STATE OF RAJASTHAN

v.

DAUD KHAN

(Criminal Appeal No. 126 of 2010)

NOVEMBER 4, 2015

[MADAN B. LOKUR AND S. A. BOBDE, JJ.]

Penal Code, 1860 – s.304 (Part I) – Arms Act, 1959 – ss. 3 and 25 – Prosecution for causing death of one person – Conviction u/s.302 IPC and u/s.3 r/w s.25 of Arms Act – High Court converted the conviction u/s. 302 to one u/s.304 (Part I) – Cross appeals by the State as well as the accused – Held: There was no delay in lodging the FIR – Delay in receipt of special report by the Magistrate is not fatal to prosecution case – Eye-witnesses to the incident were reliable and trustworthy – On collective consideration of facts of the case, prosecution case cannot be doubled – Order of High Court upheld – Code of Criminal Procedure, 1973 – s.157.

Code of Criminal Procedure, 1973 – s.157 – Delay in transmitting the special report to Magistrate – Effect of – Held: The purpose of "forthwith" communication of special report to Magistrate is to check the possibility of manipulation – If there is no delay in lodging FIR, delay in communicating special report to Magistrate would be of no consequence, since manipulation of FIR would then get ruled out – There is no universal rule that whenever there is delay in sending special report to Magistrate, prosecution version becomes unreliable.

Test Identification Parade – Not conducting of – Effect of, on prosecution case – Held: If witnesses of the case are trustworthy and reliable, mere not conducting of the Parade would not, by itself, be reason for discarding the evidence of those witnesses.

A Dismissing the appeals, the Court

HELD: 1. If the facts of the case are considered collectively, there is no room for doubt. On a consideration of the entire material, the view taken by
B the High Court with regard to the offence committed by accused No.1 and his conviction for that offence is upheld. [Paras 47, 48] [1156-E-F; 1137-D-E]

2. There was no delay in lodging the FIR. The
C incident is stated to have occurred at about 9.30 pm. The FIR was lodged at about 10.30 pm. There is hardly any 'delay' in lodging of the FIR. The plea that FIR was ante-dated, which is apparent from the overwriting on the FIR is not correct. There is nothing to suggest any
D semblance of any overwriting in the original FIR. [Paras 23, 24] [1144-B, D-E]

Thulia Kali v. State of Tamil Nadu (1972) 3 SCC 393 : 1972 (3) SCR 622 – referred to.

E 3.1 The purpose of the "forthwith" communication of a copy of the FIR to the Magistrate (as required u/s. 157 Cr.P.C.) is to check the possibility of its manipulation. Therefore, a delay in transmitting the special report to the Magistrate is linked to the lodging of the FIR. If there
F is no delay in lodging an FIR, then any delay in communicating the special report to the Magistrate would really be of little consequence, since manipulation of the FIR would then get ruled out. Nevertheless, the prosecution should explain the delay in transmitting the
G special report to the Magistrate. However, if no question is put to the investigating officer concerning the delay, the prosecution is under no obligation to give an explanation. There is no universal rule that whenever there is some delay in sending the FIR to the Magistrate,
H the prosecution version becomes unreliable. In other

words, the facts and circumstances of a case are important for a decision in this regard. [Para 26] [1145-B-C; 1146-A-C]

3.2 It is no doubt true that one of the external checks against ante-dating or ante-timing an FIR is the time of its dispatch to the Magistrate or its receipt by the Magistrate. The dispatch of a copy of the FIR "forthwith" ensures that there is no manipulation or interpolation in the FIR. If the prosecution is asked to give an explanation for the delay in the dispatch of a copy of the FIR, it ought to do so. However, if the court is convinced of the prosecution version's truthfulness and trustworthiness of the witnesses, the absence of an explanation may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case. [Para 28] [1148-D-E]

3.3 In the present case, there was no delay in lodging the FIR. Hence the question of its manipulation does not arise. Additionally, the officer in charge of the police station, PW-21 was not asked any question about the delay in sending the special report to the Magistrate. An explanation was, however, sought from the investigating officer PW-25 who tersely responded by saying that it was not his duty to send the special report to the court (or the Magistrate). In the absence of any question having been asked of the officer who could have given an answer, namely, the officer in charge of the police station, no adverse inference can be drawn against the prosecution in this regard, nor can it be held that the delay in receipt of the special report by the Magistrate is fatal to the case of the prosecution. This is apart from the consistent evidence of the eye witnesses. [Para 29] [1148-F-G; 1149-A-C]

A *Brahm Swaroop v. State of U.P.* **(2011) 6 SCC 288 : 2010 (15) SCR 1**; *Sheo Shankar Singh v. State of U.P.* **(2013) 12 SCC 539: 2013 (8) SCR 1100 – relied on.**

