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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.376 of 2014

Judgment reserved on: 6.7.2022

Judgment delivered on: 21.7.2022

Ramvriksh @ Birchha Lohar S/o Sahdeo Lohar, aged about 50 years, Occupation-Agriculturist and Lohari, R/o. Vill-Karcha, Bichepara, P.S. - Chando, Civil Distt.-Balrampur-Ramanujganj, Revenue Distt.-Surguja (CG)

---- Appellant
(In Jail)

Versus

State of Chhattisgarh Through Police Station Chando, Distt.-Balrampur (CG)

---- Respondent

For Appellant: Mr.A.N.Pandey, Advocate
For Respondent/State: Mr.Sudeep Verma, Dy.G.A. and Mr.Soumya Rai, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Shri Justice Sanjay S. Agrawal
C.A.V. Judgment

Sanjay K. Agrawal, J.

1. This criminal appeal preferred by the appellant herein under Section 374(2) of the CrPC is directed against the impugned judgment dated 19.2.2014 passed by the Special Judge, Surguja (Ambikapur), in Special Sessions Trial No.121/2009, whereby the learned Special Judge has convicted the appellant herein for offences under Section 302 of the IPC and under Sections 25(1-B) and 27 of the Arms Act, 1959 (hereinafter called as 'Arms Act') and sentenced him to undergo imprisonment for life and fine of Rs.1000/-, in default of payment of fine to further undergo simple imprisonment for six

months, R.I. for 3 years and fine of Rs.500/-, in default of payment of fine to further undergo simple imprisonment for 3 months and R.I. for 7 years and fine of Rs.500/-, in default of payment of fine to further undergo simple imprisonment for 3 months. All the sentences were directed to run concurrently.

2. The case of the prosecution, in brief, is that on 25.9.2008 at 3 p.m. at village Kumhaiyapat, Police Station Chando the appellant herein caused death of Sohna Uraon by gun shot injury and thereby committed the offence. It is further case of the prosecution that wife of deceased Sohna namely Julan (not examined) absconded with the appellant herein eloping with him and were staying in the house of Sandhuwa Korwa situated at pahar (mountain). On 27.9.2008 Dhani Ram (PW-3) informed to deceased Sohna Uraon that the accused and his wife Julan were in mountain nearby forest, then deceased Sohna and Dhaniram both went to the spot where the accused and the deceased's wife Julan were present and staying therein, the deceased asked his wife to accompany him, but the accused / appellant said that he will take her & reach to village along with Julan, on that promise given by the appellant, the appellant herein and Julan proceeded for their village and thereafter the deceased and Dhaniram (PW-3) were also returning for their village, on the way near Kumhaiyapat Dhaniram (PW-3) stayed for answering the call of nature and deceased Sohna

proceeded further for his village and thereafter Dhaniram heard noise of gun-shot injury, then he has reached to the spot and found Sohna lying dead on the floor and gun shot injury was made by the appellant herein. Dhaniram reached to the village and informed to Kotwar Dubraj and other villagers about the incident and thereafter he & Kotwar Dubraj, Mangala and Vrikshram Uraon came to the spot and brought dead body of deceased Sohna Ram to the Police Station Chando and pursuant to the report of Namar Sai (PW-4) on 28.9.2008, FIR was registered vide Ex.P-9. Merg was also recorded vide Ex.P-10. Dead body of deceased Sohna was sent for postmortem to Community Health Center, Kusmi, where Dr.Pramod Kumar Sinha (PW-10) conducted postmortem over the body of the deceased and opined that cause of death was hemorrhage and shock due to injury to lungs and head by bullet and death was homicidal in nature. His postmortem report is Ex.P-14. Spot map was prepared by investigating officer vide Ex.P-2. Statements of the witnesses were recorded. On 2.12.2008 Head Constable Lalit Ram Bhagat (PW-1) seized sealed packet (Ex.P-1) in which one bullet taken out from the body of the deceased was there and the appellant was arrested on 19.8.2009 vide Ex.P-8 and as per his memorandum statement (Ex.P-6), country-made pistol was recovered from Kachra Chawari para jungle. Explosive and cracker were also seized vide Ex.P-7 and were sent to armourer and report of armourer is Ex.P-

17. The appellant was charge-sheeted in the Court of Judicial Magistrate First Class, Ramanujganj, who in turn, committed the case to the Court of Session, Surguja (Ambikapur) for trial in accordance with law.

