

(2003) 10 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Criminal Appeal No. 4 of 2002 and Cr. Ref. No. 27 of 2002

Shabir Ahmed Teli

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 16-10-2003

Acts Referred:

Ranbir Penal Code, 1989 — Section 109, 201, 302, 341

Citation : (2010) 3 JKJ 442

Hon'ble Judges : V.K. Jhanji, J; Syed Bashir-ud-Din, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Syed Bashir-ud-din, J.—In all four accused have been tried under sections 302/341/109/201 RPC and 7/25 Arms Act. Appellant Shabir

Ahmad Teli accused has been convicted for the offence of culpable homicide amounting to murder of one Gani Shah and sentenced to life

imprisonment u/s 302 RPC. The other three accused are acquitted of the charge for offences under sections 302/109 RPC. Against the

judgment/order of conviction/sentence, life convict Shabir Ahmad Teli, has filed appeal and the trial court of District and Session Judge, Anantnag

has made reference for confirmation of imposed sentence of life imprisonment u/s 374 Cr.P.C.

2. Prosecution case in brief is that on 6.8.1997 at about 8.30 P.M. the deceased Gani shah was on way to his home, after offering ""Isha"" prayers

at the local Mosque in village Magray-pora of Tehsil Anantnag. Accused Shabir Ahmad Teli intercepted him on the lane, just outside his kitchen

and after taking aim on him fired several shots from the gun which he was carrying. Gani Shah was hit and received gun shot wounds. He

succumbed to the injuries. His wife and son, as also people who gathered around, lifted him physically and he was taken inside the house. The

motive for the crime is stated to be eagerness and fondness of accused to many deceased daughter 'Lovely' and the deceased and his daughter's

refusal to accept marriage proposal from the accused.

3. On the next morning of the night following the incident, that is early 7.8.1997, Ghulam Rasool Shah Chowkidar of the village learnt that Gani

Shah had been killed. He alongwith 'Lumberdar' of the village, one Mohammad Ahsan Dar, reported matter to the concerned police station at

Achabal. A case was registered at the police station. The offence/crime was investigated and final report (challan U/s 173 Cr.P.C.) was filed

against the accused Shabir Ahmed Teli before Chief Judicial Magistrate Anantnag, who committed the case to Session Court at Anantnag.

Accused Shabir Ahmed Teeli was charged for commission of offences under Sections 302/341/201 RPC read with Section 7/25 Arms Act.

Accused pleaded not guilty and case was set for prosecution evidence. Before the evidence could be received/recorded, Public prosecutor at the

Sessions Court filed an application for further investigation of the case u/s 170(8) Cr.P.C. After objections were invited and matter considered, the

application for further investigation was allowed. On such investigation a supplementary report was submitted to the court by the Investigating

agency against other three accused viz., Manzoor Ahmad Wagay, Nazir Ahmad Hajam and Shabir Ahmad Hajam. These accused were charged

for commission of offences u/s 302/341/201/109 RPC and 7/25 Arms Act. These accused also entered a plea of no guilt.

4. Prosecution has examined as many as twelve witnesses, followed by recording of the statement of accused u/s 342 Cr.P.C. In defence seven

witnesses have been examined. The trial court of District and Session Judge Anantnag upon hearing, perusal of record, appreciation of evidence

and on consideration of the matter has recorded a finding of conviction and sentence as above against the accused Shabir Ahmad Teli and

recorded judgment/order of acquittal against the other three accused.

5. In the appeal, the judgment of conviction and order of sentence passed against the appellant/accused Shabir Ahmad Teli is challenged on the

