

(2010) 09 BOM CK 0159
In the Bombay High Court
Case No : Criminal Appeal No. 1405 of 2003

Salim Abdul Razak Baig

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-09-2010

Acts Referred:

Arms Act, 1959 — Section 25(1B), 27, 3, 5
Criminal Procedure Code, 1973 (CrPC) — Section 100(7), 107, 51
Penal Code, 1860 (IPC) — Section 302

Citation : (2011) 8 RCR(Criminal) 3013

Hon'ble Judges : D.D. Sinha, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Aabad H.H. Ponda, for the Appellant; Y.S. Shinde, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Heard the learned Counsel for the appellant and the learned Addl. Public Prosecutor for the State.

2. This Criminal Appeal is directed against the judgment and order dated 18.10.2003 passed by the learned Addl. Sessions Judge, Greater Mumbai, in Sessions Case No. 846 of 1999 whereby the appellant Salim Abdul Razak Baig was convicted for the offence punishable u/s 302 of the Indian Penal Code and was sentenced to suffer R.I. for life and was directed to pay fine of Rs. 5,000/-, in default to suffer R.I. for one year. The appellant was also convicted for the offence punishable u/s 3 read with Section 25(1-B) of the Arms Act and was sentenced to suffer R.I. for one year and to pay a fine of Rs. 1,000/-, in default to suffer R.I. for three months. The appellant was also convicted for the offence punishable u/s 5 read with 27 of the Arms Act and was sentenced to suffer R.I. for one year and to pay a fine of Rs. 1,000/-, in default to suffer R.I. for three months. The other co-accused were acquitted of all the charges and the State has not preferred any appeal against the order.

3. The circumstances which have given rise to the prosecution of the appellant are as follows:

On 16.12.1998, Byculla police station received a telephonic message sent by one Ashraf Mansoor Khan on his mobile that a firing had taken place in hospital lane, D'lima Street, Mazgaon, Mumbai. In response to this telephonic message, PSI Sanjay Natkar reached the spot and noticed that some persons had fired bullets on a person sitting in a taxi by the side of the taxi driver's seat. There was nobody in the taxi besides the victim. The injured was immediately rushed to the hospital where Doctors declared him dead. The police came to know that the person who was murdered was Sudhakar Kashinath Lone, a right-hand man of Mr. Arun Gavli. The police were informed by the wife of the deceased during the course of initial interrogation that on the date of the incident i.e. on 16.12.1998 the deceased had left the house along with one Abubakar Mehboob Khan (co-accused No. 2). During the course of investigation, police initially nabbed accused No. 2 Abubakar Mehboob Khan and during the course of interrogation with the said accused, the police came to know that the appellant was also involved in the said crime. On 24.12.1998 the police arrested the appellant. At the time of arrest, the appellant was searched. The police recovered a pistol from the person of the appellant along with live cartridges.

4. On 16.12.1998 Madan Jain (P.W.6), Niraj Pathak, Director (P.W.8), the deceased, the appellant, Abubakar Mehboob Khan and Nasim alias Neha Fakhruddin Saifee Khan were present in the office of the Director Niraj Pathak at 1.30 p.m. at Andheri. Discussions had taken place for making a film. It was agreed to meet again and, thereafter, all of them disbursed. According to the prosecution, Niraj Pathak then gave lift to all four persons in his car upto Andheri and left them near a taxi stand. From Andheri, the appellant and other co-accused along with the deceased hired a taxi and went towards Mazgaon. The deceased was sitting by the side of the driver whereas others were sitting in the rear seat of the taxi. When the taxi came near Hospital Lane, the taxi driver was asked to take the taxi in Hospital Lane, D'lima Street, Mazgaon. The taxi driver stopped the taxi in the Hospital Lane and at that point of time, the appellant opened fire, four bullets were fired from his pistol from close range. On hearing the sound of firing, the driver of the taxi left the taxi and ran away from the said spot. When he returned to the taxi, he found Sudhakar Lone lying in an injured condition and hence, he reported the said matter to the police, however, in the meanwhile, one of the pedestrians Ashraf Khan had also contacted the police from his mobile and informed about the firing.

