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Case :- CRIMINAL APPEAL No. - 1813 of 2014
Appellant :- Monu
Respondent :- State of U.P.
Counsel for Appellant :- Vikrant Rana, Gajendra Kumar Gautam, Pradeep Kumar
Counsel for Respondent :- Govt. Advocate

Hon'ble Manoj Kumar Gupta,J.
Hon'ble Om Prakash Tripathi, J.

(Per Manoj Kumar Gupta, J.)

The accused appellant has filed the instant appeal assailing the judgment and order dated 7.04.2014 and 11.04.2014, passed by Additional District & Sessions Judge, Court No.4, Ghaziabad in S.T. No.1408 of 2006 convicting him under Section 302 IPC and awarding rigorous imprisonment for life and fine of Rs.50,000/- and in default in payment thereof, to three years additional simple imprisonment and under Section 506 IPC to seven years rigorous imprisonment and fine of Rs.20,000/- and in default in payment thereof, to ten months additional simple imprisonment and in Sessions Trial No.1409 of 2006 under Section 25 (1) (b) of the Arms Act, to three years rigorous imprisonment and fine of Rs.10,000/- and in default in payment thereof, additional simple imprisonment of six months.

According to the prosecution case, on 13.6.2006 at about 10:30 p.m., accused Monu (appellant) and Khalid, neighbours of the victim Manju Sharma came to her house while she was sitting on a cot

alongwith her daughter Komal (PW-1) on the open terrace. Her mother Sheela and brother Yogesh and Nitin were in the courtyard. Monu had some talk with her. After about five minutes, he took out pistol *(tamancha)* from his pocket and fired at the victim from the back side. While his accomplice co-accused Khalid, who was carrying some object made of iron, hit her on the head and hand several times. Her daughter Komal (PW-1/complainant), who had witnessed the incident, raised alarm and whereupon both of them escaped through the staircase brandishing the *tamancha* and threatening Yogesh and Nitin (brothers of the victim) and Smt. Sheela (mother of the victim) to kill them if they come in their way. The accused were duly identified in the moon light and light of lantern, as they live in the neighbourhood and the complainant (Komal) had known them since her childhood. Her mother was rushed to Jeevan Hospital by her maternal uncle. The victim was later shifted to Narendra Mohan Hospital and thereafter to Jang Bahadur Hospital, Delhi where she succumbed to her injuries and died on 14.06.2006 at 4:10 p.m. A first information report relating to the incident was got registered by Komal on 13.06.2006 under Sections 307, 506 IPC as Crime Case No.227 of 2006. Later on offence was converted to Section 302 IPC. The accused surrendered in court on 26.06.2006. On 04.07.2006, the court allowed police remand of 24 hours. On the same day, the police, on pointing out of the accused,

recovered a country made pistol *(tamancha)* of 315 bore, 3 live cartridges – 315 bore and an iron handle of hand-pump. The Police, after investigation, submitted charge sheet under Sections 302 and 506 IPC. The Chief Judicial Magistrate by order dated 14.9.2006 committed the trial to the Court of Sessions and it came to be registered as S.T. No.409 of 2006. By order dated 3.7.2007, the trial court declared co-accused Khalid as juvenile and he was tried separately by the Juvenile court.

During course of investigation of Crime Case No.227 of 2006, a separate case bearing No.270 of 2006 was registered against the appellant under Section 25 of the Arms Act on basis of recovery of a country made pistol of 315 bore and three live cartridges 315 bore on 4.7.2006. The police, after investigation, submitted a charge sheet. The Chief Judicial Magistrate by order dated 14.9.2006 forwarded the charge sheet to the Court of Sessions, where it came to be registered as S.T. No.1408 of 2006. Both the cases were tried together and have been decided by common judgment impugned herein.

