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SHRI SATISH KUMAR & ANR.

v.

THE STATE OF HIMACHAL PRADESH & ANR.

(Criminal Appeal No. 19 of 2017)

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MARCH 02, 2020

**[UDAY UMESH LALIT, INDU MALHOTRA  
AND HEMANT GUPTA, JJ.]**

C *Penal Code, 1860: s.302 r/w s.34 – Prosecution case was that the informant was the daughter of the victim-deceased – As per her statement, the deceased had left in the morning on the fateful day to meet one ‘K’ and thereafter he had to join duty – When he did not return home till 6 pm she called him but his phone was switched off – Next morning, she called the Forest Guard who told her that the deceased had not come to duty – Thereafter she called*

D *accused-S whose house was near her house and sought number of ‘K’ – Police came to her house and she found that her father had died due to gun shot by accused-S and accused-R and the body was lying in the forest – The dead body and murder weapon were allegedly recovered on the disclosure statements made by the two*

E *accused stated to have been made in presence of PW-2 and PW-3 – Trial court acquitted all the accused for the reason that prosecution failed to prove the guilt of the accused beyond reasonable doubt – On State’s appeal against acquittal, High Court reversed the order of acquittal holding that the finding of trial court that dead body was recovered prior to the disclosure statement made by the*

F *accused-S and accused-R was not correct and that the dead body was recovered only on the basis of the disclosure statements – Appeal against conviction – Held: The statements of the prosecution witnesses did not appear to be trustworthy – The entire prosecution case was based on the telephone call made by accused-S but no*

G *call details were produced to verify their correctness – The other incriminating circumstance weighed with the High Court was the recovery of the single barrel gun with the cartridge from the house of accused-L, the licence holder – The report of the forensic science laboratory only showed that such gun was used in the commission of crime, but prosecution failed to establish which of the accused*

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*actually used the gun – The disclosure statement of accused-S was that he fired from the gun – But the recovery of the gun was on the basis of disclosure statement of accused-R – There was no direct evidence as to the use of licensed gun of accused-L, though the gun along with empty and live cartridges were recovered on the statement of accused-R – In the absence of evidence as to which of the two accused fired upon the deceased, the accused cannot be convicted only on the basis of recovery of gun used in the commission of crime – Prosecution also failed to prove any motive on the part of the accused – Thus, in the absence of any evidence led by the prosecution as to who fired the fatal shot, the benefit of doubt to the accused persons was rightly granted by the trial court – High Court interfered with the findings of acquittal even though the conclusion drawn by the trial court was a possible conclusion on the basis of evidence on record – As regards conviction under ss.25 and 27 of Arms Act, none of the conditions mentioned in those sections were attracted – Conviction of the appellants for the offences punishable under s.302 r/w s.34 and ss.25 and 27 of the Arms Act is set aside – Arms Act, 1959 – ss.25 and 27.*

*Code of Criminal Procedure, 1973: s.389 – Jurisdiction of Appellate Court to interfere with order of trial court – Scope of – Held: While exercising the jurisdiction under s.389 of the Code, especially when trial court has recorded a finding of not proving the guilt, the Appellate Court should interfere only if the findings are perverse and are not possible by any reasonable person – High Court in an appeal against acquittal does not interfere only if the Appellate Court has a different view on process of evidence than what was taken by the trial court – Penal Code, 1860 – s.302 r/w s.34.*

*Evidence: Circumstantial evidence – Motive, absence of – Effect on prosecution case – Held: In a case based upon circumstantial evidence, motive is relevant – In the instant case, prosecution failed to prove any motive on the part of the accused – As per the statement of PW-1, the motive was land dispute with accused-S – If such was a motive, then there was no reason for her to contact accused-S who was said to be staying near her house, to find out whereabouts of her father (victim-deceased) – The said motive had no foundation to stand – Criminal law – Motive – Penal Code, 1860 – s.302 r/w s.34.*

