

A.F.R.
“Reserved”

Court No. - 45

Case :- CRIMINAL APPEAL No. - 5824 of 2010

Appellant :- Satish Sharma And Another

Respondent :- State of U.P.

Counsel for Appellant :- Saurabh Gour, A.B.L. Gaur, Anurag Shukla,
Manish Tandon, Neeraj Tiwari, Siddharth Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Manoj Misra,J.

Hon'ble Sameer Jain,J.

(Delivered by Manoj Misra, j)

1. This appeal is filed against the judgment and order dated 26.08.2010, passed by Additional Sessions Judge, Court No.10, Ghaziabad in connected Sessions Trial Nos.440 of 2000; 440A of 2000; and 699 of 2000. Sessions Trial Nos.440 of 2000 and 440A of 2000 arise from case Crime No.778 of 1999, police station Kavinagar, district Ghaziabad, whereas Sessions Trial No.699 of 2000 arises from Case Crime No.1 of 2000. In Sessions Trial No. 440 of 2000 appellant Satish Sharma has been convicted under Section 302/34 IPC whereas in Sessions Trial No.440-A of 2000, the appellant no.2 Naresh Sharma has been convicted under section 302/34 IPC and both have been sentenced to imprisonment for life with fine of Rs.5,000/- each and a default sentence of six months imprisonment. In Sessions Trial No.699 of 2000, appellant Naresh Sharma has been convicted under Section 25 of the Arms Act and sentenced to two years R.I. with fine of Rs.1,000/- and a default sentence of two months imprisonment. Both sentences awarded to appellant Naresh Sharma were to run concurrently.

INTRODUCTORY FACTS

2. On a written report (not exhibited) submitted by one Nijakat (not examined), on 31.12.1999, G.D. Entry, vide report no.19 (Exb. Ka-2), and a Chik FIR (Exb. Ka-1) was made by PW-5 at 11.35 hours, giving rise to Case Crime No.778 of 1999 at P.S. Kavinagar, district Ghaziabad. In the first information report (FIR), it was alleged that in the evening of 30.12.1999 the accused- appellant Naresh Kumar Sharma and his brother Satish Sharma brought their help Jaiveer, took him to the upper

storey of their house, assaulted him and, thereafter, brought him on their shoulder to the ground floor and locked him in their shop. It is alleged that the informant heard Jaiveer crying and in the morning, informant came to know that Jaiveer is dead. The FIR alleges that the entire incident had been witnessed by persons in the neighbourhood including Rickshaw pullers. Pursuant to the FIR, inquest was completed by 2.15 p.m. on 31.12.1999 at shop no.1452, ward no.12, Lal Kuan, police station Kavinagar, district Ghaziabad of which the witnesses were Mukesh Kumar (PW-1), Kunwar Pal, Radhey Shyam, Buddha Pal Yadav and Bharat Singh. The inquest report (Exb. Ka-10) prepared by PW-9 describes the body position as follows :

“मृतक का शव दुकान के अन्दर लोहे के किवाड़ से सटकर बैठी हुई अवस्था में है पैर आलती फालती मार बैठने की अवस्था में है दोनो हाथ दोनों जाँघो पर टिके है हाथ के पंजे खुले हुए पीठ पश्चिम में है व आगे का हिस्सा पूर्व दिशा में है गर्दन उत्तर दिशा में बाँयी तरफ झुकी हुई व बाँये कन्धे पर टिकी है नाक से खून निकल रहा है बाँयी आँख बन्द व दायी आँख खुली हुई। मुह खुला है”

3. The body was thereafter sent for autopsy. The autopsy report (Exb. Ka-3), dated 01.01.2000, prepared by PW-6 reveals that the autopsy was completed at 4.30 pm on 01.01.2000. The body was described as Jaiveer son of unknown and it was shown to be brought by CP 2324 Mahesh Chand and CP 684 Rakesh Kumar of police station Kavinagar. The external examination of the body revealed presence of rigor mortis all over body; eyes closed. The ante-mortem injuries noticed were as follows: (1) abraded contusion on the whole of the right arm, elbow and forearm; (2) abraded contusion multiple on the whole of the back; (3) lacerated wound size 1 cm x 2 cm on the lower third of the right leg; (4) multiple abraded contusion on the whole of the leg, left side; and (5) lacerated wound size 3 cm x 2 cm on the right side of the head. The internal examination of body of the deceased revealed fracture of parietal bone of the skull plus laceration. Stomach contents were empty and no other abnormality was noticed. According to the Doctor, the death was about a day before caused by coma due to head injury relating to ante-mortem injuries.

4. In between, the Investigating Officer (I.O.) (PW-9), on 31.12.1999

lifted plain earth and blood stained earth from the spot of which recovery memo (Exb.Ka-7) was prepared and the same was got signed by Anil (PW-2) and Mukesh (PW-1). I.O. (PW-9) also inspected the spot and prepared site plan (Exb. Ka-8) on 31.12.1999. During the course of investigation, on 01.01.2000, PW-9 (Anurag Prakash Dixit) along with other fellow police officers disclosed arrest of appellant no.2 Naresh Sharma from near Dharam Kanta in the Industrial Area of Bulandshahar and showed recovery of a country made .315 bore pistol with two live cartridges from him of which recovery memo (Exb. Ka-10) was prepared, which had no public witness. On 01.01.2000 itself, PW-9 effected recovery of two bamboo sticks on the pointing out of the appellant no.2 (Naresh Sharma) from inside the house, the recovery memo (Ex. Ka-9) of which is stated to be signed by Mukesh Sharma (PW-1).

