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HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 474 of 2019

Mohan Singh Rawat

.....Appellant

Versus

State of Uttarakhand .....Respondent

Present:-

Mr. Piyush Sammal, Advocate for the appellant.
Mr. Siddhartha Bisht, AGA for the State.
Mr. Nimish Chibb, Advocate with Mr. Satyam Bhatia and Ms. Gurbani Singh, Advocates for the complainant.

Coram: Hon'ble Ravindra Maithani, J.
Hon'ble Alok Mahra, J.

Hon'ble Ravindra Maithani, J. (Oral)

The challenge in this appeal is made to the judgment and order dated 09.08.2019 passed in Sessions Trial No. 66 of 2018, State of Uttarakhand v. Mohan Singh Rawat, whereby the appellant has been convicted under Section 302 IPC and Section 30 of the Arms Act, 1959 and has been sentenced as under:-

(i) Under Section 302 IPC – Life imprisonment and a fine of Rs. 10,000/-. In default of payment of fine, to undergo further imprisonment for a period of six months.

(ii) Under Section 30 of the Arms Act, 1959 – Rigorous imprisonment for a period of six months.

2. Heard learned counsel for the parties and perused the record.

3. The prosecution story, briefly stated, is as follows. The deceased Gaurav Kush Bakshi was running a mobile shop in the name and style of “Gauri Communication” in Haldwani. On 05.07.2018, during day time, the appellant gave his mobile phone for repair. Again, on the same day, at about 3-3:30 p.m., the appellant visited the mobile shop. The deceased handed over his mobile phone saying that a new battery has been put in the mobile phone, therefore, once charged, it would work properly. But, the appellant insisted that the mobile phone is not repaired. In this altercation, the appellant hit the mobile phone on the wall, which hit the photograph of the father of the deceased, due to which the photo frame had broken. The other workers in the shop tried to pacify the appellant, but he prepared to scuffle with the deceased and in a fit of rage, left the shop.

4. Again at about 07:30 p.m., in the evening, when PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya were also in the shop, the appellant visited the shop. At that time, the deceased told the appellant that he is misbehaving, therefore, he should leave the shop or else he would report the matter to police. But, then suddenly, the appellant took his gun from his shoulder and fired, due to which the deceased Gaurav Kush Bakshi fell over the ground. The appellant left his bag and gun and ran away from the spot. PW 4 Gaurav Arya tried to catch him, but since a lot of crowd had gathered, he came back in the shop and placed the gun and the bag of the appellant on the counter.

5. The deceased was taken to hospital, where he was declared brought dead. A report of the incident was given by the brother of the deceased, namely, PW 1 Gaurav Luv Bakshi, Ex. A-2,

based on which, Chik FIR, A-9, was lodged at 09:15 p.m. on the same day and a Case Crime No. 215 of 2018 under Sections 302 IPC and Section 30 of the Arms Act, 1959 was lodged against the appellant. The appellant was apprehended on the same day. His trousers, shoes and socks were taken into custody. A recovery memo, Ex. A-18 was prepared and its reference was made in the general diary of the police station on 06.07.2018. The extract of general diary is Ex. A-20. On the date of incident itself, when the police visited the spot, they took into custody the plain and blood stained tiles from the shop, prepared its recovery memo, Ex. A-21. The police also took into custody the DBBL gun, which had one empty cartridge in the right barrel and one live cartridge in the left barrel. In addition to it, there were six more live cartridges on the chair. They were taken into custody. A recovery memo, Ex. A-22, was prepared and entry to that effect was made in the general diary at police station at 02:48 p.m. on 06.07.2018. The extract of general diary entry of police station is Ex. A-24. Inquest of the deceased was prepared on 05.07.2018, which is Ex. A-1. Postmortem was conducted on 06.07.2018, which is Ex. A-11. According to the post-mortem report, the cause of death is due to shock as a result of injury sustained to vital structures of head and neck caused by smooth bore firearm.

6. During investigation, site plan was prepared on 07.07.2018. It is Ex. A-29. On the same day, the police also recovered the mobile phone of the deceased. Its recovery memo is Ex. A-8. The police also recovered on that date some human body parts, hair and pallets, of which recovery memo Ex. A 26 was prepared. The mobile and other recovered pallets, etc. were lodged at the police station on

the same day vide general diary report no. 39 of 07.07.2018. Its GD extract is Ex. A27.

