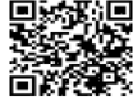


IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE BINOD KUMAR DWIVEDI

CRIMINAL APPEAL No. 585 of 2016

PIYUSH SHARMA @ KAKA

Versus

THE STATE OF MADHYA PRADESH

…..

Appearance:

Shri Virendra Sharma – Advocate for appellant.

Shri Kamal Kumar Tiwari – Govt. Advocate for the respondent / State.

…..

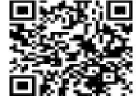
Reserved on : 16/10/2024

Pronounced on : 25/10/2024

J U D G M E N T

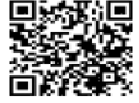
Per*: *Justice Binod Kumar Dwivedi

This appeal under Section 374 of Code of Criminal Procedure, 1973 (hereinafter referred as, 'Cr.P.C.') has been preferred by appellant / convict against judgment and order dated 08/03/2016 passed by III Additional Sessions Judge, Dewas (M.P.) in Sessions Trial No.115/2013, whereby the appellant Piyush Sharma @ Kaka has been convicted under Section 302



and 449 of Indian Penal Code, 1860 (hereinafter referred as, 'IPC') and Section 25(1-B)(A) read with Section 3 and 27 of the Arms Act, 1959 and sentenced to under to Life Imprisonment with fine of Rs.25,000/-, 10 years RI with fine of Rs.10,000/-, 05 years RI with fine of Rs.5,000/- and 07 years RI with fine of Rs.5,000/- with usual default stipulation for respective offences.

02. The prosecution story as emerged during trial briefly stated is that complainant Neelesh Pathak (PW-1) on 16/02/2013 at about 09:50 hours came to the Police Station Kotwali, District Dewas and reported that today at about 08:00 to 08:30 pm he, his brother Mukesh @ Monu Pathak (now deceased) and his brother's wife (*Bhabhi*) were at their home. Appellant / accused Piyush Sharma @ Kaka, friend of his brother came in the drawing room and demanded Rs.19 Lakhs from his brother deceased Monu, as his brother Monu has lent out Rs.1,00,000/- on interest from appellant to Patwardhan Sahab. Patwardhan Sahab has committed suicide. Appellant was demanding amount from his brother Monu, which was due allegedly to him from Patwardhan Sahab. His brother was unable to pay such huge amount of interest. When Monu told appellant that he is unable to pay such huge amount, appellant got enraged. He by his mobile phone



managed conversation between Monu and co-accused Vishal Sharma, brother of the appellant. Vishal Sharma hurled filthy abuses on phone to Monu and threatened to kill him if he did not pay the money.

03. After that Vishal Sharma himself had conversation with appellant and after appellant became infuriated and asked Monu to vacate the house immediately, which Monu refused. After this appellant fired from pistol on chest of his brother Monu and fled away. His parents also came witnessed appellant Piyush shooting Monu. After the incident, he along with Lalit, friend of his brother, who also witnessed the incident rushed injured Monu to Sanskar Hospital, where doctor declared him dead. Appellant Piyush on exhortation of Vishal Sharma, due to money transaction shot dead Monu. Jabbar Khan (PW-33) ascribed *Merg* intimation No.13/2013 (Ex.-P/51) under Section 174 of Cr.P.C. on written information (Ex.-P/34) received from Sanskar Hospital to the effect that deceased Mukesh Pathak was brought dead to the Hospital.

04. Investigation was started. *Safina* Form (Ex.-P/3) was issued for preparing of *Naksha Panchayatnama* of dead body of deceased Mukesh @ Monu and in the presence of witnesses *Naksha Panchayatnama* (Ex.-P/4) was prepared. An application (Ex.-P/49) for conducting autopsy on

the dead body was given.

05. Autopsy on dead body was conducted by Dr. H. S. Rana (PW-31) at District Hospital, Dewas. Dr. H. S. Rana (PW-31) found that there was a wound on the left side of chest of the deceased. Right lung was fractured and blood was found in pleural cavity. One entry wound was found in head of pericardial cavity, which affected left ventricle of heart after that it entered interventricular septum and also affected right lung through mediastinal. To ascertain the place of bullet, dead body was sent for x-ray and after ascertaining the place of bullet it was removed. Clothes of the deceased, blue denim colour shirt, vest and hairs, which were found in the right hand of the deceased, along with bullet were sealed and handed over to the police. Doctor has opined that the death of the deceased was due to cardiogenic shock and excessive bleeding, which was due to rupture of heart by bullet injury. Death of the deceased was of within 24 hours of when the postmortem was conducted. Injury found on the person of the deceased was sufficient to cause death. He prepared postmortem report (Ex.-P/50).

06. On the basis of *Merg* inquiry, First Information Report at Crime No.240/2013 at Police Station Kotwali, Dewas under Sections 302, 449,

506 and 109 of IPC was registered on 16/02/2013. The investigation was set in motion.

07. On 17/02/2013, police photographer Constable Jagdish Chandra (PW-23) prepared fifteen photographs (Article-A3 to A17), which were seized *vide* Seizure Memo (Ex.-P/39). Spot Map (Ex.-P/6) was prepared by Station House Officer Bhupendra Singh (PW-36) at the instance of Neelesh Pathak (PW-1). After arresting appellant Piyush Sharma @ Kaka and co-accused Vishal Sharma on 18/02/2013, Arrest Memos (Ex.-P/27 and P/29) were prepared. From the spot empty cartridge, earring, one pair of gents shoes were seized *vide* Seizure Memo (Ex.-P/7). Black jacket of the deceased was produced by Neelesh Pathak (PW-1) and seized by the police *vide* Seizure Memo (Ex.-P/8).

