

**A.F.R.**

**Reserved on: 19.07.2022**

**Delievered on: 21.10.2022**

**Court No. - 48**

**Case :- CRIMINAL APPEAL No. - 791 of 2013**

**Appellant :- Mohammad Anwar And Another**

**Respondent :- State Of U.P**

**Counsel for Appellant :- Raghbir Singh,A.C.Srivastava,Anita Singh,Jata Shankar Pandey,Sukhvir Singh**

**Counsel for Respondent :- Govt. Advocate**

**Hon'ble Suneet Kumar,J.**

**Hon'ble Syed Waiz Mian,J.**

**Per Hon'ble Syed Waiz Mian, J.**

1. We have perused the record and have also heard Shri Sukhvir Singh, Amicus Curiae and Shri Om Prakash Mishra, learned A.G.A. for the State-respondents.

2. This criminal appeal has been preferred by appellants against the judgement and order dated 08.02.2003 passed by A.D.J., Court No.1, Agra in Sessions Trial No.677 of 2010, arising out of Case Crime No.35 of 2010 (State of U.P. Vs. Mohd. Anwar Painter and another), under Sections 302 read with Section 34 I.P.C.; S.T. Nos.678 & 679 of 2010, under Sections 4/25 Arms Act in Case Crime No.172 of 2010 (State of U.P. Vs. Anwar Painter) and S.T. No.679 of 2010 (State of U.P. Vs. Gulsher); S.T. No.173 of 2010, under Section 4/25 Arms Act, Police Station -Sikandra, District-Agra.

2. Convicting and sentencing the accused appellants, Anwar Painter and Gulsher on 04.02.2013 & 08.02.2013 for life imprisonment and fine of Rs.25,000/- each and in default of payment of fine, they have further to undergo simple imprisonment of three years each and also sentencing them under Sections 201 I.P.C. for three years rigorous imprisonment and fine of Rs. 10,000/- each and in default of fine, they have to further undergo 8 months each simple imprisonment.

3. Accused appellants-Anwar Painter and Gulsher have also been sentenced under Section 4/25 Arms Act with one year each rigorous imprisonment and fine of Rs.5,000/- each and in default of payment of fine both have to further undergo 6 months each, simple imprisonment. All the sentences are directed to run concurrently.

4. Prosecution case in brief is that the informant, Smt. Salma presented an F.I.R. Paper No. Exhibit No. Ka-1 to D.I.G., Agra on 08.01.2010 and on its movement, F.I.R. Chik No.8 of 2010 case at Crime No.35 of 2010 on 16.01.2010 at 12:30 p.m., Police Station Sikandra, District Agra, was registered. The facts in the F.I.R., Exhibit No. Ka-1, unfolds that informant's daughter Ashma was married with Sonu, five years before, in which dowry was given and Rupees two lakhs were spent. After marriage, her son-in-law, Sonu, father-in-law- Anwar Painter, mother-in-law-Baby, Sister-in-law (Anjum) wife of Nazim, resident of Haryana, Chauka, and Smt. Sarbery, wife of elder brother of father-in-law (Anwar), Afsar, Anwar, resident of Ghad Teli Pada, Sarai Khawaja Police Station-Shahganj, District Agra and also Smt. Aato wife of Ali Husain resident of Mehrav Ka Nagla Teli Pada, (near Sarai Khwaja), Police Station Shahganj, District-Agra, would taunt her daughter that sufficient amount of dowry has not been given by her parents and constantly demanded motor cycle as additional dowry.

5. Informant had also presented an earlier application in the Year 2006 to S.S.P. Agra, and thereupon, police sent her daughter with Sonu but all the accused persisted to torture her mentally and physically on account of

non-fulfilment of additional demand for dowry, they also threatened that if their demand was not fulfilled, she will be killed; she was trying to meet her daughter in her matrimonial house since last one month but none was found there; she met Sarvari and Afser and enquired about her daughter; they told her that after killing her daughter, Sonu, Anwar, Anju, Baby have left their houses; she approached police station to lodge the F.I.R. but that was not lodged there.

6. Upon receiving the investigation, I.O. along with police team arrested accused-Anwar Painter and Gulsher on 30.03.2010; in the hope of recovery of assault weapon in the house of Anwar, in the presence of the witnesses Maharaj, Mammu Khan, accused Anwar took them to the room of this house and at his pointing out weapon of offence (chhuri) from beneath the bed, was recovered, whereas, at the instance of co-accused (Gulsher) a chhuri (knife) from beneath the bed was also recovered; both the accused in the presence of the witnesses confessed that by means of the recovered weapons, they had killed Sonu. The details of the aforementioned recovered weapons has also been described in the memo of recovery, Exhibit Ka-2.

7. The Investigating Officer also on 08.04.2010, got recovered the dead bodies of Sonu, Ashma and Choti from under the gutter and memo of recovery of the bodies Paper No. Ka.32 was prepared.

