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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 16.02.2023***
***Pronounced on: 18.04.2023***

\+ **CRL.A. 419/2022**

**VINOD KUMAR** **.....Appellant**
Through: Ms. Manika Tripathy (DHCLSC), Mr. Manish Vashist, Mr. Varun Bhatnagar and Mr. Roshan Kumar, Advocates

versus

**STATE (GNCT OF DELHI)** **..... Respondent**
Through: Ms. Shubhi Gupta, APP. Inspector Rajbir Singh, PS: Punjabi Bagh.

**CORAM:**
**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**
**HON'BLE MR. JUSTICE GAURANG KANTH**

**J U D G M E N T**

**GAURANG KANTH, J.**

1. The present Appeal has been preferred by the Appellant under Section 374(2) of Criminal Procedure Code, 1973 (hereinafter referred to as 'Cr.P.C') impugning the Judgment dated 24.05.2022 (hereinafter referred to as 'Impugned Judgment') and Order on sentence dated 08.07.2022 (hereinafter referred to as 'Impugned Order') passed by Sh. Pooran Chand, learned Additional Sessions Judge-02 (West), Tis Hazari Court, New Delhi (hereinafter referred to as 'Trial Court') in Sessions

Case No. 57716/2016, titled as 'State Vs Vinod Kumar & Anr.', emanating from FIR No. 154/2016, registered in PS Punjabi Bagh under Section 302/34 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and 25/27/54/59 Arms Act.

2. By way of Impugned Judgment, the Appellant was convicted by the learned Trial Court for committing the offences under Section 302/34 IPC and 25/27/54/59 Arms Act. Vide the Impugned Order, the Appellant was sentenced to: (a) rigorous imprisonment for life for offences under Section 302/34 IPC along with fine of Rs. 10,000/-, in default of which a further rigorous imprisonment for 6 months; (b) to rigorous imprisonment for one year for offence under Section 25 Arms Act along with fine of Rs. 5,000/-, in default of which further rigorous imprisonment for 3 months; and (c) to rigorous imprisonment for four years along with fine of Rs. 5,000/-, in default of which rigorous imprisonment for three months. It has further been ordered by the learned Trial Court that all the sentences shall run concurrently.

**FACTS GERMANE FOR ADJUDICATION OF PRESENT APPEAL**

3. It is the case of the prosecution that PW-11, ASI Sardar Singh, who was posted at PP Madipur, PS Punjabi Bagh, received DD No. 38PP on 18.02.2016. Thereafter, he along with PW-13, Ct. Banwari Lal reached at the spot of crime i.e., 194-A, Lal Quarter, Punjabi Bagh. On enquiry, it was found

that a boy was shot and he was taken to Maharaja Agrasen Hospital. PW-13, Ct. Banwari Lal was directed to remain at the spot of crime in order to protect the site of crime and PW-23, Inspector Ajmer Singh ('IO') and SI Nafe Singh, who had reached at the spot by then, along with PW-11, ASI Sardar Singh left for the hospital.

4. Upon reaching the hospital, they got to know that the deceased boy, namely Yash, aged two years, was declared brought dead by the doctors. Consequently, PW-23, Inspector Ajmer Singh collected MLC No. 150/16 of the deceased from the doctor. A parcel, which was sealed by the doctor, containing T-shirt, vest, sweater, etc. of the deceased boy was seized by IO Ajmer Singh vide seizure memo, Ex. PW-11/A. He recorded statement (Ex. PW-1/A) of father of deceased, PW-7, Lalit Kumar (also the complainant) at the hospital.

5. PW-7, in his examination-in-chief, has stated that on 18.02.2016, the Appellant came to his house at about 8 PM and asked him to accompany him to consume liquor. The wife of PW-7 objected to the same. The Appellant got angry and left the house of PW-7. PW-7 further stated that the Appellant again came to his house on the same day at about 10 PM, when he was lying on *charpai* and his deceased son was playing on his chest. A bullet was fired from the window which hit his son. PW-7 immediately ran outside his house and saw that the Appellant was sitting on a motor cycle as a

pillion rider and fled away. Thereafter, the wife of PW-7 took their injured son to Maharaja Agrasen Hospital.

6. After recording statement of PW-7, police personnel came back to the spot, whereupon, Inspector Ajmer Singh prepared the site plan (Ex. PW-7/E & 7/I) of the place of incident. Crime team inspected the spot and photographs of the spot were clicked. PW-11, ASI Sardar Singh went to the Police Station along with *rukka* for registration of FIR.

7. Subsequently, a seizure memo (Ex. PW-7/B) was prepared vide which led of bullet was seized (Ex. PW-7/B1) and piece of blood stained quilt was also seized (Ex. PW-7/C). Thereafter, statements of witnesses were recorded and case property was deposited with MHC(M).

8. Post mortem of deceased body was conducted on 19.02.2016 at Sanjay Gandhi Memorial Hospital Mortuary. In the Post Mortem Report (Ex. PW-24/A), the doctor opined cause of death as "craniocerebral damage as a result of gunshot injury, antemortem in nature."

9. The Appellant was arrested on 20.02.2016 at about 4 PM by IO Ajmer Singh from his house on identification of the Complainant Lalit Kumar vide Arrest Memo, Ex. PW-6/C. After interrogation, a disclosure statement (Ex. PW-6/F) was recorded wherein the Appellant disclosed the location of the weapon by which offence was committed. On his disclosure statement, recovery of weapon of offence i.e., *desi katta* was made from the almirah in his house. At the instance of the

Appellant, two live cartridges were also recovered. A cartridge case was found to be entangled in the barrel of the *katta*. All these articles were seized vide seizure memo (Ex. PW-7/H). Thereafter, Accused Ashok was also arrested at the instance of Appellant vide arrest memo (Ex. PW-6/G).

