A

PANKAJ

v.

STATE OF RAJASTHAN

B

(Criminal Appeal No. 2135 of 2009)

SEPTEMBER 09, 2016

[V. GOPALA GOWDA AND R.K. AGRAWAL, JJ.]

C *Penal Code, 1860: s.302 r/w s.34 – Murder – Allegation that appellant along with other three accused fired bullet at victim-deceased which hit him in the neck due to which deceased fell down and became unconscious – Deceased was rushed to hospital where he succumbed to injuries after few days – Trial court convicted all the accused u/s.302 – High Court upheld conviction of appellant* D *while acquitted other accused – On appeal, Held: Sole eye-witness (PW-8) stated that he took the deceased to the hospital and the blood was oozing from his body – However, during investigation blood stained clothes were not seized by the investigation officer – This made his presence highly suspicious – Testimony of sole witness* E *was at variance with the medical evidence – There were several infirmities in the dying declaration – There was variance in the statements of PW-6 and PW-8 with regard to the distance between the deceased and the appellant-accused – The contradiction, i.e., the distance of fire, is material and such an important aspect cannot be ignored – There is no material to connect that the gunshot injury* F *suffered by the deceased was due to the shot fired from the firearm of the appellant-accused – Though the bullet was recovered but the same was not connected with the weapon – Moreover, the prosecution was not able to prove the motive clearly – Appellant entitled to benefit of doubt – Conviction set aside.*

G *Criminal law: Use of weapon – Held: In a case where death is due to injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused.*

H

Allowing the appeal, the Court A

HELD: 1 The prosecution case was that after the alleged incident, the deceased was taken to the General Hospital, Bharatpur wherefrom he was transferred to Agra for further treatment. His dying declaration was allegedly recorded at 10:45 p.m. on that day at Agra by the then SDM. PW-6 who first B examined the body of the deceased at the General Hospital categorically stated in his statement that the victim-deceased was unconscious when he was brought to the hospital at 12:45 p.m. It is very hard to believe that the deceased who was unconscious in the noon, regained consciousness in front of SDM that too in the absence of certificate of the duty doctor that the patient is fit C to make a statement. In view of such infirmities in the dying declaration, the High Court rightly discarded the same. [Para 7] [822-D-F]

2. At the time of the alleged incident, PW-8, the brother of the deceased was present at the spot. He was the sole eye- D witness to the incident. In his statement, he very specifically stated that the appellant fired a shot at his brother in front of him and fled away from the crime scene along with others. As per the prosecution, the case rested upon the sole testimony of PW-8, which got corroboration from the statement of PW-5, who was present at the relevant time in a nearby shop. PW-5, in his E statement stated that as soon as he heard the sound of a bullet, he came out of the shop and noticed that the appellant was having revolver in his hand and was fleeing away at the relevant time along with three others. But it is also pertinent to note that PW-5 was a resident of village Dehra situated at a distance of 12-13 F kms. (approx.) from Bharatpur where incident took place. In his statement, he also stated that he came to Bharatpur in order to inquire about a locker in the name of his father in the Bank. DW-2 was examined from the other side who deposed that in the year 1997-1998 no locker was operated in the name of the father of PW-5. In this view of the matter, it is suspicious and hard to G believe that he visited the place of the incident at a distance of about 12-13 kms. (approx.) just for hair cut. [Para 8] [822-G-H; 823-A-C]

3. PW-8, in his statement deposed that both the deceased and the appellant-accused were sitting in front of each other. H