5. Consequent to the recovery of the country made .315 bore pistol from appellant no.2, Case crime No.1 of 2000 was registered at police station Kavinagar, district Ghaziabad of which Chik FIR (Exb. Ka-5) was prepared by PW-8, giving rise to a case under Section 25 of the Arms Act.

6. During the course of investigation, the body of the deceased was got identified and it was found to be not of Jaiveer but of Mahaveer. Ultimately, after investigation, the police submitted charge-sheet in both the cases. After taking cognizance on the charge-sheets, the two cases were committed to the court of session giving rise to Sessions Trial Nos.440 of 2000 and 440A of 2000, arising out of Case Crime No.778 of 1999, and Sessions Trial No.699 of 2000, arising out of Case Crime No.1 of 2000. All three Sessions Trials were connected and decided by impugned judgment and order.

PROSECUTION EVIDENCE

7. During the course of trial, the prosecution examined as many as 12 witnesses. We notice their testimony, in brief, below :

(i) **PW-1 -Mukesh Kumar.** He is a witness of the inquest; recovery of plain earth/blood stained earth from the spot; recovery of two bamboo sticks from the house of the accused. PW-1 stated that though Naresh Sharma and Satish Sharma are real brothers but he has no knowledge whether their truck helper has been killed or not. He denies being a witness of lifting of plain earth/blood stained earth from the spot. At this

stage, the prosecution declared him hostile and sought permission for his cross-examination. During cross-examination by the prosecution, PW-1 denied his signature on the seizure memo of plain earth/blood stained earth; he denied recovery of bamboo sticks in his presence and also stated that no recovery memo with regard to that was prepared in his presence and that the recovery memo does not bear his signature. He also stated that neither the inquest report dated 31.12.1999 was prepared in his presence nor the body was sealed in his presence. When confronted with his signature appearing on the inquest report, he denied his signature thereon. When confronted with his statement recorded under Section 161 CrPC, he denied having given any such statement. He denied the suggestion that the seizure memo and the inquest carried his signatures and that he has colluded with the accused.

(ii) **PW-2 – Anil Kumar**. He is also a witness of recovery of the plain earth/blood stained earth from the spot. He denied that on 31.12.1999 the police recovered plain earth/blood stained earth in his presence. The prosecution declared him hostile and cross examined him. In his cross-examination by prosecution, PW-2 stated that he had not signed the recovery memo and that the recovery memo was not prepared in his presence. He stated that if someone has forged his signatures then he cannot provide reason. When confronted with the statement recorded under Section 161 CrPC, he stated that he had never given any such statement. He also denied the suggestion of having colluded with the accused.

(iii) **PW-3 – Ram Singh**. He is a resident of village Siauli, district Badaun of which the deceased was a domicile. He stated that the deceased Mahaveer son of Raghunath Singh was a helper in the truck of Naresh and Satish (the appellants). On 02.12.1999, the accused-appellants had come to the house of Raghunath Singh (the father of the deceased) and shouted that either Mahaveer should handover the papers of their truck or else they will do something adverse. PW-3 stated that after extending threats both the accused-appellants left village Siauli. He stated that later, the accused did send a man calling for Mahaveer to get a settlement of his dues. Thereafter, Mahaveer went to Ghaziabad and when Mahaveer did not return for 4-5 days, PW-3 came to Lal Kuwan, Ghaziabad along with Raghunath Singh and Ram Bahadur Singh (PW-4)

then he came to know that Mahaveer has been killed. **In his cross-examination**, PW-3 stated that prior to the incident he had never come to see as to where Mahaveer worked. PW-3 also could not give the date when he had come to Lal Kuan. PW-3, however, stated that he came to know from the people there that Mahaveer has been killed. PW-3 could not tell the name of the person from whom he came to know of that fact. PW-3 stated that he recognised Mahaveer from the photograph maintained at the police station. PW-3 stated that when Raghunath Singh had visited the police station he had got some report written. PW-3 stated that it must have been the twelfth month of the year 1999 when the report was written but he does not remember the exact date. PW-3 denied the suggestion that Raghunath Singh had made no report at the police station. PW-3 stated that after lodging the report, they all returned back to their village. PW-3 added that police never visited his village but used to call him at the police station. PW-3 stated that interrogation in respect of the incident was made sometimes in the month of December, 1999 though, he does not remember the date and, thereafter, the police also inquired from him in January, 2000. He stated that in January, 2000, the police had inquired from him at village Siauli and then he had informed the police that people at Lal Kuan had informed him that Mahaveer has been killed. When this witness was confronted with his previous statement recorded under Section 161 CrPC, he stated that this fact which he has just stated is not mentioned there. He also stated that when he along with Raghunath Singh and Ram Bahadur Singh visited Lal Kuwan, they had not stayed at anybody's house. At Lal Kuwan, the people residing on road had informed him that Mahaveer has been killed.

(iii-a) On further cross-examination, PW-3 stated that he saw Naresh and Satish (accused-appellants) for the first time at village Siauli in December, 1999 and after the incident he did not meet them. He identified the accused Naresh and Satish in the court. He denied that while recording the statement in court the Government Counsel had got him to identify the accused. He stated that at the time of the incident, Mahaveer must have been 23-24 years old and was of average built. He stated that he has come to give his statement on receiving court summons. He stated that Mahaveer used to work in the field and also use to drive vehicle. He stated that he was not aware as to whose vehicle he drove but he drove

vehicle for about a year. He stated that he does not know whether Mahaveer had a license. He denied the suggestion that Raghunath Singh is his maternal uncle and because of his relationship with Rathunagh Singh he is telling lies. He also denied the suggestion that he never met the accused and that he is telling lies because he is related to the deceased.