7. In fact, during investigation, the police had also taken a DVR from the house of one Tribhuvan Joshi, which was installed at a distance of about 100 mts. from the place of incident. Its recovery memo was also prepared, which is Ex. A-23. It is further the prosecution case that on 10.07.2018, the elder brother of the appellant Laxman Singh handed over the gun licence of the appellant by which he fired at the deceased. A recovery memo of it was prepared, which is Ex. A-30. This was immediately entered into the police station by GD report no. 44 of 10.07.2018, the extract of which is Ex. A-31. The police also obtained information with regard to the gun licence number of the appellant from the District Magistrate, Bageshwar, who reported that the gun is in the name of the appellant. This report is Ex. A-32.

8. The seized DBBL gun, cartridges, tiles and clothes of the deceased as well as pants, socks, shoes of the appellants and other articles, such as, a piece of jaw with teeth, hair, which were collected from the place of occurrence were sent for forensic examination. The reports were received from the forensic science laboratory, which are Exs. A-36, A-37 and A-38. In fact, in the instant case, the last witness PW 12 K.R. Pandey was examined on 25.05.2019. Thereafter, on 31.05.2019, the prosecution filed an application with the averments therein that the forensic science laboratory report has been received from the forensic science laboratory, which is admissible evidence under Section 293 of the Code of Criminal Procedure, 1973 (“the Code”), therefore, they be admitted in evidence and exhibited accordingly. This application 33A was not objected to by the appellant.

Accordingly, Exs. A-36, A-37 and A-38 were marked on those three forensic science laboratory reports. They will be discussed in detail at a later stage.

9. After investigation, the charge sheet, Ex. A-35 was filed against the appellant, which is the basis of the case. On 23.10.2018, the charge under Section 302 IPC and Section 30 of the Arms Act, 1959 was framed against the appellant. He denied the charges and claimed trial.

10. In order to prove its case, the prosecution examined as many as 12 witnesses, namely, PW 1 Gaurav Luv Bakshi, PW 2 Arvind Kumar Tiwari, PW 3 Kailash Singh Negi, PW 4 Gaurav Arya, PW 5 Head Constable Mohammad Aakil, PW 6 Dr. P.S. Kholia, PW 7 Constable Santosh Singh Bisht, PW 8 SI Nirmal Singh Latwal, PW 9 SS Dasoni, PW 10 Constable Bansidhar Joshi, PW 11 Rajesh Tiwari and PW 12 K.R. Pandey.

11. After the prosecution evidence, the examination of the appellant was done under Section 313 of the Code. After hearing the parties, by the impugned judgment and order, the appellant has been convicted and sentenced, as stated hereinbefore. Aggrieved, the appellant has preferred the instant appeal.

12. Learned counsel for the appellant submits that the prosecution has utterly failed to prove its case beyond reasonable doubt; the appellant ought to have been acquitted of the charge framed against him, but he has wrongly been convicted. Learned counsel have also raised the following points in his submission:-

(i) The incident of 03:30 p.m. on 05.07.2018 has been stated by PW 4 Gaurav Arya only; his statement on this aspect is uncorroborated.

(ii) PW 2 Arvind Kumar Tiwari has not stated anything about the incident that allegedly took place on 05.07.2018 in the afternoon, therefore, there is no motive as such proved.

(iii) There are no independent eyewitnesses; according to the witnesses, there were some customers in the mobile shop, but they have not been examined; further, the police had taken the DVR in custody, but CCTV footages have not been proved during trial; it doubts the prosecution case.

(iv) PW 4 Gaurav Arya and PW 2 Arvind Kumar Tiwari, both are highly interested witnesses; their statements cannot be termed as totally reliable statements; in absence of independent witnesses, their evidence may not be a basis of conviction.

(v) Insofar as the incident of firing is concerned, the forensic science laboratory report is not conclusive; FSL report has not been placed to the appellant under Section 313 of the Code, therefore, the report may not be read into evidence.

(vi) Referring to the statement of PW 2 Arvind Kumar Tiwari, it is argued that his statement is totally unreliable. According to him, he neither tried to catch the appellant nor he visited the hospital or the police station. It is argued that had PW 2 Arvind Kumar been present in the shop, he would have acted differently; therefore, his statement is not reliable.

(vii) Referring to the statement of PW 4 Gaurav Arya, it is argued that according to him, the tiles from the mobile shop were taken into custody on 07.07.2018, whereas, according to PW 9 S.S. Dasoni, the tiles were taken into custody by him on 05.07.2018. The recovery memo of which is Ex. A21, which was lodged at the police station on 06.07.2018 at 02:48 a.m. by virtue of GD extract, Ex. A-24. It is argued that it doubts the prosecution case.

