep at the mortuary.

However, in answer to a question mentioned hereinabove, PW 47 has categorically stated that despite his efforts, PW 11 Constable Kuldeep could not meet him. So in any case, PW 47 and PW 45 are not speaking the truth about their meeting with PW 11. PW 47 has categorically stated that in the police station around lunch time when PW 11 met him, he disclosed about the identity of the assailants. We fail to understand, why this identity was not mentioned by PW 11 Ct. Kuldeep in his statement given to the IO which was given later on in the evening. PW 47 SHO is also silent about the identity of the assailants given by constable Kuldeep and, strangely enough, SHO does not call for a sketch artist to get the sketches of assailants prepared. This shows how the investigation has been botched up and how the SHO and the IO had managed to “solve” this case.

38. In our opinion, the answer has been given by this SHO (PW 47) to the question put to him regarding taking of action against PW 11 is shameful. Rather than taking any action against PW 11 Ct. Kuldeep, he has shielded him, despite knowing that Ct. Kuldeep was having his mobile number and mobile numbers of other police officials of PS Shakarpur and was also having wireless set. What was the purpose of PW 11 having, and being provided with these communication devices if they were not to be used-when most called for? Now, even if we go by this very vague, senseless and shame full answer given by PW 47, even then in our opinion, Ct. Kuldeep could have at least sent a text message to him. This PW 47 wants us to believe that when he leaves the police station, then there is no way to contact him when he is away, and in the instant case, he says he was at the mortuary

so he had switched off his phone, which also does not stand to reason. He was holding a highly responsible position. Why should he switch off his mobile phone? It is also not that for hours he would remain in the mortuary, as if, he was conducting the postmortem. He could have put his phone on silent or vibrating mode, so that he remains in touch with his police station. From his testimony, it appears that he lost contact with his police station for hours, which is not believable and the answer given by him is only a ploy to save the situation.

39. According to the prosecution, PW 11 was the eye witness of the incident, so prudence demanded that the site plan of the place of the incident should have been prepared at the instance of the alleged eye witness. But the record reveals that the site plan-which is Ex. PW 26/A, has been prepared by PW 26 Inspector Mukesh Kumar Jain, draftsman on the pointing out of Inspector Amleshwar Rai (PW 45.)

40. We fail to understand, why the IO has not got the site plan prepared at the instance of the eye witness PW 11, who was in a better position to explain the manner in which the incident took place and could have pointed out the places in the site plan as to where the dead body was lying at the spot; from where he saw the accused persons escaping on the motorcycle; point at which he tried to stop the motorcycle of the accused persons; the directions towards which they escaped and turned left, and; the source of light near the spot. Therefore, non preparation of the site plan by the IO at the instance of PW 11 further goes on to show that PW 11 is not the eye witness-which was within the knowledge of PW 45 (IO) and SHO PW 47.



Otherwise, he was the best person at whose instance site plan should have been prepared, and this could have given some credence to the case of the prosecution. It seems under a well planned strategy, the IO and SHO shielded PW 11 from the cross examination, which could have further brought on record that he was not the eye witness but a planted witness, solely with the aim to “solve” the case. Therefore, in view of the discussions mentioned hereinabove, by no stretch of imagination PW 11 can be said to be an eye witness of the incident on which the Ld. Trial Court has heavily relied.

Money carried by the deceased.

41. According to the case of the prosecution, on the date of the incident, deceased was carrying with him a sum of Rs. 8.5 Lakh-which, according to the prosecution, was looted from him. It has been argued by the counsel for the appellant Mustakeem that the prosecution has even failed to prove that on the date of the incident the deceased was carrying with him a sum of Rs. 8.5 Lakh, which further goes to show that the prosecution has cooked up a story and falsely implicated the appellant in the present case.

42. PW 2 Juned has deposed that he had given 3 DDs of Rs. 9940/- each on 06.03.2011 to the deceased. PW 3 has deposed that his employee had given Rs. 45,000/- to the deceased in the month of March 2011, but he had failed to give the exact date in this regard. He was declared hostile by the Ld. APP and in his cross examination he stated that he is not aware when payment of Rs. 45,000/- was made to deceased Atul Jain from his shop. He

further denied that he is not aware if deceased Atul Jain was carrying more money in his bag.

