

\$~

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

+ CRL.A. 901/2018

SUBHASH

..... Appellant

Through Mr. R.N.Mittal, Sr. Advocate with
Ms. Inderjeet Sidhu, Advocate
(DHCLSC), Vasudha Bajaj and R.P.
Singh, Advocates

versus

STATE

..... Respondent

Through Ms.Aashaa Tiwari, APP for the State
with Inspector Ram Sahay and
S.I.Pankaj Kumar, P.S.Vasant Vihar

%

Reserved On: 04th March, 2020

Date of Decision: 08th May, 2020

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. Present appeal has been filed by appellant-convict challenging the judgment dated 29th January, 2018 and the order on sentence dated 31st January, 2018 passed by Additional Sessions Judge-02, New Delhi District, Patiala House Courts, New Delhi in Sessions Case No. 71/2017 arising out of FIR No. 157/2013 registered with Police Station Vasant Vihar, whereby he had been convicted under Sections 302 of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to rigorous imprisonment for life with a fine of Rs. 20,000/-.

CASE OF THE PROSECUTION

2. The prosecution's case, as noted by the Trial Court, is reproduced hereinbelow:-

“ 1. Brief facts of the case as per prosecution case are that on receipt of DD No. 21-A SI Suresh and Ct. Dharambir went to house no. 401/1, BE, Budh Vihar, Munirka and found a dead body of one girl namely Sakshi @ Pinki daughter of Sh. Pritam Singh. The deceased was taken to Safderjung Hospital where she was declared dead. On the MLC, the doctor opined gunshot injury. IO came back to the spot and found an eye witness namely Ishwar Chand and recorded his statement who told that at about 10.45 pm, when he was present at his house he heard noise like a cracker and all of a sudden his brother Bhisham Raj's grand daughter namely Archana came and told that deceased who was residing in the neighbourhood had fallen and her aunt is calling him. He reached at the house of the deceased and found the door of the deceased bolted from inside. He knocked at the door and after some time the door opened and he saw Sakshi @ Pinki lying on the floor and one boy (accused Subhash) was standing nearby and stated that the dispute was their personal matter and thereafter the accused closed the door from inside. The wife of the said Ishwar Chand had also gone to the house of the deceased to invite for a marriage and all of a sudden she saw that the accused opened the door and ran away.

2. On the basis of the said complaint a rukka was prepared and the present case under section 302 IPC was registered. IO Inspector Ram Sahai came to the spot and conducted the investigation. He called the crime team and got the photographs of the deceased as well as the site of the incident clicked and lifted the blood samples and also the empty cartridges and also collected the other evidence including the marriage card and a newspaper carried by accused. During investigation IO searched the accused and arrested him, who disclosed that he had fallen in love with the deceased, but the deceased and her family were opposing the marriage due to which he killed her. The accused got the country made revolver recovered from his house and

confessed to his crime. During the investigation the blood sample and the semen sample of the accused were collected and sent for FSL examination for their comparison with blood and semen on the clothes of the deceased as well as vaginal swab. The country made pistol was also sent for ballistic expert examination and the accused was produced in the Court. The accused refused to participate in the TIP proceedings. IO after recording statements of the witnesses and collecting the various expert reports and preparing the documents completed the investigation and filed the challan. After supplying the copies a charge under section 302 IPC was framed against the accused to which he pleaded not guilty and claimed trial.”

FINDING OF THE TRIAL COURT

3. The Trial Court had come to the conclusion that the prosecution had proved its case beyond reasonable doubt and the appellant-convict was convicted under Section 302 IPC. The conclusion of the Trial Court is reproduced hereinbelow:-

“ 8. The defence taken by the accused is clearly a false defence in view of the scientific evidence of PW 26 Dr. V.K. Mahapatra, who has proved his biological and DNA reports which categorically proves that the sperms of the accused matched with the vaginal swab of the deceased, which clearly proves that before committing the murder of the deceased, the accused committed sexual assault upon her either putting her to fear or by her consent, but the same does not matter (as his presence get proved). It is seen that while cross examining PW 3 namely Pritam Singh suggestions have been put by the accused that the deceased and accused were having a love affair and as there was a marriage proposal and as the accused and deceased used to talk to each other and since the father of the deceased namely PW 3 refused to marry the deceased with the accused they entered into a suicide pact and since the deceased killed herself first with the country made revolver, but due to bursting of the barrel of the said revolver, the accused could not commit

suicide and therefore the case is not a murder case, but one where both entered into a suicide pact, but because the barrel of the country made revolver busted the accused could not commit suicide. It is seen that after giving this suggestion, the accused took a new defence while cross examining the investigating officer by suggesting that he was not present at the spot and had not committed any offence. He had further given a suggestion that the present case is a case of honour killing where parents and relatives of the deceased had killed her, as they were opposed to the love affair of the deceased with the accused. The defence taken by the accused is clearly a false defence for the simple reason that there cannot be two contradictory defences and suggestions as stated above. The accused cannot blow hot and cold at the same time. There is no evidence whatsoever found by the investigating officer that it was a case of the honour killing where father of the deceased or his relative had killed the deceased. The two star witnesses i.e. Ms. Archana and Ishwar Chand have categorically proved in their testimony that accused was very much present inside the room of the deceased at the time of firing of the gun shot and these witnesses are independent witnesses who are not related to the deceased or her family in any manner. There is not even slightest of evidence to show that the present case was of honour killing by family of the deceased to kill the deceased. It is also seen that the recovery of country made weapon was made from the house of the accused at his instance after his arrest. The mere absence of the other public witnesses at the time of recovery of weapon is no reason for me to not believe the testimony of the independent public witnesses, who have no reason to plant a false murder case upon the accused. It is seen that by giving suggestion that the accused and deceased were having love affair and used to frequently talk to each other and also by giving suggestion that there was a suicide pact wherein the deceased committed suicide, but as the barrel of the country made pistol busted, the accused could not commit suicide is itself an admission on the part of the accused that he was present at the spot inside a closed room and a firing incident took place in his presence. It is not believable as to how the deceased could have fired on her in middle of her chest and the

