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Vijay Kumar Shukla Vs. State

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Court : Delhi

Decided On : Dec-17-2012

Judge : S. P. Garg

Appellant : Vijay Kumar Shukla

Respondent : State

Judgement :
* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON :

20. h September, 2012 DECIDED ON :

17. h December, 2012 + CRL.A.No.912/2009 VIJAY KUMAR SHUKLA ..... Appellant Through : Mr.Vishal Gosain, Advocate. Versus STATE ..... Respondent Through : Ms.Richa Kapoor, APP for the State. + CRL.A.No.839/2009 RAJESH RAJA ..... Appellant Through : Mr.D.C.Mathur, Sr.Advocate with Mr.Satish Tamta and Ms.Nisha Narayanan, Advocates. Versus THE STATE ..... Respondent Through : Ms.Richa Kapoor, APP for the State. CORAM: MR. JUSTICE SANJIV KHANNA MR. JUSTICE S.P.GARG S.P.GARG, J.

1. Vijay Kumar Shukla (A-1) and Rajesh Raja (A-2) impugn judgment in Sessions Crl.A.Nos.912/2009 & 839/2009 Case No.09/2008 arising out of No.48/2001, Police Station Rajender Nagar by which they were convicted for committing offences punishable under Sections 302/186/34 IPC; under Section 68 Excise Act and under Section 25/27 Arms Act and sentenced to undergo imprisonment for life

with fine.

2. On 04.02.2001, Const.Krishan Kumar and Const.Kadam Ganga Dhar were on patrolling duty on motorcycle bearing not DL-1SM0597 (TR-33) from 09.00 A.M. to 09.00 P.M. Const.Krishan Kumar was the driver and Const.Kadam Ganga Dhar was pillion rider. At about 07.30 P.M., at the corner of block No.27, they found a Maruti car in which two boys were consuming liquor at a public place. Const.Krishan Kumar, in the discharge of his official duties, went to check the car. He made enquiries from the driver and asked him to show his licence. He also took out a black colour bag from the car. On that, one of the boys (A-2) exhorted A-1 to fire at Const.Krishan Kumar as they were caught. A-1, thereafter, fired at him (Const.Krishan Kumar) twice on his chest and the assailants fled the spot. Kadam Ganga Dhar took Krishan Kumar to Ganga Ram Hospital where he was declared dead on arrival.

3. Insp.Mahipal Singh with staff reached Ganga Ram Hospital and recorded Kadam Ganga Dhars statement. He prepared rukka and lodged First Information Report. He with his staff including Kadam Ganga Dhar went to the spot from the hospital and conducted necessary legal proceedings. Crime team and photographer were summoned. On checking the bag, it was found containing .315 bore country-made loaded pistol, four live cartridges (one of .315 bore and other three of .38 bore) etc. Two vouchers/receipts dated 29.11.1999 and 30.11.1999 bearing the name and address of Moolchand Sharma Building Material Supplier, Near Vikas Furnitures, Sector-22, Noida were also recovered from the spot and seized. Inquest proceedings were conducted and the body was sent for post-mortem examination. Dr.P.C.Dixit (PW-9) conducted post-mortem examination of the body on 05.02.2001.

4. The police on the strength of the vouchers/ building material receipts (Ex.P1 and P2) went to Mool Chand Sharma and contacted Richwan Singh. A-2 was produced at Police Station, Sector-20, Noida from where he absconded and was arrested on 19.02.2001. A revolver make Smith and Wesson with four cartridges was recovered from his possession. A-1 was arrested on 14.02.2001. Applications were moved for Test Identification Proceedings (for short TIP) but A-1 and A-2

declined to participate in it. During the course of investigation, the exhibits including the revolver, pistol, cartridges were sent to Forensic Science Laboratory and reports were collected. The Investigating Officer recorded statements of witnesses conversant with the facts and after completion of the investigation submitted a charge-sheet against A-1 and A-2 for committing the offences described previously. The accused were duly charged and brought to trial. The prosecution examined forty-two witnesses to prove charges against the accused. They pleaded false implication in 313 Cr.P.C. statements. A-1 claimed that he was lifted from Greater Noida-53B, Gama Sector-G2 on 12.02.2001 where he used to stay with his brother. A-2 stated that he was lifted from Chandigarh in February 2001. Revolver of his relative Kawaljit Singh was stolen in 1996 and was recovered from Delhi. Thereafter, he was falsely implicated in this case.