A           **Allowing the appeals, the Court**

**HELD: 1.** The first statement of PW-1 was that she came to know from the police, when they arrived at the village, that accused-S and accused-R have killed her father. She as PW1 deposed that the statement of the accused was recorded before they proceeded to the forest, and that except ward member (PW-2) nobody had told her that her father had been murdered by accused-S and accused-R. It was after her statement that she went to the forest with the police, along with PW-2 and PW-3, and accused-R and accused-S. She further deposed that PW-2 had informed her before the arrival of the police that the dead body of her father was lying in the forest. PW-2 is ward member from Balh Churani of Gram Panchayat Robin. Some officials proceeded to the spot, whereas some came along with dead body of her father. On the other hand, PW-2 was declared hostile. In his cross-examination, he denied that any disclosure statement was made by the accused-S and accused-R. He also denied that accused-R had signed any statement in his presence. He denied other recovery memos as well. In the cross-examination by the accused, he admitted that Balh Churani forest starts near the house of deceased and many registered hunters used to come to this forest for hunting prior to the occurrence. Some hunters without permission, would also come to the forest. The dead body was recovered from a distance of approximately 1 KM from his house. The motorable road is at a distance of 1½ KM from the dead body. He deposed that the statement of PW-1 and accused-S was recorded near the dead body after identification of the dead body. He deposed that accused-S stated to the police that he fired a gunshot by mistake but he had not stated that the gunshot was fired by him and by accused-R. He stated that accused-R had stated to the police that their gun was not used for firing but was still taken into possession by the police. He admitted that there were criminal cases between the father of accused-S and himself, but those cases were compromised. [Paras 15, 16][1155-E-H; 1156-A-D]

**2.** PW-3 also turned hostile and denied that any statement was made by accused-S and accused-R in his presence. In cross-examination, he deposed that 15-20 persons of Balh Churani

Village had gone to the forest. He admitted that the dead body was searched by the police and was not demarcated by anybody else. PW-15 (Inspector) in his cross-examination deposed that accused-S and accused-R were arrested on 22nd December, 2009 at 1.30 pm. He categorically deposed that he had not informed PW-2 before proceeding from the police station. He did not enquire with anybody over the telephone from the police station pursuant to Daily Diary Report. He deposed that he came to know that deceased had died due to gunshot injury before recording the statement of PW-1. [Paras 17, 18][1156-E-G]

3. The phone call was received by police at 7.15 am. The distance of the place of recovery of dead body in forest from the house of the deceased is only about 2 Kms approx. In the first statement of PW-1 recorded at 12.45 pm, there is an assertion that her father was killed by gun shot by accused-S and accused-R. How could she disclose the names of the assailants, if the police had yet to start investigation? The statement of accused-S was recorded prior to the statement of accused-R which was recorded between 1.30 to 2.00 pm as per PW-15. But as per PW-2 the police called him and got the first confirmation about the incident from him, whereas the IO completely denied having made any attempt to contact PW-2 to get any information. As per the IO, he proceeded to Balh Churani forest after associating accused-S, PW2, PW3 and PW-1. The conclusion of the cause of death as due to gunshot by accused-S and accused-R could find mention in the FIR, which is the basis of initiating the investigating process, only if the dead body had already been recovered. The IO has given contradictory statement as that of statement of PW-1 as well as PW-2. The statements of the witnesses did not appear to be trustworthy so as to maintain conviction of the appellants. The evidence of the prosecution did not inspire confidence. [Para 19][1157-A-D]

4. The entire prosecution case was based upon the telephone call made by accused-S but no call details have been produced to verify the correctness of the telephone call. As per the IO, there was no verification made in pursuance of the phone call received. The other incriminating circumstance weighed with

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A the High Court was the recovery of the single barrel gun with the cartridge from the house of accused-L, the licence holder. The report of the forensic science laboratory would only show that such gun was used in the commission of crime, but the prosecution has failed to establish which of the accused has actually used the gun. The disclosure statement of accused-S is that he fired from the gun. But the recovery of the gun is on the basis of disclosure statement of accused-R. There is no direct evidence as to the use of licensed gun of accused-L, though the gun along with empty and live cartridges were recovered on the statement of accused-R. It is not possible to conclusively hold that it was either accused-R or accused-S who fired upon the deceased. In the absence of the evidence as to which of the two accused fired upon the deceased, the accused cannot be convicted only on the basis of recovery of gun used in the commission of crime. [Paras 20, 21][1157-E-H; 1158-A]