bullet pierced her chest from her back. It is not possible for a person not trained in arms and ammunition to shoot herself in chest from a country made revolver. The false defence of the accused is further proved from the report of the DNA and biological expert, who categorically proved that sperms of the accused were found from vaginal swab of the deceased, which clearly shows sexual assault. The testimony of PW 3 Pritam Singh categorically proves that the accused wanted to forcibly marry his daughter and had threatened to kill her in case marriage did not take place. The other two witnesses PW 7 and PW 14 proves the presence of the accused inside the room of the deceased at the time of firing and also his immediately running away from the spot after the murder. The recovery of weapon at the instance of the accused further proves the case of the prosecution. It is also seen that the SIM card used by the accused which was in the name of his friend PW 4 Pramod, who has categorically stated that he had given a SIM card obtained by him on the basis of his documents to the accused. The nodal officer had proved the call details of the accused with the deceased. It is also seen that prosecution has also proved the recovery of invitation card and the newspaper which was carried by the accused to conceal the country made revolver and the said invitation card having been given to the accused which had been proved by PW 21 Ashok. The accused chose not to lead any defence evidence.”

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT

4. Mr. R.N. Mittal, learned senior counsel for the appellant-convict, submitted that the impugned judgment was a cryptic one and suffered from non application of mind. According to him, the trial court failed to apply its mind and appreciate the evidence placed before it in the correct perspective. He emphasised that the trial court was swayed by the evidence to prove the presence of appellant-convict at the spot which is not in dispute.

5. He stated that the appellant-convict had been denied a fair trial inasmuch as there was no effective legal representation at the Trial Court by the Amicus Curiae appointed for the appellant-convict. He pointed out that there was no cross examination of twenty five prosecution witnesses at first instance by the Amicus Curiae or his private counsel.

6. Mr. Mittal contended that the appellant-convict and deceased-Sakshi loved each other and wanted to get married. He further contended that the present incident had occurred in pursuance to a suicide-pact between the appellant-convict and the deceased-Sakshi because father of deceased-Sakshi i.e. Pritam Singh (PW-3) was not agreeable to their marriage. He emphasized that the evidence on record supported the theory of suicide-pact and the deceased-Sakshi had died on account of a self inflicted gunshot injury. He contended that before the appellant-convict could shoot himself as per the suicide-pact, the barrel of the weapon broke and the weapon could not be used again. He stated that there was a second cartridge in the pistol which proves the theory of suicide-pact.

7. Learned senior counsel for the appellant-convict stated that the evidence on record had proved that there had been 'physical contact' between the appellant-convict and the deceased-Sakshi in a locked room, while her family members were present in the house. In view of the same, he contended that the deceased-Sakshi was a willing partner as she had not raised any alarm which could have been easily heard by her family members.

8. He stated that the appellant-convict and deceased-Sakshi used to speak to each other frequently on their mobile phones and to prove the same, he relied upon the call detail records (CDR) of the appellant-convict's

mobile number, which was given to him by Pramod Kumar (PW-4).

9. Learned senior counsel for the appellant-convict contended that the prosecution had not established that the death of deceased-Sakshi was homicidal in nature. He also contended that the bullet that had hit the deceased-Sakshi had not been recovered and no chance prints were lifted from the recovered weapon of offence i.e. *katta*. Consequently, according to the learned senior counsel for the appellant-convict, the prosecution had failed to establish who had fired the fatal shot from the pistol.

10. He further stated that the initial defence taken by the appellant-convict (i.e. the incident had occurred due to a suicide pact) while cross-examining Pritam Singh (PW-3) should be accepted and all the other defences should be ignored. He submitted that unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubts. According to him, the accused has only to raise doubts on a preponderance of probability. In support of his submission, he relied upon the judgment of the Supreme Court in *Reena Hazarika vs. State of Assam, AIR 2018 SC 5361*.

11. In view of the same, he argued that the prosecution had failed to prove its case beyond reasonable doubt and the appellant-convict ought to be given benefit of doubt.

ARGUMENTS ON BEHALF OF THE STATE

12. *Per contra*, Ms. Aashaa Tiwari, learned APP for the State stated that the present case was based on eye-witness accounts of Ms. Archana (PW-7) and Mr. Ishwar Chand (PW-14) who had seen the appellant-convict inside the room where the deceased-Sakshi was found and when the gunshot was fired. She pointed out the aforesaid witnesses were independent and were

not related to deceased-Sakshi or her family in any manner whatsoever.