5. The police came to the spot of occurrence, shifted the injured to the hospital and panchas were called. Spot panchanama (exh.36) was drawn. From the taxi, three empty cartridges were recovered which were seized. The police arrested the appellant and other three co-accused from different places, recovered not only empty cartridges from the taxi where the incident had taken place but also succeeded in recovering the pistol and the live cartridges. Identification parade

was held. Madan Jain (P.W. 6) and Niraj Pathak (P.W.8) identified the appellant to be the person who had been to his office on 16.12.1998 at noon along with the deceased Sudhakar Lone. Empty cartridges and pistol as well as live cartridges were forwarded to the Ballistic Experts. After completion of the investigation, charge-sheet was filed against four accused persons. Charge was framed against all of them, they pleaded not guilty and claimed to be tried. The trial Court convicted the appellant and acquitted the other co-accused of all the charges framed against them. The appellant, being aggrieved by the judgment and order passed by the trial Court, filed the present appeal.

6. The case of the prosecution is based on circumstantial evidence. It is well-settled law that if a case is based on circumstantial evidence, the circumstances must be such that they unerringly point to the guilt of the accused. It is also well-settled that the circumstances from which a conclusion of guilt should be drawn should be fully proved and established and must be consistent with the hypothesis of guilt of the accused and must rule out the element of innocence. The circumstances brought on record should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else. There is no quarrel with the law declared by the apex Court in this regard in its decision reported in Padala Veera Reddy Vs. State of Andhra Pradesh and others, and AIR 1996 SCW 2903 and other decisions cited by the counsel for the appellant.

7. The learned Counsel for the appellant has submitted that the prosecution case is based on the following circumstances which the prosecution has claimed to have been proved:

(i) Last seen together.

(ii) Recovery of cartridges from the taxi where the dead-body of the deceased Sudhakar Lone was found.

(iii) Recovery of a revolver and cartridges allegedly from the appellant on 24.12.1998.

8. The learned Counsel for the appellant has submitted that it is the case of the prosecution that the incident was taken place in the night at around 9.00 to 9.30 on 16.12.1998. The deceased was found lying injured in a taxi of Shaikh Mohd. Mumtaz Suleman (P.W.2) and at a later point of time declared dead by the Doctors. Shaikh Mohd. Mumtaz Suleman (P.W.2) has turned hostile. The prosecution has relied upon the evidence of Madan Jain (P.W.6) and Niraj Pathak (P.W.8). It is submitted that Pathak improved his version before the Court where he claimed that after the appellant and others left his office, he followed them and he also left the office and gave them a lift upto the taxi stand and left those persons at Lotus Petrol Pump near Adarash Nagar. It is contended that the evidence of Niraj Pathak (P.W.8) regarding leaving the office and accompanying the persons till the taxi stand near Lotus Petrol Pump is clearly an omission and

contradiction to the effect that this witness never stated so to the police and, on the contrary, stated that the portion marked "A" which is just converse, viz., that he remained in the office and never left the office. It is contended that all that the prosecution has been able to establish through this witness is that there was some meeting between Madan Jain (P.W.6), this witness Pathak, deceased Lone, the appellant and one lady as well as one More. The said meeting was in respect of the making of a film. The said meeting had taken place in the afternoon on 16.12.1998 and, therefore, there was sufficient time-gap between the parting of these persons from the office of Niraj Pathak (P.W.8) and the murder which took place in the taxi in the Dockyard area of Mumbai. The counsel for the appellant has submitted that if the time-gap is large between the point of time when the accused and the deceased were last seen and if there exists even a small possibility that any other person could have met the deceased, then the circumstance of last seen together loses its significance. In order to substantiate this contention, reliance is placed on various authorities of the apex Court, some of which are reported in AIR 2005 SCW 905. (2006) 10 SCC 172. (2002) 8 SCC 45 and (2008) Cri.L.J. 3502. It is contended that in the instant case, the circumstance of last seen together is not established by the prosecution. It is submitted that Madan Jain (P.W.6) does not even claim that the deceased accompanied them to the meeting where the appellant was supposed to be present, though Niraj Pathak (P.W.8) had said so in his evidence. It is, therefore, contended that there is no corroboration between the evidence of Madan Jain (P.W.6) and Niraj Pathak (P.W.8) relating to the circumstance of last seen together in the afternoon on 16.12.1998.

9. The counsel for the appellant further contended that the panchanama dated 16.12.1998 drawn in the taxi in which it is clearly mentioned that the deceased was found with certain pamphlets and literature relating to Akhil Bhartiya Sena, which is a political party. Therefore, it is clear that the deceased had taken some papers relating to his political party of which he was a leader on that day and obviously had some meeting with Niraj Pathak (P.W.8). It is submitted that the said finding of literature of Akhil Bhartiya Sena assumes significance because the wife of the deceased Suvarna Sudhakar Lone (P.W.1) has clearly admitted in her cross-examination that her husband was at one time with Shiv Sena and when he shifted to Akhil Bhartiya Sena, the workers of Shiv Sena were displeased. Her husband informed her that he was having danger to his life because of his change of political parties. It is, therefore, contended that the possibility of this being the cause of murder cannot be ruled out. The circumstance of last seen together, therefore, in these circumstances has no significance and has not been established by the prosecution.

