

Reserved

Delivered on 2.9.2019

Court No. - 43

Case :- CRIMINAL APPEAL No. - 7669 of 2009

Appellant :- Pankaj Alias Bobby

Respondent :- State Of U.P.

Counsel for Appellant :- B.P. Singh Dhakray, Jitendra Kumar Shishodia, S.S. Dhakray

Counsel for Respondent :- Shree Prakash Giri, Sujan Singh, R.P. Dwivedi, Sheshadri Trivedi, A.N. Mulla, A.G.A

::connected with::

Case :- CRIMINAL APPEAL No. - 6198 of 2009

Appellant :- Mool Chand Sharma And Others

Respondent :- State Of U.P.

Counsel for Appellant :- Aklank Kumar Jain, Jitendra Kumar Shishodia

Counsel for Respondent :- A.N. Mulla, A.G.A, R.P.Dwivedi, S.P. Giri, Satish Trivedi

Hon'ble Pankaj Naqvi,J.

Hon'ble Suresh Kumar Gupta,J.

(Delivered by Hon'ble Pankaj Naqvi, J.)

These two criminal appeals assail the judgment / order dated 6.10.2009 by Addl. Sessions Judge, Agra in S.T. No.419 of 2006, (Case Crime no. 105 of 2006, P.S. Tajganj, Agra), convicting / sentencing the appellant- Pankaj Sharma @ Bobby under Section 302 / 148 IPC to life and other appellants under Section 302 /148 / 149 IPC with life and fine of Rs. 20,000/- each, a default sentence of 2 years each and under Section 148 IPC to 6 months sentence each.

1. The case of the prosecution in a nutshell is as under:-

(A) There was a marriage of the brother-in-law (Amit Sharma) younger brother of the informant on 5.3.2006. The wife of victim / Lalit Parashar, i.e, Soniya @ Shashi was at her maternal house to attend the marriage. The in-laws of the victim had borrowed Rs.2 lacs from him. On 22.3.2006, victim along with his nephew / Amit / PW-2 visited the house of in-laws at around 7:00 in the morning for "Bidai" of his wife as also to demand borrowed amount. The in-laws refused to comply both the demands, a quarrel ensued and before victim could understand any thing, the in-laws caught hold of him, accused Pankaj @ Bobby snatched pistol from the waist of the victim and fired a shot at him. PW-2 rushed the victim in a car to Upadhyay Hospital. He simultaneously informed PW-1/ informant elder brother of the victim, telephonically about the occurrence. PW-1 came to the hospital to be informed by PW-2 that as a part of conspiracy, accused Jagdish (father-in-law of deceased), Anil, Amit, Rahul (brother-in-laws), Moolchand (father-in-law), Anil, Ajay (maternal uncle of Sonia), Shiv Rani (mother-in-law of Lalit Parashar) caught hold of the victim, while accused Pankaj @ Bobby after

snatching the pistol from the victim fired a shot at him. This murder was alleged to have been committed with a view to usurp the borrowed amount and the wife's adorned jewellery. The condition of the victim was reported to be critical.

(B) On above allegations, a written report (Exbt. Ka-1) dated 22.3.2006 came to be scribed / lodged by PW-1 / Dhruv Parashar, as Case Crime no. 105 of 2006 under Section 307 IPC, P.S. Tajganj, Agra on 22.3.2006 at 8:30 A.M, against the abovenamed 8 accused persons.

(C) During treatment victim died on 23.3.2006, at 7:00 A.M, case was converted to Section 302 IPC vide G.D. Entry no.15 (Exbt. Ka-5).