13. She stated that after the disclosure statement of the appellant-convict (Ex. PW-19/D) was recorded, a pistol was recovered at his instance which was seized vide seizure memo Ex. PW-19/H. She further stated that the police had also recovered an empty cartridge from the scene of crime (vide seizure memo Ex. PW-22/E). She pointed out that the CFSL Report (Ex. PW-27/A) had confirmed that the cartridge found from the scene of crime was fired from the recovered pistol.

14. Learned APP for the State also stated that the birthday card recovered from the scene of crime had matched with a copy of birthday card (Ex. P2), given by Mr. Ashok (PW-21) to appellant-convict. The relevant portion of his testimony is reproduced hereinbelow:-

“On 3rd of August about three years back I had gone to the house of the accused in Loni to give him a birthday card as his birthday is on 4th August and thereafter I came back to my house.

At this stage the MHCM has produced the birthday card alongwith the envelope which is already Ex. P-2. The witness submits that it is the same card which he had given to the accused on that day. The card Ex. P-2 as well as the marriage card Ex. P-1 are retained on the judicial record.”

15. She emphasised that there was no second live bullet in the recovered pistol.

16. She stated that the details of messages (Ex. PW-31/A) sent from the phone of the appellant-convict proved that it was a one-sided love as there were no messages from deceased-Sakshi.

17. Learned APP stated that though the appellant-convict had suggested multiple contrary defences during cross examination of prosecution

witnesses (including honour killing, suicide-pact etc.), yet he had led no evidence and in his statement recorded under Section 313 Cr. P.C. his only defence was that he was not present at the scene of crime.

18. Consequently, according to the learned APP, the prosecution had to prove the presence of the appellant-convict at the scene of crime only—which it successfully did.

COURT'S REASONING

CFSL REPORTS (WHICH PROVED THAT THE SPERMATOZOA FOUND ON THE EXHIBITS OF DECEASED-SAKSHI WERE OF THE APPELLANT-CONVICT) AS WELL AS THE DEPOSITIONS OF MS. ARCHANA (PW-7) AND MR. ISHWAR CHAND (PW-14) PROVE BEYOND DOUBT THAT THE APPELLANT-CONVICT WAS WITH THE DECEASED-SAKSHI IN HER ROOM AT THE TIME OF THE INCIDENT

19. Having heard the learned counsel for the parties and having perused the evidence on record, this Court is of the view that Ms. Archana (PW-7) and Mr. Ishwar Chand (PW-14) are the two 'star' witnesses of the present case who had seen the appellant-convict at the scene of crime and subsequently fleeing the spot. The relevant portions of their testimonies are reproduced hereinbelow:-

A. Statement of Ms. Archana (PW-7)

".....The room of Pinki @ Sakshi was at a little distance from the room of Rajesh Tai but on the same floor i.e. Ground Floor. I had gone to the house of Rajesh Tai alongwith my Dadi Sushila Devi on 10th Day of 5th Month last year as my Dadi Sushila Devi wanted to give the wedding invitation card to Rajesh Tai. We were having tea which was prepared by Sandhya Chhachi when we heard a loud sound as if some cracker had been burnt and on that Rajesh Tai shouted for Pinki Didi to see if any bulb had a

fuse or bursting. Rajesh Tai went to the room of Pinki Didi but her door was locked and she repeatedly banged on the door but there was no response from inside. She got worried and told me to go outside and bring someone to help her. I went outside and told everything to my Dadaji Ishwar Chand who rushed back to the spot alongwith me.

My Dadaji Ishwar Chand and Rajesh Tai started banging on the door and after some time the door was slightly opened from inside. I saw that Didi Pinki was lying on the floor and one boy was standing and told Dadaji and Rajesh Tai 'hamara aapas ka mamla hai, tum log jao'. Court observation is made that the child witness has pointed out towards the accused present in the court today as the boy who was inside the room and told them to go away. There was no one else inside the room except for the accused present in the court today and Didi Pinki. Accused after telling us to go away shut the door from inside again.

As soon as my Dadaji and Rajesh Tai went away, accused came out and ran away. I went inside the room and saw that blood was oozing out of the chest of Didi Pinki. Later on the police reached the house of Pinki Didi and inquired from me about the incident and I had told all the facts to the police."

(emphasis supplied)

B. Statement of Mr. Ishwar Chand (PW-14)

".... On 10.05.2013 at around 10.45 am, when I was present inside my house, I heard some sound of a cracker and one girl namely Archana who is the granddaughter of my brother came to me and said one 'Rajesh Tai' who is residing in the neighbourhood is calling me. I accordingly went to the house of said 'Rajesh Tai' who then told me that one Pinki who was the daughter of her brother in law was inside the room, and she was knocking at the door but the door was not being opened. I also knocked at the door but it did not open but when I pushed it hard, then the door slightly opened and upon peeping inside, I saw Pinki lying on the ground with her face towards the ground. I also saw one boy standing over there inside the room and the said boy again tried to close the door stating that 'humara aapas

ka mamla hai'. I accordingly told Rajesh and her daughter in law about what I saw inside the room and I accordingly returned back to my house.

However, when I was just entering inside my house, suddenly the said boy ran from behind me. I accordingly asked my brother Bhism Raj to make a call at No. 100. The said boy at that time was wearing a black pant and white shirt with checks.