08. On search the person of Piyush Sharma @ Kaka, one mobile phone of Samsung Company and two photographs were seized *vide* Seizure Memo (Ex.-P/30). From the co-accused Vishal Sharma, one mobile phone of Nokia Company was seized and Seizure Memo (Ex.-P/31) was prepared. During investigation appellant Piyush Sharma @ Kaka S/o Omprakash Sharma was interrogated and on information given disclosure memo (Ex.-P/32) under Section 27 of the Indian Evidence Act, 1872 was

prepared. Appellant disclosed that he has hidden cartridges and pistol in his Almirah under the clothes. At the instance of the appellant, a country made pistol of one barrel and magazines with three live cartridges were seized, which was marked as Ex.-D/1. A register in which details of money transaction of Rs.13 Lakhs was written was seized *vide* Seizure Memo (Ex.-P/13).

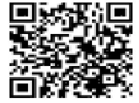
09. Statements of Neelesh Pathak (PW-1), Kailash Pathak (PW-2), Smt. Hnsha Pathak (PW-3), Smt. Garima Pathak (PW-4), Mohan @ Sunil Sharma (PW-5), Rupesh Kahar (PW-6), Dharmendra Singh Rajput (PW-7), Bhavendra Mandli (PW-8), Abhishek Yadav (PW-9), Lalit Malviya (PW-10), Jakir Ulla (PW-12) and Dilip Patidar (PW-13), Santosh Modi (PW-14), Rohit Sharma, Rajesh Vyas were recorded under Section 161 of Cr.P.C.

10. A mobile phone of Nokia Company bearing series number 9755555508 was seized *vide* Ex.-P/9. Letter (Ex.-P/64) was sent to the Medical Officer, M.G.H., Dewas for collecting blood sample of appellant Piyush Sharma @ Kaka for DNA examination. FSL Report (Ex.-P/44) and DNA Report (Ex.-P/45-A) were obtained and annexed with the record along with call details of seized mobile phone of appellant and his brother,

co-accused Vishal Sharma.

11. For prosecuting the appellant under Section 25(1-B)(A) read with Section 3 and 27 of the Arms Act, prosecution sanction (Ex.-P/38) was obtained. FSL report with regard to seized pistol and empty cartridge was also obtained. After usual investigation, charge sheet was laid against appellant and his brother, co-accused Vishal Sharma before Magistrate of competent local jurisdiction. Learned Magistrate after complying with the formalities stipulated under Section 207 of the Cr.P.C. committed the case to the Court of Sessions. Appellant was charged under Sections 302 and 449 of IPC and Section 25(1-B)(A) read with Section 3 and 27 of the Arms Act. The appellant abjured the guilt and claimed to be tried. Prosecution, in order to prove its case, examined as many as 36 witnesses before the trial Court. Apart this, document Ex.-P/1 to Ex.-P/64 were also marked in evidence.

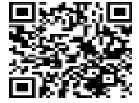
12. The incriminating circumstances appearing against the appellant were brought to his notice in his examination under Section 313 of the Cr.P.C. The appellant either denied or claimed innocence regarding most of the incriminating circumstances and submitted that he has been falsely implicated in this case. He has further pleaded that he was detained in



police station and his hairs were pulled out forcibly from his head. Pistol was also not recovered from him. Due to friendly relationship with the deceased, money transaction had taken place. Deceased paid all the money due to him and therefore, documents in this regard were returned to the deceased. Due to previous animosity he has been falsely implicated in this case. The defence has examined Satyendra Singh Rathore (DW-1) and Anil Raj Singh (DW-2).

13. Learned trial Court on the basis of the evidence adduced before it *vide* impugned judgment found the appellant guilty for the offences under Sections 302 and 449 of IPC and Section 25(1-B)(A) read with Section 3 and 27 of the Arms Act and sentenced him to undergo imprisonment along with fine as mentioned in para 1 of this judgment.

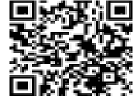
14. Learned counsel for the appellant has vehemently assailed the conviction and sentence on the ground that appellant has been falsely implicated in the case by the police due to his previous animosity with police. He has further contended that all the alleged eye-witnesses have turned hostile and did not support the prosecution case. As far as the circumstantial evidence is concerned, prosecution has failed to establish chain of incriminating circumstances exclusively and unerringly pointing



out towards guilt of the appellant, therefore, the learned trial Court has committed a serious error in recording conviction against him. It is further submitted that learned trial Court has overlooked serious anomalies, omissions and contradictions present in the prosecution case. Independent witnesses have neither supported the disclosure statement nor seizure of the incriminating articles at the instance of the appellant or from the spot. There was no motive for killing the deceased by the appellant as he was having friendly relationship with him.

15. To buttress his contentions, learned counsel has also assailed the impugned judgment on the ground that complaint (Ex.-D/2) allegedly lodged by the deceased cannot be treated as dying declaration. His signatures on the application have also not been proved. He has further stated that judgment by Apex Court in **Dalbir Singh Vs. State of U.P.** reported in **(2004) 5 SCC 334** relied upon by the trial Court in this regard is not applicable.

