

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

% Reserved on: 20th March, 2023
Decided on: 10th April, 2023

+ **CRL.A. 527/2019**

SURENDER KUMAR MATHUR Appellant
Represented by: Mr.Kanhaiya Singhal, Mr. Prasanna,
Mr.Udit Bakshi, Mr.Jasmeet Singh,
Mr.Ajay Kumar and Mr.Ujwal Gahi,
Advocates.

Versus

STATE OF NCT OF DELHI Respondent
Represented by: Mr.Laksh Khanna, APP for the State.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MS. JUSTICE POONAM A. BAMBA
MUKTA GUPTA, J.

1. By way of this appeal, the appellant challenges the judgment dated 5th March, 2019 passed by the learned Trial Court (“impugned judgment”) convicting the appellant for murder of one Jai Kumar (“deceased”); and also the order on sentence dated 15th March, 2019 (“impugned order on sentence”) whereby the appellant was directed to undergo rigorous imprisonment for life along with fine of ₹30,000/- in default whereof simple imprisonment for one year for offence punishable under Section 302 of the Indian Penal Code, 1860 (“IPC”); was also directed to undergo rigorous

imprisonment for three years along with fine of ₹3,000/- in default whereof simple imprisonment for one month for offence punishable under Section 201 IPC; and was also directed to undergo rigorous imprisonment for three years along with fine of ₹5,000/- in default whereof simple imprisonment for one month for offence punishable under Section 27 of the Arms Act, 1959.

2. A brief background to the filing of the present appeal is that in FIR No.48/2009 wherein a charge-sheet was filed against the appellant, learned Trial Court passed a judgment dated 18th January, 2014 convicting the appellant for murder of the deceased. The said judgment was challenged vide Crl.A. 268/2014, wherein a Co-ordinate Bench of this Court set aside the judgment dated 18th January, 2014 for the reason that the learned Presiding Officer/ASJ had shown undue haste in conducting the Trial and fair opportunity of effectively cross-examining the witnesses was not given to the appellant and accordingly, the judgment dated 18th January, 2014 was set aside and the matter was remanded back to the Trial Court with the following directions vide the judgment of this Court dated 19th August, 2014:

“14. We, therefore, set aside the impugned judgement of conviction and order on sentence and remand the matter back to the learned Trial Court for recalling PW-2 HC Pramod, PW-3 HC Surender Singh, PW-4 HC Surender Singh, PW-5 Ct. Sunil Kumar, PW-6 Ct. Mandeep, PW-7 Ct. Ajay, PW-8 Ct. Hari Om, PW-9 Ct. Kuldeep, PW-14 Ct. Anil, PW-15 Ct. Sandeep, PW16 HC Ranbir, PW-17 Ct. Pawan, PW-18 Hari Ram, PW-19 HC Nand Kishor, PW-20 Bhupender Singh, PW-24 Inspector Mahesh Kumar, PW-25 Puneet Puri, PW-26 Kapoor Singh, PW-27 SI Sandeep Tushir, PW-28 Dr. Manoj Dhingra, PW-29 Inspector

Puran Pant, PW-30 SI Jai Prakash, PW-31 Inspector Sunil Kumar Sharma and PW-32 Inspector Rajesh Kumar and permit the accused to cross-examine them. The court would then follow the procedure prescribed by recording additional statement of accused under Section 313 Cr.P.C. if need be and permit the accused to lead defence evidence if any. The appellant would also be at liberty to file an application for bail before the learned Trial Court which would be disposed of in accordance with law.

3. Thereafter, again an interim application was filed on behalf of the appellant vide Crl. M.A. 16592/2014 in Crl. A.268/2014, and this Court vide its order dated 29th October, 2014 directed that the matter be transferred to some other Court and the Trial shall recommence in terms of its judgment dated 19th August, 2014 with the following directions:

“1. Having perused the application as also the various orders passed by the learned Trial Judge on October 15, 2014 and the order passed on October 16, 2014, we dispose of the application directing that Sessions Case No.109/2013 concerning FIR No.48/2009 PS Begumpur for offences under Section 302/201 IPC and Section 27 Arms Act be transferred by the learned District and Sessions Judge (North-West Distt.) to some other Court.

2. We set aside the order dated October 16, 2014.

3. We direct that trial shall re-commence in terms of the order dated August 19, 2014. Witnesses referred to in paragraph 14 of the order dated August 19, 2014 would be re-summoned by the Court to which the matter is transferred and they shall be permitted to be cross-examined by the accused.

*... ..
... ..”*

Thereafter, the learned transferee Court finally heard and passed the impugned judgment and order on sentence in FIR No.48/2009 dated 3rd December, 2009 at PS Begumpur.

