

**IN THE COURT OF SH. NAVEEN KUMAR KASHYAP
ADDITIONAL SESSIONS JUDGE-04, CENTRAL DISTRICT,
TIS HAZARI COURTS, DELHI.**

**Sessions Case No.:28692/2016
CNR NO.-:DLCT01-005488-2015**

STATE

Vs.

1. Lokesh Kumar

s/o Lt. Babu Ram
R/o H.No. A-74, IInd Floor,
Flat No.1, Ankur Vihar,
DLF Ghaziabad, UP

Also At:-

Village Chudiyala, PS
Bhojpur Distt. Ghaziabad
UP

2. Mohit

s/o Babu Ram
H.No. E-299/A, Jagjeet Nagar
New Usmanpur, Delhi-53

Also At:-

Village Chudiyala,
PS Bhojpur, Distt. Ghaziabad (UP)

Case arising out of:-

FIR No.	:	348/2015
Police Station	:	Nabi Karim
Under Section	:	392, 397, 411, 34 IPC

Date of Institution : *09/03/2016.*

Date of Judgment : *19/09/2020.*

J U D G M E N T:-

The Facts:-

1 In nutshell, the case of the prosecution is that on 09/07/2015 ASI Virender

Kumar alongwith Constable Nitin reached near hotel Omega, Pahar Ganj, Delhi. There complainant Ashok Aggarwal alongwith his brother Daal Chand handed over accused No.1, Lokesh Kumar and accused No.2 ,Mohit to them alongwith one pistol which was allegedly used in robbery of one bag with Tiffin inside, alongwith motorcycle Splender. It is further stated that such complainant further narrated details of incident in question including that both such accused alongwith one more accused snatched complainant's bag from him and when the complainant resisted then accused who was standing at a distance took out a pistol and targeted towards the complainant as a result, due to fear, complainant let go his bag. When both such accused started riding back on motorcycle ,then gathering some courage, complainant got hold of accused sitting as pillion rider on the motorcycle and as a result motorcycle got slipped on the spot. In the meanwhile, complainant's brother Dal Chand also reached the spot. At this stage, the accused who had snatched complainant's bag ran away. But the pillion rider whom the complainant has caught hold, was having pistol and he again tried to take away the same but complainant gave a sudden shake to him and as a result pistol fell down. In the meanwhile, complainant's brother Dal Chand caught the rider of the motorcycle. Thereafter they called the police.

ASI Virender Kumar unlocked the magazine of the pistol and found three live cartridge in the same. As such, same was seized and necessary procedure work was carried out and same was sealed with the seal of VS and same was later on sent to FSL. The recovered bag of complainant as well as motorcycle used in the crime bearing No. DL -5SL 0269 was also seized. As a result, the present FIR U/s 392, 397, 411 r/w section 34 IPC as well as Under section 25, 27 r/w section 54, 59 Arms Act was registered. Further disclosure

statements of both the accused No.1 & 2 were recorded. They ,inter alia, disclosed that the name of third accused is Mohit @ Munna. It is further claimed that despite efforts made, such third accused could not be traced at all. They further confessed their involvement in the present case in such disclosure statement made to police after registration of FIR.

As such the present chargesheet was filed accordingly for the above mentioned offence. Later on, a supplementary chargesheet dated 21/04/2016 was also filed relating to the pistol and fire arm in question alongwith sanction 39 of Arms Act and the FSL result.

2. Argument on charge were heard by my learned predecessor. Vide order dated 02/12/2015 accused No.1 was charged with offence u/s 392 r/w section 34 IPC. He was further charged separately for offence u/s 397 IPC as well as section 27 of Arms Act.

But accused No.2 Mohit was charged with offence under section 392 r/w 34 IPC.

Charge was framed accordingly against them on 02/12/2015. Both of them pleaded not guilty and claimed trial.

3. It may further be noted that later on, my another learned predecessor vide order dated 17/05/2018 framed additional charge u/s 25 Arms Act regarding possession of such pistol with three live cartridges against accused No.1 Lokesh Kumar. To such additional charge also, accused No.1 Lokesh Kumar pleaded not guilty and claimed trial.

4. In order to establish the liability of accused persons, prosecution in total examined 9 witnesses, including the complainant / PW-3 Ashok Aggarwal, PW5 / Dal Chand, brother of the complainant and the IO/PW8.