(iv) **PW-4 Ram Bahadur.** He is the brother of the deceased Mahaveer. PW-4 stated that his deceased brother was working as a truck-helper with accused Satish and Naresh for which he used to get Rs.1,200/- per month. He stated that the accused had not given salary for a year as a result his brother had returned to village Siauli. This fact was disclosed by his brother to PW-4 as well as his father. He stated that on 02.12.1999, the accused had come to village Siauli and had enquired about Mahaveer. When PW-4 asked as to what they want from Mahaveer, they stated that Mahaveer has got vehicle papers which they want back. PW-4 stated that the accused thereafter hurled abuses; at that time Ram Singh (PW-3), Raghunath and other persons were present. PW-4 stated that the accused Naresh and Satish threatened that if Mahaveer does not return vehicle papers then he will have to face adverse consequences, on which, PW-4 told them that Mahaveer's salary of one year has not been paid therefore, that salary be paid. He stated that, thereafter, Naresh and Satish (accused-appellants) sent another man to village Siauli, who told Mahaveer to come for settlement of his dues. Thereafter, Mahaveer left with that person to visit the accused. When Mahaveer did not return, PW-4 and others went to Lal Kuan, Ghaziabad on 17/18.01.2000 and found the house of the accused locked there, upon enquiry, they came to know that the accused have killed Mahaveer. When they went to police chowki, they were sent to police station Kavinagar where they identified the deceased Mahaveer from his photograph and clothes. He stated that at that time his father Raghunath Singh and Ram Singh were both there. PW-4 also stated that the police has incorrectly mentioned the name of deceased as Jaiveer in place of Mahaveer. He stated that he believes that the accused have killed Mahaveer.

(iv-a) **In his cross-examination,** PW-4 stated that he has not seen any person assaulting or beating Mahaveer but, this fact came to his knowledge when he had visited accused's house; there, people of the

locality told him this fact; that prior to the incident he had never come to the house of the accused at Lal Kuan; that he did not see the place where his brother was killed, as that place was locked. He could not remember as to what was around that place. PW-4 stated that after visiting the police station he came straightway to the village; that at the police station they had lodged written report but copy of that report was not provided to them. He further stated that he met Mahaveer about 1 ½ months before the incident and that Mahaveer used to work for last 1 ½ year. He stated that where Mahaveer used to work earlier, he does not know. He stated that he came to know about the incident when he went to the house of the accused and enquired from the people around but he does not remember the name of those persons. He identified accused Satish in court and told that accused Naresh is not present in court.

(iv-b) PW-4 further stated that when the accused had come to his village on 02.12.1999, Mahaveer was there and he had told him that these persons were Satish and Naresh with whom he used to work. Mahaveer had also told him that his salary has not been paid for months. PW-4 clarified that Mahaveer had not gone with Satish and Naresh and that Mahaveer had left with a man sent by the accused though he does not remember the name of that man. PW-4 admitted that he did not make any report in respect of the threats extended on 02.12.1999 but denied the suggestion that no threats were extended by the accused. He stated that when threats were extended by the accused there were 10-12 people around including Chhatrapal, Brijpal, Veerpal, Gajram, Ram Nath and others. Some of them are his relatives whereas some are neighbour but none have come to the court. He denied the suggestion that at the time of the incident Mahaveer was not working with the accused. He denied the suggestion that only for getting the salary dues of the deceased he has set up false case and that the entire exercise is at the behest of the police.

(v) **PW-5 Ram Babu Gautam.** He is the Head Constable at Kavinagar police station, Ghaziabad, who made G.D. Entry of the FIR of Case Crime No.778 of 1999. He proved the Chik FIR and G.D. Entry by which report was registered giving rise to Case Crime No.778 of 1999. **In his cross-examination**, he stated that the informant's report was registered under the belief that he is Nijakat though, personally he was not known to PW-5. PW-5 stated that copy of the Chik FIR was handed over

to the informant and that a copy was sent to the Circle Officer through post on 01.01.2000. He stated that his statement was recorded on 31.12.1999. He denied the suggestion that the report was not lodged by Nijakat but it was got lodged at the police station at the dictate of the police.

(vi) **PW-6 Dr. Anil Kumar Agrawal.** He proved the autopsy report and stated that the autopsy was conducted at 4.30 p.m. on 01.01.2000. He proved the contents of the autopsy report and stated that the death could have been caused a day before on account of coma as a result of head injury. He also stated that the death could have occurred in the night of 30.12.1999 also. **In his cross-examination**, he stated that rigor mortis starts about six hours after death and remains for 24 hours depending on the weather condition. He accepted the suggestion that the parietal bone fracture noticed by him could also be a result of head banging on the wall but not on account of fall. He accepted the suggestion that sometimes foul odour is noticed immediately after 24 hours of death. He, however, denied the suggestion that at the time of post-mortem, the body was emitting foul odour. He also denied the suggestion that he had himself not seen the injuries on the body of the deceased and that he had prepared the report sitting at the table of the hospital.

(vii) **PW-7 Sub-Inspector Ambika Prasad Bhardwaj.** He is the second Investigating Officer of case crime no.778 of 1999 who submitted charge-sheet on 26.01.2000, which, on his statement, was marked as Exb. Ka-4. **In his cross-examination**, he stated that he had not recorded statement of any witness and that on the date when this first information report was lodged he had not been posted at the police station concerned. He denied the suggestion that he had submitted an incorrect charge-sheet.

