*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on : 14th September, 2022

Pronounced on : 31st October, 2022

\+ **CRL.A. 689/2019**

VIJAY SAINI @ RAM SINGH ..... Appellant

Represented by: Mr.Sumeet Verma, Advocate with Mr. Mahinder Pratap Singh, Advocate.

versus

STATE ..... Respondent

Represented by: Ms.Shubhi Gupta, APP for the State.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MR. JUSTICE ANISH DAYAL

J U D G M E N T

ANISH DAYAL, J.

1. This appeal assails the judgment of the learned Trial Court dated 31st October, 2017 convicting the appellant for offences punishable under Section 302 IPC, Sections 25 (1B) (a) and 27(1) Arms Act and order on sentence dated 7th November, 2017 awarding the sentence of life imprisonment to the appellant for offence punishable under Section 302 IPC alongwith fine of Rs. 2000/-, rigorous imprisonment for one year for offence under Section 25 (1B) (a) Arms Act and fine of Rs. 1000/-, rigorous imprisonment for 3 years for offence under Section 27 (1) Arms Act and fine of Rs. 1000/-, additional rigorous imprisonment for 3 months in default of payment of fine. All sentences to run concurrently.

The impugned judgment of the learned Trial Court had also convicted two other co-accused Tabrez Ahmed @ Sameer and Ashraf Ali @ Fuddey for offence punishable under Section 212/34 IPC and Sheikh Shekhu for offence punishable under Section 25 (1B) (a) Arms Act and the sentence awarded to them was for the period already undergone by them respectively and the fine of Rs. 1000/- each was deposited by them since they did not wish to challenge their conviction and sentence.

The Incident

2. As per the case of the prosecution, information was received by PCR on 8th March, 2011 at about 10:20 a.m. by PW-9 Ajit Singh that a girl had been shot at Dhaula Kuan foot over-bridge, Satya Niketan. This was shared with PS Dhaula Kuan vide DD No. 19-A recorded at 10:25 a.m. PW-47 Inspector Bal Ram (IO) along with other police officials reached the spot and found that one unidentified girl had been shifted to the hospital but could not survive. At the hospital, the complainant Rajender Singh PW-1 had also reached and identified the deceased as his daughter Radhika Tanwar. FIR No.49/2011 was registered on the statement of the complainant who mentioned that his daughter Radhika had left house for her college at about 9:30 a.m. and at about 11:00 a.m. he had received a call on his mobile phone that someone had shot his daughter at Satya Niketan. Upon reaching the hospital pursuant to information received, he found that his daughter had already expired. During the investigation, it was found that the assailant had fired one bullet at the back of the deceased resulting in her death and that the appellant Vijay Saini used to follow the deceased few years prior to the incident. Later it was found that the appellant had fled to Mumbai and his associates, the co-accused with whom he had stayed in the night after the

date of the incident had fled to their native place at District Sitapur, UP. The appellant and the co-accused were arrested from respective places and brought to Delhi and later the fourth co-accused Sheikh Shekhu was arrested from his house who got recovered the firearm used by appellant Vijay Saini.

3. Consequently, all four accused were charge sheeted and the case was committed to the Court of Sessions. Charges under Section 302 IPC and 25/27 Arms Act were framed against the appellant; charge under Section 201/34 IPC against the accused Tabrez and Ashraf Ali; and charges under Section 212/34 IPC and 25/27 Arms Act against accused Sheikh Shekhu. All of them pleaded not guilty and claimed trial. The prosecution examined 50 witnesses, statements of the appellant and other co-accused were recorded under Section 313 of Cr.P.C and they did not lead any evidence in defence.

Submissions on behalf of the Appellant

4. The appellant through his appeal and arguments on his behalf led by learned counsel submitted that the case of the prosecution was based upon circumstantial evidence and the prosecution was unable to establish guilt beyond reasonable doubt since there were various missing links in that chain. The learned Trial Court had failed to appreciate that witness PW-5 Nar Bahadur, PW-9 Ajit Singh and PW-18 Sanjeev Malik who were stated to be eyewitnesses had made contradictory statements. There were material contradictions in the versions narrated by PW-5 and PW-9 with regard to presence of the appellant at the place of occurrence. PW-9 in fact had stated in his cross-examination that he informed the media that he had not seen anything pertaining to the incident on 8th March, 2011. PW-5 had admitted in his cross-examination that only three public