10. The learned Counsel for the appellant further contended that so far as the recovery of cartridges from the taxi on 16.12.1998 in the night at around 9.30 is concerned, it is the case of the prosecution that certain cartridges were recovered from the taxi which were supposed to have been used in the commission of the murder. These cartridges were alleged to have been seized

from the spot. It is submitted that a perusal of the panchanama (exh.125) shows that cartridges which were found in the taxi were not seized. They were not even labelled with the signatures of panchas. The entire panchanama does not mention sealing or labelling of these cartridges at all. A perusal of this panchanama clearly indicates that some glass pieces were labelled with panchas' signatures and there is no mention about sealing in the body of the panchanama. Sealing is different from labelling. It was incumbent on the prosecution to seal the property in order to rule out the possibility of tampering. Affixing labels of panchas signature on the particular article is only to identify the article and it is not for the purposes of ruling out tampering of the said article. It is further contended that from the testimony of panch (P.W.11), it is clear that there was no sealing or labelling on the spot, the police only seized the articles. It is submitted that the prosecution has not examined the second panch deliberately knowing that he would also support the version of the defence. Therefore, the evidence of the prosecution is lacking in this regard which goes to the root of the matter.

11. The learned Counsel for the appellant further submitted that the evidence of the Investigating Officer Jalindar Laxman Khandgale (P.W.16) shows that the packets were sealed with the panchas' labels only and there was no sealing done independently. Similarly, Tukaram Kuduba Bhalerao (P.W. 17) claims that the cartridges were taken charge of not by sealing them but by labelling them with panchas' signatures. He does not say that they were sealed and separately labelled. The counsel for the appellant has contended that there is no evidence to show that the articles were actually sealed on the spot. To put the panchas' label and call it sealing is not sealing. It is submitted that if the articles were not sealed, the possibility of tampering was not ruled out and, therefore, the second circumstance of recovering cartridges from the taxi also loses its significance. In order to substantiate his contention, reliance is placed on various decisions which are: (i) 2004 All M.R. (Cri.) 3257: (ii) 1994 Vol. 4 B.C.R. 85: and (iii) Salim Akhtar @ Mota Vs. State of Uttar Pradesh, . The learned Counsel for the appellant has submitted that the entire prosecution case falls to the ground on the bare reading of the panchanama which clearly establishes that the articles found were neither sealed nor labelled and in view of the law declared by the apex Court, the appellant-accused is entitled to get the benefit in this regard. It is contended that the prosecution has to stand on its own legs, not cross-examine the witnesses and the Investigating Officer, in this regard, does not assume any importance as the prosecution cannot rely upon the weakness of the defence and must prove the charge beyond all reasonable doubt. The counsel for the appellant further contended that the prosecution was also duty bound to show that the articles were in a sealed condition from the time they were seized from the spot on 16.12.1998 till they were sent to the Chemical Analyser on 31.12.1998. There is no evidence to show that the articles were sealed or they remained in a sealed condition and/or in whose custody they were during the period from 16.12.1998 to 31.12.1998 and in the absence of the same, it is fatal

to the prosecution. In order to substantiate this aspect, reliance is placed on the judgment of this Court reported in 1994 (4) Bom.C.R. (Cri.) 85 and State of Rajasthan Vs. Daulat Ram, .

12. As regards the recovery of revolver allegedly on 24.12.1998, it is contended that the prosecution has relied upon the panchanama (exh.28). The revolver is alleged to have been recovered from the appellant along with some cartridges. It is contended that in the said panchanama also, it is not mentioned that these articles were sealed after their seizure. In the absence of any evidence of sealing on the spot in respect of the articles, no reliance can be placed upon the recovery of the revolver and cartridges even for the purpose of establishing the charge under the Arms Act, though the defence is disputing the fact that anything was seized from the appellant. It is contended that if something was allegedly found from the appellant, then u/s 51 of the Cr.P.C, the appellant ought to have been given a receipt of this. Admittedly, it has not been done. Similarly, u/s 107 of the Cr.P.C., if during the search of premises, something is found, then a copy of this list has to be given to the person from whose premises it was so found. This is also not done in the present case which creates doubt about the alleged recovery.