4. In nutshell, case of the prosecution is that on 3rd December, 2009 at 4.35 PM, an information was received from Ct. Pawan Kumar (PW-17) that

a dead body of a male was lying at F. No.50, Pkt-16A, Sector 22, Rohini which was recorded vide DD No.27A at PS Begumpur. On this information, SI Jai Prakash (PW-30) and Ct. Hari Ram (PW-18) reached the spot and found a dead body lying in a pool of blood in the kitchen of the said flat, with bullet injury on the body of the deceased. Three fired leads and two empty cartridges were lying near the body. SI Jai Prakash made endorsement on DD No.27A and sent the *rukka*, on which FIR No.48/2009 dated 3rd December, 2009 under Section 302 IPC at PS Begumpur was registered. In the meantime, crime team reached the spot and a private photographer was called as the camera of photographer of the crime team was not in a working condition. Efforts were made to ascertain the identity of the deceased but no information about any missing person was found. Thereafter, the body was sent to mortuary at SGM Hospital with a request to preserve the body. Efforts were again made for getting the identity of the deceased established by flashing the photographs on cable TV, newspapers etc. but the same could not be ascertained. Ultimately, on 11th December, 2009, the body was sent for post-mortem examination, and after the post-mortem, the dead body was sent to electric crematorium for cremation. On 21st December, 2009, one aged person named Baddal came to the police station and inquired about the photographs of the deceased flashed in the cable TV etc. and on seeing the photograph of the deceased, he identified the deceased to be his son. On 29th December, 2009, Baddal again came to the police station and informed that he had suspicion on one Sonu @ Surender who is constable in Delhi Police as he had some money dispute with the deceased. Thereafter, appellant was interrogated by Insp. Rajesh Kumar (PW-32) on 21st January, 2013, whereafter, he was arrested vide

arrest memo (Ex.PW-27/A) and his disclosure statement recorded (Ex.PW-27/C). After completion of investigation, Insp. Rajesh Kumar filed the charge-sheet and the appellant was charged for offences punishable under Sections 302/201 IPC and Section 27 Arms Act. To prove its case, the prosecution examined 37 witnesses.

5. Dr.Manoj Dhingra (PW-28) conducted the post-mortem examination on 11th December, 2009 tendered his report (Ex.PW-28/A) and opined:

- a) *Firearm entry wound 0.5 cm x 0.5 cm on inner front of left chest, 6 cm above and inner to left nipple, 4.5 cm left to midline from a point 7.5 cm below sternal notch. The projectile travelled in the direction downward, backward and from left to right and penetrated the front of heart at the root of _____ across the front of right lung through the right 6th intercostals space and coming out through the*
- b) *Exit wound 0.5 cm x 0.5 cm on outer back of right chest 7 cm below and outer to the angle of scapula (lower angle) and 10 cm right to midline back.*
- c) *Firearm entry wound 0.8 cm x 0.7 cm on inner front of right side of chest 3 cm inner to and below right nipple 5 cm right to midline from a point 13 cm below sternal notch. The projectile travelled in the direction downward, backward and from right to left penetrating right ventricular wall through the right ventricle lumen through left ventricle lumen and left ventricular wall fracturing the 5th rib in left anterior axillary line and coming out through the*
- d) *Firearm exit wound 0.5 cm x 0.5 cm on outer aspect of left side of chest 13 cm below the axilla.*
- e) *Firearm entry wound 1 cm x 0.5 cm on inner front of left side of chest 10 cm below and inner to left nipple and 1 cm left to midline from a point 17.7 cm below sternal notch with abrasion collar present at superolateral margin of the wound. The projectile travelled in the direction downward, backward and from left to right penetrating the chest wall at 7th intercostals space, through the front of right lobe of liver across the parenchyma, out of the outer aspect of right lobe of liver and coming out through the*

- f) Exit wound 0.5 cm x 0.5 cm on outer back of right lower chest 18 cm right to midline and 35 cm below the acromion process.
- g) Firearm entry wound 0.5 cm x 0.5 cm on left front of chest 11 cm below and inner to left nipple and 4 cm left to midline from a point 21 cm below sternal notch with surrounding abrasion collar. Projectile is directed downward, backward and left to right penetrating the chest wall, then through the front of right lobe of liver causing laceration of liver size 9 cm x 1 cm x 1 cm and out of the inferior surface of right lobe of liver and coming out through the
- h) Firearm exit wound 0.5 cm x 0.3 cm on outer aspect of right side of abdomen 6 cm above and back to anterior superior iliac spine.
- i) Firearm entry wound 0.5 cm x 0.5 cm on back of left forearm 12.5 cm above wrist. The projectile travelling downward and forward fracturing the middle of radius bone of left forearm and coming out through the
- j) Firearm exit wound on outer front of left forearm 11 cm above wrist
- k) Firearm entry wound 0.5 cm x 0.5 cm on back of left forearm 12 cm above wrist and 0.5 cm inner to injury (i) with surrounding abrasion collar. The projectile travelled downward and forward coming out through the
- l) Firearm exit wound on front of left forearm 10 cm above the wrist 0.5 cm inner to injury (j)
- m) Firearm entry wound 0.5 cm x 0.5 cm on inner back of right lower thigh 5 cm above the knee. The projectile travelled downwards across soft tissue of leg and coming out through
- n) Exit wound 0.5 cm x 0.5 cm on inner back of right upper leg 3 cm below knee.
- o) Firearm entry wound 0.5 cm x 0.5 cm on inner back of upper part of right knee.
- p) Firearm exit wound 0.5 cm x 0.5 cm on outer aspect of right leg 11 cm below knee. The projectile travelled through (o), directed downward, forward and outward and coming out through (p).
- q) Multiple abrasions over a area 8 cm x 4 cm on middle front of right leg.
- r) Abrasion 2 cm x 1 cm on middle back of right hand

s) *Abrasion 3 cm x 2 cm on inner back of right forearm.*

Corresponding marks were present on the clothes of the deceased.

Subsequent opinion of Dr.Manoj Dhingra was sought and he opined that time since death was approximately 8-9 days (Ex.PW-28/B).