During course of trial, the prosecution examined two witnesses of facts. The first one is Km. Komal (PW-1), who is daughter of the victim and also the complainant. She had seen the accused firing and assaulting her mother. The other is Nitin Sharma (PW-4), who is

brother of the deceased victim and had seen the accused running away after committing the offence. The prosecution had examined thirteen other witnesses: PW-5, Pawan Kumar, Assistant in Jeevan Hospital, PW-6, Dr. Barkha Gupta, who conducted the postmortem, PW-7 S.I. Chamu Bhagat, the police officer, who prepared the death report and got the postmortem done, PW-8 S.I. Krishna Pal, scribe of the first information report (Ex. Ka.10), PW-9 Inspector Somveer Singh, Investigating Officer of Crime Case No.227 of 2006, PW-10 S.I. Aftab Ali, Investigating Officer of Crime Case No.270 of 2006, PW-11, retired S.I. Ram Saran, witness of seizure memo, PW-12 S.I. Vishesh Kumar Singh, last Investigating Officer of Crime Case No.227 of 2006, PW-13 S.I. Parvinder Pal Singh, first Investigating Officer of Crime Case No.227 of 2006.

The prosecution proved the written complaint (Ex. Ka-1) by examining PW-1, FIR (Ex. Ka-10) by examining PW-8, the Fard of ordinary and blood stained earth (Ex. Ka-2) by examining Chokhey Lal (PW-3), application filed by Nitin Sharma (Ex. Ka-3) by examining him (PW-4), postmortem report (Ex. Ka-4) by examining Dr. Barkha Gupta (PW-6), seizure memo of country made pistol, 3 live cartridges and iron handle of hand-pump (Ex. Ka-12) by examining PW-9, report of Vidhi Vigyan Prayogshala (Ex. Ka-20) by examining PW-12.

The accused was confronted with the incriminating material and evidence under Section 313 Cr.P.C. wherein he denied his involvement and stated that he was falsely implicated and claimed to be tried.

We have heard counsel for the parties and perused the record and the impugned judgment and order.

Learned counsel for the appellant submitted that the prosecution has utterly failed to bring home the charges. The appellant was falsely implicated. The deceased was a call girl and woman of loose character and she had been to jail in a double murder. There are inherent inconsistencies in the statement of PW-1 and PW-4. It is submitted that while PW-1, in her statement, said that her mother was not doing any work, PW-4 stated that she was working in a bulb factory in Modi Nagar. Again PW-1 admitted that her mother remained confined in jail in connection with murder of one Shashi but PW-4 feigned ignorance regarding her incarceration. It is further submitted that the medical evidence does not support the prosecution case; that the prosecution could not lead any evidence to prove *mens rea*. It is also urged that the alleged bullet recovered from the body of the victim was not sent for forensic examination, therefore, the prosecution had failed to establish link between the seized weapon and the bullet recovered from the body of the victim. In other words, the contention is that in the absence of the

report of ballistic expert to connect the appellant with the bullet recovered from the body of the victim, the prosecution had failed to establish its case.

On the other hand, learned A.G.A. for the State submitted that the prosecution has succeeded in proving its case to the hilt. The eye version account of PW-1, daughter of the victim, is of unimpeachable character and so is the statement of her brother Nitin Sharma (PW-4). The prosecution story stands corroborated by the postmortem report wherein the injuries were found to tally with the manner in which the injuries were said to have been inflicted as per the prosecution story. It is submitted that the doctor PW-6 had fully proved that injury no.2 is a entry wound of bullet and was sufficient to cause death. The other injuries, as per her statement, are attributable to blows received from hard and blunt object and the prosecution had successfully established that those were inflicted by the iron handle of hand-pump. He further submitted that there is no material contradiction in the testimony of PW-1 and PW-4 inasmuch as their consistent version was that the victim died because of gun shot injury and other blows by a hard object. It is urged that the prosecution story is fully supported by medical evidence and consequently, it is wholly immaterial whether the bullet recovered from the body of the victim was sent for ballistic

report or not. In support of his contention, he has placed reliance on judgments of Supreme Court in **State of Himachal Pradesh Vs. Mast Ram, AIR 2004 SC 5056** and **Munna alias Surendra Kumar Vs. State of M.P., AIR 2003 SC 3346**.

