



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No.39 of 2017.
Reserved on : 01.11.2018.
Date of Decision : 06.11.2018.

Kamla Nand

...Appellant.

Versus

State of Himachal Pradesh

...Respondent.

Coram

The Hon'ble Mr. Justice Sanjay Karol, Judge.

The Hon'ble Mr. Justice Chander Bhusan Barowalia, Judge.

Whether approved for reporting?¹ Yes.

For the appellant : Mr. Rajesh Mandhotra, Advocate.

For the respondent : Mr. Vikas Rathore, Additional Advocate General.

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/accused/convict (hereinafter referred to as "the accused"), laying challenge to judgment dated 24.2.2011, passed by learned Additional Sessions Judge, Fast Track Court, Shimla, H.P., in Sessions Trial No.16-S/7 of 2010, whereby the accused was convicted for the commission of the offence punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act and sentenced as under:-

<u>Offence</u>	<u>Sentence</u>
Under Section 302 IPC	Sentenced to imprisonment for life and fine of ₹10,000/-;
Under Section 27 of Arms Act	Sentenced to simple imprisonment for a period of three years and to pay fine of ₹10,000/-. Both the substantive sentences shall run concurrently.

¹ Whether reporters of Local Papers may be allowed to see the judgment? Yes.

2. The key facts necessary for adjudication of this appeal can tersely be summarized as under:

Accused-appellant, who belongs to Village Kalyai of Gram Panchayat Dhar Kundru, Tehsil Theog, District Shimla, was having his wife, namely, Smt. Kanta Devi, sons, namely, Rakesh Kumar (PW-1), Virender Verma (PW-2) and Meena Devi-daughter, who was studying in ITI at Shimla. As per the prosecution case, accused is a dead drunkard and used to quarrel with his wife, whenever she asked the accused not to take liquor. Not only this, the accused also gave beatings to his wife (Kanta Devi-deceased) frequently under the influence of liquor. It is alleged that two years before this incidence, Kanta Devi, wife of the accused left the matrimonial house and went to the house of her parents. Further, with the intervention of the relatives and members of Panchayat, the matter was compromised and his wife joined company of the accused on the promise that he will not take liquor in future nor he will beat her. On 28.5.2010, at about 6:00 PM, a day before the incidence, accused left the house without telling anyone. In the morning of 29.5.2010, Virender Verma, PW-2 (son of the accused and Kanta Devi) went to nearby forest around 7:00 AM, for grazing the cattle. At about 7:30 AM, Kanta Devi, was in the kitchen and preparing meals for the day. Rakesh Kumar, (PW-1) elder son of the accused had just put off his clothes to take bath, when he heard a gun shot in the kitchen and cries of his mother "Mar Diya". He immediately put on his clothes and rushed towards the kitchen and found that his mother Kanta Devi, was lying on the floor and

a gun shot had hit her and she received injuries on her back side. He found his father standing at the door of the kitchen with a gun in his hands. On finding, something unusual had happened Smt. Nirmala Devi (PW-4) rushed to the house of the accused, found him standing at the door with gun, then went to the kitchen and put Kanta Devi in her lap. She tied 'dhatu' (head gear) on the wound of Kanta Devi, simultaneously, Virender Verma (PW-2) and other residents of the village also arrived there, when people started collecting there, the accused tried to flee away from the spot, but he fell down and received injuries. Pradhan of the village was informed about the incidence telephonically to Police Post Matiana within whose jurisdictions this incidence has taken place. Police reached at the spot alongwith Police of Police Station, Theog. Statement of Rakesh Kumar (PW-1) recorded under Section 154 of the Code of Criminal Procedure, in respect of this incidence and site plan was prepared. The inquest report was prepared and took into possession, blood stained clothes from the kitchen as well as the blood lying on the floor with the help of cotton swab in the presence of witnesses taken into possession and spot was also photographed. Thereafter, the accused was arrested by the police and it has been alleged in the charge sheet that he while in police custody made a disclosure statement, under Section 27 of the Indian Evidence Act, on 29.5.2010, in the presence of witnesses that he could get his double barrel gun as well as the used cartridge recovered and pursuant thereto, a double barrel gun was recovered from the ceiling of the room and empty cartridge from a field situated nearby the house. The police also took into possession gun as well as cartridge and got them analyzed from