13. The counsel for the appellant further contended that it is the case of the prosecution that the revolver and cartridges were kept by the police and brought them. This is the substantive evidence of Manohar Baburao Bhosale (P.W.4) who has not been declared hostile and shows that the police had brought pistols and five to six cartridges and kept them on the table. The evidence of Manohar Baburao Bhosale (P.W.4) is corroborated by the evidence of Ganesh Shankar Tawade (P.W.7) in this regard. The counsel for the appellant further submitted that there is a clear-cut discrepancy in what has allegedly been seized on 24.12.1998 and what was sent to the Chemical Analyser. The following chart will highlight this aspect:

14. The counsel for the appellant further submitted that there is no evidence to show that between 24.12.1998 and 31.12.1998 where the said articles were kept and whether they were in a sealed condition and who took them to the Chemical Analyser. The statement of the carrier was also not recorded nor the carrier was examined. It is contended that all these circumstances create grave doubt about the genuineness of the prosecution case. The chain of circumstances is far from complete. The prosecution has thus miserably failed to prove the charge against the appellant beyond reasonable doubt and, therefore, the finding of conviction is liable to be quashed and set aside and the appellant deserves to be acquitted.

15. Mr. Shinde, the learned Addl. Public Prosecutor for the State, has submitted that in the instant case, the prosecution has examined as many as 17 witnesses. However, the taxi driver Shaikh Mohd. Mumtaz Suleman (P.W.2), Mohd. Rafiq A.H. Kadge (P.W.3), Manohar Baburao Bhosale (P.W.4), Aslam Abdul R. Patni (P.W.5) and panch witness Ganesh Shankar Tawade (P.W.7) have turned hostile. It is contended that the case of the prosecution is based on circumstantial

evidence and the prosecution has succeeded in proving that the deceased was last seen together with the accused on the date of the incident, recovery of cartridges from the taxi where the dead-body of the deceased Sudhakar was found as well as the recovery of revolver and cartridges from the appellant on 24.12.1998 at the time of his arrest.

16. The learned Addl. Public Prosecutor has submitted that in order to prove the circumstance of the accused last seen together, the prosecution has examined Madan Jain (P.W.6) and Niraj Pathak (P.W.8). It is the case of the prosecution that on the date of the incident i.e. on 16.12.1998 at about 1.30 p.m., the appellant, Madan Jain, the deceased Sudhakar and one lady went to the office of Niraj Pathak (P.W.8) who is a film writer and Director. All of them were in the office of Niraj Pathak (P.W.8) and discussed the details about the film which was proposed to be made on the life of Mr. Arun Gavli. In the late afternoon, the deceased, the appellant and the other woman left the office of Niraj Pathak (P.W.8). They hired a taxi and went towards Dockyard which is near Mazgaon. At a later point of time, the dead-body of the deceased Lone was found in the said taxi, driven by taxi driver Shaikh Mohd. Mumtaz Suleman (P.W.2).

17. The learned Addl. Public Prosecutor has contended that Madan Jain (P.W.6) and Niraj Pathak (P.W.8) identified the appellant-accused in the identification parade conducted by P.W.9 Pramod Sawant, S.E.O. on 7.1.1999. The learned Addl. Public Prosecutor, therefore, contended that the prosecution successfully proved the circumstance of deceased last seen together with the accused by adducing evidence which is clinching in nature. The learned Addl. Public Prosecutor for the State has further submitted that the other important circumstance i.e. seizure of two empty cartridges from the taxi has been proved by panch witness Mohd. Asif Abdul Kadir Shaikh (P.W.11). The seizure panchanama is at exh.36. The seizure was conducted by Tukaram Bhalerao (P.W.17) in the presence of panch witness Mohd. Asif Abdul Kadir Shaikh (P.W.11). The substantive evidence of panch witness as well as Tukaram Bhalerao (P.W.17) would show that the articles i.e. empty cartridges were seized and kept in a sealed condition. The learned Addl. Public Prosecutor further contended that the appellant was arrested on 24.12.1998 by Police Inspector J.L. Khandagle. One revolver and live cartridges were seized from the person of the appellant. The relevant panchanama is at exh.28. It is submitted that the articles which were seized under exh.28 were kept in a sealed condition. The learned Addl. Public Prosecutor further submitted that all these articles were forwarded to the Ballistic Expert and the Chemical Analyser in order to obtain their report in this regard. It is contended that the recovery of pistol and live cartridges from the person of the accused and the empty cartridges seized from the taxi were matched with each other. As per the opinion of the Ballistic Expert, it was established that empty cartridges were fired from the very same pistol which was seized from the person of the appellant. Panch witness Ganesh Shankar Tawade (P.W.7) proved the seizure panchanama (exh.28).