6. Learned counsel for the appellant assailed the impugned judgment on the ground that there was no motive for the appellant to commit the alleged offence as also noted by the learned Trial Court in its impugned judgment. It was contended by learned counsel that even the identity of the deceased was not established by the prosecution and the same is doubtful. Identification of the deceased by father of the deceased Baddal (PW-23) is doubtful as no evidence is brought on record as to show how was the deceased identified by PW-23 either during investigation or trial. It was pointed out that the identity of the deceased could have been established by DNA evidence, however, no efforts were made to get the DNA of the deceased and PW-23 tallied. Further, there is nothing on record to show that the appellant was acquainted with the deceased and a suggestion to this effect was also denied by PW-23. It was contended that from the post-mortem report (Ex.PW-28/A), the subsequent report (Ex.PW-28/B) and the cross-examination of Dr.Manoj Dhingra, it is unclear as to when the death of the deceased actually took place and from a cumulative reading of these evidences, death may have taken place anytime between 2.30 PM on 1st December, 2009 till 2.30 PM of 3rd December, 2009, and therefore, it cannot be concluded that the death took place between 1.00 AM to 5.00 PM on the

intervening night of 2nd-3rd December, 2009. It was further contended that the prosecution relied upon the testimony of Bhupender Singh (PW-20), the CDR (Ex.PW-36/D) and location chart (Ex.PW-36/F) of the appellant to contend that the appellant was absent from his duty hours on the night of the incident. However, PW-20 did not support the case of the prosecution during his cross-examination as he stated that the appellant was with him for the whole night and had gone for only about half an hour to bring tea for himself and for PW-20. Even as per the CDRs, the appellant remained on the same location i.e. in the area of Sector-16, Rohini till 2.36.02 hours on the night of 3rd December, 2009, and there is nothing to show that the appellant was in the area of Sector-22, Rohini, and thus, the prosecution could neither establish the appellant's presence at the scene of crime nor his absence from the place of duty. It was contended that it is unknown as to how the deceased or his body reached at the place from where it was shown to have been recovered and even father of the deceased (PW-23) denied having any knowledge about the whereabouts of his son/deceased. It was further contended that even the scene of crime has not been established by the prosecution. As per the testimony of SI Jai Prakash (PW-30), the crime team was called at the spot, however, no crime team report was brought on record during the trial, for which adverse inference must be drawn in terms of illustration (g) to Section 114 of the Indian Evidence Act, 1872. It was submitted by learned counsel for the appellant that in the present case there is no evidence to connect the appellant with the alleged crime as there are neither any bloodstained clothes of appellant, nor any finger prints or chance prints to connect the appellant with the crime.

7. Learned counsel for the appellant contended that as per the case of the prosecution, seven rounds were fired at the time of incident, however, no evidence was brought on record to explain about the other five fired empty cartridges and lead. Neither the site plan (Ex.PW-30/C) nor any photographs show the presence of any empty cartridges at the scene of crime. It was further contended that the alleged pistol was not even seized and no seizure memo was prepared as is evident from the testimony of Insp. Puran Pant (PW-29), who deposed that the pistol issued to the appellant was not seized and was sent directly to FSL Rohini from PS Kanjhawala. It was contended that the prosecution failed to connect the alleged pistol No.9512 with the appellant at the relevant time. Even Register No.19 (Ex.PW-37/X) is silent about the Road Certificate No.14/21/11 vide which the empty cartridges were sent to FSL which creates doubt on the proper custody of the said cartridges. Furthermore, there is neither any *malkhana* entry nor any acknowledgement on record to show that the five live cartridges of 9mm requisitioned for test firing were in fact deposited at the FSL. As per the *Asla* register, the alleged weapon was issued to the appellant on 7th November, 2009 and thereafter, on 14th November, 24th November, and 3rd December, 2009, meaning thereby that the appellant was not in possession of the alleged weapon i.e. Pistol No.9512 on 1st and 2nd December, as also on the intervening night of 2nd and 3rd December, 2009. It was contended that the said *Asla* Register was never seized as is evident from cross-examination of PW-14 and PW-34 and therefore, the chances of tampering of the said register cannot be ruled out. Furthermore, PW-15 stated that the entries made at Sr.No.1-6 out of the entries dated 6th, 7th and 8th November, 2009 were made by him, and PW-16 denied having made the entries dated

7th November to 3rd December, 2009 and therefore, the alleged relevant entries dated 10th November, 14th November, 24th November, and 3rd December, 2009 could not be proved. Even the tampering of empty cartridges or the arms register is not ruled out. Thus, there is no conclusive evidence even to say that the appellant was in possession of the alleged weapon of offence i.e. pistol No.9512 either on 2nd December, 2009 or on the intervening night of 2nd and 3rd December, 2009. It has further not been proved by the prosecution that the cartridges recovered were nowhere proved to have been fired from pistol No.9512. Further, reliance was placed on the decisions in (2009) 11 SCC 625 Abhudal Abdulmajid Baloch vs. State of Gujarat and 2014 SCC OnLine Delhi 3479 Bimla Devi and Anr. vs. State to contend that evidence of recovery of weapon of offence coupled with ballistics/forensic evidence is not sufficient to hold the appellant guilty. Thus, in terms of the aforesaid arguments it was pleaded that the impugned judgment and order on sentence of the learned Trial Court be set aside and the appeal be allowed and appellant be acquitted.