D 5. The High Court has convicted all the accused additionally for the offences under Sections 25 and 27 of the Act. None of the conditions mentioned in Section 25 of the Act were even broadly extended towards the accused including accused-L, the licensee. Section 27 of the Act provides for punishment if whoever uses any arms or ammunition in contravention of Section 5 of the said Act. Again, none of the conditions mentioned in Section 5 are attracted towards any of the accused including accused-L. [Para 22][1158-B-C]

F 6. In a case based upon circumstantial evidence, motive is relevant but the prosecution has failed to prove any motive on the part of the accused. As per the statement of PW-1, the motive was land dispute with accused-S. If such was a motive, then there was no reason for her to contact accused-S who was said to be staying near her house, to find out whereabouts of her father. The said motive has no foundation to stand. [Para 23][1158-D]

G 7. The trial court has recorded an order of acquittal. Such order of acquittal could be interfered with only if there was perversity in the findings recorded by the trial court. Mere fact that the High Court has a different opinion will not be sufficient to enable the High Court to set aside the order of acquittal. While

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exercising the jurisdiction under Section 389 of the Code of Criminal Procedure, 1973, especially when trial court has recorded a finding of not proving the guilt, the Appellate Court should interfere only if the findings are perverse and are not possible by any reasonable person. The High Court in an appeal against acquittal does not interfere only if the Appellate Court has a different view on process of evidence than what was taken by the trial court. [Para 24][1158-E-G]

8. The High Court interfered with the findings of acquittal even though the conclusion drawn by the trial court is a possible conclusion on the basis of evidence on record. The prosecution has failed to prove the role of accused in causing death of the deceased inasmuch as the recovery of dead body in pursuance of similar disclosure statements made by accused-S and accused-R is not proved. In the absence of any evidence led by the prosecution as to who fired the fatal shot, the benefit of doubt must go to the accused persons and was rightly granted by the trial court. The order of the High Court convicting the appellants is wholly illegal, unwarranted and unjust. The conviction of the appellants for the offences punishable under Section 302 read with Section 34 IPC and Sections 25 and 27 of the Act is set aside. [Paras 25, 26][1159-G-H; 1160-A-B]

*Sharad Birdhichnd Sarda v. State of Maharashtra* (1984) 4 SCC 116 : [1985] 1 SCR 88 ; *Brajendra singh v. State of M.P.* (2012) 4 SCC 289 : [2012] 3 SCR 599  
*Chandrappa and Others v. State of Karnataka* (2007) 4 SCC 415 : [2007] 2 SCR 630 – referred to.

#### Case Law Reference

[1985] 1 SCR 88	referred to	Para 11	
[2012] 3 SCR 599	referred to	Para 12	
[2007] 2 SCR 630	referred to	Para 24	G

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 19 of 2017.

From the Judgment and Order of Conviction dated 20.09.2016 and Order of Sentence dated 22.09.2016 of the High Court of Himachal Pradesh, Shimla in Criminal Appeal No. 126 of 2013.

A With

Criminal Appeal No. 1109 of 2016

Ms. Ruchi Kohli, Ms. Babita Yadav, Amit Sharma, Ms. Srishti Mishra, R. C. Kohli, Advs. for the Appellants.

B Ms. Upasana Nath, Abhinav Mukerji, Ms. Radhika Gautam, Advs. for the Respondents.

The Judgment of the Court was delivered by

**HEMANT GUPTA, J.**

C 1. Criminal Appeal No. 19 of 2017 is preferred by Satish Kumar and Rajeev Kumar whereas Criminal Appeal No 1109 of 2016 is preferred by Lekh Ram, against common judgment of the High Court of Himachal Pradesh dated 20th September, 2016 whereby the appeal filed by the complainant was allowed and the order of acquittal passed by the learned trial court on 30th November, 2012 was set aside. The appellants were  
D convicted for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860<sup>1</sup> as well as under Sections 25 and 27 of the Arms Act, 1959<sup>2</sup>.

