

(2011) 12 J&K CK 0026

In the Jammu And Kashmir High Court

Case No : Criminal Appeal No. 19 of 2007 and Cr.M.P. No. 11 of 2011 c/w
Confirmation No. 06 of 2007

Balwant Raj and Others

APPELLANT

Vs

State of Jammu & Kashmir

RESPONDENT

Date of Decision : 29-12-2011

Acts Referred:

Arms Act, 1959 — Section 25, 3
Ranbir Penal Code, 1989 — Section 302

Citation : (2011) 4 JKJ 267

Hon'ble Judges : Virender Singh, J; Muzaffar Hussain Attar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Virender Singh, J.—This judgment will dispose of Criminal Appeal No. 19/2007 filed by Balwant Raj S/o Anant Ram R/o Bachyal, Tehsil

& District Jammu (hereinafter to be referred as 'accused'), after suffering conviction u/s 302 of Ranbir Penal Code read with Section 3/25 of Arms

Act; and Confirmation No. 06/2007 sent by the learned Sessions Judge, Udhampur u/s 374 of Code of Criminal Procedure (State Code).

2. It needs to be mentioned here that Bharat Bhushan alias Papu S/o Mani Ram, co-accused of the present accused could not be nabbed by

police, as such, proceeded u/s 512 Cr.P.C. Till the conclusion of the trial i.e. upto July, 2007 he was not arrested as is clear from the impugned

judgment itself. Mr. Qazi states that he has not been apprehended till date. It also requires mentioning that the accused moved an application for

transfer of the case from Sessions Court, Reasi apprehending his elimination at the hands of the complainant-party. Consequently, the present case

was transferred to Sessions Judge, Udhampur for trial from where he has now suffered conviction and sentence.

3. The sentence imposed u/s 302 RPC is rigorous imprisonment for life and a fine of Rs. 50,000/- , in default thereof, to further undergo rigorous

imprisonment for one year; u/s 3/25 Arms Act sentence of rigorous imprisonment of five years and Rs. 10,000/- as fine, in default thereof, to

further undergo imprisonment for two months. Both the sentences have, however, been directed to run concurrently.

4. The prosecution case:-

Date of occurrence is 28.05.1999. Place of occurrence is near Sessions Court compound, Reasi. Time of occurrence is 8.30 A.M. Name of the

deceased is one Som Dutt alias Somu S/o Chaju Ram R/o Jammu. Intimation to the police about the occurrence was received at 8.40 A.M. on the

date of occurrence itself. It was through some reliable source. On the same day, F.I.R. No. 71/1999 was registered u/s 302 RPC and Section

3/25 Arms Act with Police Station Reasi. F.I.R. was received by the Ellaga Magistrate (Judicial Magistrate) 1st Class, Reasi on 29.05.1999 at

1.45 p.m. Name of the assailant is not mentioned in the F.I.R.

5. One finds from the contents of the F.I.R; that deceased Som Dutt, who was working in Katra, was proceeding towards Court Complex Reasi

to appear in a case. At about 8.30 A.M., when he was to cross the entrance gate of the Court complex, an unknown person who was already in

the Court compound came closer to him and fired a shot from a small weapon (ultimately found to be a pistol of foreign make). The shot hit the left

side of the chest of Som Dutt, who succumbed to the injury at the spot itself. His dead body was shifted to the hospital from the scene of crime.

6. PW SHO Daljit Singh of Police Station, Reasi took up the investigation and visited the hospital, got the post mortem of the dead body

conducted by PW Dr. Mohinder Kumar. He also took into possession the blood stained clothes of the deceased and sample of the blood of the

deceased. All this material was subsequently resealed by Naib Tehsildar. From the place of occurrence, an empty cartridge bearing engraved mark

KF 7.65 mm was seized. It was got sealed. Rought Site Plan of the place of occurrence was also prepared. Till the investigation remained with

SHO Daljit Singh, he could not get any clue with regard to the identity of the

main assailant.

7. By an order bearing No. CB/8928-31 dated 12.06.1999, investigation of the present case was handed over to Crime Branch Jammu. PW

Shamsher Singh Sambyal, Inspector Crime Branch, took over the investigation in his hand on 13.06.1999. He also recorded the statements of

certain witnesses, who were acquainted with the facts of the case. During his investigation, Inspector Shamsher Singh could get some clues from

the statements of PWs Deep Sharma and Brij Mohan alias Bittu. It was thereafter that on 28.07.1999 the accused was arrested near the office of

'Kashmir Tour and Travel Agency' situated at B. C. Road Jammu. His formal arrest was made on the identification by the aforesaid Deep Sharma

and Brij Mohan, who also happened to be eye witnesses to the occurrence. Other two witnesses namely Sukhdev Singh and Ajay Kumar Gupta

were also present there. At the time of his arrest, the accused was found in possession of a pistol and four live cartridges, which were also seized

and sealed in presence of aforesaid witnesses. It was Italy make pistol having No. 3291 of 7.65 calibre. The four cartridges allegedly recovered

from the accused were in the magazine of the said pistol having marks of KF 7.65. Seized pistol, four live cartridges and the empty cartridge

recovered from the spot were subsequently sent to Forensic Science Laboratory for expert opinion. PW S.H. Bukhari has submitted his report in

this regard.