B **4. A perusal of the FSL report suggests that it is not conclusive one way or the other whether the bullet extracted from the body of the deceased had or had not been fired from the pistol recovered from accused No.2 at the instance of the appellant-accused No.1. Although** C **the FSL report was inconclusive, but there was no doubt that the extracted bullet was capable of being fired from the recovered gun. In other words there was no mismatch between the bullet and the gun. [Paras 31, 34] [1149-H; 1150-A; 1151-H; 1152-D]**

D *Mohinder Singh v. The State.* **1950 SCR 821**; *Abdul Sayeed v. State of Madhya Pradesh* **(2010) 10 SCC 259 : 2010 (13) SCR 311 – distinguished.**

5. Each of the eye-witnesses stated that the shot E **was fired by appellant-accused No.1from very close quarters and in any event from a distance of two feet or less. Under the circumstances, there would have been some blackening of his skin. The Trial Court acknowledged this, but was of the opinion that since the** F **deceased was wearing a vest and a shirt (Exhibit P-6) his skin was perhaps prevented from being blackened by the gunshot wound. That may be so, but there is no evidence, one way or the other, that the vest and shirt of the deceased were blackened or not, nor was any** G **question asked of any witness in this regard. Therefore, there is no reason to dispute the conclusion of the Trial Court. [Paras 36, 38] [1152-H; 1153-A; 1154-A-C]**

Modi's Medical Jurisprudence and Toxiocology H 22nd edition page 354 – **referred to.**

6.1 PW-14, one of the members of the Board that conducted the post mortem stated that he could not give any opinion about blood being spilt under such circumstances and that it is not necessary that blood would fall outside if any part of the body is injured. On the other hand, PW-15 another member of the Board that conducted the post mortem was of the view that blood might have fallen at the place of occurrence, "but the blood in small quantity comes out from [the] wound which is caused by the entry of the bullet and the blood in large quantity comes out from the exit injury of the bullet." It is, therefore, not surprising that there was no spillage of deceased's blood at the place of the incident. [Para 40] [1154-F-H; 1155-A]

6.2 While it may seem odd that the deceased could have run a distance of about 70 (seventy) feet with a bullet in his chest, it might not be improbable. The best persons to have been asked to explain this would have been the medical experts, but no question was put to them in this regard. Under the circumstances, it is difficult to rule out the possibility of the deceased having traversed the distance before collapsing across the road. [Para 41] [1155-B-C]

Meharaj Singh v. State of U.P. (1994) 5 SCC 188 – referred to.

7.1 The pleas of the appellant-accused No.1 that since the three chance witnesses since were all from out of town, they could not have identified the accused persons; and because there was no test identification parade was conducted and reliance could not have been placed only on their dock identification since were not raised either in the Trial Court or in the High Court therefore, there is no reason to permit such an argument being raised at this stage. [Paras 42, 43] [1155-E-F]

A **7.2 That apart, if the witnesses are trustworthy and reliable, the mere fact that no TIP was conducted would not, by itself, be a reason for discarding the evidence of those witnesses. [Para 44] [1156-A]**

B *Ashok Debbarma v. State of Tripura* **(2014) 4 SCC 747 : 2014 (4) SCR 287**; *Kanta Prashad v. Delhi Administration* **AIR 1958 SC 350 : 1958 SCR 1218**; *Harbhajan Singh v. State of Jammu & Kashmir* **(1975) 4 SCC 480**; *Jadunath Singh v.* C *State of Uttar Pradesh* **(1970) 3 SCC 518 : 1971 (2) SCR 917**; *George v. State of Kerala* **(1998) 4 SCC 605 : 1998 (2) SCR 303**; *Dana Yadav v. State of Bihar* **(2002) 7 SCC 295 : 2002 (2) Suppl. SCR 363**; *Manu Sharma v. State (NCT of Delhi)* D **(2010) 6 SCC 1 : 2010 (4) SCR 103 – relied on.**

7.3 In the present case, there were two other witnesses to the shooting, who were local residents and knew the deceased and accused No.1 and could easily E **identify them. Five witnesses have testified to the events. There is no reason to disbelieve any of them, particularly since they have all given a consistent statement of the events. There are some minor discrepancies, which are bound to be there, but these do not take away from the** F **substance of the case of the prosecution nor do they impinge on the credibility of the witnesses. [Paras 45 and 46] [1156-C-D]**

Case Law Reference

G	[1972] 3 SCR 622	referred to	Para 24
	[2010] 15 SCR 1	relied on	Para 26
	[2013] 8 SCR 1100	relied on	Para 27
H	[1950] SCR 821	distinguished	Para 31

[2010] 13 SCR 311	**distinguished**	**Para 34**	A
(1994) 5 SCC 188	**referred to**	**Para 39**	
[2014] 4 SCR 287	**relied on**	**Para 44**	
[1958] SCR 1218	**relied on**	**Para 44**	
(1975) 4 SCC 480	**relied on**	**Para 44**	B
[1971] 2 SCR 917	**relied on**	**Para 44**	
[1998] 2 SCR 303	**relied on**	**Para 44**	
[2002] 2 Suppl. SCR 363	**relied on**	**Para 44**	C
[2010] 4 SCR 103	**relied on**	**Para 44**	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 126 of 2010. D

From the Judgment and Order dated 11.11.2008 of the High Court of Judicature for Rajasthan at Jodhpur in D B Crl. A. No. 879 of 2005.