(viii) The statement of PW 4 Gaurav Arya is also not reliable, because he has developed a new story of breaking of photo frame at 03:30 p.m. on 05.07.2018 by the appellant by hitting his mobile phone on it; this story is not corroborated by any other witness.

(ix) PW 4 Gaurav Arya also is not an eyewitness; had he been present at the spot, he would have visited the hospital or the police station; his conduct, like conduct of PW 2 Arvind Kumar Tiwari is quite unnatural; therefore his statement is not reliable.

13. On the other hand, learned State Counsel as well as the learned counsel for the informant submits that it is a case of direct evidence; PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya are independent witnesses; they were working in the shop of the deceased for different companies; they were being paid from their companies; they have witnessed the incident. Following points have also been raised on behalf of the prosecution and the informant:-

(i) PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya are the eyewitnesses; they have witnessed the incident that took place at 07:30 p.m. on 05.07.2018, when the appellant fired at the deceased.

(ii) PW 2 Arvind Kumar Tiwari has categorically stated that in the morning at about 11:00 a.m., the mobile phone was given by the appellant for repair; during lunch hours, this witness had gone to his home and again at 07:30 p.m., the incident of firing took place, whereas PW 4 Gaurav Arya has given evidence of all the three stages, i.e. what

happened when the mobile phone was given by the appellant in the morning at 11:00 a.m., as to what happened at 03:30 p.m. and finally, as to how the incident did take place at 07:30 p.m.?

(iii) With regard to the incident that took place at about 03:30 p.m., in fact, PW 1 Gaurav Luv Bakshi has stated that after the incident, the deceased had called him and told that the appellant had done altercation and abused him; soon after the incident, the deceased was taken to hospital, but he was declared brought dead by the doctors.

(iv) The post-mortem report supports the ocular evidence.

(v) The appellant had come with his gun and cartridges at the shop, which he left after the incident; the gun licence of the appellant was given by the elder brother of the appellant, namely, Laxman Singh Rawat. The gun has same number, which is incorporated in the licence and as per the report of District Magistrate, Bageshwar the licence of the gun that was recovered from the spot, was in the name of the appellant. The FSL report confirms that the DBBL gun was fired through. The shoes,

socks, pants of the appellant had blood of the deceased.

14. On behalf of the prosecution, it is argued that the prosecution has been able to prove its case beyond reasonable doubt; the appellant has rightly been convicted; the appeal is devoid of merit, which deserves to be dismissed.

15. Before the arguments are appreciated, it would be apt to note as to what the witnesses have stated.

16. PW 1 Gaurav Luv Bakshi is the informant, who is the brother of the deceased. He has stated that on 05.07.2018, at about 02:30 - 03:00 p.m., the deceased had telephonically informed him that the appellant had quarrelled with him at about 2-2:30 p.m. and had also abused him; at 07:30 p.m. on the same day, PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya, who were working on the shop of the deceased, telephoned him that the appellant had fired the deceased and after firing, he had left his gun and bag at the spot; he was tried to be caught but as the crowd had gathered, he could not be caught; the deceased was taken to hospital, where he was declared by the doctors as brought dead. This witness has proved his signature on the inquest, which is Ex. A1. He has also proved the FIR, which he lodged.

17. PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya are the eyewitneses. According to PW 4 Gaurav Arya, on 05.07.2018, he was working in the shop of the deceased Gaurav Kush Bakshi on behalf of Samsung company; he was getting his salary from the said company; on that day, in the morning, at about 11:00 a.m., the

appellant came and gave his mobile phone for repair to the deceased Gaurav Kush Bakshi; at about 03:00 – 03:30 p.m., on the same day, the appellant visited the shop; PW 2 Arvind Kumar Tiwari was not at the shop; he had gone for lunch; the appellant demanded his mobile phone, which he had given for repair; the deceased gave his mobile phone saying that he has put new battery into it and it requires charging, but the appellant said that he had given the mobile phone for repairing, therefore, it should be fully repaired. The witness further stated that, in this conversation, the appellant suddenly threw the mobile phone, which hit the photograph of the father of the deceased and the photo frame had broken. This witness and others tried to pacify the appellant, but he prepared for scuffle with the deceased. According to PW 4 Gaurav Arya, again at 07:30 p.m. on the same day, the appellant came at the shop; this witness, PW 2 Arvind Kumar Tiwari and other persons were in the shop; the appellant was holding a gun and a bag in his hand; he again inquired about the mobile phone; the deceased told that he is misbehaving with him, therefore, he should leave the shop; at it, the appellant took his gun and fired at the deceased Gaurav Kush Bakshi; after firing, the appellant left his bag and gun and started running; this witness tried to catch him, but could not run because there was a lot of crowd; he came back in the shop and put the mobile phone and the gun on the counter and other articles, which had spilled out from the bag were also kept in the bag.