8. On the other hand, learned APP for the State contended that the prosecution had successfully established the chain of circumstantial evidence and the learned Trial Court after proper appreciation of evidences had rightly convicted the appellant thus, the impugned judgment and order on sentence be upheld and the appeal be dismissed for which learned APP relied upon the following facts proved by the prosecution:

- i. That the appellant was working as a police constable in Delhi Police on the intervening night of 2nd and 3rd December, 2009 and PW-15 deposed that the appellant was deputed in the Anti-Robbery Picket Team in November, 2009 and was directed to go on duty with

arms. Even the appellant has not denied working as police constable in his statement under Section 313 of the Code of Criminal Procedure, 1973 (“Cr.P.C.”).

ii. That the pistol no. 16709512 (noted with last four digits as ‘9512’ in *asla* register) was issued to the appellant on 7th November, 2009 by PW-16 and recorded in the *asla* register which also bore appellant’s signatures. The entry was then brought forward on 10th November, 14th November, 24th November and lastly on 3rd December, 2009. Sandeep (PW-15) explained the process of maintaining the register and stated that when a particular arm/ammunition is not deposited on the same day of issuance, the entry is carried forward and the previous entry is struck off. No signatures are taken on the carried forward entries and no signatures are taken at the time of deposit of the arms. It was pointed that all of the above-stated entries were struck off when the pistol was deposited back.

iii. On the intervening night of 2nd and 3rd December, 2009, the appellant was on picket duty at Sardar Colony, Bawana Road along with Ct.Bhupender of Civil Defence (PW-20) which was proved by Ct.Hari Om (PW-8) who deposed that on the said date, he made the DD entry No.45B and 46B regarding the arrival and departure of picket staff. PW-20 deposed that on the alleged night of incident, the appellant left the police picket in his Santro car for a tea break but did not return till 7.00 AM, and the said witness maintained his version in cross-examination, but when he was cross-examined again on 7th July, 2015, he resiled from his previous statement. It was pointed out that at

the time PW-20 was cross examined on 7th July, 2015, the appellant was on interim bail from 20th May, 2015 till 28th July, 2015 and thus, the witness was won over by the appellant. With respect to the delay in cross examination, reliance was placed on the decision in (2015) 3 SCC 220 Vinod Kumar v. State of Punjab and CrI.A.127-130 of 2008 C.Muniappan & Ors. v. State of Tamil Nadu.

iv. As per the testimonies of Ct.Pawan (PW-17), Ct. Hari Ram (PW-18) and SI Jai Prakash (PW-30), it is evident that three fired leads and two empty cartridges were found at the scene of crime on 3rd December, 2009 and they were seized vide seizure memo (Ex.PW-30/D). Even the rough site plan (Ex.PW-30/C) corroborates the said seizure memo. These recovered articles were duly seized and deposited in the *malkhana* and ASI Raj Singh who was the MHC(M) on 3rd December, 2009 has corroborated the fact of depositing of three *pullandas* (Ex.PW-37/A) and also establishes that the articles were deposited on the same day therefore, negating the chances of tampering.

v. Insp. Puran Pant (PW-29) collected the pistol bearing No.9521 from PS Kanjhawala and sent the same to FSL Rohini, through Ct.Mandeep (PW-6) which was deposited at FSL vide RC No.68/21/11. Further, five cartridges of 9 mm were requested by the FSL for test firing, which were collected after approval and deposited at the FSL. As per the FSL (Ballistics) Report (Ex.PW-25/A), the individual characteristics of firing pin and breech face marks present on the empty cartridge recovered from the spot and on test fired cartridges were found identical and it was also opined that the

recovered empty cartridges were fired from the pistol issued to the appellant.

vi. As per the handwriting expert report (Ex.PW-21/A), the person who wrote the signatures on the Arms Register (FSL Ex.1) was the same who wrote the specimen signatures (FSL S1-S6) i.e. of the appellant.

vii. From the analysis of the CDR of the appellant, on 3rd December, 2009, at 1.28.32 hours, the appellant was in the area of Sector-16 Rohini and at 2.37 hours, the location was at Sector-11 Rohini and it was pointed out that to reach the scene of crime, a person has to take route via Sector-11 Rohini, which was in fact appellant's location.

9. After hearing both the parties and perusing the record, the following evidence emerges.

10. Ct. Pawan (PW-17) vide his evidence affidavit (Ex. PW-17/1) wherein he deposed that while posted at PS Begumpur on 3rd December, 2009, he was in the beat of Sector 21 and 22, Rohini. At about 4.00 PM, one source came to him and informed that one dead body was lying at F.No.50, Pocket-16A, Sector 22, Rohini and on reaching the spot, he found a dead body of a male aged about 24-25 years at the spot. He passed the information to PS Begumpur, on which, SI Jai Prakash and Ct. Hari Ram reached the spot. The dead body was lying in the kitchen of the flat having bullet injuries on his hands, foot and chest. The head of the body was towards North and feet were towards bathroom in the South direction. There was blood on the floor and lead and empty cartridges were also lying near dead body with bullet marks on the wall of the kitchen. In his cross-

examination, he stated that when he reached the spot, the flat was not locked and the door was only shut. He further stated that chance prints were lifted by the crime team in his presence and the IO lifted empty cartridges and lead pieces along with some other exhibits from the spot.

