REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2230 OF 2011

MANGU SINGH ..... APPELLANT(S)

VERSUS

DHARMENDRA & ANR. ..... RESPONDENT(S)

WITH

CRIMINAL APPEAL NO.1707 OF 2015

(Arising out of SLP(Crl.) No.9148 of 2011)

STATE OF U.P. ..... APPELLANT(S)

VERSUS

DHARMENDRA ..... RESPONDENT(S)

J U D G M E N T

Pinaki Chandra Ghose, J.

1. Leave granted in SLP(Crl.) No.9148 of 2011.

2. These appeals have been directed against the judgment and order dated 06.08.2010 passed by the High Court of Judicature at Allahabad in Criminal Appeal No.1417 of 2006, wherein the accused/respondent was acquitted by the High Court against the Judgment of life imprisonment as awarded by the Trial Court.

Criminal Appeal No.2230 of 2011 has been filed by the complainant/informant and the connected matter, i.e. Special leave Petition (Criminal) No.9148 of 2011 is filed by the State against the acquittal of the accused/respondent.

3. The brief facts necessary to dispose of these appeals are that The respondent/accused came on 18.11.2003 to Police Station, Simbhaoli, District Ghaziabad, and confessed vide a written report Ext. Ka 22, of having killed his wife and daughter. The accused's father in-law (PW1) was informed and subsequently inquest proceedings were conducted to which the PW1 is the formal witness. PW1 then lodged another FIR against his son-in-law for having committed the murder of his daughter through a gun-shot injury and also of his wife by throttling. Investigation was thrown into the offence and at the instance of the accused a country-made 12-bore pistol and empty shell Ext. A-6, were recovered on 19.11.2003. Since the occurrence was found to have taken place in territorial jurisdiction of Police Station, Babugarh, the senior officers sought to get the investigation conducted through Police Station, Babugarh after about one month since the FIR was lodged.

4. After investigation, charge-sheet was filed against the accused. After considering the material on record and hearing the counsel, the accused was charged for the offences punishable under Sections 302 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and also Section 25 of the Arms Act. The charges were read over and explained to the accused. The accused pleaded not guilty and in his statement under Section 313, rebutted that the alleged murder was due to loot in which his daughter and wife were killed and he had sustained gun-shot injury in his thigh. The confessional written statement which formed the basis of the first FIR was replied by the accused to be under threat from the police and he claimed to be falsely implicated in the case.

5. The Trial Court by its judgment and order dated 25th January, 2006, convicted the accused for both the offences charged and sentenced him to imprisonment for life. The convictions were based on the evidences of the eye witnesses and the recovery of the weapons used which were further corroborated by the admission made to the police officers, the motive being established and also non-explanation by the accused of the facts within his knowledge

as mandated under Section 106 of the Indian Evidence Act, 1872. The accused challenged the conviction order before the High Court and the High Court by the impugned judgment and order allowed the appeal on the ground that the prosecution failed to bring home the guilt of the accused beyond reasonable doubt. The acquittal was based on ground that both the FIRs were ante-timed and the eye witnesses who were relied upon by the Trial Court were interested and unreliable witnesses. The motive was neither investigated nor established and the conviction order was perverse and against the sound legal principles.

6. The Informant PW1 has filed the present appeal before this Court. The State is also before us by filing special leave petition against the acquittal order. The learned counsel for the State has argued in line of the decision arrived at by the Trial Court. It is vehemently argued that the motive of the accused that he wanted to get rid of the victims so that he could marry his love, was proved by the testimony of PW1. The respondent was alone with the two victims and it was his duty as provided under Section 106 of the Indian Evidence Act, 1872, to give a reasonable explanation regarding the homicidal death of the two victims. Over this, the

respondent took a false plea of loot being committed upon him and his family and he created a false minor injury to support his story. He made a written statement in his own handwriting to the police, confessing his crime which is admissible in evidence as he was not an accused at the time of making the statement. Finally it was argued that the recovery of the country-made pistol and an empty shell was made at the instance of the accused himself. Mr. Ratnakar Dash, learned senior counsel appearing for the State of U.P. substantiated his case by arguing that in addition to the above, PW4 is the eye witness of the incident of murder who saw the accused with the gun in his hand. It is further argued that the medical reports and the testimonies of the formal witnesses further strengthened the case of the State.

7. The learned senior counsel for the respondent accused has made various submissions countering the arguments put forward by the appellant. It is argued that the motive was neither investigated nor proved. PW1 deposed about the motive that the accused wanted to get rid of his wife and daughter as he wanted to marry a girl he loved. However, it is argued that the same is hearsay evidence and neither PW1 nor the Investigating Officer

inquired upon this fact. Against the second FIR, it was argued that it was ante-timed, false and manufactured, PW1 was not himself an eye-witness and as per his testimony he could not have been in the police station to lodge the FIR at the time stated in the FIR. PW4 was argued to be an interested witness and his testimony was marked by severe lacunae and is itself proved to be self-contradictory and hence, unworthy of any reliance. The bullet injury received by the accused is proved not to be self-inflicted and hence there exits some truth in the claim of the accused about the loot. The recovery was proved to be concocted.