18. PW 2 Arvind Kumar Tiwari has corroborated the statement of PW 4 Gaurav Arya and stated about the incident that took place at 11:00 a.m. when the appellant had given his mobile phone for repair and about the incident that took place at 07:30 p.m., when the deceased was shot dead by the appellant. With regard to the

incident that took place at 03:30 p.m., this witness is not an eyewitness. According to him, in the afternoon, he had gone for lunch and he arrived at the shop at 04:00 p.m. and then he was told by PW 4 Gaurav Arya and others that in the afternoon, the appellant had visited the shop and had abused the deceased.

19. PW 3 Kailash Singh Negi was incharge Police Chowki, Medical College, Haldwani, District Nainital on 05.07.2018. He is a formal witness. According to him, on that day, he had received a death memo of Kush Bakshi from Sushila Tiwari Hospital, Ex. A-3; he entered it into general diary of the police station. According to this witness, the inquest was prepared and the dead body was sent for post-mortem. This witness has also stated about those documents.

20. PW 5 Head Constable Mohd. Aakil is also another formal witness. He has recorded the chik FIR, Ex. A-9 and entered it into the GD entry, Ex. A-10.

21. PW 6 Dr. P.S. Kholia had conducted the post-mortem of the deceased on 05.07.2018. He had found the following external injuries on the body of the deceased:-

> "1. Entry wound, measuring 3 x 2 cm situated over left side of neck, 5 cm away from midline, wound is directed left to right and piercing the neck structure including skin, subcutaneous tissue, trachea, esophagus through and through, whereas on the right side there is an exit wound of size 9.5 x 6 cm, all the neck structures are pierced including laryngio-tracheal structure. On the

deeper tissue of neck region, a greyish metallic projectile measuring 2 x 0.5 cm and a piece of greyish metallic projectile measuring 0.5 cm x 0.5 cm were recovered. And also a greenish blackish plastic wad was recovered. All the neck structure were ecchymosed.

2. Along the track of wound the mandible was fractured in multiple pieces in the front and on the right side.

3. Fracture of hard palate/upper palate noted.

4. Maxillary bone of right side fractured into multiple piece.

5. Laceration, measuring 2 x 1 cm, bone deep present over middle of forehead.

6. Lacerated wound measuring 5. X 3 cm, bone deep present over palmer aspect of left index finger along with the black staining of margins.

7. Blackish discolouration noted just below the right eye."

22. According to PW 6 Dr. P.S. Kholia, the cause of death was due to shock as a result of injury sustained to vital structures of head and neck caused by smooth bore firearm. He has proved the post-mortem report, Ex. A11.

23. After the incident, the police acted on two directions. PW 8 SI Nirmal Singh Latwal was incharge Police Chowki Heeranagar, Haldwani. According to him, at 08:00 p.m. on 05.07.2018, he was informed about the incident of firing; he along with PW 7 Santosh Bisht and others reached at the spot; he was told to maintain law and order; he was also asked for search of the appellant; thereafter, the appellant was arrested at 11:50 p.m.; he prepared the arrest memo. This witness has proved the arrest memo and other documents, Ex. A-14, A-15 and A-16. According to this witness, he also took into custody the pants, shoes and socks of the appellant and prepared its recovery memo, Ex. A-18. He has proved the GD entry related to it, Ex. A-19. He also proved the articles like pants, socks, shoes, material exhibits 1 to 4.

24. PW 7 Santosh Bisht has corroborated the testimony of PW 8 Nirmal Singh Latwal. In addition to it, this witness has also stated about the articles, which he had lodged at forensic science laboratory.

25. There is another set of activity done by the police on 05.07.2018, after the incident. PW 9 S.S. Dasoni was posted as Senior Sub-Inspector at Kotwali Haldwani on 05.07.2018. According to this witness, on receiving the information of firing, he reached at the place of incident and took into custody the plain and blood stained tiles, prepared their recovery memo, Ex. A-21. He also took into custody the DBBL gun of the appellant, the cartridges and prepared their recovery memo, Ex. A-22 and he lodged all these articles at the police station on 06.07.2018 at 2:48 a.m., which was entered into the general diary, the extract of which is Ex. A-24. This witness has proved the articles that

he had taken into custody on that day, which are material exhibits 5 to 21.