3. In order to prove the prosecution case, the prosecution examined as many as 14 witnesses and exhibited 17 documents Exs.P-1 to P-17. Statement of the accused/appellant under Section 313 of the CrPC was recorded, in which he denied guilt and entered into defence stating that he has not committed the offence and he has falsely been implicated in offence in question. However, the accused examined none in his defence.

4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment dated 19.2.2014, acquitted the appellant herein of the charge under Section 3(2)(5) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, however, convicted him under Section 302 of the IPC and Sections 25(1-B) and 27 of the Arms Act and sentenced him as aforementioned, against which, this appeal has been preferred by the appellant herein.

5. Mr.A.N.Pandey, learned counsel for the appellant, would submit that Dhaniram (PW-3) has not seen the incident and merely on the basis of his testimony, conviction cannot be recorded against the appellant. He would

further submit that pistol was seized on 19.8.2009 after 11 months of the date of incident and that too from dense forest and Dhaniram (PW-3) has not supported the case of the prosecution and turned hostile and only on the basis of evidence of investigating officer N. Khess (PW-12), seizure cannot be held to be proved and furthermore, alleged recovery pursuant to disclosure statement is not helpful to the prosecution as it was not recovered from the possession of the appellant and was recovered from forest. Even armourer report (Ex.P-17) is not reliable as bullet which was taken out from body of deceased Sohna was given to one constable Mukesh Mishra who has brought dead body for postmortem, but surprisingly it was recovered from Head Constable Lalit Ram Bhagat (PW-1) that too on 02.12.2008 after 2 months which creates doubt and it has not been explained by the prosecution where the bullet was kept from 28.9.2008 till the date of seizure dated 02.12.2008 and as such, report of armourer is not reliable and liable to be set aside. The prosecution has failed to prove its case beyond reasonable doubt and even offences under Sections 25(1-B) and 27 of the Arms Act are not made out as seizure has been made from jungle, that too in a open place. He would also submit that incident took place on 25.9.2008, whereas report has been lodged on 28.9.2008 and there is no explanation of 3 days delay in lodging the FIR. He would further submit that Dhaniram (PW-3) being father-

in-law of the deceased being closed relative and interested witness and therefore, his testimony should not be relied upon. He would further submit that Dhaniram (PW-3) has stated in his evidence that he has noticed two gun shots, whereas Dr.Pramod Kumar Sinha (PW-10) has noticed only one gun shot injury and Julan who was accompanied the appellant was not examined. As such, the impugned judgment deserves to be set aside.

6. On the other hand, Mr.Sudeep Verma, learned Deputy Government Advocate for the respondent / State, would submit that the prosecution has been able to prove its case beyond reasonable doubt as Dhaniram (PW-3) who was accompanied Sohna on the date of incident has clearly stated before the Court that he has seen the accused assaulting the deceased Sonha by pistol. He would further submit that seizure of bullet has been proved in accordance with law and as such, the appeal deserves to be dismissed.

7. We have heard the learned counsel appearing for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

8. The first question for consideration would be, whether the learned trial Court has rightly held the death of deceased Sohna Uraon to be homicidal in nature. The trial Court after appreciating medical evidence available on record particularly statement of Dr.Pramod

Kumar Sinha (PW-10) and considering that cause of death was hemorrhage and shock due to injury at lung and heart by a bullet came to the conclusion that death of the deceased was homicidal in nature. The finding recorded by the trial Court is the finding of fact based on medical evidence of Dr.Pramod Kumar Sinha (PW-10) and postmortem report (Ex.P-14), which is neither perverse nor contrary to record. We affirm the finding recorded by the trial Court.