grounds taken in the memo of appeal and as per submissions of the learned

counsel on the plea that the evidence is for the most part hear-say. The credibility of witnesses has not been properly gauged and evidence is not correctly appreciated. No post mortem is conducted of the deceased. In absence of such examination and autopsy report, the cause of death could not be determined and there is no occasion to hold that the accused/appellant is guilty of committing culpable homicide by gun shot wounds. The gun alleged to be fired at Gani Shah has not been recovered. The investigating agency has made no effort to trace and recover the gun. The investigating agency has also committed error in citing some persons as eye witnesses, when as per Nissar Hussain Sub Inspector who initially conducted investigation, there are no eyewitnesses to the occurrence. Besides there are glaring contradictions in the statements of the witnesses, which affect the very cogency of the evidence against the accused. The scene and site of occurrence as also topography of the place, suggest that the witnesses could not have been in a position to spot the occurrence. The name of the accused is not in the FIR lodged by Chowkidar and Lumberdar and it is subsequent manipulation that the name of the accused Shabir Ahmad Teli has been fitted in the story. The evidence of deceased's son Zakir Hussain Shall and his wife Fatah as also his daughter Zubidah and son-in-law Abdul Rehman Shah, cannot be believed to be trust-worthy, as they were inimical to accused. The accused has been acquitted of charge u/s 7/25 Arms Act. Therefore, he could not have been convicted and sentenced for offence of murder by gun shot wounds on firing the gun. The investigation has been perfunctory and has been deficient. It has failed to locate the real culprits responsible for death of Gani Shah.

6. The Government Advocate while countering the submissions of other side, urges that the case is based on direct evidence. The occurrence is viewed by number of witnesses. Eyewitness account is fully corroborated by circumstances, proved motive for the crime and culpability of the accused in killing Gani Shah by a pre-conceived planned act of opening fire at said Gani Shah. The Session Judge has appreciated evidence to pointedly prove the complicity of the accused in commission of the crime. Merely because there is no post mortem examination of the dead body or there is deficiency in the investigation of the case would not ipso-facto absolve accused of his penal liability in killing Gani Shah and that too in

the face of eyewitness account offered by eye-witnesses one after another. The failure to seize the gun in the back-ground that the accused, has been admittedly a surrendered militant acting as 'source/Mukhbir' of Army, commonly known as Tkhwani' is not in the facts and circumstances fatal to this case. The possession of gun by the accused at the time of commission of offence is not a distinct possibility. In fact it is common knowledge that such persons who cooperate with army and are its source do carry guns and the phenomena is not uncommon in the present day conditions of the State. The hyper technical view cannot be taken of the matter to absolve accused, when the trial Judge has scrutinized the evidence and reached the conclusion based on such evidence. The sight of occurrence and the topography on spot is not such that the eye witnesses cannot be witnesses of the actual occurrence. Merely because some of the witnesses are close relations of the deceased, that perse is no ground to discard the evidence, moreso, when the trial court of District and Session Judge Anantnag is alive to this circumstance and has taken care and observed caution, while scrutinizing the related portion/part of evidence. The absence of name of accused in FIR is not an unusual circumstance, from which much is sought to be drawn by the defence counsel, in as much as Chowkidar and Lumberdar who have lodged FIR, have as per their own showing lodged the report after some one next morning told them that on the previous evening at about 8.30 P.M. some unknown gun wielding persons have shot dead Gani Shah while he was walking back to his home after offering 'Isha' prayers at the local Mosque. The moment police reached the spot and inquired about the matter, they were given the name of the accused by one and all witnesses. FIR is not end-all and be-all of the prosecution case. The Govt. Advocate further submits that merely because accused is acquitted of the charges U/s 7/25 Arms Act for failure of prosecution to prove the charge and for want of sanction for prosecution/ trial, much cannot be made out of these circumstances. The motive for the murder is outright refusal by the deceased to give his daughter 'Lovely' in marriage to the accused. Accused has been fond of and desirous to marry her. Spurning the offer by the father and the girl, was too much for the accused, who in the situation he was placed, with access to the gun and the bullets, did not even hesitate to kill him. The acquittal of co-accused charged vicariously as abettors does

not affect the culpability of the accused Shabir Ahmed Teli against whom case is made out beyond all shadows of doubt. Only because witnesses

have been believed to the extent of incriminating evidence against Shabir Ahmed Teli and not as against the other accused, the accused Shabir

Ahmed Teli cannot for that reason alone earn acquittal. The case against the accused Shabir Ahmed Teli has been proved beyond all reasonable

doubt and his conviction and sentence is sustainable on cogent and sufficient evidence.