At this stage, the witness has pointed out towards accused Subhash, present in the court today (pointed out correctly as the boy who was present inside the room with Pinki and was later on seen by him running from the gali). During that time, certain ladies were shouting that 'Pinki ko goli lagi hai'."

(emphasis supplied)

20. Perusal of the abovementioned testimonies reveals that these witnesses have stated in unison that the appellant-convict was present at the time and place of incident i.e. inside the deceased's room which was locked from inside. They have also stated that they had gone to the spot after hearing a loud noise i.e. the gunshot. According to their testimony, upon opening the door they had seen the deceased-Sakshi lying in the said room and the appellant-convict had shut the door stating that it was their 'personal matter'. Thereafter, the appellant-convict had fled from the spot.

21. It is pertinent to mention that the CFSL report (Ex. PW-26/B) had found human spermatozoa on the clothes and vaginal exhibits of deceased-Sakshi. Subsequently, sperm sample of the appellant-convict was taken and CFSL report (Ex. PW-26/C) proved that the spermatozoa found on the exhibits of deceased-Sakshi were of the appellant-convict. The relevant portion of the FSL reports is reproduced hereinbelow:-

A) CFSL Report (Ex. PW-26/B)

*“CFSL Form No.: CFSL-CBI-ND-Bio-03
BIOLOGY DIVISION
CENTRAL FORENSIC SCIENCE LABORATORY (CBI),
MINISTRY OF HOME AFFAIRS,
BLOCK-4, CGO COMPLEX,
LODHI ROAD, NEW DELHI – 110 003
Biological Examination & DNA Profiling Report*

REPORT NO.: CFSL-2013/B-0922

Dated: 14.11.2013

To,

*The Addl. Deputy Commissioner of Police,
South Distt., New Delhi*

1. *Reference: Case FIR/RC No.: 157/13 Dated: 10.05.2013,
P.S./Branch: Vasant Vihar South District, New Delhi,
Under Section: 302 IPC & 25 Arms Act.*

xxxx xxxx xxxx xxxx xxxx

3. *Description of Parcel(s)/Exhibit(s)*

xxxx xxxx xxxx xxxx xxxx

Exhibit-4b: *One light blue and white coloured striped lower
having reddish brown stains at few places.*

xxxx xxxx xxxx xxxx xxxx

Exhibit-5: *Cotton wool swab on a wooden stick described as
“Vaginal swab of deceased Sakshi”*

xxxx xxxx xxxx xxxx xxxx

8. Results of Examination:

xxxx xxxx xxxx xxxx xxxx

8.3 Human spermatozoa were detected on the exhibits- 4b and 5.

xxxx xxxx xxxx xxxx xxxx

8.5. DNA profile generated from the male fraction DNA obtained from the Source of exhibits: 4b (Lower) and 5 (Vaginal swab) was found to be human male in origin and consistent with each other.

Sd/-

14.11.2013

(Dr. B.K. Mohapatra)

SSO-I (Bio)

CFSL, CBI, New Delhi”

(emphasis supplied)

B) CFSL Report (Ex. PW-26/C)

“CFSL Form No.: CFSL-CBI-ND-Bio-03

**BIOLOGY DIVISION
CENTRAL FORENSIC SCIENCE LABORATORY (CBI),
MINISTRY OF HOME AFFAIRS,
BLOCK-4, CGO COMPLEX,
LODHI ROAD, NEW DELHI – 110 003**

DNA Profiling Report

REPORT NO.: CFSL-2014/B-0273

Dated: 16.04.2014

To,

The Station House Officer,
Vasant Vihar, New Delhi.

1. Reference: Case FIR/RC No.: 157/13 Dated: 10.05.2013,
P.S./Branch: Vasant Vihar South District, New Delhi,
Under Section: 302 IPC & 25 Arms Act.

xxxx xxxx xxxx xxxx xxxx

6. Description of Parcel(s)/Exhibit(s)

xxxx xxxx xxxx xxxx xxxx

Exhibit-1: Reddish brow stained gauze cloth piece described as “blood in guaze”.

Exhibit-2: Small amount of viscous, liquid material kept in a small plastic container described as “semen sample of Subhash.”

xxxx

xxxx

xxxx

xxxx

xxxx

8. Results of Examination:

8.1 DNA profile of Subhash source of exhibits : 1 (Blood sample) and 2 (Semen sample) is consistent with the DNA profile generated from the male fraction DNA obtained from the source of exhibits 4b (Lower) and 5 (Vaginal swab) forwarded to this laboratory vide Memo No. 2470-R/SO/VV Dated 25.07.2013 (Ref: CFSL Report No.: CFSL-2013/B-0922 Dated: 14.11.2013).

xxxx

xxxx

xxxx

xxxx

xxxx

Sd/-16.04.2014
(Dr. B.K. Mohapatra)
SSO-I (Bio)
CFSL, CBI, New Delhi”
(emphasis supplied)

22. The aforesaid reports prove that the appellant-convict was with the deceased-Sakshi at the time of the incident.

23. Further, as per the post mortem report of the deceased (Ex. PW-10/A), the cause of death was opined “*shock due to haemorrhage caused by firearm injury*”. The relevant portion of the post mortem report (Ex. PW-10/A) is reproduced hereinbelow:-