5. Learned counsel for the appellants assailed the findings of the Trial Court and urged that it did not appreciate the evidence in true perspective. PW-4 (Const.Kadam Ganga Dhar) in his original statement Ex.PW-4/A did not name and assign any role to A-2. Supplementary statement at variance with FIR was introduced to secure conviction of A2. PW-4s presence at the spot was doubtful as he did not give description of the assailants in his statement Ex.PW-4/A. His conduct as a police officer was unreasonable and he did not attempt to apprehend the culprits or flash wireless message. The service revolver was not used to protect Const.Krishan Kumar. It was unbelievable that he could hear the conversion/exhortation between A-1 and A-2 while standing at a long distance from the car. No damage was caused to the motorcycle and its mechanical inspection was not carried out. The vouchers Ex.P1 and P2 lacked in material particulars and were fabricated afterwards in connivance with PW-3 (Mool Chand Sharma). PW-20 (Richwan Singh) did not support the prosecution and turned hostile. A-1s finger prints were not detected on the car. No finger prints of the accused were found on the articles recovered at the spot on 04.02.2001. No independent public witness was associated at the time of arrest of the accused. Parallel investigation was carried out by Insp.K.P.Kukreti without any authorisation. The Trial Court ignored vital discrepancies and contradictions which emerged in the testimonies of the prosecution witnesses. A-2 had no nexus with the revolver used in the crime. The police did not produce any evidence to suggest

how the revolver reached to A-1. A-1 cannot be held guilty of having used the revolver in the absence of any evidence of transfer of weapon to him. It was not recovered subsequently from the possession of A-1. PW-4 (Kadam Ganga Dhar) was not a reliable witness as he had made material improvements in his deposition before the Court.

6. Learned APP supported the findings of the Trial Court and urged that it does not call for interference. PW-4 (Kadam Ganga Dhar) witnessed the occurrence and identified both the assailants in the Court. On the exhortation of A-2, A-1 fired twice on the chest of the deceased which proved fatal. Adverse inference is to be drawn against the accused for refusal to join TIP. The revolver in possession of A-2 was used by A-1 to fire at Const.Krishan Kumar. A-2 was a previous convict.

7. We have considered the submissions of the parties and have examined the Trial Court records. We have also gone through the written submissions of the parties on record and have examined the citations relied on by them.

8. Homicidal death of Constable Krishan Kumar is not under challenge. PW-9 (Dr.P.C.Dixit) conducted post-mortem examination of the body on 05.02.2001 and proved report Ex.PW-9/A. Two external injuries (one firearm entry wound 1.2X1.1 cm over right side front of chest and another 1.1X1.1cm over and outer part of left side front of chest) were found. Cause of death was haemorrhage and shock consequent upon firearm injuries to the lungs, liver and colon via injuries No.1 & 2. The injuries were ante-mortem, recent and caused by firearm (rifled) ammunition discharged from distant range. Crl.A.Nos.912/2009 & 839/2009 Injury Nos.1 and 2 Page 6 of 26 were sufficient to cause death in the ordinary course of nature individually and collectively. Undoubtedly, it is a case of culpable homicide.