7. The norm and standard of proof epitomized by phrase, 'beyond reasonable doubt', is the legal requirement of proof in a criminal case.

Obviously 'reasonable doubt', has to be a fair doubt based on reason and common sense emerging from evidence on record. Its concept of

probability and its degree is to express upon reason and objectivity. The cardinal principle of criminal jurisprudence that a case can be said to be

proved only when there is certain and explicit evidence cannot be overstated. The general or primary burden of proving a case is throughout on

prosecution. The prosecution evidence oral or documentary is to be scrutinized, evaluated and appreciated by this court.

(See: Dr. N.G. Dastane Vs. Mrs. S. Dastane, ; Sawal Das Vs. State of Bihar, ; Sharad Birdhi Chand v. Sarda, (AIR 1984 SC 624) and State of

U.P. Vs. Krishna Gopal and Another,

In State of Punjab v. Karnail Singh (AIR 2003 SCW 4065), the Apex court observed:

Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence.

Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing

justice according to law. Gurbachan Singh Vs. Satpal Singh and others, , Prosecution is not required to meet any and every hypothesis put forward

by the accused, State of U.P. Vs. Ashok Kumar Srivastava, . A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair

doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is

artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the

meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond

reasonable doubt is a guideline, not a fetish. Inder Singh and Another Vs. The State (Delhi Administration), . Vague hunches cannot take place of

judicial evaluation. ""A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see

that a guilty man does not escape. Both are public duties."" (Per Viskcount Simon in Stirland v. Director of Public Prosecution (194 AC (PC) 315)

quoted in State of U.P. Vs. Anil Singh, . Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford

any favourite other than truth. Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, State of U.P. Vs. Krishna Gopal and Another,

and Gangadhar Behera and others v. State of Orissa, (2002(7) Supr 276).

8. The counsel for the parties have taken us through the evidence. We have scanned and evaluated the whole evidence, perused documents and

judgment and considered the matter.

9. The recorded depositions show that there are as many as six eye witnesses to the occurrence. Four relation witnesses and two unrelated and

independent witnesses have given eye-witness account of occurrence as evidence in the case. Zakir Hussain (son), Fatah (Widow), Zubeedah

(Daughter) and Ab. Rehman shah (son-in-law) have unequivocally stated that while Gani Shah was on way to his home after offering 'Isha' prayer

at the local Mosque in the village, accused Shabir Teli waylaid on the lane just outside and in the vicinity of deceased's kitchen and fired gun shots

after taking aim at the deceased. Gani Shah received bullet injuries and succumbed to the injuries. People around came and shifted him to his

house. The version of events and incident offered by Zakir Hussain and Fatah (son and widow of the deceased) positively speaks of the son and

his mother having come out of the house with lantern in hand, after hearing gun shots to find Shabir Teli outside the house. Shabir Teli fired towards

Zakir Hussain's father and Fatah's husband. Gani Shah the moment later reached near his house abutting the lane. He received bullet injuries and

fell down and died soon after on spot. The motive and cause for death is stated to be refusal by Gani Shah to give his daughter 'Lovely' in marriage