the Ballistics Expert at FSL, Junga. The report of expert shows that gun shot was fired from the aforesaid gun. The postmortem of the deceased was conducted at IGMC, Shimla, from the Forensic Experts and as per the report of expert, she died due to injuries of gun shot. Investigating Officer also took into possession, the record pertaining to the gun licence of the accused, purchase of live cartridges by him from Arms Dealer at Theog. It has come in the investigation that the deceased immediately before her death had told Nirmla Devi (PW-4) that accused had killed her. It has also come during the investigation, on the evening of 28.5.2010, accused had gone to the house of Tara Chand Verma, his brother-in-law and left in the early morning of 29.5.2010 for his (accused) house. After completion of investigation, *challan* was prepared and presented in the Court.

3. The prosecution, in order to prove its case, examined as many as twenty one witnesses. Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he pleaded not guilty. The accused did not lead evidence in his defence.

4. The learned Trial Court, vide impugned judgment dated 24.2.2011, convicted the accused for the commission of the offence punishable under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life and fine of ₹10,000/-. The convict is further sentenced to simple imprisonment for a period of three years and to pay fine of ₹10,000/-, for offence punishable under Section 27 of the Arms Act. Both the substantive sentences to run concurrently.

5. Mr. Rajesh Mandhotra, learned counsel for the accused/appellant has vehemently argued that the prosecution has failed to prove the guilt of the accused conclusively and beyond the shadow of reasonable doubt, as the disclosure statement and recovery made thereafter seems to be improbable, as per the prosecution case, accused was not having any opportunity to conceal the gun at the place from where it was recovered. He has argued that dying declaration is also not clear, as the deceased has only stated that "*Inhone Maar Diya*", which does not mean that it was the accused who has killed her. He has further argued that accused was not in his house on the previous night and his presence in his house in the early morning on 29.5.2010, is highly improbable.

6. Conversely, Mr. Vikas Rathore, learned Additional Advocate General has argued that the gun belongs to the accused and accused purchased the cartridge, empty shell of the cartridge, which was recovered from the field found to be fired from the gun by the Ballistics Expert of FSL, Junga, the presence of the accused alongwith gun on the door of the kitchen making people come there after the gun shot coupled with the fact that dying declaration of the deceased was clear and unambiguous (*'Inhone'* means husband) leads to only one of the conclusion that it was the accused, who has killed his wife after firing gun shot. He has further argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt and thus, well reasoned judgment of learned Trial Court is not required to be interfered with.

7. In rebuttal, learned counsel appearing on behalf of the accused has argued that for severe punishment, strict proof is required. He has argued that the sequence of events shows that the prosecution story is full of lacuna and the accused, who has been convicted on the basis of prosecution evidence, which is full of surmises and suspicion, required to be acquitted.

8. In order to appreciate the rival contentions of the parties, we have gone through the record carefully.

9. PW-1, Rakesh Kumar, deposed that he got recorded his statement under Section 154 of the Code of Criminal Procedure, Ex.PA, on the basis of which, FIR Ex.PW17/A was registered in Police Station, Theog. He deposed that the accused was his father and Kanta Devi was his mother. He deposed that he is having one more brother Virender Verma (PW-2) and one sister Meena. He deposed that his father was having a double barrel gun which was licensed one. He deposed that his father was dead drinker and there used to be quarrels between his mother and father. He deposed that two years back, the quarrel has taken place between his mother and father and thereafter, his mother left the matrimonial house and went to the house of her parents. Further, she was brought back pursuant to the compromise which took place before Pradhan of Panchayat, Vidya Sagar (PW-3), at the time of compromise, his father has agreed not to take liquor in future. He deposed that on 28.5.2010, his father went out of the house around 6:00 PM, without telling anything and he did not return at night. In the morning of 29.5.2010, when his brother went to graze the cattle and his mother was preparing meals in the kitchen, at about 7:30 AM, he had gone to bathroom