11. Bhupender Singh (PW-20) deposed before the Court that on 2nd December, 2009, he was working in Delhi Civil Defence and was posted at Sector 16, Sardar Colony at police picket. He stated that on the intervening night of 2nd and 3rd December, 2009, he along with the appellant were on duty at the said picket, and at about 11.45 PM, both of them reached the said picket. He further stated that he and the appellant remained together for about one hour and thereafter, the appellant left the police picket in his Santro car to take a tea break and did not return back until 7.00 AM till he was on duty. In his cross-examination, he stated that no PCR or any other police vehicle came for inspection at the police picket. When he was recalled for his cross-examination on 7th July, 2015, he stated that he was forcefully brought from his house by two Sub-Inspectors of PS Begumpur when this case was opened in 2013 and on the way to PS, he was given two slaps in the gypsy and the said police officers coerced him to be a witness in this case. He stated that he had deposed under the influence of police on account of this incident. Thereafter, the witness was declared hostile and on cross-examination by APP, he stated that the appellant was with him for the entire night and that after 1.38 AM on 3rd December, 2009, the appellant had left the picket for about half an hour to bring tea for both of them from Rohini Jail. He denied the suggestion that he was approached by the appellant while the appellant was on interim bail and hence, he was deposing falsely on 7th July, 2015 in contradiction to his previous statement.

12. Baddal (PW-23), who was the father of the deceased, stated during his testimony on 26th September, 2013 that about three years ago, he had left for Panipat when Jai Kumar (deceased) left for the destination where he had to go for work. Thereafter, he was declared hostile as he was resiling from his previous statement and in his cross-examination, he stated that he was shown the photographs of the deceased at PS Begumpur from which he identified his deceased son. He stated that he did not know whether his son/deceased had any acquaintance with Sonu. He further denied the suggestion that his son/deceased had an acquaintance with Sonu R/o Israna, Panipat. He denied the suggestion that his son/deceased had to take ₹20,000/- from Sonu. He even denied stating to the police that his son/deceased had some money transaction with Sonu R/o Karala, Delhi

13. Ct. Ajay (PW-7) vide his affidavit (Ex. PW-7/1) deposed that on 2nd December, 2009, the appellant and Ct. Bhupender were deputed at Sardar Colony, Bawana Road. In his cross-examination, he deposed that he used to maintain a duty register regarding deployment of police staff of PS K.N. Katju Marg. The duty roster was prepared on daily basis as per the strength of the staff of other police staff assigned to PS K.N. Katju Marg.

14. Ct. Hari Om (PW-8) vide his affidavit (Ex. PW-8/1) deposed that on 2nd December, 2009 at 11.30 PM, he made the entry No.45B & 46B regarding arrival and departure of picket duty staff. In DD No.45B, Ct. Bhupender and in DD No.46B, the appellant were deputed at picket at Sardar Colony, Bawana road.

15. Ct. Sandeep (PW-15) vide his affidavit (Ex. PW-15/1) deposed that he was posted as *chitha munshi* at PS Kanjhawala in November and December of 2009. On 7th November, 2009, HC Ranbir refused to issue a

pistol to the appellant, on which, the appellant came to him and thereafter, he accompanied the appellant to HC Ranbir, who then issued a 9mm pistol No.9512 and ten live rounds to the appellant. He stated that the complete number of the pistol was 16709512, however, only the last four digits used to be written in the arms register. On the direction of HC Ranbir, he made the entry in the arms register and got the signatures of the appellant. He further stated that HC Ranbir concluded the *Goswara* through him every second or third day and it was assessed how many arms were not deposited and the entries of the not deposited arms were brought forward by striking off the previous entries on the day of *Goswara*. He further stated that the said pistol was issued to the appellant on 7th November, 2009 and the entry was repeatedly brought forward in his handwriting till 3rd December, 2009, on which day, at about 6.00-7.00 PM, the appellant came to him and deposited the said pistol along with ten live rounds and after checking the same, he struck off the entry after depositing the pistol. He again stated that the said pistol along with the ten live rounds was in the custody of the appellant from 7th November, 2009 to 3rd December, 2009. In his cross-examination, he stated that out of the entries dated 6th, 7th and 8th of November, 2009, the entries at Sr. No.1 to 6 were made by him. He stated that they used to obtain the signatures of the recipient of arms and ammunitions in the register against the concerned entry and as soon as the arms and ammunitions were deposited, they used to cancel the concerned entry by striking it off manually. He further stated that as per practice, the arms and ammunitions taken out of the *malkhana* on a particular date and not returned on the same date, the entries used to be carried forward the next day and the entries of previous day were struck off and such carried forward

entries did not have the signatures of the recipient. No signatures of the recipient used to be taken at the time of deposit of the arms and ammunitions. He further stated that usually, the exercise of carrying forward the entries of undeposited arms used to be done within 2-3 days as per the instructions of HC Ranbir. He further stated that the entry of pistol No.9512 was struck off on 3rd December, 2009 and the said pistol was issued to SI Ishwar Singh on 6th December, 2009.

16. HC Ranbir (PW-16) vide his affidavit (Ex. PW-16/1) corroborated version of PW-15. However, in his cross-examination, he denied the knowing the contents of Ex. PW-16/1.