to Shabir Teli, no matter accused was pressing them for accepting her marriage

with him and had even threatened the family and the deceased of dire consequences, if he failed to give his daughter in marriage to him. It is also in the evidence that Shabir Teli was a member of 'Ikhwan party' and was working with the Army. Witness Zakir Hussain deposed that the Police recorded his statement on the next day of occurrence and thereafter his statement was recorded twice by the police. FIR was lodged in this case by a person other than him, but he too filed an application before the police against accused Shabir Teli, wherein he has not mentioned the other three accused. It is also in his statement that he saw Aslam, Rasool Shah, Zubidah and Rehman Shah on spot at the time of occurrence. The accused before firing the fatal gun shots fired some shots to scare the people around, and he even asked him and his mother to stay inside the room though they stayed in the room, but were on took out from the open window. Fatah has also corroborated the version given by Zakir Hussain. Zubedah daughter and Abdul Rehman son-in-law of the deceased have in their deposition in the court sufficiently given out that no sooner Zubedah's father came out of the mosque and started to walk towards his house, she followed her father as on the day of the occurrence, she heard some gun shots and saw accused Shabir Teli on spot. Her father was asked to raise the hands by the accused Shabir Teli, to which the deceased asked as to what wrong he had committed. Accused Shabir Teli fired number of shots towards Gani Shah, who fell down. She took him in her lap and accused ran away from the occurrence. It is in her evidence that accused Shabir Teli wanted to marry her sister 'lovely' but she and her father refused to oblige him. Accused Shabir Teli was neighbour and was a member of Tkhwan' and was usually carrying a gun. It is also in her evidence that her residential house is close to the mosque. On hearing gun shots villagers did not come out of their houses immediately, in as much as, they were afraid but she, her husband, mother and brother were on spot. Her statement was recorded by the police after four days. As the accused was threatening her father, the moment accused opened fire, she and her family members understood that he has come to kill her father. The moment they heard first fire, her husband, and she came out of their house to follow her father to see accused killing her father by firing gun. This statement of her is corroborated by her husband Ab. Rehman Shah. It

is further in his evidence that accused in fact deputed one Manzoor Ahmed Wagay co-accused in the case to find if deceased was in the mosque

and it was this co-accused who informed him about deceased's presence in mosque. No sooner Gani Shah came out of the Mosque and reached

in the vicinity of his Kitchen on the lane, Shabir Teeli took aim and fired six shots from his gun towards Gani Shah who fell down and died on spot.

The accused ran away from the spot. It is also in his evidence that Shabir Teli is their neighbour and he was associated with the Tkhwan' and used

to carry a gun. He did hold threat to Gani Shah that in case he did not agree to marry his daughter Lovely with him, he would kill him. Seeing this

desire of his unfulfilled, he actually fired at and killed, Gani Shah. He has admitted that his statement too has been recorded two or three times by

the police on different occasions. Witness has refuted the suggestion that he was not on spot and did not witness the occurrence by his own eyes.

Besides the other accused Nazir Ahmad, Manzoor Ahmed Wagay and Shabir Hajam were also on spot, but they did nothing except Manzoor

Ahmed informed the accused Shabir Teli about the presence of the deceased in Mosque and deceased's expected return to his home, after

offering Tsha prayers'. Yet another witness Mohd. Aslam Shah has testified that he saw Shabir Teli accused with the gun standing near kitchen of

the deceased. No sooner Gani Shah while returning from the Mosque after prayers, reached near his house; accused Shabir Teli fired four bullets

in the chest of the deceased with his gun. Gani Shah was hit and died on spot. Shabir Teli was associated with Ikhwan and had gun with him.

Accused used to coerce Gani Shah to marry his daughter 'Lovely' with him, but the deceased refused to oblige him. It is in the evidence of the

witnesses that besides Zakir Hussain, Zubedah, Fatah and Rehman Shah, occurrence was witnessed by some other witnesses including Ali Mohd.

Lone. He also spotted three persons, besides Shabir Teli, running from the spot. His statement was recorded more than once by the Police and

even his statement is recorded U/s 164 Cr.P.C.

10. Ali Mohd. Lone, eye witness Neighbour of the deceased and accused, has unequivocally stated that he spotted accused Shabir Teli with gun

and the moment deceased appeared on spot, he took aim at him and opened fire. Gani Shah who was hit fell dead. The reason and the motivation

for commission of murder was deceased's refusal to give his daughter 'Lovely' to accused in marriage. The witness also did spot accused on spot.

11. From the evidence and the ocular account of the occurrence by witnesses it is more than made out that accused Shabir Teli did cause the

death of Gani Shah by fire arm, after shooting him down with the gun he was carrying. One and all witnesses have given very consistent, clear and

positive statements about complicity of the accused in the murder. The Assistant Surgeon Achabal has also spoken, on physical examination of the

dead body that the death is due to loss of blood, shock and hemorrhage due to bullet injuries deceased had received. The accused Shabir Teli has

been seen by one and all carrying the gun and shooting down the deceased. The gun was not recovered and seized by the investigating agency.