16. Learned counsel has further referred statements of photographer Jagdish Chandra (PW-23) and Umesh Bhatiya (PW-24). He has also referred para 31 and 32 of statements of Jabbar Khan (PW-33) and para 14 of statement of the then SHO Bhupendra Singh (PW-36) for buttressing

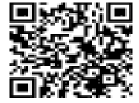


his point that prosecution has utterly failed to prove case against the appellant.

17. Learned counsel has also assailed the DNA report on the ground that sampling was not proper and for this he has relied upon the judgment by the Apex Court in the case of **Rahul Vs. State of Delhi, Ministry of Home Affairs and Another** reported in **(2023) 1 SCC (Cri) 305**. For impeaching the circumstantial evidence and to bolster his submission that chain of evidence is not complete, he has relied upon the judgment by the Apex Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra** reported in **AIR 1984 SC 1622**.

18. He has further placed reliance upon the judgment by the Apex Court in the case of **Joginder Singh Vs. State of Haryana** reported in **(2014) 3 SCC (Cri) 366** for bolstering his contentions that since co-accused Vishal Sharma has been granted benefit of doubt, therefore, learned trial Court has wrongly placed reliance on the same set of evidence for convicting the appellant.

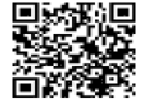
19. In the alternative limb of his argument, learned counsel has raised feeble plea that the incident took place suddenly in the heat of passion. There was no premeditation on the part of the appellant to kill the



deceased, therefore, if this Court found appellant guilty, his conviction from Section 302 may be converted to Section 304 (Part-1) of IPC. To bolster his submission, he has relied upon the judgment by the apex Court in the case of **Gurpal Singh Vs. State of Punjab** reported in **2017 (2) MPLJ (Cri) (SC) 1**. On the above premises, learned counsel has prayed for allowing the appeal and setting aside the impugned judgment of conviction and order of sentence and acquitting the accused of all the charges levelled against him.

20. *Per contra,* learned counsel for the State supported the impugned judgment and has submitted that there is ample evidence on record to prove the prosecution case. He has further submitted that appellant has won over the eye-witnesses, however, circumstantial evidence along with DNA and Ballistic Expert Reports are sufficient to connect the appellant with the allegations levelled against him. Learned trial Court properly appreciated the evidence and findings of conviction recorded against the appellant on foolproof. Appeal is devoid of substance. Impugned judgment needs no interference by way of this appeal, therefore, prayed for dismissed the appeal *sans* merit.

21. Heard learned counsel for the parties and perused the record.

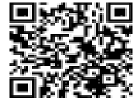


22. We have bestowed our anxious consideration to the rival submissions raised at bar and have also carefully perused the impugned judgment and evidence available on record. The question for consideration is, whether the conviction and sentence recorded by the learned trial Court is not based on proper appreciation of relevant legal position and the evidence on record?

23. Admittedly, the eye-witnesses in the case viz. Neelesh Pathak (PW-1), brother of the deceased; Kailash Pathak (PW-2), father of the deceased; Garima Pathak (PW-4), wife of the deceased; and Mohan @ Sunil Sharma (PW-5) have turned hostile, therefore, it is to be seen, whether other evidence available on record is sufficient to hold the appellant guilty for murder of the deceased.

24. The law relating to circumstantial evidence is by now well settled by a catena of authorities. The five golden principles, otherwise known as the 'Panchsheel' with regard to proof of a case based on circumstantial evidence which have been stated by the Apex Court in the case of ***Sharad Birdhichand Sarda (Supra)*** are as follows :

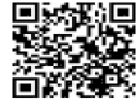
> **"***(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established;*
>
> *(ii) the facts so established should be consistent only*



> *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;*
>
> *(iii) the circumstances should be of a conclusive nature and tendency;*
>
> *(iv) they should exclude every possible hypothesis except the one to be proved; and*
>
> *(v) 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.*"

25. In **Aftab Ahmed Ansari Vs. State of Uttranchal** reported in **AIR 2010 SC 773** equivalent to **2010 (2) SCC 583** the apex Court has considered about the mode and manner as well as the approach to be adopted while dealing with a case of circumstantial evidence. The relevant part whereof runs as under :

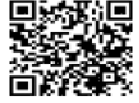
> "*In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion howsoever strong cannot be allowed to take place of proof and, therefore, the Court has to judge watchfully and ensure that the conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturization of actual incident but the circumstances cannot fail. Therefore, many a times, it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider*



the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. …….. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case."

26. The evidence adduced by the prosecution has to be appreciated in the light of the aforesaid legal principles so as to examine as to whether the findings arrived at by the learned trial court with regard to proof of the circumstances as well as the fact that the complete chain of circumstances is established exclusively pointing towards the guilt of the accused are in accordance with evidence.

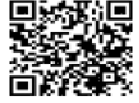
27. As far as contention of the appellant with regard to unequal treatment meted out to him on the same set of evidence is concerned, in the considered view of this Court there is no substance in this contention in the factual matrix of the case. From perusal of the prosecution evidence, it has been found that at the spot co-accused Vishal Sharma, who has been acquitted by the trial Court extending benefit of doubt, was not present.



Except the allegation of exhortation to the appellant to kill the deceased, no other overt act has been attributed to him. This allegation has also not been found proved only on the basis of call records wher there is no recording of conversation between the appellant and co-accused, his brother Vishal Sharma the appellant's case cannot be said to be on the same footing with that of co-accused.