(viii) **PW-8 Constable CC Hari Shankar Lal.** He proved the Chik FIR (Ex. Ka-5) of Case Crime No.1 of 2000 and the G.D. Entry (Ex. Ka-6) thereof. **In his cross-examination**, he stated that the copy of the Chik FIR was sent to the Circle Officer through post. He also stated that he prepared the Chik FIR as was in the Fard Baramadgi. He stated that at the time when the Chik FIR was prepared, Sanjay Bhardwaj (informant of case no.1 of 2000- S. O. P.S. Kavi Nagar) was not there at the police station but CC 472 Ajit Khan was present and the Chik FIR was prepared by getting it copied from the Fard Baramadgi. He denied the suggestion

that the Chik FIR was prepared on the oral dictation of the informant and not on the basis of what was written in the Fard Baramadgi. He, however, admitted that at the time when the first information report was written, the accused was not in front of him and that he had himself put the accused in the lockup and at that time when the accused was searched by him, except for clothes nothing was found.

(ix) **PW-9 Anurag Prakash Dixit.** The first Investigating Officer of Case Crime No.778 of 1999. He stated that the investigation of this case was handed over to him on 31.12.1999. In furtherance of the investigation, he lifted plain earth/blood stained earth from the spot, prepared recovery memo in respect thereof, which was signed by Mukesh and Anil in his presence, which was exhibited as Exb. Ka-7. He proved the preparation of site plan on the basis of his inspection, which was marked Exb. Ka-8. He proved the arrest of accused Naresh on 01.01.2000 at about 7.10 a.m. at Dharmkanta near Bulandshahr Industrial Area and stated that at the time of arrest, a country made pistol .315 bore with two live cartridges was recovered. He stated that on the disclosure statement of Naresh, he also recovered two *Danda* (sticks) of which recovery memo was prepared which was marked Exb. Ka-9. He produced the plain earth/blood stained earth; clothes etc. of the deceased; country made pistol etc., which were made material exhibits. He stated that the inquest report was prepared by him on 31.12.1999 and he also prepared photo nash, challan nash, letter to the Prabhari and all the papers in respect of autopsy of the body and got these papers exhibited. He also produced bamboo sticks recovered by him which were made material exhibits. He proved various other stages of investigation and stated that an effort was made to ascertain the identity of the deceased and, on 18.01.2000, the deceased was identified by Raghunath Singh on the basis of his photograph and clothes; and from Raghunath's statement real name of the deceased could be known as Mahaveer and necessary entry to that effect was made.

(ix-a) **In his cross-examination,** he stated that the site plan was prepared as per the instructions of the informant; that the informant had come to him on his own, however, he could not tell the age of the informant; that he could not give the description of the informant with regard to his height though, stated that he was dark in colour. He also could not describe the clothes that he was wearing. PW-9 stated that in

the site plan he had not mentioned the spot from where the informant had witnessed the incident; that the place of incident was inside the shop; that the spot was *Adhkachha* (semi built) i.e. built of *Khadanja* (vertically laid bricks) and mud. He clarified that, by saying that the floor of the shop was semi-built and that blood was noticed on the floor and he had lifted the blood stained soil from there. He admitted that he had not sent the blood stained soil to Forensic Laboratory rather, it was sent to the office. He stated that the country made pistol recovered was sealed by Station Officer Sanjay Bhardwaj (not examined) and the recovery memo of the bamboo sticks was prepared by him and they were sealed on the spot but currently they are not sealed. He denied that the bamboo sticks were not recovered from the spot. He also denied the suggestion that the witnesses of the recovery were not present.

(ix-b) On further cross-examination, he stated as follows :

“यह सही है कि घटना स्थल से सटा हुआ आम रास्ता है। उस पर 24 घंटे लोग आते जाते रहते हैं। घटना स्थल के पूरब, पश्चिम, उत्तर, दक्षिण में क्या है। मुझे ध्यान नहीं है। यह मैं नक्शा नजरी देखकर बता सकता हूँ”

(ix-c) He stated that the country made pistol recovered was sealed in his presence but the sample seal is not there on record at present. He admitted that at the time of making the site plan of the recovery i.e. Case Crime No.1 of 2000, he was present with the informant of that case. He could not tell as to what were the surroundings from where recovery of the country made pistol was made though he stated that he can tell after looking at the site plan. He then clarified by stating that it was recovered from in front of Veer Narayan's Dharmkanta where the accused was found standing. On further cross-examination, he stated that a person who makes the recovery, seals it, the seals are distinct and separate. He stated that the distance of the place from where recovery was made was about 4 km from the police station, he could not tell the time they took to reach the spot. He admitted that the recovery in respect of Case Crime No.1 of 2000 was made from a place which is an Aam Rasta (public road) where 24 hours people are present and that there were many people around but none were prepared to be a witness of the recovery. He admitted that he did not ask the name of persons whom he had requested to be a witness. He denied the suggestion that the entire exercise was

carried out at the police station and that no recovery was made. He also denied the suggestion that the accused has been falsely implicated.