43. PW-5A Amit Ahuja has deposed that on 06.03.2011, he handed over to the deceased cash of Rs. 2,45,000/- which was kept by him in a black bag. However, PW 5A failed to identify the black bag as the one, which- according to the prosecution, the deceased was carrying on the date of the incident.

44. PW-9, who is the father of the deceased has deposed that on 06.03.2011, his son Atul Jain was having a cash of Rs. 8.5 Lakh to 9 Lakh. But it is not understood as to how, and on what basis, PW-9 has disclosed the figure of Rs. 8.5 – 9 lakh. It is not his case that at any point of time he was informed by his son that his collection on 06.03.2011 was Rs. 8.5 Lakh to 9 Lakh.

45. PW 12 Atish Jain has deposed that on the date of the incident, deceased had given him Rs. 1,62,000/- and out of that four were demand drafts amounting to Rs. 50,000/- and the balance i.e. 1,12,000/- was in cash. PW 13 Sh. Deepak Sureka has deposed that he had paid Rs. 55,000/- to the deceased on 06.03.2011, which he has clarified in his cross examination by the Ld. APP. So from the testimony of the witnesses relied upon by the prosecution on the date of the incident, the deceased was only carrying a sum of Rs. 2,33,000/- in cash as against Rs. 8.5 Lakh alleged by the prosecution. So the prosecution has failed to prove that the deceased was carrying Rs. 8.5 Lakh on the date of the incident as alleged.

Arrest of and Recovery from appellant Arshad

46. In the impugned judgment, appellant Arshad has been acquitted of the charges of conspiracy, and he has only been convicted U/s 392/34 IPC and U/s 411 IPC.

47. According to the prosecution, appellant Arshad was arrested on 16.03.2011 vide DD No. 25-A U/s 41.1 (b) Cr.P.C. by SI K.K. Sharma of P.S. Anand Vihar. The arrest memo of appellant Arshad is Ex. PW 11/B and the same has been witnessed by SI Bheem Sain and Ct. Kuldeep Singh. Thereafter, appellant Arshad was arrested in this case on 17.03.2011 when he was produced in the Karkardooma Court. This arrest memo has also been witnessed by PW 11 Ct. Kuldeep and the same is Ex. PW 11/S.

48. PW 11 Constable Kuldeep has remained associated with PW 44 SI Bhim Sain at the time of first arrest of appellant Arshad. PW-44 SI Bhim Sain has deposed that on 16.03.2011, when he was posted at PS Anand Vihar, Inspector Rohtash Meena received a secret information regarding arrival of Mustakeem gang at CBD Ground. He joined the raiding party with SI K.K. Sharma, ASI Shahid Khan, ASI Shahid Ali, H.C. Umesh, H.C. Manoj with other police officials alongwith secret informer. They reached CBD ground at around 5:15 p.m. and on the way 6-7 public persons were asked to join the investigation, but none agreed. Thereafter, they erected the barricades. He further deposed that since Ct. Kuldeep knew about the culprits of Mangal Bazar offence, which was committed on 06.03.2011, therefore, Ct. Kuldeep was also summoned and he also joined them.

CRL.A. 419/2018 & 466/2018

Page 25 of 41

49. PW 44 has deposed that at about 5:40 p.m. from the side of pond at CBD Ground accused Zaki came and waited for someone. Ct. Kuldeep identified him as one of the offenders of the offence committed on 06.03.2011. Secret informer also identified Zaki. Now, further what this witness has deposed is of great relevance so we are reproducing the same herein below:

“At about 6:15 p.m. from the side of Vishwas Nagar, accused Arshad came there. Ct. Kuldeep informed that said Arshad was not involved in the commission of offence dated 06.03.2011”

50. He further deposed that secret informer pointed out towards Arshad and identified him as Arshad. He further deposed that after sometime Zaki and Arshad tried to leave the place but as per the instructions of SI K.K. Sharma both of them were surrounded, apprehended and their disclosure statements were recorded.