“Department o Forensic Medicine and Toxicology
Department of Forensic Medicines and Toxicology
All India Institute of Medical Sciences, New Delhi – 110029

Post-Mortem No. 568-13
FIR/DD Number: 157

Total Pages: 4

FIR/DD Date : 10/05/2013
Police Station : Vasant Vihar

Doctor/Autopsy Board Members
Dr. SHASHANK POONIYA SENIOR RESIDENT

On
the
body
of

Name.....Sakshi
Father's Name.....Preetam Singh
or
Husbands Name.....
Sex..... FEMALE
Age..... 18 years
Religion.....
Address..... H. No. 401/1 BE Budh
Vihar, Munirka NEW
DELHI, DELHI

xxxx xxxx xxxx xxxx xxxx

Body Identified by

- 1. Name: Pritam Relation: Father NEW DELHI DELHI*
- 2. Name: Rohtash Singh Relation : NEW DELHI*

Date & Hour of Receipt of dead body.....11/5/2013
12:00 pm

Date & Hour of Receipt of inquest papers.....11/5/2013
12:25 pm

Date & Hour of Starting Autopsy.....11/5/2013
12:35 pm

Date & Hour of Conducting Autopsy.....11/5/2013 1:50 pm

BRIEF HISTORY (as per Inquest Report).....Alleged history of
gunshot injury on
10/05/13 at about
10.45 am. She was
declared brought
dead in safdarjung
hospital at 11.25 am
on same day.

xxxx xxxx xxxx xxxx xxxx

5. Injuries (Type, size, shape, location and directions etc.)

List of antemortem injuries:

Oval shaped entry wound of size 1.2 x 1 cm is present over left side of chest. It is 115 cm above left heel and 32 cm below the vertex. It is below the vertex. It is 2 cm lateral to midline, 8 cm below left mid-calvicular point and 8 cm medial to left nipple. It is surrounded by abrasion collar which is 0.7 cm wide laterally, 0.5 cm wide medially and 0.3 cm wide at the upper and lower margins. It is further surrounded by tattooing above upto face, downwards upto umbilicus and over chest arms and forearms on both sides. Track is directed backward, downward and outward fracturing left 4th rib and then perforating right atrium and both right and left ventricle, then perforating left lower lobe of lung and then fracturing 9th and 10th rib and existing from the back. Chest cavity is having about 2 litres of hematoma.

The exit wound is of size 2.5 x 0.7 cm, present obliquely over the left side of back with its medial end higher than lateral end, its centre is 110 cm above left heel and 37 cm below the vertex. It is 4.5 cm lateral to midline and 19 cm from left shoulder tip.

xxxx

xxxx

xxxx

xxxx

xxxx

(J) TIME SINCE DEATH

About one day

The cause of death to the best of my knowledge and belief is In this case is shock due to hemorrhage caused by firearm injury mentioned in post-mortem report is sufficient to cause death in ordinary course of nature. There are no signs of sexual assault however required samples are preserved to rule out same. Samples to detect gun powder are also preserved."

(emphasis supplied)

24. The post mortem was conducted on 11th May, 2013 and the time of death was opined to be about a day earlier i.e. 10th May, 2013. This fact corroborates the testimonies of Ms. Archana (PW-7) and Mr. Ishwar Chand (PW-14) inasmuch as they both had heard a loud noise which was the gunshot that killed Sakshi.

THE APPELLANT-CONVICT'S CONTENTION THAT THE GUNSHOT WAS SELF-INFLICTED CANNOT BE ACCEPTED AS NO RESIDUE OF GUN POWDER WAS FOUND ON THE FINGERS AND HANDS OF THE DECEASED-SAKSHI. MOREOVER, NO SUCH SUGGESTION, LEAVE ALONE ANY CROSS-EXAMINATION ON THIS ASPECT, WAS GIVEN TO THE BALLISTIC EXPERT OR THE INVESTIGATING OFFICER OR THE DOCTOR WHO CARRIED OUT THE POST MORTEM.

25. This Court is of the view that the appellant-convict's contention that the gunshot was self-inflicted cannot be accepted as no residue of gun powder was found on the fingers and hands of the deceased-Sakshi. Moreover, no such suggestion, leave alone any cross-examination on this aspect, was given to the ballistic expert or the Investigating Officer or the Doctor who carried out the *post mortem*. It is settled law that in case a question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said issue cannot be raised subsequently [See: ***Mahavir Singh Vs. State of Haryana, (2014) 6 SCC 716***].

26. Consequently, this Court is of the opinion that Ms. Archana (PW-7) and Mr. Ishwar Chand (PW-14) are natural and independent witnesses and their testimonies are clear, cogent, consistent, credible, trustworthy and corroborated by evidence on record.

THE APPELLANT-CONVICT'S FAILURE TO ADDUCE ANY EXPLANATION REGARDING THE DEATH OF SAKSHI, DESPITE BEING PRESENT AT THE PLACE OF INCIDENT, IS AN ADDITIONAL LINK WHICH CONSTITUTES AN IMPORTANT CIRCUMSTANCE AGAINST THE APPELLANT-CONVICT.