9. Constable Krishan Kumar and PW-4 (Kadam Ganga Dhar) were on official duty for patrolling on motorcycle not DL 1.597 (TR-33) from 9:00 A.M. to 9:00 P.M. on 4th February, 2001 in the area of Police Station Rajender Nagar. PW-8 (Manju Singh) deposed that on 04.02.2001 Const.Krishan Kumar and Const.Kadam Ganga Dhar were on duty and she recorded DD No.23B (Ex.PW-5/C) by which five constables recorded their departure for patrol duty. She further clarified that TR-33 was the code of the motorcycle. PW-38 proved the duty roaster (Ex.PW-

38/Y) by which both of them were on duty. Similar is DD No.53B (Ex.PW-5/E) recorded at 06.55 P.M. to prove that both the constables left police station on motorcycle not DL 1.597 (TR-33) for patrolling. The genuineness of the official record was not challenged.

10. PW-4 (Kadam Ganga Dhar) is a crucial witness as he was on duty on motorcycle TR-33 from 09.00 A.M. to 09.00 P.M. with Krishan Kumar. They found both accused A-1 and A-2 consuming liquor in a white Maruti car. They stopped their motorcycle ahead of the car. Krishan Kumar asked the driver of the car to show his driving licence and enquired as to where they used to live. He (Const.Krishan Kumar) thereafter, took out one quarter bottle containing liquor and one glass from the car and kept on the dicky of the motorcycle. He again went to check the car and recovered one black bag from inside the car and found something amiss. On that, A-2 sitting by the side of A-1 exhorted pakre gaye, maar goli. A-1 fired at Krishan Kumar two shots on his chest. Both the accused hit the motorcycle and fled the spot. PW-4 took Krishan Kumar to Ganga Ram Hospital in a private car and informed C-61 about the incident on the way to the hospital. SHO and other staff reached there and recorded his statement Ex.PW-4/A. He narrated the incident in detail and disclosed that when Krishan Kumar during checking found a bag inside the car, A-1 fired twice on his chest and caused fatal injuries. PW-4 in supplementary statement Ex.PW-38/DX recorded on 04.02.2001 assigned a specific role to A-2 disclosing that he exhorted A-1 to fire at Const.Kishan Kumar. He further gave description of the occupants/assailants and claimed to identify them. In the crossexamination, he elaborated that departure entry with Const.Krishan Kumar was recorded in rojnamcha-B. The car was parked opposite block No.27. The occurrence was witnessed by many people who had collected there. His statement was recorded before he left the spot. He was confronted with his statement under Section 161 Cr.P.C. on some facts. He fairly admitted that he did not tell the doctor as to how Krishan Kumar had sustained injuries. He admitted that he alone had arms and ammunitions. It was somewhat dark and the street lights were on. The window-pane on the left side of the car was closed. He did not notice that the light inside the car was on or off. Both the accused were taking liquor. Krishan Kumar had taken out one glass from the car. The black colour bag was taken by Krishan Kumar after the liquor bottle and the

glass. He (Krishan Kumar) did not ask him to check the car. They were having one wireless set. He admitted that he did not take out his revolver but explained that he had become nervous. He did not fire on the running car. He flashed a message after putting Krishan Kumar in the car. He did not note down the number of the car. His first statement was recorded in the hospital and he did not tell the description of the occupants at that time.

11. Presence of PW-4 at the place of occurrence is certain and beyond doubt. He was on official duty with motorcycle rider. DD No.21A (Ex.PW-5/A) corroborates his version. He had flashed a message soon after the occurrence and DD No.21A was recorded at police station Rajender Nagar at 08.00 P.M. It was informed that Const.Krishan Kumar was admitted at Ganga Ram Hospital by Const.Kadam Singh No.844/C vide MLC No.935 and was declared brought dead. The MLC Ex.PW33/A prepared at 09.45 P.M. on 04.02.2001 records that Const.Krishan Kumar was brought dead to the hospital by Const.Kadam Ganga Dhar. PW-38 (Insp.Mahipal Singh) when reached Ganga Ram Hospital found him (Const.Kadam Ganga Dhar) present there. He deposed that Krishan Kumar was on patrolling duty with Const.Kadam Ganga Dhar vide DD Ex.PW-5/C, Ex.PW-5/D and Ex.PW-5/E. Const.Kadam Ganga Dhar went to the spot from the hospital and participated in the proceedings conducted there. The memos bear his signatures. PW-4 had no axe to grind to volunteer to be a false witness to the incident. He was not acquainted with the accused and did not name them in the statement (Ex.PW-4/A). The accused did not attribute any ill-will or ulterior motive to him for making a false statement. The incident happened at about 07.30 P.M. PW-4s statement was recorded in the hospital soon after the occurrence at about 08.50 P.M in which he claimed to have seen the occurrence and in which he narrated the incident with all details. It formed the basis of lodging First Information Report under Section 302 IPC. There was no delay in lodging the report with the police. The time gap between the occurrence and the lodging of the FIR was very short and it ruled out fabrication/concoction of a false story.

