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Case :- JAIL APPEAL No. - 3735 of 2013

Appellant :- Udaiveer

Respondent :- State Of U.P

Counsel for Appellant :- From Jail,Ajay Kumar Singh (A.C.)

Counsel for Respondent :- A.G.A.,

Hon'ble Sudhir Agarwal,J.

Hon'ble Saurabh Shyam Shamsbery,J.

(Delivered by Hon. Saurabh Shyam Shamsbery, J)

1. The accused Udaiveer has preferred the instant Jail Appeal assailing the judgment and order dated 12.1.2007 rendered by Sessions Judge Muzaffarnagar in Sessions Trial No 449 of 2005 (State Vs Udaiveer) whereby the accused has been visited with the conviction for an offence under section 302 IPC and sentenced to undergo imprisonment for life.

2. According to the prosecution case, the incident took place on 24.1.2005 at 8 PM near flour mill of one Sushil at the Tri-junction of which a written report was lodged by Pramod Kumar (PW-1), father of deceased Vikas Mittal alias Vikky at Police Station Kotwali Distt Muzaffarnagar. According to the written report, on the fateful day, deceased had gone to call on his Maternal uncle Jai Prakash son of Sewa Ram resident of Mohalla Krishna Puri. As soon as he arrived at the Tri junction near the flour mill of one Sushil, a quarrel ensued between the accused Udaiveer son of Veero Singh Toofan resident of Pinna as both had collided with each other while crossing. It is mentioned in the written report that the accused, who was a person of criminal propensity having criminal antecedents, whipped out country made pistol saying that "Sale mere Sar Se Upar Hokaar Niklega" (would you cross me over

my head) and opened fire at the deceased. On sustaining fire shot, the deceased was initially injured. It is further mentioned that the incident was witnessed by Jai Prakash (PW-2) son of Sewas Ram and Ankit Kumar (PW-3) son of Dinesh Kumar, who immediately rushed to rescue of the deceased and tried to catch hold of accused but he fled and escaped. Jai Prakash and Ankit Kumar aforesaid took injured to District Hospital and therefrom, injured was referred to Meerut.

3. The written report was scribed by Ankit Kumar (PW 3). On the basis of written report as stated supra, FIR was lodged on 24.1.2005 on being presented by PW 1 before the concerned Police Station under section 307 IPC. In the course of treatment at Meerut Hospital, injured succumbed to his injuries. Hence the case was altered to section 302 IPC on the basis of report dated 25.1.2005 at 1.20 AM.

4. The investigation was undertaken initially by Jairam Kasana who prepared inquest report, photo nash, challan nash etc. The Investigating Officer also prepared site plan and collected blood soaked as well as simple earth from the place of occurrence and prepared memo. Later-on, Vinod Kumar Tivatiya SSI (PW-4) completed investigation, and submitted charge sheet on 20.2.2005 under section 302 IPC.

5. Autopsy on the body of the deceased was conducted on 25.1.2005 by Dr Krishna Gopal Sanwaliya (PW-5), who found following ante-mortem injuries on the person of deceased.

1. Gunshot wound of entry ½ cm x ½ cm x cavity deep 7.5 cm below left nipple at 8 o'clock position and tattooing present around in an area of 12 cm x 5 cm. Margines Inverted.

2. Gunshot wound of exit 1.5 cm x 1 cm x chest cavity deep over left site back of chest 4 cm from midline at level of 8th thoracic vertebra. The left 7th rib was fractured on frontal side. Left 8th rib was fractured on back site. Left pleura lacerated on lower part and spleen was also fractured.

As per opinion of the Doctor, the causative factor of death was

shock and hemorrhage as a result of ante mortem injuries.

6. The case was committed to Sessions by Chief Judicial Magistrate on 30.3.2005 for trial. On 1.7.2005 charge under section 302 IPC was framed against the accused-appellant.