The first issue for consideration is whether the prosecution has succeeded in proving the time and place of occurence. The incident, as per prosecution case, had taken place on 13.6.2006 at 10:30 p.m. on the open terrace of the house of the victim. The first information report was got registered on 13.6.2006 i.e. on the same date at 11:20 p.m. The consistent version of eye witness PW-1, daughter of the victim and PW-4, brother of the victim, is that the victim received grievous injuries as a result of assault and was rushed to hospital by her brother. PW-1, who was stated to be 16 years of age at the time of alleged incident, got the report scribed by S.P. Samaniya, her neighbour and thereafter informed the police station. The F.I.R. was thus got registered immediately without any delay. There was no suggestion to any witness during cross-examination that the incident had not taken place on the terrace of the house of the victim, but at some other place. In fact, the accused appellant during his examination under Section 313 Cr.P.C. did not deny the time and place of incident but alleged that several other persons used to visit the house of the victim and thus tried to attribute

the offence to them. He also claimed to have been falsely implicated.

Pawan Kumar (PW-5), Assistant, Jeewan Hospital stated that the victim was brought to the hospital on 13.6.2006 in serious condition. The first aid was given to her by Dr. Upendra Rana (Surgeon). Thereafter she was referred for further treatment to other hospital. S.I. Charmu, who prepared the death report of the victim, stated that she was admitted to the hospital on 13.6.2006 with number of injuries. She died on 14.6.2006 at 3 p.m. We thus find that time and place of incident is fully proved.

The next question is whether the prosecution case that the victim was shot from close range from the back side and also hit on her head and hand with some iron object, also from back side, is proved or not and what was the cause of her death? According to post mortem report, the following ante-mortem injuries were found :-

1. Lacerated wound 5.5 x 0.5 cm bone deep on left occipital protuberance, obliquely placed, medial end above the lateral end.
2. Firearm entry wound 3.0 x 2.0 cm on Right upper back of chest 2.0 cm outer to right from midline and 4.0 cm below shoulder top, surrounded by tatooing in a area of 20.0 x 10.0 cm more on Right side blackening present on Right side of the wound. On exploration wound was packed with surgical gauge piece. The track of the wound was going forward, downward and medially after shattering the vertebra T_1 and T_2 through and through bullet

was found lodged in left mediastinal tissue surrounded by blood clots after injuring the mediastinal blood vessels.

3. Reddish bruise 5.0 x 1.0 cm present on outer aspect of right forearm 8.0 cm below elbow joint.
4. Incised wound 3.6 x 0.6 cm x 0.2 cm horizontally placed on Right thigh on front aspect 11.0 cm above the knee.
5. Incised wound skin deep 15.0 x 0.5 x 0.2 cm horizontally placed situated 0.8 cm below shoulder top on right back of the chest.
6. Reddish linear scratch mark 16.0 x 0.1 cm horizontally placed 2.0 cm below shoulder top on right back of chest 1.2 cm below injury No.5.
7. Linear Reddish abrasion 10.0 x 0.2 cm on Right lower back of chest horizontally placed 26.0 cm above gluteal cleft and inner end situated at midline.

According to medical opinion, cause of death is hemorrhagic shock due to ante mortem injury to mediastinal blood vessel produced by projectile of fire arm. Injury No.2 is fire arm entry wound on the back of chest. There is tattooing and blackening in the area of 20 x 10 cms on right side of the wound. The bullet was found lodged in left mediastinal tissue (between the lungs). This supports the prosecution case that firing was done from a close distance from the back side. The bullet recovered from the body measured 3.3 cm in length and 0.8 cm in diameter. It was opined that injury No.2 was sufficient to cause death in ordinary course of nature. Dr. Barkha Gupta, who conducted the post mortem, was examined as PW-6. In her statement she reiterated that

injury No.2 was sufficient to cause death. She further stated during cross-examination that death had occurred due to profuse bleeding from the mediastinal vessel caused by gun shot injury.

PW-6 in her cross-examination clarified that injury No.1 was outcome of blow from *kundala* and injury No.5 by a sharp weapon. All other injuries were on shoulder, back of chest and fore arm. It duly supports the prosecution case that co-accused Khalid who was carrying some object made of iron, which during investigation was found to be iron handle of hand-pump was used in hitting the victim from the back side. There was no suggestion by the defence during cross-examination of PW-6 that the injuries found on the body of the victim were not result of gun shot or blows from iron handle of hand-pump. PW-1, who is eye witness, in her statement fully supported the prosecution version. Despite a lengthy cross-examination, the defence could not succeed in extracting anything which may demolish the prosecution story. The prosecution has thus succeeded in proving that the victim died because of gun shot and other injuries sustained during assault.