28. This aspect has been elaborately dealt with by the learned Trial Court in para 64 to 68 and thereafter, benefit of doubt has been enlarged to the co-accused Vishal Sharma, who *ex-consequentia* has been acquitted under Section 302 read with Section 109 or 302/34 of IPC. In the light of the aforesaid discussion, the contention raised on behalf of the appellant for unequal treatment meted out in convicting to him on the same set of evidence is *sans* merit, hence rejected.

29. As mentioned hereinabove the prosecution witnesses including near and dear ones as Neelesh Pathak (PW-1), brother of the deceased; Kailash Pathak (PW-2), father of the deceased; and Garima Pathak (PW-4), wife of the deceased have turned hostile. But even after that as held by the apex Court in the case of **Khujji @ Surendra Tiwari Vs. The State Of Madhya Pradesh** reported in **AIR 1991 SC 1853**, it is well settled that



even after any prosecution witness turned hostile, his total testimony would not get effaced. That part of the testimony, which is corroborated by the other evidence can be relied upon.

30. In the instant case, Neelesh Pathak (PW-1) though turned hostile, has admitted his signatures on report (Ex.-P/1) from 'A' to 'A' and 'B' to 'B', which is an application / intimation to the In-charge, Police Station Kotwali, Dewas with regard to the murder of his brother Mukesh @ Monu Pathak by appellant. He has also admitted his signatures on FIR (Ex.-P/2). This has also been proved by the then SHO, Police Station Kotwali, Dewas Bhupendra Singh (PW-36). He has deposed before the Court that Neelesh Pathak (PW-1) has given a written complaint (Ex.-P/1), on which he has made a note for registering the offence and on this application offence at Crime No.240/2013 under Sections 302, 449, 506 and 109 of IPC was registered against the appellant Piyush Sharma @ Kaka, resident of Bhonsle Colony, Dewas and his brother co-accused Vishal Sharma. Ex.-P/1 is the first version with regard to the commission of offence of murder of the deceased Mukesh @ Monu Pathak and it is sufficient to prove commission of offence on the said date.

31. Learned trial Court in para 58 of the impugned judgment has

summarized circumstances which has been relied upon to prove guilt of the appellant are as under:

"*(i) Appellant on 16/02/2013 has sent a complaint (Ex.-D/2) to Superintendent of Police that appellant and co-accused Vishal Sharma are threatening to kill him and if any untoward incident happens, they will be responsible for it and on the very same day in evening at about 08:00 pm incident happened in which the deceased died.*

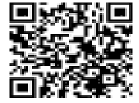
(ii) In the aforesaid complaint (Ex.-D/2), the deceased has levelled allegations against the appellant and co-accused Vishal Sharma relating to money transaction, which has been proved in the instant case by way of Ex.-P/14 and 54, which proves the statement sent to the Superintendent of Police.

(iii) The hairs found in the hand of deceased Mukesh have been proved to be of the appellant by way of DNA Report, which matched with the DNA of appellant Piyush.

(iv) Pistol used in the incident has been seized at the instance of appellant and marks of groove in the barrel have been found matched with the bullet recovered from the body of the deceased.

(v) Empty cartridge, which was recovered from the spot, which is corroborated by Ballistic report.

(vi) Call details (Ex.-P/46 and P/47) proved that on the date



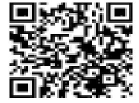
of incident appellant Piyush, co-accused Vishal Sharma and deceased were in contact on phone call.

(vii) The earring recovered from the spot has been found to be of appellant Piyush, which is shown in photographs (Ex.-P/33), proving presence of appellant Piyush on the spot and no explanation in this regard has been given by the appellant."

32. The learned trial Court on consideration of prosecution evidence has found all the aforesaid circumstances proved against the appellant.

33. As regards the nature of death of deceased, testimony of Dr. H.S. Rana (PW-31), who conducted autopsy on the dead body of deceased, is quite clinching and clear to the effect that bullet injury found on the left side of the chest has proved fatal damaging lungs and heart of the deceased. Doctor has further opined that death of the deceased was due to cardiogenic shock and excessive bleeding, which was result of bullet injury damaging heart and death of the deceased was of within 24 hours from the time of postmortem. Injury caused was sufficient to cause death. The testimony of Dr. H. S. Rana (PW-31) could not be demolished in cross-examination. It has remained intact on the material point. Thus, it is proved that death of the deceased was homicidal in nature.

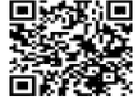
34. There appears to be no reason not to accept the testimony of Dr.



H.S. Rana (PW-31), which is free from any material infirmity or anomaly, therefore, it is found proved that the deceased Mukesh @ Monu was put to death by inflicting bullet shot injury to him on the vital part of his body and his death was homicidal in nature.

35. The contentions on behalf of the appellant with regard to the first and second circumstances, which has been relied upon by learned trial Court treating written complaint dated 16/02/2013 by the deceased to the Superintendent of Police, Dewas (Ex.-D/2) is that it has been wrongly treated as dying declaration relying upon the judgment of **Dalbir Singh (Supra)**. Counsel has further submitted that signatures on this complaint (Ex.-D/2) were of the deceased has not been proved by obtaining report of Handwriting Expert. For this he has also relied upon para 16 of statement of Neelesh Pathak (PW-1) and para 10 of Garima Pathak (PW-4), wherein they have denied signatures of deceased Mukesh @ Monu on Ex.-D/2 between 'A' to 'A' and 'B' to 'B'.