2. Brief facts leading rise to the present appeals are that on 22<sup>nd</sup> December, 2009 at about 07:15 hours, an information (Ex PW 15-  
E A) was received by Ram Singh (PW-15), Inspector, on phone said to be by Satish Kumar son of Kanshi Ram, that Ratti Ram son of late Shri Roshan Lal, had died due to gun shot. On receiving such information, a Police team led by the Station House Officer of Police Station Ghumarwin proceeded towards the place of occurrence. Subsequently,  
F on the statement of Neelam Sharma (PW-1), daughter of deceased Ratti Ram, FIR No. 218 was registered on 22<sup>nd</sup> December, 2009 at about 14:05 hours.

3. Neelam Sharma had stated that her father left home at about 8 am on 21<sup>st</sup> December, 2009 informing her that he would go to the house of Karma at Village Chujala and thereafter he would go to attend his  
G duty at Village Harlog. But when he did not return till 6 pm, she called on his mobile number but mobile was switched off. She called in the morning to the Forest Guard to inquire about her father who told her that her father had not come there to join the duty. Thereafter, she made telephone

<sup>1</sup> for short, 'IPC'

H <sup>2</sup> for short, 'Act'

call to accused Satish Kumar, whose house is in front of her house and sought phone number of Karma, resident of Village Chujala. The Police came to her house on 22nd December, 2009, when she came to know that her father had died due to gun shot by Satish Kumar and Rajeev Kumar and the body of his father is lying at Balh Churani forest. The motive of murder was said to be land dispute with Satish Kumar pending in Shimla High Court.

4. Ram Singh (PW-15), Inspector, deposed that the disclosure statements of accused Satish Kumar and Rajeev Kumar were recorded on 22nd December, 2009 itself. The statements of both the accused Satish Kumar (Ext. PW2/A) and Rajeev Kumar (Ext. PW15/C) were recorded in the presence of Jaswant Singh (PW-2) and Kuldeep Singh (PW-3). They disclosed that the dead body of deceased Ratti Ram had been concealed in Balh Churani forest and that they could get the same recovered. Both the accused accompanied the Police team to Balh Churani forest and on their demarcation of the spot, the dead body of deceased Ratti Ram was recovered on 22nd December, 2009 in the presence of witnesses Jaswant Singh and Kuldeep Singh. The memo of taking possession of dead body is Ex.PW15/F. A bag was also recovered lying nearby the dead body which was identified by Neelam Sharma (PW-1) belonging to her father. The dry soil was also taken from the spot by the Police and spot map of the recovery of dead body was also prepared. Two pellet marks were visible on the stems of bushes. The embedded pellets were removed with a stone.

5. Subsequently, on the same day, another statement of accused Rajeev Kumar was recorded in respect of disclosure of single barrel gun concealed in his house. The recovery memo is PW15/G. Accused Rajeev Kumar also stated that he had concealed empty cartridge in his house, which was also taken in possession from his house on 27th December, 2009. Accused Lekh Ram is the father of accused Rajeev Kumar. It is alleged that the gun was licensed in his name and two live cartridges were recovered from his house.

6. The Investigating Officer (IO) had also taken possession of blood-stained soil, leaves and grass particles lifted from the spot; and the clothes worn by the deceased Ratti Ram. All these articles along with the gun, the empty cartridge and the live cartridges were sent for forensic science examinations. The report (Ex.PW14/D) dated 22nd March, 2010 in respect of articles such as clothes and blood on the clothes and the



A soil was furnished whereas in respect of the gun, the cartridge was found to be fired from the gun recovered on the basis of disclosure statement of Rajeev Kumar. It was also reported that traces of gunshot residue on the holes was present on the clothes worn by the deceased and the range of firing was distant.

B 7. The postmortem was conducted on 23rd December, 2009 by Dr. N.K. Sankhan (PW-7) who had found multiple injuries on the dead body of deceased Ratti Ram and also found multiple perforated wounds. As per his final opinion, deceased Ratti Ram died due to cardio respiratory failure as a result of injuries to lungs and heart and hypovolemic shock as a result of gunshot injury.