8. During investigation, Sections 304-B, 302 and 201 I.P.C. were added and also in the light of the recovery of churi (knife), Case at Crime No.172/2010 under Section 4/25 Arms Act against Anwar and another Case Crime No. 173 of 2010 under Section 4/5 Arms Act, against co-accused-Gulsher, were registered on 30.03.2010 at 19:00 (7:00 p.m.); substance of these F.I.R.s was also entered in the G.D. Nos. 37 & 38 at 7:00 p.m.; investigation was also handed over to another Sub-Inspector. The Investigation Officer inspected the place of recovery of weapons and prepared the site plan.

9. The Inquest Report of Smt. Ashma Exhibit No. Ka-8, Choti, Exhibit No. Ka-3 and Sonu Exhibit No. Ka-3 respectively were prepared by the Investigating Officer. Doctors who conducted the autopsy over the dead bodies of the deceased also have prepared autopsy reports which shall be discussed later.

10. The Investigating Officer, during course of the investigation, recorded the statements of informant, witnesses and accused under Sections 161 of Cr.P.C. and the evidence for offences under Sections 498-A, 302, 201, 304-B I.P.C. & Section 3/4 of Dowry Prohibition Act, under Section 173 (3)(b) of Cr.P.C. against the accused Anwar Painter, Smt. Baby and Gulsher with regard to Crime No.35 of 2010 charge sheet was forwarded to the court concerned.

11. In Case Crime Nos.172/2010 & 173/2010 pertaining to Section 4/25 Arms Act, charge sheets were also forwarded against accused to the court of learned Magistrate concerned wherefrom, after completing the formalities, these criminal cases were committed to the District Court of Sessions where case pertaining to Case Crime No.35 of 2010 was registered as S.T. No.677 of 2010 whereas S.T. No.670 of 2010, 678/2010 & 689/2010 were registered in connection with Crime No.172/2010 and 173/2010 respectively.

12. The learned trial court vide order dated 15.09.2010 framed charges against the accused Anwar Painter, Smt. Baby & Gulsher for offences under Sections 498-A, 304-B read with Section 34, Section 302 read with Section 34 and Section 301 of I.P.C. and also under Section 3/4 Dowry Prohibition Act and also charge under Section 4/25 Arms Act against both accused were framed. Accused denied the charges and claim trial.

13. Prosecution in order to prove its case, examined P.W.-1-Smt. Salma, happens to be informant and witnesses P.W.-2-Krishna Nandan Tiwari (Sub-Inspector), P.W.3- Mammu Khan, P.W.4-Mool Chandra Mutaina (Sub-Inspector), P.W.5-Dr. A.K.Upadhayay, P.W.6-Desh Raj

Mutaina, P.W.7.-Shayam Bahadur Mutaina (C.P.), P.W.8- Yashpal Singh (Sub-Inspector), P.W.9-Dr. A.K. Mishra, P.W.10-Ashok Kumar (S.S.P.), P.W.11.Aseem Chaudhari (Investigation Officer).

14. Accused in their statements recorded under Section 313 Cr.P.C. have claimed that evidence of P.W.1, Smt. Salma is false and is the result of their enmity with her.

15. Co-accused Gulsher has also stated in his statement that chhuri (knife) was not recovered at his behest, he has no connection with the alleged incident; he has been falsely implicated in this case merely because of having acquaintance with family members of Sonu. He further stated that on account of the compromise, he has been falsely roped in this case.

16. Accused/applicant- Anwar Painter has also denied the recovery of the dead bodies of the deceased on 16.11.2012. He further said that a year before the incident, he with his wife in the search of work of labour had left his house for his matrimonial house in the State of Bihar. He has also stated that the deceased wife of his son was of bad character; she wanted to gift his house to her parents; many strangers would come to meet her and he tried to stop them to visit his house; thereafter, some of the strangers had done his daughter-in-law to death; bodies of the deceased were not hidden by him. On behalf of the accused, witness D.W.1, Amit Chauhan was examined.

17. By the instant criminal appeal, the impugned judgement and order dated 08.02.2013, is being challenged on the ground that without cogent evidence on record, illegal order has been passed and despite the inconsistencies and contradictions in the testimonies of the witnesses, on false appreciation, surmises and wrong presumption, the impugned judgment and order in connection with S.T. No.677 of 2010 in Case Crime No.35 of 2010, under Sections 302/34, 201 I.P.C. and S.T. Nos.678 and 679 of 2010, under Sections 4/25 Arms Act, against them has been

passed; the learned trial court has committed gross error in the eyes of law and also against the principle of justice.

18. Accused/applicants *inter-alia*, have also challenged the impugned judgment and order by saying that there is no direct, indirect or circumstantial evidence against them; the prosecution case is based on the basis of false, fabricated and unlawful evidence hence, the impugned judgment and order dated 08.02.2013, is not sustainable in the eye of law and present criminal appeal deserves to be allowed and the impugned judgment and order be accordingly set aside.

19. The learned trial court vide judgment and order dated 04.02.2013 acquitted accused Smt. Baby under Sections 498-A, 304-B read with Section 34, Section 302 read with Section 34 I.P.C. and also under Section  $\frac{3}{4}$  Dowry Prohibition Act.