10. Statement of witnesses were recorded and evidences were collected by the IO. After completing the investigation in the matter, a chargesheet under Section 173(2) Cr.P.C was filed before the learned Metropolitan Magistrate against the accused persons under Section 302/34 IPC and 25/27/54/59 Arms Act. After complying with the provision of Section 207 Cr.P.C, the learned Metropolitan Magistrate committed the case to the learned Trial Court (Sessions Court) under Section 209 Cr.P.C vide Order dated 04.06.2016.

11. The learned Trial Court framed charges against the Appellant and the other Co-Accused under Section 302/34 IPC and 25/27/54/59 Arms Act vide its Order dated 23.09.2016. The Appellant and the Co-Accused Ashok pleaded not guilty to these charges before the learned Trial Court and claimed trial. When the trial had reached at the stage of prosecution evidence, a supplementary chargesheet was filed with respect to offences under Section 25/27/54/59 Arms Act vide which FSL result of ballistics and sanction under section 39 Arms Act were brought on record. Albeit, these charges were already framed against the Accused persons but the same were re-framed against the Accused persons by the learned

Trial Court vide its Order dated 15.01.2018, to which the Accused persons again pleaded not guilty and claimed trial.

12. During the trial, the Prosecution produced 24 witnesses in support of its case, whereas, the Appellant did not lead any defence evidence in his support. In the Statement of Accused, the Appellant herein just denied all the accusations made against him and stated that he had been falsely implicated in the present case and he was innocent.

13. After completion of trial, the learned Trial Court held the Appellant and the other Co-Accused, Ashok guilty of murder of the deceased child namely Yash, punishable under Section 302/34 IPC, vide the Impugned Judgment. The Trial Court observed that the prosecution had successfully established beyond reasonable doubt that the Appellant and the Co-Accused Ashok had come to the house of PW-7, father of deceased on the night of 18.02.2016 to kill him due to Appellant's enmity with PW-7, but unfortunately, the bullet hit the child, resulting in his death. Furthermore, the learned Trial Court held that it has also been proved on record that a *desi katta* (country made gun), which was the weapon of offence in the present case, was recovered from the possession of the Appellant along with two live cartridges. The Appellant did not have any license for the same and thus, the learned Trial Court also held the Appellant guilty for an offence punishable under Section 25/27 of Arms Act.

14. Moreover, vide the Impugned Order, the learned Trial Court, after hearing the submissions made on behalf of the State and the Appellant on the point of sentence, ordered the Appellant to imprisonment and fine as per the terms mentioned earlier. All the sentences were ordered to run concurrently by the learned Trial Court. It was further directed that from the total fine of Rs. 20,000/-, Rs. 18,000/- were to be paid to the Deceased Victim's family and Rs. 2,000/- to the State for its expenses. Learned Trial Court also directed the DLSA, West to provide adequate compensation to the parents of the deceased under Section 357A Cr.P.C.
15. Being aggrieved by the Impugned Judgment and the Impugned Order, the Appellant has preferred the present Criminal Appeal.
16. It is pertinent to note that the Co-Accused Ashok was not appearing before the learned Trial Court since 21.03.2020, after he was granted bail on 24.04.2019. Consequently, proceedings under Section 82/83 of Cr.P.C were initiated against him and he was declared a proclaimed offender by the learned Trial Court vide its Order dated 11.03.2022.

**SUBMISSIONS MADE ON BEHALF OF THE APPELLANT**

17. The learned counsel for the Appellant opened her submissions by contending that the Impugned Judgment dated 24.05.2022 is based on conjectures and surmises and the same is against the facts and the settled proposition of law as the learned Trial

Court has ignored and omitted the material evidence. It has further been argued on behalf of the Appellant that the learned Trial Court has disregarded the cogent evidence in favour of the Appellant and has failed to appreciate the basic matter in dispute, as to how the Appellant has been categorized as the actual perpetrator of the crime because there is no direct evidence on record to establish that the Appellant was involved in the commission of the alleged offence.

18. The learned counsel for the Appellant has argued that there were no eye-witnesses at the place of incident and no witness saw the Appellant firing the gun at the deceased boy. She has further stated that though there were eye-witnesses earlier, but then later on, during their cross-examination, they retracted from their statements and turned hostile.

19. Learned counsel for the Appellant has taken this Court through the testimonies of PW-7 and PW-3 during her arguments. She has stated that these two witnesses were the only eye-witnesses and they both saw the Appellant outside the house and heard the gunshot being fired from outside the house. Thereafter, she pointed out irregularities in the testimonies of the aforesaid two witness and also submitted that PW-7 had turned hostile. She further pointed out that it was not possible for PW-3 to see outside the house from where she was sitting as per her own testimony.

20. Learned counsel for the Appellant has further argued that the two live cartridges recovered from the house of the Appellant

were different from the cartridge which is used in the *katta* (weapon of offence) recovered from the house of the Appellant. During the course of arguments, she also referred to the *rukka* (Ex. PW-7/A) prepared by the IO Inspector Ajmer Singh.

21. It was further submitted on behalf of the Appellant that the defence of the Appellant is that there was a fight between PW-7, father of the deceased child and PW-3, mother of deceased child. During the altercation between them, the father of the deceased child accidently shot the deceased child and due to his enmity with the Appellant and falsely implicated the Appellant in the present case.

22. Learned counsel for the Appellant has taken us through the testimony of PW-13, Ct. Banwari Lal who was one of the first police officer to reach at the spot of crime. She has pointed out from his testimony that he found out that the mother of the deceased child had taken the deceased child to the hospital alone and father of the deceased child did not accompany her to the hospital at the first place. She has submitted that this fact proves that there was a fight between the father and mother of the deceased child and during such fight, the deceased child was accidently shot, which was the reason why the father of the deceased child had not taken him to the hospital and only his mother took him to the hospital.

23. Learned counsel for the Appellant has further stated that as per the testimony of PW-3 (mother of the deceased), the

deceased child was playing on the chest of PW-7 (father of the deceased). She has argued that as per these facts stated by PW-3 in her testimony, there should have been a lot of blood on the quilt lying next to the deceased child but no such blood was found on quilt.