persons had shifted the deceased from the spot, however PW-6 in his testimony stated that he, along with one other person, shifted the deceased to the hospital and did not note who this person was, as he was in haste. PW-9 on the contrary admitted in his cross-examination that police official was the only person who took the girl to the hospital. PW-9 also admitted that he did not give any statement to the police after 8th March, 2011 and was not called for TIP on any occasion. As regards motive, learned counsel for the appellant submitted that as per PW-1, PW-10 and PW-11 the appellant allegedly had pursued the deceased 2-3 years ago and was beaten up by father of the deceased but nobody had stated that he was ever seen in that area since then. As regards the recovery of the weapon it was recovered at the instance of co-accused Shekhu and not the appellant, whereas learned Trial Court recorded that the appellant got the firearm recovered from the co-accused. As per PW-47 and PW-29 they had taken the appellant to the house of Shekhu who had pointed to the place of hiding of the weapon. However, the appellant had no knowledge of the place of recovery of the weapon and had not disclosed the same. The alleged recovery of the *katta* with an empty cartridge was also shrouded with suspicion since there was no independent witnesses associated with the recovery. It was also submitted that the appellant was arrested and brought from Mumbai by Special Staff of South District, Delhi and handed over to IO Inspector Bal Ram at PS Dhaula Kuan on 12th March, 2011 in the evening and hence it was impossible for the appellant to escort the IO and PW-29 to the house of Shekhu by 12:00 noon on 12th March, 2011. Further, PW-23 Ashwini Kumar who was the employee of Shekhu stated that Shekhu was taken by the police from his shop at about 11-11:30 a.m. on 12th March, 2011 in his presence. As regards the *res gestae* evidence of PW-5, PW-9

and PW-18, it was submitted that PW-18 had gone completely hostile and did not support the prosecution while there were several contradictions in the testimonies of the PW-5 and PW-9 which were listed in detail in written submissions by counsel for the appellant. As regards the ballistic expert's opinion, the counsel for the appellant submitted that as per report Ex. PW-8/A, the bullet marked Ex. EB1 was discharged through the country made pistol 0.315 bore marked as Ex. F1. However, PW-47 the IO deposed that he had sought opinion from the FSL whether the lead recovered from the body of the deceased was part of the shell Ex. EC1 but the report was totally silent on the same. Also, PW-8 the ballistic expert deposed that he did not match the gun powder found on the clothes of the deceased with that present on the firearm nor had he checked the range of the firing. Further, both the site plans Ex. PW-9/DA and Ex. PW-47/K do not show the position of the assailant and hence the range of the alleged firearm is not being determined. As regards the arrest from Mumbai the prosecution has not produced any railway ticket booked for Mumbai nor any flight ticket booked to confirm that the police team had indeed gone to Mumbai and there is no independent witness from Mumbai who witnessed the arrest**.** Even the alleged informant, one Azaz Khan, in Mumbai was also not examined by the prosecution.

Submissions on behalf of the Prosecution

5. The learned Additional Public Prosecutor (APP) countering the submissions of the appellant submitted that all links in the chain of circumstantial evidence were consistent and cogent and the prosecution had been able to prove the guilt of the appellant beyond reasonable doubt. As regards the motive, PW-1 the father of the deceased had stated that the appellant used to eve-tease his daughter and was beaten up by

Pankaj, Ravi and him, about 2-3 years prior to the present incident. Testimonies of PW-10 and PW-11 also established the fact that appellant used to follow the deceased in the year 2009. The motive of the appellant was further established by CDR analysis chart which showed that the appellant was following the deceased right before the incident on 8th March, 2011. The location of cell phone of the appellant was found on dates prior to the incident at Satya Niketan (near the college of deceased) and of Naraina (near the residence of the deceased). As per the learned APP the appellant was constantly stalking the deceased and when she did not accept his advances, he murdered the deceased in broad daylight as a pre-meditated act. Reliance was also placed on the conduct of the appellant post the incident since PW-14, the employee of the appellant, had stated that when he woke up in the morning the appellant was not found and when he called him on his phone number the call was answered by the co-accused Tabrez who asked him to call later, but later when PW-14 called again the phone was found switched off. On 9th March, 2011 co-accused Tabrez visited the factory of PW-14 and told him that the appellant was unwell and took away the bag of the appellant and did not ask for wages of the work done by the appellant from PW-14. A call by PW-14 to the appellant on 8th March, 2011 was confirmed by the CDR analysis. PW-17 the employee of the co-accused Ashraf and Tabrez stated that one month prior to the date of the incident the appellant had left that factory and co-accused Ashraf and Tabrez settled their accounts on 9th March, 2011. Further on 8th March, 2011 the appellant along with co-accused Ashraf and Tabrez had visited the factory and requested to sleep in the factory that night and in the morning of 9th March, 2011 all three of them left the factory without doing any work. PW-40 stated that on 9th March, 2011 at about 2:00 p.m. the