26. PW 10 Constable Banshidhar Joshi is also a witness of recovery of mobile phone, which was taken into custody on 05.07.2018.

27. PW 11 Rajesh Tiwari is an independent person. According to PW 11 Rajesh Tiwari, after the incident of firing, he also reached at the place of incident; the deceased had already been shifted to hospital. According to this witness, the police had taken blood stained tiles and plain tiles and a recovery memo was prepared; he also signed the recovery memo, Ex. A-21. He is also a witness of recovery memo by which the police had taken into custody the DBBL gun and cartridges, Ex. A-22. He is also a witness of the recovery memo, Ex. A-23, by which the police had taken into custody the DVR.

28. PW 12 KR Pandey is the Investigating Officer. He has stated about the steps taken during investigation. He also stated that the appellant was interrogated by him, wherein he had confessed his guilt. This witness had inspected the place of incident and prepared a site plan, Ex. A-29. According to PW 12 K.R. Pandey, on 10.07.2018, the brother of the appellant had given the licence of DBBL gun, by which the deceased was killed. A recovery memo, A-30, was prepared, which was entered into general diary entry of the same day. According to him, the appellant's gun licence number 3812/G-II/*Ma Rithagad*/2009 had gun no. B/74625/4614 recorded in it. Thus, according to PW 12 K.R. Pandey, the licence of the gun was in the name of the appellant, which was confirmed by the communication of the District Magistrate, Bageshwar, Ex.A-22. After investigation, this

witness has submitted the charge sheet. In fact, it is this witness, who had taken into custody the tiles, part of human body, etc. He has proved the materials collected by him during investigation, which are material exhibits 22 to 25. He has also stated about the clothes of the appellant and other articles, which were sent for forensic examination.

29. It is true that there are some witnesses, who may be termed totally unreliable, some are partly reliable and some are totally reliable, whose sole testimony may be the basis for conviction. It depends upon the facts and circumstances of the case.

30. In order to bring home the guilt of an accused, the prosecution has to prove its case beyond reasonable doubt. What is '**proved**', it has been discussed by the Hon'ble Supreme Court in the case of K. Ponnuswamy v. State of T.N. by Inspector of Police, Directorate of Vigilance and Anti-Corruption, South Range, Trichy, 2001 (6) SCC 674. In para 27 of it, the Hon'ble Supreme Court has observed as under:-

> "27. ....
>
> There can be no dispute with the legal proposition. However, let us see what is meant by "proved". Section 3 of the Evidence Act defines "proved" as follows:
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> > "**3. 'Proved'**.—A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Further, Section 114 of the Evidence Act reads as follows:

> "**114. Court may presume existence of certain facts**.—The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

Thus the fact is said to be proved when after considering the matters before it, the court believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. In coming to its belief the court may presume existence of any fact which it thinks likely to have happened having regard to the natural course of event, human conduct and public and private business, in relation to the facts of each case."

31. In the case of State of Karnataka Vs. J. Jayalalitha, (2017) 6 SCC 263, the degree of certainty i.e. proof beyond reasonable doubt has been discussed by the Hon'ble Supreme Court. In para 222 to 226 of the judgment, the Hon'ble Supreme Court has observed as follows:-

> **"222.** That the burden of proof of a charge is on the prosecution subject to the defence of insanity and any other statutory exception has been authoritatively proclaimed in *Woolmington* v. *Director of Public Prosecutions* [*Woolmington* v. *Director of Public Prosecutions*, 1935 AC 462 (HL)] and testified by the following extract : (AC pp. 481-82)
>
> > "... Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on

> the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

223. In Shivaji Sahabrao Bobade v. State of Maharashtra [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] , Hon'ble Krishna Iyer, J., in his inimitable expressional felicity cautioned against the dangers of exaggerated affinity to the rule of benefit of doubt as hereunder : (SCC p. 799, para 6)

> "6. ... The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light-heartedly as a learned author (Glanville Williams in "Proof of Guilt") has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated

> "persons" and more severe punishment of those who are found guilty."
>
> **224**. In Collector of Customs v. D. Bhoormall [Collector of Customs v. D. Bhoormall, (1974) 2 SCC 544 : 1974 SCC (Cri) 784] , this Court had observed (SCC p. 553, para 30) that in all human affairs, absolute certainty is a myth and the law does not require the prosecution to prove the impossible. It was highlighted that all that was required is the establishment of such a degree of probability that a prudent man may on this basis believe in the existence of the fact in issue. It was exposited that legal proof is thus not necessarily perfect proof and is nothing more than a prudent man's estimate as to the probability of the case.
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> 225. That proof beyond reasonable doubt is only a guideline and not a fetish and that a guilty man cannot get away with it because truth suffers from infirmity, when projected through human processes, was underscored by this Court in Inder Singh v. State (Delhi Admn.) [Inder Singh v. State (Delhi Admn.), (1978) 4 SCC 161 : 1978 SCC (Cri) 564] . It was remarked that if a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is, too imperfect and thus whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many, guilty men must be callously allowed to escape.
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> **226**. In the same vein, this Court in Ashok Debbarma v. State of Tripura [Ashok Debbarma v. State of Tripura, (2014) 4 SCC 747 : (2014) 2 SCC (Cri) 417] expounded that in our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty but only beyond reasonable doubt and the criminal courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt" even though the courts are convinced of the accused persons' guilt beyond reasonable doubt."

32. As such, it cannot be said that the testimony of a natural witness may be discarded merely because he happens to be related to the deceased in some manner. There may be circumstances where the only witness possible would be family members or near relatives, like a

situation when an offence is committed inside a house. What weight should be accorded to a witness? It depends upon the facts and circumstances of the case.

33. It is being argued that PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya are interested witnesses, therefore, their testimony is not fully reliable. This argument has no merit for acceptance. PW 2 Arvind Kumar Tiwari has stated that he was working in the shop of deceased Gaurav Kush Bakshi, but he was a salesman of OPPO company, from where he was getting Rs. 9,000/- per month salary. Similarly, according to PW 4 Gaurav Arya, he was paid employee of Samsung Company from where he was getting Rs. 8,000/- per month. Both of these persons were working in the shop run by the deceased Gaurav Kush Bakshi. They are just natural witnesses.

34. It is also true that according to PW 4 Gaurav Arya, at the time of incident of 07:30 p.m. on the date of incident, when the appellant came and fired at the deceased, there were customers and one Mohsin, but, those customers and Mohsin have not been examined. But, it is also not necessary for the prosecution to examine all the witnesses. Non-examination of any customer or Mohsin by the prosecution also does not doubt the prosecution case, even slightly.

35. It is argued that with regard to the incident of 03:30 p.m. on 05.07.2018, only PW 4 Gaurav Arya has stated. It is a well settled rule of appreciation of evidence that number of witnesses does not carry any weight. What carries weight is the credibility of a witness.

36. PW 4 Gaurav Arya has categorically stated that on 05.07.2018, at about 11:00 a.m., the appellant had given his mobile phone for repair to the deceased. This is also corroborated by PW 2 Arvind Kumar Tiwari.

37. In para 4 of his statement, PW 4 Arvind Kumar Tiwari has stated that on the same day, at 03:00-03:30 p.m., the appellant came at the shop and had an altercation with the deceased. He in fact, threw the mobile phone on the photograph of the father of the deceased, due to which the frame got broken. The appellant wanted to have scuffle with the deceased and then he left in a fit of rage. This incident of 03:30 p.m. has not been witnessed by PW 2 Arvind Kumar Tiwari because, according to PW 4 Gaurav Arya, PW 2 Arvind Kumar Tiwari had gone for lunch at that time. This is what PW 2 Arvind Kumar Tiwari has stated in para 6 of his statement. According to him, he had gone to his home for lunch and he returned at 04:00 p.m., when he was told by PW 4 Gaurav Arya and others that in the afternoon, the appellant had visited the shop and had abused him. The statements of PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya are totally reliable.

38. The credibility of the statements of PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya have been tried to be assailed on the ground that both of them have not followed the deceased to the hospital and they also had not visited the police station. In fact, in his statement at para 63 and 65, PW 2 Arvind Kumar Tiwari has stated that his condition had deteriorated, therefore, after the incident he

went to home. He neither visited hospital nor did he go to the police station. Similarly, PW 4 Gaurav Arya in para 41 has also stated that neither did he hold the deceased when he was fired, nor did he go to the hospital. He has explained in para 41 of his statement that he did not go to the hospital because the goods were lying in the shop.