51. Now the truth has come out from the mouth of PW 11 Ct. Kuldeep. When appellant Arshad was apprehended, PW 11 Ct. Kuldeep categorically stated that **appellant Arshad was not involved in the crime which took place on 06.03.2011.** Therefore, there was no occasion for the arresting officer SI K.K. Sharma to arrest appellant Arshad. As far as the identification by the secret informer-that the person alongwith Zaki is Arshad, is of no consequence. What secret informer has stated is that the man apprehended is Arshad, but he nowhere states that he was involved in the crime which took place on 06.03.2011. In the presence of 8-10 police officials who were the members of the raiding party, PW 11 constable CRL.A. 419/2018 & 466/2018

Kuldeep gave a clean chit to appellant Arshad, but still appellant Arshad was arrested, taken into custody and his disclosure statement Ex. PW 11/P was recorded. We cannot lose sight of the fact that when PW-44 SI Bhim Sain deposed that Ct. Kuldeep informed that Arshad was not involved in the commission of offence dated 06.03.2011, neither any clarification was sought from him by Ld. APP in this regard, nor he was declared hostile on this point.

52. PW 34 SI K.K. Sharma was the senior most police officer of the raiding party which was constituted on 16.0.3.2011 after receiving the secret information regarding the presence of the members of Bhura gang. This witness also nowhere in his testimony states that constable Kuldeep who was present with the raiding party at the time of arrest of accused Zaki and appellant Arshad, stated that Arshad was one of the persons involved in the incident which took place on 06.03.2011. However, as far as accused Zaki is concerned, Ct. Kuldeep had identified him as the boy involved in the incident. If Arshad was also involved in the incident, we see no reason, why constable Kuldeep would not say so, as he has stated about accused Zaki. Therefore, we have no hesitation to hold that the arrest of appellant Arshad does not inspire confidence and appellant Arshad was not arrested in the manner as suggested by the prosecution.

53. According to the case of the prosecution, PW 11 is the eye witness of the case, who has seen the accused persons escaping on a motorcycle but he has failed to mention about the description or facial features of any of the person who was escaping on the motorcycle after committing the offence. It

is the case of the prosecution that the IO had received the secret information regarding the presence of the accused persons of this case. When such was the position, in our opinion, there was no need to join PW 11 as the member of the arresting party. The correct procedure would have been to get the arrested persons identified by PW 11 in judicial TIP which was not done. The IO of this case has not even bothered to get the sketches of the assailants prepared at the instance of PW 11-who claims to be the eye witness, and seen the accused persons and later on identified them in the Court and for the reasons best known to PW 45 (IO) and PW 47 (SHO), PW 11 was taken alongwith the secret informer for arresting the accused persons of this case.

54. According to the prosecution, on the basis of the disclosure statement of appellant Arshad, alleged looted amount of Rs. 40,000/- was recovered at his instance and appellant also got recovered some clothes. The pointing out and the recovery memo of cash is Ex. PW 37/C which has been witnessed by SI Bhim Sain and prepared by SI Karambir-who has been examined as PW 37. In this regard he has deposed that on 25.03.2011, he alongwith SI Bhim Sen, Inspector Akhilesh Mishra and two constables-whose name he does not remember, and accompanied by accused Arshad went to his house at House No. 1536, Patodi House, Daryaganj Delhi. Accused Arshad led them to the first floor and from a room near the kitchen, he got recovered a suit case from which some clothes and cash of Rs. 40,000/- was recovered. The currency notes were seized and sealed vide memo Ex. PW 37/C.



55. As far as recovery of Rs. 40,000/- from the house of appellant Arshad is concerned, the same has not been denied by him and he has stated in his statement U/s 313 Cr.P.C that no recovery was effected from his house or at his instance. Police had taken out Rs. 40,000/- from his residence and same was planted later. He has further stated that the said money was kept in the house which was received after selling an agricultural land which was in the name of his mother Smt. Quresha Khatoon. The Ld. Trial Court has observed that since the appellant Arshad could not account for Rs. 40,000/- which was recovered from his house, so by drawing presumption U/s 114 of the Indian Evidence Act he was convicted.