5. Statement of the accused No.1 Lokesh Kumar as well as no.2 U/s 313 Cr.PC were recorded.

In nutshell, it is the defence of accused no.1 that he is falsely implicated in the present case. That PWs have wrongly identified him with ulterior motive in order to save themselves as it is a case of road rage in which complainant was at fault. It is further stated that such case of robbery is made out in connivance with local police official by the complainant and his brother. It is further stated that permission u/s 39 of Arms Act is given in mechanical manner. But accused No.1 Lokesh Kumar chose not to lead any defence evidence.

Likewise accused no.2 Mohit also stated that same. He also chose not to lead any defence evidence.

6. Arguments in detail were addressed by both the sides.

It is argued by learned Addl. PP for State that ingredient of all the offences for which accused no.1 Lokesh Kumar and accused No.2 Mohit were charged are satisfied and proved beyond reasonable doubt. It is argued by learned Addl. PP for State that public witnesses / victim has supported the prosecution on all the material aspects, including during their cross examination. It is further argued that one of the accused i.e. accused no.1 was a police official at the time of incident in question. It is further stated that sanction required under arms act was duly proved and testimony of the PW9 / sanctioning authority remain un rebutted.

On the other hand, learned counsel for the accused persons argued orally as well as submitted written arguments. It is argued by learned counsel for accused persons that *Rukka* has been written at the time of sending the *Tehrir* at 11:45 pm but FIR was registered at 11:15pm itself. It is further argued there is material difference in the version of

complainant in the FIR viz-a-viz his deposition during examination in court regarding the place where accused no.1 Lokesh Kumar was standing and how he used the pistol allegedly. It is further stated that there is doubt as to who took out the pistol i.e. whether it was accused no.1 Lokesh Kumar or co-accused Shoib Munna (who could not be arrested at all). As such, it is stated that in any case charge U/s 397 IPC is not made out at all. It is further argued that the conduct of the complainant is not natural. It is further argued that no independent witness including from omega hotel was examined, although, the same was on the opposite side of the road and was having a glass gate. It is further argued that PW4 admitted that they have not made arrival entry or departure entry at the police station. It is further argued that spot from where the pistol in question was recovered is also in doubt and there is difference in the evidence of PW3 and PW5 in this regard. It is further stated that the IO failed to take finger prints of the accused persons to connect the accused with the pistol. It is further argued that despite the place of incident a thickly populated area, no public witness was joined from the spot while carrying out procedures relating to alleged recoveries of case property / bag, pistol and motorcycle allegedly used in the offence in question. It is further argued that Dal Chand / PW5 is not signatory to any of the proceedings carried out on the spot which also reaffirms that he is a planted witness. As such, it is claimed that both the accused be acquitted as prosecution has failed to prove any of the offence beyond reasonable doubt.

7. Before proceeding further, as per mandate laid down under Section 354 (1) (b) Cr.PC following are the points of determination which are necessary to consider in order to arrive at a conclusion:

(1) Whether the accused persons no.1 and 2 committed robbery and

whether such offence charged against them, is done in furtherance of common intention of all and as such accused no.1 or 2 or both of them committed offence u/s 392 IPC?

(II) If so, whether accused no.1 put the complainant in fear of instant death or hurt or instant wrongful restrain, and thereby induced the complainant to deliver case property (or in the alternative in order to commit such robbery or while committing such robbery or in carrying away property obtained by such robbery, such accused persons or any of them towards that and voluntarily caused or attempt to cause any person death or hurt or wrongful restrain), as such accused no.1 committed offence u/s 397 IPC?

(III) whether accused no.1 possessed pistol loaded with live cartridges and therefore, committed offence u/s 25 of Arms Act?

(iv) whether accused no.1 used such country made pistol loaded with live cartridges and therefore, committed offence u/s 27 of Arms Act?

The Findings:-

8. My findings according to above mentioned points of determination are given in following paras as under:

9. **(I) The First point of determination:**

“Whether the accused persons no.1 and 2 committed robbery and whether such offence charged against them, is done in furtherance of common intention of all and as such accused no.1 or 2 or both of them committed offence u/s 392 IPC”

10. The court has to consider whether the material evidence, in relation to offense u/s 392 r/w section 34 IPC against the accused persons, included the disclosure statement of accused on inquiry by the police officers, regarding alleged robbery in question is

admissible, as well as reliable and trustworthy in the present case?

As far as the disclosure statements of accused no.1 & 2 are concerned, it is to be seen how much of such alleged disclosure statement can be read in evidence, if so at all.

Admittedly accused No.1 & 2 made their disclosure statements while in police custody and that too to a police officer.

Section 25 and 26, which have stood the test of the time for about one & half century, bars reading of any such statement given by accused person to the police or while in police custody.