WITH E

Crl. A. No. 351 of 2010.

Sushil Kumar, Sr. Adv., S.S. Shamshery, AAG, Amit Sharma, Yishu Prayash, Ms. Ruchi Kohli, Ms. Preeti Bhardwaj, Aditya Kumar, Surya Kamal Mishra, Mushtaq Ahmad, Ms. Namita Choudhary, for the appearing parties. F

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. These appeals are directed against the judgment and order dated 11th November, 2008 passed by the High Court of Judicature for Rajasthan at Jodhpur. Criminal Appeal No.126 of 2010 has been filed by the State of Rajasthan challenging the refusal of the High Court to uphold the conviction of Daud Khan for an offence G H

A punishable under Section 302 of the Indian Penal Code (for short the IPC). Criminal Appeal No. 351 of 2010 is filed by Daud Khan challenging his conviction for an offence punishable under the first part of Section 304 of the IPC.

B 2. The broad facts leading to the decision of the High Court are that on 19th June, 2004 at about 9.30 p.m. Nand Singh had gone to Bathra Telecom & Restaurant at Nimbahera, District Pratapgarh in Rajasthan. He was accompanied by his friends Nitin Sindhi (accused No.3) and Narendra Kumawat. C While they were seated in the restaurant, Javed Beg (accused No.2) and Daud Khan (accused No.1) came there on a motor cycle. It appears that Javed Beg and Daud Khan had some grudge against Nand Singh concerning the result of a cricket match between India and Pakistan.

D

3. According to the prosecution, Javed Beg brandished a knife and told Nand Singh that today his end had come. Thereupon Daud Khan fired upon Nand Singh with a loaded pistol on the right side of his chest and then both of them E escaped on their motor cycle. They were chased by Narendra Kumawat and Nitin Sindhi but they were not successful in apprehending the assailants.

4. Thereafter, Narendra Kumawat and Nitin Sindhi took F Nand Singh to a nearby hospital on their motorcycle but Nand Singh was declared brought dead. Thereupon, Narendra Kumawat went to Nand Singh's residence and informed his brother PW-1 Gajendra Singh about the incident. Gajendra Singh also visited the hospital and then lodged FIR No.374/ G 04 on 19th June, 2004 with the Nimbahera Police Station at about 10.30 p.m. Daud Khan and Javed Beg were named as the two accused persons.

5. On 21st June, 2004 Daud Khan was arrested. H Thereafter, Javed Beg was arrested on 15th July, 2004. The

gun used by Daud Khan to shoot Nand Singh was recovered at his instance from Javed Khan's possession. Nitin Sindhi was arrested on 28th July, 2007. A

6. A charge-sheet was filed against all three persons and it was alleged that Daud Khan was guilty of offence punishable under Section 302 of the IPC and Section 3 read with Section 25 of the Arms Act while the others were guilty of an offence punishable under Section 302 of the IPC read with Section 34 thereof and Section 109 read with Section 302 thereof. B C

7. The case was tried by the Additional District & Sessions (Fast Track) Camp Nimbahera, District Pratapgarh as Sessions Case No.103 of 2005. In his judgment and order, the Trial Judge convicted Daud Khan of an offence punishable under Section 302 of the IPC and Section 3 read with Section 25 of the Arms Act. Javed Beg was convicted of an offence punishable under Section 3 read with Section 25 of the Arms Act but was found not guilty of an offence under Section 302 read with Section 34 of the IPC. Nitin Sindhi was found not guilty of any offence. The accused persons were appropriately sentenced. D E

8. Feeling aggrieved by the decision of the Trial Court, appeals were filed in the High Court by Daud Khan and Javed Beg challenging their conviction and by the State challenging the partial acquittal of Javed Beg and complete acquittal of Nitin Sindhi. By its judgment and order dated 11th November, 2008 the High Court came to the conclusion that Daud Khan was not guilty of an offence punishable under Section 302 of the IPC but was guilty of an offence punishable under the first part of Section 304 of the IPC. His conviction under Section 3 read with Section 25 of the Arms Act was maintained. As far as the conviction of Javed Beg under the Arms Act is concerned, it was upheld by the High Court, but the sentence F G H

A was reduced. The High Court also dismissed the appeal filed by the State against the acquittal of Javed Beg of the offence punishable under Section 302 of the IPC and the complete acquittal of Nitin Sindhi.

B 9. Feeling aggrieved, the present appeals have been filed, as mentioned above, by Daud Khan and the State.