56. It is a settled principle of law that the prosecution has to stand on its own legs and cannot draw strength from the lacuna in the defence case. The appellant may have taken a wrong defence, but it was for the prosecution to prove its case. In ***“Sharad Birdhichand Sarda Vs. State of Maharashtra”***, Criminal Appeal No. 745 of 1983 decided on 17.07.1984 by the Supreme Court of India it has been held that the absence of explanation and /or post explanation, or a false plea taken by an accused was not sufficient to convict the accused. It was observed in this case that *“it is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence”*. This is trite law and no decision has taken a contrary view. What some cases have held is only that: *“where various links in a chain are in themselves complete, then a false plea for a false defence may be called for aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that*



all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by the Court.” In the instant case, we have already held that PW 11 is not an eye witness of this case. Considering PW 11 to be the eye witness of this case, and throwing all settled principles of law relating to TIP to winds, constable Kuldeep was joined in the raiding party alongwith secret informer and other police officials for apprehending the accused persons of the incident which took place on 6.3.2011, but PW 11 has categorically stated to PW 44 SI Bhim Sain that appellant Arshad was not involved in the crime which took place on 6.3.2011, but despite that his disclosure statement was recorded and recovery of Rs. 40,000/- was effected from him. No doubt, the appellant has not been able to give proper explanation as to how he was in possession of Rs. 40,000/-, but burden was upon the prosecution to prove that the appellant was involved in the crime which took place on 6.3.2011, which the prosecution has miserably failed to do, as discussed hereinabove. Therefore, the Ld. Trial Court was not correct in drawing presumption against the appellant Arshad U/s 114 of the Indian Evidence Act and to convict him. The only evidence which remains on record against appellant Arshad is his disclosure statement which is not admissible in evidence. Apart from this, there is not even an iota of evidence against appellant Arshad to connect him with the crime which took place on 6.3.2011.



Arrest and Recoveries from appellant Mustakeem @ Bhura

57. According to the case of the prosecution, the appellant Mustakeem was arrested vide arrest memo Ex. PW 11/A which has been witnessed by PW 47 SHO P.S. Shakurpur, PW 39 SI Devendeer Kumar and PW 11 constable Kuldeep. The arrest memo was prepared by PW 45 Inspector Amleshwar Rai. The date of arrest is 17.03.2011 and the time of arrest is 1:30 a.m. At the time of his apprehension, appellant Mustakeem, was carrying a black bag which was searched and found to contain Rs. 70,000/-, DL of Atul Jain, copy of PAN Card and photocopies of income tax return of assessment year 2008-2009 and 2009-2010. The articles recovered from the black bag were seized and sealed. The said black bag was also found to contain the looted country made pistol which was seized vide seizure memo Ex. PW 11/C-1 and witnessed by the same witnesses, who had witnessed the arrest memo of appellant Mustakeem. Thereafter appellant Mustakeem made his disclosure statement, narrating about his involvement in the crime. His disclosure statement is Ex. PW 11/D-1.

58. According to the case of the prosecution, at about 12 midnight a secret information was received that appellant Mustakeem @ Bhura who was involved in the present case was about to leave Delhi by catching a bus from ISBT, Sarai Kale Khan, so on receiving this information PW 11 Ct. Kuldeep, PW 47 SHO Shakarpur and PW 45 Inspector Amleshwar Rai and other police officials reached at ISBT Sarai Kale Khan and they also tried to join public witnesses, but none agreed. Appellant Mustakeem was

apprehended when he was coming from the side of Ring Road and came under the flyover.

59. According to the case of the prosecution, a sum of Rs. 8.5 Lakh was looted from deceased Atul Jain but, as discussed hereinabove, the prosecution has not been able to prove that on the date of the incident, he was carrying the above said amount. The contention of the counsel for the appellant in this regard is that the appellant has been falsely implicated and nothing was recovered from him and all the recoveries have been planted. It has been further argued that no public witness was joined by the IO at the time of arrest and recoveries.