One would have appreciated if there would have been postmortem, but even in absence of atopsy report the eye witnesses account cannot be

brushed aside merely because there has been no postmortem conducted on the deceased. It cannot take away the positive impact of evidence

given by the eyewitnesses. Rule 618 (2) of J&K Police Manual, also envisages that the investigating officer may in appropriate case dispense with

the surgical examination of dead body, if such investigating officer is satisfied about the cause of death. In this case having regard to the eye-witness

account given by the witnesses, supported by the evidence of Asstt; Surgeon and the motive conclusively established by prosecution evidence, no

doubt is left about the death caused to Gani Shah by accused on firing the Gun. The I.O. states that he did not go for post-mortem examination as

the Dr. Assistant Surgeon at Achabal opined that the death caused by gun shots and wounds was evident.

12. Besides one Mohd. Afzal a marriage broker has deposed before the trial court that 'Lovely' was engaged at 'Gopal Pora', which accused

Shabir Teli did not like and the accused approached him to break the engagement and threatned him that in case he failed, he would kill him and

even threatened him with the Gun. Accused an 'Ikhwani' so approached him at his house at Kangan. 'Lovely' in her evidence deposes that Shabir

Teli wanted to marry her but she and her father refused. Accused threatened them with the gun which he used to carry. Villagers were afraid of him

for this reason. The accused killed her father, when she was away in the house of her cousin at 'Guri', as she was send their by her family after the

family members feared that Shabir Teli might forcibly kidnap her. She came to know about the occurrence after some time.

13. It is in the evidence of Dr. Bashir Ahmed Padder that he examined the dead body of Gani Shah and he found three gun shot wounds on the

body of the deceased. First wound was at right axillary area, second was on right inframammary area and the third one was upon right

inframammary area. The cause of death in the opinion of Doctor was due to loss of blood leading to hemorrhage and shock. He has owned

authorship of the injury certificate as one true / correct and under his hand and certified its contents. It is also in the evidence of Doctor that post-

mortem was not conducted, as the cause of death was apparent, on observing the wounds on the dead body. It is also in his evidence that he

could not give exact cause of death in case of gun shot injury in question as post-mortem was not conducted. But in any case it was a clear case of

death by hemorrhage and shock. One of the investigating officer Nissar Hussain has stated that the post mortem was not conducted as the Doctor

had opined that the death of the deceased caused by Gun shots was clear and there was no need to conduct the post-mortem examination. Shabir

Teli was booked in the case U/s 302/341/201 and 109 RPC and 7/25 Arms Act, while as the other three accused were initially cited witnesses

and not accused but once challan was produced before the court under orders of the court case was further investigated and three persons were

also booked as co-accused in the case. The other Inspector Abdul Hamid who conducts part of the investigation has deposed to conduct of

further investigations against accused and filing of report against the accused. He made an effort to recover the gun, but did not succeed.

14. The defence counsel has contended that the conduct of son and wife in not coming to rescue of Gani Shah, father and husband of the two

witnesses, is unusual and that by itself makes their presence doubtful on spot. The counsel has cited State of Punjab Vs. Sucha Singh and Others, .

However, the authority has no application to the facts of this case, in as much as, there is ample evidence pointing to the fact that both mother and

son, on hearing gun shots, immediately came to the spot, of occurrence, just in the vicinity of the house. The other daughter of the deceased

(Zubaidah) and his son-in-law (Ab.Rehman Shah) were also present on spot. The accused Shabir Teli, before taking arm at and shooting down

Gani Shah, fired shot(s) from the gun to scare the people around. It was at this point of time that when Fatah and Zakir (Widow and son) looked out, accused asked them to be in the room and shut the window. Yet both getting suspicious, did not close window but did look out, till deceased appeared on scene enroute to his house from the mosque, to be fired and shot at with the gun by the accused. Brother, mother and son lost no time to come out of their house on the lane by the side of their kitchen, to view the bizarre occurrence by their own eyes. It cannot be said that they failed to come to rescue of Gani Shah. After all in the tell-tale facts and circumstances, they had no opportunity to do so. Thus viewed and judged we do not find any infirmity in evidence, on this count.