But section 27 of Indian Evidence Act creates an exception to section 25 and 26 of Indian Evidence Act provided following two conditions are fulfilled:

- i) if and when certain facts are deposed to as discovered in consequences of information received from an accused person in police custody, and
- ii) if the information relates to the facts discovered.

11. But the court must be cautious of the possibility of 'planted discovery' in order to bring the case within the ambit of section 27 and to by-pass the salutary main provisions of section 25 and 26 of Indian Evidence Act. The court must scrutinize the evidence on record keeping such precaution at the back of the mind. In order to utilize the provisions of section 27 against an accused person an ordinary recovery, if so at all, can not be turned into a discovery. The fact must be the consequence and the information the cause of its discovery. The information and the fact must be connected with each other as cause and effect and *not vice-verse*.

12. As far as present case is concerned, nothing is recovered at the instance of the

accused No-1 and for that matter at the instance of accused No-2. Accused No.1 and 2 were apprehended immediately after the offence, as per PW-3 /complainant / victim and public witness PW-5 / Dalchand / brother of the victim. Not only that, as per evidence of PW-3 and 5, the case property / bag of the complainant / PW-3 was also recovered then and there. Further the pistol was also recovered then and there. Thus there was no occasion to make any disclosure statement by accused No.1 or accused no.2.

Thus, as far as disclosure statements of accused No.1 and accused No. 2 are concerned, nothing is covered/saved under section 27 Evidence Act.

13. At this stage, it may also be noted that it is a settled proposition of criminal law that prosecution is supposed to prove its case on judicial file beyond reasonable doubt by leading reliable, cogent and convincing evidence. Further it is a settled proposition of criminal law that in order to prove its case on judicial file, prosecution is supposed to stand on its own legs and it cannot derive any benefit whatsoever from the weaknesses, if any, of the defence of the accused. Further it is a settled proposition of criminal law that burden of proof of the version of the prosecution in a criminal trial throughout the trial is on the prosecution and it never shifts on to the accused. Also it is a settled proposition of criminal law that accused is entitled to the benefit of reasonable doubt in the prosecution story and such reasonable doubt entitles the accused to acquittal.

14. At this stage, it may be noted that section 34 IPC states that when an act is done by several persons in furtherance of common intentions of all, each of such person is liable in the same manner as if it was done by him alone.

In the present case, it is categorically deposed by PW3 / victim / complainant

that when he reached at the corner of his street, he noticed that two boys were present there. It is further deposed that one of them was standing on one side of street and other on the other corner. It is further deposed that he noticed another boy sitting on a motorcycle of grey colour present at a short distance from these two boys. When he was going to take turn towards his street, one of the above said two boys aimed revolver at him. The said boy then snatched his bag which he was carrying. It is further deposed that when he raised alarm, inter-alia such two boys took seat on the pillion of such motorcycle but his brother pushed said motorcycle resulting in its fall. As a result, one of the assailant then left the bag and ran away towards the road. He further stated that he caught hold of one of the boy and his brother caught hold of motorcyclist. Thus, the manner in which all the three persons, including the present two accused acted in tandem with each other including riding the same motorcycle immediately after committing the offence, clearly show that all the three committed such criminal act in furtherance of their common intention of all, Thus present two accused persons can be convicted u/s 392 r/w section 34 IPC.

15. At this stage it would be, pertinent to note that argument of the Learned Counsel for accused persons relating to non-joining of public witnesses. It is argued by learned Counsel for accused persons that in the case of “**Anoop Joshi Vs. State**” 1992(2) C.C. Cases 314(HC), Hon'ble High Court of Delhi had observed as under:

“18. It is repeatedly laid down by this Court in such cases it should be shown by the police that sincere efforts have been made to join independent witnesses. In the present case, it is evidence that no such sincere efforts have been made, particularly when we find that shops were open and one or two shop-keepers could have been persuaded to join the

raiding party to witness the recovery being made from the appellant. In case any of the shopkeepers had declined to join the raiding party, the police could have later on taken legal action against such shopkeepers because they could not have escaped the rigors of law while declining to perform their legal duty to assist the police in investigation as a citizen, which is an offence under the IPC”.

16. It is further argued by Ld. Counsel for accused persons that in “**Roop Chand Vs. The State of Haryana**” 1999(1) C.L.R.69, the Punjab & Haryana High Court held as under:

“3. I have heard the learned counsel for the parties and gone through the evidence with their help. The recovery of illicit liquor was effected from the possession of the petitioner during noon time and it is in the evidence of the prosecution witnesses that some witnesses from the public were available and they were asked to join the investigation. The explanation furnished by the prosecution is that the independent witnesses were asked to join the investigation but they refused to do so on the ground that their joining will result into enmity between them and the petitioner”.