12. A-1 after arrest on 13.02.2001 was produced in the Court of Sh.T.S.Kashyap, the then Additional Chief Metropolitan Magaistrate on 14.02.2001. Vide memo Ex.PW-38/M, an application was moved for conducting TIP. On 16.02.2001, A-1

refused to participate in the TIP. An adverse inference is to be drawn against A-1 for declining to participate in the TIP without any plausible reason. In the Court, PW-4 identified him to be the assailant who had fired twice at the chest of Const.Krishan Kumar. PW-4 stood the test of searching cross-examination and nothing material emerged to discredit his version. PW-4 gave vivid description of the incident which is entirely consistent with medical evidence. The postmortem examination report (Ex.PW-9/A) reveals that there were two entry wounds on the chest. The injuries were ante-mortem, recent and caused by fire arm (rifled) ammunition discharged from distant range. Brief history recorded by PW-9 in the post-mortem examination report reveals that Krishan Kumar was fired at about 07.30 P.M. on 04.02.2001 by two persons and Krishan Kumar was brought dead to Ganga Ram Hospital at 07.45 P.M. We have no doubt that A-1 fired at Const.Krishan Kumar and caused his death.

13. It is true that in the original statement Ex.PW-4/A, PW-4 (Kadam Ganga Dhar) did not assign specific words to A-2. However, in the supplementary statement recorded on the same day i.e. on 04.02.2001, he recorded that A-2, had exhorted A-1 to fire at Krishan Kumar after being caught hold (pakre gaye, mar goli). He explained that he could not give the description of the assailants as he had become perplex. The supplementary statement is under criticism and it is alleged that it was fabricated to implicate A-2. A-2 surfaced only in the so-called supplementary statement.

14. It is well settled that FIR is not an encyclopedia. FIR puts the police machinery into motion and detailed and exhaustive investigation is carried out thereafter to find out the crime and the culprits. There is no bar to record supplementary statement/ statements. There should not be major variance/contradictions in the original and supplementary statements. If true, it carries equal weight. In Harpal Singh vs. Devinder Singh and another, AIR 199.SC 2914.the Supreme Court observed :

16. Another advanced by the trial court against evidence of Harpal Singh is that when he was interrogated by the Investigating Officer subsequently, he gave more details regarding the occurrence. Firstly, the said supplementary statement

recording by the Investigation Officer could only have been used to contradict the witness in view of the interdict contained in Section 162 of the Cr.P.C. Secondly, that statement cannot be used for comparing it with the FIR. That apart, if the Investigating Officer elicited more details from the same person during any subsequent interrogation how could his evidence become suspect? It is not advisable to throw the evidence of the informant overboard merely because the Investigating Officer succeeded in eliciting further details or even fuller details during subsequent interrogation.