15. The counsel also points out that in evidence there is variation as to the time of incident. However, it is to be remembered that all the witnesses have unequivocally stated that the occurrence took place after Tsha prayers' when deceased was returning from the Mosque to his house. There is hardly any variation as to time of death, in as much as, the death is stated to have taken place around 8.30 P.M. Besides it is also to be remembered that in villages, mostly time is described by reference to 'Nimaz' which is offered five times a day and each 'Nimaz' is understood by reference to definite time period of the day and night. Reference to occurrence soon after Tsha Nimaz' leaves no doubt as to the time/period of incident/occurrence in question. There is only one version as to time and period of occurrence, therefore, question of giving any benefit to the accused does not arise. *Moti etc. Vs. State of U.P.*, has no parallel to this case on facts and the principal of law enunciated thereto is not as such applicable to this case.

16. The defence counsel has also pointed out that the witnesses have been examined by investigating agency number of times and in any case, the first statement has been recorded by investigating agency after couple of days and there was opportunity to the witnesses to give a concocted version. *Balakrushna Swain Vs. State of Orissa*, is cited for the proposition. In this cited case the investigating officer did not explain the delay in recording the statement of witnesses after 10 to 11 days, after the occurrence, which rendered the evidence of such witnesses not reliable.

However, it is not a universal proposition of law that in all cases where

statements are recorded U/s 161 Cr.P.C. by the investigating agency

belatedly and may be even after a long delay, the evidence has to be perse discarded. It depends on the facts and circumstances of each case. In

our case the first version of events and incident is recorded as statement(s) by the investigating agency are after 3 to 4 days after the occurrence.

Having regard to the nature of the evidence, background of the entire case and ground realities, the evidence in this case cannot be said to have

been recorded after a long delay, so as to afford opportunity to witnesses to come up with manipulated version, than what actually happened. It is

to be understood that the witnesses in this case are not shown to have changed the statement(s). No attempt is, detected to be, made by witnesses

to tailor their statements, qua occurrence to a situation other than what actually happened on ground level. The court cannot loose sight of harsh

realities of life and shut its eyes to the soft-peddling by the police agency, entrusted with investigation of the case. The attitude of investigating

agency appears not only slow but cool, may be when so much of killings are taking place around and police is called often now and then to take

charge of the situation. Terror atmosphere and peaking of militancy, in the area, at the relevant period, has its own fall out on police functioning.

Deficiency at investigating level is not to affect the case on merits.

17. The counsel also contends that the deficiency and lapse on the part of the investigating agency in failing to recover the gun, omit to conduct

post-mortem and in not obtaining opinion of the ballistic expert has adversely affected the case and these circumstances cannot be lost sight of and

have material bearing on merits of the case. Further it was only under the orders of the court that further investigation was conducted to rope in the

other three accused who were earlier cited prosecution witnesses. All this counsel submits is sufficient to indicate that the investigating agency has

committed errors. The truth fullness of the case is shakey and it renders prosecution case doubtful.

18. Admittedly neither gun/fir-arm nor the crime cartridges fired from the gun have been recovered/seized in this case. The Inspector Ab. Hamid a

co-investigator has deposed that de- spite efforts made by him to recover the gun he did not succeed to recover the gun, nor the cartridges could

be seized. Contextually it is to be noted that the accused like other counter

surgents used to carry the gun as a counter in-surgent connected to Army/para-military forces. All the eye witnesses have unequivocally stated that the accused was frequently wielding and carrying gun and on the fateful day after firing from the gun and shooting down Gani Shah dead, he ran away with the gun from spot. The people including near relations of the deceased went to nearby army stationed at Khandoora, to complain about the accused Shabir Teli. In such circumstances deficiency if any, on the part of investigating officer to recover the gun and fire cartridge is not fatal to the case. Having regard to the over-whelming evidence of the accused committing culpable homicidal death of Gani Shah by firing gun, the failure to send the gun/ fir- arm and the cartridges in the above circumstances, to ballistic expert is not fatal to the case and cannot be considered to affect the credit-worthiness of the prosecution case.