8. In order to lend assurance, Inspector Shamsher Singh got the identification parade of accused conducted in presence of Tehsildar Reasi on

30.07.1999, in which he was identified by PWs Krishan Kumar-Petition Writer of Reasi Courts, Rajesh Singh, Surinder Kumar and Manohar Lal.

9. Investigation further revealed that the present accused had traveled to Court Complex Reasi in a vehicle make Ceilo bearing No. DL-1Z-0314

belonging to Bharat Bhushan, the absconding accused, which ultimately was taken into possession from his house by Inspector Shamsher Singh of

Crime Branch.

10. Motive:

It is a case of contract killing in which services of the accused are hired by Bharat Bhushan, absconding accused. Long drawn enmity between de-

ceased-Som Dutt and absconding accused Bharat Bhushan is the cause. Both of

them were also gangster and as such having gang rivalry. Both the groups were bent upon to eliminate each other. Many a times, murderous assaults were undertaken by rival of both groups. The law enforcing agency had detained Narinder Kumar, brother of Bharat Bhushan, along with his two companions namely Narad and Babu under Public Safety Act. In order to kill Som Dutt, Bharat Bhushan had engaged the accused. For this deal, Bharat Bhushan had promised to pay Rs. 2 lacs to him. Investigation further revealed that the accused was facing trial in number of cases and a promise was given to him of every assistance and expenses of the litigation. He was also handed over a pistol by Bharat Bhushan for committing the murder. Investigation further revealed that earlier to the incident, Bharat Bhushan had brought the accused to Reasi town in his vehicle (Ceilo), which he was plying as Taxi to make him acquainted with the place where the Court Complex was and certain lanes to be used for escaping after committing the murder.

11. Eye Version Account of the occurrence:-

As per the eye version account, on the date of occurrence, the deceased came to Reasi to attend his Court case in a vehicle make Tata Sumo accompanied by PWs Deep Sharma and Brij Mohan. Deceased was also carrying a double barrel gun as he was apprehensive about the threat to his life at the hands of Bharat Bhushan. Before entering the Court premises, deceased asked Deep Sharma to stand near his vehicle stationed outside the Court complex. When he accompanied by PW Brij Mohan was heading towards the Court building, PW Krishan Kumar-the Petitioner also joined them incidentally. When he was about to enter the main gate of the Court complex, the accused who was already in the Court compound, came running towards him and fired a shot from close range on the left side of his chest. The accused ran away towards the road and was chased by PW Brij Mohan. He also asked PW Deep Sharma to follow him. Both the PWs, however, could not nab him as he mingled with the persons walking on the road in a nearby narrow lane and ultimately got lost. Som Dutt died at the spot and was ultimately shifted to the hospital.

12. Since Bharat Bhushan could not be arrested till the filing of the charge-sheet and proceeded u/s 512 Cr.P.C., on completion of the

investigation charge-sheet was filed against the present accused only. He was charged for the offences for which he now stands convicted.

13. Though, in all, the prosecution case is hinging upon twenty eight (28) witnesses examined during investigation as is clear from the list of

witnesses supplied with the challan, only seventeen (17) witnesses were examined during the trial. For better appreciation of the prosecution case,

the main witnesses examined can be put in different sets.

14. Main witnesses to the occurrence are Deep Sharma, Brij Mohan alias Bittu and Krishan Kumar-Petition Writer. PW Ashwani Kumar also

happened to be in the Court compound, but he is not a witness to the occurrence. He deposed during investigation that he was present in the

Court compound and after hearing the noise came to know that someone had died whose name was Som Dutt alias Somu. Krishan Kumar and

Ashwani Kumar have not supported the case of the prosecution.

15. PWs Deep Sharma and Brij Mohan alias Bittu are the witnesses to the arrest of the accused also. PWs Sukhdev Singh and Ajay Kumar

Gupta are also witnesses to this effect as they happened to be sitting in the office of M/s Kashmir Tour & Travels at a particular time on a

particular date i.e. 28.07.1999.

16. PWs Surinder Kumar and Rajesh Singh are the witnesses who on the date of occurrence had seen Bharat Bhushan, the absconding accused,

on the steering of his vehicle make Ceilo bearing No. DL-1Z-0314 and the accused happened to be sitting by the side of Bharat Bhushan. These

are the witnesses, who subsequently identified the accused after he was formally arrested by Inspector Shamsheer Singh of Crime Branch. The test

identification parade was conducted in the presence of Amar Singh, Tehsildar (Executive Magistrate). One Manohar Lal was also joined by the

prosecution agency while conducting the identification parade.