21. The learned trial Court has also acquitted accused Anwar Painter from the charges under Sections 498-A, 304-B read with Section 34 and Section  $\frac{3}{4}$  Dowry Prohibition Act. Hence this appeal has been preferred by accused Anwar Painter and Gulsher against impugned judgment and order against their conviction and sentence for offences under Sections 302/34 & 201 I.P.C. & Section 4/25 Arms Act.

22. P.W.1, Smt. Salma, informant in her oral evidence has proved F.I.R. as Exhibit.Ka.1.

23. P.W.1 Smt. Salma, in her chief examination deposes that she had married her daughter (Aashma) five years ago with Sonu and had given dowry as per her financial capacity; about Rs.2 lakhs was spent in the marriage; after marriage, Sonu (husband), Anwar Painer (father-in-law), Smt. Baby (mother-in-law), Anju (sister-in-law/nand) Smt. Sarbery (wife of elder brother of Anwar Painter), were not satisfied with dowry and consistently demanded motor cycle as an additional dowry and subjected her daughter to torture and also would beat her; she had made a complaint to S.S.P., Agra in the Year 2006, but during Mediation and Conciliation,

her daughter was persuaded by her husband to go with him, however thereafter, it is alleged that they again tortured and threatened her (Smt. Salma); threatening, her daughter would be done to death, if their demand of motorcycle is not met; she went to meet her daughter at her matrimonial house, but she did not find her; on inquiry from the neighbours, she came to know that ten days ago, after locking the house, they with Aashma had left their house; later on she came to know that they are living somewhere in the State of Bihar. On arrest from Bihar, accused Anwar Painter and Smt. Baby confessed that her daughter, son-in-law, Sonu and grand daughter (Saleem Fatima) aged about one and half years before were killed by them; Gulsher, who is friend of Anwar Painter, was also involved in the commission of the incident; all the accused also confessed that they have killed all the three aforementioned persons and their dead bodies have been hidden in the gutter of the in-laws house.

24. P.W.1 Smt. Salma, in her cross examination, has stated that in the F.I.R., it was mentioned that Gulsher was not involved in the incident; therefore, she has not nominated Gulsher in the F.I.R. She deposed that her daughter was disable; house of Gulsher is situated adjacent to the house of Anwar Painter.

25. P.W.1 also deposed that her statement, by Sub-Inspector, was recorded in which she did not tell him that family members of Sonu would beat her daughter; she also admits that she has not witnessed Gulsher killing her son-in-law, grand daughter. She states that Smt. Baby had told her that after killing the deceased their body were thrown in the gutter; she has also admitted that she did not see accused Gulsher to hide the knife; she did not receive any phone call from Bihar; brother of Anwar Painter had told her that Anwar, Baby had absconded to Bihar. As such P.W.1 Smt. Salma, admits in her deposition that she had not witnessed the accused killing Sonu, Aashma and her grand daughter.

26. She has deposed that Daroga Ji (I.O.), had called her from Bihar; some Army men had asked her to reach over there, because all the possibilities indicated that Ashma, Sonu, Baby & Anwar Chotu have been killed; she also admits that Daroga Ji, (Investigating Officer) had not enquired about Anwar and Gulsher in her presence; and (chhuri)/knife was not got recovered from Gulsher; she has also not acknowledged that dispute existed between Gulsher and Anwar Painter; she has also denied the suggestion put to her on behalf of accused Gulsher that it would be wrong to say that he had not killed Aashma, Chotu and Sonu and she has falsely implicated him.

27. It transpires from the above, deposition of P.W.1. Smt. Salma that she has not seen the accused killing Sonu, Smt. Aashma and daughter-in-law; her admission in her ocular evidence that she did not witness the recovery of alleged chhuri (knife) on the pointing out of Gulsher; her deposition about the demand of motorcycle as an additional dowry by the accused and on account of non-fulfilment of the demand, her daughter was subjected to mental and physical torture, has not been found credible, corroborative and trustworthy. The learned trial court for want of cogent evidence on record pertaining to offences u/s 498-A, 304-B of I.P.C. &  $\frac{3}{4}$  Anti Dowry Prohibition Act has not held accused (Anwar Painter and his wife Baby) guilty, thus, has acquitted them from the charges under above mentioned offences.

28. P.W.1 Smt. Salma, in her cross examination has deposed that Anwar Painter had solemnised second marriage and out of that wedlock, they have five children and he also solemnised his third marriage and out of that marriage, he has one child. Next, she has stated that Anwar Painter has total five children; she has denied the suggestion put to her that three months after marriage her daughter delivered a baby; accused did not make complaint to her or any one about her bad character of her daughter; she has also denied in her deposition that due to alleged bad character of her daughter, strangers would visit her and Sonu had ever raised any