8. In our considered opinion, four main issues are argued before this Court and we shall now examine each and every contention in light of the arguments adduced before us. It is a settled law that motive is not a necessary element in deciding culpability but it is an equally important missing link which can be used to corroborate the evidences. In the present case, the motive of the accused was stated to be two-fold. One being that he was in love with a girl, whom he wanted to marry but his wife and daughter were the hindrance. The other immediate motive was the non-fulfillment of dowry demand by PW1 (father of the girl). Upon

perusal of the records, it appears that PW1 has deposed that the accused/respondent was in love with a girl who lives in Ghaziabad and this fact was told to him by his wife, who got this information from her daughter Geeta (deceased). Even if the said fact is presumed to be true, still PW1's deposition to this fact is hearsay and in fact, his wife should have been examined to testify this fact. PW1 neither stated this fact in the FIR nor in the statement made before the police, and it was only after two and half years later that this fact was stated in his deposition before the Court. The Prosecution also laid heavy emphasis on the said fact. However, in the investigation no such fact came to light, nor the wife of PW1 was summoned for making statements before the police or before the Court. The witness even testified that this alleged relation of the accused was reported to the accused's father upon which he apologized for his conduct, however, the said fact was not proved. As against the immediate cause, which again is a material addition at the time of deposition before the Court, neither such fact was made before the police nor investigated by the police. The Court did not even try the accused/respondent for the alleged offence of dowry demand, as prima facie no case was made out.

9. The second issue which is of paramount consideration is the testimony of the eye-witnesses. PW1 and PW4 are the eye-witnesses, out of which PW1 is the father of the first victim and maternal grand-father of the second victim. The police investigation itself disclosed that PW1 came to the spot after information was sent to him by the police. The intimation was him after the accused is alleged to have made the written FIR. In these circumstances, PW1 cannot be said to be an eye-witness to the offence. PW4 is the actual eye-witness. At the outset, it was admitted by PW1 that PW4 was his distant brother living in the same village. PW1 deposed that when he, along with Ishwar, was going back to their village, they saw the victim Geeta (daughter of PW1) lying in the pool of blood in the rear seat of the car with the accused/respondent standing nearby with a country-made pistol. The time was about 6:30 pm. He further deposed that the accused respondent threatened both PW4 and Ishwar to flee away or else they would meet the same fate. Upon this threatening, PW4 flew away from the spot and did not disclose the fact to anybody. Neither he approached the police for help, nor did he inform this to PW1. It was only after 3-4 days that he narrated the facts to PW1.

Even after that, PW1 and PW4 did not approach the police to get the statement of PW4 recorded. It was only after one month of the incident that PW4 was summoned at the Police Station, Babugarh, and his statement was recorded. If one carefully examines the deposition of PW4, it seems unnatural and not to be trustworthy. PW4 in his testimony firstly stated that victim Geeta was shot in his presence, but he did not know as to in which part of the body she was shot. Then he corrected himself by deposing that the bullet had pierced her abdomen and blood started oozing out from her body. This deposition is contradictory to the medical evidence as the cause of death of Geeta was strangulation and she never received any gun-shot injury. Moreover, the blood-stained clothes of the victims or bullet ridden car parts were not recovered. It was not investigated at all as to in which portion of the car the victims were killed. Apart from this, there appears a material alteration in the testimonies of the witnesses. Both PW1 and PW4 deposed that they saw the dead body in the rear seat of the car, whereas the police investigation reveals that the dead body was lying in the front left side seat of the car. PW4 was thoroughly cross-examined but more suspicions arose in his testimony. The conduct of PW4

seemed unnatural that he did not sought for any help, nor did he inform anybody in the village that a daughter from his village was killed. PW4 admitted that he was accompanied by one Ishwar but he was never examined in order to strengthen the prosecution case. PW4 also stated in his deposition that he did not remember as to whether victim Geeta was wearing a saree or a suit, yet he remembered the registration number of the car. The place of incident is proved to be secluded one and on a small link road, which raises suspicion that PW4 saw the number plate in dark hours of evening of the winter season.