(ix-d) He admitted that at the time of inquest, the name of the deceased was stated to be Jaiveer and the inquest was prepared as *Lawaris* (father not known) and that, later, father of the deceased arrived, recognised the deceased on the basis of his photograph and clothes, and informed the police that the deceased is Mahaveer. PW-9 stated that the name of deceased's father was Raghunah Singh and Raghunath Singh did not inform him that the name of his son is Jaiveer @ Mahaver. PW-9 stated that he did not investigate to confirm the identity of Jaiveer as his father had already recognised him on the basis of his photograph and clothes. He admitted that he had not requested for the voter list or Ration Card to ascertain the identity of the deceased as his identity was proved by his father. He denied the suggestion that the entire exercise was completed while sitting at the police station and that the records were fabricated. He denied the suggestion that he used to extort Rs.5,000/- a month from the accused and when the accused refused they were falsely implicated.

(x) **PW-10 Sub-Inspector Ajit Roria.** He conducted the investigation of Case Crime No.1 of 2000. He stated that he recorded the statement of Sub-Inspector Anurag Dixit (PW-9) and after completing the investigation he had submitted charge-sheet which was marked as Exb.Ka-19. He also proved that he obtained sanction from the District Magistrate for prosecution under Section 25 of the Arms Act. The sanction letter was proved and marked as Exb.Ka-18.

(xi) **PW-11 Ved Bhushan.** He is one of the witnesses of recovery of bamboo sticks at the instance of appellant Naresh. He denied having witnessed the recovery and was declared hostile. On being confronted with the recovery memo, he stated that the signatures appearing thereon are not his and that the Investigating Officer had never recorded his statement. On being confronted with the statement recorded under Section 161 CrPC, he stated that he had never made any such statement. He denied the suggestion that he has colluded with the accused.

(xii) **PW-12 Constable Rajendra Kumar.** He was examined on 23.02.2010 to prove that the informant Nijakat is no more. He stated that he had gone to serve court summons to Nijakat. There he came to know

that two years before, he died of TB. He also produced death certificate of Nijakat, which is there on record as paper no. 95-Kha and was exhibited C-1. **In his cross-examination**, he stated that he has not enquired as to in which hospital the informant was admitted. He also stated that he is not aware whether the summons were sent at the address of the informant or not. He stated that he had gone on a bus to Alapur, Badaun where the informant resided.

8. The incriminating circumstances appearing in the prosecution evidence were put to both the accused. The accused Naresh not only claimed that the allegations are incorrect and false but also denied both the alleged recoveries. And also denied that the deceased was employed as his helper. He also stated that he had no truck. Similarly, accused Satish denied the prosecution allegations as incorrect and stated that the accused was not employed as his helper and that he owned no truck.

9. The accused also examined a defence witness (DW-1) Devendra Mittal who stated that he is a neighbour of Kanchhilal Sharma (the father of the accused). He stated that neither from the shop nor from the house of the accused recovery of the body was made and that Kanchhilal Sharma does not have any truck. He also stated that the police had come to him to interrogate him but he had informed the police that no such occurrence had ever taken place. **In his cross-examination**, he feigned ignorance that the cycle repairing shop which he has, has been purchased by Kanchhilal Sharma (the father of the accused). He stated that Kanchhilal Sharma though had a shop on the ground floor but to whom it was let out he is not aware but, reiterated that on 31.12.1999 no body was recovered from the shop of Kanchhilal Sharma. He also denied the suggestion that on 31.12.1999 the inquest was conducted at the spot.

TRIAL COURT FINDINGS

10. The trial court found following circumstances proved-that body was recovered from the shop of the accused; that the medical evidence indicated that that man was killed; that the body was identified to be of Mahaveer; that it was proved that Mahaveer was employed as a helper by the accused; that accused had visited the house of Mahaveer to demand vehicle papers, which Mahaveer seemed to be withholding in lieu of his salary dues, and had threatened Mahaveer of dire consequences; that the accused resided on the upper floor of the building in the ground floor of

which there was the shop from where the body of Mahaveer was recovered; and that sticks used to assault the deceased was recovered at the instance of appellant no.2. All these circumstances complete a chain, pointing towards the guilt of the accused appellant and, therefore, in absence of explanation, the appellants were liable to be convicted. In addition to above, on the basis of recovery of country made pistol, the appellant no.2 Naresh Kumar was convicted under section 25 of the Arms Act.

11. We have heard Sri Manish Tandon, as amicus curiae, representing the appellants; Sri H.M.B. Sinha and Sri Amit Sinha, learned AGA, for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

12. Learned counsel for the appellants submitted that there is no eye witness account / direct evidence of the crime and consequent to non-examination of the informant the contents of the FIR cannot be looked into therefore, the prosecution case rests purely on circumstantial evidence. He submitted that in so far as the circumstantial evidence is concerned, there is no substantive evidence of the deceased being last seen alive with the appellants on or about the night of the incident. The motive for the crime is also not convincing because the testimony of PW-3 and PW-4 with regard to the employment of the deceased under the appellants is inconclusive, inasmuch as, they have not specifically disclosed whether the appellants had any truck for which the deceased used to work as a helper. The Investigating Officer also could not collect evidence to demonstrate that the appellants had a truck and, in fact, the appellants had categorically denied having a truck in their statement recorded under Section 313 CrPC. Thus the stand that the deceased had worked as a helper for the appellants and in connection with his services there were dues is not satisfactorily established. Otherwise also it can only provide a weak motive for the crime and that by itself would not be sufficient to record conviction. In so far as recovery of the body of the deceased from the shop is concerned, firstly, the recovery was denied and independent witnesses have not confirmed the recovery, secondly, the plain earth and blood-stained lifted from the spot has not been sent for forensic examination, and, thirdly, it has not been proved that the shop was in exclusive control and possession of the accused; further, shop's floor was semi-built and it was adjoining the road where there was 24 hours traffic;