to take bath, which is adjoining to the kitchen, when he was to take bath, he heard the sound of gun shot from the kitchen side. He heard the cries of her mother also "*Mar Diya*". Thereafter he (PW-1), came out from the bathroom and found his father standing there with a gun in his hands, he was standing just outside the door of the kitchen. He went to kitchen and found that her mother lying on the floor with gun shot injuries on the back side. From the wound blood was gushing out. He loudly made a call to his brother, who was grazing cow in a field nearby. On hearing, the gun shot, his uncle Khem Raj and *Chachi* Nirmla Devi (PW-4), whose house was adjoining also reached there and his brother Virender Verma (PW-2) also came there. Thereafter, he made a phone call to his uncle Balanand and requested him to come there. He deposed that all of them were attending the deceased, accused went away. Further, at that time, many persons gather there and they caught the accused while running the accused fell down and received injuries on his head. His mother died shortly, thereafter, the police from Police Post, Matiana and Police Station, Theog, reached there, his statement was recorded. He has stated that '*Dhatu*' (head gear) of his mother had been tied by his aunt on the wound of his mother. The '*Dhatu*' (head gear) was taken into possession by the police. Thereafter, this witness remained busy in connection with dead body of the mother. On 31.5.2009, the police again came to their house, at that time, his uncle, Balanand and Dinesh Verma were also present. He handed over the gun licence to the police, which was taken into possession, vide memo, Ex.PB, which bears his signature and signatures of the witnesses and exhibited the licence, Ex.P1. He has

identified the gun, which was sealed in a parcel, with three seals of FSL and after opening the seal parcel, a double barrel gun was taken out and the same as per this witness belongs to his father. The gun was exhibited, as Ex.P2. He has also identified the 'dhatu' (head gear) to be the same of his mother, which smeared with blood type substance. The 'dhatu' (head gear) was exhibited, as Ex.P3. He also stated that this is the same 'dhatu' (head gear) which was tied by her aunt on the wound of his mother. In his cross-examination, he stated that income from the orchard was about ₹80,000/- to ₹90,000/- per year. He has admitted that the gun licence had been given to his father by the administration for crop protection. He has admitted that gun shot was to be fired to scare the wild animals. He has stated that neither he nor his brother load and use the gun. He has stated that the distance between kitchen and bathroom is about 8 feet and one of the wall is common between two. The said wall is 'kachha' one. He has admitted that keys of the house generally remained with his mother. The gun Ex.P2 and cartridges were used to be kept by his father in his own room. He has specifically denied that the gun and cartridges used to be at a place accessible to all family member and the gun was to be used by any of them. He has stated that the distance between the place where his mother was lying down in the kitchen and door of the kitchen is about 7 feet. He has admitted that he has not seen the gun fire with his own eyes. He has stated that the marriage of his parents took place 23 years ago and the relations between them were generally good, but quarrels used to take place on account of his father taking liquor. The quarrels used to be wordy one, but sometime his father

used to beat his mother with '*danda*'. He has admitted that his mother never filed any complaint with the police. He has denied that no compromise was taken place two years back. He has admitted that partition of the land has taken place between his father and his uncle. He has denied that he does not possess a double barrel gun. He has admitted that his mother not met him in the morning of 29.5.2010 before this incidence. He has stated that he had not heard any such quarrel taken place in the kitchen on that day. He had taken off his clothes in the bathroom, when he heard the gun shot. He has stated that his brother used to go to School at 8:30-8:45 AM, but he has denied the suggestion that his brother never used to go to graze cattle in the morning. He has specifically stated that he used to graze cattle in a field at a distance of 50-60 meters from their house and no one else used to graze cattle there. He has denied that accused was not present, when the incidence has taken place.

10. PW-2 Virender Verma, second son of the accused deposed that they are two brothers and one sister. He deposed that his sister studying in ITI, Shimla. He stated that his father used to quarrel with his mother on account of liquor. He deposed that on 28.5.2010, his father left the house around 7:00 PM and on the next day, he has gone to graze cattle in a nearby forest, when he left the house, his mother was present in the kitchen. He heard a loud call at about 7:30 AM that his mother had been killed by his father, when he came to the house, he saw his father was on the stairs with a gun in his hands, whereas mother was lying unconscious in the kitchen. She had received a gun shot injuries. He has stated that Nirmla is '*Chachi*' and