(D) PW-8 / Sanjay Kumar Jaiswal, the first I.O, obtained the statement of the first informant (PW-1), PW-2 and prepared the site-plan (Exbt. Ka-8). He recovered a pistol with the marking "RP8121 / Indian Ordinance Factory", 2 magazines along with 15 live cartridges- 32 bore, one empty and a bullet of 32 bore, memo prepared (Exbt. Ka-9). He collected blood from the floor in a glass bottle, memo (Exbt. Ka-10). The

incriminating materials were sent for forensic / ballistic examination, ballistic report (Exbt. Ka-20). He recorded the statements of memo witnesses Suresh Chandra and Santosh (both not examined). The field unit took the photographs of the finger prints on the weapon in presence of PW-8. He then proceeded on the same day, i.e, 22.3.2006 for Upadhyay Nursing Home, met Dr. Upadhyay, who stated that the injured was admitted in ICU in a precarious state, who was brought by one Amit Sharma. PW-8 arrested accused Jagdish Prasad Sharma, Pankaj Sharma, Rahul Sharma and Smt. Shivrani from the bus-stand, obtained their statements on the same day.

(E) PW-9 took up investigation from 23.3.2006 after conversion of case to Section 302 IPC. He, on the same date, conducted the inquest (Exbt. Ka-2) at the Hospital, collected blood stained apparels of the deceased, memo (Exbt. Ka-12). He prepared police papers including the letter to CMO for autopsy. He attempted to record the statement of wife (Sonia @ Shashi) of the deceased on various occasions, but in vain.

He on 22.4.2006 filed a charge-sheet against arrested accused Jagdish Sharma, Smt. Shivrani, Pankaj @ Bobby, Rahul Sharma and Moolchandra under Sections 147, 148, 307 and 302 IPC while continuing investigation against other absconding accused. On transfer of PW-9, investigation was again transferred to PW-8. He finally filed a charge-sheet against Anil Sharma, Amit Sharma and Vijay Sharma under Sections 147, 148, 307, 302 IPC.

(F) The case of all the 8 accused was committed to the Sessions, charges under Sections 302 / 148 IPC framed against accused Pankaj @ Bobby and that of Sections 302 / 149 / 148 IPC against 7 other accused.

(G) The prosecution examined as many as 10 witnesses. PW-1 / the informant and real brother of the deceased, PW-2 nephew of the deceased, a sole eye-witness, PW-3 witnessed the running of the accused from the scene. PW-4 the Head Constable Collector Singh of P.S. Tajganj, proved the FIR (Exbt. Ka-3) as also the G.D. entry no. 15 at 8:15 A.M in his handwriting (Exbt. Ka-4). PW-5, the doctor, is

alleged to have examined the victim at the time of his admission in Upadhyay Nursing Home and is also the author of the injury report (Exbt. Ka-6). PW-6/ Dr. Surendra Singh, a family friend of PW-1, a hearsay to the occurrence. PW-7/ the doctor, conducted the autopsy (Exbt. Ka-7) of the deceased on 23.3.2006 at 12:15 P.M. PW's-8 and 9 are the I.O.'s. PW-10, the Compounder of Upadhyay Nursing Home, who allegedly proved the registration form of the victim, filled up at the time of his admission. The trial court examined CW-1, Constable 1794 of P.S. Tajganj, Agra, who allegedly proved the G.D. entry (Exbt. C-1) that the victim was admitted by accused Anil Sharma in Upadhyay Nursing Home.

(H) The defence alleged that as the first marriage of the deceased came to be dissolved after series of litigation, second too on the verge of collapse, victim used to torture his wife Sonia @ Shashi, as frustration had set in as she had denied to cohabit with the victim as a result of which he shot himself from his own pistol which he used to carry. No defence evidence was led.

2. The trial court after analysing the evidence was of the view that it was a case of cold blooded murder, plea of suicide is devoid of merit, while acquitting accused Smt. Shivrani and Vijay Sharma as they were not close relatives of the other co-accused and had no occasion to be present at the time of occurrence, while Vijay Sharma was nursing a fracture, convicted the appellants as above.