4. It is well settled principle of the law that the Investigating Agency should join independent witnesses at the time of recovery of contraband articles, if they are available and their failure to do so in such a situation casts a shadow of doubt on the prosecution case. In the present case also admittedly the independent witnesses were available at the time of recovery but they refused to associate themselves in the investigation. This explanation does not inspire confidence because the police officials who are the only witnesses examined in the case have not given the names and addresses of the persons contacted to join it is a very common excuse that the witnesses from the public refused to join the investigation. A police officer conducting investigation of a crime is entitled to ask anybody to

join the investigation and on refusal by a person from the public the Investigating officer can take action against such a person under the law. Had it been a fact that the witnesses from the public had refused to join the investigation, the Investigating officer must have proceeded against them under the relevant provisions of law. The failure to do so by the police officer is suggestive of the fact that the explanation for non joining the witnesses from the public is an after thought and is not worthy of credence. All these facts taken together make the prosecution case highly doubtful.”

17. It is further argued by Ld. Counsel for accused persons that in case reported as **1992 Criminal Law Journal page 55** Hon'ble High Court of Delhi had also observed that stereotype versions were being churned out. It was observed:

“.....The recovery is proved by three police officials who have differed on who snatched the *Kirpan* from the petitioner and at what time. The recovery was from a street with houses on both sides and shops nearby. And, yet no witness from the public has been produced. Not that in every case the police officials are to be treated as unworthy of reliance but their failure to join witnesses from the public especially when they are available at their elbow, may, as in the present case, cast doubt. They have again churned out a stereotype version. Its rejection needs no Napoleon on the Bridge at Arcola....”

18. It is further argued by Learned Counsel for accused persons that present case is planted upon the accused persons, as complainant himself was at fault regarding hitting the motorcycle of the accused persons with his car. That even an altercation took place between the two sides regarding the same. But taking advantage of his area and in connivance with his

brother and police officials, both the accused are made prey for the present case. It is further argued that in order to suppress his own misdeed, complainant as well as his brother with police wrongly deposed in court regarding identification of accused no.1 as well as accused no.2.

19. In the present case it is not in dispute that there is no independent witness to the recovery of case property / bag as well as the alleged pistol, three live cartridges and the motorcycle, apart from the complainant / PW-3 and his brother / PW5. On the basis of this , in the light of such case law, it is claimed by the learned Counsel for accused No.1 and accused No.2 that the testimony of all police witnesses as well as that of PW2 and PW5 be rejected.

20. On the other hand Learned Addl PP for state argued to the contrary on this aspect. Learned Addl PP also referred to certain case law including the case of “**Appabhai Vs. State of Gujrat**” (AIR 1988 SC 696), where it has been held as under:

“.....it is no doubt true that the prosecution has not been able to produce any independent witness to the murder that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The Court, therefore, instead of

doubting the prosecution case for want of independent witness must consider the spectrum or the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused.”

21. Thus it is argued by Learned Addl P.P. that adverse inference cannot always be drawn on account of failure of the prosecution to join independent witnesses, despite presence and availability of public witness.

22. This court has considered the arguments and case law relied by both sides. This court is mindful of the fact that there is no presumption that the Police Officers are unreliable witnesses and, therefore, their evidence cannot be accepted.

23. Further as far as search of case property / weapon of offence etc. is concerned, it is also laid down by the Hon'ble Supreme Court time and again that the evidence of the investigating Officer conducting a search can be relied upon without corroboration ,but is equally settled law at the same time is that the question of corroboration depends upon the facts in each case.

24. Thus it is held by this court that whether non-joining of independent persons /witnesses would, at the time of arrest , or recovery of case property/weapon of offence etc. on the spot , (and for that matter recovery of case property in situation covered u/s27 of Evidence Act) , be fatal to the prosecution case or not, would depend on the facts and circumstance of each case, in view of appreciation of evidence on record. *There can not be a universal rule for the same.*

25. In this backgrounds of law, including case laws, coming back to the facts of

present case, out of the disclosure statement Ex. PW-7/A of accused No.1 , Lokesh and Ex.PW7/B of accused No.2 ,Mohit, nothing is admissible in evidence for the simple reason that nothing was discovered as a consequence thereto. Hence, their entire statement continued to be hit by the bar of section 25 & 26 of Indian Evidence Act, and question of protection of section 27 Indian Evidence Act does not arise.