A There was a distance of about one and a half feet between them. The appellant-accused took out a pistol and fired a bullet on the neck of the deceased. However, the version of PW-8 is in conflict with the medical evidence. During cross-examination, PW-8 was also not able to answer satisfactorily with regard to the B arrangement of chairs in the shop which is though not material but creates a doubt in the mind about the correctness of the incident and makes his version highly artificial. Though PW-8 specifically mentioned that he took the deceased to the hospital and the blood was oozing from his body, it is not understandable that during investigation why the blood stained clothes were not C seized by the investigation officer and why he did not resist at the relevant time, which also makes his presence highly suspicious. PW-6 (doctor) had examined the deceased in the General Hospital. As per the *post mortem* report, drawn by PW-7, the cause of the death was shock and hemorrhage due to *ante-mortem injuries*. Admittedly, there is variance in the statements D of PW-6 and PW-8 with regard to the distance between the deceased and the appellant-accused. In a case where death is due to injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused E with the weapon with which and in the manner in which they are alleged to have been caused. In the case on hand, the contradiction, i.e., the distance of fire, is material and it would not be appropriate to convict the appellant-accused by ignoring such an important aspect. [Paras 9, 10, 11] [823-C-F; 824-D-E; 825-B-C]

F 4. There is no material on record to connect that the gunshot injury suffered by the deceased was due to the shot fired from the firearm of the appellant-accused. Though the bullet was recovered but the same was not connected with the weapon. Moreover, the prosecution was not able to prove the motive G clearly. [Para 12] [826-A-B]

5. It is a well-settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted. Inasmuch as the prosecution failed to establish the circumstances in which the appellant was alleged to have fired at H the deceased, the entire story deserves to be rejected. When

the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. The evidence on record in the case is not sufficient to bring home the guilt of the appellant. In such circumstances, the appellant is entitled to the benefit of doubt. The evidence of PW-8 inspires no confidence at all, therefore, the conviction and sentence awarded to the appellant is set aside. [Paras 13, 14] [826-C-E]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2135 of 2009.

From the Judgment and Order dated 03.09.2008 of the High Court of Judicature for Rajasthan, Jaipur Bench in D. B. Criminal Appeal No. 1071 of 2002.

Rakesh Kr. Khanna, Sr. Adv., Sudhir Nagar, Pramod Chaudhary, Advs. for the Appellant.

Puneet Parihar, (For Milind Kumar), Adv. for the Respondent.

The Judgment of the Court was delivered by

R.K. AGRAWAL, J. 1. This appeal has been filed against the judgment and order dated 03.09.2008 passed by the Division Bench of the High Court of Judicature for Rajasthan at Jaipur in Criminal Appeal No. 1071 of 2002 whereby the High Court dismissed the petition filed by the appellant herein.

2. **Brief facts:**

(a) On 19.03.1998, a First Information Report (FIR) being No. 136 of 1998 was filed by one Shri Ram Babu stating that when he was present in his juice shop, which is situated in his house at Ketan Darwaja, Bharatpur, Pankaj-the appellant herein, along with three other persons, visited that place and ordered 4 (four) glasses of juice. At the relevant time, Raj Kumar (since deceased), elder brother of Ram Babu, came at the shop from the house who was called inside the shop by Pankaj-the appellant herein. It is the case of the prosecution that Pankaj used to come to the abovesaid juice shop and used to consume juice without paying for the same and when this matter was informed to the uncle of the appellant-accused by Raj Kumar, he developed a grudge against him.

A (b) As soon as Raj Kumar went inside the shop, Pankaj, who was present there along with three others, took out a country made pistol from his pocket and fired one bullet on Pankaj which hit him from straight side in the neck due to which he fell down on the ground and became unconscious. Immediately after the incident, all the accused persons fled away from the scene of crime. Ram Babu (PW-8), younger brother B of Raj Kumar, took him to the General Hospital, Bharatpur from where he was referred to Agra for treatment.

(c) A FIR being No. 136 of 1998 got registered under Sections 452, 307 and 34 of the Indian Penal Code, 1860 (in short 'the IPC') C against Pankaj-the appellant-accused and other accused persons at P.S. Mathuragate, District Bharatpur at the behest of Ram Babu. Raj Kumar succumbed to his injuries on 25.03.1998. On completion of investigation, a charge sheet was filed against the accused persons under Sections 302, 452 and 34 of the IPC and under Section 3 read with Section 25 of the Arms Act, 1959 and the case was committed before the Court of D Additional District and Sessions Judge, (Fast Track) No. 1, Bharatpur.