27. In view of the aforesaid, this Court is of the opinion that Section 106 of the Evidence Act is attracted to the present case and the burden was on the appellant-convict to show how Sakshi had died of a gunshot injury as the

said fact was especially within his knowledge. However, he had not only failed to explain Sakshi's unnatural death, he had even denied being present at the spot.

28. Consequently, this Court is of the view that the appellant-convict's failure to adduce any explanation regarding the death of Sakshi, despite being present at the place of incident, is an additional link which constitutes an important circumstance against the appellant-convict.

THE FACT THAT THE BULLET THAT HAD HIT THE DECEASED-SAKSHI WAS NOT RECOVERED IS INCONSEQUENTIAL INASMUCH AS THE EMPTY CARTRIDGE RECOVERED FROM THE SPOT WAS SUFFICIENT TO PROVE THAT THE PISTOL RECOVERED AT THE INSTANCE OF APPELLANT-CONVICT WAS USED IN THE COMMISSION OF CRIME IN THE PRESENT CASE.

29. Further, the weapon of offence i.e. a country made pistol had been recovered at the instance of the appellant-convict and the same was seized vide seizure memo Ex. PW-19/H. The learned APP has correctly pointed out that the empty cartridge recovered from the scene of crime (vide seizure memo Ex. PW-22/E) had been shot from the aforesaid recovered pistol. The relevant portion of the ballistics report (Ex. PW-27/A) on this aspect is reproduced hereinbelow:-

“CFSL Form No.: CFSL-CBI-ND-BALI-03

*BIOLOGY DIVISION
CENTRAL FORENSIC SCIENCE LABORATORY (CBI),
BLOCK-IV, C.G.O. Complex, Lodhi Road,
New Delhi – 110003*

Fire-Arm Examination Report

No CFSL-2013/F-868

Dated 06/11/2013

To,

*The Addl. Dy. Commissioner of Police,
South District,
New Delhi.*

1. *Reference: Case FIR/RC No.: 157/13 Dated: 10.05.2013,
P.S./Branch: Vasant Vihar South District, New Delhi,
Under Section: 302 IPC & 25 Arms Act.*

xxxx xxxx xxxx xxxx xxxx

5. *Date of commencement of examination : 02-09-2013*

xxxx xxxx xxxx xxxx xxxx

6. *Description of Parcel(s)/Exhibit(s)*

xxxx xxxx xxxx xxxx xxxx

*Parcel no. 1: It contained a head of a .315"/ 8 mm
cartridge (marked C/1 by me).*

Parcel no. 2:- It contained following exhibits:-
*(i) It contained one country made pistol
with broken/without barrel (marked
W/1(a) by me.)*
*(ii) One barrel of a country made firearm
(marked W/1 (b) by me).*
*(iii) One .315"/8 mm cartridge case body
was removed from the barrel (marked
C/2 by me.).*

*Parcel no. 3:- It contained clothes stated to be of accused
Subhash.*

Parcel no. 4:- It contained cotton swab for GSR stated to be

taken from the wound by the doctor.
Parcel no. 5:- It contained a tissue piece in liquid having
firearm entry wound.

xxxx xxxx xxxx xxxx xxxx

8. *Results of Examination:*

On the basis of examination carried out in the laboratory with Scientific aid, the result of examination are as under:-

- (i) One the basis of physical examination it is opined that the barrel of a country made pistol (marked W/1(b)) contained in parcel no. 2 is designed to fire .315"/8mm cartridges & it could be barrel of the country made pistol (with broken/without barrel) (marked W/1(a)) contained in the same parcel.*
- (ii) On the basis of physical examination it is opined that the head of .315"/8mm cartridge (marked C/2) removed from the barrel (marked W/1 (b)))*
- (iii) On the basis of comparison microscopy it is opined that the head of a .315"/8mm cartridges (marked C/1) contained is parcel no. 1 has been fired from the country made pistol (marked W/1(a)) & not from any other firearm even of same makes & bore because every firearm has got its own individual characteristic marks.*
- (iv) "Nitrite" one of the main constituent of GSR was detected from the exhibits contained in parcel no. 1, 2 & 5.*
- (v) Gunshot residue could not be detected from the clothes contained in parcel no. 3 & wound swab contained in parcel no. 4.*

xxxx xxxx xxxx xxxx xxxx

Sd/- 06/11/13
(Babita Gulia)
Senior Scientific Officer-II (Ballistics)
CFSL, CBI, NEW DELHI"
(emphasis supplied)

30. Consequently, it is proved that the pistol recovered at the instance of appellant-convict was used in the commission of crime in the present case.

31. The fact that the bullet that had hit the deceased-Sakshi was not recovered is inconsequential to the prosecution's case inasmuch as the empty cartridge recovered from the spot was sufficient to prove that the recovered pistol had been used in the present case. In any event, it is settled law that a lapse in the investigation cannot be a ground for acquittal. The Supreme Court in **Hema vs. State (2013) 10 SCC 192** has held as under:-

“ 18. It is clear that merely because of some defect in the investigation, lapse on the part of the investigating officer, it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions, etc. it is the obligation on the part of the court to scrutinise the prosecution evidence de hors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth. ”

(emphasis supplied)

32. The appellant-convict's contention that deceased-Sakshi was a willing partner in the alleged relationship and that they loved each other is contrary to facts inasmuch as the father of deceased i.e. Mr. Pritam Singh (PW-3) had deposed that the appellant-convict was keen on marrying deceased-Sakshi, but she was not interested and the appellant-convict was pursuing her against her wishes. The relevant portion of his testimony is reproduced hereinbelow:-