17. SI Jai Prakash (PW-30) deposed that on 3rd December, 2009, at about 4.25 PM, he received DD No.27A (Ex. PW-30/A) on which he along with Ct. Hari Ram reached Flat No.50, Pocket-A, Sector 22, Rohini, where they met Ct.Pawan. Dead body of the deceased was lying in a pool of blood with bullet injuries on his body in the kitchen of the said flat. He found three fire leads lying near the body and one empty cartridge lying on the right side of the main gate and one lying near the gate which opened towards Flat No.62. In the meanwhile, SHO and Insp. Sunil Kumar reached the spot. Crime team was called and he made endorsement on DD No.27A and prepared the *rukka* on which FIR was got registered and further investigation was assigned to Insp. Sunil Kumar Sharma. On 11th December, 2009 on instructions of Insp. Sunil Kumar, he went to mortuary at SGM Hospital and tendered the body for post-mortem examination. In his cross-examination, he stated that the IO had filled up the FSL form at the time of seizure of cartridges. He stated that Ex.PW-30/D i.e. the seizure memo of the blood

found at the spot, three fired leads and two fired shells, was not in his handwriting but bore his signatures as witness.

18. IO/Insp. Sunil Kumar Sharma (PW-31) stated that on 3rd December, 2009 he went to the spot i.e. Flat No.50, Pocket -16A, Sector-22, Rohini and on inspection, he found a dead body of a young boy aged about 28-29 years with bullet injuries lying on the floor. Blood, bullet leads and empty cartridge cases were lying around the body and bullet marks were also present on the walls of the flat. He prepared the site plan (Ex.PW-30/C) at the instance of SI Jai Prakash. Crime team was already called at the spot and since there was no photographer in the crime team, therefore, he called a private photographer through a beat constable. From the spot, he lifted bloodstained floor, three bullet leads, two cartridge cases and kept them in separate containers and seized them (Ex.PW-30/D). Despite inquiry, identity of the deceased could not be ascertained and therefore, the dead body was sent to the SGM Hospital with a request to preserve the same for 72 hours. Efforts were made to get the body of the deceased identified but as the same could not be done, the body was sent for post-mortem examination, and thereafter sent to electric crematorium for cremation. He further stated that on 21st December, 2009, one aged person came to the police station by the name of Baddal and made inquiries from the police station and wanted to see the photograph of the deceased, on which he identified the photograph to be of his son. Initially Baddal did not raise suspicion on anyone however, on 29th December, 2009, Baddal again visited the police station and stated that he had suspicion on one Sonu @ Surender, who is a constable in Delhi Police and a resident of Village Karala as his son/deceased had some monetary dispute with Sonu. In his cross-

examination, he stated that after sealing the exhibits at the spot, he did not hand over his seal to anybody and did not deposit the same into the *malkhana* when he returned to the police station. He stated that the cartridges issued to officials of Delhi Police do not bear any definite identification mark and only the pistol has a definite identification mark. In his further cross-examination on 20th November, 2015, he stated that investigation remained with him till 2nd January, 2010 and till that time crime team in-charge did not hand over any report to him. He further stated that no sketch of the empty cartridge cases and bullet leads were prepared.

19. Insp. Puran Pant (PW-29) stated that on 3rd January, 2010, investigation in the present case was handed over to him. On 15th April, 2011, he collected the pistol No.9512 from PS Kanjhawala which was issued to the appellant and was directly sent to FSL, Rohini through Ct. Mandeep vide RC No.68/21. For ballistic analysis, the expert requested for five cartridges for test-fire and after seeking the requisite permission, he obtained the live cartridges which were sealed and were deposited in *malkhana*. On 26th May, 2011, the seal parcel of test-fire cartridges was deposited in FSL. In his further cross-examination on 7th September, 2015, he stated that the FSL forms in respect of the exhibits were not filled at the time of seizure of the articles. The specimen seal of 'SKS' was not available at PS Begumpur at the time of comparison and on 17th February, 2011, he had called the seal of Insp. Sunil Kumar Sharma and affixed on the FSL Form. He further stated that no seizure memo of pistol No.9512 was prepared as it was immediately sent for FSL examination and no entry of the sealed parcel of the pistol was made in the *malkhana* register.

20. HC Surender Singh (PW-4) vide his affidavit (Ex.PW-4/A) stated that on 15th April, 2011, Insp. Puran Pant came to PS Kanjhawala and told that 9mm pistol No.9512 is to be sent to FSL in case FIR No.48/2009, PS Begumpur on which he handed over the said pistol to Insp. Puran Pant who sealed the pistol and was sent to special staff by Ct. Mandeep. In his cross-examination, he stated that on the day when pistol was seized, the same was lying in the stock of arms and ammunition in open condition and without any seal.

21. Insp. Rajesh Kumar (PW-32) deposed that investigation in the present case was entrusted to him in the month of November, 2012 and on 21st January, 2013 at about 9.00-10.00 AM, he reached outside PS Aman Vihar where the appellant met him and was interrogated by him. He along with his team and the appellant reached PS Begumpur at about 1.15 PM where he was again interrogated at length and at about 3.35 PM, the appellant was arrested (Ex.PW-27/A) and his disclosure statement (Ex.PW-27/C) was recorded. On 22nd January, 2013, specimen signatures of the appellant were collected. On 23rd January, 2013 *Asla* Register for the year 2009 at PS Kanjhawala was seized (Ex.PW-19/A). In his cross-examination he stated that he did not see the *Asla* Register. In his further cross-examination on 20th November, 2015, he stated that although it is correct that to check the police officials on picket duty and patrolling duty, one inspector is deputed in one sub-division to check every picket and patrolling staff, however, it is not necessary that such Inspector may check the entire police staff on duty. He stated that he did not investigate as to who was the inspector on duty on the intervening night of 2nd and 3rd December, 2009.