Relative / interested witness Dhaniram (PW-3):-

9. The prosecution has cited Dhaniram (PW-3) as eyewitness. Admittedly, Dhaniram (PW-3) is father-in-law of deceased Sohna. It has been urged on behalf of the defence that since Dhaniram is an interested witness being close relative of deceased Sohna, his testimony must be discarded. It is well principle of law that mere relation with the victim is not sufficient to discard the credibility of a witness, whose testimony is otherwise inspire confidence to the conscious of the Court and statement has to be scrutinized consciously. (See paras-16 and 17 of **Gulab v. State of Uttar Pradesh**[1]).

10. Bearing in mind the aforesaid principle of law with regard to testimony of relative / interested witness, reverting to the facts of the present case, it is quite vivid that deceased Sohna and Dhaniram (PW-3) are admittedly closed relatives being father-in-law and

1 2021 SCC OnLine SC 1211

son-in-law. The incident took place on 25.9.2008 at 3 p.m. and the prosecution has cited Dhaniram as prosecution witness and the Court has relied upon Dhaniram (PW-3) as eyewitness, but admittedly for the reasons best known to him, he did not lodge any report to the police station immediately or belatedly and FIR came to be lodged after 3 days of incident by one Namar Sai (PW-4) on 28.9.2008 at 12.30 p.m. The prosecution has not explained as to why delay of 3 days has occurred and why Dhaniram (PW-3) did not lodge report despite the fact that his son-in-law Sohna was shot dead and he has allegedly seen the incident making gun shot injury by the appellant herein to Sohna and there is no explanation forthcoming to the record. Investigating officer N. Khess (PW-12) has been examined as PW-12. He has also not explained delay in making FIR and furthermore, there is no reason for not making FIR by eyewitness Dhaniram (PW-3) and Dhaniram's conduct being father-in-law having seen his son-in-law shot dead by gun shot injury has admittedly not lodged report and as such, his conduct is not natural. His son-in-law has shot dead and he has seen the incident on 25.9.2008, thereafter he came back to the village and gave information to Kotwar Dubraj and others persons and brought back dead body and thereafter one Namar Sai (PW-4) has made a report to the police station. Natural conduct of a father-in-law who has lost his son-in-law that too in gun shot injury

was to report the matter immediately to the police, but in the instant case, Dhaniram (PW-3) did not make any report to the police station and FIR came to be lodged by Namar Sai (PW-4) stating that he was informed by Dhaniram (PW-3), which makes his testimony suspicious as there is no reason for not making FIR immediately by Dhaniram (PW-3) and coming to the village and informing Namar Sai (PW-4) and others villagers and going to spot and bringing dead body to the police station, such a conduct on the part of Dhaniram (PW-3) is totally unnatural and makes his testimony suspicious as the prosecution has failed to explain the delay of 3 days in lodging the FIR and further for the reason that Dhaniram (PW-3) though he is alleged to have witnessed the incident and being father-in-law did not lodge the report and irresponsibly informed to Namar Sai and Dubraj (PW-6) on 26.9.2008 and they also did not bother to lodge any report promptly to the police and instead thereof, visited the spot and brought dead body to the police station. [See **P. Rajgopal v. State of Tamil Nadu**[2] and **Mukesh v. State (NCT) Delhi**[3]] (Para 50 to 54.

11. Normally when the offence is committed and it is seen by eyewitness, conduct of eyewitness is that he will immediately inform the incident to police to take stock of the matter and to get the accused arrested, but here neither Dhaniram (PW-3) nor Dubraj (PW-6) to whom information was given by Dhaniram has lodged the report

2 2019(5) SCC 403
3 2017 (6) SCC 1

and as such, that makes the statement of Dhaniram unreliable and untrustworthy.