3. We have heard Sri B.P. Singh Dhakray, Sri Jitendra Kumar Shishodia and Sri Aklank Kumar Jain, learned counsel for the appellants, Sri Satish Trivedi, learned Senior Advocate assisted by Shri Shree Prakash Giri, S/Sri Sujan Singh, R.P. Dwivedi and Sheshadri Trivedi for the informant and Sri A.N. Mulla, the learned A.G.A, for the State.

4. Learned counsel for the appellants canvassed the following arguments:

(i) The deceased committed suicide from his own fire-arm in the house of accused-appellants, deceased escorted to the hospital by appellant Anil in a car, who got him admitted at Upadhyay Hospital at 7:35 A.M, in respect of which, a memo,

was sent by the hospital to P.S. Sadar, under whose jurisdiction, the hospital is situate, recorded in the relevant G.D (Exbt. C-1), of P.S. Sadar and its further transmission to P.S. Tajganj, (P.S, in which the occurrence took place).

(ii) Presence of PW-2, the solitary eye-witness is challenged on the ground that he failed to disclose his mobile number, from which he gave information to PW-1 about the occurrence, in fact, it was appellant Pankaj, who informed PW-2 about the suicide. A complaint was also lodged as regards botched investigation to D.I.G, an inquiry conducted by Digambar Singh, C.O, who opined that PW's-1 and 2 were fabricating evidence.

(iii) The trial court committed grave illegality when it proceeded to examine PW-5 and 10, even though they were neither enlisted in the charge-sheet nor summoned under Section 311 CrPC and similarly admitted Paper nos. 66-Kha, medico legal dated 22-3-2006, 67-Kha admission slip of the hospital and 68-Kha memo from the hospital to P.S, Sadar, when these documents were not forming part of the case

diary / charge sheet.

(iv) Prosecution failed to explain injuries no.3 to 6.

(v) Exbt. (Ka-18), memo dated 22.3.2006 from the hospital to P.S. Sadar alleging that victim was murdered by in-laws and was admitted by PW-2, is not supported by any G.D. entry, giving a serious dent to the origin and the sequence of occurrence as alleged by prosecution.

5. The learned A.G.A, and Shri Satish Trivedi, Learned Senior Counsel assisted by S/Sri Sujan Singh and Sheshadri Trivedi contested the submissions as under:-

i) The deceased was put to death in a pre-planned manner as on 21.3.2006, deceased was called by appellant Mool Chandra to come to his house on 22.3.2006 before 8:00 A.M, to settle the dispute relating to loaned amount as also the matrimonial dispute.

ii) PW-2, the solitary eye-witness is wholly reliable, he cannot be disbelieved merely on the ground that he was unable to disclose his mobile number, which had

subsequently changed.

iii) There is no bar for the court to examine any witness or consider documents not forming a part of the charge-sheet as long as opportunity to cross-examine the witness and of the documents is extended to defence.

iv) PW-5, the doctor proved the firearms injuries of the victim coupled with the fact that other injuries were simple, which can be an outcome of a fall subsequent to the shot being fired.

v) The G.D. entry, (Exbt. Kha-2), on 22.3.2006 at 9:40 A.M, at P.S. Tajganj, is by an unauthorized person-namely, Pushpendra as his constable number was never disclosed and further PW-9 / the S.H.O, stated that he is not aware as to the identity of Pushpendra as he never came before him.

6. The vexed issue which the Court has to answer is as to whether the deceased was put to death by the appellants or he committed suicide. To answer this, we shall have to inter-alia necessarily first examine post occurrence events i.e, who

got the victim admitted in the Hospital.