appellant and co-accused Ashraf and Tabrez met him and asked for work and that all three persons came to his room with their luggage and finding no place to sleep, left from there. PW-41 stated that all three persons met him but since they had no place of stay, they declined offer of employment by PW-41 while co-accused Ashraf and Tabrez left for their village, UP at about 9:00 p.m. the appellant left for Mumbai. As regards the *res gestae* evidence, testimonies of PW-5 and PW-9 were consistent since both had identified the appellant before the police officials as well as the Court as a person who was running with pistol in his hand and was hiding something beneath the shirt after they had heard the sound of gunshots on the flyover. As per learned APP, since PW-5 and PW-9 were only passersby and not interested witnesses their testimonies ought to have credibility and the presence of the PW-9 is established from the call made to the PCR. As regards the recovery of the weapon of offence, the learned APP submitted that PW-29 and PW-47 categorically stated that when the appellant was brought back to Delhi, he led the team to the house of the co-accused Shekhu and mentioned he had handed over the *katta* to him. Thereafter, the *katta* was recovered at the instance of Shekhu from the attic in the northeast corner in his room wrapped in newspaper and had one fired cartridge. The ballistic report matched the bullet recovered from the body of the deceased with that of the weapon recovered. As per the medical evidence PW-4 the doctor who conducted the *post mortem*, death was due to firearm injury and therefore clearly homicidal and hence, the learned Trial Court has rightly convicted the appellant and other co-accused.

The Evidence

6. The evidence, relevant and necessary for the assessment of this case, is *inter alia* as under:

6.1 PW-1 the complainant and father of the deceased deposed that on 8th March, 2011, at about 11:00 a.m. he received a call on his mobile that someone had shot at his daughter at Dhaula Kuan and while he was on his way with his sons Vipin and Manoj to Dhaula Kuan, he again received a call and was asked to directly reach the hospital. Upon reaching the hospital he came to know that his daughter had expired, and police recorded his statement Ex. PW 1/A. He identified the body of the deceased as that of his daughter and the bag which she was carrying including other articles. He told the police that his daughter was studying in B.A (2nd) Year in Ram Lal Anand College. Later he came to know from TV news that accused Vijay Saini had fired at his daughter and after seeing the face of accused Vijay Saini in the news, he was informed by 2-3 boys of his locality, viz. Ravi and Pankaj that the appellant used to follow his daughter and was beaten about 2-3 years ago by the boys of village. In his cross-examination he confirmed that he had stated that in his village house, one boy, who was working in factory in the village and was aged about 20-22 years, used to follow his daughter and his tenants Pankaj and Ravi had beaten that boy and he too had beaten the boy. He confirmed the mobile number of the deceased daughter as 9899200980 and that she was carrying that mobile on the date of the incident. He did state in his cross-examination that he had seen the appellant Vijay Saini on TV for the first time after his arrest and he was not called for any judicial TIP of the accused persons. He also stated that his daughter had not made a complaint to him 3-4 months prior to the date of the incident about any boys teasing or following her.

6.2 PW-11, Ravi Tanwar, deposed that the deceased and the father reside in the same locality. About 2-3 years ago his friend Pankaj had shown one person and told that he used to tease Radhika and, on that

occasion, apprehended that person outside his shop and a quarrel took place. PW-10 Pankaj and PW-11 had intervened and given 2-3 slaps to the said person. He identified the appellant in the Court as that person whom they had slapped for teasing the deceased. He further stated that they called the father of the deceased who also gave beatings to the said person. PW-10, Pankaj corroborated the testimony of the PW-11 and stated that the deceased had shown the appellant (whom he identified in Court), as the person who used to tease her. He further deposed that after apprehending the person and slapping him, he had brought the person to the house of the deceased and her father had also given beatings to the person. Both PW-10 and PW-11 confirmed that the appellant was not seen in the locality thereafter but PW-10 stated that the deceased had told her that a few days later, the appellant had thrown a letter in the Indica car belonging to her father.