C 8. On the basis of the evidence produced, the learned trial court acquitted all the accused for the reason that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. The learned trial court held that the IO was in the knowledge about the dead body, therefore, the question of recording of the disclosure statements of accused persons has got no evidentiary value. The learned trial court found that the confession of guilt of the accused persons is difficult to be drawn, rather exculpatory conclusions are deducible. The circumstances are not of a conclusive nature and do not exclude every possible hypothesis consistent with the innocence of the accused.

D The learned trial court returned the following finding:

E “29. Thus, in view of the evidence as discoursed aforesaid, it is emerging that investigating officer was in the knowledge about the dead body and in view of this, the question of recording of disclosure statements of accused persons gathers no evidentiary value. If the police already had knowledge of the place of recovery then the evidence collected in pursuance to disclosure statements becomes inadmissible and takes the case out of purview of Section 27 of the Indian Evidence Act.”

F 9. The High Court found that the finding of the learned trial court that the dead body was recovered prior to the disclosure statement made by the accused Satish Kumar and Rajeev Kumar is not correct. In fact, the dead body was recovered only on the basis of the disclosure statements. The High Court further found that the recovery of the dead body and the weapon of offence in pursuance of the disclosure statement stands corroborated with the report of the forensic science laboratory.

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Thus, the chain of the circumstances is complete so as to warrant conviction of all the accused. A

10. However, in appeal preferred by the complainant, the judgment of the trial court was set aside. The High Court held that the postmortem report and the report of the Forensic Science Laboratory emphatically lead to the use of gun (Ext.P/27) by the accused. Therefore, there is incriminatory evidence against the accused. The High Court held that the dead body was not known to the prosecution, before the recovery was made in pursuance of disclosure statement, therefore, the finding of the trial court is not correct. The High Court also found that even if it is assumed that the gun shot fired by only one of the accused, it would not exculpate the incriminatory role of other co-accused in the relevant occurrence. B C

11. The learned counsel for the appellant argued that as the entire case of the prosecution is based on circumstantial evidence, the prosecution has to prove the hypothesis that the accused alone have committed the crime. The prosecution witnesses have given contradictory statements which does not complete the chain of circumstances and in fact, the truthfulness of the case of the prosecution is seriously doubted. This Court in *Sharad Birdhichand Sarda v. State of Maharashtra*<sup>3</sup>, delineated the conditions, which must be fulfilled before a case against an accused can be said to be established on the basis of circumstances. It was held as under: D E

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(I) the circumstances from which the conclusion of guilt is to be drawn should be fully established. F

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrLJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047] G

<sup>3</sup> (1984) 4 SCC 116

A “Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

B (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

C (4) they should exclude every possible hypothesis except the one to be proved, and

D (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

E 12. In *Brajendrasingh v. State of M.P.*<sup>4</sup>, this Court held that the circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. The Court held as under:

G “27. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete

H <sup>4</sup> 2012 4 SCC 289

so as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.”

13. The primary question in the present appeals is as to whether, the prosecution has recovered the dead body prior to recording of confessional statements of the accused vide Ex. PW2/A and Ex. PW15/C of Satish Kumar and Rajeev Kumar.

14. It is contended that the information with respect to death of Ratti Ram was received by Inspector Ram Singh (PW-15) on the phone by one of the appellants Satish Kumar at 07.15 hours. PW-15 proceeded to Balh Churani forest along with other police officials after receipt of such information. Ex. PW1/A is the statement of Neelam Sharma recorded at 12.45 pm by PW-15 at Village Balh Churani. The FIR is registered at 14.05 hours.

15. The first statement of Neelam Sharma (Ex. PW 1/A) is that she came to know from the police, when they arrived at the village, that Satish Kumar and Rajeev Kumar have killed her father. She as PW1 deposed that the statement of the accused was recorded before they proceeded to the forest, and that except ward member (Jaswant Singh) nobody had told her that her father had been murdered by Satish Kumar and Rajeev Kumar. It is after her statement was recorded that she went to the forest with the police, and the witness Jaswant Singh and Kuldeep Singh, and accused Rajeev Kumar and Satish Kumar. She further deposed that PW-2 Jaswant Singh had informed her before the arrival of the police that the dead body of her father was lying in the forest. Jaswant Singh is ward member from Balh Churani of Gram Panchayat Robin. Some officials proceeded to the spot, whereas some came along with dead body of her father. She denied that Balh Churani forest is a big forest.