15. PW-4 (Kadam Ganga Dhar) explained that he could not narrate all the facts including description of the assailants in the initial statement as he became perplexed and nervous. This explanation of the witness inspires confidence as the occurrence was sudden and unexpected. PW-4 (Kadam Ganga Dhar) had no time to react and use service revolver to protect the victim or to apprehend the assailants. He could not even note down the number of the car. He immediately took the victim to Ganga Ram Hospital for medical assistance and on the way, flashed the message. His whole conduct cant be treated unnatural or abnormal. Supplementary statement (Ex.PW-38/DX) was recorded on the day of incident i.e. 04.02.2001, in which PW-4 provided more information including the role of the assailants and their description. At that time also, neither A-1 nor A-2 were suspects. There was no ulterior motive for PW-4 to introduce a new version attributing role to the occupant sitting by the side of the driver of the car. In Ex.PW-4/A, he did not name the assailants. We find no good reasons to discard this supplementary statement. The vital omission to attribute role to A-2 in the original statement is not a flaw per-se to jettison his testimony. The omission appears to be due to mental disposition of the witness at the time of occurrence, when A-1, all of a sudden, caused death by firing gunshot on an unarmed Police Officer. It is not reasonable to expect that the scared/perplexed eye witness would always be able to give a meticulous and precise account of details of the incident at the first instance. However, considering the blemish attached to his supplementary statement, we believe that without reassurance from other circumstances or materials, it would not be safe to make the uncorroborated evidence of the witness, the sole basis of conviction of A2.

16. PW-13 (Const.Kamal Singh) proved production of car not DL 2CG-0195 by Richwan Singh at Sector-20, Noida on 06.02.2001. It was seized vide seizure memo Ex.PW-13/A. PW-10 (K.N.Singh) lifted five chance prints from the car on 07.02.2001 (Ex.PW-10/A). PW-11 (Shiv Raj Singh) examined five chance prints Q1 to Q5 and specimen finger prints of A-1 and A-2. Only chance print marked Q4 was identical with the left thumb impression mark S1 on the finger impression slip of A-2. Other chance prints were not identical with his finger prints. The report is Ex.PW-11/B. Chance print Q4 which matched with the specimen finger prints of A-2 establishes his presence in the car. The science of identification of finger prints is an exact science (HP Administration vs. Om Prakash, AIR 197.SC

975) and it does not admit of any mistake or doubt (Jaspal Singh vs. State, AIR 197.S.C.1708). Presence of A-2 in the car is therefore established.

17. A-2 was arrested on 19.02.2001 vide arrest memo Ex.PW- 24/D. He was kept in the muffled face and produced in the Court on 20.02.2001. An application for TIP (Ex.PW-38/Q) was made. A-2 did not participate in the TIP. The proceedings are Ex.PW-38/R. A-2 did not justify refusal to participate in the TIP. Adverse inference can be rightly drawn against A-2. As already noticed A-1 was arrested earlier on 13.02.2001.

18. PW-19 (Kawaljit Singh) had a licenced revolver make Smith and Wesson and he kept it with licence at the house of his sister in Chandigarh in 1996. After one and a half year, Jagdip Singh, his nephew informed him that in a theft in the house, the said revolver was stolen. PW-19 (Kawaljit Singh) lodged First Information Report No.56/1996 under Sections 392/411/420 IPC, PS Sector-36, Chandigarh. PW-17 (SI Janak Singh) proved the copy of the said FIR (Ex.PW-17/A). PW-31 (Dev Ram Sharma) produced original record to prove that .32 bore revolver not H-153993 was allotted to Sh.Kawaljit Singh R/o House No.233, Sector-21A, Chandigarh and it was renewed upto 27.03.1998 vide Ex.PW-31/A. PW-37 (Maya Ram) produced record regarding issuance of arms licence No.22/OD/DM/CH/95 to prove that the licence was issued in the name of Kawaljit Singh. The copy of the record is Ex.PW-37/A.