12. The prosecution has cited and relied upon Dhaniram (PW-3) as eyewitness, whereas according to the learned counsel for the appellant, the incident happened on 25.9.2008 and merg intimation was given by Namar Sai (PW-4) on 28.9.2008 at 12.15 p.m. vide Ex.P-10, pursuant to which, FIR was lodged after conducting merg inquiry. Postmortem was conducted on 29.9.2008 by Dr.Pramod Kumar Sinha (PW-10) and the appellant was arrested on 19.8.2009. On 28.9.2008, 161 CrPC statement of eyewitness Dhaniram was taken in which he has not stated that he has seen the incident causing gun shot injury by the appellant to deceased Sohna, but in the Court's statement recorded on 10.6.2013 he has claimed himself to be eyewitness, which has not been relied upon by the trial Court. It has been argued by the learned counsel for the appellant that Dhaniram (PW-3) is not eyewitness as he has improved his version in Court's statement recorded on 10.6.2013.

13. It is pertinent to mention here that the appellant herein has not confronted or contradicted Dhaniram (PW-3) statement under Section 161 CrPC when he (PW-3) was examined before the Court.

14. It is trite law that the trial Court has ample power to take & appreciate the evidence and also the appellate Court has equal power to reappreciate the evidence of a

criminal case but the courts cannot suo moto take the cognizance of the discrepancy between the court deposition of a witness vis a vis his statement given to police u/s 161 CrPC and the defense cannot use the statement u/s 161 CrPC without complying the mandate of Section 145 of Evidence Act.

15. The Supreme Court in the matter of **V.K.Mishra and another v. State of Uttarakhand and another**[4] has held that the statements under Section 161 CrPC recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose:- (i) of contradicting such witness by an accused under Section 145 of Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court and (iii) the re-examination of the witness if necessary. It was observed as under:-

> "16. Court cannot suo moto make use of statements to police not proved and ask question with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 Cr.P.C. "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. Statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of Evidence Act that is by drawing attention to the parts intended for contradiction.

4 AIR 2015 SC 3043

18. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction.

19. In the case at hand, PW-1 was not confronted with his statement recorded by the police under Section 161 Cr.P.C. to prove the contradiction nor his statement marked for the purpose of contradiction was read out to the investigating officer. When neither PW-1 nor the investigating officer were confronted with the statement and questioned about it, PW-1's statement recorded under Section 161 Cr.P.C. cannot be looked into for any purpose much less to discredit the testimony of PW-1 and the prosecution version."

16. As such, statement under Section 161 CrPC and supplementary statement under Section 161 CrPC and statement under Section 164 CrPC cannot be relied upon by the defence and by the Court also as Dhaniram has not been contradicted by and on behalf of the appellant / defence and the defence has not complied the mandate of Section 145 of the Evidence Act which was mandatory in view of decision of the Supreme Court in **V.K.Mishra** (supra).

Recovery of country-made pistol:-

17. Pursuant to the disclosure statement made by the appellant herein vide Ex.P-6, country-made pistol was seized from forest of Karcha Chawari para vide Ex.P-7. Explosive, chharanuma bullet and cracker were also seized. Dhaniram (PW-3), witness to memorandum and seizure, has turned hostile. It is pertinent to mention here that the incident is of 25.9.2008, whereas memorandum has been made by the accused / appellant on 19.8.2009 and recovery of pistol has been made on 19.8.2009 (after 11 months of the incident) and that too from dense forest at Karcha Chawari Para, Police Station Chando and accessible to all and it is not clear that whether it was visible to all, but it remained in dense forest for more than 11 months.

18. The Supreme Court in the matter of **Trimbak v. The State of Madhya Pradesh**[5] has held in that case that when the field from which the ornaments were recovered was an

5 AIR 1954 SC 39

open one, and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. The fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles.

19. Similarly, in the matter of **State of Himachal Pradesh v. Jeet Singh**[6] their Lordships of the Supreme Court have clearly held that when recovery of any incriminating article was made from a place which is open or visible to others, it would vitiate the evidence under Section 27 of the Evidence Act. It was observed as under:-

> "26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For Example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred its hidden state would remain unhampered. The person who hid it alone knows were it is until he discloses that fact to any other person. Hence the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not,

6 (1999) 4 SCC 370

then it is immaterial that the concealed place is accessible to others.