objection; she has also denied that in view of visits by strangers, accused Anwar and his wife had left their house for Bihar; she also admits that part of the incident occurred at the house of Anwar Painter situated at P.P.,Nagar, Police Station Sikandra. As such, Smt. Salma, has also admitted in her statement that no part of the incident was witnessed by her; her testimony with regard to the murder of daughter or son-in-law by the accused is based on hearsay; and also her admission in her cross examination to the effect that after three and half months police arrested Anwar Painter and Smt. Baby from Bihar and was brought them to Agra; Smt. Baby had told the police in Bihar that dead bodies of Aashma, Sonu and their baby aged about 1 ½ half year, after their murder were thrown in the gutter and also in her deposition, in the examination-in-chief, she has stated that accused have killed her daughter, son-in-law and grand daughter and they had hidden their dead bodies in the gutter, and on the pointing out of the accused, all the three bodies were recovered, this testimony is not only self contradictory but also inconsistent with prosecution story; Memo, Exhibit-ka.32 pertaining to the recovery of the dead bodies of the deceased and in this connection, video cassette and C.D. which were allegedly made on the date of the recovery i.e., 30.03.2010, by the Investigating Officer, does not bear either the signature or thumb impression of informant P.W.1, Smt. Salma, therefore, it is clear that recovery of the dead bodies from under the gutter of the house owned by Anwar Painter was not witnessed by her.

29. P.W.4, Nandan Tiwari, deposes in his examination-in-chief that on 30.03.2010 at 12:55, along with police team (Officer in-charge) of the police station, S.I., and other police personnel along with accused Anwar Painter and Gulsher had visited and inspected the house of accused Anwar Painter; At their instance, accused Anwar Painter and Gulsher, got retrieved the decomposed bodies out of gutter in his (Anwar Painter) house of Sonu, daughter-in-law(Aashma) and grand daughter; At the place

of the recovery, A.C.M.-II was also present; all three dead bodies were separately sealed in cloth.

30. P.W.2, Krishna Nandan Tiwari, has also stated that accused Anwar Painter and Gulsher respectively had got recovered chhura (knife) from beneath the bed of room; and both accused had in their disclosure statement confessed that by these knives, they had killed the deceased.

31. P.W.2, Krishna Nandan Tiwari, Sub-Inspector, admits in his cross examination that the memo of recovery does not bear the signature of local witnesses; he also further admits that on 30.03.2010 at 12:55, relevant papers on the record having been prepared on the dictation of A.C.J.M. -II.

32. P.W.2, Krishna Nandan Tiwari, Sub-Inspector, has not been cross examined about his deposition in his examination-in-chief regarding the recovery of decomposed dead bodies of Sonu, Aashma and their daughter on the pointing out of accused Anwar Painter and Gulsher from under the safety tank/gutter and two knives from underneath the bed and this witness has also not been confronted in his cross-examination regarding his deposition that both the accused i.e., Anwar Painter and Gulsher, after recovery of all the dead bodies of the deceased and each knife on their pointing out from the house of accused Anwar Painter and their disclosure statement that they had hidden the dead bodies of the deceased and knives, whereby they killed deceased.

33. P.W.2, Krishna Nandan Tiwari, Sub-Inspector, has proved memo of recovery of two knives Exhibit.Ka.2.; P.W.3, Mammu Khan, in his statement has supported P.W.2 Krishna Nandan Tiwari, Sub-Inspector to the effect that the recovery of dead bodies of deceased and each knief on the pointing out of the accused Anwar Painter and Gulsher were got recovered from separate places from the house of accused Anwar Painter and memo of recovery Exhibit-ka.2 on 30.03.2010 was having been prepared and signed by him and also by other witnesses.

34. P.W.3. states in his examination-in-chief that in his presence, at the instance of both the accused, dead bodies of Sonu, Smt. Aashma and Baby Choti were having been retrieved from the gutter of the house of Anwar Painter and on the pointing out of both the accused, two knives were also having been recovered from beneath the bed in the room, and both the accused had confessed that, they had assaulted the deceased with knives and killed them. Witness, P.W.3, Mammu Khan, is a relative of accused Anwar Painter and Smt. Aashma was his daughter who was married to Sonu s/o Anwar Painter; accused were known to him. He further deposes that at the place situated 10 Km away from the house of Anwar Painter on a call Gulsher had reached at the house of Anwar Painter on the date of recovery of dead bodies and weapons of crime.

35. In the presence of P.W.3, Mammu Khan, before the trial court, two pack of sealed cloth were broke open and out of these, two knives (chhuriya) were emerged and to see these knives (chhure), P.W.3, Mammu Khan, identified them and deposed that these weapons were having been recovered at the instance both the accused; the same had been sealed in his presence by Sub-Inspector and in this connection, memo of recovery of the weapons by Sub-Inspector was having been prepared and he had signed the memo; he during his deposition also identified his signature thereon and as such, knife (chhuri) as material Exhibit-ka.3 was marked and he in his statement has also described it in details.

36. P.W.3, Mammu Khan, also corroborates statement of P.W.1, Smt. Salma who has stated that Anwar Painter has married thrice; he denies the suggestion that it would be wrong to say his daughter was of bad character; he also denies that after marriage of his daughter, she had delivered a child within a span of three months; he also refuted that old lover of Aashma would often visit her house and P.W.-3 Mammu Khan, also refuses that Salma's son-in-law Sonu and Aashma would often quarrel with each other; he also denies that dead bodies of the deceased were beyond identification or dead bodies of the deceased had not got

recovered in his presence; he also states in his deposition that knives also having been recovered in his presence and the weapons were not planted by the police.