17. PWs Gurcharan Singh, Krishan Singh, Manohar Lal are the witnesses disclosing the past enmity of Bharat Bhushan with the deceased.

18. Dr. Mohinder Kumar is the doctor of autopsy and prepared the postmortem report exhibit EX-MK, whereas the report of FSL, exhibit EX-

SH is prepared by PW S.H. Bukhari.

19. As already said, the investigation of the present case was initially conducted by PW Daljit Singh SI of Police Station Reasi and thereafter, by

Inspector Shamsheer Singh of Crime Branch, detail thereof has already been depicted hereinabove.

20. This is long and short of the prosecution case before the trial Court.

21. The case set up by the accused as one finds from his statement recorded u/s 342 Cr.P.C. (State Code) is of denial of the allegation simpliciter.

According to him, no pistol was ever recovered from his possession and that all the witnesses deposed against him to falsely implicate him.

However, he has not produced any evidence in his defence.

22. We have heard Mr. Sunil Sethi, learned Sr. Advocate assisted by Mr. Aijaz Mehrab, Advocate appearing on behalf of accused and Mr. A. H.

Qazi, learned Addl. Advocate General representing the State. We have also once again gone through the trial Court record minutely.

23. The first attack launched by Mr. Sethi to demolish the prosecution case is that a blind murder has been converted into an eye version account

by importing PWs Deep Sharma and Brij Mohan who were very close to the deceased; Deep Sharma being son of real sister of the mother of the

deceased and also employed in his hotel at Katra and Brij Mohan being a close friend to the deceased. The most independent witness, Krishan

Kumar-the Petition Writer of District Courts Reasi, has not supported the case of the prosecution. This by itself creates a lot of doubt about the

presence of aforesaid two witnesses. Mr. Sethi further contended that Ashwani Kumar, who also happened to be there in the Court Complex and

reached the spot after the occurrence, also did not lend any support to the prosecution case and declared hostile. Learned counsel contended that

the aforesaid two witnesses to the occurrence, who otherwise happened to be the most interested witnesses, have been brought forward with a

sole object that the case of the prosecution does not go untraced as the police could not nab the absconding accused Bharat Bhushan.

24. While strengthening his argument, the learned Sr. Advocate laid stress on the delay caused in this case on every count inasmuch as the

occurrence relates to 28.05.1999 whereas upto 13.06.1999 till the investigation was transferred to Crime Branch and handled by Inspector

Shamsheer Singh, no witness had come forward to depose about, the occurrence before SI Daljit Singh of Police Station, Reasi. It is only after the

investigation was handed over to Crime Branch, PW Deep Sharma and two

others namely Brij Mohan and Krishan Kumar-Petition Writer came forward projecting themselves to be the witnesses to the occurrence. This huge delay, by itself, speaks volume of the shoddy investigation conducted in this case right from the very beginning. Keeping all these aspects into consideration, it is a case in which it can be comfortably said that the eye version account has been introduced subsequently to falsely implicate the accused, who, according to the prosecution, happens to be the friend of absconding accused Bharat Bhushan.

25. Mr. Sethi has also pointed out certain contradictions surfacing in the statement of PWs Deep Sharma and Brij Mohan alias Bittu, which according to him, are vital and go deep to the roots of the case to dub them as unreliable witnesses to the occurrence.

26. Mr. Sethi then submitted that even otherwise the identification parade conducted in the presence of Amar Singh, the Executive Magistrate, is a sheer formality for the reason that accused was already in custody of the police and was not produced at any time in a muffled face. Prior to

conducting the test identification parade in the office of Tehsildar, he must have been shown to the witnesses, who according to the prosecution,

had noticed him sitting in Ceilo car of Bharat Bhushan on the date of occurrence. At least possibility of it cannot be ruled out. The learned counsel

then submitted that even otherwise the accused is shown to have been apprehended in the presence of PWs Deep Sharma and Brij Mohan alias

Bittu, who happened to be with Inspector Shamsheer Singh throughout. Therefore, getting the accused identified in the test identification parade was

just an eye wash. Surinder Kumar-the other witness, who had seen the accused in the Ceilo car of Bharat Bhushan has not said a word about

conducting of identification parade in his presence. Rajesh Kumar, who had also seen the accused in the Ceilo car of the Bharat Bhushan, stated

that the identification was conducted in the police station after two months of the occurrence in which he had identified the accused, whereas

Tehsildar-Amar Singh stated that the identification was conducted in his office. All these flaws, according to the learned counsel, make the

identification parade weak and it does not lend any support to the prosecution case to fix the presence of the accused at the scene of occurrence.