27. It is now well settled that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it. (Pulikuri Kottaya[7]). The said ratio has received unreserved approval of this Court in successive decisions. (Jaffar Hussain Dastagir v. State of Maharashtra[8], K.Chinnaswamy Reddy v. State of A.P.[9], Earabhadrappa v. State of Karnataka[10], Shamshul Kanwar v. State of U.P.[11], State of Rajasthan v. Bhup Singh[12])."

20. Recently, the Supreme Court in the matter of **Bijender alias Mandaar v. State of Haryana**[13] has held that in order to sustain the guilt of an accused, the recovery should be unimpeachable and not be shrouded with elements of doubt and held as under:-

"16. We have implored ourselves with abounding pronouncements of this Court on this point. It may be true that at times the Court can convict an accused exclusively on the basis of his disclosure statement and the resultant recovery of inculpatory material. However, in order to sustain the guilt of such accused, the recovery should be unimpeachable and not be shrouded with elements of doubt.[14] We may hasten to add that circumstances such as: (i) the period of interval between the malfeasance and the disclosure; (ii) commonality of the recovered object and its availability in the market; (iii) nature of the object and its relevance to the crime; (iv) ease of transferability of the object; (v) the testimony and trustworthiness of the attesting witness before the Court and/or other like factors, are weighty considerations that aid in gauging the intrinsic evidentiary value and credibility of the

7 AIR 1947 PC 67
8 (1969) 2 SCC 872
9 AIR 1962 SC 1788
10 (1983) 2 SCC 330
11 (1995) 4 SCC 430
12 (1997) 10 SCC 675
13 (2022) 1 SCC 92
14 Vijay Thakur v. State of H.P., (2014) 14 SCC 609

recovery. (See: Tulsiram Kanu V. State[15]; Pancho V. State of Haryana[16]; State of Rajasthan V. Talevar[17] and Bharama Parasram Kudhachkar V. State of Karnataka[18]) .

17. Incontrovertibly, where the prosecution fails to inspire confidence in the manner and/or contents of the recovery with regard to its nexus to the alleged offence, the Court ought to stretch the benefit of doubt to the accused. Its nearly three centuries old cardinal principle of criminal jurisprudence that *"it is better that ten guilty persons escape, than that one innocent suffer"*[19]. The doctrine of extending benefit of doubt to an accused, notwithstanding the proof of a strong suspicion, holds its fort on the premise that "the acquittal of a guilty person constitutes a miscarriage of justice just as much as the conviction of the innocent"."

Their Lordships further held as under:-

"19.4 Fourthly, the recovered articles are commonplace objects such as money which can be easily transferred from one hand to another and the "red cloth" with "Kamla" embossed on it, as has been acceded by the Investigating Officer, Rajinder Kumar (PW 14), can also be easily available in market.

19.5 Fifthly, the recovery took place nearly a month after the commission of the alleged offence. We find it incredulous, that the Appellant during the entire time period kept both the red cloth and the passbook in his custody, along with the money he allegedly robbed off the Complainant."

21. Since pursuant to memorandum statement, recovery was made after the period of 11 months from the date of offence and that too from dense forest, which is accessible to all, it is difficult to accept that it was in exclusive possession of the appellant as it was seized from forest accessible and visible to all and

15 AIR 1954 SC 1
16 (2011) 10 SCC 165
17 (2011) 11 SCC 666
18 (2014) 14 SCC 431
19 W. Blackstone, Commentaries on the Laws of England, Book IV, c. 27 (1897), p. 358. Ed.: see R. v. John Paul Lepage, 1995 SCC OnLine Can SC 19

thus, recovery of country-made pistol becomes doubtful.

22. Postmortem was conducted by Dr.Pramod Kumar Sinha (PW-10) on 29.9.2008. Body was taken to the Community Heath Center, Kusmi by one constable Mukesh Mishra No.399, but he has not been examined. According to Dr.Pramod Kumar Sinha (PW-10), he has given bullet found in the body of the deceased to said constable Mukesh Mishra, but surprisingly there was no seizure from constable Mukesh Mishra of said bullet and it has been seized on 02.12.2008 vide Ex.P-1 from one Lalit Ram Bhagat, who has been examined as PW-1.