37. P.W.3 also deposes that he has seen the house of Anwar Painter before the incident; once he had gone there; he further says in his evidence that he knows the difference between the chhuri and chaku; two knives (chhuriya) during his deposition in the trial court were laid before him and he has categorically said in his deposition that the assault weapons placed before him were churies not knives.

38. The testimony of P.W.3, Mammu Khan reflects that he was present on the date of the recovery of dead bodies of the deceased and churies (knives) from the house of Anwar Painter were recovered and he has also identified his signature on memo of recovery of assault weapon; in his statement he also has denied that being relative of deceased, he has adduced evidence. In his deposition there is minor inconsistency with prosecution story because he has stated in his statement that chhuri and knife are not same and one.

39. P.W.-3 in his cross-examination says that he knows that Baby was the third wife of Anwar Paniter. The suggestion put on behalf of accused, P.W.3 Mammu Khan has denied that the bodies of the deceased had not been recovered in his presence; he admits that bodies of the deceased had decomposed, however, they were identifiable. He also denies the suggestion put by the learned counsel that both churies were planted by police; he also denies that he is deposing against the accused because Anwar Painter is his friend.

40 The investigation of the instant case was entrusted to I.O. on 17.01.2010 and he had recorded the statement of Smt. Salma, and at her instance, he had prepared the site plan of the alleged incident in his writing; he had also recorded the statements of Ashok Rajendera and Rahman during the investigation and had come to know that informant

and accused Anwar Paniter and Baby with their family members were living somewhere in Bhaglpur in the State of Bihar; he admits in his cross-examination that on his visit to the house of Anwar Painter, it was found locked and he had not broken the lock.

41. Another I.O. P.W.-4 Mool Chandra Mutaina, S.I. in his examination-in-chief says that on information received from the informer, he along with police force reached at Bijli ghar (Electricity House) which was being built at Fatehpur; Anwar Paniter, who was a labour, was apprehended from there; he was brought back to police station and he had confessed that he with his wife and other associate Gulsher had killed his son, daughter-in-law (wife of his son), grand-daughter and they had thrown their dead-bodies into the gutter of his house.

42. On the strength of statement of co-accused Anwar Painter, name of his associate, namely, Gulsher surfaced during investigation.

43. P.W.-6 Desh Raj Mutaina, I.O. further states that after confession of the accused, they went to the house of Anwar Painter to recover the dead-bodies of the deceased and also the assault weapons; in respect of the alleged incident, he had intimated the Additional District Magistrate-II, Sri D.P. Singh and S.P. City Sri L. Kumar and Media persons and they also reached there; both the accused namely- Anwar Painter and Gulsher, in the presence of Magistrate had made their confession that they had killed three persons and their dead-bodies were hidden in the gutter, and on their pointing out all three dead bodies were retrieved from the gutter. Magistrate had conducted the inquest over the bodies of the deceased and after preparing the inquest reports, the dead-bodies of the deceased were forwarded with the copies of inquest reports and other relevant documents to mortuary for post-mortem to ascertain the reason of their death. P.W. 6- during his testimony has identified the memo and on its proof, the same has been marked as Ex. Ka-2. He also says that on the basis of collected evidence Section 302 of IPC was added.

44. P.W.-6 (I.O.) in his cross-examination says that crime weapons were not placed before him; the arrest of both the accused was entered into G.D. No.24 time 12:30 dated 30.03.2010. He also states in his cross-examination that the copy of the recovery memos was not given to the accused-persons, but had got signed by them. This witness denies that alleged recovery was not made on the pointing out of both the accused and falsely have been planted.

45. P.W.-11 Aseem Chaudhari (C.O.) states in his examination-in-chief that on 02.04.2010 he was posted as Circle Officer at Police Station- Hari Parwat and in the remaining investigation pertaining to Crime No. 35 of 2010, under Sections 498-A, 304B, 302 and 201 of IPC and Section 3/4 of D.P. Act; he was partly involved and statements of witnesses Prayag Singh and Bheekam Singh, were recorded; At the instance of witness Prayag Singh, he had inspected the place of occurrence and in his writing and signature had prepared a site plan which is on record and he has also identified the said site plan. The same was marked as Ex. Ka 30. He has also deposed that he had recorded the statements of other witnesses and on the basis of collection of ample evidence against accused- Anwar Painter, Gulsher and another, he submitted the challan in his writing and signature to the court concerned.

46. P.W.-11 Aseem Chaudhari (C.O) in his cross-examination reiterates that at the instance of witness Prayag Singh, he has prepared the site plan and also recorded the statements of Bheekam Singh, Raju, Rajpal and others but none of the witnesses claimed to have witnessed the commission of incident. He has also given details of the dead-bodies, the place of the occurrence and says that he had also recorded the statement of informant Salma on 20.04.2010. He further states that he had not met Anwar Painter and Gulsher. He states that he had recorded the statements of witnesses and admits that the recovery of assault weapons and dead-bodies of the deceased were not made in his presence. He further admits that the statements of the neighbor of accused Gulsher were not recorded

by him. Next he denies the suggestion to the effect that he did not make any investigation and the said papers were having been prepared in his office.