26. So far so good for the accused persons.

But, in this case, PW-3/ complainant/ victim/ public witness as well as his brother / PW5 fully supported the prosecution on material particulars. PW-3 deposed on the line of his original complaint Ex. PW-3/A. He correctly identified accused no.1 as well as accused no.2 in court also. He further deposed that his brother / PW5 captured the accused No.2. He further deposed that accused No.1 snatched his bag carrying his Tiffin box while aiming revolver / pistol at him. He further naturally deposed that thereafter when both the accused were caught, police arrived and recorded his statement.

Not only this, in his cross-examination, PW-3 fully supported the prosecution on all material particulars except some minor discrepancies which are not of much consequence. He reiterated his stand taken by him in the examination in chief. He further deposed and admitted that Omega hotel was just nearby and there are houses from each side of the street. He further admitted that he stated before the police in his statement that two boys were standing at a distance and in front of his car and that he did not state therein that one of them was standing on one corner and another on the other corner of the street. He further admitted that it is not mentioned in his original statement Ex.PW3/A, that he stated to police that he usually stopped and parked his car in front of Omega and alighted from it. He

further reconfirmed that both the boys were at the distance of 5-7 feet whereas the motorcycle was at the distance of 70 feet from him when he noticed the same. He further admitted that perhaps he has not stated before the police while making statement Ex.PW3/A that while he was going to take turn towards street, one of the above said two boys aimed revolver or pistol at him. He denied the suggestion that he is giving different answers because no such incident took place in his presence or that he concocted the story in collusion with the IO. Not only this, he again reaffirmed the manner in which all the three assailants were behaving and how the two accused persons were caught by him and his brother.

27. Further, PW5 / Dalchand, who is the brother of complainant / PW3 deposed that on 09/07/2015 at about 10:15 PM he was walking in the Gali / street situated in front of his house. He noticed that his elder brother Ashok Aggarwal entered inside the gali on foot having a bag. He also noticed that two persons were standing at the corner of the gali. One of them came running towards his brother / PW3 and tried to snatch the bag from his brother. In the meanwhile, another boy came there having pistol and pointed the same towards his brother and due to that his brother left the bag and started making hue and cry. Further, he deposed that both such boys started running towards the road and one bike came from the back and one boy who snatched the bag sat on the bike and the other person who has shown the pistol also sat on the bike but his brother chased them and managed to catch hold one who was having pistol and as such bike got disbalance and fell on the road. In the meanwhile, PW5 also reached there. It is further deposed that he apprehended the person who was driving the bike. It is further deposed that the boy who used the pistol, is accused

no.1 and the other boy is accused no.2. PW5 correctly identified both of them in the court. He further deposed on the lines of his brother PW3 and supported the prosecution story in all particular points.

28. Further during his cross-examination, he supported the prosecution in all material. He denied the suggestion that he was not walking in the gali or that he has concocted the present story in collusion with his brother and IO. He further denied the suggestion that he did not see any such incident in question. It is further deposed that he stated to police that his brother apprehended the accused who was showing the pistol but he admitted in his cross examination that same is not mentioned in his statement marked PW5/DX1. He further admitted in his such statement mark PW5/DX1, it is not mentioned by him that such accused came running towards his brother or that his brother raised hue and cry. But he denied the suggestion that he did not know both the accused and IO has shown the accused persons to him in court on the day of his evidence. He further denied the suggestion that he did not sign any of the memo prepared at the time of incident as he was not present there at all.

29. Hence, it can be seen that there is a categorical statement made by PW3 / victim and his brother / PW5 implicating the present accused No-1 and accused no.2 in the present case. Further the line of defence taken by the accused persons appear to be an afterthought, that some altercation took place between the accused persons and as such complainant got implicated both accused persons in such heinous case. It may further be noted that accused no.1 was in Delhi Police as constable at the time of such incident. Therefore, it is highly improbable that Delhi Police would implicate its own constable in a false case, that too of

present magnitude. Further, no evidence is led by the accused persons in support of their defence. Further, apart from bald suggestions to the prosecution witnesses, nothing material could be extracted in their testimony in favour of the accused persons. Further testimony of PW3 & PW5 is natural, consistent and to the point. There are some minor discrepancies about the role, position of accused persons, where the pistol was lying etc. but such incident has happened in split of seconds and whole of it would not have taken much time. Further, it is not the case of accused that they were apprehended later on. In fact, they were arrested on the spot. Further motorcycle as well as pistol with live cartridges in it were also seized from the place of incident only.

30. Further nothing except bald denial has surfaced when the incriminating evidence aforesaid was put to the accused during their statements under section 313 CrPC. All what was stated by the accused No.1 & accused No.2 in their statement u/s 313 Cr.PC is that they are falsely implicated by the complainant in connivance with the local police. But apart from it, no possible explanation is given by accused No.1 and/or accused no.2 how come were apprehended on the spot and then handed over to the IO / police. Further, in any case, accused No.1 or accused No.2 did not lead any defence evidence to substantiate their defence.