23. As stated before the Court that bullet was kept in sealed packet in hospital and it has produced and seized vide Ex.P-1 on 02.12.2008, whereas Dr.Pramod Kumar Sinha (PW-10) has stated that bullet he has already given to constable Mukesh Mishra No.399. As such, it is not established that bullet which was found in the body of the deceased was in safe custody of any person and bullet taken out from the body of the deceased was very same bullet which was seized vide Ex.P-1 on 02.12.2008 as the prosecution has failed to account for the custody of said bullet from 29.9.2008 to 02.12.2008. It creates doubt on the prosecution case as Dr.Pramod Kumar Sinha (PW-10) has stated that bullet has already been given to constable Mukesh Mishra, whereas Lalit Ram Bhagat (PW-1) has stated before the Court that he has brought it from hospital and as such,

such a bullet taken out from the body of the deceased was sent to armourer Rameshwar Prasad Sawara (PW-14) is not established, whereas the armourer Rameshwar Prasad Sawara (PW-14) has said in serial No.15 of his report (Ex.P-17)) that bullet taken out from the body of deceased Sohna by the doctor has been fired from country-made pistol and sent to him for examination.

24. The Supreme Court in the matter of **Gulab** (supra) has held that in a case where firearm has been used by the accused in order to commit the crime the report of ballistic expert is certainly a vital piece of evidence to connect the firearm with the particular injury but still it is a rule of prudence and the court if found other sufficient evidences from the side of prosecution, it may relax the said rule of prudence.

25. Finally, reverting to the facts of the case in the light of aforesaid discussion, it is quite established that conduct of Dhaniram (PW-3) (father-in-law of deceased Sohna) though cited as prosecution witness did not make any report to the police promptly on 25.9.2008 or belatedly and only informed to Namar Sai (PW-4) and Dubraj (PW-6) on 26.9.2008 and those two witnesses also did not inform the police about the incident and without informing the police brought dead body to the police station and thereafter merg intimation was made only on 28.9.2008 and then wheels of investigation started running. Postmortem was conducted on 29.9.2008

and bullet recovered from body of the deceased was given to constable Mukesh Mishra, who was not examined and bullet was not seized immediately by the investigating officer and it allowed to be kept in unknown place / hospital as disclosed by Lalit Ram Bhagat (PW-1) and it was only seized on 02.12.2008 and the accused was arrested on 19.8.2009 and pursuant to his memorandum (Ex.P-6), country-made pistol was seized on 19.8.2009 with a delay of 11 months from dense forest accessible to all, which makes the memorandum and recovery doubtful. Furthermore, delay in lodging the FIR has not been explained satisfactorily by the prosecution and thereby, we are of the considered opinion that the learned trial Court is absolutely unjustified in convicting the appellant for offence under Section 302 of the IPC.

26. The appellant has also been convicted for offence under Sections 25(1-B) and 27 of the Arms Act and sentenced as stated above. Since in preceding paragraphs, we have recorded the finding that the prosecution could not establish that it is the appellant who used country-made pistol in shooting deceased Sohna.

27. In view of the aforesaid finding, we hereby set aside the conviction awarded for offence under Section 27 of the Arms Act, however, we hereby affirm the conviction and sentence of the appellant for offence under Section 25(1-B) of the Arms Act.

28. For the foregoing reasons, the criminal appeal is partly allowed. Conviction and sentence of the appellant under Section 302 of the IPC and Section 27 of the Arms Act are hereby set aside, however, his conviction and sentence under Section 25(1-B) of the Arms Act are hereby maintained. He is acquitted of the charge under Section 302 of the IPC and Section 27 of the Arms Act. It is stated at the Bar that the appellant is in jail since 19.8.2009, he be released forthwith if not required in any other case.

Sd/- Sd/-

(Sanjay K. Agrawal) (Sanjay S. Agrawal)
Judge Judge

B/-