Khem Raj-uncle reached at the spot together. He deposed that his uncle and aunt resided in the same building. He found blood was oozing out from the wound of his mother. He stated that his bother telephonically informed Bala Nand, about the incidence who also came to the spot. The accused tried to flee from the spot, but his uncle and brother tried to catch the accused. In this process, the accused received injuries while fleeing away from the spot. He deposed that accused was not carrying gun with him while fleeing. Thereafter, Vidya Prakash, Vidya Sagar and Prakash, also came on the spot. He stated that his mother had told Vidya Sagar, Pradhan of Gram Panchayat, Dhar-Kandru that accused used to quarrel with his mother after taking liquor. In his cross-examination, he has stated that he is studying in 10+1. He deposed that he used to go School from house around 9-9:15 AM. He deposed that when he reached his house, his mother alongwith brother were present there. Police recorded his statement in his house. He has stated that he is not in a position to take his mother to the hospital, as there was no occasion to take her to the hospital. He has denied the suggestion that he has not gone to the forest in the morning. He stated that the gun used to be kept in a room, where the accused normally used to sleep. He stated that our house is double storyed and in the ground floor, cattle are kept. He has stated that he does not know where his father used to keep the cartridges. He does not know about the loading of gun. He stated that the relationship of his mother and father were cordial, but sometime they used to quarrel on the point of liquor. He has denied that no such quarrel took place on 28.5.2010.

11. PW-3, Vidya Sagar, President of Gram Panchayat, Dhar Kundru and Advocate by profession. As per this witness, on 29.5.2010, at about 8:00 AM, he received a phone call from Vidya Prakash, husband of Up-Pradhan of Panchayat that gun shot had been fired on a lady. He immediately telephonically informed Police Post, Matiyana about it. He went to Kalyai, in a vehicle of Station House Officer, Theog, the police of Police Post, Matiyana, reached at place Kalayai, almost simultaneously many persons had collected at the spot, the accused was standing nearby his kitchen and he had been detained by the people. PW-1, Rakesh Kumar, got his statement recorded before the police. He remained associated with the police when blood was taken with the cotton swab and put into a bottle. The '*dhatu*' (head gear) was taken into possession, which was smeared with blood and recoveries were effected. As per this witness, the accused also made disclosure statement in his presence and on the basis of disclosure statement, gun was recovered from the ceiling. He identified the gun and cartridges to be the same in the court on that day. He also identified the '*dhatu*' (head gear), and the cartridge Ex.P4, which was recovered from the spot. He also deposed that he appended his signatures on the parcel. He deposed that Pradhan of Panchayat, had gave information that the accused used to beat the deceased. Earlier, the deceased had gone to the house of her parents after getting annoyed from the conduct of the accused, as he had beaten her. He deposed that he has also gone to the house of the parents of deceased in order to get the matter compromised and pursuant to the compromise, the deceased had joined the company of the accused. He deposed that written

compromise was effected at that time and copy thereof was given to the parties and one copy was retained with the Panchayat, but now it was misplaced, while the record was shifted to new Panchayat Ghar. In his cross-examination, he deposed that he know all the residents of the area in the capacity of Pradhan of Gram Panchayat. At that time, 20-25 persons of the locality had collected there. He stated that just adjoining to the house of the accused, the other house located at some distance of about 5-10 minutes walk. He deposed that gun was taken into possession from the ceiling and at that time, he was present in that room. In his cross-examination, he admitted that 15-20 persons are authorized to possess this type of gun in his Panchayat, but he do not know the kind of guns they have. He has stated that his statement was recorded on the spot. They remained on the spot till 8:00 PM. He stated that it is incorrect that no proceedings were prepared in his presence. He has denied the suggestion that accused never used to quarrel with his wife and used to give beatings. He has denied that no compromise was got effected by the Panchayat. He stated that police recorded his statement twice. He has denied the suggestion that being Pradhan of the Panchayat, he made his false statement.

12. PW-4, Nirmla Devi, sister-in-law of the accused, deposed that accused used to quarrel with his wife (Kanta Devi) after taking liquor, as Kanta Devi, used to ask the accused not to drink. She deposed that on 29.5.2010, at about 7:30 AM, she rushed to the spot immediately, on hearing gun shot and cries and there put Kanta Devi in her lap, tied '*dhatu*' (head gear) on the wound and then Kanta Devi made dying declaration to her

that "*Inhone Mar Diya*". PW-5, Sanjeev Verma, in whose presence the articles of the deceased i.e. ornaments were handed over to Bittu Verma, vide memo, Ex.PG. PW-6, Karam Chand, Halqua Patwari, Patwar Circle Dhar Kundaru, who prepared copy of *jamabandi*, Ex.P5 and prepared *tatima* Ex.P6, of the spot and handed over them to the Investigating Officer, SI Ram Phal (PW-21). PW-7, Ishwari Devi, mother of the deceased to show that there had been quarrels between the accused and the deceased regarding liquor and even Kanta Devi had left the matrimonial house, when the accused gave beatings to her. PW-8, Dr. Peeyush Kapila, Assistant Professor, Department of Forensic Medicine, I.G.M.C, Shimla, who conducted autopsy upon the deceased and prepared report Ex.PW8/C. The observations during the postmortem examination are as under :