“Charge

I, S.N.H.Zaidi, Sessions Judge, Muzaffarnagar do hereby charge you Udaivir as follows:

That you on or about 24.1.2005 at about 8 P.M. At the Trvium near the flour mill of Sushil in Mohalla Krishna Puri , within P.S.Kotwali, District Muzaffarnagar, committed murder by causing the death of Vikas Mittal alias Vikki and thereby committed an offence punishable u/s 302 of the I.P.C and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge.”

The accused abjured the guilt and claimed to be tried.

7. In this case, in order to bring the guilt home to the accused, the prosecution examined Pramod Kumar as PW-1, Jai Prakash as PW-2, Ankit Kumar as PW-3 , SSI Vinod Kumar Tavetiya as PW4, Dr Krishan Gopal Sanwaliya PW-5 and constable Raj Kumar Sharma as PW-6. The defence also examined one Charan Singh as D.W-1. The prosecution also exhibited documents and material objects.

8. PW-1 Pramod Kumar, who is the father of deceased was examined on 4.1.2006. To begin with, he reiterated the incident as mentioned in the First Information Report. He deposed that the report was scribed by Ankit Kumar (PW-3) on his dictation and the said written report was submitted by him alone at the Police Station. The witness was subjected to gruelling cross examination. In the cross examination, he deposed that the report was scribed by Ankit Kumar PW-3 on his dictation and that the distance between the place of his residence and house of accused was less than ½ Km.

9. PW-2 is Jai Prakash was examined on 4.1.2006, 2.2.2006 and lastly on 6.2.2006. This witness corroborated the version as contained in First Information Report and specifically stated that he was ocular witness of the incident and had witnessed the entire incident alongwith Anikit Kumar (PW-3). He specifically deposed that on the day of occurrence, between 7.30 pm and 8 pm, he had gone to collect flour from flour mill and on arriving near the flour mill, he saw accused Udai Veer and deceased Vikky involved in exchanging hot words. He heard accused saying that “Tum Hamare Sar Pal Nikal Kar Jaoge” and thereafter, he saw accused whipping out country made pistol and firing at the deceased. He rushed and tried to catch hold of the accused but he fled away. He also deposed that he saw incident in the electricity light. After the incident, Ankit kumar went to give information of incident to the family of deceased and after arrival of father of deceased at the place of occurrence, deceased who was then injured was rushed to hospital. At hospital, Doctor attending on the injured referred deceased for treatment to Meerut looking to his worsening serious condition.

10. The witness was also subjected to gruelling cross examination and deposed in the cross examination that at the time of occurrence, the area was lit with electricity light and a tube light was glowing. He also deposed that he heard the conversation between accused and deceased. He also deposed that accused was domiciled of the same same Mohalla and he was the person of criminal propensity, having criminal antecedents.

11. P.W.3 is Ankit Kumar, who was examined on 21.8.2006. He also corroborated the version as contained in the written report. He specifically deposed the fact that he saw accused and deceased involved in exchange of hot words and heard their conversation in which accused was saying “Sale Mere Sar Par Pe Rakhkar Utrega” followed by hurling of abuses. The accused then whipped out country made pistol from his trouser and fired at the deceased, which hit deceased in chest. After

being hit by fire, deceased slumped down. He also deposed that after firing at the deceased, the accused fled away from the scene . He also deposed that he had not accompanied the father of deceased to Police Station for lodging of First Information Report.

12. P.W-4 Vinod Kumar Tevatiya, who was then posted as SSI Kotwali Distt Muzaffarnagar, deposed that the case was registered under section 307 IPC in his presence and investigation of the case was entrusted to SI Jai Raj Kasana. The case was altered to section 302 IPC on 25.1.2005 at 1.20 am. He deposed that SI Jai Ram Kasana was posted at PS Kotwali Muzaffarnagar and proved Ex Ka 2 to Ka 8 prepared by S.I. Jai Ram Kasana. He also deposed that on 27.1.2005, investigation was entrusted to him and he recorded statement of accused from Jail on 3.2.2005. He also recorded the statements of SI Jai Ram Kasana and two constables on 13.2.2005, who had carted away the body for post mortem. After concluding investigation, he submitted charge sheet on 20.2.2005 under section 302 IPC. This witness was also cross examined. He denied allegation that investigation conducted by him was spurious and he had filed charge sheet against the accused on trumped up charges.