The most crucial issue is whether the prosecution has succeeded in proving that the accused-appellant was responsible for the crime in question or not? PW-1, as noted above, was eye witness of the occurrence. She is daughter of the victim and was aged about 16 years at that time. She has unequivocally supported the prosecution case that

accused Monu and Khalid who are resident of same mohalla, came to the open terrace of her house where she was sitting on a cot alongwith the victim. Monu had some talk with the victim and after five minutes he fired at her from the back followed by several blows by co-accused Khalid with a *hatthi* (हत्थी). The victim shouted and PW-1 also shouted. Her maternal uncle and her Naani, on hearing the shouts came near the staircase. However, Monu, brandishing the *tamancha* and threatening to fire at them, succeeded in running away from the *gali* towards field. The accused were identified in moon light and light of lantern. She further stated that she was able to identify them as they are her neighbours and she had been seeing them since childhood. She also stated that her mother was grieviously hurt as a result of assault from fire arm and iron *hatthi.* Her maternal uncle rushed her mother to Narendra Mohan Hospital and in the end to Jang Bahadur Hospital where she died. In her cross-examination, she clarified that her father had died when she was nine months of age. Her mother had since been residing with her Naani. She specifically denied that her mother was having enmity with other persons and they were instrumental in her murder. She also denied the suggestion that she had falsely implicated the appellant-accused as her engagement with him got snapped.

PW-4 Nitin Sharma is the brother of the victim. He stated that he

was present in the courtyard of the house at the time of occurrence. He also stated that it was a moonlit night and there was also light of lantern. The accused came to his house at about 10:30 p.m. on 13.06.2006. At that time the victim and her daughter were sitting on open terrace. He further stated that the accused told him that they want to talk to the victim and they were told that she was on terrace. Thereafter the accused went to the terrace through the staircase. After 5-6 minutes, he heard sound of gun shot and PW-1 was shouting for help. When he rushed towards the terrace, the accused were coming down through the staircase. Accused-appellant Monu was having *tamancha* and Khalid was having handle of hand-pump in his hand. Monu asked him to clear his way otherwise he will fire at him. He thereafter succeeded in running away. When they went on the terrace, they found victim bleeding profusely. The victim was taken to the hospital.

The submission of learned counsel for the appellant was that the statement of PW-1 and PW-4 is contradictory and has therefore to be discarded. It is true that PW-1 in her cross-examination stated that the victim was not doing any work, while PW-4 stated that she was engaged in a company at Noida. Again, PW-1 in her cross-examination admitted that her mother had been to jail in connection with a case relating to murder of two persons and was released after three months

on bail, but denied her illicit relationship with them, or having murdered them, but PW-4 feigned ignorance regarding these facts. These small variations in the statement of PW-1 and PW-4 are not sufficient to doubt the creditworthiness of the witnesses as their testimony on the other crucial aspects as noted above, is fully consistent and unambiguous and totally supports the prosecution case. They are consistent and unambiguous on the point that the accused-appellant and his accomplice came to their house, went to the terrace, where the victim was sitting with PW-1. While PW-1 had witnessed the accused firing and inflicting grievous injuries to the victim, PW-4 who was in the courtyard had heard the sound of gun shot and seen them running away. The suggestion that accused-appellant was falsely implicated because of enmity, was categorically denied. The defense had made feeble attempt during cross-examination to show that the victim was having illicit relationship with two persons and was sent to jail in that connection, but neither it was able to prove the same nor does it in any manner detract from the merits of the prosecution version regarding the involvement of the accused-appellant in the crime.

The accused appellant had surrendered before the court on 26.6.2006. On 4.7.2006 the Court allowed police remand for 24 hours. On the same day, the police on pointing out of the accused recovered a country made pistol of 315 bore, three live cartridges -315 bore and an

iron handle of hand-pump from nearby field burried under heap of grass. As per site plan, the said place was at the distance of 200 paces from the house of the deceased victim. It corroborates the version of PW-1 and PW-4 that the accused after committing the crime escaped through the gali to the adjoining field.