and it has not been demonstrated by the Investigating Officer that the shop was not accessible to all or that it was locked, of which the key was with the accused, or that the door of the shop was broke open to recover the body or that the key to the lock put on the door of the shop was found in possession of any of the accused. It has been pointed out that the site plan (Exb.Ka-8) does not disclose that the shop had a door, which was locked. Importantly, the body was found in a sitting posture reclining on the iron gate which is at the internal end of the shop. The front portion of the shop, which opens on the road, is not shown to have a door and there is no evidence at all to suggest that the door was locked and had to be broke open. It was thus submitted that since the case now turns on circumstantial evidence, unless there is cogent evidence that nobody other than the accused could have had access to the shop, conviction of the appellants for the offence punishable under Section 302/34 IPC is not at all sustainable. It was submitted that in so far as the recovery of bamboo sticks is concerned, firstly, that recovery has not been proved because the witness of the recovery has squarely denied having signed the recovery memo and no effort was made to obtain expert report to prove his signatures on the recovery memo; and, secondly, the bamboo sticks have not been sent for forensic examination to determine whether it carried any blood stain or not. Other than that a bamboo stick is readily available and is ubiquitous in every house. Therefore, recovery of bamboo stick by itself is not an incriminating circumstance that may indicate the guilt of the accused-appellants.

13. In addition to above, learned counsel for the appellants questioned the recovery of country made pistol on the ground that, admittedly, the recovery was made at a public place yet, there is no support of a public witness. Further, the recovery is stated to have been made early morning on 01.01.2000 by stating that the Investigating Officer had received information from an informer with regard to the presence of the accused at that spot. No good reason has been shown for the presence of the accused there, so early on a winter morning, as also the reason for arrest that early in the morning, particularly, when the accused had a house and were men with property and their arrest could easily have been effected by taking recourse to coercive processes had they been evading their arrest. Under the circumstances, this arrest is nothing but to implicate the

appellants in an additional case under the Arms Act. Further, the genuineness of the arrest is also doubtful because when the Investigating Officer was required to give description of the surroundings of that place from where the arrest and recovery of country made pistol was made, he stated that he cannot disclose without looking at the site plan and the police records, which suggests that the recovery was nothing but bogus. It has thus been submitted that this is a fit case where the benefit of doubt should be extended to the appellants and that the judgment and order of conviction be set aside and the appellants be released.

SUBMISSIONS ON BEHALF OF THE STATE

14. Learned AGA submitted that although no ocular direct evidence survives consequent to death of the informant, but the lodging of the first information report has been duly proved; the employment of the deceased under the accused-appellant is proved; the dispute between accused-appellant and the deceased in connection with salary dues and vehicle papers is proved therefore, motive is proved; the spot where the body of the deceased was found has been proved; this spot is a shop in the ownership of accused-appellants' father whereas, there is no cogent explanation as to how the body came to be there; that the recovery of bamboo stick, which could have been utilised to inflict injuries, completes the chain of incriminating circumstances, which conclusively indicate that the prosecution story as set out in the first information report is correct and, therefore, the trial court in absence of cogent explanation has justifiably convicted the appellants. In respect of conviction of appellant no.2 under section 25 of the Arms Act, learned AGA submitted that it is not always necessary that independent witnesses are roped in for effecting recovery because many a times the witnesses, out of fear and generation of ill-will, do not agree to be witness and, even if they agree, more often than not, they resile from their commitment, therefore, if the Investigating Officer has been able to prove the recovery, the same is sufficient to record conviction, particularly, when no cogent motive for false implication has been proved.

ANALYSIS

15. Before we proceed further, we must clarify that we shall divide our analysis into two parts. First part would be in respect of the charge

of the offence punishable under section 302 read with section 34 against both the appellants; and the second would be in respect of the charge under section 25 Arms Act against the appellant no.2 (Naresh Kumar). In respect of the charge relating to murder, at the outset, we may observe that this is a case where there is no direct evidence of murder. We are thus dealing with a case where the prosecution seeks to bring home the charge of murder against the accused-appellants on the strength of circumstantial evidence. It would therefore be useful to notice the legal principles which a court must bear in mind before recording conviction on the basis of circumstantial evidence. The earliest judgment of the Supreme Court on the issue was in the case of **Hanumant Govind Nargundkar V. State of UP, AIR 1952 SC 343**, which has been consistently followed and elaborated from time to time in various subsequent decisions. In **Hanumant Govind's case (supra)**, it was held that: *"in cases where the evidence is of circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every other hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.* In a relatively recent decision in **Vijay Shankar V. State of Haryana, (2015) 12 SCC 644**, the Supreme Court following its earlier decisions including the celebrated decision in **Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116** and **Bablu V. State of Rajasthan, (2006) 13 SCC 116**, held that *"the normal principle is that in a case based on circumstantial evidence*

the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and inconsistent with their innocence”. In **Sharad Birdhichand Sarda's case**, vide paragraph 153, it was further clarified that the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby they 'must or should' and not 'may be' established. In addition to above, we must bear in mind the most fundamental principle of criminal jurisprudence which is that *the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions* (vide **Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793**). These settled legal principles have again been reiterated in a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

“18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion,

howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same.”