Decision of the Trial Court

C 10. Before the Trial Court, quite a few contentions were urged. It was contended that the First Information Report (FIR) is suspicious inasmuch as in the newspapers the next day, it was reported that unknown persons (strangers) had committed the murder of Nand Singh in an STD booth. The police had arrived at the spot and taken the injured (Nand Singh) to the D hospital. It was argued that a report in this regard was lodged, but thereafter removed from the record and suppressed. That apart, it was argued that the FIR was lodged after a delay of one and half hours and reliance was placed on ***Thulia Kali v. State of Tamil Nadu***.[1] In addition to this, it was argued that E there was considerable unexplained delay in informing the Magistrate of the lodging of the FIR. The delay was to the extent of one day and 13 (thirteen) hours (a total of about 36/37 hours). There was enough time, therefore, to manipulate the facts so F as to involve the accused.

11. It was also contended that the mere recovery of a pistol (from Javed) was not enough to hold Daud Khan guilty. In any event, the opinion of the Forensic Science Laboratory G (FSL) was not definite that the bullet taken out from the body of Nand Singh was fired from the recovered pistol. Additionally, it was argued that according to the witnesses, the shot had been fired from a close distance but the post mortem report did not indicate any blackening of the skin which would have

H [1] (1972) 3 SCC 393

happened had the shot been fired from a close range. It was sought to be suggested that the eye witnesses were perhaps not present when the incident occurred and a story was made up to involve Daud Khan. A

12. The defence contended that the incident did not occur at the place where it is said to have occurred. In support of this contention, it was argued that the body of Nand Singh was found 70 (seventy) feet away, across the road and near the tyre repair shop, a long distance from where he was allegedly sitting in Bathra Telecom. No blood was found where the shooting took place, but blood was found only near the tyre repair shop. This was most unlikely particularly when Nand Singh had been shot near a vital part of his body on the chest. Therefore, not only was the presence of witnesses suspicious but the place of occurrence was also doubtful. B C D

13. The Trial Court did not place any reliance on the newspaper reports since there was nothing to show that a report had been filed with the concerned police station that unknown persons had committed the crime. The Trial Court also found that the time taken for lodging the FIR (about one and a half hours) was explained under the circumstances, since Nand Singh had been taken to the hospital and his brother Gajendra Singh (PW-1) had to be informed of the incident. The delay was found to be not unreasonable. However, the Trial Court did not deal with the delay in informing the Magistrate of the lodging of the FIR. E F

14. The Trial Court accepted the recovery of the pistol, as well as unused cartridges, from Javed at the instance of Daud Khan. The Trial Court also took the view that the FSL report clearly stated that a bullet had been fired from the pistol and it was not stated that the bullet taken out from the body of Nand Singh could not have been fired from the recovered pistol. The Trial Court also held that Nand Singh's skin was not G H

A blackened since he was wearing a vest and a shirt. Therefore, fully believing the version of the eye witnesses, it was held that Daud Khan shot Nand Singh at the place of occurrence and there were several witnesses present at that time. On this basis, the Trial Court convicted Daud Khan of an offence punishable
B under Section 302 of the IPC.

Decision of the High Court

15. Before the High Court, somewhat more elaborate
C contentions were urged on behalf of Daud Khan. The primary contentions urged (and they were repeated before us) were that the FSL report falsifies the version of the eye witnesses. It was urged that according to the witnesses, the gun shot was fired from a distance of about 4 (four) feet. Despite this, there
D was no blackening of Nand Singh's skin. The High Court rejected this contention on the ground that the witnesses had stated that 'the shot was fired from nearby' and that 'None of the eye witnesses has stated that it was fired from a distance of less than 4 ft.' There might be some variation in the distance
E but that could not be fatal to the case of the prosecution. That apart, merely because there was no blackening of the skin does not lead to the inevitable conclusion that the shot was fired from a distance.

F 16. It was submitted that the gun was recovered from Javed and not from Daud Khan. The High Court was of the view that while this may be so, it did not rule out the possibility of Daud Khan handing over the weapon to Javed. This submission was not pressed before us and we need not spend
G any further time on this except to note that the Trial Court found that the recovery was at the instance of Daud Khan.

17. It was argued that the news report that appeared the next day was obtained from the Superintendent of Police
H and that was to the effect that some unknown persons were

involved in the shooting. The High Court rejected this submission and held that news reports could not be treated as evidence. This submission was faintly adverted to before us as well, but is hardly decisive one way or the other.

18. It was urged that earth stained with the blood of Nand Singh was recovered about 70 (seventy) feet away from the place of incident. This was an indication that the shooting did not take place at Bathra Telecom but elsewhere. It was urged that the High Court was in error in disbelieving DW-1 Chhotu Khan who stated that someone from a truck near his tyre shop had shot Nand Singh. The High Court was of the opinion that the reason why the blood stains were found elsewhere was because Nand Singh had run away after being shot and had fallen down about 70 (seventy) feet away. It is for this reason also that the High Court disbelieved DW-1 Chhotu Khan whose version of the events was held to be an afterthought.

19. Finally, it was urged that there was an unexplained delay in the Magistrate receiving the FIR (after about 37 hours). The High Court noted this submission but unfortunately (like the Trial Court) did not deal with it.