Inspector Somveer Singh PW-9 and Retired S.I. Ram Saran Sharma PW-11 proved the seizure memo (Ex. Ka-14). They also identified the accused-appellant and stated that the recovery was made on the pointing out of the accused. They also stated that only one seizure memo was prepared in respect of all seized goods. PW-9 who prepared the site plan relating to seizure (Ex. Ka-15) proved the same.

Learned counsel for the appellant vehemently contended that since the firearm and cartridges were not sent for examination by ballistic expert, therefore, according to him, the prosecution had failed to connect the appellant with the weapon of crime. It is noteworthy that the trial court directed the prosecution to produce the lead bullet and the case property of Session Trial No. 1408 of 2006. The prosecution failed to produce the lead bullet and it transpired during enquiry held by the trial court that there was no entry relating to lead bullet in the register maintained at *Malkhana.* The trial court had found dereliction of duty and negligence on part of A.S.I. Chamu Bhagat and directed for enquiry to be held in that regard by the Director General of Police,

Lucknow and by Police Commissioner, Delhi and for taking action against him and all other found responsible for the same.

The crucial question for consideration by this Court is whether on account of negligence on part of the investigating agency in ensuring safe custody of lead bullet and sending it for opinion of ballistic expert, the prosecution version comes under doubt and has to be discarded or conviction of the appellant could be made on basis of other oral and material evidence on record.

A similar situation arose for consideration before the Supreme Court in **Vineet Kumar Chauhan vs. State of Uttar Pradesh, (2007) 14 SCC 660.** The Supreme Court held that it cannot be laid down as a general proposition that in every case where there is a firearm injury, the prosecution must lead evidence of ballistic expert to prove the charge, irrespective of the quality of the direct evidence available on record. The Supreme Court went on to observe that where direct evidence is of unimpeachable character and the nature of injuries disclosed in the postmortem report is consistent with the direct evidence, the examination of ballistic expert may not be essential. The relevant observation in this regard is as follows: -

> *"**11.** It cannot be laid down as a general proposition that in every case where a firearm is allegedly used by an accused person, the prosecution must lead the evidence of a Ballistic Expert to prove the charge, irrespective of the quality of the direct evidence available on record. It needs little emphasis that where direct*

evidence is of such an unimpeachable character, and the nature of injuries, disclosed by post-mortem notes is consistent with the direct evidence, the examination of Ballistic Expert may not be regarded as essential. However, where direct evidence is not available or that there is some doubt as to whether the injuries could or could not have been caused by a particular weapon, examination of an expert would be desirable to cure an apparent inconsistency or for the purpose of corroboration of oral evidence. (See: Gurcharan Singh Vs. State of Punjab).”

The Supreme Court in the above judgment has also considered its earlier judgment in **Mohinder Singh vs. The State, AIR 1963 SC 340** and distinguished the same by observing thus: -

*“**12.** In Mohinder Singh's case (supra) on which strong reliance is placed on behalf of the appellant, this Court has held that where the prosecution case was that the accused shot the deceased with a gun but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the shots must have been fired by more than one person and not by one person only, and the prosecution had no evidence to show that another person also shot, and the oral evidence was of witnesses who were not disinterested, the failure to examine an expert would be a serious infirmity in the prosecution case. It is plain that these observations were made in a case where the prosecution evidence was suffering from serious infirmities. Thus, in determining the effect of these observations, the facts in respect of which these observations came to be made cannot be lost sight of. The said case therefore, cannot be held to lay down an inflexible rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if Ballistic Expert is examined. In what cases, the examination of a Ballistic Expert is essential for the proof of the prosecution case, must depend upon the facts and circumstances of each case.”*