(Emphasis Supplied)

16. Bearing the above legal principles in mind we now proceed to examine whether the incriminating circumstances on which the prosecution seeks to bring home the charge have been proved beyond reasonable doubt; and whether they form a chain so complete that there is no escape from the conclusion that within all human probability the murder was committed by the accused appellant; and whether they (*the circumstances*) are incapable of explanation of any hypothesis other than that of the guilt of the accused-appellants and inconsistent with their innocence. The circumstances which the prosecution seeks to prove to bring home the charge of murder against the appellants are: (i) the deceased was employed by the appellant as a helper for their Truck; (ii) the deceased had salary dues which the appellant had withheld; (iii) in connection therewith, the deceased had retained vehicle papers; (iv) that on 02.12.1999, the accused-appellants came to the village of the deceased and threatened him to return the papers or face dire consequences; (v) that few days before the incident, a man was sent by the accused-appellant to the deceased calling for him to come to Lal Kuan for settlement of his dues; (vi) that in the morning of 31.12.1999 the body of the deceased was recovered from a shop in the ground floor of a building, on the upper storey of which the accused-appellant had their place of residence; (vii) that report was lodged in respect of homicidal death of the deceased alleging that the deceased was assaulted and dumped by the accused-appellants in the shop; (viii) inquest proceedings were held in that shop; (ix) autopsy conducted on 01.01.2000, at about 4.30 pm, confirmed homicidal death, a day before, upon noticing that the deceased had suffered multiple injuries including a fracture of parietal bone of the skull; and (x) at the instance of appellant no.2, two bamboo

sticks alleged to have been used to assault the accused were recovered from under the bed of the accused.

17. Now we shall examine whether the above noted circumstances have been established beyond doubt. In respect of past employment of the deceased under the accused-appellants, there are two witnesses, namely, PW-3 and PW-4. Their testimony in respect of deceased's employment with the appellants is not direct, that is, they only heard from the deceased about him working for the appellants at a salary of Rs.1200 /- pm. They, however, are witnesses of an incident dated 2.12.1999 when the accused-appellants came to the village and threatened the deceased to return vehicle papers. No doubt, the prosecution has not succeeded in proving that the accused-appellants owned a Truck, but, as rightly held by the trial court, there is no reason to disbelieve PW-3 and PW-4 in respect of their deposition that there existed some relationship between the deceased and the accused-appellants in connection with which there was a dispute. But, what is important is that there is no cogent evidence that this relationship continued up to the date of the incident. There is a huge time-gap between 02.12.1999 and 31.12.1999, that is, the date when the deceased died. Whether on the date of his death, the deceased was still under the employment of the accused-appellant is a question that needs to be addressed. Notably, there is no evidence in that regard except that few days after the incident dated 2.12.1999, a man was sent by the accused-appellant sending a feeler to the deceased that he may come for settlement on which he went away with that man. Whether that earlier relationship got restored thereafter; and whether the deceased was seen working thereafter for the appellants, has not been answered by any evidence. Notably, the identity of that man who had arrived for settlement is not disclosed and the exact date when that man arrived and the deceased went for settlement is also not disclosed. Importantly, it is stated by PW-4, the brother of the deceased, that when the deceased did not return then PW-4 and his father came from the village in search of the deceased on or about 17/18.1.2000. Then they came to learn about his death. Interestingly, the prosecution evidence is totally lacking as to whether the deceased used to reside with the accused-appellant or in the shop where his body was found. Thus, though the prosecution has been able to prove some kind of

initial relationship and an initial dispute between the accused-appellant and the deceased but it could lead no evidence to demonstrate that that relationship, and the dispute, continued till about the time of the incident.

18. In this background we now proceed to examine other circumstances. Before that, we may notice certain key features that are missing in the prosecution evidence. These are: (i) there is no direct eye-witness account of the incident and since the informant did not appear to prove the contents of the first information report, its contents cannot be read in evidence as they can be used for limited purposes such as corroborating or contradicting its maker or to show the implication of the accused, not to be an after thought, or that the information is a piece of evidence *res gestate* or is otherwise admissible under section 32 (1) of the Evidence Act (**vide Sheikh Hasib @ Tabard V. State of Bihar, (1972) 4 SCC 773 and Damodarprasad Chandrikaprasad v. State of Maharashtra, (1972) 1 SCC 107**), which is not the case here; (ii) there is no substantive evidence on record that the deceased was seen alive in the house or in the shop of the appellants with the appellants; (iii) the shop from where the body of the deceased is stated to have been recovered has a semi-built floor and nothing has been brought on record that in the shop commercial goods or tradeable goods belonging to the accused-appellants were present; and (iv) nothing has been brought on record to show that to retrieve the body of the deceased from inside the shop any door had to be broke open or that the shop was bolted from outside or there was a lock put on the door of the shop of which the key was with the accused. Further, from the site plan it is clear that the shop from where the body of the deceased was recovered is adjoining the main road. The site plan does not indicate that to have access to the shop there existed a door. The testimony of the Investigating Officer does not indicate that access to the shop was not possible except through the living area of the house of the accused persons. Importantly, the ante-mortem injuries found on the body of the deceased though are many but except for the head injury, there is no fatal injury. The Doctor had also opined that the head injury could be on account of banging the head with the wall or hard object. The body of the deceased, at the time of inquest, was noticed in a sitting posture. In that kind of a scenario, it is possible that the deceased might have received injuries elsewhere, in the night, and may have used

the place, where he was found dead, to rest, or he may have been beaten elsewhere and put there. Thus, the circumstances sought to be proved throw multiple hypotheses not inconsistent with the innocence of the accused-appellants therefore, even if there had been no proper explanation on the part of the accused, it would not be appropriate to presume their guilt by taking recourse to the provisions of section 106 of the Evidence Act.