39. It is the prosecution case that after the incident the deceased was immediately taken to hospital. PW 3 Kailash Singh Negi has stated that on that day, he had received a death memo from the Sushila Tiwari Hospital. This memo is Ex. A-3. It records that the deceased was taken to hospital in Dial 108 ambulance after the incident and declared by the doctors as brought dead.

40. PW 2 Arvind Kumar Tiwari tells at para 7 of his statement that at the time of incident, they tried to catch the appellant and it has further been clarified in para 52 of his statement that PW 4 Gaurav Arya had chased the appellant; this witness had raised an alarm. Similarly, PW 4 Gaurav Arya, in para 6 of his statement, has stated that after the incident, he tried to chase the appellant but could not run, as there was a lot of crowd and he kept the bag and gun of the appellant on the counter. This is what PW 2 Arvind Kumar Tiwari has also stated.

41. Now after firing, there was a lot of crowd. The appellant ran away from the spot. PW 4 Gaurav Arya tried to chase the appellant, as stated by both PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya, but PW 4 Gaurav Arya could not catch the appellant, as

there was a lot of crowd. He returned to the shop. Both these witnesses did not take the deceased to the hospital, as the police had immediately arrived and the police had taken the deceased to the hospital in an ambulance. Under these facts and circumstances, merely on the ground that PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya did not join the deceased to hospital and did not lodge the FIR, it does not doubt their credibility. Their statements are natural. Moreover, it cannot be projected as to how a person will react to an incident of firing taken place in his presence. It all depends upon the personality of a person. In the instant case also, PW 4 Gaurav Arya tried to chase the appellant, but he could not catch him. PW 2 Arvind Kumar Tiwari did not even try to chase. He did not go to hospital or to the police station. According to him, his condition had deteriorated, therefore, he went to his home. On the other hand, PW 4 Gaurav Arya says that he did not go to hospital because there were goods lying in the shop, which means he was looking after the shop. On this score, it cannot be said that the testimony of PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya is doubtful.

42. Assailing the statement of PW 4 Gaurav Tiwari, it is argued that according to him, tiles were taken into custody on 07.07.2018. It is argued that his statement is false, because it is argued that according to PW 9 S.S. Dasoni, the tiles were taken into custody on 05.07.2018 itself.

43. It is true that according to PW 9 S.S. Dasoni, the plain and blood stained tiles were taken into custody by him on 05.07.2018,

of which recovery memo was prepared, which is Ex. A-21. But, this also does not create any doubt in the testimony of PW 4 Gaurav Arya, because in para 9, PW 4 Gaurav Arya speaks of tiles, mobile phone, pallets, hair, etc. Parts of human body, pallets were, in fact, taken into custody by PW 12 K.R. Pandey on 07.07.2018, of which recovery memo was prepared as Ex. A-26. Moreover, PW 4 Gaurav Arya is not a witness of recovery of tiles, which were taken into custody by PW 9 S.S. Dasoni on 05.07.2018.

44. The tiles from the place of incident were taken into custody by PW 9 S.S. Dasoni on 05.07.2018, of which the recovery memo is Ex. A-19. The DBBL gun was taken into custody on 05.07.2018, which had one fired cartridge case and one live cartridge and there were other cartridges also. This recovery memo is Ex. A-22. They were entered into general diary of the police station at 02:48 a.m. on 06.07.2018. The extract of general diary is Ex. A-24.

45. In addition to it, the shoes, socks, pants of the appellant were also taken into custody on 05.07.2018 after his arrest. The recovery memo is Ex. A-18 and its general diary entry is A-20. These all articles were sent for forensic examination. The forensic science laboratory reports are on record. As stated, after PW 12 K.R. Pandey was examined, the prosecution filed an application that these FSL reports are admissible reports in view of Section 293 of the Code. This application 33A filed on 31.05.2018 was not objected to by the appellant, therefore, the FSL reports are exhibited as Ex. A-36, A-37 and A-38. Ex. A-36 is with regard to DBBL gun, which was recovered

from the place of incident. The cartridge case was found in one of its barrels. According to the reports, the fire was made through the right barrel of the DBBL gun. The pallets, which were recovered from the place of incident, could not be conclusively connected with the gun, but it does not, in any manner, doubts the FSL reports. The FSL report is conclusive that the DBBL gun was fired through and one cartridge case, which was found in the right barrel, was, in fact, fired through it.

46. Ex. A-37 is FSL report with regard to blood stained and plain tiles. It speaks that the pieces of tiles in parcel marked as 'Q-1' and pieces of tiles in parcel marked as 'S-1' are similar. It as such does not give any opinion of the blood or as to whose blood was on it?