24. Learned counsel for the Appellant has strongly argued that a perusal of the site plan (Ex. PW-7/E) of the place of incident reveals that PW-3, mother of deceased child could not have seen out of the main door or the window from their bed or charpai. She has further stated that all the doors were closed at the time of incident, so no witnesses could have seen any person outside the home. In view of these submissions, she has stated that the testimony of PW-3 should be discredited as she had not seen the Appellant outside the house.

25. Learned counsel for the Appellant has further referred to Ex. PW-5/P-1, photographs of the spot of incident. She has further stated that the photographs speak for themselves that it was not possible for any of witnesses sitting inside the house to see the face of the Appellant who was allegedly outside the house.

26. It has been further been argued on behalf of the Appellant that PW-7, father of the deceased had admitted that 3-4 criminal cases were pending against him so it was possible that PW-7 had many enemies, one of whom had come to attack him on the night of the incident when accidently the bullet hit the deceased child.

27. Learned counsel for the Appellant has argued that the Prosecution has failed to even establish the presence of the Appellant at the spot of crime on the night of 18.02.2016. Further, the Prosecution has also failed to show that the weapon of offence i.e., katta recovered from him was the weapon used to commit the offences concerned with the present case.

28. Learned counsel for the Appellant has further submitted that the Prosecution's story is not substantiated by the medical and scientific evidence on record because the ballistic analysis report is doubtful and contrary to the Prosecution's version. It was further argued that the learned Trial Court had observed that the FSL report is inconclusive in establishing the Appellant's guilt, therefore, considering the absence of proof, the Prosecution has miserably failed to establish its version of linking the Appellant to the alleged crime.

29. In view of the aforementioned submissions, it has been submitted on behalf of the Appellant that the learned Trial Court has failed to properly appreciate the facts and circumstances of the case, hence, the Impugned Judgment is liable to be set aside.

**SUBMISSIONS MADE ON BEHALF OF THE PROSECUTION**

30. *Per contra*, learned APP for State strongly refuted the submissions made by the learned counsel for the Appellant and submitted that the Impugned Judgment is based on proper

appreciation of the facts and evidence, hence, no interference in the Impugned Judgment is called for by this Court. She has further stated that the statements of material prosecution witnesses and medical/scientific evidence are corroborative in nature and the Prosecution has been able to prove its case beyond reasonable doubts.

31. Learned APP for State has further submitted that the *rukka* which was prepared in the hospital by the IO names the Appellant as the offender. She has further submitted that even all the public witnesses had stated in their examination in chief that the Appellant was the offender. She states that though there may exist certain minor contradictions and improvements in the depositions of the witnesses, however, the same are not such which go to the root of the Prosecution case. It was further submitted that merely because a witness was declared hostile, his entire evidence cannot be completely treated to be effaced from the record.

32. Learned APP for State has further submitted that the Prosecution had relied upon various recoveries which were made at the instance of the Appellant. It is further submitted that there is no cogent reason to doubt the aforementioned recoveries on the grounds that the same are affected only in the presence of the police witnesses and are inadmissible as the same were not supported by any independent witness(es). Learned APP has referred to the FSL report (Ex. PX-1) and states that a perusal of the FSL report corroborates the fact

that the recovered gun was used for the commission of crime in the present case.

33. It is further argued on behalf of the Prosecution that the Appellant even did not take the plea of alibi before the learned Trial Court and for that matter, even before this Court. This shows that the Appellant has no explanation as to his whereabouts on the date of incident and it reflects that the Appellant was present at the spot of crime only.

34. Lastly, it was urged by learned APP for the State that the evidence produced on record as well as the circumstances proved by the Prosecution, form a complete chain pointing unequivocally towards establishing the guilt of the Appellant. The Appellant was not able to shake the case of the Prosecution before the learned Trial Court. In view of the aforementioned submissions, it has been pleaded on behalf of the State, this Court may not interfere with the well-reasoned Impugned Judgment and the Impugned Order passed by the learned Trial Court convicting the Appellant for the offences committed by him.

**LEGAL ANALYSIS**

35. This Court has heard the learned counsel appearing for the Appellant as well as learned Additional Public Prosecutor for State at length. This Court has also examined the Trial Court Record and the Judgments cited by both the Counsels.

36. At the outset, this Court would examine the scope of an Appellate Court in an appeal under Section 374 of Cr.P.C

against a judgment of conviction. It would be apposite to refer to the decision of Hon'ble Supreme Court in ***Padam Singh Vs State of U.P.***, reported as (2000) 1 SCC 621, wherein the Apex Court held as follows:

> *"2. ....It is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court. The judicial approach in dealing with the case where an accused is charged of murder under Section 302 has to be cautious, circumspect and careful and the High Court, therefore, has to consider the matter carefully and examine all relevant and material circumstances, before upholding the conviction."*

37. Furthermore, reference may be given to the decision of Hon'ble Apex Court in ***State of W.B. Vs Kailash Chandra Pandey***, reported as (2004) 12 SCC 29, wherein it was held as follows:

> *"13. It is needless to reiterate that the appellate court should be slow in reappreciating the evidence. This Court time and again has emphasised that the trial court has the occasion to see the demeanour of the witnesses and it is in a better position to appreciate it, the appellate court should not lightly brush aside the appreciation done by the trial court*

*except for cogent reasons. In this connection, a reference may be made to a decision of this Court in the case of State of Punjab v. Hari Singh [(1974) 4 SCC 552 : 1974 SCC (Cri) 588 : AIR 1974 SC 1168] wherein Their Lordships have observed as follows: (SCC p. 557, para 9)*

> *"Supreme Court's power of interference under Article 136 with judgments of acquittal is not exercised on principles which are different from those adopted by it in dealing with convictions. It is a principle, common to all criminal appeals by special leave, that the Supreme Court will refrain from substituting its own views about the appreciation of evidence if the judgment of the High Court is based on one of two alternative views each of which was reasonably open to the High Court to accept. If, however, the High Court's approach is vitiated by some basically erroneous apparent assumption or it adopts reasoning which, on the face of it, is unsound, it may become the duty of the Supreme Court, to prevent a miscarriage of justice, to interfere with an order whether it be of conviction or of acquittal." (AIR p. 1168)*