19. In Sukhwant Singh Vs. State of Punjab, the following observation of the Supreme Court of prosecution being adversely affected if the fire-arm and the cartridges are not recovered and sent to ballistic expert and the opinion is not obtained, is on express condition that the fire-arm and the crime cartridges are recovered during investigation.

It hardly needs to be emphasized that in case where injuries are caused by firearm the opinion of the Ballistic Expert is of a considerable importance where both the fire-arm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent.

20. Obviously in the circumstances explained above the omission apart from the deficiency in investigation as dealt with separately in this judgment, this facet of the case has no adverse impact on the out-come of the prosecution case having regard to total facts and circumstances emerging from record.

21. However, every "faulty investigation or padding in evidence cannot by itself lead to total demolition of the prosecution case if it can otherwise stand, ignoring these fallacies." It cannot be held as a general and broad preposition of law that an error or deficiency in investigation would demolish the case. Whether to acquit or convict the accused would depend on facts and circumstances of each case. See Lakshmi v. State of U.P.

(2002 SCC (7) 198). So long the illegality, deficiency, or error in investigation is not to bring about miscarriage of justice such illegality, deficiency

or error committed in the course of investigation would not effect the trial on merits.

22. In *Visveswaran Vs. State Rep. by S.D.M.*, it is observed;

The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be

kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective

investigation, the only requirement is of extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely as a

result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when

it is otherwise proved.

23. Some discrepancies are bound to be there in the statements. However, so long the discrepancies do not materially affect the prosecution case,

they can be ignored. In fact the discrepancies and variations in details and immaterial particulars should serve more as badge of honesty rather than

dishonesty. After all such variations can be fairly attributed to difference in the faculties of observations, memory, recollection and re-petition.

24. We do note that the trial court has not believed some of the witnesses so far as co-accused Manzoor Ahmed Wagay, Nazir Ahmed and

Shabir Hajam are concerned and they have been acquitted of offences, with which they stood charged. But that by itself, as canvassed by the

defence counsel, cannot be ground to discard the evidence so far as accused Shabir Ahmed Teli is concerned. As the residue of the evidence

tendered by eye witnesses is sufficient to prove guilt of the accused Shabir Ahmed Teli, notwithstanding the acquittal of other co-accused, his

conviction is to be maintained. Duty of the court is to separate grain from chaff, where it is separable. Normal discrepancies in contradistinction to

material discrepancies in the testimony given by witnesses cannot shake rather ""corrode"" the credibility of the evidence and the prosecution case.

The maximum ""falsus in uno falsus in omnibus"" is not rule of law. In each case court is enjoined to find out as to what extent the evidence is

acceptable and to what extent it is unacceptable and appreciate sufficiency/

insufficiency of adduced evidence. For placing reliance on the testimony of witness(es) in part it does not necessarily follow as a matter of law that the whole evidence of the witness(es) has to be reliable/sufficient.

25. In *Sucha Singh v. State of Punjab* (AIR 2003 SCW 3984), Supreme Court has observed: -

Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw

out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything):

This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused,

notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from

chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has

been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from

the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The

maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is

merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The

doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be

called 'a mandatory rule of evidence.' *Nisar Ali Vs. The State of Uttar Pradesh*, . Merely because some of the accused persons have been

acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who

have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were

convicted. *Gurcharan Singh and Another Vs. State of Punjab*,

26. The allout effort of the defence/ appellant's counsel to challenge the conviction and sentence on the ground that the testimony of witnesses

cannot be believed as it has come from relation and interested witnesses, cannot

succeed, in the over all facts and circumstances of the case. The appreciation of evidence tendered by relation witnesses cannot be thrown out so long the evidence does not suffer from serious infirmities and the approach has to be careful and cautious.

27. In *Assad Sofi & Ors. v. State of J&K* in Cr. Apl. No. 2/2000 this court observed:-

Only because the prosecution witnesses or some of them are related to the man killed, their evidence cannot be discarded perse on that ground, if

otherwise their evidence is reliable. However, such witnesses have tendency to exaggerate things and facts. Their evidence has to be scrutinized

with care and caution. *Sharad Birdhichand Sarda Vs. State of Maharashtra*, ; *State of Uttar Pradesh Vs. Suresh alias Chhavan and Others*, and

Gurcharan Singh and Another Vs. State of Punjab, .