(d) Learned ADJ, by judgment and order dated 03.08.2002, acquitted all the accused persons under Section 452 of the IPC and convicted the appellant herein under Section 302 of the IPC and sentenced him to imprisonment for life. The appellant herein was further sentenced E to rigorous imprisonment (RI) for 2 (two) years under Section 3 read with Section 25 of the Arms Act, 1959. The other three accused persons were convicted under Section 302 read with Section 34 of the IPC and were sentenced to imprisonment for life.

F (e) Being aggrieved by the order of conviction and sentence, the appellant herein filed D.B. Criminal Appeal No. 1071 of 2002 and other accused persons filed D.B. Criminal Appeal Nos. 1070 and 1052 of 2002 before the High Court. The High Court, by its judgment and order dated 03.09.2008, dismissed the appeal filed by the appellant herein while exonerating other accused persons of all the charges.

G (f) Aggrieved by the above said order, the appellant-accused has preferred this petition by way of special leave before this Court.

3. Heard Shri Rakesh Kumar Khanna, learned senior counsel for the appellant-accused and Shri Puneet Parihar, learned counsel for the respondent-State.

H

Rival submissions:

4. Learned senior counsel for the appellant-accused contended before this Court that there was no motive behind the killing of Raj Kumar. He further contended that it is beyond imagination that a person without any provocation, motive or instigation will straight away open the fire. Learned senior counsel further contended that the brother of the deceased – Ram Babu (PW-8) is the only witness to the alleged incident who is an interested witness and there are several material contradictions in his statement. He further contended that conviction basing reliance upon the statement of PW-8 corroborating with the evidence of Shyam Sunder (PW-5) is baseless. It was further contended that the alleged recovery of the country made revolver is false and that the same has been planted by the police. He finally contended that in view of the doubtful features and other infirmities in the prosecution evidence as discussed above, it is not safe to rely upon the evidence of PW 8 whose evidence needs to be scrutinized with due care and caution. The High Court failed to take note of certain telling factors emerging from the evidence on record and there are other fatal infirmities in the evidence relied upon by the prosecution which were not adverted to by the High Court. He finally submitted that conviction based on unsustainable evidence is nothing but sheer abuse of law and should be set aside.

5. *Per contra*, learned counsel for the respondent-State submitted that the testimony of informant Ram Babu (PW-8) corroborates with Shyam Sunder (PW-5) and the appellant-accused can be convicted on the sole testimony of PW-8 as the ocular evidence is cogent, credible and trustworthy and variance, if any, in the statements of PW-8 and PW-5, is of no consequence. Learned counsel further submitted that trustworthy evidence given by a single witness would be enough to convict the appellant-accused and thus rejection of their testimony on the ground that they are interested witnesses is not proper. It was further submitted that the country made pistol was recovered at the behest of the appellant-accused. The appellant-accused led the police party to the spot and pointed out the place where the country made pistol was thrown, which fact stands confirmed by its recovery and it cannot be presumed that the recovery of the fire arm at the instance of the appellant-accused is untrustworthy. He finally submitted that in view of the cogent and reliable evidence against the appellant-accused, the conviction is fully valid and sustainable in the eyes of law and there is no reason to discard the same.

Discussion:

6. According to the case of the prosecution, on March 19, 1998, when the informant (PW-8) was in his juice shop, the appellant-accused, along with 3 (three) others, visited the shop. When Raj Kumar (since deceased) – elder brother of the informant came to the shop, Pankaj called him inside and opened fire at him using a country made pistol which hit him on his neck. Raj Kumar fell down on the ground and PW-8 took him to the hospital at Bharatpur. He succumbed to his injuries on March 25, 1998 at Agra. The appellant-accused along with others was convicted by the Court of Additional District and Sessions Judge, (Fast Track), Bharatpur under Sections 302 read with 34 of the IPC and under Section 3 read with Section 25 of the Arms Act. In appeal before the High Court, the conviction and sentence of the appellant-accused was maintained while the other accused persons were acquitted of all the charges.