*Similarly, in the case of Khem Karan v. State of U.P. [(1974) 4 SCC 603 : 1974 SCC (Cri) 639 : AIR 1974 SC 1567] it was observed as follows: (SCC p. 606, para 5)*

> *"Further, neither mere possibilities nor remote probabilities nor mere doubts which are not reasonable can, without danger to the administration of justice, be the foundation of the acquittal of an accused person, if there is otherwise fairly credible testimony. If a trial court's judgment verges on the perverse, the appellate court has a duty to set the evaluation right and pass a proper order." (AIR p. 1567)*

*Similarly, in the case of State of Rajasthan v. Bhawani [(2003) 7 SCC 291 : 2003 SCC (Cri) 1628] the appellate court reversed the finding of the trial court without considering and taking into account the testimony of eyewitnesses. Their Lordships after appreciation of the evidence reversed the order of the High Court and maintained the order of conviction of the trial court. Their Lordships observed that notwithstanding the inconsistencies,*

*exaggerations or embellishments, the eyewitnesses' account has to be accepted that clinches the case of the prosecution."*

38. In view of the above settled position of law qua the scope of Appellate Court in an appeal under Section 374 Cr.P.C., this Court will now re-examine the relevant and material evidences placed on record before the learned Trial Court while dealing with the averments made by the learned counsel for the Appellant before this Court.

39. The learned counsel for Appellant has argued before this Court that there were material irregularities in the testimony of eye-witnesses in the present case i.e., PW-3 and PW-7. She had further submitted that PW-7, father of deceased child had even turned hostile in his cross-examination and hence, the learned Trial Court erred by relying upon their testimonies while convicting the Appellant.

40. It would be apt to reproduce the cross-examination of PW-3 for the sake of convenience:

*"Xxxx by Sh. Rajesh Kumar, Ld. Counsel for accused Ashok.*

*Prior to the incident dated 18.02.2016 whenever accused Ashok came to our house with accused Vinod he never quarreled with Lalit. However, on those occasions when hot talks were taken place by Vinod with my husband Lalit then Ashok used to tell "Tu iski sunta kyu hai, iska jo karna hai kar".*

*It is wrong to suggest that on 18.02.2016 at about 10 PM I had not seen accused Ashok and Vinod when they came there on a motor cycle. I do not know the registration number of four wheeler in which I had taken my son to Maharaj Aggarsain Hospital. I also do not know the name of driver/ owner of said four wheeler as immediately after dropping me and my son at the hospital he left. Vol. I was*

*busy to save and provide treatment to my son. I cannot tell the time when I reached hospital as I was perturbed due to injury of my son and I had not seen the time. However, Maharaja Aggarsain Hospital is situated near my house. When I reached in the hospital immediately thereafter no police official met me. However, after some time police reached there and made inquiries from me in the police station.*

*I went to police station alone. It is wrong to suggest that police had not recorded my statement in the present case. It is wrong to suggest that I had not seen accused Vinod and Ashok at about 10 PM when they came in front of our house on motor cycle.*

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*XXXXXXXX by Sh. Rajender Prasad, Ld. DLSA Cl. for accused Vinod.*

*It is correct that accused Vinod also used to visit prior to incident dated 18.02.2016 as he is my jija in relation. My sister i.e. wife of accused Vinod also came to our house but not frequently. Whenever accused Vinod came to our house with his wife he never quarrel. Vol. whenever accused Vinod came to our house with Ashok they used to quarrel with us. Further Volunteer accused generally came with accused Ashok in night hours after about 8.00 pm. Accused Vinod came along with accused Ashok to our house about 2-3 times prior to 18.02.2016. I do not remember all the dates of their visit to our house prior to 18.02.2016 however one date was 26.01.2016. It is correct that on 26.01.2016, accused Vinod and Ashok did not quarrel with us. Vol on that day i.e. 26.01.2016 my husband was ill. On 26.01.2016 accused Ashok remain standing at the gate and accused Vinod came inside. Accused Vinod and Ashok also did not quarrel prior to 26.01.2016 when they visited our house once or twice. It is correct that prior to 18.02.2016 neither I had lodged any complaint against Accused Vinod and Ashok nor my husband has lodged.*

*I cannot tell the colour of cloth worn by accused Vinod on 18.02.2016 when he came along with co-accused Ashok to our house. When accused Vinod and Ashok return from our house at about 8.00 pm accused Vinod threatened us three*

*times saying that "soch liyo". At that very time i.e. around 8.00 pm I had not called the police on 100 number.*

*My house is situated on the road on corner side. I cannot tell that in which direction the gate of my house is situated as I am illiterate. On the road in front of my house there was street light. The public persons used to pass through the road in front of my house however on the date and time of incident no public persons was passing through the road due to night hours of winter season. It is correct that residential houses were situated near my house. It is incorrect to suggest that I had not seen accused Vinod and Ashok on 18.02.2016 at about 10.00 pm when they came on a motorcycle. Vol I had seen them from the back door of the house. I cannot tell the colour of cloth worn by accused Vinod and Ashok when they came to our house on 18.02.2016 either at about 8.00 pm or at about 10.00 pm. Vol I had not observed the colour of their cloths. I had only seen their faces. It is incorrect to suggest that I am unable to tell the colour of cloths of accused persons as they had not came to our house at about 10.00 pm on their motor cycle. It is incorrect to suggest that accused persons did not fire. It is further incorrect to suggest that Yash did not receive injuries from the firing of accused persons. It is incorrect to suggest that on 18.02.2016 a quarrel had taken place between me and my husband or that during that quarrel my husband had fired and the bullet hit to our son Yash. It is incorrect to suggest that accused Vinod was falsely implicated in the present case due to previous enmity.*