47. P.W.-1, Smt. Salma about the allegation in her written F.I.R. dated 08.01.2010 Exhibit-ka.1 has deposed that since one month, she was visiting the residence of her son-in-law Sonu but did not find any one; neighbours apprised her that inmates of the house had left their house at unknown place, although, she also inquired from Smt. Sarvari and Attu, elder brother of father-in-law of her daughter. She also met Anwar to know whereabouts of her daughter who told her that he along with others had killed her and Sonu.

48. Anwar Painter, Baby left their house at P.P. Nagar, Agra for undisclosed place. Accused, Anwar Painter, stated in his statement recorded 313 Cr.P.C. on 12.02.2022 that he with his wife had left his house for his matrimonial house in Bihar one year before the incident. Smt. Baby, in her statement under Section 313 Cr.P.C. stated that she was third wife of Anwar Painter, Sonu was son of first wife of Accused Painter. As such, it is also admitted to accused that Smt. Baby was the third wife of accused Anwar Painter and she was step mother of Sonu.

49. D.W.-1, in his examination-in-chief, deposed that Anwar Painter and his wife Baby in the Year 2009 had left their house in District-Agra for Bahagalpur in Bihar. Statement of D.W.-1 Amit Chauhan was recorded in the trial court on 18.01.2013. Thus, evidence of D.W.1, Amit Chauhan lends credence to statements of accused under Section 313 Cr.P.C. that Anwar Painter with his family had left his house in the Agra district for his matrimonial house to earn livelihood. Admittedly, he is a labour and poor man. There is no evidence on record to show the exact time of departure of the Anwar family for Bihar, but since retrieved bodies by the time of their recovery had decomposed, it appears that substantial period of time had passed. But, it has no adverse bearing on the merits of this case.

50. From the condition of the highly decomposed bodies, P.W.9, Dr. A.K. Mishra, has opined in his examination-in-chief that death of deceased Sonu was caused approximately three months before the post mortem which was conducted on 01.04.2010.

51. P.W.5, Dr. A.K. Upadhaya, who has also conducted autopsy on the bodies of the deceased Smt. Aashma & Baby Choti has not deposed about the approximate time of their death but it appears that all three deceased Sonu, Smt. Aashma and Baby Choti were killed in one incident.

52. It also emerges that all the bodies, at the instance of accused Anwar Painter and Gulsher and two knives were recovered from gutter and from beneath of the bed in the room of the house owned by accused Anwar Painter on 30.03.2010.

53. P.W.3- Mammu Khan has deposed in his chief examination that on the pointing out of accused Anwar Painter and Gulsher chhuri/chhura each was recovered. This witness in his cross-examination done on behalf of co-accused Gulsher has also repeated his evidence with regard to the recovery of two chhuri.

54. P.W.7 Shayam Bahadur Mutaina has stated in his examination done on behalf of Anwar Painter that recovered weapons of crime were brought and got received to him in each sealed bag; there was separate knife (chhura). He has also stated that there is difference between chhura and knife but in the recovery of memo, knives (chhura) were having been noted.

55. It emerges from the evidence P.W.3-Mammu Khan that there is consistent evidence in respect of the recovery chhura each at the instance accused Anwar Painter and Gulsher. Before the learned trial court, it was contended on behalf of accused that there is contradictory evidence with regard to weapon of offence because on the one hand; chhuri each is stated to have been recovered; On the other hand, there is evidence on record to the effect that chhuri as well as knife on the pointing out of both

the accused were having been recovered. In our opinion, there is evidence on record that chhura each was having been recovered at the instance of Anwar Painter and Gulsher. On the face value of contention put forth by the learned counsel before the learned trial court is accepted even then the evidence pertaining to the recovery of weapons, minor difference is found but all evidence has to be read in totality, as such, recovery of chhura each on the pointing out of accused Gulsher and Anwar Painter has been successfully proved by the prosecution.

56. D.W.2, Krishna Nandan Tiwari, S.I., I.O. has deposed that upon recovery of the bodies of deceased, he had prepared in his writing inquest reports and three bodies of the deceased were sealed separately in the pieces of cloth and the other related papers in this respect were also having been prepared.

57. P.W.2, Krishna Kant Tiwari, has admitted in his cross examination that inquest reports and other related papers were prepared at the dictation of A.C.M.-II, who also was present there at the time of panchayatnama of bodies of the deceased. He also admits that he was familiar with the writing and signature of A.C.M., D.V. Singh, because they were posted in the same District Agra and in the discharge of his official duty, he would off and on met him.

58. P.W.,3 Mammu Khan deposed in his statement about the inquest reports of having been prepared in his presence by police. The learned trial court in the impugned judgement and order has discussed in detail evidence of P.W.1-Smt. Salma, P.W.-2, Krishna Nandan Tiwari, P.W.11 Assem Chaudhari, I.O., and has also thoroughly evaluated all the evidence, including D.W.1 Amit Chauhan on record.

59. The learned trial court Judge has rightly opined that in view of the facts and circumstances of the instant case, time of death of all the three deceased cannot be ascertained. The learned lower court has also opined on the strength of the evidence on record that offences under Sections

498-A, 304-B read with Section 34 I.P.C. and Section 3/4 Dowry Prohibition Act, against Smt. Baby and also offences under Sections 498-A, 304-B read with 34 I.P.C. and Section 3/4 Dowry Prohibition Act, against Anwar Painter, his wife Smt. Baby and Gulsher were not proved hence, their acquittal has been recorded.