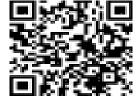
36. Learned trial Court has appreciated Ex.-D/2 in para 27 of the impugned judgment by referring statement of ASI Har Prasad (PW-11), Deepika Mujalde (PW-18) and Harish Kumar (PW-29). ASI Har Prasad (PW-11) in his statement before the Court ha stated that on 18/02/2013 he



was posted in Inward Outward Section of Superintendent of Police, Dewas, where the deceased Mukesh in person came to office and filed written complaint (Ex.-D/2), which was registered on No.B/1246 and put seal impression on it. Inward Register (Ex-P/25) was seized *vide* Seizure Memo (Ex.-P/24). This witness has not at all been cross-examined even after affording opportunity to that effect.

37. Deepika Mujalde (PW-18) has proved receipt of the above complaint. Similarly Head Constable Harish Kumar (PW-29) has also proved the fact that Head Constable Bhawar Singh Rathore (PW-32) has submitted the aforesaid letter before SI Abdul Jabbar (PW-33), which was received from the Office of Superintendent of Police, Dewas. This letter was seized by the SI Abdul Jabbar and prepared Seizure Memo (Ex.-P/35). Nothing adverse has surfaced in the cross-examination of the aforesaid witness, which could disprove the fact that complaint (Ex.-D/2) was not filed by the deceased Mukesh.

38. Even though the date of filing of the above complaint has been mentioned by ASI Har Prasad (PW-11) as 18/02/2013, but from perusal of the aforesaid complaint it is clear that it bears drafting date 16/02/2013. The incident of murder of the deceased Mukesh @ Monu took place on



16/02/2013 in evening at 08:30 pm, which if read conjointly with the date mentioned on complaint (Ex.-D/2), it makes very much clear that complaint was lodged by the deceased Mukesh on 16/02/2013 itself before the incident when he was alive, therefore, mention of date 18/02/2013 by Har Prasad (PW-11) has no bearing on the prosecution case as this witness was not cross-examined by the prosecution nor given any suggestion that this letter (Ex.-D/2) was filed after the death of the deceased.

39. As far as contention with regard to the nature of the aforesaid document (Ex.-D/2) is concerned, from perusal of the aforesaid document, it is found that deceased has given vivid description of details of money lent by appellant Piyush to Vanmali Patwardhan, wherein as security the deceased has given a blank cheque and signed stamp paper to appellant Piyush, which he did not return to him even after repeated demands.

40. It is further stated in the document that appellant was raising illegal demand of Rs.15 Lakhs from the deceased and also threatening to get executed the sale deed of house of the deceased. In this letter it has also been mentioned that appellant and his brother co-accused Vishal Sharma is threatening him to kill. It has also been mentioned that on 15/02/2013 Vishal Sharma by mobile number 9893419595 made a call on his mobile

number 9302443088 and threatened that if by 16/02/2013 he did not pay Rs.15 Lakhs to them he will be killed.

41. It has also been mentioned that the appellant and his brother co-accused Vishal Sharma can cause to happen any untoward incident with him and if any such incident happens they will be responsible for it. The deceased by way of this complaint asked for protection and getting back blank cheque and stamp paper from the appellant and his brother. This complaint has been written and lodged before the incident actually happened.

42. Looking to the aforesaid testimony of Har Prasad (PW-11), it cannot be inferred that this complaint was not prepared and signed by deceased Mukesh prior to his death. The contents of letter clearly bring it under purview of dying declaration which is admissible under Section 32(1) of the Indian Evidence Act as the statement therein has been made by the deceased Mukesh about cause of death or as to any of the circumstances or transaction, which resulted in his death. Bare reading of the letter (Ex.-D/2) reveals that same has been got typed and signed by the deceased, who was completely fed up with the threatening of illegal demand of money by the appellant and his brother Vishal Sharma.

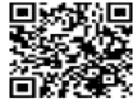
43. It has also been proved by seizure of Cheque (Ex.-P/14), which bears signature of the deceased and letter (Ex.-P/54) written by Senior Manager, Oriental Bank of Commerce to SHO Kotwali, Dewas with report that cheque (Ex.-P/14) number 838575 bears signature of Mukesh Pathak S/o Kailash Pathak of his account number 11502011001510.

44. With regard to Ex.-P/14, a letter (Ex.-P/53) to Manager, Oriental Bank of Commerce was written for ascertaining the account number and signatures of the deceased on the aforesaid cheque. Reply (Ex.-P/54) of the letter was received from the Bank reveals that the aforesaid cheque is drawn on account No.11502011001510 of the deceased Mukesh and bears his signatures on part 'A' to 'A'. From bare perusal it is found that these signatures are identical with signatures on Ex.-D/2 on part 'A' to 'A' and 'B' to 'B'. It proves that Ex.-D/2 was got prepared by the deceased Mukesh under his signatures and belies contentions raised on behalf of the appellant in this regard. From bare perusal of signatures between 'A' to 'A' on the cheque (Ex.-P/14) seized from appellant by Inspector Bhupendra Singh (PW-36) *vide* seizure memo (Ex.-D/1) and on 'A' to 'A' and 'B' to 'B' on Ex.-D/2 are on comparison found identical, which also repels the contentions of the appellant that due to non-availability of Handwriting

Expert, Ex.-D/2 has been signed by the deceased Mukesh @ Monu, is not proved.