7. The victim was admitted having sustained gunshot injuries in Upadhyay Hospital, Agra at 7:35 A.M. The defence-appellants alleged that the victim, after shooting himself in their house, was ferried by Appellant Anil in the vehicle of a neighbour – to Upadhyay Hospital. Upadhyay Hospital sent a memo to P.S, Sadar through one Rajendra, an ambulance driver indicating that victim shot himself with a revolver in the house of his in-laws and was admitted by appellant Anil, brother-in-law of the deceased. This memo was entered in the G.D, of P.S, Sadar (Exbt. C-1) at 8:15 A.M. This G.D. entry is proved by CW-1. During cross-examination, CW-1 admitted that in a cognizable case, the G.D. entry accompanies the memo / application, but in the present case, no memo / application was annexed as it was sent to P.S. Tajganj, in whose jurisdiction the incident took place. PW-4 / HC 134 Collector Singh proved the G.D. entry recorded at P.S. Tajganj at 9:40 A.M by Pushpendra Singh, which was brought by Constable Nahar Singh of P.S. Sadar. A challenge

is made by the prosecution as regards the G.D. entry at 9:40 A.M, at Tajganj on the ground that the same was recorded by an unauthorized person, not in existence as even his constable number was not disclosed. However, when we scan the evidence of PW-4, who proved the G.D. entry of P.S. Tajganj at 9:40 A.M, by Pushpendra Singh, we find that he admitted that the scribe of the said G.D. entry was Pushpendra Singh, posted along with him and with whose handwriting he was familiar. PW-4 further instructed Home Guard Harvilas along with copy of G.D. entry at 9:40 A.M, and memo to be handed over to PW-8 / Sanjay Kumar / the I.O. Home Guard Harvilas returned at 12:35 P.M, whose return is entered in the G.D, entry. Thus the challenge as to the existence and incompetence of Constable Pushpendra Singh is liable to be rejected as PW-4 neither denied his existence nor challenged his competence. PW-4 cannot be disbelieved merely on the ground that he failed to disclose constable number of Pushpendra Singh.

8. PW-8, the I.O, admitted that a memo / intimation of

admission of the victim was sent to P.S, Sadar, yet he did not examine the doctor, who admitted the victim. The prosecution is relying on memo dated 22.3.2006 (Exbt. Ka-18) intimating P.S. Sadar that victim was admitted by his nephew Amit Sharma (PW-2) at 7:35 A.M, who was shot by his in-laws, but this intimation/ memo does not find any mention in the G.D. entry at P.S. Sadar.

9. We after analysing the above evidence, are of the view that it was accused Anil Kumar Sharma, who got the deceased admitted at the Upadhyay Hospital at 7:35 A.M.

10. We hasten to add at this juncture that merely because Anil Kumar got the victim admitted in the hospital would not ipso facto be a determining factor that it was a suicide for which we will have to examine the evidence of solitary eye-witness PW-2, who was allegedly present in the house of appellants as also other evidence on record.

11. The occurrence took place inside a room of the house of accused-appellants. Thus the burden lay upon appellants under Section 106 of the Evidence Act, to explain the mode

and manner of occurrence.

12. PW-2 accompanied the victim on a two-wheeler at 7 in the morning to bring back his mami Sonia @ Shashi as also loaned amount. The deceased owned a four-wheeler / Ford Car, but still was choosing a two-wheeler to travel with P.W.-2 upto the house of in-laws to get back his wife, which is highly unlikely. PW-2 alleges that the accused-appellants refused to tender the loan amount as also the bidai of Sonia @ Shashi, a quarrel ensued, accused Jagdish Sharma caught hold of the collar of the deceased; Moolchand shirt; Anil and Amit left hand of the deceased; Rahul right hand; Shivrani caught hold of the hair of the deceased, while Vijay was trying to catch hold the deceased from rear side, accused Pankaj @ Bobby snatched the pistol from waist of the deceased and fired a shot at the deceased from a distance of 2.5 cm. All this in a room measuring 10 x 10.5 feet, which had a double bed, a TV set, an almirah and presence of 10 adults. Considering the above background evidence and in particular nomination of a specific role to each accused with no reaction shown by PW-2

appears to be highly unnatural and improbable. PW-2 is not a child. He is aged about 22 years, makes no effort to prevent accused Pankaj @ Bobby from snatching the pistol of the deceased. There appears to be merit in the contention of the appellants that if there was a conspiracy as alleged to eliminate the deceased, they could very well have used their licensed arms, i.e, the prosecution admits that the accused appellants were unarmed.