60. The learned trial court has also placed reliance on the testimonies of prosecution witnesses with regard to disclosure statement of accused Anwar Painter and Gulsher and at their instance, recovery of all the dead bodies of the three deceased and also recovery of assault weapon from the house of Anwar Painter.

61. It has also come in the evidence that Anwar Painter and his wife had left their house for Bhagalpur after locking the gate of their house from outside.

62. The learned trial court has dwelt on the evidence of D.W. 1- Amit Chauhan and also his evidence regarding the alleged bad character of Smt. Aashma. The accused have taken defence that since Smt. Aashma was of a bad character, several people would visit her and any of such persons could have killed Sonu, Smt. Aashma and Baby Choti, but in this respect, there is only the evidence of D.W.1- Amit Chauhan, he lives near Anwar Painter, therefore, he knows them, however, D.W.1-Amit Chauhan has not stated that he would regularly visit their house; he has also not shed light on the fact that accused would share their house hold affairs with him; D.W.1 also claims friendship with the accused. There is no iota of evidence on record that Sonu had any quarrel in his life time with his wife Smt. Aashma regarding her alleged bad character or alleged delivery of baby within a span of three months after her marriage with him. As such statement of P.W.1, Salma is inconsistent and contradictory hence it needs corroboration with regard to offences under Section 302/34.

63. Since, the dead bodies of the deceased were recovered at the instance of accused Anwar Painter and Gulsher from the gutter in the

house owned by Anwar Painter and Anwar Painter with his family was living therein, therefore, presumption under Section 106 of the Evidence Act would be drawn against Anwar. It is incumbent upon accused Anwar to rebut the presumption; accused has taken the defence on many grounds but these pleas have not succeeded to render the evidence adduced by the prosecution improbable.

64. Admittedly, prosecution case is that the appellant-co-accused Gulsher is neither member or relative of the family of appellant/accused Anwar Painter; he is said to be friend of Anwar Painter; P.W.-1-Smt. Salma, had admitted in her ocular evidence that since marriage and until the death of the deceased she had only once visited the matrimonial house of her daughter; she was not having opportunity to see for herself about the nature of relationship of Gulsher with co-accused/co-appellant. P.W.-1 Salma, has admitted in her statement that prior to instant incident quarrel pertaining to the demand of dowry between her daughter and her husband and members of his family had picked up and in that connection she had moved her complaint to S.S.P. Agra, who had forwarded her complaint to the Mediation and Conciliation Centre, wherein her daughter was persuaded to go with her husband, thus, her daughter had gone with her husband Sonu to her matrimonial house; she also states in her ocular evidence that compromise between her daughter and Sonu was amicably arrived at between them.

65. Appellant/accused Gulsher, in his statement recorded under Section 313 Cr.P.C. has denied to have caused the incident and on his behalf it was also contended that the alleged recovery of chhuri / knife was planted on him. He further says in his statement under Section 313 Cr.P.C. that he had facilitated to broker compromise between Sonu and his wife and for that reason he has been falsely roped in this case.

66. It is also an admitted case of the prosecution that no witness has stated to have witnessed the appellant/accused Gulsher visiting the

matrimonial house of the deceased, therefore, there is no evidence regarding his visit prior or at the time of alleged occurrence to the house of Anwar Painter.

67. It is also admitted to the prosecution that Anwar Painter on his arrest had named appellant/accused Gulsher, in commission of the alleged incident. As such, during investigation, name of appellant Gulsher appeared on the statement of co-accused Anwar Painter. Appellant/accused Anwar Painter has himself denied his involvement in the alleged incident. Evidence of the co-accused without corroboration is of a weak kind.

68. We have seen from the above discussion that Anwar Painter with his wife, who has been acquitted from the charges levelled against her, were brought from Bihar to the house of Anwar Painter.

69. On the statement of co-accused Anwar Painter, co-appellant/co-accused Gulsher, was apprehended by the Investigating Officer. However, prosecution has adduced consistent and reliable evidence against co-appellant/co-accused Gulsher, in connection with the recovery of chhuri/ knife on his pointing out from beneath of cot in the house owned by Anwar Painter.

70. There is also reliable evidence on record against Gulsher that on his, as well as, Anwar Painter's pointing out three decomposed bodies of the deceased were retrieved from the gutter in the house of Anwar Painter.

71. Learned counsel for the defence submitted that if recovery of chhuri/ knife and decomposed bodies of the deceased is accepted on its face value to have been made at the instance of Gulsher but no such presumption against him can be made that he had killed the deceased and thereafter, he had dumped the bodies of deceased down the gutter because he was not member/relative of Anwar Painter, and was also not a friend of Anwar Painter. He was just having acquaintance with Anwar Painter.

72. There is no reliable evidence on the record that Gulsher would visit the matrimonial house of the deceased Smt. Ashma and had no direct or indirect role pertaining to the incident. He has been implicated merely because of his role in the compromise arrived at between Sonu and his wife, further, it is argued that there is no cogent and reliable evidence about his involvement in the incident and he has been implicated merely on the basis of suspicion which is inconsequential under law.