20. On an overall conspectus of the facts of the case, the view canvassed on behalf of Daud Khan was that the witnesses to the shooting could not be believed. The High Court rejected this view.

21. The High Court, however, felt that a case of murder punishable under Section 302 of the IPC was not made out since Daud Khan had fired only one bullet and did not take undue advantage of the situation and therefore only a case of intention to cause bodily harm that was likely to cause death was made out, punishable under the first part of Section 304 of the IPC. Accordingly, Daud Khan was convicted of that offence and sentenced to 7 (seven) years rigorous imprisonment with fine.

22. Feeling aggrieved, Daud Khan is before us in appeal.

Delay in lodging the FIR: submissions and discussion

23. It was submitted that the FIR lodged by PW-1 Gajendra Singh was ante-dated. Actually the FIR was lodged on 20th June 2004 but was ante-dated to 19th June 2004. It was submitted that this is apparent from the overwriting on the FIR. The insinuation was that it was first decided to "fix" the accused and thereafter the FIR was lodged to that effect. We see no substance in this contention. We have seen the FIR in original and find nothing to suggest any semblance of any overwriting. We may also note that no such submission was made before the Trial Court or the High Court.

24. It was also argued that there was a delay in lodging the FIR. Reference was made to ***Thulia Kali*** and ***Lalita Kumari v. Government of U.P.***[2] We find no substance in this contention as well. The incident is stated to have occurred at about 9.30 pm. The FIR was lodged at about 10.30 pm. There is hardly any 'delay' in lodging of the FIR. It must be added, however, that this argument was premised on the assumption that the FIR was lodged on 20th June 2004 and not on 19th June 2004, a contention we have already rejected.

Section 157 of the Cr.P.C.: submissions and discussion

25. It was then submitted that there was an unexplained delay in receipt of the FIR by the Magistrate – a delay of about 36/37 hours since the copy of the FIR was received by him on 21st June 2004 at about 11.00 am. According to learned counsel for Daud Khan this was in violation of Section 157 of the Code of Criminal Procedure, 1973 (for short 'the CrPC) which requires a copy of the FIR (called a special report or an

[2] (2014) 2 SCC 1 (Constitution Bench)

express report) to be sent forthwith to the concerned Magistrate.[3]

26. The interpretation of Section 157 of the CrPC is no longer *res integra*. A detailed discussion on the subject is to be found in ***Brahm Swaroop v. State of U.P.***[4] which considered a large number of cases on the subject. The purpose of the "forthwith" communication of a copy of the FIR to the Magistrate is to check the possibility of its manipulation. Therefore, a delay in transmitting the special report to the Magistrate is linked to the lodging of the FIR. If there is no delay in lodging an FIR, then any delay in communicating the

[3] 157. Procedure for investigation.—(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:
Provided that—
(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot,
(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case:
Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.
(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub-section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

[4] (2011) 6 SCC 288

special report to the Magistrate would really be of little consequence, since manipulation of the FIR would then get ruled out. Nevertheless, the prosecution should explain the delay in transmitting the special report to the Magistrate. However, if no question is put to the investigating officer concerning the delay, the prosecution is under no obligation to give an explanation. There is no universal rule that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable. In other words, the facts and circumstances of a case are important for a decision in this regard.

27. The delay in sending the special report was also the subject of discussion in a recent decision being ***Sheo Shankar Singh v. State of U.P.***[5] wherein it was held that before such a contention is countenanced, the accused must show prejudice having been caused by the delayed dispatch of the FIR to the Magistrate. It was held, relying upon several earlier decisions as follows:

> "30. One other submission made on behalf of the appellants was that in the absence of any proof of forwarding the FIR copy to the jurisdiction Magistrate, violation of Section 157 CrPC has crept in and thereby, the very registration of the FIR becomes doubtful. The said submission will have to be rejected, inasmuch as the FIR placed before the Court discloses that the same was reported at 4.00 p.m. on 13-6-1979 and was forwarded on the very next day viz. 14-6-1979. Further, a perusal of the impugned judgments of the High Court as well as of the trial court discloses that no case of any prejudice was shown nor even raised on behalf of the appellants based on alleged violation of Section 157 CrPC. Time and again, this Court has held that unless

[5] (2013) 12 SCC 539

serious prejudice was demonstrated to have been suffered as against the accused, mere delay in sending the FIR to the Magistrate by itself will not have any deteriorating (*sic*) effect on the case of the prosecution. Therefore, the said submission made on behalf of the appellants cannot be sustained.