13. The prosecution alleged that the relations between the deceased and his wife were cordial, but the accused-appellants were not happy with the marriage, as the couple (deceased and Sonia) contracted a love marriage, as also, they had no intention to return the jewellery worn by Sonia @ Shashi. Going by the prosecution case if the relations between the deceased and her in-laws were not very cordial then why would deceased advance Rs.2 lacs to the accused-appellants, the prosecution had no answer.

14. PW-6, a doctor by profession, and a close acquaintance of PW-1 was stating that on 20.3.2006, he received a phone

call from PW-1 from Delhi that in-laws of the deceased were quite upset and agitated over demand of Rs.2 lacs, PW-6 was requested to proceed to the house of the in-laws of the deceased at R.K. Puram, lest they may commit some mischief with his brother / the deceased. PW-6 along with his friend Brijesh Tiwari (not examined) visited the house of accused on 20.3.2006 in the evening, the accused-appellants on seeing them got agitated, acquitted accused Vijay Sharma and appellant Pankaj Sharma were agitating the most. Vijay Sharma exhorted that the deceased would not be spared while accused Moolchandra was exhorting that had the deceased been his son-in-law, his nephews would have shot him. PW-6 cautioned PW-1 not to let the deceased visit his in-laws in view of highly surcharged atmosphere.

15. Surprisingly, despite receipt of aforesaid information from PW-6, PW-1 maintained stoic silence. He did not utter a single word that he had instructed PW-6, a close acquaintance or for that matter the alleged caution given by PW-1 to PW-6 regarding surcharged atmosphere in the

house of accused and the deceased be instructed not to visit his in-laws. Thus what follows from above is that the case of the prosecution that PW-1 lent Rs.2 lacs to his in-laws is not authenticated by any prosecution witness, dismantling the very edifice on which the prosecution rested its claim, i.e, dispute over non-payment of Rs.2 lacs.

16. To recapitulate, the prosecution alleged that the relations between the deceased and his in-laws were not cordial as the couple had contracted a love marriage but the relations between the couple were cordial. The defence challenged the relationship of the couple alleging that Sonia @ Shashi was subjected to physical torture at the hands of her deceased-husband in his house on 20.3.2006. She was medically examined on 21.3.2006 at 13:30 hours, in the emergency of S.N. Hospital, Agra, when she was brought by her father. The injuries (Exbt. Kha-3) are as under: -

“1. Contused Abrasion of 2 cm x 0.5 cm on right side neck redish in colour.

2. Multiple Abraided contusion of on an area of

6 cm x 4 cm on right shoulder. Redish in colour.

***3. Seared Abrasion of 05 cm x 1 cm on
of right middle finger.”***

17. DW-2, the doctor proved the above injuries. DW-2 was ruling out the possibility of the patient inflicted with above injuries being admitted in the hospital for treatment thereof but the existence of the injuries on the person of Sonia @ Shashi were not disputed. This is further corroborated when DW-1, the doctor of Dixit Nursing Home, stated that upon admission of Sonia on 21.3.2006 at 9:30 P.M, she was not subjected to any fresh medical examination, discharged next day on 22.3.2006 at 1:30 P.M, lends credence that she was never admitted in any hospital with regard to above injuries. Thus what is established is the existence of injuries on the person of Sonia, could be an outcome of wife bashing by the deceased.

18. It remained an enigma as to why Sonia @ Shashi did not enter the witness box to state that she received above injuries as she was physically tortured by her husband. The

probability of Sonia @ Shashi being in a state of guilt as the in-laws refused to let the deceased take back her in view of injuries inflicted by him cannot be ruled out. Secondly it was open for the prosecution to examine Sonia @ Shashi in support of their case, as she was a star witness to state as to what actually happened inside their house. The prosecution had no reason not to examine Sonia @ Shashi as relations between the couple were cordial, she appears to be present in the house at the time of occurrence as her plea of being admitted in the hospital is not established.