18. The learned Addl. Public Prosecutor has further submitted that the postmortem examination on the dead-body of the deceased Lone was conducted on 17.12.1998 and external injuries 1, 3, 5 and 7 were caused by bullets. All the injuries mentioned in column No. 17 were antemortem and the probable cause of death was haemorrhage and shock due to firearm injury. The Addl. Public Prosecutor, therefore, contended that the circumstantial evidence adduced by the prosecution proves all the circumstances which are adequate to complete the chain and to prove the offence charged against the appellant beyond all reasonable doubt. The learned Addl. Public Prosecutor further contended that the prosecution examined P.W.16 Jalindar Laxman Khandgale, the Investigating Officer, who has recorded the statements of the witnesses and has proved the recovery panchanama (exh.28). The articles were sealed by him in the presence of panchas. It is pertinent to note that the defence has not cross-examined this witness on the point of sealing of articles, though much hue and cry was made in this regard while arguing this Appeal by the counsel for the defence. It is contended that the prosecution has examined Tukaram Bhalerao (P.W.17), who has conducted the seizure panchanama (exh.36). No question has been asked by the defence in his cross-examination as to whether the articles seized under the seizure panchanama (exh.36) were sealed. It is submitted that the prosecution has proved its case beyond reasonable doubt and mere recovery report was not handed over to the accused will not adversely affect the prosecution case, recovery of pistol and live cartridges from the person of the accused, recovery of empty cartridges seized from the taxi were matched with the live cartridges, the Ballistic Expert's and Chemical Analyser's reports corroborate the prosecution case and, therefore, the appeal suffers from lack of merit and liable to be dismissed. In order to substantiate his contention, reliance is placed on the decision of this Court in Nitin Laxman Pansare v. State of Maharashtra 2009 All M.R. (Cri.) 2858 (evidentiary value of hostile witness) and Rajesh A. Behere v. State of Maharashtra 2009 All M.R. (Cri.) 1612.

19. We have given our anxious thoughts to the various contentions canvassed by the respective counsel, carefully scrutinised the prosecution evidence and also considered the decisions cited by the respective counsel for the parties. The case of the prosecution is based on circumstantial evidence. The circumstances from which the conclusion of guilt is to be drawn must be fully established and proved circumstances must be consistent only with the hypothesis of guilt of the accused and should rule out the element of innocence. There is no quarrel with this proposition and, therefore, it is not necessary to discuss the decisions of the apex Court on this subject cited by the learned Counsel for the appellant.

20. In the instant case, the counsel for the appellant vehemently argued that the articles seized from the spot vide exh.36 i.e. empty cartridges were not sealed at all. They were not even labelled with the signature of panchas. It is further argued that though it has come in the evidence of the Investigating Officer J.L. Khandgale (P.W.16), the packets were sealed with pancha's label, that does not mean that the articles were independently sealed. It is contended that since the

articles were not sealed, the possibility of tampering was not ruled out by the prosecution and, therefore, such circumstance cannot be relied upon in view of the law laid down by this Court and the apex Court in this regard.

21. The issue regarding sealing of the article is concerned, this aspect needs to be understood in the right perspective in the back-drop of the settled legal position. In the instant case, exh.28 is the seizure panchanama in respect of the pistol and live cartridges seized from the person of the appellant-accused. Though panch witness Ganesh Tawade (P.W.7) turned hostile, the contents of the said panchanama have been proved by the Investigating Officer J.L. Khandgale (P.W.16). P.W.16 in his examination-in-chief has stated that he arrested the appellant on 24.12.1998, conducted personal search, one pistol kept in the holster which was loaded with six live cartridges was found in his possession. In the right side packet, one magazine was found. Four live cartridges were inside the said magazine. The Investigating Officer specifically stated in his examination-in-chief that pistol, magazine and cartridges were packed and sealed with panchas' signatures on the labels. The said seizure panchanama is at exh.28. It is pertinent to note that the Investigating Officer (P.W.16) in his examination-in-chief though has specifically stated about sealing of the article seized under panchanama (exh.28) from the person of the appellant, there is no cross-examination whatsoever conducted by the defence on this aspect. The defence has not asked any question to this witness whether the sealing of article is different from putting labels with panchas' signatures on the packets. The cross-examination of this witness is completely silent on these aspects. It is important to note that the contents of (exh.28) are proved by substantive evidence of the Investigating Officer (P.W.16) and the fact of sealing of articles with signatures of panchas on the labels mentioned by this witness in his ocular testimony before the Court which has gone unchallenged. Hence, whether the defence now can make a capital of the said fact which the defence failed to challenge by cross-examining the witness on this issue, needs consideration.