6.3 PW-5, Narbahadur deposed that on 8th March, 2011 at about 10:15 a.m. when he was cleaning one car near fly-over of Satya Niketan where he was employed as a servant, he heard a noise like a tyre burst and when he went to the flyover along with another driver (whose name he did not know) he saw a girl having been shot and a person running away from flyover towards Dhaula Kuan having a pistol in his hand. He tried to apprehend him but was afraid as he had a pistol in his hand. He identified the appellant as that person whom he had seen in Court. In his cross-examination he stated that three public persons lifted the deceased from the ramp and took her to the hospital in an auto but he did not recognize them. He further stated that he was not called for TIP of any of the accused person by the police.

6.4 PW- 9, Ajit Singh he deposed that on the day at about 10:15 a.m. he was going towards his motorcycle near foot over-bridge, Ring Road and as soon as he reached the ramp of the bridge, he heard a sound of fire and saw one girl falling down on the ramp. He saw one boy standing near her and when he asked as to what had happened, he told me that a mobile had burst. While they were trying to remove the deceased from the ramp with the help of 2-3 persons, the boy slipped from there. PW-9 identified the said appellant who was standing near the girl on that day he also stated that he was hiding something beneath his shirt in his pant. In his cross-examination he stated that he did not disclose the features of that boy to the police, but a PCR call made by him disclosed that somebody had fired at a girl at Satya Niketan. He also stated that media had come to the spot when he was present there and he informed the media that he had not seen anything pertaining to the incident. He further stated that Ex. PW-9/D3 was the sketch prepared by the police at his instance, but he was never called by the police to the jail for identification of any person.

6.5 PW-18, was studying in B.Sc. (Chemistry Hon.) in Moti Lal Nehru College and on the day of incident between 10-11.00 a.m., he was having tea with his friend behind escalator at Satya Niketan when he heard the sound of shot being fired from the foot-over bridge. He reached the spot along with his friend and some police officials were standing there but he had not seen anything. Since he was declared hostile the learned APP cross-examined him regarding his statement which was given to the police earlier wherein he had seen one stranger getting down from foot-over bridge and carrying a bag on his back and that he could have identified that person.

6.6 PW-4, Dr. Akhilesh Raj, Sr. Resident, Department of Forensic Medicine, AIIMS testified that he had conducted the *post mortem* on the deceased and found firearms entry wound present in her back in *infra scapula* region on right side and burning was present over inverted margins of entry wound. The track was obliquely upwards, forwards and medially. It had pierced through the skin, superficial facia, intercostal muscles, lower lobe of lung, and the bullet was found in the fourth intercostal space in a hole of 0.7 cm diameter. In his opinion, cause of death was shock due to hemorrhage caused by firearm injury which was sufficient to cause death in the ordinary course of nature and the injury was *ante mortem*. In his cross-examination he stated that he had not given any opinion regarding the range of the firearm as it was not requested and no subsequent opinion had also been asked for by the IO nor any fire arm was produced by the IO.

6.7 PW-8, Shri Puneet Puri, the Ballistics Expert from FSL, Rohini, deposed that he had received sealed parcels containing one country made pistol of 0.315 inch bore in which one cartridge case was found marked as Ex. F1 and EC1 respectively, one bullet marked as Ex. EB1, and one-half sleeve T-shirt marked exhibit C1 having a hole marked as H1 on the right portion of the back side. As per his examination the country made pistol was in working order and was test fired successfully by using 0.315 inch cartridges from the laboratory stock. The fired cartridge ECl had been fired through the country made pistol marked Ex. F1 since the individual characteristics of firing pin marks and breech face marks present on Ex. ECl and on test-fired cartridge cases were found identical. The recovered bullet marked Ex. EB1 corresponds to the 0.315 cartridge which had been discharged through the country made pistol marked Ex.

F1 since the individual characteristics of striations present on Ex. EBl and on test fired bullet were the same. Further on examination it was opined that the hole marked H1 on the t-shirt had been caused by the bullet discharged through a firearm and gunshot residue particles were also detected on the inner wear of the deceased.

6.8 PW-14, Sh. Nooruduin deposed that in March 2011, the appellant was working in his factory and used to sleep in the said factory and had been referred through the accused Tabrez. On 8th March, 2011 in the morning when he woke up, he found that the appellant was not present in the factory and since then he never returned. On 9th March, 2011 accused Tabrez told PW-14 that the appellant was not well and was going to his village and asked for the bag of the appellant which PW-14 handed over. He stated that Tabrez did not ask for wages for the work done by the appellant when he collected the bag. He identified the appellant in the police station on 14th March, 2011 on being called by the police. He further deposed that the appellant was a friend with Tabrez and Ashraf but Ashraf had not worked with him except one or two days. He knew all the accused persons since they were his co-villagers and he said he was maintaining the register which could prove that the appellant and Tabrez had worked with him.