22. Israr Babu (PW-36) who was the Nodal Officer at Vodafone Mobile Services proved the CDR (Ex.PW-36/D) of mobile No.9899219988 along with the cell ID chart (Ex.PW-33/F) of the said number, which was in the name of the appellant. He stated that as per the CDR of the said number, on 3rd December, 2009, at 1.28.32 hours till 1.38.21 hours, the location of the phone was at Rohini Sector-16. At 2.36.02 hours, the location was at plot No.4, Rohini Sector-16. Thereafter, at 2.37.48 hours, the location was at Rohini Sector-11. Thereafter, at 6.01.21 hours the location was of Village Karala and in the intervening period between 2.37.48 hours till 6.01.21 hours, neither calls nor any SMS was made or received from the said number.

23. In his statement under Section 313 Cr.P.C. dated 24th October, 2013, the appellant stated that he was innocent and was falsely implicated in the present case. He denied having known any Jai Kumar/deceased. He stated that on the night intervening 2nd-3rd December, 2009, he was on picket duty along with Civil Defence Ct. Bhupender from 11.45 PM till 5.00 AM, and during this period, he made calls to other police officials who were on other pickets at that night and also stated that CDR of his mobile number would prove the same, which despite being obtained by the police were deliberately not placed on record by the police. He further stated that the checking officer also came at the picket to check and brief them. He further stated that *asla* i.e. 9mm pistol No.9512 along with ten rounds were issued to him on 7th November, 2009, which were deposited by him on 10th November, 2009 and thereafter, on 14th November, 2009 the same pistol along with ten rounds were again issued to him which was deposited on 24th November, 2009. Thereafter, on 12th December, 2009, 9mm pistol No.9516

along with ten rounds was issued to him, which were deposited back on 21st December, 2009. He stated that on the alleged date of incident no weapon was issued to him and that he was not issued any weapon and ammunition after 25th November, 2009 till 11th December, 2009.

24. In his statement dated 24th May, 2017, the appellant stated that he was deployed at the picket duty on the night intervening 2nd and 3rd December, 2009 but he did not have any pistol or rounds in his possession. He left the picket on his motorcycle at about 1.30 AM for bringing tea and had returned within 35-45 minutes. He denied having any car with him on that night. He stated that his and PW-20's shift ended at 5.00 AM after which, both of them left for their home. He further stated that he was neither acquainted with the deceased nor deceased's father Baddal nor their family, and also denied having any money dealing with the deceased. He stated that Insp. Sunil Kumar had a grudge against him as there was a dispute between Insp. Sunil Kumar and the appellant's father with respect to a plot in Jain Nagar. He stated that Insp. Sunil Kumar threatened him to either speak with his father or face dire consequences and Insp. Sunil had also made a complaint against him in HAP, Outer District.

25. SI Vikram (DW-1) deposed that on the intervening night of 2nd and 3rd December, 2009, he was working as a night checking/patrolling officer. On being shown copy of Register No.2(B) dated 3rd December, 2009 (Ex.DW-2/A), the witness stated that the entry at Sr. No.2 was a departure entry vide which he had left for checking and patrolling from PS; and vide DD No.7 (Ex.DW-2/B), he had returned to the PS at about 5.20 AM after patrolling and checking. He further stated that because of major lapse of time, he does not remember whether he had checked the pickets on the night

of 2nd and 3rd December, 2009 on which permission was sought by the counsel for the appellant to cross-examine the witness which was allowed. In his cross-examination, he stated that he does not remember whether he had reported any mishap or non-reporting of staff on duty or any accident to the duty officer or any other superior officer. He stated that if any mishap, non-reporting of staff on duty on the pickets, any accident, emergency call or reportable incident is recorded by the checking/night patrolling officer, he is supposed to report it to the PS.

26. Case of the prosecution is that the appellant was working as a constable in Delhi Police and was in possession of a pistol issued from PS Kanjhawala. The said pistol was issued to the appellant on 7th November, 2009 which remained in his possession till 3rd December, 2009 i.e. the date of his incident. As per the handwriting expert's opinion, the signature on the arms register (FSL Ex.1) tallied with the specimen signature of the appellant. On the intervening night of 3rd December, 2009, the appellant was on duty with Bhupender Singh at police picket at Sardar Colony, Bawana Road, Rohini. After about one hour of duty, the appellant left the picket in his Santro car and did not come back for his duty. On the same day, the dead body of the deceased was found at Flat No.50, Pocket-16A, Sector 22, Rohini and three fired leads and two empty cartridges were found near the body. As per the post-mortem report, the death was caused by the projectile discharge from a fire arm weapon. The dead body was identified by Baddal (PW-23) who was the father of the deceased, from the photographs shown to him and he also raised suspicion on the appellant and alleged that there was some monetary dispute between the appellant and the deceased, however, in his deposition before Court, Baddal denied that there was some

monetary or other dispute between the appellant and the deceased. Thereafter, the pistol issued to the appellant was sent with the three fired leads and two empty cartridges recovered from the spot to the FSL. As per the FSL report, the empty cartridges were opined to have been fired from the 9mm pistol issued to the appellant and thereafter, the appellant was arrested on 21st January, 2013.

27. Thus, as per the prosecution, the two main pieces of circumstantial evidence which link the appellant to the alleged offence of murder of Jai Kumar are firstly, while on duty on the intervening night of 2nd and 3rd December, 2009, the appellant left his duty at the picket for which the prosecution relies on the evidence of Bhupender Singh, dead body being found on the evening of 3rd December, 2009 and the opinion of the post-mortem doctor qua time of death. Secondly, the prosecution seeks to prove that the weapon of offence is a service revolver allegedly in the possession of the appellant at the time when the murder of deceased took place for which evidence of ballistic expert and other witnesses is relied to prove the possession of service revolver at the relevant time.