10. Pertinent here is the FIR lodged by PW1. PW1 deposed that he was informed at about 7.00 pm by the police that his son in-law has lodged a confessional FIR of having committed the murder of his wife Geeta and his daughter Rakhi. Thereafter, PW1 reached the place of incident at about 8.00 p.m. and since then he was a witness to inquest proceedings of both the victims Geeta and Baby Rakhi. The inquest proceedings of Geeta were recorded from 9:30-10:30 pm and inquest proceedings of Baby Rakhi were recorded from 11-11:55 pm., and thereafter, he proceeded to Police Station, Simbhaoli, which under no circumstances can be before

12.00 mid-night. Yet the FIR is stated to have been lodged at 10:05 pm. Moreover, the jurisdictional police station is of Babugarh and PW1 specifically deposed that he crossed the Police Station, Babugarh, en-route to Police Station, Simbhaoli, from Madhu Nursing Home, yet he chose not to lodge the FIR at the nearest police station but at Simbhaoli Police Station, which did not even have the jurisdiction. This jurisdictional flaw came to the knowledge of PW1 after 3-4 days, yet he preferred not to go or pursue his case at the proper police station. In the FIR the informant (PW1) failed to mention the material facts, like he having been informed about the incident by the police, his participation in the inquest, receiving ornaments seized by the police from the place of the incident, two male wrist watches, he being accompanied by two other person to the place of incident from his village. Even the motive was not mentioned in the FIR. This makes the conduct of PW1 very unnatural and suspicious. The above facts, clearly suggest that the second FIR is an outcome of manipulation, deliberation, concoction and is a sham ante-timed document.

11. The third issue is the confessional FIR. The Trial Court

proceeded to believe the FIR as admission of guilt by the accused. Not only the lodging of the FIR was delayed but it was suspected to be ante-timed. The police investigation disclosed that FIR (Ext. Ka 22/23) was lodged by the accused/respondent and thereafter at about 8:30pm PW1 was informed. However, as per the deposition of PW1, he received the information about the FIR at about 7.00 pm, thereafter he proceeded to the place of incident and was a witness to inquest proceedings. The accused respondent has taken the defence that he was forced to scribe it at the dictation of the Investigating Officer, after being assaulted at the police station and it was registered ante-timed. The series of events above stated, thus, cast doubts on the time of the FIR. The facts of the FIR remained disproved and hence Ext. Ka 22/23 is not reliable. The Trial Court laid undue stress on the non-explanation of fact of death of the victims by the accused respondent. It is established that the Trial Court based the conviction upon the testimony of PW4, yet it took a 'U' turn to shift the burden on the accused respondent under Section 106 of the Indian Evidence Act, 1872, to prove the incident. The High Court, in our considered view, rightly reversed the finding on this point of law. Section 106 does not

absolve the prosecution's burden under Section 101 to prove its case of guilt of the accused beyond reasonable doubt. As stated above, the prosecution has miserably failed to explain the facts and circumstances surrounding the lodging of both the FIRs, and the testimony of PW4 is proved to be crooked. The prosecution case was never a case of circumstantial evidence as the prosecution, till the end laid stress on the testimonies of eye-witnesses.

12. At this juncture the defence version needs to be examined. The accused respondent stated that they were stopped by two unknown persons and he stopped only because his wife recognized those persons to be from her village. The two persons then attempted to loot them, and in the process two gun-shots were fired – one at Baby Rakhi and another at accused/respondent. Victim Geeta was strangulated to death. Upon perusal of the medical evidences, the gun-shot injury to Baby Rakhi was proved to be at point blank range, whereas no such assertion was made in case of accused respondent's gun-shot wound. The accused respondent stated that he was hit by one fire-shot and he neither knew upon whom second shot was fired, nor did he know as to how his wife was killed. The accused respondent further deposed

that he ran towards the nearby hotel for seeking help. The sequence of events and the injuries do not exclude the defence version. It is a settled law that the defence needs to only establish its case based on probability, whereas the prosecution has to prove the guilt of the accused beyond reasonable doubt.

13. The next aspect for our consideration is the recovery of the country-made pistol and an empty cartridge. To begin with, it is undisputed from the ballistic report that the gun was the same from which the shot was fired and also the formal witnesses stood the test which established that the gun was recovered in their presence. The prosecution strongly relied on this evidence, and even the trial court was convinced by this piece of evidence. However the High Court pointed out the relevant provision i.e. Section 27 of the Indian Evidence Act, 1872, and clarified that it is not the material recovery which has to be proved, but the disclosure based upon which the recovery is made. The pivotal fact is making of the statement to the police which leads to recovery. The High Court rightly pointed out that during the investigation, no statement disclosing the fact/material to be discovered was proved before the Court. In our opinion, the High Court is correct

to point out this serious lacunae.

14. We have given our careful and thoughtful consideration to the rival contentions put forward by either sides and have also scanned through the entire materials available on record, including the impugned judgment. It appears that the prosecution has failed to prove its case beyond reasonable doubt against the accused and the High Court was justified in doubting the veracity of the prosecution case and recording the verdict of acquittal, which does not suffer from the vice of perversity.

15. Thus, in the light of the above discussion, we find no compelling and substantial reasons to interfere with the judgment passed by the High Court. The appeals are, accordingly, dismissed.

.....J
(Pinaki Chandra Ghose)

.....J
(R.K. Agrawal)

New Delhi;
December 16, 2015.