31. In this context, we would like to refer to a recent decision of this Court in *Sandeep* v. *State of U.P.*[6] wherein the said position has been explained as under in paras 62-63: (SCC p. 132)

"62. It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157 CrPC instantaneously. According to the learned counsel FIR which was initially registered on 17-11-2004 was given a number on 19-11-2004 as FIR No. 116 of 2004 and it was altered on 20-11-2004 and was forwarded only on 25-11-2004 to the Magistrate. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in *Pala Singh* v. *State of Punjab*[7] wherein this Court has clearly held that (SCC p. 645, para 8) where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned be, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

[6] (2012) 6 SCC 107
[7] (1972) 2 SCC 640

A 63. Applying the above ratio in *Pala Singh* to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the
B investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that aspect. In such circumstances we do not find any infirmity in the case of the prosecution on that score. In fact the above decision was subsequently followed
C in *Sarwan Singh* v. *State of Punjab*,[8] *Anil Rai* v. *State of Bihar*[9] and *Aqeel Ahmad* v. *State of U.P.*[10]"

28. It is no doubt true that one of the external checks against ante-dating or ante-timing an FIR is the time of its
D dispatch to the Magistrate or its receipt by the Magistrate. The dispatch of a copy of the FIR "forthwith" ensures that there is no manipulation or interpolation in the FIR.[11] If the prosecution is asked to give an explanation for the delay in the dispatch of a copy of the FIR, it ought to do so.[12] However, if the court is
E convinced of the prosecution version's truthfulness and trustworthiness of the witnesses, the absence of an explanation may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case.[13]

F 29. In so far as the present case is concerned, there was no delay in lodging the FIR. Hence the question of its manipulation does not arise. Additionally, the officer in charge of the police station, PW-21 Surender Singh was not asked any question about the delay in sending the special report to
G the Magistrate. An explanation was, however, sought from the

[8] (1976) 4 SCC 369
[9] (2001) 7 SCC 318
[10] (2008) 16 SCC 372
[11] Sudershan v. State of Maharashtra, (2014) 12 SCC 312
[12] Meharaj Singh v. State of Uttar Pradesh, (1994) 5 SCC 188
H [13] Ratiram v. state of Madhya Pradesh, (2013) 12 SCC 316

investigating officer PW-25 Rajinder Parik who tersely responded by saying that it was not his duty to send the special report to the court (or the Magistrate). In the absence of any question having been asked of the officer who could have given an answer, namely, the officer in charge of the police station, no adverse inference can be drawn against the prosecution in this regard, nor can it be held that the delay in receipt of the special report by the Magistrate is fatal to the case of the prosecution. This is apart from the consistent evidence of the eye witnesses, which we shall advert to a little later.

Ballistics report: submissions and discussion

30. It was vehemently contended that the report of the FSL (Exhibit P-37) did not conclusively say that the bullet recovered from the body of Nand Singh was fired from the pistol recovered from Javed at the instance of Daud Khan. The FSL report reads as follows:

> "1. One .32 country made revolver (W/1) from packet 'E' in (is) a serviceable firearm. However, it has the tendency to misfire the ammunition.
>
> 2. The examination of the barrel residue indicates that submitted one .32 country made revolver (W/1) had been fired. However, the definite time of its last fire could not be ascertained.
>
> 3. Based on the stereo and microscopic examination, it is the opinion that it has not been possible to link definitely one 7.65 mm cartridge case (C/1) from packet 'E' and one .32 copper jacket bullet (B/1) from packet 'D' with submitted one .32 revolver (W/1) from packet 'E' due to lack of sufficient evidence."

31. A perusal of the FSL report suggests that it is not conclusive one way or the other whether the bullet extracted

A from the body of Nand Singh had or had not been fired from the pistol recovered from Javed at the instance of Daud Khan. In view of this, learned counsel placed reliance on ***Mohinder Singh v. The State.***[14] The facts of that case were quite unique. The deceased-Dalip Singh was said to have suffered two
B injuries, one inflicted on his chest with a gun used by appellant-Mohinder Singh and the other near his ear while he was lying sideways, inflicted by Gurnam Singh with a rifle from a distance of about 4-5 feet. According to the definite case of the prosecution, appellant-Mohinder Singh had fired from a gun,
C but this was not accepted by this Court which felt that the injury attributed to appellant-Mohinder Singh was caused by a rifle. In other words, there was a mismatch between the weapon and the bullet. In this context, this Court observed as follows:

D "In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be 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
E with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case. In the present case, it is doubtful whether the injuries which are attributed to the appellant
F [Mohinder Singh] were caused by a gun or by a rifle. Indeed, it seems more likely that they were caused by a rifle than by a gun, and yet the case for the prosecution is that the appellant was armed with a gun, and, in his
G examination, it was definitely put to him that he was armed with the gun P-16. It is only by the evidence of a duly qualified expert that it could have ascertained whether the injuries attributed to the appellant were caused by a gun or by a rifle and such evidence alone

H [14] 1950 SCR 821

could settle the controversy as to whether they could possibly have been caused by a fire-arm being used at such a close range as is suggested in the evidence." A

32. And, what was the opinion of the expert in that case? This Court noted that the opinion of the Director, C.I.D. Laboratory, Philaur could be summed up in the following words: B