7. It is evident from material on record that when Raj Kumar was shot at, he was taken to the General Hospital, Bharatpur wherefrom he was transferred to Agra for further treatment. The dying declaration of Raj Kumar was allegedly recorded at 10:45 p.m. on 19.03.2008 at Agra by Shri Naresh Pal Gangwal, who was the then SDM. Dr. Vanay Singh (PW-6), who first examined the body of the deceased at the General Hospital categorically stated in his statement that he was unconscious when he was brought to the hospital at 12:45 p.m. The dying declaration is also alleged to have been recorded on the said date at 10:45 p.m. It is really very hard to believe that Raj Kumar, who was unconscious in the noon, regained consciousness in front of SDM that too in the absence of certificate of the duty doctor that the patient is fit to make a statement. In view of such infirmities in the dying declaration, we are of the opinion that the High Court has rightly discarded the same. It has already been held by this Court in a catena of cases that when a dying declaration is suspicious, it should not be acted upon without corroborative evidence.

8. At the time of the alleged incident, Ram Babu (PW-8) was present at the spot. Meaning thereby, he was the sole eye-witness to the incident. In his statement, he has very specifically stated that Pankaj fired a shot at his brother in front of him and fled away from the crime scene along with others. As per the prosecution, the case rests upon the sole testimony of PW-8, which gets corroboration from the statement of Shyam Sunder (PW-5), who was present at the relevant time in a nearby

shop. Shyam Sunder (PW-5), in his statement has stated that as soon as he heard the sound of a bullet, he came out of the shop and noticed that Pankaj was having revolver in his hand and was fleeing away at the relevant time along with three others. But it is also pertinent to mention here that PW-5 is a resident of village Dehra which is situated at a distance of 12-13 kms. (approx.) from Bharatpur. In his statement, he also stated that he came to Bharatpur in order to inquire about a locker in the name of his father in the Punjab National Bank. Vijay Kumar (DW-2) was examined from the other side who deposed that in the year 1997-1998 no locker was operated in the name of the father of Shyam Sunder (PW-5). In this view of the matter, it is suspicious and hard to believe that he visited the place of the incident at a distance of about 12-13 kms.(approx.) just for hair cut.

9. PW-8, in his statement, has deposed that both Raj Kumar and the appellant-accused were sitting in front of each other. There was a distance of about one and a half feet between them. The appellant-accused took out a pistol and fired a bullet on the neck of Raj Kumar. However, the version of PW-8 is in conflict with the medical evidence which we will discuss in the later part of the judgment. During cross-examination, PW-8 was also not able to answer satisfactorily with regard to the arrangement of chairs in the shop which is though not material but creates a doubt in the mind about the correctness of the incident and makes his version highly artificial. Though PW-8 specifically mentioned that he took the deceased to the hospital and the blood was oozing from his body, it is not understandable that during investigation why the blood stained clothes were not seized by the investigation officer and why he did not resist at the relevant time, which also makes his presence highly suspicious.

10. Dr. Vanay Singh (PW-6) is the person who examined Raj Kumar at the General Hospital, Bharatpur. It is imperative to mention here some of the portion of his statement which is as under:-

> "...when killer and object, i.e., injured person both remains on the right angle, i.e., just in front of each other, then it is possible, as there was no burning, plunging and tattooing as such. As per rule of thumb of fire arms the distance was more than 3 feet. The exact distance can be decided only by the opinion of the plastic expert."
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> "It is corect that if the injured is in front of the killer and who

A caused a injury by a fire arm in the neck of injured from a distance of 2 feet. Then the wound would not come in the shape of as shown in Exh. P-5. As per Rule of thumb, the fire made from maximum, nearest place, the entrance would will be big, then the exit wound and as distance will be increased the entrance wound become smaller then the exit wound, it means part of foreign body came out from a fire arm, as the distance will increase the passage of foreign body will be spread and will cause more loss in the nearby area..."