In **Sukhwant Singh vs. State of Punjab, AIR 1995 SC 1380**, the Supreme Court found that the evidence of the complainant, the solitary eye witness, was not reliable, as it stood belied by the medical evidence. The presence of Gurmeet Singh, elder brother of the deceased, was also found to be doubtful. In the said background, the Supreme Court held that where the presence of the accused is doubtful, the prosecution ought to have sent the recovered empty cartridges and seized pistol for opinion of ballistic expert to connect the accused with the crime and omission on part of the prosecution in that regard was held to have seriously affected the creditworthiness of the prosecution case. Relevant observations made in this regard in paragraph 21 and 22 are as follows: -

> *"**21.** There is yet another infirmity in this case. We find that whereas an empty had been recovered by PW6, ASI Raghubir Singh from the spot and a pistol alongwith some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution, for reasons best known to it, did not send the recovered empty and the seized pistol to the ballistic expert for the examination and expert opinion. Comparison could have provided link evidence between the crime and the accused. This again is an omission on the part of the prosecution for which no explanation has been furnished either in the trial court or before us. It hardly needs to be emphasised that in cases where injuries are caused by fire arms, the opinion of the Ballistic Expert is of a considerable importance where both the fire arm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the credit-worthiness of the prosecution case to a great extent.*

22. From a critical analysis of the material on the record, we find that it would not be safe to rely upon the sole testimony of PW3 Gurmej Singh, the brother of the deceased, without independent corroboration in view of the infirmities pointed out by us above which render his testimony as not wholly reliable and since in the present case no such independent corroboration is available on the record, it would be unsafe to rely upon the testimony of PW3 only to uphold the conviction of the appellant. The prosecution has not been able to establish the case against the appellant beyond a reasonable doubt. The trial court, therefore, fell in error in convicting and sentencing the appellant. His conviction and sentence cannot be sustained. This appeal consequently succeeds and is allowed. The conviction and sentence of the appellant is set aside. The appellant is on bail. His bail bonds shall stand discharged."

The judgement in **Sukhwant Singh** case was considered by the Supreme Court in **Surendra Paswan vs. State of Jharkhand, (2003) 12 SCC 360**. The Supreme Court once again reiterated that **Sukhwant Singh** is not an authority for the proposition that whenever bullet is not sent for ballistic examination, the prosecution has to fail. In that case the victim was fired on the left eye. On receiving bullet injuries the victim fell down and was later declared dead. The Supreme Court after considering the oral and medical evidence held that there was only one injury on the body of the deceased which was fully explained by the doctor in his evidence and consequently, failure to send the weapon and the bullet for ballistic examination did not result in denting the prosecution version. The relevant observations are as follows :-

*"**10.** So far as the effect of the bullet being not sent for ballistic examination is concerned, it has to be noted that Sukhwant Singh's case (supra) is not an authority for the proposition as submitted that whenever a bullet is not sent for ballistic examination the prosecution has to fail. In that case one of the factors which weighed with this Court for not finding the accused guilty was the prosecution's failure to send the weapon and the bullet for ballistic examination. In the instant case, the weapon was not seized. That makes a significant factual difference between Sukhwant Singh's case (supra) and the present case.*

***11.** It has to be noted that there was not even a suggestion to any of the prosecution witnesses that the injuries were sustained by the accused-appellant in the manner indicated by him, as stated for the first time in the statement under Section 313 Cr.P.C.*

***12.** So far as the confusion relating to bullet and pellet is concerned, the same has been clarified by the doctor's evidence. In his examination the doctor (PW-3) has categorically stated that there was only one injury on the body of the deceased and no other injury was found anywhere on the person of the deceased. Therefore, the question of the deceased having received any injury by a pellet stated to have been recovered by the investigating officer is not established. The investigating officer has clarified that the embodied bullet was given to the police officials by the doctor which was initially not produced as it was in the Malkhana but subsequently the witness was recalled and it was produced in Court."*

Once again, the Supreme Court in **State of Himanchal Pradesh vs. Mast Ram, AIR 2004 SC 5056** reiterated the legal proposition that the bullet recovered from the body of the victim need not be necessarily sent for ballistic examination or in case of failure, an adverse inference is liable to be drawn. Paragraph 7 of the judgement, which is relevant, is reproduced below :-