28. In *Masalti Vs. State of U.P.*, , *Gajendragadkar, C. J.* Speaking for the court observed: -

There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful

in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the Court as genuine, whether

or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to

contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often

enough, where factions prevail in villages and murders are committed, as a result of enmity between such factions criminal courts have to deal with

evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of

justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing

with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

29. In this case besides the eye witness account of homicidal death caused by *Shabir Teli* of *Gani Shah*, the motive for crime is clearly established.

There is certain and consistent evidence that unwillingness on the part of deceased to give his daughter in marriage to accused with whom accused

wanted to marry by hook or by crook and on the particular date sending her away for the fear that she may be kidnapped by the accused, invited

accused's wrath. On earlier occasion accused had threatened deceased and even his daughter. He even carried threat to marriage broker who was

acting as go-between to arrange Lovely's marriage at another village viz Gopalpora. All this motivated accused and his intense desire to have

Lovely by fair or foul means, drew accused to do away with the deceased. With these background facts and circumstances the accused actually

killed Gani Shah. This factual background and motivation in the circumstances render strong corroboration to the eyewitnesses graphic account

offered by the witnesses. This corroborative and re-assuring circumstance is of great evidentiary value.

30. The accused Shabir Teli it is seen has not in fact put forth any tangible defence. At least two defence witnesses Ali Mohd. and Abdul Hamid

have supported the prosecution witnesses by stating that Gani Shah was shot dead as alleged, that Lovely's hand was demanded by Shabir Teli

which deceased refused and accused Shabir Teli was connected with 'Ikhwan' and he was possessing and wielding a Gun. Other defence

witnesses Abdul Rashid Zargar Mohd. Abdullah Shah and Mohd. Sultan have also broadly supported prosecution version. The so called defence

version and the testimony given by the defence witnesses fairly and broadly support prosecution case and the conclusions derived from evidence

on record that the accused did cause death of Gani Shah by Gun after firing shots towards him on spot. In this background some minor

discrepancies in the FIR and while describing the incident, need not be given undue weight. The niceties and necessities of law are not understood

by the rural folk. Court cannot be swayed by minor discrepancies with practically no effect on the merits of the case. What is required is that first

information given must disclose commission of a cognizable offence and must provide basis for the police officer to suspect the commission of

offence, if so the police officer is to register case and investigate the matter. FIR after all is not be all and end all of a case.

31. The last counsel contends is that as accused Shabir Teli is acquitted of the charge u/s 7/25 of Arms Act, he could not be convicted U/s 302

RFC of killing Gani Shah with the Gun. However, this contention of the counsel is not well founded. Section 7 prohibits acquisition or possession,

or of manufacture or sale, of prohibited arms and ammunition unless specially authorised by the Central Government. Section 25 makes

acquisition, possession, manufacture or sale of such prohibited arms and ammunition penal and provides that person (s) guilty of the offence shall

be punished with the imprisonment for a term not less than five years which punishment may extend to 10 years and fine. Even if offence u/s 7/25

Arms Act, is not proved, as in this case, yet a person can still be guilty and convicted of offence of homicidal death amounting to murder by gun

shot wounds. All the witnesses have with open eyes viewed the accused possessing and carrying the gun, firing at the deceased with such gun and

killing him on spot. The offence of homicidal death including one U/s 302 RFC is independent of section 7/25 Arms Act and a person can be

convicted U/s 302 RFC of murder by fire arm, notwithstanding the accused may or may not be convicted U/s 25 of the Arms Act. This argument

cannot hold good, in the face of enormous cogent and reliable evidence to positively establish culpability of accused in causing death of Gani Shah

by firing from the gun he was wielding and carrying with him.

32. In result, for the above view of the matter, on examination and consideration of the whole case, scrutiny, and appreciation of the evidence, we

accept the reference, affirm the order/judgment of conviction and sentence, and dismiss the appeal filed by accused convict.

33. Registrar Judicial to take follow-up action.

34. Disposed of.