Prior to his death, injury received by Raj Kumar was examined which reads as under:-

C (1) One punctured lacerated wound with bleeding circular in shape of 1cm x 1cm x soft tissue to bone deep on right side neck region on sterno mastoid muscle line to middle part.

(2) Edges and margin is verted with color of contusion.

(3) No burning, blackening and tattooing seen, sulgesmic of D wound of entry of fire arm.

As per the *post mortem* report, drawn by Dr. B.B. Sharma (PW-7), the cause of the death was shock and hemorrhage due to *ante-mortem* injuries.

11. Admittedly, there is variance in the statements of PW-8 and E PW-6 with regard to the distance between the deceased and the appellant-accused as stated above. In this fact situation, it is imperative to quote the "Phenomena observed in Firearm Injuries or Short Holes on Clothing", from Modi's Jurisprudence (24th Edition) which is as under:-

	Phenomena	Range and Remarks
F 1.	Flame/burning scorching/singeing.	Revolver/pistols—within about 5-8 cm generally. Rifles—within about 15-20 cm generally. G Shotguns—may show evidence of scorching upto 30-10 cm
2.	Smoke/powder marks	Rifles generally upto about 30 cm (blackening) and about 100 cm (powder residues). H Handguns upto about 60 cm.

3.	Tattooing	Handguns upto about 60 cm. Rifles upto 75 cm generally. Shotguns upto 100-300 m (may be found after careful search at higher range).

In a case where death is due to injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. In the case on hand, the contradiction, i.e., the distance of fire, is material and in our considered opinion, it would not be appropriate to convict the appellant-accused by ignoring such an important aspect.

12. An objection was raised by learned senior counsel for the appellant-accused that recovery of fire arm at the instance of appellant-accused was planted by the police and it could not have been relied upon. This Court, in a number of cases, has held that the evidence of circumstance *simplicitor* that an accused led a police officer and pointed out the place where weapon was found hidden, would be admissible as conduct under Section 8 of the Evidence Act, irrespective of whether any statement made by him contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act. In the above backdrop, it would be appropriate to quote the Forensic Report dated 25.06.1999 with regard to the alleged recovery of the country-made pistol recovered at the behest of the appellant-accused which is as under:-

"Result of Examination

1. One .32 country made pistol (W/1) from packet 'D' is a serviceable firearm.

2. The examination of the barrel residue indicates that submitted .32 country made pistol (W/1) had been fired. However, the definite time of its last fire could not be ascertained.

3. Based on stereo and comparison microscopic examination it is the opinion that one .32 lead bullet (B/1) from packet 'C' has not been fired from submitted .32 country made pistol (W/1)."

A It is clear from the above that there is no material on record to connect that the gunshot injury suffered by the deceased was due to the shot fired from the firearm of the appellant-accused. It is also discernible that though the bullet was recovered but the same has not been connected with the weapon. Moreover, the prosecution is not able to prove the motive clearly. Though motive is not *sine qua non* for the conviction of the appellant-accused, the effect of not proving motive raises a suspicion in the mind. In the present case, it appears that the theory behind motive has been given after much thought process.

13. It is a well-settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted. Inasmuch as the prosecution has failed to establish the circumstances in which the appellant was alleged to have fired at the deceased, the entire story deserves to be rejected. When the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. After having considered the matter thoughtfully, we find that the evidence on record in the case is not sufficient to bring home the guilt of the appellant. In such circumstances, the appellant is entitled to the benefit of doubt.

14. After giving our careful consideration, we are unable to place any reliance on the evidence of PW-8. Since the same inspires no confidence at all, therefore, we are constrained to set aside the conviction and sentence awarded to the appellant. The appeal is allowed.

Devika Gujral Appeal allowed.