“Accused Subhash is my relative. He is the brother in law (Saala) of my nephew Deepak. We are residing in a joint family with separate kitchens in the same building and accused Subhash has been coming to see my nephew Deepak on and off. My wife is working as a maid servant working in JNU and I am a plumber and working in JNU. Deceased Sakshi @ Pinki was my daughter

who was about 18 years of age at the time of her death.

xxxx

xxxx

xxxx

xxxx

Accused Subhash had been pursuing me, my wife as well as my daughter Sakshi @ Pinki for his marriage with my deceased daughter. He had been threatening us with death in case Sakshi @ Pinki was not married to him. I came to know that accused Subhash had been tormenting my deceased daughter and stalking her all the time. I had a discussion with accused and tried to make him understand that my deceased daughter was hardly 17-18 years of age and she wanted to study further and there was a big age difference between him and my daughter.”

(emphasis supplied)

33. In any event, even if the deceased-Sakshi was a consenting party, it has no effect on the prosecution's case inasmuch as the appellant-convict has not been charged for the offence of rape. The evidence on record establishes that deceased-Sakshi had died a homicidal death and the appellant-convict has failed to create a dent in the prosecution's case.

THE SUBMISSION THAT THE SUGGESTION PUT BY THE LEARNED COUNSEL FOR APPELLANT-CONVICT DURING THE CROSS-EXAMINATION OF MR. PRITAM SINGH (PW-3) SHOULD BE TAKEN AS A DEFENCE AND BE ACCEPTED IS UNTENABLE IN LAW, ESPECIALLY WHEN THE APPELLANT-CONVICT HAD DENIED THE SAME IN HIS STATEMENT RECORDED UNDER SECTION 313 CR.P.C. IN ANY EVENT, THIS COURT IS OF THE OPINION THAT THE DEFENCE OF SUICIDE-PACT IS A BALD CLAIM WITHOUT ANY EVIDENCE TO PROVE THE SAME.

34. Further, the appellant-convict's contention regarding suicide-pact is contrary to facts and untenable in law as from the scene of crime and from the place of recovery of the pistol as well as from the pistol itself, no second live bullet was found. Surely, appellant-convict could not have thought that

one bullet would have been sufficient to kill both the deceased-Sakshi and appellant-convict under the suicide-pact!

35. Also if there was a suicide pact, then there was nothing to show that the pact stipulated that if the pistol got jammed, then the appellant-convict would not have killed himself!

36. Further, the submission that the suggestion put by the learned counsel for appellant-convict during the cross-examination of Mr. Pritam Singh (PW-3) should be taken as a defence and be accepted is flawed inasmuch as the said defence amounts to admission on behalf of the appellant-convict to the extent that he was present at the spot, whereas the appellant-convict had denied the same in his statement recorded under Section 313 Cr.P.C.

37. A Division Bench of the Gujarat High Court in ***Koli Trikam Jivraj & Another Vs. The State of Gujarat, AIR 1969 Gujarat 69*** has held that suggestions put in cross-examination are no evidence. The relevant portion of the said judgment is reproduced hereinbelow:-

“15. To put it shortly Mr. Nanavati in advancing this argument merely repeated the main ground on which the conviction of the appellants was based by the learned Sessions Judge viz., that the accused no. 1 and accused no. 2 admitted their presence at the scene of the offence and that they were beaten by Dharamshi and Talshi. If the lawyer of the accused puts a suggestion to a prosecution witness that a particular event happened, or happened in a particular manner, then it cannot be implied that the lawyer commits himself to such an assertion. Suggestions put in cross-examination are no evidence at all and on the basis of such suggestions no inference can be drawn against the accused that he admitted the facts referred to in the suggestions. It is possible that in putting suggestions the lawyer of the accused, if he thinks fit and proper, may not put the entire case of the accused in the cross examination of a prosecution witness.”

16. Moreover the lawyer who appears for the accused keeping in mind the facts of the case that he defends, has the right to take up a defence that he thinks just and proper. In *Nga Ba Sein v. Emperor*, 37 Cri LJ 293 : (AIR 1936 Rang 1), the facts were that the accused was charged for committing murder of his brother-in-law. The defence taken by the accused was that he had not caused the injury. In the Sessions Court the lawyer appearing for the accused openly advised his client to admit the assault and plead the right of private defence but the accused was stubborn and persisted in denying altogether his liability in the crime. The learned Sessions Judge did not allow the lawyer to take up the plea of right of self-defence and the High Court hearing the appeal observed:—

“Moreover, in this particular case it is not correct to say that the right of self-defence was not pleaded. It was pleaded by the pleader who was appearing for the appellant and if the pleader of the accused cannot set up a defence on his behalf, then I would ask what is the use of his appearing at the trial at all. The accused himself may on his own behalf take up a line of defence but it is equally open to his pleader on his behalf to take up another and alternative line of defence.”