28. To prove the first circumstance that appellant left the picket on the intervening night of 2nd and 3rd December, 2009, Bhupender Singh (PW-20) deposed that after one hour of his and appellant joining duty at 11.45 PM, the appellant did not return back on 3rd December, 2009 till 7.00 AM when he left his duty. Though in his subsequent cross-examination, this witness turned hostile, however, still his testimony as recorded initially can be relied upon. The fact that the appellant was not at the picket throughout the night also stands proved by his CDRs. However, the moot question is whether the prosecution has been able to prove that the murder was committed when the

appellant left his duty. As per the post-mortem report (Ex.PW-28/A), the doctor did not opine anything regarding the time of death and it was only in the subsequent opinion (Ex.PW-28/B) that the time of death was opined to be eight to nine days. In his cross-examination, PW-28 stated that the time since death may also be nine to ten days. Therefore, in light of these facts, the exact time of death is not ascertainable. Hence, it is not proved that the murder was committed when the appellant left the picket.

29. Even if the version of the prosecution is believed that the death in fact took place on the intervening night of 2nd and 3rd December, 2009, it would be imperative to ascertain whether the alleged weapon i.e. pistol No.9512 was in fact in possession of the appellant. Case of the prosecution is that vide the *Asla* Register, the appellant was in possession of the pistol No.9512 till 3rd December, 2009, on which day the pistol was returned and the entry in the said register was struck off. However, the version of the appellant is that he was in possession of the said pistol till 24th November, 2009 and was never in possession of any weapon on the alleged date of incident. This Court on perusal of the *Asla* Register available with the trial court record found out that the said register was maintained in a very haphazard manner and there was no set procedure for recording either the issuance of a weapon/ammunition, or its continued possession with any officer, or the return of a weapon/ammunition.

30. PW-15 and PW-16 by way of their evidence affidavit and their cross-examination, explained the procedure of recording of entries in the *Asla* Register as per which whenever any weapon was issued, the name of the officer along with the pistol number and the number of cartridges issued were recorded and signatures of the concerned police officer to whom the

weapon was issued was taken. Whenever the weapon was returned, the entry of issuance of weapon was simply struck off without noting any time and date of return. If any weapon was not returned, the previous entry was struck off and was carried forward to a subsequent date, but without the signature of the concerned police officer to whom weapon was issued.

31. It is not in dispute that the appellant was in possession of pistol No.9512 till 24th November, 2009 as the same was admitted by him during his statement under Section 313 Cr.P.C. Referring to the *Asla* Register, learned counsel for the appellant drew attention of this Court to various other entries in the said *Asla* Register which shows major discrepancies in the manner of recording the issuance, carrying forward and return of the arms and ammunition. It was also pointed out that it is unknown as to why entry dated 14th November, 2009 was not struck off when the same was carried forward to 24th November, 2009, which was struck off. Therefore, this Court finds it difficult to place reliance on the *Asla* Register as it is.

32. Further, entry dated 3rd December, 2009 in the *Asla* Register recorded Pistol No.9512 along with ten cartridges in the name of the appellant, which was struck off after the pistol with ten cartridges was deposited back on 3rd December, 2009 itself. As per the post-mortem report there were seven fire arm entry wounds on the body of the deceased and as per PW-30 and PW-31, three leads and two cartridge cases were recovered from the scene of crime. It was the case of the prosecution that the appellant used the service revolver for commission of the offence and thereafter deposited back the said pistol. Along with the pistol, all the ten live cartridges were deposited back by the appellant. Thus, if the appellant committed the alleged offence, he either procured some bullets from outside and either used them for

commission of the offence or he used the bullets issued to him and replenished the cartridges from outside at the time of depositing them back. Ct.Sandeep categorically deposed that at the time when the pistol and the cartridges were deposited by the appellant on 3rd December, 2009, he struck off the entry after checking the pistol and the cartridges, and in the absence of any investigation or evidence with respect to the appellant procuring or using other cartridges, the prosecution has miserably failed in connecting the appellant with the weapon of the offence allegedly used.

33. Further, the prosecution also tries to establish motive on behalf of the appellant to commit the crime i.e. a financial dispute between the appellant and the deceased however, the witness on this count, i.e. Baddal, father of the deceased has not supported the case of prosecution. Hence, there is no evidence on record to prove even an iota of any financial dispute between the two which could be the motive to commit the alleged offence.

34. In view of the discussion aforesaid, it is evident that the prosecution has not been able to prove that the appellant committed the murder of deceased beyond reasonable doubt. Hence, the impugned judgment of conviction and order on sentence is set aside. The appellant is directed to be released forthwith if not required in any other case.

35. Appeal is disposed of.

36. Copy of the judgment be uploaded on the website of this Court and be conveyed to the Superintendent, Jail for intimation to the appellant and compliance. Copy of this judgment be also sent to the Commissioner of Police, Delhi to look into the anomalies in maintaining the Asla registers at the police stations.

**CRL.M.A. 9032/2021 (permission to file affidavit of the neighbour/
landlord)**

CRL.M.B.1183/2022 (suspension of sentence)

Applications are dismissed as infructuous.

**(MUKTA GUPTA)
JUDGE**

**(POONAM A. BAMBA)
JUDGE**

**APRIL 10, 2023
'vn'**



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