"166 cm, female body was brought with blood soiled clothes on back. Body had cooled down to room temperature. Hypostasis was present on back, fixed. Rigor mortis present in smaller joints. No evidence of decomposition present. Skiagrams of Xray were taken before autopsy.

Antemortem Injury :

1. 11 x 4 cms Lacerated penetrating gunshot wound present on left back, medial end of injury 2 cms from midline at the level of L3-4 vertebrae, lateral end having grazed and medial and having avulsion, 60 cms from top of head, 102 cm from heel and 2 cms from midline, placed transversely.

After opening the body wad 3.5 x 1.5 cm, black made of plastic & rubber was present in the retroperitoneal space on right side. There was fracture of spine and transverse processes of L3-4 vertebrae. Some pellets were present on right lumbar region just below the skin, taken out and preserved to be handed over to the police. Individual pellet wounds 3 in number present in mesentery of small intestine lacerating liver on right inferior lobe. There was contusion of pancreas and perinephric area of right side. Gross laceration of vessels of abdomen present in the tract

which directed from left side of back to right side lacerating skin, muscles, then fracturing L3-4, transacting spinal cord completely, lacerating major vessels in retroperitoneal space and reaching almost horizontally to right side just below skin. No blackening, singeing, scorching or tattooing were present on the skin.

Contents of Cranium and thorax were grossly normal except that they were pale.

One pallet/bone fragment have exited from skin of right lumbar area measuring .05 cms.

No food or fluid was present in stomach without any smell or congestion.

Laceration of right lobe of liver by pallets was present.

Peri-nephric contusion was present without injury to kidney.

Uterus was non pregnant size and was normal."

13. PW-9, Dr. Naseeb Singh Patial, Ballistics Expert, examined Fire Arm i.e. gun Ex.P2, cartridge case, Ex.P4, traces of gun shot on cotton swab as well as the clothes, jacket and shirt Ex.P7 of the deceased and then prepared report Ex.PW9/A. PW-10, Dr. Kuldeep, who conducted the postmortem in Civil Hospital, Theog and gave his report, Ex.PW10/B. He also examined the accused and prepared MLC, Ex.PW10/E. PW-11, Mohinder Kumar, salesman of Theog Gun House from where the accused purchased cartridges on 29.12.2009 produced the entries of the relevant register, which is Ex.PW11/A. PW-12, Jeet Ram, Junior Assistant of SDM Office, Theog, to prove the report Ex.PW12/B, regarding the verification of gun licence of the accused. PW-13, HHC Ranjeet Singh of Police Post, Matiana, to prove entries of Roznamacha Ex.PW13/A, which were made on the basis of intimation given in Police Post, Matiana, regarding the incidence. Further, he brought rukka

Ex.PA from the spot for registration of FIR in Police Station, Theog and after registration of the same and handed over to Investigating Officer, SI Ram Phal (PW-21). The gun licence, Ex.P1 of the accused was taken into possession on 31.5.2010, vide memo, Ex.PB. PW-14, Constable Surinder Singh got the autopsy conducted upon the body of the deceased in Civil Hospital, Theog and thereafter, in I.G.M.C, Shimla. The parcels handed over to him by Medical Officers were deposited by him with MHC of Police Station, Theog on 1.6.2010. PW-15, Constable Damodar Dass, who carried different sealed parcels alongwith sample seals and dockets mentioned in Ex.PW15/A and deposited them in FSL, Junga on 4.6.2010. PW-16, Constable Rajesh Kumar, who brought one sealed parcel alongwith samples of seal and docket to FSL, Junga and deposited them on 2.7.2010. PW-17, Constable Manoj Kumar, who recorded the departure report Ex.PW17/A, when the police party headed by SI Ramphal Yadav, left the Police Station to Village Kaliyai, on getting intimation of this incidence. PW-18, ASI Laiq Ram, recorded FIR Ex.PW18/A in Police Station, Theog, on the receipt of rukka Ex.PA. PW-19, MHC Het Ram, with whom different sealed parcels were deposited by the Police Officers during the course of investigation and then sent them to FSL, Junga, for the purpose of analysis on different dates, vide R.C Ex.PW15/A and Ex.PW16/A. PW-20, ASI Ajay Kalia, who partly investigated the case and took into possession gun licence, Ex.P1, vide memo, Ex.PB. PW-21, SI Ram Phal, deposed that on 29.5.2010 at about 8:20 AM, ASI Ajay Kalia, informed regarding murder of a lady, on the basis of which, entry in the daily diary was made, which is, Ex.PW17/A. He deposed that the dead body