13. PW-5 is Dr Krishna Gopal Sawliya, who was then posted at Distt Hospital Muzaffarnagar. He deposed that on 25.1.2005, he conducted autopsy on the body of the deceased Vikas alias Vikky aged about 22 years son of Pramod Kumar (PW-1), resident of 92 Qaziyan PS Kotwali at 1.10 PM. Ante mortem injuries found on the person of deceased are already enumerated above. He opined that the cause of death was due to shock and hemorrhage. The duration was ½ day. He deposed that the cloths which deceased was wearing, sealed and handed over to Police personnel. During cross examination, he deposed that interregnum between death and post mortem was six hours; deceased died due to fire arm injuries; which was on the left side of deceased and not on right side, and, on account of some aberration, he might have mentioned that the injury sustained was on right side.

14. PW-6 is Raj Kumar Sharma, who was then posted at PS Kotwali Distt Muzaffarnagar. He deposed that he had registered First Information Report on the basis of written report submitted by Pramod Kumar (PW-1). During cross examination, he stated that the complainant had come to him alone. The complainant (PW-1) was not accompanied with anyone. He denied the suggestion that case was anti-timed or anti-dated.

15. The statement of accused was recorded under section 313 Cr.P.C in which his case was that of denial and false implication in addition to the defence that the accused had enmity with one Satendra, who was the brother of the Pradhan. In the year 2002, he had an altercation with Satendra. One person namely Sonu, who was allied to Satendra was murdered and that murder was falsely foisted on him. Further, defence is that he was admitted to bail after efflux of two and half year. Since he had no one to prosecute his case, verdict of conviction was given in that case. Against conviction, he had filed appeal in which he was admitted to bail. After his release on bail, he was again falsely nominated as an accused in the instant case just after 10 days of his release at the behest of aforesaid Satendra in the murder of witness Mahesh and Vikas alias Vikky. He also stated that he was cited to be native of Peena, while the fact remains, he was not a native of Peena. He denied knowledge about who murdered the deceased Vikas. He also stated that all the witnesses had deposed against him on account of enmity

16. The defence has examined DW-1 Charan Singh. He deposed that between 7.30 and 8 PM, he was coming from the lane in question. He heard someone weeping. When he neared the injured person, preparation was being made to take the injured to Doctor. The persons present there were saying that the injured was fired at by Peenawala. Thereafter, electricity was restored. He denied knowledge, who fired at the deceased. He stated that Udaiveer was not involved. He also deposed that Udaiveer was involved in another murder case prior to it and Udaiveer was not present there. During cross examination, he stated

that he was related to Udaiveer as his uncle (Tau). He was called from his house by the mother of Udaiveer. He stated that Vikas was not fired at or murdered in his presence. When he reached the place of occurrence, Vikas was about to be taken to hospital. He could not tell the name of the person, who was saying that Vikas was fired at by Pinnewala.

17. The learned Trial Court by order dated 12.1.2007, after giving anxious consideration to the entire materials on record, converged to the conclusion that on the basis of the evidence, it was proved to the hilt that accused Udaiveer committed murder of Vikas alias Vikky intentionally on 24.1.2005 at about 7.30 to 8.00 PM, thereby he committed an offence under section 302 IPC, for which he is liable to be convicted. After hearing on the issue of sentence, learned Trial Court sentenced accused to undergo life imprisonment by an order of even date.

18. Heard Shri Ajay Kumar Singh, Advocate (Amicus Curaie) on behalf of the appellant and also learned A.G.A. The arguments made across the bar as well as our consideration are as under:

19. The learned counsel for Appellant submitted that Informant (PW-1) Pramod Kumar, is not an eye witness and as per PW 1 the written report was scribed by Ankit Kumar (PW-3). However, as per Ankit Kumar (PW-3), he had not visited Police Station and by this reckoning, the contents of First Information Report cannot be lapped up and further the prosecution has suppressed the genesis of the occurrence.