22. It is well-settled that the prosecution has to stand on its own legs and is required to prove the charge against the accused by adducing cogent and convincing evidence. However, whenever the defence has declined to avail the opportunity to put his essential and material case in the cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that cross-examination of the witness is merely a technical rule of evidence. It is the rule of essential justice. Therefore, an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination, would lead to the inference that the evidence is accepted, subject of course to its being assailed as inherently incredible or palpably untrue. It is well-settled that whenever a statement of fact made by a witness in his examination-in-chief is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed. In other words, if there is no cross-examination of a prosecution witness in respect of certain facts, it will show that said fact is not challenged. Similarly, if there is a particular fact stated

by the witness in the statement made in the examination-in-chief which is questionable or which requires explanation and the defence counsel failed to ask questions in the cross-examination of such witness on those particular aspects, it shall demonstrate that evidence in chief was not disputed, unless of course there are inherent improbabilities. The legal position which emerges is that once the right to cross-examine a witness is foregone, it is not open to a party to make any grievance about it. It is a rule of essential justice that whenever the defence has declined to avail himself of opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue is not disputed.

23. In the instant case, the Investigating Officer Khandgale (P.W.16) who has specifically stated in his examination-in-chief that the pistol, magazine and cartridges seized under panchanama (exh.28) were packed and sealed with the signature of panchas on the labels. Omission or neglect on the part of the defence to challenge the said evidence in the cross-examination would show that the said evidence is not disputed and there is nothing on record to hold that the said evidence is either inherently incredible or palpably untrue. It is pertinent to note that the defence for the first time before this Court made a hue and cry about the fact of sealing of the articles on the ground that the sealing and labelling with panchas' signatures are independent actions and even if the articles are labelled with panchas' signatures, it would not amount to sealing of that article in order to rule out the possibility of tampering. If the fact of sealing/labelling the articles was questionable or required an explanation from the witness or the Investigating Officer, failure on the part of the defence in the present case to cross-examine the witness on this aspect would show that the evidence in chief was not disputed by the defence and it will not be open for the defence to canvass the grievance, in this regard, at a later point of time in the appeal, since it was never challenged before the trial Court. There is no quarrel about the proposition that if the articles are not sealed and are not kept in a sealed condition till they are sent to the Chemical Analyser for analysis, the possibility of tampering cannot be ruled out and such circumstance should not be relied upon. There is no quarrel with the said proposition. However, in the present case, in view of the evidence of the Investigating Officer, the same is not attracted and, therefore, we do not intend to refer to the decisions cited by the counsel for the appellant in this regard, since there is no quarrel about the law declared on this subject in those decisions by the apex Court/High Courts.

24. Similarly, so far as the seizure panchanama (exh.36) is concerned, the prosecution has examined panch witness Mohd. Asif Shaikh (P.W.11) to prove the contents thereof. The proceedings of seizure panchanama were conducted by (P.W.17) Tukaram Bhalerao. P.I.P.W.11 in his examination-in-chief has stated that in his presence, two empty cartridges were found in the taxi and other papers were seized by the police. His signature was obtained on the panchanama. Police Inspector Bhalerao (P.W.17) in his examination-in-chief has stated that all the articles were taken in charge and were sealed with pancha's signatures and labelled. It is pertinent to note that there is absolutely no cross-examination by

the defence on the aspect of sealing of articles seized under panchanama (exh.36). The cross-examination is completely silent in this regard. In the context of the settled legal position, there is no reason for us to disbelieve the substantive evidence of Mohd. Asif Shaikh (P.W.11) and (P.W.17) Bhalerao, P.I. in respect of the seizure, sealing and labelling of the articles seized under seizure memo (exh.36). Similarly, the evidence of the Investigating Officer Khandgale (P.W.16) for the same reason cannot be disbelieved in respect of the seizure, sealing and labelling of articles with the signatures of panchas which were seized under seizure panchanama (exh.28).

25. It is no doubt true that panch Ganesh Tawade (P.W.7) was declared hostile by the prosecution. However, the evidence of seizure panchanama (exh.28) can be believed on the basis of the evidence of the Investigating Officer Khandgale (P.W.16), who has proved Exh.28, unless the evidence of the said police officer is shown to be otherwise unreliable. In the instant case, there is nothing on record to show that the evidence of Investigating Officer Khandgale (P.W.16) is either untrustworthy or unreliable. It is, therefore, evident that the prosecution has succeeded in establishing the circumstances in respect of the recovery of empty cartridges from the taxi as well as recovery of revolver and live cartridges from the person of the appellant on 24.12.1998.