19. This revolver was recovered from the possession of A-2 at the time of his arrest on 19.02.2001 by PW-38 (Insp.Mahipal Singh). He (PW-38 Insp.Mahipal Singh) deposed that on search of A-2, one loaded revolver make Smith and Wesson, H-153993 was recovered from his left dub. Four cartridges were inside the revolver and seized vide seizure memo Ex.PW-24/B. The sketch of the revolver and cartridges was Ex.PW-24/A. He identified revolver Ex.P22, cartridges Ex.P23/1-4 recovered from A-2. In the cross-examination, no material discrepancy emerged to discredit the recovery of revolver. PW-24 (SI Joginder Singh) denied in the cross-examination that A-2 was brought from Chandigarh by the police in the presence of his wife. A-2 did not examine his wife in defence to substantiate his defence. A-2 admitted in 313 Cr.P.C. statement that PW-19 (Kawaljit Singh) was his relative and his revolver was stolen in 1996. The revolver was recovered from Delhi. PW-19 (Kawaljit Singh) did not depose about the recovery of stolen revolver. A-2 also did not elaborate and explain as to when the stolen revolver was recovered and from whose possession. He did not name the person from whom the revolver was recovered and in whose custody it remained after its alleged recovery. Apparently, A-2 has not presented true and correct facts.

20. During investigation, it transpired that A-2 was married to PW-20 (Richwan Singh)s sister. PW-20 (Richwan Singh) admitted that A-2 was married to his sister. He claimed that they had no connection with A-2 as he did not belong to their fraternity and his sister had married outside their religion. In the disclosure statement (Ex.PW-38/P), A-2 disclosed that he married Naveen (PW-20s sister) who was earlier residing in Chandigarh from where the revolver was stolen.

21. PW-14 (HC Harish Kumar) was Malkhana Moherer at police station Rajender Nagar on 19.02.2001. PW-38 (Insp.Mahipal Singh) deposited with him two sealed pullandas stated to contain a revolver and four cartridges. He made entry at Sl.No.659, Register No.19. On 02.03.2001, Insp.Mahipal Singh deposited an envelope bearing seal of MAM College stating to contain the bullet vide entry No.667. PW-14 (HC Harish Kumar) sent the pullandas on 14.03.2001 to FSL, Malviya Nagar vide Road Certificate 57/21. The relevant entries are Ex.PW-14/A1, Ex.PW-14/A2 and Ex.PW-14/A3. A-2 did not challenge the testimony. PW-22 (A.C. Varshney), Sr.Scientific Officer (Ballistics), FSL, Rohini received nine sealed

parcels on 14.03.2001 for examination and opinion. Parcel No.1 contained one country-made pistol of .315 inch bore, one cartridge of the same bore and one improvised cartridge marked as Ex.F1, A1 and A2. Parcel No.2 contained three cartridges of .380 inch marked as Ex.A3 to A5. Parcel No.4 contained two bullets marked as Ex.EB1 and EB2. Parcel No.8 contained one revolver of .32 inch caliber marked as Ex.F2. Parcel No.9 had four cartridges of .32 inch marked A6 to A9. He examined the exhibits and submitted detailed report dated 27.04.2001 (Ex.PW-22/A). The report reveals that the country-made pistal Ex.F1 and revolver Ex.F2 were in working order. He was of the opinion that bullets Ex.EB1 and EB2 were fired through revolver Ex.F2. We have no reasons to doubt the opinion of the expert in the report.

22. The prosecution proved and established that the cartridges/bullets recovered from the body of the deceased were fired from the revolver Ex.P22 on the day of incident. We have noticed and observed that A-2 was present with A-1 in the Maruti car when the firing incident took place. Apparently, the revolver of A-2 was used by A-1 to fire at Const.Krishan Kumar. The said facts are established and proved beyond doubt. In these circumstances, it was for A-2 to explain as to how and under what circumstances revolver Ex.P22 came into possession of A-1. A-2 did not offer any explanation whatsoever. Explanation, if any, were in the exclusive knowledge of A-2 and the obligation was upon him under Section 106 of the Evidence Act. Legitimate presumption/inference can be drawn that revolver Ex.P22 belonging to A-2 was used to fire at Const.Krishan Kumar. How and why it came into the hands of A-1 was known only to A-2, but is not explained or adverted to.