60. According to PW 11 Ct. Kuldeep after receiving the secret information about the presence of appellant Mustakeem at Sarai Kale Khan, IO had requested 5-6 persons to join the proceedings but none agreed and they left the spot without telling their name and addresses. As far as joining of public witnesses before conducting the raid is concerned, PW 11 and PW 39 have deposed that IO asked 6-7 public persons to join the investigation but none agreed. However, PW 45 (IO) Inspector Amleshwar Rai has not uttered a single word regarding his efforts to join the public witnesses in the raiding party.

61. PW 47 SHO Shakarpur has also stated that 6-7 persons were requested to join the proceedings by Inspector Amleshwar Rai but none agreed and left without disclosing their name and addresses. Here it is pertinent to mention that the other witnesses are deposing that IO Inspector Amleshwar Rai has requested 6-7 public persons to join the investigation but

CRL.A. 419/2018 & 466/2018

the IO himself has not uttered a single word in this regard. Therefore, in these circumstances, it can be very well inferred that the IO had not made any efforts to join any public person in the investigation and the other witnesses have simply stated so in a routine manner.

62. We are aware that there is no rule of law or evidence, which lays down that unless and until the testimony of the police official is corroborated by some independent evidence, the same cannot be believed. But it is a Rule of Prudence, that a more careful scrutiny of the evidence of the police officials is required, since they can be said to be interested in the result of the case projected by them.

63. In the instant case, we have already observed hereinabove in the judgment that PW 11 Ct. Kuldeep who has been projected as an eye witness by the IO of this case, is not an eye witness and has been planted in order to “solve” the case. Therefore, we have find it hard to believe the testimonies of the police officials in the absence of corroboration from any public witness, looking into the facts and circumstances of this case and also the manner in which the IO and the SHO have conducted themselves. For the sake of repetition, the IO had made no efforts to join the public witnesses. Had he made any such efforts, then the things would have been different, but in the instant case, the manner in which the investigation has been done and the non joining of any public witnesses reduces the arrest and search of the appellant untrustworthy, and the same does not inspire confidence.

64. According to SHO PW 47, appellant Mustakeem is the BC of the area. Whosoever is the BC of the area is a hardened criminal, and is under CRL.A. 419/2018 & 466/2018



the constant watch of the local police. So the theory of the prosecution that at the time of his arrest appellant Mustakeem was carrying black bag of the deceased which contained Rs. 70,000/-, DL of Atul Jain, copy of PAN Card, photocopies of income tax return of assessment year 2008-2009 and 2009-2010 and country made pistol is highly improbable. He would know the risk of carrying documents of the deceased, which-in any case, were of no use or value to him.

65. We fail to understand as to why a person who had allegedly killed a man and is the BC of the area would be carrying with him all the articles mentioned hereinabove with him, that too after 11 days of the incident. In our opinion, 11 days were sufficient for the appellant Mustakeem to get rid of these articles but, strangely enough, as per the prosecution, he was roaming around with all this stuff of the deceased attached to his chest. It is also a matter of common sense that whenever an offence is committed in the jurisdiction of a police station, as a matter of routine, the concerned SHO places suspicion on the local goons and specially BC of the area. So, when such is the situation, we fail to digest the theory of the prosecution that on the day of his arrest-which is after 11 days of the date of the incident, appellant Mustakeem would be carrying with him the articles of the deceased. There would have been record of the accused maintained in the Police Station and the same could be used to identify him and establish his involvement. Where was the necessity of involving a secret informer?

66. PW 11 Ct. Kuldeep has not uttered a single word in his examination-in-chief that any of the accused persons was carrying the black colour bag



while making good their escape. According to PW 11, he has come to know from public persons at the spot that robbers had taken a black colour bag of the deceased. No such person was made an eye witness in this case, and even PW 11 has not made any efforts to note down the name and addresses of the persons who had stated so to him.