16. On the other hand, PW-2-Jaswant Singh was declared hostile when he deposed that no disclosure statement was made by Rajeev

- A Kumar in his presence. He was cross-examined by the public prosecutor. He denied that any disclosure statement was made by the accused Satish Kumar and Rajeev Kumar. He also denied that Rajeev Kumar had signed any statement in his presence. He denied other recovery memos as well. In the cross-examination by the accused, he admitted that Balh Churani forest starts near the house of deceased Ratti Ram and many registered hunters used to come to this forest for hunting prior to the occurrence. Some hunters without permission, would also come to the forest. The dead body of Ratti Ram was recovered from a distance of approximately 1 KM from his house. The motorable road is at a distance of 1 ½ KM from the dead body. He deposed that the statement of Neelam Sharma and accused Satish Kumar was recorded near the dead body after identification of the dead body. He deposed that Satish Kumar stated to the police that he fired a gunshot by mistake but he had not stated that the gunshot was fired by him and by Rajeev Kumar. He stated that Rajeev Kumar had stated to the police that their gun was not used for firing but was still taken into possession by the police. He admitted that there were criminal cases between Kanshi Ram, father of Satish Kumar and himself, but those cases were compromised.
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17. PW-3 Kuldeep Singh turned hostile and denied that any statement was made by accused Satish Kumar and Rajeev Kumar in his presence. In cross-examination he deposed that 15-20 persons of Balh Churani Village had gone to the forest. He admits that the dead body was searched by the police and was not demarcated by anybody else.
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18. PW-15 Ram Singh in his cross-examination deposed that the accused Satish Kumar and Rajeev Kumar were arrested on 22nd December, 2009 at 1.30 pm. He categorically deposed that he had not informed Jaswant Singh (PW-2) before proceeding from the police station. He did not enquire with anybody over the telephone from the police station pursuant to Daily Diary Report. He deposed that he came to know that deceased had died due to gunshot injury before recording the statement of Neelam Sharma. The accused Satish Kumar and Rajeev Kumar were questioned in the presence of Jaswant Singh and Kuldeep Singh. He denied that no telephone call was made by Satish Kumar to police station. He admitted that the place where the dead body was lying was about 1 KM from the house of Ratti Ram and both the accused collectively identified the place where the dead body was lying.
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19. The phone call was received by police at 7.15 am. The distance of the place of recovery of dead body in forest from the house of the deceased is only about 2 Kilometers approx. In the first statement of Neelam Sharma recorded at 12.45 pm, there is an assertion that her father was killed by gun shot by Satish Kumar and Rajeev Kumar. How could she disclose the names of the assailants, if the police had yet to start investigation? The statement of the accused Satish Kumar was recorded prior to the statement of Rajeev Kumar which was recorded between 1.30 to 2.00 pm as per PW-15. But as per PW-2 Jaswant Singh, the police called him and got the first confirmation about the incident from him, whereas the IO completely denied having made any attempt to contact PW-2 to get any information. As per the IO, he proceeded to Balh Churani forest after associating Satish Kumar, Jaswant Singh, Kuldeep Singh and Neelam Sharma. The conclusion of the cause of death as due to gunshot by Satish Kumar and Rajeev Kumar could find mention in the FIR, which is the basis of initiating the investigating process, only if the dead body had already been recovered. The IO has given contradictory statement as that of statement of PW-1 Neelam Sharma as well as PW-2 Jaswant Singh. The statements of the witnesses do not appear to be trustworthy so as to maintain conviction of the appellants. The evidence of the prosecution does not inspire confidence.

20. The entire prosecution case is based upon the telephone call made by Satish Kumar but no call details have been produced to verify the correctness of the telephone call. As per the IO, there was no verification made in pursuance of the phone call received.