27. Learned Senior Counsel then submitted that for proving the previous enmity

between the deceased and the absconding Bharat Bhushan, the prosecution has examined two independent witnesses namely PWs Krishan Singh and Manohar Lal alias Sonu besides PW Deep Sharma who happens to be in close relation of the deceased. Manohar has not supported the case of the prosecution and has been declared hostile. This witness was also produced with regard to the identification of the accused before Tehsildar. In this regard also he did not support the case of the prosecution. Statement of Krishan Singh, the other prosecution witness, runs contrary to the statement of PW Deep Sharma with regard to the previous enmity. Therefore, the motive for commission of alleged offence is also not proved to the hilt.

28. Much has been said by Mr. Sethi with regard to the eye version account vis-a-vis medical evidence stating that the medical evidence totally demolishes the case set up by the prosecution as there is complete variance between eye version account and the medical evidence, inasmuch as the case set up by the prosecution is that the accused had released one shot, that too from a close range from the pistol he was carrying in his hand, whereas the postmortem report reveals that atleast two shots had hit the deceased, if not three. Dwelling upon his argument, Mr. Sethi submitted that Injury No. 1 is on the outer surface of the right hand. It is 'an entry wound' and there is 'an exit wound' on the Palmar surface of the same hand. Assuming that the shot which had hit outer surface of the right hand, pierced into the hand and the lead went out making 'an exit wound' on the Palmar surface, that shot released from such a close range hitting the hand in all probabilities should have caused fracture of bone while going through and through. This is not the position. This shows that the weapon of offence is different from the one which is allegedly shown to be in the hand of the accused and subsequently recovered and that the occurrence has not held as projected by the prosecution. In turn, it demolishes the recovery of weapon also.

29. With regard to Injury No. 3, which is on the left side of the chest, Mr. Sethi submitted that this is a separate injury in itself as it is on the different side of the body i.e. left side. It has ruptured the lung tissue and jugular vein. This injury, in fact, is said to be fatal. As per the postmortem, this injury has not made any 'exit wound'. As per the statement of the doctor, he

did not find any lead in the body at the time of autopsy. Therefore, it becomes doubtful whether even Injury No. 3, which is on the left side of the chest, could be caused with the pistol from a close range. This would again call for an answer about the very nature of the weapon used in the commission of the offence. Rather, it can be safely said that the pistol was implanted upon the accused by the prosecution agency in order to complete the chain of evidence. Mr. Sethi vigorously submitted that as per the postmortem report, it is clear that deceased had received injuries not by one shot but more than one shot and this demolishes the eye version account.

30. Mr. Sethi then submitted that the prosecution has miserably failed to establish the link of the pistol and four live cartridges allegedly recovered from the accused with the commission of alleged offence, inasmuch as, there is considerable delay in sending the empty cartridge allegedly recovered from the spot. The argument advanced in this regard is that the empty cartridge was taken into possession by SI Daljeet Singh on the date of occurrence itself and that the formal arrest of the accused was made on 28.07.1999, whereas the entire material is sent to FSL on 06.08.1999 through one SI Chattar Singh, who has neither stepped into the witness box nor tendered his affidavit in this regard. The empty cartridge remained with the police till the arrest of the accused and, therefore, chances of tampering with it cannot be ruled out. Had there been a fair investigation in this case, the empty cartridge taken from the spot on the date of occurrence should have been sent without waste of any time and the pistol & live cartridges allegedly recovered from the possession of the accused could be sent subsequently also, which exercise has not been done in this case at all. Not only that, even the Incharge of Malkhana, who was in possession of the empty cartridge through out, has neither stepped into the witness box, nor tendered his affidavit to prove that till the material (case property) remained with him, it remained untouched by anybody. Therefore, the report exhibit EX-SH submitted by PW S.H. Bukhari will be of no advantage to the prosecution so as to connect the accused with the commission of the main offence of murder.

31. The learned counsel further submitted that for proving the recovery of pistol and four live cartridges, the prosecution mainly relies upon the

statement of two independent witnesses namely Ajay Kumar Gupta and Sukh Dev Singh. In their presence, the formal arrest of the accused is also

shown. Their evidence is staring at each other and when appreciated in the light of the statement of Brij Mohan alias Bittu, an eye witness to the

occurrence, who is also shown as witness of arrest of the accused, it appears that the formal arrest of the accused was made just to complete

paper formality, whereas actually he was already in custody of the police. This demolishes the entire recovery effected from him on 28.07.1999, as

such the charge of Arms Act also falls on the ground. The learned counsel has also pointed out some discrepancy occurred in the statement of PW

Ajay Kumar Gupta wherein he has stated that single packet was prepared with regard to the recovery of pistol and life cartridges, whereas F.S.L.

has received two packets.

32. The learned Counsel lastly contended that no blood stained earth was taken from the spot and, therefore, the clothes of the deceased sent to

F.S.L. for serological examination will also not prove any link. Even otherwise, serological report is not proved on record.