20. Per contra, learned counsel for State submitted that according to PW-1 Pramod Kumar, the written report was scribed by Ankit Kumar on his dictation and he affixed his signatures thereon and the said written report was given at the Police Station by PW-1, who had gone to Police Station, unaccompanied by anyone. PW-6, constable Raj Kumar has stated in his statement that PW-1 had come alone alongwith the written report and contents of the same were recorded verbatim in the register.

21. Considering the submissions and perusing statements of PW 1

and PW 6 as well as the First Information Report and the written report, it admits of no doubt that the written report was written by Ankit PW-3 on the dictation of PW-1, Pramod Kumar. However, Ankit had not accompanied (PW-1) Pramod Kumar to Police Station and PW-6 recorded the same verbatim in the case diary. It would thus transpire that First Information Report was lodged by PW-1 on the basis of information given by eye witness (PW-3) Ankit and the same was mentioned in the Register. Therefore, the submission raised by learned counsel for appellant aforesaid does not commend to us for acceptance.

22. Further there is nothing on record to show that the prosecution suppressed genesis of occurrence. It is also worthy of notice that the occurrence took place around 8 PM on 24.1.2005 and First Information Report was lodged on 24.1.2005 at 9.05 PM. The distance from the place of occurrence to Police Station was only 2 Km. It would thus appear that First Information Report was lodged with promptitude, regard also being had to the fact that PW-1 Pramod Kumar, being father of deceased and also being anxious to save the life of injured had to arrange for rushing injured to the hospital for immediate medical help.

23. In order to prop up the above view, we feel called to rely upon the decision in ***Sheikh Hasib alias Tabarak Vs. State of Bihar reported in 1972 (4) SCC 773*** on the issue of relevancy of First Information Report. Part of Para 4 being relevant is abstracted below.

“The legal position as to the object, value and use of first information report is well settled. The principal object of the first information report from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party. The first information report, we may point out, does not constitute substantive evidence though its importance as conveying the earliest information regarding the occurrence cannot be doubted It can, however, only be used as a previous statement for the purpose of either

corroborating its maker Under Section 157 of the Indian Evidence Act or for contradicting him Under Section 145 of that Act. It cannot be used for the purpose of corroborating or contradicting other witnesses.” (Emphasis supplied)

24. According to the learned counsel for appellant, presence of ocular witnesses namely, PW-2 Jai Prakash and PW 3 Ankit at about 7.30 to 8 PM on the winter night of January at the place of occurrence is within the realm of grave doubt and further these witnesses are related to the deceased as PW-1 is the uncle (Maternal Uncle) of deceased and PW-3 Ankit is the cousin of deceased and as such these witnesses cannot be credit-worthy being interested witnesses and further, no independent witness has been examined in the instant case. Secondly, distance between the place of occurrence and place where witnesses were standing was not such that the witnesses could be able to hear conversation between the accused and deceased and further from the place where the witnesses were standing, the place of occurrence was not visible as they were at the corner of the road.

25. Learned counsel for the State submitted on this issue by relying upon the site plan that from the place where witnesses were standing, both the accused and the deceased were clearly visible and as per statement of PW-2 Jai Prakash, distance was less than 2 meters and PW-3 Ankit has stated that he was with PW-2 at the time of occurrence.

26. We have given our thoughtful consideration to the submissions advanced on the issue and we have also closely looked at the site-plan. In the map, the places where witnesses were standing are marked as 'C' and 'D' which is in front of Sunil's flour mill and the places 'B' and 'D' are marked where deceased and accused were present. From the places marked as 'C' and 'D' places 'A' and 'B' are clearly visible and distance between them is less than 2 meter. It leaves no manner of doubt that PW-2 and PW-3 had witnessed the occurrence from very short distance and also heard the conversation between accused and deceased. It does not

appear to be improbable that PW 1 and PW-2 had gone to the Sunil's flour mill at 8.00 PM on the date of occurrence. The evidence of PW 1 and PW 2 is consistent and completely supports the prosecution version.