67. As far as the identity of the bag is concerned, the same has been identified in the TIP proceedings by the father of the deceased as that of his deceased son. Father of the deceased has been examined as PW 9. In his examination-in-chief he has stated that his son used to carry a black colour bag, but he has not given any description about the bag in his examination-in-chief. He is totally silent as to what type of bag it was, and of what material it was made. He has identified the case property i.e. bag in the TIP proceedings because there was a mark of “T” in the zip of the chain. However, in his cross examination he has stated that he has not told the fact about the “T” mark on the zip to the MM, or to the police. He has further stated that he does not recollect if there was any other mark or metal of identification of the said bag. In these circumstances, the prosecution has failed to prove by positive evidence that the bag-which according to the prosecution, appellant Mustakeem was carrying at the time of his arrest belonged to the deceased. Therefore, in view of the discussions mentioned hereinabove, we have no hesitation to say that the arrest of the appellant Mustakeem in the manner as stated by the prosecution and the recoveries effected from him does not inspire confidence.



Recovery of motorcycle bearing No. DL-5SZ-8410

68. According to the case of the prosecution, the above said motorcycle bearing No. DL-5SZ-8410 and a black helmet were found at the spot. Further, according to the case of the prosecution, the accused persons have come on two motorcycles, however, they have escaped on only one motorcycle, leaving at the spot the above said motorcycle. Accused Nadeem @ Nadda had made a disclosure statement and pointed out the place from where the said motorcycle was stolen by him and the memo in this regard is Ex. PW 11/M. The owner of this motorcycle is PW 20 who got the same released from the Court. Nothing has been placed or proved on record as to what was the fate of the FIR bearing No. 69/11 U/s 379 IPC which was registered in respect of the theft of this motorcycle. Therefore, the prosecution failed to prove that the above said motorcycle was stolen by the alleged accused person of this case, and used subsequently in committing the offence.

69. In order to connect the appellant Mustakeem with the offence, again the Ld. Trial Court has raised presumption U/s 114 (a) of the Indian Evidence Act. The presumption U/s 114 (a) of the Indian Evidence Act may be available if the goods in question found in possession of the person in question after the theft, are proved to be stolen property. Unless the goods are proved to be stolen property, the presumption U/s 114 (a) of the Act is not available. In the instant case, the prosecution has not been able to prove that it was the appellant who had committed the offence on the date of the incident as alleged by the prosecution. It was also not justified on the

part of the Ld. Trial Court to draw presumption U/s 114 (a) of the Evidence Act as the possession, if any, cannot be said to be recent possession. Therefore, if the prosecution has not been able to prove that the sum of Rs. 70,000/- which according to the prosecution was allegedly recovered from the appellant Mustakeem, was the looted amount, the appellant cannot be convicted with the crime by raising presumption U/s 114 (a) of the Indian Evidence Act.

70. The Ld. Trial Court in order to connect the appellant with the offence has opined that the country made pistol recovered from the appellant was used in the crime. We have already doubted the recoveries effected from the appellant Mustakeem, but still we will examine, if the gun recovered from the possession of the appellant was used in committing the crime.

71. As per the case of the prosecution which is unfolded from the charge sheet, there were 3 country made pistols in operation. One country made pistol was with appellant Mustakeem, second country made pistol was given by Mustakeem to co-accused Nadeem and the third country made pistol was used by accused Naushad @ Laddu who could not be arrested. As per the case of the prosecution appellant Mustakeem fired one shot on the deceased but while escaping the said country made pistol was left at the spot. Thereafter, according to the case of the prosecution, accused Nadeem returned one country made pistol to appellant Mustakeem which was given by him to accused Nadeem before the commission of the crime. So this pistol-which was handed over by accused Nadeem to appellant Mustakeem, was the one which has been recovered from appellant Mustakeem at the