26. So far as the circumstance of the deceased last seen together is concerned, the prosecution has heavily relied on the evidence of Madan Jain (P.W.6) and Niraj Pathak (P.W.8). We will first consider the evidence of Niraj Pathak (P.W.8). Niraj Pathak in his examination-in-chief has specifically submitted that on 16.12.1998 the appellant Salim, deceased Sudhakar Lone, Madan Jain (P.W.6) and one other female came to his office at about 1.30 p.m. There was a discussion about the making of a film for a while in the office of Pathak. P.W.8 further stated in his testimony that after the discussion about payment, all of them decided to meet again after one week in the office of P.W.8. This witness was also called to identify the appellant in the identification parade conducted by (P.W.9) Pramod Sawant, S.E.O., on 7.1.1999 and he identified the appellant in the identification parade. The tenor of the cross-examination conducted by the defence would show that the defence has not seriously disputed the fact of meeting which took in the office of Pathak at 1.30 p.m. on 16.12.1998 wherein the appellant, the deceased, Madan Jain and one other female were present. P.W.8 has admitted in his cross-examination that the persons who had come to visit him were not known to him except Jain. He further admitted that those persons had come to see him in connection with the making of a movie, meeting was held in his cabin and the persons who had accompanied the appellant did not take part in the discussion. He dropped the appellant, deceased Lone and the other female at the Lotus Petrol Pump from where they took a taxi and went away. There is an omission brought out in this regard by the defence in his police statement about leaving these persons near the taxi stand. The said omission, in our view, is not a material omission and does not affect the veracity of the substantive evidence of this witness on the point of the deceased last seen with

the appellant in his office on the date of the incident. The prosecution has examined P.W.8 in order to establish that on the date of the incident i.e. on 16.12.1998 at about 1.30 p.m., the deceased was in the company of the accused for the whole afternoon. There is no material omission and contradiction in respect of the material particulars of the prosecution case disclosed by P.W.8 in his substantive evidence. Madan Jain (P.W.6) is another witness who has corroborated the fact of meeting being held in the office of P.W.8 on 16.12.1998 at about 1.30 p.m. and in the same meeting the appellant and others were present. It is no doubt true that this witness has not specifically mentioned in his evidence the presence of the deceased in the said meeting. However, the evidence of P.W.8 in respect of the presence of the appellant, the deceased, Madan Jain and one female in the meeting which was held on the date of the incident i.e. on 16.12.1998 at 1.30 p.m. in his office was not seriously disputed by the defence and, therefore, the said omission not being material, does not render the evidence adduced by the prosecution on the point of last seen, unreliable or untrustworthy.

27. It is pertinent to note that Madan Jain (P.W.6) and Niraj Pathak (P.W.8) identified the appellant-accused in the identification parade. The another circumstance which is incriminating and connects the appellant with the crime in question is the Ballistic and Chemical Analyser's reports (exh.67 and 68). It has been established by the prosecution that the empty cartridges seized from the spot of the incident i.e. the taxi were fired from the same pistol which was recovered from the appellant Salim. The prosecution has also established that live cartridges seized in the present case also matched with the empty cartridges which were recovered from the spot of the occurrence.

28. In the instant case, the learned Counsel for the appellant pointed out some discrepancy with respect to the number of the pistol. However, these discrepancies were not in respect of the basic number of the pistol and, therefore, do not adversely affect the credibility of the prosecution evidence. The trial Court considered the opinion given by the Ballistic Expert based on the queries made by the Investigating Officer and found that the Expert's report coupled with the fact that empty cartridges recovered from the scene of offence proved the charge u/s 3 read with Section 25(1-B) and Section 5 read with Section 27 of the Arms Act. These findings, in our view, are sustainable in law. Considering the totality of the evidence of the prosecution, the circumstances which are established by the prosecution to complete the chain are as follows:

(i) On 16.12.1998 the deceased Lone, appellant Salim, co-accused Nos. 2 and 3 met Niraj Pathak (P.W.8) in his office and discussed about making of a film on the life of Mr. Arun Gavli. The meeting took place at about 1.30 p.m.

(ii) The evidence of Madan Jain (P.W.6) and Niraj Pathak (P.W.8) corroborates the fact that the deceased, the present appellant as well as the co-accused and Madan Jain (P.W.6) participated in the meeting which was held on 16.12.1998 in the office of Niraj Pathak (P.W.8).