6.9 PW-17, Rakesh Chaudhary deposed that he was running a stitching factory in village Naharpur, Rohini and one month prior to the date of the incident appellant had left his job with him after working for around 1½ months. The accused Ashraf and Tabrez however settled their accounts on 9th March, 2011, the day after the incident. On 8th March, 2011 at about 11:30 p.m. his employee Riyaz called him to tell him that

Tabrez and appellant had come to the factory and wanted to sleep in the factory. When he spoke to the Tabrez on the phone, he stated that the appellant wanted to sleep in the factory that night and that they would work from the following morning. They slept in the factory on that night of 8th and 9th March, 2011 and left at about 10:30 a.m. On being shown the CCTV recording dated 8th March, 2011 by the police he identified the appellant, Tabrez and Ashraf coming in at about 11:00 p.m. whom he also identified in the Court.

6.10 PW-27, Riyaz corroborated the testimony of PW-17 regarding the appellant, Tabrez and Ashraf coming to factory at about 11:00 p.m., telephoning PW-17 to request for permission and that after spending the night there all three left in the morning and did not work in the factory.

6.11 PW-40, Faizan Ahmed deposed that he was working as a tailor in a company in Gurgaon and that on 9th March, 2011 at about 2:00 p.m. the appellant had called him to request for work in the company. When he tried to search for a room for them there was no room available and three persons came to his room with their luggage and on not finding any space, they left. He stated in his cross-examination that all three belonged to his village.

6.12 PW-41 Mohd. Fayeem deposed that he was residing in a rented accommodation at Gurgaon and he was in regular touch with the appellant and the accused persons through a common friend Faizan who was earlier his roommate. Though he did not remember the exact date or the year being either 2010 or 2011, he stated that the three had come to his room in his absence and he met them at about 8:00 p.m. and he came

back to duty. They stated that even though Faizan had offered them employment in the factory, but not having any place for stay they had declined. According to PW-41 Tabrez and Ashraf left at about 9:00 p.m. for their village in U.P while the appellant left saying that he was going to Bombay.

6.13 PW-47 Inspector Bal Ram deposed that on 8th March, 2011 information was received with DD No. 19A regarding shooting of a girl at Satya Niketan foot over-bridge and he, along with other police members, reached the spot and came to know that she had been removed to the hospital. Upon reaching the hospital they found that the doctors had declared her death and MLC had been prepared and father of the deceased had identified his daughter upon which his statement was recorded, the *rukka* was prepared. The body was shifted to AIIMS mortuary where he prepared inquest papers and a *post mortem* was conducted. He had gone to the spot and taken a small piece of blood-stained piece of tile and seized and secured it. On 11th March, 2011 information was received from Special Staff in the PS that accused Ashraf and Tabrez were arrested and he came to know that they were arrested from Sitapur, U.P. and brought to Delhi post their disclosure statements. He also came to know that the appellant Vijay Saini had been apprehended by Aishvir Singh in Mumbai and brought to Delhi. He came back to PS Vasant Kunj (South) where he met Inspector Aishvir Singh who produced the appellant Vijay Saini and gave him the arrest papers. The appellant then disclosed that *katta*/country made pistol which he used for shooting the deceased was lying with his friend Sheikh Shekhu at Kotla Mubarakpur. Consequently, PW-47 along with other staff reached Kotla Mubarakpur along with the appellant where he identified

Shekhu who was present in the said house and he was accordingly apprehended. Shekhu led the police team to the attic of the house from where he recovered the pistol wrapped in a newspaper which contained an empty cartridge. PW-7 seized and secured the same. Upon an application for TIP proceedings, the accused had refused to participate but later pointed out the place of incident as well as the factory office at village Naharpur where he disclosed that he had come on the night of the incident. PW-7 seized the CCTV footage installed at the premises of the factory upon requesting the owner PW-17 Rakesh Chaudhary. He deposed that he had collected the CDR of the accused persons and found that they were in constant touch prior to the incident. He denied that the photographs of the appellant had been led to any media person on 12th March, 2011.