time of his arrest. We have hereinabove in the judgment have not believed the theory put forth by the prosecution in regard to the arrest and recoveries effected from appellant Mustakeem. The third country made pistol was with accused Naushad @ Laddu who fired 4/5 times on the deceased. Now again we have no words to express our anguish in the manner in which the investigation has been conducted in this case. ASI Choke Lal who has been examined as PW 21 and had reached the spot after the commission of the crime saw that one motorcycle, helmet, country made pistol, cartridges were lying at the spot. For the reasons best known to him, he picks up the pistol and the cartridges and hands over them to SI Pradeep Kumar PW 31 who then hands over the same to the IO of the case Inspector Amleshwar Rai, who then seized and sealed this country made pistol and the cartridges. We fail to understand, why PW 21 ASI Chokelal was in such a hurry to lift the country made pistol and the cartridges from the spot without waiting for the arrival of the crime team. As per the case of the prosecution, crime team has lifted some chance prints from the petrol tank of the motorcycle lying at the spot and some chance prints from the helmet lying at the spot. These chance prints were sent for comparison with the finger print of the appellant Mustakeem and other accused persons of this case, but the same could not be matched which is evident from the report Ex. PW 4/C. Had PW 21 ASI Chokelal shown some sense, he would not have touched the country made pistol lying at the spot and waited for the crime team, so that the chance prints could have been lifted from the said country made pistol also. PW 21 ASI Chokelal destroyed a very critical piece of evidence which could have thrown some light on the persons involved in the commission of the crime.



Therefore, in our opinion, the prosecution has even failed to prove that the appellant Mustakeem has any connection with the gun found at the spot.

72. It is pertinent to note in the case of the prosecution that almost all the documents prepared by the IO have been witnessed by Ct. Kuldeep Singh, as if, he was omnipresent. Even with the necked eyes, one can see, that the documents which have been witnessed and signed by PW 11 Ct. Kuldeep Singh bear different signatures. No two documents signed by Ct. Kuldeep Singh bears the same signatures which also fortifies our view that he has never been the eye witness of the incident, and has only been involved in this case for solving the same.

73. To sum up, the Trial Court has failed to appreciate the testimony of PW 11 Ct. Kuldeep in its right earnest, and has wrongly placed reliance on his testimony for the reasons discussed hereinabove in the judgment; the Trial Court has also erred in believing the arrest version of the appellants and the recoveries effected from them; the Trial Court has wrongly relied on the provisions of Section 114 (a) of the Indian Evidence Act while coming to the conclusion of guilt against the appellants; the Trial Court has further erred in not looking to the fact as to whether on the date of the incident the deceased was carrying the amount as alleged by the prosecution; the Ld. Trial Court has also wrongly relied upon the case of the prosecution in regard to the recovery of the country made pistol and its connection with the appellant Mustakeem, and the Trial Court has further failed to appreciate that except the disclosure statement, there is no evidence against the appellants.



74. As far as the judgments, relied upon by the Ld. counsel for appellant Mustakeem are concerned, we have gone through the judgments and the same speaks as to how the court should approach the case in appreciating the circumstantial evidence to reach at the guilt of the accused.

75. As a result of the above discussion, both the appeals are allowed. The impugned judgment of conviction and order of sentence qua both the appellants are quashed and set aside. Both the appellants are acquitted and are directed to be released forthwith, unless required to be detained in any other case. Both the appellants shall fulfill the requirements of Section 437-A of the Cr.P.C. to the satisfaction of the Ld. Trial Court at the earliest.

76. Before parting with the judgment, we are pained to say that because of the lacksidal approach of the IO and the SHO of this case, the entire investigation has been botched up. PW 11 Ct. Kuldeep has been cited as an eye witness by the IO and the SHO, but no action has been taken against him in not reporting the matter immediately to them in such a serious offence. They even fail to take or recommend any action against him. Rather, they shielded him when they were questioned about the veracity of PW 11 in their cross examination. Therefore, in our opinion, this is a fit case, where the conduct and the manner of investigation done should be brought to the notice of the Commissioner of Police for taking appropriate action against the erring police officials. A certified copy of this judgment be sent to the Commissioner of Police for necessary action and compliance.



77. Both the appeals are disposed of and Crl.M.(Bail) 6459/2020 in Crl. A.419/2018 is also disposed of accordingly. Trial court record be sent back forthwith alongwith a certified copy of this judgment.

RAJNISH BHATNAGAR, J

VIPIN SANGHI, J

NOVEMBER 02, 2020

Sumant