19. Non-examination of Sonia @ Shashi as a defence witness could be a lapse but that would not give any advantage to the prosecution. It is well settled that the prosecution has to stand on its own legs and it cannot rely on weaknesses of the defence. Reliance is placed on a recent decision of the Apex Court in ***Anand Ramchandra Chougule Vs. Sidarai Laxman Chougala & others in Crl. Appeal No. 1006 of 2010 decided on 6.8.2019.***

20. The prosecution alleged that the deceased was

eliminated by the accused-appellants in their house as a part of conspiracy as it was a call from Moolchandra on 21.3.2006 who had invited the deceased next day before 8 A.M, to settle the dispute as he had to leave elsewhere. This plea is liable to be repelled firstly on the premise that if the accused-appellants were so adamant to eliminate the deceased then why would they do so in their own house? Secondly why they would not use their own licensed weapons? Thirdly, why would the accused spare PW-2 a solitary eye-witness?

21. Learned counsel for the informant submitted that at the stage of bail before the trial court accused Jagdish had come up with a case that it was Amit, brother-in-law of the deceased, who took the victim to the hospital, but subsequently in the bail of other co-accused, it was alleged that Anil (another brother-in-law of the deceased) took the deceased to the hospital in short G.D. entries in this regard were manipulated. We have already held above that G.D. entry, Exbt. C-1 and Exbt. Kha-2 already stands proved, wherein it was indicated that it was Anil, (brother-in-law of the

deceased), who took the deceased to the hospital. Secondly, we have our own serious doubts as to whether a contention taken up at the stage of bail be a determining factor in ascertaining the guilt.

22. Presence of PW-2, the sole eye-witness is also challenged on the following grounds:-

- i) PW-2 nephew of the deceased was unable to disclose the mobile number from which he conveyed information of the occurrence to PW-1.
- ii) PW-2 was unable to disclose the name of the owner of the vehicle in which he ferried the deceased to Upadhyay Hospital.
- iii) The I.O's made no effort to enquire from PW-2 the particulars of the car and its owner in which the deceased was ferried to Upadhyay Hospital.
- iv) PW-2, present inside the room along with the deceased and 8 other accused person, after alleged hot talks makes no effort either to desist the accused-appellants or to rescue the

deceased.

(v) If the accused-appellants had entered into a conspiracy to eliminate the deceased in their house, then why would they spare PW-2, the sole eye-witness?

23. PW-2 gave an explanation that the mobile number from which he called up to convey the message to PW-1 had changed a year ago and he could not recall his earlier mobile number. On the contrary, the defence alleged that soon after the incident, appellant Pankaj called PW-2 from his mobile number 9837254452, at the latter's mobile number 9319353367 to convey the message about the unfortunate incident. It would be highly unlikely for the appellants committing the murder of the victim and at the same time would also intimate PW-2 about the occurrence. The contention of the informant that alleged intimation to PW-2 comes under suspect as such information ought to have been given to PW-1, elder brother of the deceased. We are not impressed with this argument as PW-2 was not a child, rather was living with the family of the deceased since long. He also

gives an explanation for not obtaining the particulars of the car or the owner of the car as soon after the occurrence the crowd had gathered, providing first aid to the deceased was a top priority. We even if give a leeway to the prosecution on points (i), (ii) and (iii) yet we fail to understand as to why the accused-appellants, instead of using their licenced weapons would wait to snatch the deceased's weapon, when they had conspired to eliminate the deceased and finally after executing their plan why would the accused spare PW-2, the sole eye-witness? We are not oblivious with the legal position regarding the conduct of a witness that witnesses react differently in a given situation, but in the background of above case, PW-2 remaining a mute spectator is highly unlikely.