(iii) After the meeting, deceased Lone left the office along with the appellant and others.

(iv) The incident had taken place on the same day in the taxi of P.W.2 Shaikh Mohd. Mumtaz Suleman. Sudhakar Lone received bullet injuries in the same taxi.

(v) From the spot of the incident (taxi), the police recovered three empty cartridges.

(vi) Identification parade was held in which Madan Jain (P.W.6) and Niraj Pathak (P.W.8) identified the accused to be the person who was present with the deceased Lone at the time of meeting which was held in the office of P.W.8.

(vii) The evidence of the Special Executive Magistrate Mr. Sawant who conducted the identification parade corroborates the evidence of P.W.6 and P.W.8 insofar as it relates to the identification of the accused.

(viii) On 24.12.1998 the appellant was arrested by the police. One pistol and live cartridges were recovered from the person of the appellant.

(ix) The report of Ballistic Expert demonstrates that the empty cartridges which were found in the taxi were fired from the pistol which was seized from the person of the appellant Salim.

(x) The empty cartridges were matched with the live cartridges which were recovered from the person of the appellant.

(xi) The post-mortem report shows that the injuries received by the deceased were bullet wounds. Hence, the medical evidence corroborates the material particulars of the prosecution case.

The above referred circumstances established by the prosecution rule out the hypothesis of innocence of the appellant and result in proving the charge framed against the appellant beyond all reasonable doubt.

29. We want to express that it is not a rule of law that whenever panch witness to the recovery turns hostile or does not support the case of the prosecution, the Court will have no option but to reject the evidence of recovery of article in toto. It is well-settled that the evidence of the Investigating Officer who has recovered the articles, if convincing, the evidence as to recovery need not be rejected on the sole ground that the panch witness failed to support the prosecution case in this regard. It is, therefore, evident that in the instant case, the evidence of the Investigating Officer who has effected the recovery of articles such as cartridges, pistol and sealing of articles being convincing, the question of rejecting the said evidence merely on the ground that the evidence of panch witness in respect of seizure of such articles did not support the prosecution does not arise. It is well-settled that last seen theory comes into play when the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. However, while

appreciating the evidence adduced by the prosecution on the point of last seen, it is necessary to consider it in view of the other positive evidence adduced by the prosecution to complete the sequence of events which must positively establish the guilt of the accused. In the instant case, the circumstance of the deceased last seen with the accused, coupled with the other circumstances established by the prosecution, in our view, prove the charge of murder as well as the charge under the Arms Act. In the instant case, the deceased was last seen with the appellant in the late afternoon on the date of the incident and the dead-body of the deceased was found on the same day at about 9.30 p.m. in the taxi. It is pertinent to note that the defence of the appellant is that of total denial and there is nothing on record to show that the appellant and the deceased parted company after the deceased was last seen with the appellant. It is also well-settled that in circumstantial evidence, the accused taking a false defence is an additional circumstance which completes the chain. In the instant case, the deceased and the accused were present in the meeting which was held in the office of P.W.8 in the afternoon on 16.12.1998. The accused and the deceased after the meeting, left the office of P.W.8 together and the dead-body of the deceased was found at about 9.30 p.m. on the same day. Similarly, there is no explanation given by the accused whether the deceased parted his company after they left the office of P.W.8 together. It is, in these circumstances, that the evidence adduced by the prosecution on the aspect of the accused last seen with the appellant assumes importance and coupled with the other circumstances established by the prosecution, the findings of conviction recorded by the trial Court for the offence charged, in our view, are sustainable in law.

30. Lastly, the contention canvassed by the learned Counsel for the appellant that the procedure stipulated under Sections 51 and 100(7) of the Cr.P.C. was not followed by the Investigating Officer creates doubts about the genuineness of the prosecution case as well as the evidence adduced by the prosecution, in our view, does not improve the case of the appellant nor affects the genuineness as well as the credibility of the evidence adduced by the prosecution. The substantive evidence adduced by the prosecution is cogent, trustworthy and consistent with the material particulars of the prosecution case, in that event, non-observance of the procedure contemplated under Sections 51 and 100(7) of the Cr.P.C., by itself would not render such evidence untrustworthy or unreliable. In the instant case, non-observance of the procedure under the said sections by the prosecution does not affect the prosecution evidence nor creates any doubts in respect of the same.

31. For the reasons stated hereinabove, the Criminal Appeal suffers from lack of merits and the same is dismissed.