33. Pointing out aforesaid flaws in the prosecution case, Mr. Sethi submitted that the prosecution has miserably failed to bring home the guilt qua

the accused beyond any shadow of reasonable doubt so to hold him liable for the offence punishable under Sections 302 RPC & 3/25 Arms Act,

as such, the impugned judgment of conviction and sentence deserves to be set aside.

34. Per contra, Mr. Qazi learned Addl. Advocate General submitted that the case of the prosecution connecting the accused with the commission

of alleged offence is proved to the hilt. PWs Deep Sharma and Brij Mohan alias Bittu, the independent witnesses to the occurrence, have no axe to

grind against the accused. He further submitted that even if PW Krishan Lal-Petition Writer, has not supported the case of the prosecution, the

evidence of aforesaid two witnesses is trustworthy and the discrepancies or contradictions as pointed out in their statements by Mr. Sethi are not

of that serious nature, which would damage the prosecution case in its totality.

35. With regard to the medical evidence, Mr. Qazi submitted that flaw pointed out by Mr. Sethi, in medical evidence, if any, would not over ride

the unimpeachable eye version account. According to him, it is a case in which

accused Bharat Bhushan (since absconding), who was having long drawn enmity in his bosom, has availed the services of the accused in eliminating the deceased. Mr. Qazi, thus, prays for maintaining the conviction and sentence as already recorded by the trial Court.

36. Discussion:-

After churning the entire prosecution evidence in its right perspective, we are of the considered view that the prosecution has been able to prove its case beyond any shadow of reasonable doubt qua the accused for the charges framed against him. For arriving at that conclusion, we would now enter into the following discussion covering all the vital aspects of the prosecution case while taking into account the submissions advanced by Mr. Sethi, learned Sr. Advocate.

37. May be at the cost of repetition, let us have a flashback of the prosecution case, in brief, for better appreciation. When PWs Deep Sharma,

Brij Mohan alias Bittu and Krishan Kumar-Petition Writer, were examined by SI Daljit Singh of Police Station Reasi on 28.05.1999, the date of

occurrence itself, it was revealed to the investigating agency by PWs Deep Sharma and Brij Mohan alias Bittu about the group rivalry going on

between two sides. It was also disclosed that 7-8 months prior to the present occurrence, PW Narinder Kumar alias Nandi and one other had

assaulted Som Dutt (since deceased) with a pistol. The assailants were subsequently nabbed. In that occurrence, Som Dutt deceased had received

injury on his hand. It was also revealed that another group was in support of Som Dutt (since deceased) and that it was 15-16 days prior to the

present occurrence, Bharat Bhushan absconding accused had threatened Deep Sharma on phone asking him not to support Som Dutt, which fact,

was disclosed by him to the deceased also. With regard to the main occurrence, PWs Deep Sharma and Brij Mohan alias Bittu stated before SI

Daljit Singh that Som Dutt-deceased had brought both of them (PWs) in Tata Sumo to the Court complex as he had to appear in a case.

Deceased and Deep Sharma had gone towards the Court side whereas Brij Mohan alias Bittu stood near the vehicle. Both the witnesses then gave

a complete physiognomic description of the main assailant, who had fired a shot with a fire arm (Pistol) being carried by him from a close range.

These two witnesses had taken the deceased to the hospital also. They are also

witnesses to the recovery of empty cartridges from the place of occurrence taken by SI Daljit Singh. It is also borne out from the record that till 28.07.1999, the accused was not arrested as his formal arrest is shown on this date only in the presence of aforesaid two witnesses and other two witnesses namely PWs Sukh Dev Singh and Ajay Kumar Gupta, who were sitting in the office of M/s Kashmir Holiday Tour and Travels as the formal arrest of the accused is shown nearby that place. The accused is identified by PWs Deep Sharma and Brij Mohan alias Bittu when they were already with Inspector Shamsheer Singh of Crime Branch. It is on their identification only, the accused was taken in custody. PWs Sukh Dev Singh and Ajay Kumar Gupta are also the witnesses of recovery of pistol and four live cartridges taken from the possession of accused at the time of his formal arrest. It is thereafter on 30.07.1999 identification parade was got conducted by Naib Tehsildar Amar Singh, the Executive Magistrate Reasi, in his office in the presence of PWs Rajesh Singh and Surinder Kumar. In this regard, proceedings EXPWAS was reduced into writing.

38. Let us now switch over to the argument advanced by Mr. Sethi, the learned Sr. Advocate, dubbing the main witnesses namely PWs Deep Sharma and Brij Mohan alias Bittu as unreliable witnesses to the occurrence contending that upto 28.07.1999 when the accused was formally arrested, there was no evidence with the prosecution to connect him with the commission of offence. This, in fact, was the main attack launched by Mr. Sethi assailing the eye version account.