45. In the light of aforesaid evidence on record, contentions raised on behalf of the appellant that this letter Ex.-D/2 does not bear signatures of the deceased cannot be accepted.

46. Even inward of Ex.-D/2 in the office of Superintendent of Police on 18/02/2013 does not change the nature of this document, has rightly been considered as dying declaration by learned trial Court in view of the **Dalbir Singh (Supra)**. Similar view was also taken in **Pakala Narayana Swami Vs. King-Emperor** reported in **AIR 1939 PC 47**, where K. told to his wife that he was going to Berhampore, as P.'s wife had written and asked him to come and receive payments due to him. On March 21, K. left his house in time to catch a train for Berhampore, where P. lived with his wife. On March 23, K.'s dismembered body was found in a trunk which had been purchased for P. In the aforesaid factual backdrop Court held that on the trial of P. for the murder of K., the statement made by K. to his wife was admissible in evidence under Section 32, sub-S.1, of the Indian Evidence Act as a circumstance of the transaction which resulted in K.'s death.

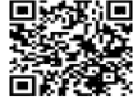


47. In our considered view the learned trial Court has not committed any error in treating (Ex.-D/2) as dying declaration. Thus, reliance placed by learned trial Court treating Ex.-D/2 as dying declaration of the deceased is lawful and cannot be questioned.

48. Learned trial Court has relied upon the DNA report, which matched with the DNA of appellant Piyush with the hairs found in the hand of deceased Mukesh. Contention raised on behalf of the appellant with regard to the aforesaid DNA report is that hairs allegedly found in the hand of the deceased have been implanted to falsely implicate him. For this, testimony of Jagdish Chandra (PW-23) who has taken and developed photographs (Article-A3 to A17) have been referred to buttress his point.

49. To appreciate the contention *Shav Panchayatnama* (Ex.-P/4), which has been prepared by SI Abdul Jabbar Khan (PW-33) is relevant. This document has been prepared and proved on 17/02/2013. In this *Panchayatnama,* it is specifically mentioned that in between fingers of right hand of the deceased some hairs have been found stuck.

50. Constable / Photographer Jagdish Chandra (PW-23) has proved that he has taken photographs (Article-A3 to A17), which have been seized by Seizure Memo (Ex.-P/39) by SI Abdul Jabbar Khan (wrongly mentioned



as 'Gaffar'). From perusal of his statement, it cannot be inferred that hairs found in the hand of deceased were implanted. This witness in examination-in-chief has stated that in mortuary room photograph Article-A9 was taken in which hair was in the hand of the deceased. Mere further statement that Investigating Officer after putting the hair on the ground got prepared photograph does not dent the prosecution case, therefore, this contention that hairs found in the hand of deceased were implanted to falsely implicate the appellant, is not tenable.

51. Dr. Atul K. Bidwai (PW-34) has deposed before the Court that on 19/02/2013 he was posted as Pathologist in District Hospital, Dewas. Sub Inspector A. Jabbar (PW-33) had produced appellant Piyush Sharma @ Kaka, resident of Bhonsle Colony, Dewas for collecting his blood sample for DNA examination. He arranged blood sampling and sample was seal packed in the presence of witnesses and was handed over to SI A. Jabbar (PW-33). In this regard form (Ex.-P/9) was filled up by him, which bears his signature between 'A' to 'A' and 'B' to 'B'. He has also got signatures of the appellant on this form along with his thumb impression. This statement of the Doctor remained intact in the cross-examination. SI Jabbar Khan (PW-33) has also proved blood sampling for DNA

examination in para 9 of his examination-in-chief. He has further stated that he has also signed form (Ex.-P/59). Form along and annexures along with blood samples were sent to Forensic Science Laboratory, Sagar for DNA examination.

52. This fact has also been proved by Bhawar Singh Rathore (PW-32). This witness has stated that filled up identification form bearing signatures of the appellant and seal of MGH were seized by Head Constable Gopal Singh Bhusare and seizure memo (Ex.-P/42) was prepared. Thus, it is proved by cogent evidence that blood samples for DNA examination were taken from the appellant.

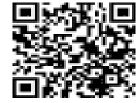
53. Seized articles along with hairs recovered from the hand of the deceased were sent for DNA examination to Forensic Science Laboratory, Sagar. DNA report (Ex.-P/45-A) received from FSL, Sagar mentions about positive result. It is mentioned that in Ex.-A(7487) hairs recovered from the hand of the deceased Mukesh Pathak @ Monu and Ex.-A(7488) blood sample of the appellant Piyush Sharma @ Kaka has identical DNA profile. This DNA report is conclusive proof to prove complicity of appellant in murder of the deceased. The contention raised to impeach the credibility of DNA report is of no avail as nothing has been adduced by the appellant

against this report neither by way of defence evidence nor otherwise any fact could be culled out by way of cross-examination of prosecution witness. In the light of the aforesaid factual matrix, judgment relied upon by the appellant in the case of **Rahul (Supra)** is of no avail.

54. DNA finger print is identical for every part of body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred percent precise.

55. In the case of **Mukesh & Anr. Vs. State For Nct Of Delhi & Ors. reported in (2017) 6 SCC 1**, the Apex Court in paragraphs 455, 457 and 458 has elaborately dealt with value of DNA finger printing, which are extracted as under:-

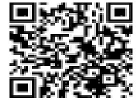
> *"455. Before considering the above findings of DNA analysis contained in tabular form, let me first refer to what is DNA, the infallibility of identification by DNA profiling and its accuracy with certainty. DNA – De-oxy-ribonucleic acid, which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens,*



victim's DNA on the blood-stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders. Finger prints are only on the fingers and at times may be altered. Burning or cutting a finger can change the make of the finger print. But DNA cannot be changed for an individual no matter whatever happens to a body.