was inspected by him and then recorded the statement of Rakesh Verma, Ex.PA and made endorsement, Ex.PW21/A. The rukka was sent to Police Station, Theog, for registration of FIR through HHC Ranjit Singh (PW-13). He stated that the blood with cotton swab and one blood stained 'dhatu' (head gear), which was tied on the wound of the deceased was taken into possession by him. The said articles were sealed separately in different parcels and sealed with seal 'X' and taken into possession, vide memo, Ex.PC in the presence of Bala Nand, Vidya Sagar and Sunil Kumar. He prepared spot map Ex.PW21/B, which bears his signatures. He has stated that during the course of investigation, accused disclosed that he could get the gun as well as empty cartridge recovered, his statement was recorded, which is Ex.PD, in the presence of Vidya Sagar, Chaman Prakash and HC Sunil Kumar. He deposed that the gun was double barrel and on it W.J. JEFFERY & Co. Ltd. was written. He stated that the gun was taken into possession, vide memo, Ex.PE, after being recorded at the instance of accused. In his cross-examination, he has stated that the spot is at a distance of 35 KM from Police Station, Theog. He stated that no quarrel took place between the accused and his wife on 28.5.2010, when accused went to the house of his relatives. However, it is correct that there is no statement of any witness to this effect. He stated that the accused did not make any disclosure statement. He denied the suggestion that the finger prints were not taken by him from the gun. He stated that he cannot tell, if a person fires a gun shot from 12 bore gun, then fire residue will stick to his hands. There was no hand wash of the accused for determining gun shot residue. He stated that the accused was

got medically examined in the intervening night on 29/30.5.2010. He stated that he remained present there at the spot till 8:45 PM and came to Police Station, Theog and reached there 11:30 PM.

14. After analyzing the above record, including the evidence of the parties and exhibits, it is clear that the following circumstances emerge for consideration :

a) The deceased used to request the accused not to take liquor, but the accused never listen to her. Rather, he resorted to her beatings after taking liquor.

b) The complainant, Rakesh Kumar, who was about to take bath in the adjoining bathroom on hearing gun shot and cries of his mother, immediately, came out and saw that accused was standing at the door of kitchen with a gun in his hands.

c) The deceased while in the lap of Nirmla Devi, PW-4, made a dying declaration to the effect that the accused killed her.

d) The accused made disclosure statement, while in police custody and got recovered a gun as well as the used cartridge in the presence of witnesses.

15. In the present case, family members are the best persons to depose about the affairs of the family. Complainant, Rakesh Kumar (PW-1) has categorically stated that accused, his father, is a dead drinker and there used to be quarrels on this ground between his parents. He has further stated that about two years before, a quarrel had taken place and thereafter,

his mother left the house and went to the house of her parents. She returned back only when a compromise was effected in the presence of Pradhan and other respectable persons. PW-7, Ishwari Devi, mother of the deceased has also stated that her daughter and the accused remained happy for 8-9 years and thereafter, accused-Kamla Nand, started quarreling with her and he used to beat his wife after taking liquor. Further, about two years before this incidence, her daughter was beaten by the accused and then, she came to her house. She has further stated that the matter was settled in the Panchayat by way of written compromise in the presence of Vidya Sagar, Pradhan. Nirmla Devi (PW-4), who is *devrani* (sister-in-law) of the deceased and resided in the same building, has also deposed that the matter regarding quarrels between the accused and his wife was taken by the Panchayat and conciliation was effected pursuant to the assurance of the accused, that he would not take liquor in future and not to beat his wife. PW-3, Vidya Sagar, Pradhan of Gram Panchayat, Dharkundru, has also stated that accused had beaten his wife, and the deceased, getting annoyed with his behaviour, had gone to the house of her parents. He has further stated that he had gone to the house of the parents of the deceased and got the matter conciled pursuant to which, she joined the company of the accused. Complainant, Rakesh Kumar (PW-1), elder son of the accused and his statement was recorded during trial of the case on 13.12.2010. He has stated that on 28.5.2010, his father left the house around 6:00 PM without telling anything and he did not return even during night. On 29.5.2010, his brother Virender, went to graze cattle, whereas, mother was preparing food in the kitchen. He