27. Further evidence of PW 1 and PW 2 cannot be discarded merely on the ground that they are related to the deceased. In this connection, we feel called to refer to the decision in *Ganpathi and another Vs State of Tamil Nadu, reported in 2018 (5) SCC 549*. Paras 14 and 15 being relevant are excerpted below.

“13.'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested' [See: State of Rajasthan Vs. Smt. Kalki and Anr. (1981) 2 SCC 752].

14. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made [See : Maranadu and Anr. Vs. State by Inspector of Police, Tamil Nadu (2008) 16 SCC 529]. (Emphasis supplied)

28. Learned counsel for the Appellant further assailed the impugned judgment and order on the premises that the ocular and medical evidences are incongruent with each other, as PW-2 and PW-3 have not stated the manner of assault by fire arm and about the distance from where alleged fire was shot. He also drew attention to incongruities between the medical report and statement of Doctor (PW-5).

29. Per contra, learned A.G.A refuted the submission and relied upon autopsy report prepared by PW-5 Dr Krishna Gopal as well as his

statement. He pointed out that at the gun shot wound of entry there was tattooing present around in an area of 12 cm x 5 cm. Therefore, the gunshot has been fired from close range which is evident from the site plan also that shows that the maximum distance between the accused and the deceased was eight steps.

30. We have considered rival submissions. PW-2 and PW-3, the ocular witnesses have categorically stated in their testimonies that accused had fired gun shot at the chest of the deceased and which is corroborated by the medical evidence as the report of the PW-5 (Dr Krishna Gopal Sanwaliya) mentioned the entry wound of fire arm was 7-1/2 cm below the right nipple. Therefore, we are of the considered opinion that in the case in hand, ocular evidence has fully corroborated the medical evidence. Presence of tattooing shows that the gun shot was fired from close distance which fact is corroborated by the site map as well as by ocular evidences. Accordingly, the submission of learned counsel for the appellant does not commend to us for acceptance.

31 Supreme Court in ***Rakesh Vs State of M.P reported in (2011) 9 SCC 115*** has ruled in para 13 as under:

“13. It is a settled legal proposition that the ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence. More so, the ocular testimony of a witness has a greater evidentiary value vis-a-vis 7 medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence if proved, the ocular evidence may be disbelieved. (Vide: State of U.P. v. Hari Chand, (2009) 13 SCC 542; Abdul Sayeed v. State of Madhya Pradesh, (2010) 10 SCC 259; and [Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana](#), (2011) 7 SCC 421). “

32. The other limb of argument brought to bear on behalf of the appellant is that there are material contradictions/inconsistencies among the prosecution witnesses. However, learned Counsel has failed to show

any material contradictions/inconsistencies barring some minor contradiction, which are not material. In ***Rammi Vs State of M.P. Reported in 1999 (8) SCC 649***, Court has held in para 24 as under:

“24. When eye-witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.”

33. Considering the submissions in view of the settled law, we are of the considered view that there is no force in the above submission of learned counsel for the appellant and hence, it falls short of acceptability.

34. Learned counsel for appellant also points out that the statement of accused recorded under section 313 Cr.P.C has not been considered. It is worthy of notice here that the accused has not examined any defence witness to corroborate his version as mentioned in the statement under section 313 Cr.P.C. DW-1 Charan Singh has not stated anything in support of the said statement.

35. Supreme Court in para 41 of the judgment in ***Raj Kumar Singh alias Raju alias Batya Vs state of Rajasthan reported in 2013 (5) SCC 722***, has held as under:

“41. In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 Cr.P.C. is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the

trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 Cr.P.C. cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution's evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 Cr.P.C. is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 Cr.P.C.