> *"7. Thirdly, the High Court was of the view that during the course of post-mortem examination conducted by PW-2 Dr. Sanjay Kumar Mahajan, two pellets were recovered - one each from the right and left lung of the deceased, which were handed over to the police. However, the pellets recovered were never sent for examination to a ballistic expert in order to find out if such pellets were fired from the gun (Ex. P-11) or not. According to the High Court, failure of the prosecution to send the pellets for examination by a ballistic expert will draw an inference against the credibility of the prosecution story. This finding, in our view, is utterly perverse. It is not the requirement of law that pellets recovered from the body be sent to ballistic expert to determine as to whether the pellets were fired from the exhibited gun or not. On the contrary, the recovery of pellets from the body clearly establishes the prosecution case that the deceased died of gun shot injuries."*

In a more recent judgement in **Prabhash Kumar Singh vs. State of Bihar (now Jharkhand), (2019) 9 SCC 262**, the Supreme Court was dealing with a case where the weapon of assault and the bullet were not even recovered. The issue was whether on the basis of eye witness account, the accused can be convicted. The Supreme Court dealt with the said issue in the concluding paragraph of the judgement as follows :-

> *"**13.**.....As there is clear eyewitness account of the incident and none of the two eyewitnesses could be shaken during cross-examination and they had stuck to the recollection of the facts relating to the incident, the mere fact that the weapon of assault or the bullet was not recovered cannot demolish the prosecution case."*

Thus law on the point whether it is essential for the prosecution to obtain report of ballistic expert to prove the charge of gun shot injury against the accused is clear and unambiguous. Where there is direct evidence of unimpeachable character and nature of injury stands corroborated by medical evidence, the examination of the ballistic expert would not be essential. However, where the oral evidence of the witness is not trustworthy or the injuries sustained do not stand corroborated by medical evidence, the prosecution may have to take aid of the ballistic expert to bring home the guilt.

In the instant case, as discussed above, the statement of PW-1 and PW-4 who were eye witnesses is consistent and of unimpeachable character. They were put to lengthy cross-examination but the defence could not succeed in extracting anything which may demolish the prosecution case. The injuries sustained by the victim is fully corroborated by the medical evidence. Albeit, it would have been better if the lead bullet was sent for opinion of the ballistic expert but the same is not sufficient to demolish the prosecution case which otherwise stands fully proved. We thus find no force in the submission that the prosecution of the appellant should fail for want of opinion of ballistic expert.

In view of the foregoing discussions, it is clear that the accused appellant inflicted injuries with the intention of causing such bodily injury as he knew to be likely to cause death of the victim. He has rightly been held guilty of criminal intimidation and murder and convicted for the offences.

As regards offence under the Arms Act, according to the prosecution version, a *tamancha* (an immitation firearm converted into firearm) and three live cartridges were recovered on the pointing out of the appellant. Concededly, the appellant was not having any licence in that behalf, as envisaged under Section 6 of the Act. The seizure memo was duly proved by PW-9 and PW-11. The contention that in absence of public witness to the seizure memo, it cannot be relied upon, stands rightly discarded by the trial court relying on the judgement of the Supreme Court in **Manish Dixit and others vs. State of Rajasthan, (2001) 1 SCC 596** and judgement of Delhi High Court in **Ashraf Ali vs. State, (1991) 2 Crimes 226**. Learned counsel for the appellant did not make any other submission relating to the finding of conviction and sentence recorded by the court below in respect of commission of offence under the Arms Act. We have perused the statement of PW9 and PW11 and we fully endorse the findings recorded by the trial court in relation to commission of offence and under Section 25(1)(b) of the Arms Act.

As regards sentence, since the offence was committed in a preplanned and ghastly manner inside the house of the victim, we do not find any reason to take lenient view and interfere with the sentence imposed by the trial court. Accordingly, we uphold the conviction and sentence as awarded by the trial court in toto.

Before parting, we clarify that this judgement will in no manner influence or prejudice the proceedings, if any, pending before any court of law in respect of co-accused Khalid, who was declared juvenile and against whom separate trial was held.

The appeal lacks merit and is accordingly dismissed.

Order Date: 22.11.2021
SL

(Om Prakash Tripathi, J.) (Manoj Kumar Gupta, J.)