6.14 PW-44, Aishvir Singh deposed that on 11th March, 2011 he was posted as part of Special Staff, South District and upon having information that the appellant had left Delhi and gone to Mumbai, he along with PW-45 Inspector Jai Prakash and PW-36 HC Mahender departed for investigation to Mumbai by IndiGo flight and reached Mumbai at around 5:00-5:30 p.m. They went to a gali in Mallad, Mumbai-West and met one Azaz Khan who was in contact with the appellant and informed that the appellant had arrived in the morning at 6:00 a.m. on 11th March, 2011 itself and had gone to Tagore Nagar, Vikhroli Mumbai. He further deposed that the appellant was apprehended at the instance of another secret informer at Tagore Nagar at about 10:30 p.m. and was brought to Delhi by Kingfisher flight on 12th March, 2011 and the custody was handed over to the IO at PS Dhaula Kuan. In his cross-examination he stated that they were assisting PW-47

in the investigation of the present case as per directions of the DCP South. Directions issued by DCP South were mentioned in the departure entry dated 8th March, 2011. PW-44 testimony was corroborated by PW-45 Inspector Jai Prakash and PW-36 ASI Mahender Singh.

Analysis

7. Having examined the evidence on record and on appreciation of the submissions of all parties, this Court is of the considered view that the prosecution has been able to prove the guilt of the appellant beyond reasonable doubt, for *inter alia* the following reasons:

7.1 The death of the deceased was clearly homicidal in nature caused due to fire arm injury, as evident from the testimony of PW-4, the doctor who conducted the *post mortem.*

7.2 Even though there were no direct eye witnesses at the point of shooting the deceased, the *res gestae* evidence of PW-5 and PW-9 was consistent in that both had heard a sound of a fire shot and both had seen the girl on the ramp of the flyover and while one had seen a boy standing next to her with something hidden under his shirt other had seen a boy running away with pistol in his hand. Both had identified the appellant in front of the police and then in the Court and being independent and not interested witnesses, they had no ground or reason to falsely implicate the appellant. The presence of PW-9 at the time and place is established from the fact that he made a call to the PCR to inform the police regarding the incident which is evident from Ex. 9/D1.

7.3 The motive of the appellant for killing the deceased is also quite evident from the testimonies of PW-10 Pankaj and PW-11 Ravi who

stated that the appellant had been present 2-3 years back in their village where the deceased stayed and they had intervened and beaten him up since the deceased had pointed out that he was stalking her and teasing her. Both have stated in their testimonies that they had then taken the appellant to the house of the deceased where the father PW-1 had also beaten him up and this was corroborated by the testimony of PW-1 as well. While PW-1 was able to identify the appellant when he saw his picture on television, PW-10 and PW-11 both stated that they had gone to the police station on being called and identified the appellant as the same person.

7.4 The presence of the appellant in the area of the deceased's residence and at the place of incident is further corroborated by the CDR record marked as Ex. PW-21/I which was presented by the prosecution before this Court. An analysis of the CDR for mobile No. 8010769628 of the appellant reveals that between 22nd December, 2010 and 2nd March, 2011 the location of the call phone of the appellant can be traced to Naraina village near the residence of the deceased on multiple occasions, and on 20th and 29th December, 2010 as well as on 20th February, 2011 cell phone of the appellant can been located near the college of the deceased in Satya Niketan.

7.5 The subsequent conduct of the appellant also gives serious credence and corroboration to the fact that he had tried to abscond post having shot the deceased on 8th March, 2011. *Firstly*, as per the testimony of the PW-14 the appellant used to stay and sleep in the factory at night but he was not found in the morning when PW-14 woke up and when he tried to call him on his mobile, his phone was answered by the co-accused Tabrez who asked him to call later and when he again

made the call, the phone was switched off; *secondly* on 9th March, 2011 co-accused Tabrez visited the factory of PW-14 stating that the appellant was unwell and took away the bag of the appellant while not clearing the wages of the appellant and PW-14 had not seen them since; *thirdly*, the fact that PW-14 had called the appellant on that day is established from the CDR analysis which shows the location of cell phone of the appellant to be in Naharpur, where the factory of PW-17 is located, where they were present on that day; *fourthly,* PW-17 and PW-27 both stated that on 8th March, 2011 the appellant along with co-accused Ashraf and Tabrez visited the factory and asked to sleep in the factory that night and on the next morning i.e. on 9th March, 2011 all of them left without doing any work one after the other; *fifthly,* PW-40 stated that on 9th March, 2011 the co-accused and the appellant had come to ask for work and for accommodation but having not found any room for themselves in that area they left in the night at about 8:00 p.m., the appellant going to leave for Mumbai whereas the co-accused Ashraf and Tabrez leaving for their village; *sixthly*, the information revealing their departures on the night of 9th March, 2011 was corroborated by PW-41 as well; *seventhly* the fact of the appellant and the two co-accused being present at the factory of PW-17 on the night of 8th March, 2011 was corroborated by the CCTV recording seized by the police. The said circumstance of absconding immediately after the incident of murder would be admissible as "relevant conduct" under Section 8 of the Evidence Act.