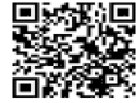
457. ***DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or from witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA finger printing makes it possible to obtain conclusive results. Section 53A*** *Cr.P.C. is added by the Code of Criminal Procedure (Amendment) Act, 2005. It provides for a detailed medical examination of accused for an offence of rape or attempt to commit rape by the registered medical practitioners employed in a hospital run by the Government or by a local authority or in the absence of such a practitioner within the radius of 16 kms. from the place where the offence has been committed by any other registered medical practitioner.*

458. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in Santosh Kumar Singh v. State



through CBI (2010) 9 SCC 747, the Court held as under:-

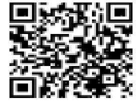
> *"65. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the appellant. The trial court had found against the prosecution on this aspect. In this connection, we must emphasise that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development.*
>
> *66. Dr. Lalji Singh in his examination-in-chief deposed that he had been involved with the DNA technology ever since the year 1974 and he had returned to India from the UK in 1987 and joined CCMB, Hyderabad and had developed indigenous methods and techniques for DNA finger printing which were now being used in this country. We also see that the expertise and experience of Dr. Lalji Singh in his field has been recognised by this Court in Kamalanantha v. State of T.N. (2005) 5 SCC 194 We further notice that CW 1 Dr. G.V. Rao was a scientist of equal repute and he had in fact conducted the tests under the supervision of Dr. Lalji Singh. It was not even disputed before us during the course of arguments that these two scientists were persons of eminence and that the laboratory in question was also held in the highest esteem in India.*
>
> *67. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements*



supported by documents that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the appellant was from a single source and that source was the appellant.

68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In Bhagwan Das v. State of Rajasthan AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.

71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in Kamti Devi v. Poshi Ram (2001) 5 SCC 311. In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already

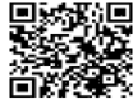


> *indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9.” [emphasis added].*

56. Learned trial Court has not committed any error in relying upon the DNA report as an additional link to connect the appellant with the crime.

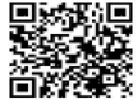
57. Another circumstance is Ballistic Expert Report (Ex.-P/44) from the FSL, Sagar. The then SHO, Police Station Kotwali, Dewas Bhupendra Singh (PW-36) has stated before the Court that from the spot, on the date of incident 16/02/2013 a empty cartridge (Article-A28) having a whole on its bottom bearing mark 7.65 kf was recovered and Seizure Memo (Ex.-P/7) was prepared by him. During postmortem bullet (Article-A29) was recovered from the body of deceased and in seal packed condition was handed over to the police by Dr. H.S. Rana (PW-31), which was seized by SI Abdul Jabbar Khan (PW-33). This fact is proved by the statement of Dr. H. S. Rana (PW-31).

58. It has also been proved by Bhupendra Singh (PW-36) that during investigation on the basis of information given by the appellant in his disclosure memo (Ex.-P/32) he has seized single barrel pistol (Article-25) and magazine with three live cartridges (Article-27) in the presence of witnesses and prepared Seizure Memo (Ex.-D/1). Seized articles i.e.



pistol, magazine (Article-26), live cartridges and empty cartridge recovered from the spot (Article-28), bullet recovered from the body of deceased Mukesh (Article-29) and jacket, vest and shirt (Article-31), which the deceased was wearing at the time of incident, were seized by Bhupendra Singh (PW-36) and were sent for FSL examination. Bhupendra Singh (PW-36) has withstood lengthy cross-examination and his statement remained intact. Nothing adverse surfaced which could make his statement unbelievable.

59. In FSL report (Ex.-P/44), it has been opined that pistol (Article-1) is semi automatic pistol, which has been manufactured for firing 7.65 mm semi-rimmed cartridges. This was in working condition. In the barrel remains of fired cartridges were found. Empty Cartridge (Article-EC1) of 7.65 mm bears chamber marks with that of barrel of the above pistol. Bullet (Article-EB1) has been fired from the pistol (Article-A1). In the lab from pistol (Article-A1), cartridge (Article-LR3) was test fired and rest of the two live cartridges could also have been fired from the pistol (Ex.-A1). It has also been opined that jacket (Ex.-C1), Shirt (Ex.-C2) and Vest (Ex.-C3) bears hole (H1), which can be caused by jacketed bullet EB1. On jacket (Ex.-C1) around gunshot hole (H1) powder marks blackening has



been found, which shows that bullet was fired from about within two feet. The above evidence could not be impeached during cross-examination, which again connects the appellant from the commission of murder of the deceased.

60. Learned trial Court in impugned judgment has properly appreciated the evidence in this regard looking to the above, contentions raised on behalf of the appellant with regard to the aforesaid FSL report, has no substance.

61. Next circumstance which has been relied upon by the learned trial Court to connect the appellant with the commission of offence of murder, call details were obtained from the mobile phone of the deceased, appellant and his brother Vishal Sharma, which are Ex.-P/46 and P/47.