has further stated that at about 7:30 AM, when he was in the bath room to take bath, he heard gun shot and cries of his mother "Mar Diya" from kitchen side. He has elaborated his statement and stated that he came out of the bathroom and found that his father (accused) was standing just outside the door of the kitchen with gun in his hands. Further, when he went to kitchen, he saw his mother lying on the floor and a gun shot had hit her on the back. He made a call loudly to his brother, who was grazing cattle in a nearby fields. He has further stated that on hearing gun shot, his uncle Khem Raj and aunt, Nirmla (PW-4) came there and immediately thereafter, his brother Virender Verma (PW-2) came. He has stated about the arrival of police to the spot and making to them, statement Ex.PA. This is what, he has deposed to about the material aspects of the case, i.e. about the person, who killed his mother. It is evidently clear that if his statement is accepted as correct, it leaves no doubt that it was the accused who, killed his wife with gun shot.

16. Statements of PW-1, Rakesh Kumar and PW-2, Virender Verma, also show that their versions are true, they had spoken truth and nothing else, so their versions are fully reliable and trustworthy. PW-2, Virender Verma, has specifically stated that he had gone to forest for grazing cattle, thereafter, when he came home, he had to go to School. In villages, generally children do domestic works before going to the School. His statement is that he was grazing cattle in the field and the forest is adjoining to the field, he reached back within two minutes and found his father standing there and mother lying unconscious. Similarly, statement of PW-1, Rakesh Kumar, is trustworthy, reliable and there is no reason, whatsoever, to

discard his version. It is not in dispute that the complainant was family member of the accused and he was residing in that house at the relevant point of time. His presence in the house was natural. The incidence has taken place in the early hours of the morning around 7:30 AM and it is quite natural that at that time people used to take bath. Site plan Ex.PW21/B, prepared by SI Ramphal, Investigating Officer (PW-21) depicts that bathroom at point 'j' is adjoining to kitchen and one of the wall between the two is joint. The distance between the doors of the kitchen and the bathroom is just 8 feet. The wall between the kitchen and the bath room there was a '*kachha*' wall, as has been stated by the complainant. So, there is nothing doubtful, in the deposition of the complainant that he heard the gun shot and the cries of his mother in the bathroom. There was nothing unusual and unnatural if the complainant immediately came out of the bathroom and rushed towards the kitchen. The distance between the doors of kitchen and bathroom is just 8 feet and it would have been covered by the complainant within a second. The complainant, immediately came out of the bathroom on hearing gun shot. He saw his father standing at the door of kitchen. No other person was found standing with him at that time. The accused was alone, therefore, there is no ground to believe that some other person might have used the gun and committed the crime. PW-2, Virender Verma, younger son of the accused was studying in a School. He has stated that on 29.5.2010, at about 7:00 AM, he went to nearby field to graze cattle and on the loud call, at about 7:30 AM, of his brother, that father had killed the mother, he came to house and saw the accused on the stairs with a gun. His statement has been