7.6 As regards the contention of the counsel for the appellant that no transit remand had been taken for the arrest of the appellant from Bombay, this Court notes that it is not fatal to the case of the prosecution, particularly in light of other corroborating circumstances. PW-44 clearly states in his testimony that the appellant was arrested at about 11.00 p.m.

on 11th March, 2011 and information of the arrest was duly given to SHO, PS Vikhroli, Mumbai as evident from Ex. PW-44/B which clearly mentions the time of arrest as 11.00 p.m. He has further stated that appellant was brought to Delhi by Kingfisher flight on 12th March, 2011 in muffled face and his custody was handed over to the IO. The same is corroborated by PW-45 and PW-36 both of whom had accompanied PW-44 to Mumbai to arrest the appellant. Also, PW-44 states in his testimony that he had claimed reimbursement for their trip to Bombay for the flight expenses. Even though he has not filed the reimbursement certificate, but he said he could produce it if so directed. The fact that flight tickets were not produced would not be fatal to the case of the prosecution that the appellant was apprehended from Mumbai. Further, PW-47 IO Bal Ram has confirmed that PW-44 produced the accused before him on 12th March, 2012 and all four accused including the appellant were produced before the Ld. Magistrate at Dwarka Courts as confirmed from Trial Court Order Sheet dated 12th March, 2011.

7.7 The fact that the mobile being used by the appellant was issued in the name of Sh. Munir Khan PW-19 does not dilute the case of the prosecution, since PW-19 states that when he was working in the factory in Naraina, the appellant and the co-accused Ashraf and Tabrez were also working there, and since Ashraf and the appellant were not having IDs of Delhi, he had got issued three mobile connections and given to Ashraf and Vijay. PW-19 stated that the two mobile numbers 8010869628 and 9654137114 were with appellant Vijay and mobile number 9582291946 with appellant Ashraf.

7.8 The recovery of the weapon of offence i.e. the country made pistol/katta was at the instance of the appellant (disclosure statement of

the appellant at Ex. PW-36/D) who disclosed that soon after shooting the deceased he ran to the house of his acquaintance Shekhu, resident of Babu Park, Kotla Mubrak Pur, and handed over the desi katta with a cover to him. PW-47 IO Bal Ram and PW-29 HC Devender Kumar along with the accused went to House No. S-48, Babu Park where not only was Sheikh @ Shekhu apprehended but the desi katta too was recovered. Shekhu confirmed (disclosure statement at Ex. PW-29/C) having received the desi katta from the appellant on 8th March, 2011 and hiding it by wrapping in a newspaper in the attic of his room. The ballistic opinion clearly showed that the bullet lodged in the body of the deceased had been fired from that weapon as also it corresponded to the empty cartridge found in the recovered weapon.

7.9 The discovery of the fact of the weapon being at Sheikh@Shekhu house confirms both the recovery of the object i.e. weapon as well as the place of hiding and the knowledge of the appellant of this fact. This confirmation is admissible to this extent as per the doctrine of confirmation encompassed in section 27 of the Indian Evidence Act. While a mental fact disclosed by an accused in custody may not be admissible, disclosure leading to the recovery of a physical object or confirmation of a physical fact offers an admissible confirmation to the prosecution. A short overview of a few decisions of the Hon'ble Supreme Court which developed, articulated and reiterated the principles in this regard are extracted as under, for ease of reference:

a) ***Mohd. Inayatullah v. State of Maharashtra*** (1976) 1 SCC 828

> *12. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to*

consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see Sukhan v. Crown [AIR 1929 Lah 344 : ILR 10 Lah 283 (FB)] ; Rex v. Ganee [AIR 1932 Bom 286 : ILR 56 Bom 172 : 33 Cri LJ 396]). Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Palukuri Kotayya v. Emperor [AIR 1947 PC 67 : 74 IA 65 : 48 Cri LJ 533] ; Udai Bhan v. State of Uttar Pradesh [AIR 1962 SC 1116 : 1962 Supp (2) SCR 830 : (1962) 2 Cri LJ 251]).