"The gun had signs of having been fired but he [the expert] could not say when it was fired last. The cartridge cases P-10 and P-15 could have been fired through the gun P-16, but he could not say whether they were actually fired from that particular gun or a similar gun or guns. He did not make any experiment by firing any cartridge from the gun P-16, nor did he compare the markings on the empty cartridges P-10 and P-15." C D

33. On this basis, it was observed that according to the prosecution, two shots were fired at the deceased-Dalip Singh and "one of the crucial points which the prosecution had to prove was that these shots were fired by two persons and not by one man, and both the shots were fired in such manner and from such distance as is alleged by the eye witnesses. There is, in our opinion, a gap in the prosecution evidence on a most fundamental point and the error which has been committed by the courts below is to ignore the gap....." In view of this gap in the prosecution evidence, this Court gave the benefit of doubt to the appellant-Mohinder Singh. Additionally, this Court did not believe the three eye witnesses since two of them were chance witnesses and "not altogether independent persons" while the third was a partisan witness and his testimony was otherwise improbable since he claimed to have witnessed the shooting after he had himself been shot at the back of the neck. E F G

34. In so far as the present appeal is concerned, the facts of the case are quite different. Although the FSL report H

A was inconclusive in the sense that it could not be stated whether the extracted bullet could be 'definitely' linked to the recovered weapon, but there was no doubt that the extracted bullet was capable of being fired from the recovered gun. In other words (and this is important) there was no mismatch between the B bullet and the gun. ***Mohinder Singh***, therefore, does not come to the aid of Daud Khan. However, learned counsel sought to cash in on the absence of definitiveness by relying on ***Abdul Sayeed v. State of Madhya Pradesh***[15] but that decision is also of no relevance. In that case, there was a conflict between C the medical evidence and the ocular evidence; while in this case there is no such conflict. There is no doubt both from the medical and the ocular evidence that Daud Khan had shot with a gun. The forensic evidence shows that the bullet extracted from the body of Nand Singh was capable of being fired from D the recovered gun. Whether Nand Singh was shot by use of the recovered gun or some other gun was not questioned and none of the witnesses was asked any substantive question about the gun recovered from Javed at the instance of Daud Khan or whether it was the same gun (or a different one) used E by Daud Khan.

Blackening of the skin: submissions and discussion

35. It was contended that since Nand Singh was shot F from a close distance, there would have some blackening of his skin, but the post mortem report did not show any such blackening. It was contended, on this basis, that Nand Singh was actually shot elsewhere (where he collapsed) and not at the place suggested by the prosecution.

G

36. PW-11 Narendra Kumawat who had accompanied Nand Singh and was with him when the incident occurred stated that Daud Khan had fired from a distance of about two feet. Similarly, PW-19 Suraj Mal stated that the bullet was fired

H [15] (2010) 10 SCC 259

from a distance of two feet, while PW-7 Mahabir Singh stated that the bullet was fired from a distance of one foot. PW-23 Narender Singh stated that the bullet was fired from a distance of 'four fingers and the bullet was not fired touching the pistol to the chest.' Finally, PW-24 Rishi Raj Shekhawat stated that "Fire was not made after touching the chest of Nand Singh, rather it was fired from the distance of one or two feet." Therefore, each of the eye witnesses stated that the shot was fired by Daud Khan at Nand Singh from very close quarters and in any event from a distance of two feet or less. The High Court found, incorrectly, that the witnesses had testified that the shooting had occurred from nearby but no distance was mentioned by any witness.

37. Be that as it may, at this stage, reference may be made to ***Modi's Medical Jurisprudence and Toxicology***[16] wherein it is noted, with reference to blackening of the skin in a gunshot wound, as follows:

> "If a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches round the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattoed with unburnt grains of gunpowder or smokeless propellant powder. The adjacent hairs are singed, and the clothes covering the part are burnt by the flame. If the powder is smokeless, there may be a greyish or white deposit on the skin around the wound. If the area is photographed by infrared light, a smoke halo round the wound may be clearly noticed. Blackening is found, if a firearm like a shotgun is discharged from a distance of not more than three feet and a revolver or a pistol discharged within about two feet. ..."

[16] 22nd edition page 354

38. Under the circumstances, in all likelihood if Nand Singh was in fact shot at from a close range of about two feet or less, there would have been some blackening of his skin. The Trial Court acknowledged this but was of the opinion that since Nand Singh was wearing a vest and a shirt (Exhibit P-6) his skin was perhaps prevented from being blackened by the gunshot wound. That may be so, but there is no evidence, one way or the other, that the vest and shirt of Nand Singh were blackened or not, nor was any question asked of any witness in this regard. Therefore, we have no reason to dispute the conclusion of the Trial Court.

Blood trail: submissions and discussion

39. Learned counsel for Daud Khan referred to an odd circumstance, which is that Nand Singh managed to cover on foot a distance of about 70 (seventy) feet after being shot in the chest. Throughout this distance, there was no blood trail, nor was any blood spilt at the place of occurrence. In ***Meharaj Singh v. State of U.P.***[17] the absence of blood at the place of occurrence or any blood trail from the place of occurrence to the place where the corpse was found led this Court (among other things) to doubt the prosecution story.