47. Ex. A-38 is FSL report regarding shirt, pants, undershirts, belt, underwear of the deceased and gauze with blood collected during post-mortem of the deceased, pieces of tiles, piece of jaw with teeth, hair collected from the place of incident and as per the DNA profiling, according to the report, they were from same human male source. It definitely connects the appellant to the incident. The DNA of the deceased was found on the clothes of the appellant. The blood of the deceased was found on the tiles. It confirms the place of incident as well.

48. It is argued that these forensic science laboratory reports were not put to the accused in his examination under Section 313 of the Code. It is true that unless the incriminating evidence is put to the accused under Section 313 of the Code, such evidence cannot be read

into evidence. In fact, the law on this point has been summarized by the Hon'ble Supreme Court in the case of Nar Singh v. State of Haryana, (2015) 1 SCC 496 and in para 30, the Hon'ble Supreme Court has observed as under:-

> **"30.** Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:
>
> **30.1.** Whenever a plea of non-compliance with Section 313 CrPC is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.
>
> **30.2.** In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.
>
> **30.3.** If the appellate court is of the opinion that non-compliance with the provisions of Section 313 CrPC has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 CrPC and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.
>
> **30.4.** The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused."

49. The question is as to whether the FSL reports were even placed before the appellant so as to give an opportunity to explain it

and the another question is – if it is not so placed before him, what is its effect?

50. In question no. 25 of the statement under Section 313 of the Code, the appellant was asked that as per PW6 Dr. P.S. Kholia, two metallic projectiles were taken from the dead body and they were given to the police. Appellant has answered that he does not know about it. In question No. 29, the appellant was asked that his pants, socks and shoes were blood stained and were taken into custody, to which the appellant replied that he does not know about it. In question no. 28, the appellant was told that Santosh Singh had deposited 9 bundles of the articles, which were sent for FSL. The appellant answered that he does not know about it. Question no. 30 is also about recovery of pants, shoes and socks. The appellant expresses ignorance about it also. Question No. 31 is with regard to taking custody of pallets, to which also the appellant expresses ignorance. In question no. 32, the appellant was asked about recovery of cartridges and other articles from the bag that was recovered from the place of incident on 05.07.2018. According to the appellant, it is false proceeding. Similarly in question nos. 34 and 35, the appellant was asked about the recovery that was made from the shop and the recovery of the DVR, to which he replies that he does not know.

51. In question no. 52, the appellant was asked that his clothes were taken into custody by the police and they were sent for FSL and the reports are Ex. A-36, A-37 & A-38. In answer to question no. 52, the appellant expressed ignorance. The appellant was

categorically told that certain articles were recovered from the place of incident. In answer to some questions, the appellant said that the proceeding is false and in answer to some questions, he said that he does not know. With regard to FSL report, in question no. 52, the appellant expressed his ignorance.

52. As stated, after closure of the prosecution examination, on 31.05.2018, in the instant case, an application was moved by the prosecution that three FSL reports have been received, which are admissible in evidence under Section 293 of the Code, therefore, while exempting the expert to examine orally, these reports may be admitted and exhibited as evidence. This application has not been objected to on behalf of the appellant. It is only thereafter that the FSL reports have been accepted.

53. Under these factual circumstances, this Court holds that in the instant case the appellant was told about the FSL reports. He was given enough opportunity to explain under Section 313 of the Code about it. The argument that has been raised on this aspect has also less merit for acceptance.

54. It is categorically established by the prosecution that the appellant was the licence holder of the gun, which was recovered from the place of incident, which was fired through. The gun was licenced in the name of the appellant. It has also been proved. In answer to a question under Section 313 of the Code, the appellant has admitted that this gun licence is in his name.

55. PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya have seen the appellant firing from a gun, which he left at the place of incident. Forensic science laboratory reports confirm it.

56. In the instant case, the statements of PW 2 Arvind Kumar Tiwari and PW 4 Gaurav Arya are natural. Their evidence inspires confidence. It finds corroboration with the medical and forensic examination. Therefore, this Court is of the view that, in fact, the prosecution has been able to prove its case beyond reasonable doubt. The court below has rightly convicted and sentenced the appellant by the impugned judgment, which calls for no interference. Consequently, the appeal deserves to be dismissed.

57. The criminal appeal is dismissed.

(Alok Mahra, J.)
12.11.2025

(Ravindra Maithani, J)
12.11.2025

Avneet/