21. The other incriminating circumstance weighed with the High Court is the recovery of the single barrel gun with the cartridge from the house of Lekh Ram, the licence holder. The report of the forensic science laboratory would only show that such gun was used in the commission of crime, but the prosecution has failed to establish which of the accused has actually used the gun. The disclosure statement of the accused Satish Kumar is that he fired from the gun. But the recovery of the gun is on the basis of disclosure statement of accused Rajeev Kumar. There is no direct evidence as to the use of licensed gun of Lekh Ram, though the gun along with empty and live cartridges were recovered on the statement of Rajeev Kumar. It is not possible to conclusively hold that it was either Rajeev Kumar or Satish Kumar who fired upon the deceased. In the absence of the evidence as to which of the two accused fired upon the

- A deceased, the accused cannot be convicted only on the basis of recovery of gun used in the commission of crime.

22. The High Court has convicted all the accused additionally for the offences under Sections 25 and 27 of the Act. None of the conditions mentioned in Section 25 of the Act are even broadly extended towards all the accused including Lekh Ram, the licensee. Section 27 of the Act provides for punishment if whoever uses any arms or ammunition in contravention of Section 5 of the said Act. Again, none of the conditions mentioned in Section 5 are attracted towards any of the accused including Lekh Ram. At best, there could be an allegation of violation of conditions of licence but, none of the accused have been charged for violation under Section 30 of the Act. Therefore, none of the accused is liable for conviction for any offence under the Act.
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23. In a case based upon circumstantial evidence motive is relevant but the prosecution has failed to prove any motive on the part of the accused. As per the statement of Neelam Sharma (PW-1), the motive was land dispute with Satish Kumar. If such was a motive, then there is no reason for her to contact Satish Kumar, who was said to be staying near her house, to find out whereabouts of her father. The said motive has no foundation to stand.
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24. The trial court has recorded an order of acquittal. Such order of acquittal could be interfered with only if there was perversity in the findings recorded by the trial court. Mere fact that the High Court has a different opinion will not be sufficient to enable the High Court to set aside the order of acquittal. The High Court in appeal took a different view than what was taken by the trial court to set aside the judgment and convict the appellants herein. While exercising the jurisdiction under Section 389 of the Code of Criminal Procedure, 1973<sup>5</sup>, especially when trial court has recorded a finding of not proving the guilt, the Appellate Court should interfere only if the findings are perverse and are not possible by any reasonable person. The High Court in an appeal against acquittal does not interfere only if the Appellate Court has a different view on process of evidence than what was taken by the learned trial court. This Court in *Chandrappa and Others v. State of Karnataka*<sup>6</sup> considered the scope of powers of the appellate court against an order of acquittal passed by the trial court under the Code and held as under:-
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<sup>5</sup> For short "the Code"

H <sup>6</sup> (2007) 4 SCC 415

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge: A

(1) An appellate Court has full power to review, reap-preciate and reconsider the evidence upon which the order of acquittal is founded; B

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, “substantial and com-pelling reasons”, “good and sufficient grounds” “very strong circumstances”, “distorted conclusions”, “glar-ing mistakes”, etc. are not intended to curtail exten-sive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion. C D

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of in-nocence available to him under the fundamental prin-ciple of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his in-nocence is further reinforced, reaffirmed and strength-ened by the trial court. E F

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

25. We find that the High Court interfered with the findings of acquittal even though the conclusion drawn by the trial court is a possible conclusion on the basis of evidence on record. We find that the prosecution has failed to prove the role of accused in causing death of the deceased Ratti Ram inasmuch as the recovery of dead body in pursuance of similar disclosure statements made by accused Satish Kumar and Rajeev Kumar is not proved. In the absence of any evidence led by the prosecution as G H



- A to who fired the fatal shot, the benefit of doubt must go to the accused persons and was rightly granted by the learned trial court.

26. Consequently, we find that the order of the High Court convicting the appellants is wholly illegal, unwarranted and unjust. The conviction of the appellants for the offences punishable under Section 302 read with Section 34 IPC and Sections 25 and 27 of the Act is set aside. Accordingly, both the appeals are allowed. The order of acquittal recorded by the trial court is restored. The bail bonds shall stand discharged. All the accused be set at liberty, if not wanted in any other case.
- B

Devika Gujral

Appeals allowed.