Therefore, the accused is entitled to the benefit of the plea set up by the lawyer but it cannot be said that the plea or defence which his lawyer puts forward must bind the accused. The reason is that in a criminal case a lawyer appears to defend the accused and has no implied authority to make admissions against his client during the progress of the litigation either for the purpose of dispensing with proof at the trial or incidentally as to any facts of the case. See Phipson's Manual of Evidence, Eighth Edition Page 134. It is, therefore, evident that the role that a defence lawyer plays in a criminal trial is that of assisting the accused in defending his case. The lawyer has no implied authority to admit the guilt or facts incriminating the accused. The argument of Mr. Nanavati that suggestion put by the lawyer of the accused in the cross-examinations of the prosecution witnesses amounts to an admission under Section 18 of the Indian Evidence Act cannot be accepted.

17. Now in the present case it is in evidence that the question that Dharamshi and Talshi had caused injuries to the appellants was even put to Premji Prag who was not an eye-witness to the incident. It seems question in form of suggestion had been put in the cross-examination of the prosecution witness for question's sake. In their statements under Section 342 accused No. 1 and accused No. 2 stated that on the night of occurrence the bullock of accused No. 1 had gone away from his vadi land and therefore, they had gone in the search of the bullock, in the field situated within the revenue limits of village Khakhoi. When they were passing through one field two persons came there, beat them and they fell down. The accused did not know who these persons were or to which village they belonged. Thus it was not the case of the accused in their statements that they were beaten near the field of Premji Prag and at the time at which Dharamshi and Talshi were beaten. It was not their case that there was a fight between them and their assailants. The suggestions put by their lawyer in cross examination of Dharamshi and Talshi were thus not adopted by the accused in their statements under Section 342 of the Cr PC. It is also to be noted that the attention of the appellants was not drawn while recording their statements under Section 342 of the Cr PC to these denials of the suggestions put in the cross-examination of Dharamshi and Premji and no circumstance can be used against the accused unless he has been given an opportunity to explain the same. Thus from mere fact that suggestions were made in the cross examination of the prosecution witnesses to the effect that Dharamshi and Talshi had beaten the appellants outside the vadi land, no inference can be drawn that the accused had admitted the same.

18. There is another principle which is equally to be borne in mind that suggestions made in the cross-examination of prosecution witnesses cannot be used to fill in the gaps in the evidence of prosecution. Burden lies on the prosecution to prove the guilt of the accused. Such suggestions cannot stand higher than the statement of the accused under Section 342 of the Cr PC. The statement of the accused under section 342 of the Cr PC cannot be used against the accused unless the prosecution proves

its case against him by satisfactory evidence. At times it is used only to lend an assurance to the case of the prosecution case but it can never be used to fill in the gap in the evidence of prosecution.”

(emphasis supplied)

38. In view of the aforesaid, this Court is of the opinion that the defence of suicide-pact taken by the counsel for the appellant-convict at the initial stage of trial is a bald claim without any evidence to support the same. Consequently, in the opinion of this Court, there was no ‘suicide-pact’ between the appellant-convict and deceased.

THE CONTENTION THAT THE AMICUS CURIAE APPOINTED FOR THE APPELLANT-CONVICT HAD NOT PROVIDED ADEQUATE LEGAL REPRESENTATION OR NOT CROSS-EXAMINED THE PROSECUTION WITNESSES IS CONTRARY TO FACTS.

39. Insofar as the contention regarding ineffective legal representation and the Amicus Curiae not cross-examining any of the prosecution witnesses is concerned, this Court is of the view that the same is contrary to facts. The material witnesses i.e. ten out of the twenty five prosecution witnesses had been specifically recalled for cross-examination at the request of Amicus Curiae.

40. In fact, from the alternative / contradictory stands taken by the appellant-convict, it is apparent that it was the appellant-convict’s personal decision to change the advocates. This view is fortified by the diametrically opposite defence taken by the appellant-convict in his 313 Cr.P.C. statement and the suggestions given to the prosecution witnesses during the course of the trial.

41. Also, the fact that the appellant-convict had engaged two private advocates shows that he had a lawyer of his own choice during the trial and the decision to change the lawyer was out of his own personal volition and not thrust or foisted upon him. Consequently, the contention that the Amicus Curiae appointed for the appellant-convict had not provided adequate legal representation or not cross-examined the prosecution witnesses is incorrect and unacceptable.

42. Keeping in view the aforesaid facts and findings, this Court is of the opinion that the prosecution has successfully established its case against the appellant-convict. The evidence on record in particular the depositions of Ms. Archana (PW-7) and Mr. Ishwar Chand (PW-14) prove beyond doubt that the appellant-convict was with the deceased-Sakshi in her room at the time of the incident and she had died on account of a gunshot injury and the sole cartridge had been fired from a pistol recovered at the instance of appellant-convict. Though the appellant-convict had fled from the scene of crime, yet his sperms had been found in the vaginal swab as well as the clothes of the deceased-Sakshi. The presence of appellant-convict at the scene of crime and his failure to adduce any explanation regarding the death of Sakshi, is an important circumstance against the appellant-convict.

CONCLUSION

43. Consequently, this Court is in agreement with the findings of the Trial Court. The conviction order and the order on sentence passed by the Trial Court are confirmed.

44. Accordingly, present appeal, being bereft of merit, is dismissed.
45. Trial court record be sent back.
46. Copy of the judgment be sent to appellant-convict through the concerned Jail Superintendent.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

MAY 08, 2020

rn