39. We are also conscious of the fact that one of the witnesses to the occurrence namely Krishan Kumar-Petition Writer, who happened to be in the Court complex at the time of occurrence, has not supported the case of the prosecution with regard to fixing the identification of the accused with the commission of alleged offence. Evidence of PW Ashwani Kumar, in any case, is of no relevance as he is not a witness to the main occurrence. So the prosecution case primarily hinges upon the evidence of PWs Deep Sharma and Brij Mohan alias Bittu, one of whom namely PW Deep Sharma is related to the deceased being son of real sister of mother of the deceased and the second one namely Brij Mohan alias Bittu being close friend of the deceased. We are also conscious of the fact that PW Deep Sharma was working in hotel Vikrant at Katra being run by he

deceased only. Whether all these factors dent their evidence, when tested by us on the touchstone of reliability so as to hold that these witnesses are giving us an untrue account of occurrence or have been imported as witnesses to the occurrence in order to falsely implicate the accused on account of the group rivalry going on between the two groups, is the vital issue for our consideration.

40. Entire stress was laid by Mr. Sethi, learned Sr. Advocate, with regard to the delay caused by the investigating agency in this case inasmuch as the investigation of the case was handed over to Crime Branch on 13.06.1999, whereas the arrest of the accused is shown on 28.07.1999 and this delay covers the prosecution case under thick clouds of doubt.

41. It is true that delay caused by the investigating agency on any count, normally, is seen with an eye of suspicion and can create doubts in the mind of the Court about its shoddy nature. But this depends upon the facts of an individual case. It cannot be said in each and every case in which there is a delay in arrest of the accused or some laxity is shown by the investigating agency in delaying the matter, the benefit must be extended towards the accused. In the case at hand, what we have noticed is that the witnesses did not know about the name, parentage or as a matter of fact, any particulars of the assailant. They knew Bharat Bhushan, the absconding accused, only, who was carrying enmity with the deceased.

Therefore, when the statements of PWs Deep Sharma and Brij Mohan alias Bittu were recorded u/s 161 Cr.P.C. by SI Daljit Singh of Police

Station Reasi on the date of occurrence, it was revealed to him by these witnesses that one person of a particular height and approximate age

having fire arm in his hand released a single shot from the said fire arm and ran towards a particular direction, who was chased by Brij Mohan alias

Bittu who was accompanying the deceased followed by PW Deep Sharma, who was standing by the side of Tata Sumo. Only physiognomic

description of the assailant was disclosed to the SI Daljit Singh at that time. So far as Bharat Bhushan the absconding accused is concerned, his

name was made very pertinent on 28.05.1999 itself while depicting the motive of occurrence and the fact that Bharat Bhushan had also threatened

PW Deep Sharma to abstain from rendering support to Som Dutt deceased. Thereafter the investigation was handed over to Crime Branch and

Inspector Shamsheer Singh took over the investigation on 13.06.1999 and started searching Bharat Bhushan and the main assailant. Bharat

Bhushan could not be nabbed till the filing of the challan against the accused. However, Inspector Shamsheer Singh took into possession Ceilo car

bearing No. DL-1Z-0314 belonging to Bharat Bhushan vide recovery memo EXPWSS on 22.09.1999. It was recovered from the house of

Bharat Bhushan accused. It is only on 28.07.1999 when Inspector Shamsheer Singh was searching for the accused and happened to be near M/s

Kashmir Holiday Tour & Travels alongwith PWs Deep Sharma and Brij Mohan alias Bittu, on pointing of these two witnesses, he nabbed the accused.

Since these witnesses were already aware of the physiognomic description of the main assailant, therefore, they did not find any difficulty in

identifying him. We just do not find any fault in it. If the prosecution agency was bent upon arresting the accused without he being involved in it for

any reason whatsoever, there was no difficulty with the Crime Branch to show his formal arrest immediately after the investigation was handed over

to Inspector Shamsheer Singh on 13.06.1999 or some time thereafter. The arrest is made after 1-1/2 months of taking over the investigation. Even

Mr. Sethi contended that the accused was already in their custody. This rather shows that the investigation was being carried on very fairly and

truthfully. First attempt of the prosecution was to nab Bharat Bhushan the absconding accused, who had the motive in his bosom to get Som Dutt

eliminated and after his arrest only, the prosecution agency could get other clues including the name of the main assailant. Since he could not be

nabbed, the investigating agency was absolutely helpless till the accused was arrested on 28.07.1999. If we examine the evidence of main two

witnesses namely Deep Sharma and Brij Mohan alias Bittu from that angle only, we do not find any difficulty in holding that these two witnesses are

the most truthful witnesses, who are giving us the true account of the occurrence as it happened in front of them without any motive or ill will.

Therefore, the delay caused in this case in arresting the accused on any count, in our considered view, will not cause any damage to the very case

set up by the prosecution. In turn, it will also not make the eye witnesses to the occurrence as unreliable witnesses. There is no inflexible rule that

delay would always uproot the prosecution case.