31. Further, the deposition of PW3 and PW5 find support from the evidence of other police witnesses PW1, PW2, PW4, PW7 and IO PW8. Their evidence is in consonance with PW3 & PW5. PW8 / IO stated that on 09/07/2015 he alongwith constable Nitin / PW7 were on emergency night duty. They received DD entry no.40A Ex.PW1/A and they reached at the spot in question and thereafter he proved overall case of the prosecution deposing from the

point when he reached the spot till filing of chargesheet and the supplementary chargesheet.

32. At this stage, it may be noted that the standard of proof required in a criminal case is 'beyond reasonable doubt' and not 'beyond doubt'. As such, it may be noted that it is not every doubt which goes in favour of accused. Only those doubts, which are reasonable in the facts and circumstance of a particular case, goes in favour of accused.

33. In this background, it can be seen that there may be some doubt regarding false implication of accused No.1 & accused No.2, as also raised by the learned counsel for the accused, but in present case victim / PW3 & PW5 have time and again identified such accused no.1 & 2 and deposed against them. Further, both of the accused were arrested on the spot.

34. Further, at this stage, it may be noted that as far as the stand taken by learned counsel for both the accused persons that PW-3 and PW-5 are interested witnesses and closely related to each other, the judicial pronouncements of the Hon'ble Apex Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinized and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. **(Ref: Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju@Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Ganga**

bhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52).

35. In the present case nothing material or convincing has been brought on record to prove that the evidence of PW-3 & PW-5 cannot be believed and they have falsely implicated the accused no.1 and accused no.2 due to some personal vengeance or have been implicated in the present case at the instance of the prosecution. Therefore, aforesaid testimonies cannot be rejected on the mere ground of their relationship because the relationship by itself is not a sufficient ground to discard the evidence of the witnesses and specify it as inappropriate for credence and hence the argument of the counsel for the accused no.1 & accused No.2 with regard to interested witness hold no ground.

36. Further from the evidence adduced by the prosecution, this court is of the view that the failure of the IO to take finger prints of the accused persons and matching it on finger print on the pistol, should not lead to an adverse inference. The prosecution has been able to establish the commission of the offence in question by the accused No.1 and accused no.2 beyond the shadow of all reasonable doubt based on the other evidence , particularly ocular evidence, produced on record.

37. At this stage, it may also be noted that under these such facts and circumstances and evidence proved on record, by the virtue of Section 106 of the Indian Evidence Act, both the accused persons ought to have explained the incriminating circumstances pointing against them sufficiently.

38. It is also a settled legal position that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond any

shadow of reasonable doubt. It is only, when such a burden is discharged from the onus of the prosecution and eventually shifts on to the accused to prove any fact within his special knowledge, to establish that he/she is not guilty of the aforesaid alleged offence. In this context, the following Para, from the judgment of the Apex court in **Sucha Singh v. State of Punjab**, reported in AIR 2001 SC 1436 may be referred as under:

"We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to Soffer any explanation which might drive the court to draw different inference."

39. In the judgment in the case of **Raj Kumar vs. State of M.P.**, 2014 Cri. LJ 1943, the Apex Court reiterated the view that where the accused fails to give any explanation in his statement recorded under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him, the Court will be entitled to draw such adverse inference against the accused as maybe permissible in law. Relevant Para of the said judgment is reproduced as under: -

"The accused has a duty to furnish an explanation in his statement Under Section 313 Code of Criminal Procedure regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the Court, then the accused may choose to maintain silence or even remain in complete denial when his statement Under Section 313 Code of Criminal Procedure is being recorded. However, in such an event, the Court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law."

40. Placing reliance on the judgment of the Apex Court in the case of **Prithpal Singh vs. State of Punjab & Ors.** reported in (2012) 1 SCC 10, the Apex Court in the following Para has held as under:

"... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

41. Keeping in view the law laid down above, it stands settled that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.

42. From the above discussion, it is proved on record that the testimonies of the prosecution witnesses are corroborating and the alleged contradictions, if any are minor discrepancies, which do not affect the core of the prosecution case, and therefore, cannot be made a crucial ground to reject the evidence in its entirety. Further, the recovery of pistol with three live cartridges found from the spot also confirms the alleged offence.

43. As such, both the such accused no.1 and accused no.2 are held guilty for the offence under section 392 r/w section 34 IPC.