23. Recovery of two vouchers Ex.P1 and P2 issued by Mool Chand Sharma, supplier of building material at Noida proved crucial to reach to the culprits. PW-29 (Insp.K.P.Kukreti) was associated with the investigation of this case on the direction of DCP Central. He visited Mool Chand Sharma at Sector-22, Noida and examined him. Mool Chand Sharma produced a diary of the year 1999 (Ex.PX1) where he had noted down the details of the slips (Ex.PW-20/1 and Ex.PW-20/2). The contents revealed that on 29.11.1999, he had made entry for supply of the material at H72, Sector-16. The diary was seized vide memo Ex.PW-3/A. It further

transpired that the building material was supplied at the site of Richwan Singh on 29.11.1999 and 30.11.1999. Mool Chand Sharma further disclosed that Richwan Singh was working at plot No.160, Sector-58 (as on 05.02.2001). This information took PW-29 to the said site where Richwan Singh met him and confirmed that he used to get building material from Mool Chand Sharma. PW-29 (Insp.K.P.Kukreti), testified that he directed Richwan Singh to produce A-2 and the Maruti car used by him. A-2 was called at Sector-58 and was interrogated. A-2 became nervous and did not give satisfactory reply. He informed that his brotherin-law Richwan Singh had supplied him a white colour Maruti car No. DL 2 CG 019.and he was assisting him (Richwan Singh) in his business. A-2 was set free with the direction to join the investigation next day at the site at Sector-58, Noida. PW-29 (Insp.K.P.Kukreti) further deposed that when on 06.02.2001, A-2 did not turn up to join the investigation, he contacted Richwan Singh, and he informed that A-2 had made the confession before him on the previous night and he had handed over his custody to the police of PS Sector-20, Noida. PW-29 recorded his statement Ex.PW20/3.

24. The prosecution examined PW-16 (Const.Kali Ram) who was posted as clerk constable PS Sector-20, Noida on 05.02.2001. He admitted that SI S.P.Singh, SO handed over to him custody of A-2 at about 05.30 A.M. He was instructed by SO to keep A-2 in custody and not to allow anyone to talk to him. When his duty was over at 08.00 A.M. he handed over the custody of A-2 to the official who assumed duty after him. Later on, he came to know that A-2 had run away from the police station. On 07.02.2001, he was suspended vide suspension order Ex.PW16/A. Apparently, PW-16 (Const.Kali Ram) cannot fake issuance of suspension order. PW-35 (SI Bhopal Singh) handed over suspension order Ex.PW-16/A to PW-16 (Const.Kali Ram) and that order was issued by SSP, Gautam Budh Nagar on 07.02.2001. PW-20 (Richwan Singh) admitted that he used to receive building material from M/s.Mool Chand Sharma. He further admitted that A-2 was his sisters husband. He elaborated that he was not having any ties with him as his sister had married outside their religion without their consent. He further admitted that Maruti not DL 2 CG 019.was registered in his name and it was taken away by the police vide memo Ex.PW-13/A. He did not support the prosecution on other facts and turned hostile. Since A-2 is closely related to PW-20 it appears that he

has not presented complete true facts to favour A-2.

25. Delhi police was not aware that vehicle not DL 2 CG 019.belonged to PW-20 (Richawan Singh). A-2 was not a suspect and the police had no clue about the identity of the assailants. They reached to PW-20 (Richwan Singh) when PW-3 (Mool Chand Sharma) confirmed that the building material was supplied to his construction site vide vouchers Ex.P1 and P2 recovered from the spot. They were able to find that A-2 and PW-20 were related to each other. There is overwhelming evidence that A-2 was produced in Police Station Sector-20, Noida and he absconded. PW-16 (Const.Kali Ram) had to suffer suspension on that account. A-2 remained in hiding before he was arrested on 19.02.2001 in Delhi. A-2 refused to participate in the Test Identification Proceedings. PW-4 (Const.Kadam Ganga Dhar) identified him in the Court to be one of the occupants of the car with A-1 at the time of incident in Maruti car No. DL 2 CG 0195.His finger prints were also detected on the said Maruti car. A-2 did not explain as to why he remained in hiding for so long. He did not elaborate as to where he remained present during this period. He did not examine his wife to establish that Delhi police had brought him from Chandigarh in her presence as alleged. The circumstance of abscondance is a material incriminating piece of evidence against A-2 to connect him with the crime. Similarly, A-1 absconded after the crime and could be arrested on 14.02.2001.