*Police reached in the hospital within 10-15 minutes of my reaching with my son there. I do not remember the number of police official however they were many in number. My husband, my father in law, mother in law and Jeth reached at the hospital within 10-15 minutes. As per my recollection police and my husband and in-laws reached simultaneously. It is correct that my statement as well as statement of my husband and Jeth were recorded at the P.S. I cannot tell the time of my stay in the hospital. I cannot tell the time when I reached to the P.S. I also cannot tell the time of my stay at the PS. Many persons i.e. our relatives and neighbours visited P.S. however I do not remember the name of all the*

*said persons. It is incorrect to suggest that I had given my statement to the police on the asking of my husband and in laws. It is further incorrect to suggest that I am deposing falsely at the instance of my husband, mother in law and Jeth."*

41. The cross-examination of PW-7 conducted by the learned counsels for the accused persons along with the re-examination is also extracted herein below:

*"XXXX by Sh. Rajender Prasad, Ld. LAC for accused Vinod.*

*It is correct that when accused Vinod along with co-accused Ashok came to my house at about 8 PM on 18.02.2016, they had not misbehaved and made any quarrel either with me or my wife. It is correct that accused Vinod is my brother-in-law (sandu bhai) and prior to this case we were having cordial relations between both the families.*

*It is correct that in one case I and accused Vinod were the accused. It is correct that during the trial of said case when I was produced in the Court along with the accused Vinod we had some hot talks with each other. It is wrong to suggest that due to said hot talks exchanged with the accused Vinod stopped talking to him even after being released on bail in the said case.*

*It is correct that I have been facing trial as an accused in 3-4 cases in different courts. It is wrong to suggest that after the said hot talks I thereafter had hot talks with the accused Vinod on 2-3 occasions and on those occasions I threatened him to teach a lesson and also to implicate in false case.*

*It is correct that on the 2nd occasion on 18.02.2016, at about 10 PM, when I heard the noise of fire arm, I came out of my house, I only noticed two persons on the bike while turning but I could not see their faces due to dark as it was night time. The distance where I noticed the said persons while taking turn at a bike was about 15-20 steps from my house. It is correct that there was no street light on the spot where I notice the said persons on the bike. It is correct that I did not notice the registration number of the bike i.e. DL 6S AG 9288 while said two person took turn in the lane.*

*After the incident when my brother along with other persons went to the house of accused Vinod he flee away after leaving his bike and only thereafter the registration number of the said bike was noticed by my brother. It is wrong to suggest that my brother did not visit the house of accused Vinod on the said night or that no such visit was ever happened by which registration number of bike was noted. It was about 11:30 PM - 12 midnight in the same night when I was told about the registration number and fleeing away of accused Vinod from his house. The name of my cousin brother is Sanjay, my real brother Shailender went to the house of accused Vinod. I do not know the address of house of accused Vinod but it is in Sarai Rohilla Delhi. I cannot tell the distance of the house of accused Vinod from my house but on bike it will take around 20-25 minutes to reach there. I came to know about the above said facts in the Maharaja Aggarsain Hospital when I reached there from my in laws house as I had gone there in search of accused Vinod as his bike was at his parental house. It is correct that we made the search of accused Vinod only on the basis of suspicion.*

*It is correct that in the first visit at about 8 PM when accused persons came to my house I did not notice from their conduct any threat to be extended to me or my wife. My in laws resides at Wazirpur, Madrasi Colony, Delhi. I went to my in-laws house on the bike of my friend but its registration number I do not remember. However, it was a Splendor bike. I had apprised my friend Golu about the incident. I did not stated my visit to my in-laws house on the bike to my friend to the police. I have conveyed my suspicion about accused Vinod to his wife as well as my in-laws when I visited their house. The wife of accused Vinod and my in-laws did not inquire the reason of my suspicion about accused Vinod. I reached at the house of my in laws at about 11 PM and reached at the hospital at about 12 mid night. The wife of accused Vinod and my in-laws accompanied me to the hospital. My both brother in laws, wife of Dilar @ Rinku also accompanied me. It is wrong to suggest that police was not present at the hospital when I reached there.*

*When I reached at the hospital, my brother, cousin brother and other family members and neighbours were already present there. It is correct that police did not record my statement in the hospital. It is correct that statement of none else was recorded by the I.O in my presence in the hospital.*

*In reply to Court question witness states that police made inquiry from me and my family members regarding the incident.*

*It is correct that I did not name accused Vinod and Ashok to the I.O when he made inquiries from me in the hospital. We stayed in the hospital at about 15-20 minutes and reached home around about 12:30 AM. It is correct that on the same night police did not visit our house and no writing work was done either at my instance or of my family members.*

*It is correct that on 20.02.2016, I did not join the investigation of this case along with 5-6 police officials and no recovery was made. It is correct that accused Vinod and Ashok were not arrested at my instance on 20.02.2016. Vol. I was in Gar Mukteshwar on the said date. I came back to Delhi from Gar Mukteshwar around 6:30 PM. It is correct that at around 7:30 PM I was called to PS Punjabi Bagh. It is correct that both the accused persons were present in the PS and were being taken to hospital for their medical. It is correct that my signatures were obtained on some written documents and on some blank papers.*

*It is correct that after 20.02.2016, I never joined the investigation of this case. It is correct that my statement was not recorded on 18.02.2016 and 20.02.2016. My wife was called in the PS. It is correct that none of my family member was called in the PS in my presence. It is wrong to suggest that statement of my wife was not recorded in my presence.*

*XXX by Sh. Rajesh Kumar, Ld. Counsel for accused Ashok.*

*It is correct that I had not seen accused Ashok while driving the bike at the time of fire at my son Yash. It is correct that prior to this case I had never seen accused Ashok and nor he was known to me. It is correct that I had never seen accused Ashok in the association of co- accused Vinod at any point of time. It is correct that I had never*

*visited at the house of accused Ashok at Gali no. 10, Than Singh Nagar, Anand Parbat, New Delhi.*