44. (II) The Second point of determination is as under:-

“If so, whether accused no.1 put the complainant in fear of instant death or hurt or instant wrongful restrain, and thereby induced the complainant to deliver case property (or in the alternative in order to commit such robbery or while committing such robbery or in carrying away property obtained by such robbery, such accused persons or any of them towards that and voluntarily caused or attempt to cause any person death or hurt or wrongful restrain), as such accused no.1 committed offence u/s 397 IPC?”

45. It is settled law that section 397 IPC is attracted only against the accused who has used the deadly weapon.

In present case, it is also deposed categorically by PW3 / complainant that accused No.1 Lokesh is the person who aimed revolver / pistol at him. He further deposed when the motorcycle fell down such accused with pistol again aimed pistol at him but PW-3 gave a blow to accused no.1 resulting in fall of the pistol from his hand and he caught hold of accused no.1. Further as already noted above he correctly identified accused no.1 in court as the person who aimed pistol at him. He further deposed that such pistol / revolver was seized vide seizure memo Ex.PW3/F when the police arrived on the spot. Further, FSL report was also obtained and produced in court regarding such revolver / pistol alongwith three empty cartridges and such accused identified that it is the same revolver which was used by accused No.1 Lokesh and was recovered from his possession.

Further, as discussed later on in this judgments such pistol is found to be a firearm and such three live cartridges which were in its magazine at that relevant time were found to be capable of firing, thus, it is clear that it would be dangerous to life, if actually used. Thus, the same can be categorized, under the facts of the present case, as deadly

weapon. Further it is deposed by PW2 that accused No.1 Lokesh was the person who used the same by aiming the same at him. Thus ingredients of section 397 IPC are also satisfied against accused No.1 Lokesh. Accordingly, he is held guilty u/s 397 IPC also.

46. (III) The Third point of determination is as under:-

“Whether accused no.1 possessed pistol loaded with live cartridges and therefore, committed offence u/s 25 of Arms Act?”

47. Before proceeding further it would be fruitful to note the relevant part of Section 25(1B) (a) of Arms Act which states that whoever acquires, has in *his possession* or carries any firearm or ammunition in contravention of section 3, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years *and* shall also be liable to fine.

Further it may be noted in this regard that relevant part of section 3(1) of Arms Act states that no person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made there under.

But it may be noted in this regard that section 39 of Arms Act states that no prosecution shall be instituted against any person in respect of any offence under section 3 without the previous sanction of the district magistrate.

48. At this stage it may further be noted that the Hon'ble Supreme Court in the case of **Gunwantlal Vs. State of Madhya Pradesh**, reported in 1972 2 SCC 194, wherein the Hon'ble Supreme Court has held that the possession of a firearm under the Arms Act must

have, firstly the element of consciousness or knowledge of that possession in the person charged with such offence and secondly, where he has not the actual physical possession, he has nonetheless a power or control over that weapon so that his possession thereon continues besides physical possession being in someone else. The first pre-condition for an offence under Section 25(1) (a) is the element of intention, consciousness or knowledge with which a person possessed the firearm before it can be said to constitute an offence and secondly that possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power and control. In any disputed question of possession, specific facts admitted or proved alone will establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or not in possession of the thing in question. In this view it is difficult to postulate as to what the evidence will be. If the possession includes the constructive possession of the firearm in question then even though he had parted with physical possession on the date when it was recovered, he will nonetheless be deemed to be in possession of that firearm.

49. In this case, it is deposed by PW3 that accused No.1, Lokesh aimed revolver at him. Infact, as a commom person ,PW-3 deposed that he cannot say whether such weapon was revolver or pistol. Further PW-3 deposed that when the motorcycle fell down, such boy (accused No-1) again aimed pistol at him. As such, it can be very well inferred that such accused No.1 was consciously in possession of such weapon / fire arm as he was voluntarily using the same . Further such revolver was seized and sent to FSL and same is exhibited as Ex.P3 and the cartridges are Ex.P4(colly).