An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become witness against himself.”

36. In view of above discussion and exposition of law aforesaid, the submission raised by learned counsel for appellant again does not commend to us for acceptance, having no force.

37. Learned counsel for the appellant also argued that the absence of any motive and non recovery of weapon used in occurrence are sufficient to throw prosecution case over board. Regard being had to the fact that in the present matter, there are ocular witnesses which implicitly corroborate the medical evidence and in view of the following judgments passed by Hon'ble Supreme Court, the arguments raised are not tenable. The first case is ***State of U.P. Vs Babu Ram reported in 2000 (4) SCC 515***. Para 12 of this case being relevant is quoted below.

“12. In this context we would reiterate what this court has said about the value of motive evidence and the consequences of

prosecution failing to prove it, in Nathuni Yadav vs. State of Bihar {1998 (9) SCC 238} and State of Himachal Pradesh vs. Jeet Singh {1999 (4) SCC 370}. Following passage can be quoted from the latter decision:

"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

38. The second case is ***Raja Gopal Vs Muthupandi alias Thavakkalal and others reported in 2017 (11) SCC 120***. Para 14 of this decision being relevant is quoted below.

"14. Equally, it is well established that motive does not have to be established where there is direct evidence. Given the brutal assault made on PW-1 by criminals, the fact that witnesses have turned hostile can also cut both ways, as is well known in criminal jurisprudence."

39. The Third case is ***Mritunjoy Biswas Vs Pranab aslias Kuti Biswas and another reported in 2013 (12) SCC 796***.

"33. The learned counsel for the respondent has urged before us that there has been no recovery of weapon from the accused and hence, the prosecution case deserves to be thrown overboard and, therefore, the judgment of acquittal does not warrant interference.

34. In Lakshmi and Others v. State of U.P. [(2002) 7 SCC 198 : (AIR 2002 SC 3119 : 2002 AIR SCW 3596)], this Court has ruled that

"Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the

prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder”.

35. In Lakhan Sao v. State of Bihar and Another [(2000) 9 SCC 82 : (AIR 2000 SC 2063 : 2000 AIR SCW 1955)], it has been opined that the non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable.

33. In State of Rajasthan v. Arjun Singh and Others [(2011) 9 SCC 115 : (AIR 2011 SC 3380 : 2011 AIR SCW 5295)], this Court has expressed that:

“18..... mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place”.

Thus, when there is ample unimpeachable ocular evidence and the same has been corroborated by the medical evidence, non-recovery of the weapon does not affect the prosecution case.”

40. Lastly learned counsel submitted that the present case is of sudden and grave provocation and appellant is entitled to the benefit of Exception to section 300. However, the learned counsel has miserably failed to show any evidence on record in this respect and in the light of para 10 of the judgment rendered by Supreme Court in ***Sukh Lal Sarkar Vs Union of India reported in 2012 (5) SCC 703***, the said submission falls short of acceptability. Para 10 of the aforesaid decision being relevant is quoted below.

“11. Under Exception 1 of Section 300, provocation must

be grave and sudden and must have by gravity and suddenness deprived the appellant of the power of self-control, and not merely to set up provocation as a defence. It is not enough to show that the appellant was provoked into losing his control, must be shown that the provocation was such as would in the circumstances have caused the reasonable man to lose his self-control. A person could claim the benefit of provocation has to show that the provocation was grave and sudden that he was deprived of power of self-control and that he caused the death of a person while he was still in that state of mind.”

41. In view of the above, we converge to the conclusion that the court below reached the correct conclusion in accepting the prosecution case. Hence the present appeal is dismissed.

42. We appreciate the assistance rendered by Shri Ajay Kumar Singh, Amicus Curiae to the Court in deciding the present appeal. Registrar General is directed that the aforesaid Amicus Curie shall be paid a sum of Rs 10000/- as fee for the services rendered by him within a period of four weeks.

Order Date :- 18.4.2019

MH