73. Hon'ble Apex Court in ***Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra; 2022 Live Law (SC) 596*** has outlined the conditions necessary for applicability of Section 27 of the Evidence Act:

*“that the appellant stated before the panch witnesses to the effect that "I will show you the weapon concealed adjacent the shoe shop at Parle". This statement does not suggest that the appellant indicated anything about his involvement in the concealment of the weapon. Mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of that weapon at the place through some other source also. He might have even seen somebody concealing the weapon, and, therefore, it cannot be presumed or inferred that because a person discovered the weapon, he was the person who had concealed it, least it can be presumed that he used it. Therefore, even if discovery by the appellant is accepted, what emerges from the substantive evidence as regards the discovery of weapon is that the appellant disclosed that he would show the weapon used in the commission of offence.”*

74. In the present case there is evidence on record that accused Anwar Painter had disclosed to the Investigating Officer that he along with Gulsher had killed the deceased and bodies of the deceased were concealed down the gutter, in the house of Anwar Painter and Gulsher also along with Anwar Painter got retrieved the bodies of the deceased out of the gutter and also at his instance concealed weapon, chhuri/ knife was

recovered from beneath the cot/bed lying in the room of house owned by Anwar Painter.

75. Gusher has denied in his statement under Section 313 Cr.P.C to have made disclosure statement to the investigating officer. Even if, it is accepted, that after his arrest, he had made discloser statement, to the arresting police officer, in the event of his denial before the Court such disclosure statement cannot be relied and accepted.

76. In view of above referred judicial pronouncement, ***Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra***; merely, on the strength of the discovery of the dead bodies and chhuri/knife at the pointing out of Gulsher it cannot be suggested that he had done any act of concealment of the weapon of offence and for bodies, and it is not sufficient to infer authorship of concealment by Gulsher, who got discovered assault weapon and dead bodies of the deceased.

77. It cannot be ruled out that he could have acquired knowledge of the existence of the weapon and concealment of the dead bodies in the gutter of the house owned by the Anwar Painter through some other source also, therefore, it cannot be presumed that appellant/accused Gulsher was also the person who had concealed the dead bodies, as well as, the assault weapon, therefore, merely on the basis of the said recovery of the dead bodies and assault weapon, at his instance, it cannot be made a sole basis to presume that he had also participated in the commission of the incident and had concealed the dead bodies of the deceased along with Anwar Painter in the gutter of the house and chhuri/knife beneath the cot. Further it cannot be presumed that he had used the recovered weapon chhuri/ knife to kill the deceased.

78. Hon'ble Supreme Court in **Hanumant vs The State Of Madhya Pradesh, reported in 1975 AIR 1083**, has held that ;

*“In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to*

recall the warning addressed by Baron Alderson to the jury in *Reg v. Hodge (1)* where he said :-

*"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to over-reach and mislead itself, to supply some little link that 'is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."*

*It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved."*

79. Hon'ble Supreme Court in **Jaharlal Das vs State Of Orissa, reported in 1991 AIR 1388** has held that ;

*"It may not be necessary to refer to other decisions of this Court except to bear in mind a caution that in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. Bearing these principles in mind we shall now consider the reasoning of the courts below in coming to the conclusion that the accused along has committed the offence."*

80. Having regard to the facts and circumstances of the case, and for reasons stated herein above, we find that there is no cogent and clinching evidence against Gulsher to hold him guilty.

81. Resultantly, the impugned judgment and order dated 08.02.2003, passed by the learned Additional Sessions judge, Court No. 1, Agra in Sessions Trial No.677 of 2010, arising out of Case Crime No.35 of 2010 (State of U.P. Vs. Mohd. Anwar Painter and another), under Sections 302 read with Section 34 I.P.C.; S.T. Nos.678 & 679 of 2010, under Sections 4/25 Arms Act in Case Crime No.172 of 2010 (State of U.P. Vs. Anwar Painter) and S.T. No.679 of 2010 (State of U.P. Vs. Gulsher); S.T. No.173 of 2010, under Section 4/25 Arms Act, Police Station -Sikandra, District-Agra, convicting the appellant/accused Gulsher is hereby set aside, whereas, the impugned judgment and order dated 04.02.2013 and

08.02.2013 convicting and sentencing the appellant/accused Anwar Painter is upheld.

82. Hence the appeal is **allowed** in part, insofar, it relates to appellant Gulsher. The appeal of Anwar Painter is, accordingly, dismissed.

83. Appellant/accused Gulsher, if detained in judicial custody be set at liberty forthwith, if not required in any other case.

84. The mandate of Section 437A of Cr.P.C. to be complied.

85. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

86. Since the appellants/accused-Anwar Painter and Gulsher are detained in jail as none of them has been enlarged on bail therefore, office is directed to inform the appellants/accused through Jail Superintendent/ District Jail/ Central Jail concerned along with copy of this judgment for information and necessary action.

Order Date: 21.10.2022

Shivangi

(Syed Waiz Mian, J.)

(Suneet Kumar,J.)