42. No doubt, PW Deep Sharma is closely related to the deceased being son of real sister of mother of the deceased and PW Brij Mohan alias

Bittu happens to be friend of the deceased. But that fact by itself will not make them unreliable. It is well settled that evidence of such a nature, at

the most, has to be tested with a note of 'care and caution', which test has been applied by us. After appreciating their evidence on record in a fine

toothed comb, we do not find any basic infirmity in the statement of these two witnesses, which would render them unreliable. Rather they have

projected prosecution case in Court without any tinge of adulteration. No doubt, the third witness to the occurrence namely Krishan Kumar-

Petition Writer has not supported the case of the prosecution and declared hostile. But this fact would also not cause any damage much less

substantial damage to the prosecution case.

43. The other set of evidence with the prosecution in order to connect the accused is the evidence of PWs Rajesh Singh and Surinder Kumar, who

had seen Bharat Bhushan the absconding accused driving a Ceilo car and the accused sitting by his side. These two witnesses knew Bharat

Bhushan accused earlier and during investigation they had revealed this fact to the investigating agency. These witnesses could identify the accused

in the identification parade also. In order to dent this part of the investigation, Mr. Sethi has drawn our attention to the statement of PW Rajesh

Singh, who has stated that after two months of the occurrence, he was called in the Police Station, Reasi, where he had identified the accused. He

also drawn our attention to the statement of PW Surinder Kumar, who does not say a word about the identification parade.

44. We do find some weightage in the submission of Mr. Sethi and are of the view that on this aspect, the prosecution case, perhaps, is on slippery

footings. But this weakness, in our considered view, would not weaken the case of the prosecution for the reason that the main witnesses, who had

seen the accused firing the shot at the deceased outside the Court complex and had given the complete physiognomic description of the accused in

their statement recorded u/s 161 Cr.P.C., had actually identified him on 28.07.1999 which fact is unfolded in Court also. It appears that during the

investigation when it revealed to the investigating agency that Rajesh Singh and

Surinder Kumar had noticed Bharat Bhushan driving his Ceilo car, in which the accused was also sitting by his side, the investigating officer in his wisdom, in order to complete the chain of evidence got the identification parade conducted so as to avoid any lapse on his part. Be that as it may, the fact remains that the evidence of two main eye witnesses referred to hereinabove is enough to establish the identity of the accused at the scene of crime.

45. Great stress has been laid by Mr. Sethi demolishing the case of the prosecution from the angle of medical evidence stating that it totally washes away the eye version account. Prima facie, his argument appears to be somewhat attractive, but when appreciated minutely looking at the postmortem report and the evidence of the Doctor of Autopsy, it deserves to be rejected.

46. It would be pertinent to reproduce the injuries noticed by Dr. Mohinder Kumar on the person of the deceased at the time of autopsy. These are:-

1. wound of entry

Circular wound diameter about 2.20 cms on the dorsal surface metacarpal area of Index finger Rt. Hand with everted edges, blood oozing out

2. wound of exit

Circular wound Palmar aspect Metacarpal area Index finger Rt. Hand size 3.5 cms diameter with everted edges, blood oozing out

3. wound of entry

Circular wound chest It side anteriorly 220 cms diameter 2nd Intercostal space 1-1/2 cms medially from It mammary line.

47. Minute examination of the injuries would reveal that the deceased when noticed the accused attacking at him with the pistol, in natural reflex

must have put his right hand on the left side of the chest. This is most natural reflexion in such like situation. The shot punctured soft tissue of the

Palmar surface of the right hand and then in the same direction punctured the chest cage and went through the Intercostal space tearing the lung

tissue and jugular vein at the base of the neck. After that it would have certainly lodged in the spine (Vertebra). It could not be confirmed unless

Vertebra was dissected or X-ray of the Spine of the body had been done by the doctor of autopsy. In the present case, incidentally Vertebra is

not dissected by the doctor, who conducted the autopsy. This appears to be the reason that Dr. Mohinder Kumar when stepped into the witness

box, on a specific question put to him by defense counsel with regard to the placement of the lead into the body, replied that he did not find any

lead piece inside the dead body nor there were any granules present there. Certainly, there was no 'exit wound' with regard to injury of left side of

the chest for the reason that the lead must have lodged in the Vertebra. Had the dissection of Vertebra been done in this case, the doctor of

autopsy could find the lead placed some where. In our view, the autopsy is not done the way it should have been done in the present case knowing

very well that it was a case of fire arm injury. Somewhat casual approach is shown in this case, which should be avoided by the doctor as his

opinion carries some weightage though Court is not bound to accept it as it is.