*At this stage, Ld. Add. PP for State seeks permission to re-examine the witness as the witness has changed his version today pertaining to the role of accused Vinod as well as identification at the spot of occurrence as well as recovery of weapon of offence at the instance of accused Vinod.*

*Heard. Allowed.*

*I am illiterate. It is correct that on 20.08.18, I gave my statement in the court without any pressure, coercion and I was in the sane mind. I have given my statement voluntarily. I had deposed on that day about the role of incident and regarding my joining the investigation. It is wrong to suggest that today I am changing my version from my earlier statement about the role of the accused persons because I have been won over by them being close relative i.e. sadu (brother in law of accused Vinod) and accused Ashok is his friend.*

*XXXX by Sh. Rajender Prasad, Ld. LAC for accused Vinod.*

*It is wrong to suggest that IO had tutored me on 20.08.18 prior to giving evidence in this court. Even none of the other person besides the IO tutored me as to what I had to depose in the court on 20.08.18.*

*Court question: Whatever you had deposed on 20.08.18 in the court, those were the correct facts of the incident as happened?*

*Answer: It is correct that I had stated only and only truth of the facts pertaining to the incident on 20.08.18."*

42. The perusal of the testimonies of PW-3 and PW-7 does not substantiate the averments made by the learned counsel for the Appellant. The testimony of PW-3 shows that her credibility was unimpeached by the learned counsel for the Appellant. PW-3 has categorically denied every suggestion put by the learned counsel for Appellant and she has reiterated

the facts stated by her examination-in-chief in her cross-examination, more particularly the fact that she had seen the Appellant outside the house in the night at the time of the incident. It is a settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. Thus, undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. In view of the above, the testimony of the PW-3 shows no major contradictions and the minor deviations therein are not of such nature so as to disregard her whole testimony as the same are not fatal to the case of the Prosecution. Therefore, this Court is of the view that the testimony of PW-3 cannot be disregarded for the purposes of adjudication of the present case.

43. It is also to be noted that PW-7 is the brother-in-law (*Sadu*) of Appellant so there are chances of family putting undue pressure on PW-7 for changing his stand in the deposition given by him in his examination-in-chief against the Appellant, who is his own brother-in-law. Also, it is to be noted that that there was significant time lapse in the cross-examination of PW-7, which took place after almost 6 months, in view of which also undue influence and pressure from the family upon PW-7 to contradict his statement earlier made before the Court cannot be ruled out.

44. Even though PW-7 had turned hostile in his cross-examination with respect to the various facts which were stated by him in his examination-in-chief, however, on his re-examination and a question being put to him by the learned Trial Court, he stated that his deposition in examination-in-chief was voluntary and without any undue pressure, coercion or influence from anyone. He further stated that he was in sane mind at the time of deposition of testimony given in his examination-in-chief and had stated completely true facts in his statement before the court.

45. It is also to be regarded that the deposition of PW-7 in his examination in chief stands in solidarity with his statement in *rukka* (Ex. PW-7/A), which is a documentary evidence having corroborative value since the same have been proved by prosecution witnesses including by PW-23, Inspector Ajmer Singh in his deposition. Further, the statement made by PW-7 in his examination-in-chief has not only stated to be correct and voluntarily made by him without any force, pressure, coercion and undue influence but the same is also corroborated by other prosecution witnesses, who have been able to withstand the cross-examination of the defence and have proved the case of the Prosecution.

46. In view of the decision of Hon'ble Supreme Court in ***Khujji Vs State of M.P.***, reported as (1991) 3 SCC 627, this Court is of the opinion that the learned Trial Court is right in placing reliance upon the said decision of Hon'ble Supreme Court and

not setting aside the testimonies of PW-3 and PW-7. The relevant portion of the decision in ***Khujji*** (*supra*) is reproduced hereinbelow:

> *"6. We have given our anxious consideration to the submissions made by the learned counsel for the contesting parties. The fact that an incident of the type alleged by the prosecution occurred on May 20, 1978 at about 8.20 p.m. is not seriously disputed nor is the location of the incident doubted. The evidence of PW 3 Kishan Lal and PW 4 Ramesh came to be rejected by the trial court because they were declared hostile to the prosecution by the learned Public Prosecutor as they refused to identify the appellant and his companions in the dock as the assailants of the deceased. But counsel for the State is right when he submits that the evidence of a witness, declared hostile, is not wholly effaced from the record and that part of the evidence which is otherwise acceptable can be acted upon. It seems to be well settled by the decisions of this Court — Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389 : 1976 SCC (Cri) 7 : (1976) 2 SCR 921] , Rabindra Kumar Dey v. State of Orissa [(1976) 4 SCC 233 : 1976 SCC (Cri) 566 : AIR 1977 SC 170] and Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59 : (1980) 1 SCR 95] — that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof… "*

47. The Hon'ble Supreme Court took a similar view in its decision in ***Devraj Vs State of Chhattisgarh***, reported as (2016) 13 SCC 366, following the decision in ***Khujji*** (*supra*). The relevant portion from the said decision is extracted hereinbelow:

> *"18. Another judgment which needs to be noted is Khujji v. State of M.P. [Khujji v. State of M.P., (1991) 3 SCC 627 :*

*1991 SCC (Cri) 916] This Court in the above case held that merely because a witness was declared hostile, his entire evidence cannot be treated as effaced from the record, his testimony, to the extent found reliable, can be acted upon. In para 6 following was observed: (SCC p. 635)*

> *"6. ... The evidence of PW 3 Kishan Lal and PW 4 Ramesh came to be rejected by the trial court because they were declared hostile to the prosecution by the learned Public Prosecutor as they refused to identify the appellant and his companions in the dock as the assailants of the deceased. But counsel for the State is right when he submits that the evidence of a witness, declared hostile, is not wholly effaced from the record and that part of the evidence which is otherwise acceptable can be acted upon. It seems to be well settled by the decisions of this Court—Bhagwan Singh v. State of Haryana [Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389 : 1976 SCC (Cri) 7] , Rabindra Kumar Dey v. State of Orissa [Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233 : 1976 SCC (Cri) 566] and Syad Akbar v. State of Karnataka [Syad Akbar v. State of Karnataka, (1980) 1 SCC 30 : 1980 SCC (Cri) 59] — that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."*