19. At this stage, we may notice a recent decision of the Apex Court in the case of **Shivaji Chittappa Patil V. State of Maharashtra, (2021) 5 SCC 626** wherein, following earlier decisions, in paragraph 23 of the report, it was observed: *“it could thus be seen that it is well settled that section 106 of the Evidence Act does not directly operate against either husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused.”* In paragraph 25 of this judgment, the Apex Court observed: *“Another circumstance relied upon by the prosecution is that the appellant failed to give any explanation in his statement under Section 313 CrPC. By now it is well settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused. However, it cannot be used to complete the chain.”* Seen in the light of the law noticed above, what clinches the issue in the present case is that the prosecution has failed to lead evidence to rule out other hypotheses not inconsistent with the innocence of the appellant. The recovery of bamboo sticks is denied by the witnesses whose signatures are, purportedly, there on the memorandum. Those witnesses have challenged their signatures on the recovery memo but no effort is there to prove their signature. Importantly, the plain earth and the blood stained earth that is alleged to have been lifted from the spot from where the body was recovered has not been sent for serological examination to find out the presence of human blood. Thus,

it is not certain whether the deceased died there from where he was recovered or was brought dead from somewhere else or he suffered injury somewhere else and came there. Further, the seizure memo of the blood stained earth and plain earth has not been supported by the eye-witnesses PW-1 and PW-2. They have even denied their signatures on the recovery memo as also on the inquest report and no other witness of the inquest has been examined. No effort has been made to prove the signatures of PW-1 on the inquest memo and of PW-2 on the recovery memo. No doubt, the recovery memo can still be believed and be treated as proved by the Investigating Officer but here the Investigating Officer has not send the blood stained earth and plain earth for serological examination to confirm the presence of human blood on the spot therefore, the issue whether the deceased died in the shop or was brought dead from outside and planted in the shop is an issue which remains unanswered, particularly, when the eyewitness (informant) has not been examined and the exclusive control and possession of the shop with the accused-appellant is not proved.

20. Now, we may notice the site plan prepared by the I.O. on inspection and at the instance of the informant. The site plan is there on record as Exb. Ka-8. It appears from the site plan that the spot from where the body of the deceased was recovered was a shop. This shop appears on the ground floor and seems to have direct access to the Ghaziabad - Dadri road. In front of the shop, there is open space which can be considered as *Patri* (pavement) of the main road. The shop has an opening on the main road. The body of the deceased is shown inside the shop at some distance from the open space outside the house. It has not been established by any evidence as to who is the owner and in exclusive possession of that shop. It has also not been established by any evidence that the deceased used to reside as a helper in the premises of the accused or in that shop. Further, there is no clear and specific evidence that the place from where the body of the deceased was recovered is not accessible to anybody except the accused or inmates of the house of the accused. Thus, keeping in mind that there is complete lack of evidence of the deceased being last seen alive with the accused, it would not be safe on our part to convict the accused-appellants for the charge of murder of the deceased, particularly, when the body of the deceased carried only

one fatal injury on the head which could be a consequence of banging the head on the wall or on the iron gate or any hard substance. In so far as the evidence of recovery of the bamboo stick is concerned, that becomes doubtful because the witnesses of recovery have not only denied the recovery but have also denied their signatures on the recovery memo yet, no effort was made by the Investigating Officer to prove their signature. Further, bamboo sticks are freely available in the market and commonly found in every house. Importantly, those bamboo sticks were not sent for forensic examination to find out whether there is any mark of human blood on it. In view of the above discussion, we are of the view that the prosecution has not been successful in proving the guilt of the appellants beyond reasonable doubt for the charge of an offence punishable under Section 302 read with Section 34 IPC.

21. In so far as the conviction of the appellant no.2 for the offence punishable under Section 25 Arms Act is concerned, the recovery of firearm has been denied by the appellant no.2. The recovery does not inspire our confidence for the reason that the recovery is stated to have been made while the police was in the process of arresting the accused wanted in Case Crime No.778 of 1999. No justification has been given for taking steps to effect the arrest of the accused in the early hours of a winter morning, particularly, when it has not been demonstrated that the accused was evading arrest or that coercive processes had already been issued to effect his arrest. Notably, the accused is a person having property therefore, there was no logical reason for him to escape. In such circumstances, there appears very little justification to arrest the accused in the early hours of a winter morning. The recovery, which has been vehemently denied by the accused, in our view, appears to be to add colour to the prosecution case. More so, because it has no public witness to support it. Further, when the Investigating Officer was cross-examined as to the surroundings from where the accused was arrested, he could not remember the surroundings and sought to refresh his memory from the records, which also makes the recovery doubtful. We, therefore, give the benefit of doubt to the accused in the matter of recovery of firearm from him.

22. For the reasons recorded above, we are of the view that the prosecution has failed to prove beyond reasonable doubt the charges for

which the appellants have been tried and convicted. Consequently, the appeal is **allowed**. The impugned judgment and order of the trial court dated 26.08.2010 in Sessions Trial Nos. 440 of 2000, 440A of 2000 and 699 of 2000 is hereby set aside. The appellants are acquitted of the charges for which they have been tried and convicted. The appellants are reported to be in jail, they shall be released forthwith subject to compliance of Section 437A CrPC to the satisfaction of the court below.

23. Let a copy of this judgment and order be certified and sent along with the record of the record of the court below to the court below concerned for compliance.

Order Date :- 08.04.2022.
Rks.