disputed by the defence on the ground that he was a student of a Senior Class at that time and he could not have afforded to graze cattle, that too in the morning, when he was also required to go to School. There is substance in the defence. His statement shows that he, his aunt, Nirmla Devi, PW-4 and Uncle Khem Raj, reached the place of incidence almost simultaneously, within a minute or two. The important thing to take note of his statement is that he had seen his father with a gun on the stairs, shown at point 'm', which connect the upper floor of the building with court yard. So, it is evident that after committing crime, the accused tried to flee *via* these stairs, shown at point 'm' and he was seen with gun by Virender Verma (PW-2) at that point of time. The mere fact that Nirmla Devi (PW-4), has not supported the prosecution case on the point that she had seen the accused standing with a gun outside door of the kitchen, does not dilute the statement of Virender Verma (PW-2). The accused was having sufficient time to conceal the weapon after committing the crime, as everyone was busy looking after the deceased, who may be unconscious at that time and healing her wound. So, we do not find any force in the arguments of learned counsel appearing on behalf of the appellant that he was having no time to conceal the recovery of weapon, on this disclosure statement is not believable. Rather, disclosure statement made by the accused leading to the recovery of weapon is in the presence of witnesses and duly proved on record. The recovery of weapon is a fact, which is proved by the prosecution on record. At the same point of time, the accused has purchased cartridges. FSL report shows that the cartridge was fired from the gun and it was owned and possessed by the

accused. The dying declaration of Kanta Devi-deceased to her '*devrani*' when she was lying in the kitchen. Points to her husband only as the Hindu ladies do not refer their husbands by names, whenever their reference comes in a talk. They have devised an easiest expression to refer them i.e. '*Inhone*'. The deceased had sufficient time to see the accused, because it was a broad summer day and the accused was very close to her i.e. within a gap of 02 mtrs. Therefore, when she told Nirmla Devi (PW-4) "*Inhone Mujhe Maar Diya*", she clearly conveyed that it was her husband, who killed her with gun shot. PW-4, Nirmla Devi, had heard the cries and weeping of Rakesh, immediately after the gun shot as also of his making call to his brother Virender. She has further stated that Virender also reached the spot almost simultaneously with her, which also shows that Virender Verma (PW-2) was not present in the house, when the incidence had happened. This belies that defence plea that expression '*inhone*' is referable to Rakesh and Virender also. Nirmla Devi (PW-4), sister-in-law of the deceased that she always considered the deceased as her elder sister. So, there were reasons for the deceased to confide in her and tell what had happened to her. So, there is no vagueness or ambiguity in dying declaration and it necessarily refers to the accused alone. There is due corroboration of the dying declaration on material particulars of the case i.e. presence of accused at the door of the kitchen with gun by Rakesh Kumar (PW-1) and death of the deceased on account of gun shot etc. The wife of the accused was fired at about 7:30 AM on 29.5.2010, when she was in the kitchen and preparing food. The accused was found with a gun in his hands outside the kitchen, by none else, but his son Rakesh

Kumar. The deceased told few minute, thereafter her sister-in-law, that she had been killed by her husband. The accused was not present in the house on the previous night, but his presence on the spot at the relevant point of time is proved. The injuries were found sufficient in the ordinary course of things to cause death. Strange is the human behaviour and a person may resort to heinous crime for small and trifling matters. The accused wanted to lead free and unbridled life and did not like day-to-day interference of his wife in matters relating to liquor etc. and for this reason, he went to the extent of killing her. The accused used a gun from a very short distance and fired at his wife, who received gun shot and died. The intention to kill his wife, on the part of the accused is very evident on record. The accused, admittedly, was granted licence Ex.P1, in respect of double barrel gun bearing No.34535 W.J. Jeefary for self/crop protection by the competent authority. He used it, as is evident from the statement of Dr. Nasib Singh Patial and the report of FSL, Ex.PW9/A, for unlawful purpose. Therefore, accused committed the offence within the ambit of Section 27 (1) of the Act.

17. In view of the above facts and circumstances of the case, it is amply clear that the prosecution has proved the guilt of the accused conclusively and beyond the shadow of reasonable doubt. The only conclusion is that it was the accused, who has killed his wife by firing gun shot with his licencee gun, knowingly fully well in all probabilities that the gun shot will cause death of his wife (Kanta Devi-deceased).

18. In our considered view, the prosecution has been able to prove the guilt of the accused, beyond the shadow of reasonable doubt, by leading clear, cogent, convincing and reliable evidence. We, thus, do not find any merit in this appeal, which is accordingly dismissed. Pending application (s), if any, also stand (s) disposed of.

19. Copy of this judgment be send to the convict free of cost, through DGP (Prisons), as prayed for by Mr. Rajesh Mandhotra, learned Legal Aid Counsel.

(Sanjay Karol)
Judge

(Chander Bhusan Barowalia)
Judge

November 6, 2018
(CS)

High Court of J&K