24. PW-5, the doctor at Upadhyay Hospital, reported the following injuries of the deceased at the time of admission in the hospital on 22.3.2006 at 7:35 A.M:--

“1. Wound of entry of bullet of firearm weapon of 3/4 cm size, rounded in shape, swelling around the wound bleeding present, situated on right tempro-parietal region 3”

above right ear, margins irregular, right black eye.

2. Wound of exit of 1 cm size at left temporo parietal region 2" above left ear; huge swelling around it; margins everted, left black eye, good amount of bleeding present from the wound. X-ray skull showing # of right side of skull, small in size & big # of left temporo-parietal region due to exit. Adv. CT scan Head for details of injury to skull & brain.

3. One small abrasion of 1 cm rounded red, just below right patella found. Patient is deeply unconscious."

25. Learned counsel for the appellants raised two submissions in the light of medico-legal evidence, i.e, PW-5 straightaway entered the witness box (without any previous statement under Section 161 CrPC), the injury report never became a part of the case diary rather was filed in the Court.

26. Learned counsel for the appellants could not cite any provisions of the Code or the law, which prohibits the Court in accepting the evidence unless routed through investigational

agency. All materials gathered during investigation, forming a part of the charge sheet are to be mandatorily supplied to the accused at the stage of Section 207 of the Code, so that the accused is not taken by surprise at the trial, lest it may occasion prejudice. But where the materials are taken on record, which were not forming a part of the charge sheet and no objection was raised as to its admissibility at the trial, then no objection can be raised in appeal that the same were admitted behind their back. We lest not forget that purpose of any criminal trial is the ultimate quest for the truth for which there could be no fetters, the only caveat being that the side against whom any material is admitted must be confronted with the same. Admittedly no objection whatsoever was raised when PW-5 was examined on the injury report (Exbt. Ka-6) of the deceased. Thus PW-5 and the injury-report cannot be disbelieved on the premise that they were not forming part of the charge sheet.

27. Learned counsel for the informant / A.G.A argued on the strength of Modi's Medical Jurisprudence (Page 538 of 24th

Edition) that it was not a case of suicide for following reasons:

“when a muzzle is pressed against a target, a contact entry is caused; here the forceful expansion of the gases of explosion and particles produce a blast effect in the skin and subcutaneous tissues. In contact wounds of the skull, the tissues may crepitate because of impounded gases, but there will be no evidence of burning, tattooing or soot; occasionally there may be a circular impression of the muzzle on the skin around the entry hole. The edges may be ragged and everted and the exit wound is smaller.”

28. Thus there could be no dispute that when a muzzle is touching the target it would give rise to blast effect in the skin and subcutaneous tissues on account of forceful expansion of gases of explosion and particles.

29. Reverting to the prosecution case, it was alleged that as the distance between the muzzle and the target was about 2.5 cm, i.e, the muzzle was not touching the target, also authenticated with the absence of any blast effect. We are not impressed with the plea that as the muzzle of the pistol did not press the target, i.e, head of the deceased, it was a homicide by the appellants, **as suicide cannot be attributed only when the muzzle is pressed against the target** (emphasis ours). There is no hard and fast rule as to at

what distance the muzzle of the firearm and the point of contact / target, a shot fired would be suicidal or homicidal. In the present case, the distance between the muzzle and the target was only of 2.5 cm and it cannot be said that from such distance, a suicidal shot cannot be fired.

30. We thus have no doubt in the light of entire evidence that it was a case of suicide as all was not well between the couple a day before, as she had been assaulted by the deceased, first marriage of the deceased had already ended on a bitter note after a litigious process, refusal on the part of the second wife to join the matrimonial company of the deceased, had left the husband dejected and frustrated, leaving no option for him to commit suicide at the house of his wife. A plea was raised that the deceased was young, a weightlifter of certain standing but that by itself would not mean that he would also be emotionally strong. A physically strong person need not always be emotionally strong.