48. What we find from the original trial Court record is that at one stage, Inspector Shamsheer Singh of Crime Branch sought a clarification from

Dr. Mohinder Kumar, the doctor of autopsy with regard to Injury No. 3 on the left side of chest of the deceased specifically with regard to non-

recovery of the bullet in the chest and the doctor clarified that the reason for non-recovery of the bullet could be that bullet mostly changes its

direction in the line of vertebral column and might have struck in the Vertebra. Unfortunately, the said opinion given by the doctor, which is

available on record, was not put to him by the Public Prosecutor conducting the case on behalf of the State nor any specific question was put to

him in his examination in chief in this regard. This shows that the doctor, who had conducted the postmortem, knew it very well that the lead/bullet

can change its direction and lodge in the Vertebral column. Had he dissected the Vertebra and even X-rayed the Spine, this situation would have

not arisen at all and a clear position would have been before us. At the same time, the opinion given by the doctor with regard to the turning the

lead into the granules does not appeal to us at all, that too when the shot is released from a very close range and autopsy done within the shortest

possible time. It appears to be a hypothetical statement made by the doctor in his cross examination and we are not inclined to accept it in the

present set of circumstances. In fact, it is a self perceived inconsistency between material evidence and ocular evidence projected by Mr. Sethi,

whereas in our considered view, there is no difficulty in holding that the injuries found on the person of the deceased are result of one and one shot

only released from a close range, which is possible from a pistol recovered from the accused.

49. The last attempt made by Mr. Sethi, in order to create doubt about the shoddy investigation especially with regard to the recovery of the pistol

and the live cartridges, in our view, will also be of no advantage to him. No doubt, that the empty cartridge was recovered by SI Daljit Singh of

Police Station Reasi on 28.05.1999, the date of occurrence itself, from the place of occurrence whereas pistol and four live cartridges are

recovered from the possession of the accused on 28.07.1999, the date of his arrest. All this material was sent to FSL on 06.08.1999 through one

ASI Chatter Singh. It is also true that he has not stepped into the witness box to prove this fact. Even Incharge, Malkhana of the Police Station,

who had kept the empty cartridge in his custody till 06.08.1999 has also not stepped into the witness box. We do find laxity on the part of the

investigating agency in this regard. Under normal circumstances, so much of delay should not have occurred in despatching the case property to the

FSL for examination. At least the empty cartridge which was recovered on the date of occurrence should have been sent without wasting any time

and keeping the same in the police station for the purpose of sending it with weapon of offence, which was yet to be recovered in near future can

certainly create somewhat doubt in the mind of the Court. We have noticed that invariably till the main weapon of offence is recovered from the

accused, the other material (case property) which is already in the custody of the police is not sent to the FSL. This practice should be avoided.

One can understand that till the main weapon of offence is not recovered, the live cartridges or empty cartridge are not examined by the expert, but

at the same time, if it is kept in the police custody, that too without maintaining a proper record in this regard, possibility of its tampering can not be

ruled out. In certain cases, it can be a very damaging factor. In the present case, though this laxity on the part of investigating officer is apparent on

record, yet in our considered view, it would not go to the roots to dislodge the prosecution case against the accused which is otherwise proved to

the hilt from the other cogent evidence available on record. It is well settled that the case of the prosecution, if otherwise proved, should not be

thrown merely on the casual approach or remissness adopted by the investigating officer. Justice can not fall prey at the hands of the investigating officer. The entire fabric of the prosecution case is to be appreciated in its right perspective, which exercise has been done by us very minutely to arrive at a just conclusion of the case.

50. The discrepancies pointed out by Mr. Sethi in the statement of certain witnesses, in our view, are not to be given any weightage as we are appreciating the evidence collectively. Reliance on one line out of context would not serve the ends of justice.

51. Perhaps, no other vital point is left by us untouched in our discussion.

52. Viewed, thus, we find that the prosecution has been able to prove its case against the accused for the offences punishable under Sections 302

RPC and 3/25 Arms Act beyond any reasonable doubt, as such, his conviction and sentence as already recorded by the learned Trial Court for

the said offences deserve to be upheld. We, accordingly, affirm the judgment of the learned trial Court in toto.

53. The net result is that the Cr. Appeal No. 19/2007 stands dismissed. Accordingly, Confirmation No. 06/2007 also stands answered.

54. Before parting with the judgment, we express our deep anguish over the most casual approach adopted by the prosecution agency in not

making any attempt to apprehend Bharat Bhushan, the co-accused of the present accused who is still at large as stated by learned State Counsel.

After all he has not evaporated in the air. As per the prosecution case, Bharat Bhushan had plotted the elimination of Som Dutt alias Somu by

hiring the services of the present accused. It is a case of contract killing. It appears that the prosecution agency felt satisfied with the recording of

the conviction of the present accused and thereafter did not bother to take any pain for apprehending Bharat Bhushan. This approach is not

appreciated by us. We, therefore, direct Inspector General of Police J&K Police (Jammu Province) to look into the matter and pass necessary

directions in this regard. Director General of Police, J&K Police shall also be informed in this regard. Let copy of the order be sent to both the

concerned quarters. Registrar Judicial of this Court to take note of it.