*19. The above propositions have again been reiterated by this Court in Vinod Kumar v. State of Punjab [Vinod Kumar v. State of Punjab, (2015) 3 SCC 220 : (2015) 2 SCC (Cri) 226 : (2015) 1 SCC (L&S) 712] , where in para 31 following has been stated: (SCC p. 237)*

> *"31. The next aspect which requires to be adverted to is whether testimony of a hostile witness that has come on record should be relied upon or not. Mr Jain, learned Senior Counsel for the appellant would contend that as PW 7 has totally resiled in his cross-examination, his*

> *evidence is to be discarded in toto. On a perusal of the testimony of the said witness, it is evincible that in examination-in-chief, he has supported the prosecution story in entirety and in the cross-examination he has taken the path of prevarication. In Bhagwan Singh v. State of Haryana [Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389 : 1976 SCC (Cri) 7] , it has been laid down that even if a witness is characterised as a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence. In Khujji v. State of M.P. [Khujji v. State of M.P., (1991) 3 SCC 627 : 1991 SCC (Cri) 916] , the Court after referring to the authorities in Bhagwan Singh [Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389 : 1976 SCC (Cri) 7] , Rabindra Kumar Dey v. State of Orissa [Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233 : 1976 SCC (Cri) 566] and Syad Akbar v. State of Karnataka [Syad Akbar v. State of Karnataka, (1980) 1 SCC 30 : 1980 SCC (Cri) 59] , opined that the evidence of such a witness cannot be effaced or washed off the record altogether, but the same can be accepted to the extent it is found to be dependable on a careful scrutiny thereof."*
>
> *20. The evidence of a witness who has been declared hostile can be relied on if there are some other material on the basis of which said evidence can be corroborated. More so, that part of evidence of a witness as contained in examination-in-chief, which remains unshaken even after cross-examination, is fully reliable even though the witness has been declared hostile."*

48. The learned counsel for the Appellant has argued that PW-3 could not have seen the Appellant from the door of the house, however, a bare perusal of the photographs of the site (Ex. PW-5/P-1) and site plan of the place of incident (Ex. PW-7/E) does not substantiate the argument advanced by the learned

counsel for the Appellant. Moreover, the testimony of PW-3 also proves the fact that PW-7, her husband had gone out of the house and had seen the Appellant fleeing away on a motor cycle. The said fact becomes a relevant fact as it took place immediately after there was a noise of gunshot, thus, forming the part of same transaction. Therefore, the said fact is relevant fact as per the principle of res gestae as provided under Section 6 of the Indian Evidence Act, 1872 and the same corroborates the case of the Prosecution.

49. It would be apt to refer to the judgment of Hon'ble Supreme Court in ***Sukhar v. State of U.P.***, reported as (1999) 9 SCC 507, discussing the principle of res gestae:

> *"7. Sarkar on Evidence (15th Edn.) summarises the law relating to applicability of Section 6 of the Evidence Act thus:*
>
> *"1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.*
>
> *2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.*
>
> *3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and bystanders. In conspiracy, riot & c the declarations of all concerned in the common object are admissible.*
>
> *4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."*

50. Additionally, Illustration (a) to Section 6 of Evidence Act may also be referred to:

> *"(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."*

51. The learned counsel for the Appellant has further averred that the two live cartridges found from the almirah of the Appellant in his house did not match with the pistol which was also recovered from the Appellant's almirah. She further stated that ballistic analysis report (Ex. PX-1 & Ex. PW-21/A) is doubtful and contrary to Prosecution's case. However, a perusal of the FSL ballistic analysis report (Ex. PX-1) shows that two cartridges recovered along with the country made pistol (*katta*) were test fired by the ballistics division of forensic science laboratory of Government of NCT of Delhi. After test firing the two live cartridges, their cartridge cases were matched with the cartridge case which was found in the barrel of recovered gun and the same were found to be identical. Moreover, it was established by the FSL report that the country made pistol (*katta*) recovered from the Appellant's possession was in working condition. Thus, the FSL report (Ex. PX-1) does not support the argument raised by the learned counsel for the Appellant.

52. Moreover, the post mortem report of deceased child (Ex. PW-24/A) clearly opines that the cause of death is craniocerebral damage as a result of firearm injury. The said post mortem

report read (Ex. PW-24/A) with the FSL report (Ex. PX-1) makes it clear that the weapon of offence recovered from the Appellant's almirah in his house at the instance of the Appellant, was in a working condition and the said reports read in conjunction with the testimonies of prosecution witnesses, especially PW-3 and PW-7 clearly establishes the chain/sequence of events which establishes the commission of offence by the Appellant by using country made pistol (*katta*) which was recovered from his possession.

53. Further, this Court also does not agree with the defence taken by the Appellant as he has not been able to prove anything on record. The Appellant even failed to lead any evidence in support of the defence taken by him before the learned Trial Court. It has further been contended on behalf of the Appellant that there was a fight between the mother and father of the deceased child and during that fight, the father of deceased child fired towards the mother, but accidentally the bullet hit the child resulting in his death. This Court is of the view that the said defence raised by the Appellant is a mere speculation and he has not been able to prove same on record. The learned counsel for the Appellant had only given suggestions to the Prosecution's witness(es) to this effect, however the said suggestions do not help the Appellant in proving his case in any manner whatsover.

54. Nevertheless, this Court also does not agree with the averment of the learned counsel for Appellant that there was no blood

found on the quilt which was lying near to the deceased child at the time of incident and no blood on the shirt of the Complainant (PW-7), father of the deceased child. This Court finds that the said contention of the learned counsel for the Appellant to be misconceived because the FSL Report (Ex. PW-21/A) makes it conspicuous that there was blood on the quilt and that blood on the quilt matched with the DNA of the deceased child. Further, this Court is of the view that if the shirt of the Complainant has not been placed on record by the Prosecution then one such fact would not come to the rescue of the Appellant as the Prosecution as it does not break the chain of events and circumstances which have already been established on record by the Prosecution to substantiate the guilt of the Appellant beyond reasonable doubts.