26. We are aware, that abscondence by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent person may run away for fear of being falsely involved in criminal cases. But in the present case, in view of the circumstances which we have discussed above and which have been established by the prosecution, it is clear that absconding of the accused specially A-2 not only goes with the hypothesis of guilt of the accused but also points a definite finger towards them. The accused have not given reasonable excuse for being away from their normal place of residence. In fact A-2 gave a slip to the police and escaped from its custody resulting in suspension of a police official. He was subsequently arrested and the weapon of offence Ex.P22 was recovered.

27. It was pointed out that there was inconsistency between ocular version and the medical evidence (Ex.PW-9/A). PW-4 claimed that Krishan Kumar was fired from close range by the driver of the car but the post-mortem report revealed that the bullets were fired from distant range. There was no blackening of the wounds. We find no major inconsistency in it. PW-9 (Dr.P.C.Dixit) who conducted the post-mortem examination, in the cross-examination was unable to give approximate range. He explained that when it is outside the range of tattooing, blackening, it is called distant range. The range of blackening and tattooing is approximately 60 cm. and it depends on a lot of factors including the type of powder, length of the barrel, presence and absence of choking etc. It is well settled that in case of contradiction between ocular and medical, ocular evidence has to be given primacy. Minor variation between the two is not relevant. Where direct evidence is satisfactory and reliable, it is not liable to be rejected on the hypothetical medical evidence. Use of Ex.P22 as the weapon of offence is established from the bullets recovered from the body of the deceased as discussed in paragraph 22 above.

28. Learned counsel contended that the investigation by PW-29 (Insp.K.P.Kukreti) was tainted as he carried out a parallel investigation without any authorization. It is true that the case was registered at police station Rajender Nagar and PW-29, was posted as SHO, Police Station Nabi Karim. We find no illegality or irregularity in the investigation carried out by him under directions from concerned DCP. Delhi police is one unit. Even if there was any irregularity, it will not bar or prohibit the prosecution from relying upon the evidence/material collected. In Pooran Mal Vs. Director of Inspection (Investigation), New Delhi and Ors. AIR 197.SC 348.it was held that : It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure is not liable to be shut out.

29. It is further argued that A-1 and A-2 did not share common intention to murder the victim. They had no prior enmity with him. A-2 did not use weapon. We find no merits in these submissions. A-1 and A-2 were present in the Maruti car and were consuming liquor at a public place. When they were caught by police officials during routine checking and unauthorized deadly weapons were recovered, in the

car, A-1 on the exhortation of A-2 fired twice on the vital organ of the victim with a revolver. They both fled the spot and remained in hiding after the crime. They did not explain to have in possession of arms without licence. Apparently, the motive was to eliminate the victim by firing at him and to escape from the spot to avoid arrest for keeping the country-made pistol and cartridges without licence. A-1 and A-2 immediately thereafter drove away. Both the assailants actively participated in the crime. A-2 exhorted A-1 to fire at the victim. The weapon (Ex.P22) belonged to A-2 and he facilitated the commission of crime. Cumulative effect of proved facts establishes that A-1 and A-2 shared common intention to kill the victim. Common intention may develop at the spur of the moment.

30. We have considered the various discrepancies, improvements or contradictions pointed out to us by the counsel but do not find material enough to throw the prosecution case as a whole as these do not go to the root of the case.

31. In the light of above discussion, we find no merit in the appeals preferred by the appellants. Their conviction and sentence are maintained. A-2 is directed to surrender and serve the remainder of his sentence. For this purpose, he shall appear before the Trial Court on 21.12.2012. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment. The appeals are dismissed subject to compliance with the above direction. (S.P.GARG) JUDGE (SANJIV KHANNA) JUDGE DECEMBER 17 2012 Sa/tr

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