Further, in this regard it is noted that PW3 HC Ashok Kumar deposed, he handed over one sealed parcel to constable Monu Yadav for its delivery at FSL Delhi and he put a note in this regard at Sl.No.1468/15 and road certificate relevant portion No.99/21/15 is Ex.PW2/B. He further deposed that such parcel was earlier handed over to him on 10/07/2015 by PW8. He further deposed that on 07/04/2016 one sealed parcel with report was received from FSL and he recorded a note against the same from point B to B. Further, in his cross examination, he denied the suggestion that no copy of seizure memo was delivered to him or that he recorded entry No.1468 at the instance of IO. Further PW6 constable Monu Yadav was also examined. PW-6 deposed that he went to FSL Rohini to deposit the sealed pullanda from maalkhana of the police with RC No.99/21/15. Further PW7 constable Nitin Rathi who accompanied the IO at the relevant time on 09/07/2015 also deposed on the same line that such pistol and three live cartridges were sealed in his presence at the spot. Further, PW8 IO SI Virender Kumar deposed in this regard that he checked the pistol in question and three live cartridges were found in the magazine of the said pistol. He further stated that he requested 4-5 public persons and neighbours to join investigation but none of them agreed. It is further deposed by PW8 that he prepared rough sketch of weapon of offence and recovered live cartridges and the same is already exhibited as Ex.PW3/1. He further deposed that same bears his signature at point X. Further he deposed regarding the measurement of such weapon of offence. He further deposed that the pullanda of weapon of offence was prepared and the same was sealed with the seal of VS and such weapon of offence was seized vide seizure memo already exhibited as Ex.PW3/F. He further deposed regarding sending such pistol and cartridges to FSL Rohini on

06/08/2015. He further deposed that later on he collected FSL report from MHC(M) on 07/04/2014. He further deposed that he even obtained sanction u/s 39 of Arms Act from then Additional DCP / PW9 on 13/04/2016. PW8 / IO further correctly identified such pistol and cartridges in court.

Further as per result of FSL exhibited marked as F1 in the report, such weapon is a firearm as defined in arms Act. It is further reported that it is a improvised pistol capable of firing standard 7.65mm ammunition. It is further reported that cartridges which is marked A1 to A3 were successfully test fired through such pistol marked F1. As such, it is opined that A1 to A3 are ammunition defined as in Arms Act.

50. From a combined reading of evidence of PW3 read with that of such police official, PW2, PW6, PW7 and PW8 / IO, it is clear that article found in possession of accused No.1, proved to be a firearm. Not only that, the cartridges found in the magazine of such fire arm, also proved to be ammunition under the Arms Act.

51. Further, PW9, the then additional DCP, Chinmoy Biswal deposed in court that he granted the sanction under section 39 of Arms Act proved as Ex.PW9/A bearing his signature at point A. No cross examination of this witness was conducted despite opportunity being given. Thus, the requirement of prosecution under section 39 Arms Act is also satisfied relating to the prosecution of offence u/s 3 of such Act.

52. Under these facts and circumstances, particularly having regard to the evidence of PW3 read with FSL result proved on record, it is held that accused No.1, Lokesh was in possession of a firearm as well as ammunition in it. Further, no evidence is led by the

defence at all to show that he had any license regarding such firm arm and such ammunition as mandatory under section 3 of Arms Act. As such, he is held guilty of the offence under section 25 (1B) (a) of the Arms Act.

53. *(IV) The Fourth point of determination is as under:-*

“Whether accused no.1 used such country made pistol loaded with live cartridges and therefore, committed offence u/s 27 of Arms Act?”

54. It may also be noted that section 27(1) of the Arms Act mandates that whoever, inter alia, uses any arms or ammunition in contravention of section 5 shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years *and* shall also be liable to fine.

Further it may also be noted that section 5(1) of Arms Act states that no person shall *use*, manufacture, sell, transfer, convert, repair, test or prove, or expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof, any firearm or any other arms of such class or description as may be prescribed or any ammunition, unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder.

55. As also noted above, it is deposed by PW3 that accused No.1 Lokesh aimed the firearm / revolver in question at him when PW3 was going to take a turn towards his street and then such boy(accused No-1) snatched his bag. Not only this, PW3 further deposed that such accused No.1 who was armed with such firearm again aimed pistol at him ,but PW3 gave a blow to him resulting in fall of such pistol / firearm. As such, there is categorical

evidence of PW3 that such fire arm was used by the accused No.1 in committing such crime in question. It may further be noted that it is not the case of accused nor any evidence is placed on record that such accused No.1 had a license for such use as required under section 5 of Arms Act. Accordingly, such accused no.1 Lokesh Kumar is held guilty of the offence under section 27 (1) of the Arms Act.

56. **Thus, accused No.1,Mr. Lokesh Kumar is convicted for the offence U/s (i) 392 IPC r/w section 34 IPC, (ii) 397 IPC, (iii) 25 (1B) (a) of the Arms Act ,and (iv) 27 (1) of the Arms Act .**

Accused no.2, Mr. Mohit is held guilty and convicted for offence u/s 392 IPC r/w Section 34 IPC.

*Announced in open court
during physical hearing
on 19/09/2020.*

**(NAVEEN KUMAR KASHYAP)
ASJ-04/Central District/Delhi**