(emphasis supplied)

b) ***State of Maharashtra v. Damu*** (2000) 6 SCC 269

35. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. ...

36. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. In this case, the fact discovered by PW 44 is that A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motorcycle.

(emphasis supplied)

c) ***Bodhraj v. State of J&K*** (2002) 8 SCC 45

18. ... The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. ... The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be

confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information.

(emphasis supplied)

d) ***State (NCT of Delhi) v. Navjot Sandhu*** (2005) 11 SCC 600

121. The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] : (AIR p. 70, para 10)

Quoting further from the Privy Council's view expressed in ***Kottaya*** case, the Supreme Court highlighted the following extract:

"In Their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is

discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

(emphasis supplied)

e) ***Mehboob Ali v. State of Rajasthan*** *(2016) 14 SCC 640* relies on State of Maharashtra v. Damu in para 17 and holds as under:

18. In Ismail v. Emperor [Ismail v. Emperor, 1945 SCC OnLine Sind CC 32 : AIR 1946 Sind 43] it was held that where as a result of information given by the accused another co-accused was found by the police the statement by the accused made to the police as to the whereabouts of the co-accused was held to be admissible under Section 27 as evidence against the accused.

20. Considering the aforesaid dictums, it is apparent that there was discovery of a fact as per the statement of Mehmood Ali and Mohd. Firoz. Co-accused was nabbed on the basis of identification made by accused Mehboob and Firoz. That he was dealing with fake currency notes came to the knowledge of police through them. Recovery of forged currency notes was also made from Anju Ali. Thus the aforesaid accused had the knowledge about co-accused Anju Ali who was nabbed at their instance and on the basis of their identification. These facts were not to the knowledge of the police hence the statements of the accused persons leading to discovery of fact are clearly admissible as per the provisions contained in Section 27 of the Evidence Act which carves out an exception to the general provisions about inadmissibility of confession made under police custody contained in Sections 25 and 26 of the Evidence Act.]

7.10 Culling out the essential ingredients of section 27 of the Indian Evidence Act in consonance with the principles articulated by the

Hon'ble Supreme Court, the following aspects would need to be considered and factored in, while applying the doctrine of confirmation by subsequent events, embodied in section 27:

i) There has to be an '*information'* received from an accused.

ii) The accused has to be in the custody of a police officer when such '*information'* is given.

iii) The said '*information'* was not within the knowledge of the police officer, when it was received from the accused.

iv) As a consequence of that '*information*', a '*fact'* is discovered.

v) Only that part of the '*information*' which is the direct and immediate cause of discovery of the '*fact*' and is distinctly related to it, stands *confirmed* for the purposes of the prosecution.

vi) If the prosecution deposes to the '*fact'* based on that part of the '*information'* (as in (v) above), it would stand *proved*.

Applying the principles to the facts of this case, it would be evident that pursuant to the disclosure by the appellant, in custody, an information was received that *first*, the appellant committed the offence; *second*, the appellant ran to the house of Sheikh@Shekhu; *third*, the house of Sheikh@Shekhu is at Babu Park, Kotla Mubrak Pur; *fourth*, the appellant had given the country made pistol with a cover to Sheikh@Shekhu to keep/hide. It would be quite clear that the first two pieces of information are not facts which can be '*discovered'* but are either confessional/inculpatory or un-discoverable facts. But the latter two pieces of information lead to two *facts* which are discovered i.e. that Sheikh @ Shekhu lives in that particular address, that he had a country

made pistol in his possession and that the pistol was hidden in the attic in his house. Both these factual discoveries, not hitherto known to the police, are therefore probative and offer confirmation of the information given by the appellant, to that extent. This confirmation offers the prosecution case an important hook and clasp in the chain of circumstantial evidence, thus leading finally to proving the guilt of the appellant beyond reasonable doubt.

Conclusion

8. In light of the above discussion and analysis, this Court finds that the guilt of the appellant for the murder of the deceased has been proved beyond reasonable doubt and duly supported by circumstantial evidence by the prosecution. Consequently, this Court finds no error in the impugned judgment of conviction and order on sentence by the learned Trial Court.

9. Appeal is accordingly dismissed.

10. Copy of this judgment be uploaded on website and be also sent to Superintendent, Tihar Jail for intimation to the appellant and updation of records.

(ANISH DAYAL)
JUDGE

(MUKTA GUPTA)
JUDGE

October 31, 2022/rk