55. Now, it would be apt to reproduce the observations of the learned Trial Court:

> "***80.*** *Judging in the light of the said law laid down by the said Superior Courts with regard to* ***last seen evidence****,* ***PW-3 Aarti and PW-7 Lalit*** *had* ***seen the accused outside*** *their house at about* ***10.15 PM*** *and after* ***firing gunshot*** *they both fled in the motorcycle belonging to accused Vinod. As per the* ***post mortem report Ex.PW24/A****, the* ***time of death of deceased is opined at 11.09 P.M****. Therefore, it is clear from the circumstances that there* ***was a time gap of only 54 minutes****. In the said circumstances, there* ***is no possibility of any other person intervening in between and the "last seen theory " is also applicable in the present case.***
>
> xxx xxx xxx
>
> ***87****. Therefore, if the* ***entire evidence that has come on record and the post mortem report*** *is read* ***cumulatively****, they conclusively point towards a* ***definite possibility that***

> ***the deceased must have been killed by the accused persons and none else.***
>
> xxx xxx xxx
>
> ***89.*** *Therefore, in view of the above discussion, I am of the considered opinion that being the position on facts and in law the chain of facts and circumstances and the connecting links stands proved.* ***The prosecution has been able to establish or prove its version by proving circumstantial evidence unerringly pointing out towards the guilt of the accused persons*** *and ruling out any hypothesis of innocence of the accused. In sum and substance, the prosecution has been able to bring the entire chain of evidences which, in totality, lead to a definite conclusion that in all human probability,* ***it is the accused persons, who on the date of incident, came to the house of PW-7/complainant, in order to take revenge, fired gunshot aimed at PW-7, which instead hit the deceased child, which led to his death.*** *Resultantly, both the accused persons are held* ***guilty of offences punishable u/s 302/34 IPC****. Further, it has been proved on record that the* ***weapon of offence i.e country made pistol alongwith two live cartridges have been recovered from the possession of accused Vinod*** *without any license and hence, he is also held guilty for offence punishable u/s 25/27 Arms Act.*
>
> ***90.*** *Accused* ***Ashok is already a proclaimed offender****, hence, let accused Vinod be heard on the point of sentence."*

56. In the light of the reasons as discussed herein above, this Court agrees with the observations made by the learned Trial Court in the Impugned Judgment.

57. The case of the Prosecution has been based on circumstantial evidences and last seen theory. It has been proved on record by the testimony of PW-7 that there was enmity between the Appellant and PW-7, which establishes the motive of the Appellant to commit the crime. Further, the Prosecution has sufficiently proved on record that PW-7 had last seen the

Appellant at the spot of crime, which fact has further been corroborated by the testimony of PW-3. Further, PW-3 has corroborated the said fact by stating in her testimony that she saw that her husband had gone out immediately after the noise of firearm being shot and he saw the Appellant fleeing on hus bike. Further, the testimony of PW-7 is corroborated by the site plan and photographs prepared by the IO as they prove the fact that the bullet was fired from outside the house and came through the window and hit the deceased child. The weapon of offence i.e., a *desi katta* was also recovered from the house of the Appellant on the basis of his disclosure statement. An empty cartridge case was also found stuck in the barrel of the country made pistol (*katta*) and two live cartridges were also recovered besides the pistol from the house of the Appellant. The two live cartridges were test fired from the recovered pistol in FSL and their empty cartridge case were matched with the empty cartridge case recovered from the pistol. Upon such comparison, the cartridge cases of tested cartridge were found to be identical with the empty cartridge case found in the gun. These facts prove that the weapon of offence was in working condition and there was an empty cartridge case in the said gun when it was recovered. Further the post mortem report (Ex. PW-24/A) has opined the cause of death as injury due to gunshot and it also found 2 wounds on the head of the deceased child indicating the entry and exit point of the bullet in the head. The aforesaid facts

i.e., recovery of pistol found in working condition from the house of the Appellant based on his disclosure statement; the Appellant last seen at the spot of crime at the time of incident; opinion in post mortem report with respect to death due to gunshot injury coupled with the testimony of the prosecution witnesses clearly establishes a chain/sequence of events and circumstances pointing to the fact of the Appellant being guilty of charges framed against him.

58. Once, the prosecution had discharged its onus of proving the fact that the Appellant had committed the crime in question then the onus was upon the Appellant to prove that he was innocent. However, the Appellant has failed to do so. In fact, the Appellant has even failed to prove his whereabouts on the date of incident including in his statement recorded under Section 313 Cr.P.C. Furthermore, the Appellant did not even lead any evidence, whether documentary or oral, with respect to his whereabouts before the learned Trial Court. The Appellant has not been able to raise any doubts on the version of the Prosecution supported by evidence. On the other hand, the Prosecution has successfully proved on record that the Appellant is guilty for the charges framed against him. The prosecution has also proved all the circumstantial evidences and the fact that the Appellant was last seen at the spot of incident. Thus, the chain of evidences has been completely proved by the Prosecution without any broken link in the said chain/sequence. Under these circumstances, this Court is of

the view that the Impugned Judgment and Impugned Order passed by the learned Trial Court warrants no interference.

59. This Court finds no basis or reason to disagree with the inferences arrived at by the learned Trial Court convicting the Appellant of the offences under Sections 302/34 IPC and Section 25/27 Arms Act nor with the sentence meted-out for such offences.

60. Accordingly, the Impugned Judgment dated 24.05.2022 and the Impugned Order dated 08.07.2022 are upheld, and the present Appeal is dismissed without any order as to costs.

**GAURANG KANTH, J.**

**SIDDHARTH MRIDUL, J.**

**APRIL 18, 2023**
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