31. We, after considering the entire evidence on record, are of the firm view that the prosecution has failed to establish its

case beyond a reasonable doubt.

32. We are of the firm resolve that once the prosecution failed to prove its case beyond a reasonable doubt, the issue of propriety of application under Section 391 CrPC remains purely an academic issue. The application is **disposed of** accordingly.

33. The appeals are **allowed**. The judgment and order dated 6.10.2009 is set aside. The appellants are acquitted of the charges. Appellant Pankaj @ Bobby is in jail. He shall be released forthwith unless wanted in any other case. The other appellants are on bail. Their bail bonds are cancelled and sureties discharged.

34. We cannot sign off at this stage unless we disclose writ-large virtual bungling in the investigational process which shocked our judicial conscience on following aspects:-

i) PW-5, Dr. Ajay Agarwal, who first conducted the medico-legal (Exbt. Ka-6) of the deceased was not examined by any I.O, as also the medico-legal (Exbt. Ka-6) was never

made a part of investigation.

ii) The I.O's failed to examine Rajendra, ambulance driver of the Upadhyay Hospital, who brought the memo to P.S, Sadar regarding intimation of the admission of the deceased in the hospital; CW-1, Constable Awadhesh Kumar, who recorded the G.D. (Exbt. Kha-1), at P.S. Sadar, at 8:15 A.M, on the basis of above intimation; Constable Nahar Singh of P.S. Sadar, who conveyed the above G.D. entry to P.S, Tajganj; Constable Pushpendra, who recorded the above intimation in the G.D. (Exbt. Kha-2) at P.S, Tajganj at 9:40 A.M; Home Guard Harvilas, who was sent to communicate the G.D. entry of 9:40 A.M of P.S. Tajganj to PW-8, the I.O, whose return to P.S, Tajganj was entered in the G.D.

iii) The IO's failed to obtain the identity of the owner of the car, who along with PW-2 and the deceased (according to prosecution) went to Upadhyay Hospital soon after the occurrence, he also failed to obtain the statements of the immediate neighbours of the colony.

iv) Although the field unit arrived to obtain the finger prints

of the accused on the pistol, but it failed to obtain finger prints of the deceased.

v) The I.O's also failed to collect the CDR's of the mobile numbers of appellants Pankaj @ Bobby and that of PW-1 and 2 on which they conversed with each other regarding the information of the incident.

35. We fail to understand that despite above severe glaring investigational glitches, shocking our judicial conscience, the Circle Officer, under whose authority the investigation was being conducted did not even care to direct the I.O, to conduct the investigation in a fair and an impartial manner.

36. We are not impressed with the plea of prosecution that it was a case of homicide as the ballistic report (Exbt. Ka-20) indicated that a second bullet was found stuck in the barrel indicating that the accused appellant had all the intention to eliminate the deceased, ruling out the plea of suicide. The plea is liable to be rejected firstly on the ground that PW-2, the sole eye-witness only alleged the use of a solitary firearm shot. Further once the prosecution committed investigational

glitches of grave magnitude, the possibility of the firearm also being tampered to suit the case of prosecution cannot be ruled out. Had the entry of P.S. Sadar at 8:15 A.M, and the G.D. entry at P.S. Tajganj, at 9:40 A.M, been investigated impartially, a much clearer picture of the incident would have emerged.

37. We accordingly, call upon the SSP, Agra to forthwith institute an appropriate inquiry against the erring officials, and report the fall out of the same to this Court within 4 months. This exercise is imperative to restore faith in the process of investigational machinery.

38. Let a copy of this judgment be sent to the Sessions Judge, for ensuring compliance under intimation to this Court.

Copy of this order be also sent to the D.G. Police, U.P, Lucknow and I.G, Zone, Agra to ensure compliance.

Order Date :- 2.9.2019
N.S.Rathour

(Suresh Kumar Gupta,J.) (Pankaj Naqvi.J.)