62. In this regard contention raised is based on non-availability of certificate under Section 65-B of the Indian Evidence Act. This has been proved by Nodal Officer Gaurav Kapoor (PW-30). Nothing adverse has been surfaced in cross-examination of this witness, therefore, call details cannot be discarded only on the basis of non-availability of certificate under Section 65-B of the Indian Evidence Act. This set of evidence has been dealt with by the trial Court in para 47 to 49 of the impugned

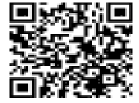
judgment. This also gives an adverse link in the chain of the circumstances.

63. From perusal it is clearly established that the appellant Piyush Sharma @ Kaka had caused death of the deceased Mukesh @ Monu by firing bullet shot on his chest, which proved fatal. No fault can be found in the finding that it is the appellant Piyush Sharma @ Kaka, who caused death of the deceased.

64. Learned counsel for the appellant has raised contention with regard to the applicability of Section 302 of IPC, therefore, this aspect is also dealt with in the light of prevailing legal position. For this learned counsel relied upon the judgment by the Apex Court in the case of **Gurpal Singh (Supra)**.

65. In the aforesaid premises the question arises whether the murder of Mukesh @ Monu falls in the category of murder within Section 300 of IPC or culpable homicidal not amounting to murder under Section 304 of IPC?

66. Learned counsel for the appellant has vehemently submitted that in the facts and circumstances of the case and the manner in which the alleged incident has occurred the case squarely stands covered by



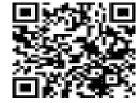
Exception 4 of Section 300 of IPC because there is nothing to indicate that there was a pre-mediation on the part of the appellant. The submission is that the appellant feeling enraged because of heated altercation by the deceased, in a sudden quarrel fired the shot, therefore, at the most it can be said that appellant in the heat of passion at the spur of moment, had opened the fire from his pistol, which unfortunately landed on the chest of the deceased resulting in his death. The contention is that intention to cause death cannot be attributed in the facts and circumstances of the case to the appellant, hence the case is covered by Section 304 Part I or Part II of IPC and not by Section 302 of IPC.

67. Exception 4 to Section 300 of 'IPC' runs as under:

> *"Exception 4.- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation.-It is immaterial in such cases which party offers the provocation or or commits the first assault."*

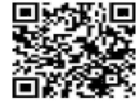
68. The issue with regard to applicability of exception 4 of Section 300 IPC came to be considered by the Hon'ble apex Court in **Ravindra Shalik Naik & Ors. Vs. State of Maharashtra** reported in **2009 (12) SCC 257**, wherein the law has been summarized as under:-

> *"6. .... The help of Exception 4 can be invoked if*



death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acting in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the `fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons."

69. In the instant case, it has been found that the appellant was continuously threatening the deceased to kill him due to monetary transaction, which has taken place on the security of the deceased. For this he has also lodged (Ex.-D/2) with the Superintendent of Police, Dewas. The appellant not only entered to the house of the deceased armed with pistol, which in itself reveals his intention. When he failed to terrorize and extort money from the appellant, which was allegedly due from one Patwardhan Sahab, who committed suicide, the appellant hurled filthy abuses on the deceased and when objection was raised, he opened fire on him. This in no manner leaves any doubt that the appellant has intention to kill the deceased. In such circumstances, the judgment relied upon by learned counsel for the appellant in the case of **Gurpal Singh (Supra)** is

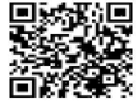


distinguishable on facts and no way comes to rescue of the appellant.

70. The Apex Court in the case of **Anbazhagan Vs. The State Represented by the Inspector of Police** reported in **2023 LiveLaw (SC) 550 : 2023 INSC 632** has elaborately dealt with the distinction between Section 299 and 300 of IPC. Para 21 of the aforesaid judgment is relevant to ascertain the intention of the appellant in the instant case, which runs as under:

> ***"****21. Intention, which is a state of mind, can never be precisely proved by direct evidence as a fact; it can only be deduced or inferred from other facts which are proved. The intention may be proved by res gestae, by acts or events previous or subsequent to the incident or occurrence, on admission. Intention of a person cannot be proved by direct evidence but is to be deduced from the facts and circumstances of a case. There are various relevant circumstances from which the intention can be gathered. Some relevant considerations are the following:-*
>
> *1. The nature of the weapon used.*
>
> *2. The place where the injuries were inflicted.*
>
> *3. The nature of the injuries caused.*
>
> *4. The opportunity available which the accused gets.****"***

71. As discussed hereinabove, in the instant case from very beginning the appellant has intention to kill the deceased as has transpired from the evidence on record, therefore, by no stretch of imagination it can be held that the injury caused by the appellant was not with intention of causing



death of the deceased. As the totality of the established facts and circumstances do show that the occurrence had happened most unexpectedly in a sudden quarrel and without premeditation during the course of which the appellant caused a solitary bullet injury. Even if single injury is inflicted, if that particular injury as in the present case was intended, and objectively that injury was found sufficient in the ordinary course of nature to cause death, the requirements of Clause thirdly to Section 300 of the IPC, are fulfilled and the offence comes under the category of murder and not under Section 304 (Part-I) or 304(Part-II) of IPC. Therefore, we are of the considered view that this contention raised on behalf of the appellant also does not have any substance and accordingly, it is rejected.

72. Resultantly, this appeal being devoid of merits, deserves to be and is hereby accordingly, dismissed by upholding the conviction and sentence passed by the trial Court.

Certified copy as per rules.

(VIVEK RUSIA) **JUDGE**	**(BINOD KUMAR DWIVEDI)** **JUDGE**

Tej