40. However, the evidence on record in this case does not leave any doubt in this regard. PW-14 Dr. Tej Singh Dangi (one of the members of the Board that conducted the post mortem) stated that he could not give any opinion about blood being spilt under such circumstances and that it is not necessary that blood would fall outside if any part of the body is injured. On the other hand, PW-15 Dr. K. Asif (another member of the Board that conducted the post mortem) was of the view that blood might have fallen at the place of occurrence, "but the blood in small quantity comes out from [the] wound

[17] (1994) 5 SCC 188

which is caused by the entry of the bullet and the blood in large quantity comes out from the exit injury of the bullet." It is, therefore, not surprising that there was no spillage of Nand Singh's blood at the place of the incident. A

41. It has come on record that Nand Singh was a young and healthy person. While it may seem odd that he could have run a distance of about 70 (seventy) feet with a bullet in his chest, it might not be improbable. The best persons to have been asked to explain this would have been the medical experts, but no question was put to them in this regard. Under the circumstances, it is difficult to rule out the possibility of Nand Singh having traversed the distance before collapsing across the road. B C

Dock identification: submissions and discussion D

42. It was contended by Daud Khan that the three chance witnesses, PW-7 Mahabir Singh, PW-23 Narender Singh and PW-24 Rishi Raj Shekhawat were all from out of town. As such, they could not have identified Daud Khan or Javed. It was further contended that no test identification parade (for short TIP) was conducted and reliance could not have been placed only on their dock identification. E

43. No such argument was raised by Daud Khan either in the Trial Court or in the High Court and we see no reason to permit such an argument being raised at this stage. F

44. That apart, it was recently held in ***Ashok Debbarma v. State of Tripura***[18] that while the evidence of identification of an accused at a trial is admissible as a substantive piece of evidence, it would depend on the facts of a given case whether or not such a piece of evidence could be relied upon as the sole basis for conviction of an accused. It was held that G

[18] (2014) 4 SCC 747 H

A if the witnesses are trustworthy and reliable, the mere fact that no TIP was conducted would not, by itself, be a reason for discarding the evidence of those witnesses. In arriving at this conclusion, this Court relied upon a series of decisions.[19] Earlier, a similar view was expressed in ***Manu Sharma v.***
B ***State (NCT of Delhi)***.[20]

45. In any event, there were two other witnesses to the shooting, namely, PW-11 Narender Kumawat and PW-19 Suraj Mal who were local residents and knew Nand Singh and Daud
C Khan and could easily identify them.

46. Five witnesses have testified to the events that took place at Bathra Telecom on the night of 19th June 2004. We see no reason to disbelieve any of them, particularly since they
D have all given a consistent statement of the events. There are some minor discrepancies, which are bound to be there, such as the distance between the gun and Nand Singh but these do not take away from the substance of the case of the prosecution nor do they impinge on the credibility of the witnesses.

E

Conclusion

47. If the facts of the case are looked at individually and randomly, they might create a doubt. However, if they are considered collectively, there is no room for doubt. The facts
F collectively are: (i) Nand Singh was shot with a gun. (ii) The bullet extracted from the body of Nand Singh could have been fired from that gun, or to put it negatively, it cannot be said that the extracted bullet could not have been fired from the recovered
G gun. Nobody questioned this. (iii) The gun-shot was fired from a close distance, but there was no blackening of Nand Singh's

[19] Kanta Prashad v. Delhi Administration, AIR 1958 SC 350, Harbhajan Singh v. State of Jammu & Kashmir, (1975) 4 SCC 480, Jadunath Singh v. State of Uttar Pradesh, (1970) 3 SCC 518, George v. State of Kerala, (1998) 4 SCC 605 and Dana Yadav v. State of Bihar, (2002) 7 SCC 295

H [20] (2010) 6 SCC 1, paragraphs 255 to 258

skin possibly due to his apparel. Nobody questioned this. (iv) Nand Singh's death was not immediate and he could have traversed a distance of about 70 (seventy) feet despite being shot. Nobody questioned this. (v) The medical experts testified that spillage of blood from the entry wound is not inevitable and so it is possible that Nand Singh's blood was not found between the place of the incident and the place where he collapsed. The blood was, however, found where Nand Singh collapsed. (vi) There were five eye witnesses to the incident of shooting and they gave consistent statements and identified Daud Khan as the person who shot Nand Singh. None of these findings and conclusions are perverse. On the contrary, they have been accepted by the Trial Court and the High Court. We see no reason to take a different view.

48. On a consideration of the entire material before us, we have no hesitation in upholding the view taken by the High Court with regard to the offence committed by Daud Khan and his conviction for that offence. We see no substance in the appeal filed by the State and find no reason to reverse the conclusions arrived at by the High Court with regard to the offence committed by Daud Khan.

49. Both the appeals are dismissed.

Kalpana K. Tripathy Appeals dismissed.