SUPREME COURT OF INDIA

Musheer Khan @ Badshah Khan

Vs.

State of M.P.

Crl.A.No.1180 of 2005

(G.S Singhvi and Asok Kumar Ganguly JJ.)

28.01.2010

JUDGEMENT

A.K.Ganguly, J.

1. Several appeals were heard together as they arose out of similar incidents and some common questions are also involved.

2. The prosecution version as unfolded in the case is that on 29.11.2000 around 7:10 P.M. one 1 Pappu @ Prakash Tripathi (PW-3) was in his apartment. Then on hearing the firing of three shots, he came out of his apartment and saw a light blue coloured scooter, which was parked in front of the apartment, was being started by a man and after him two other persons also boarded that scooter. PW-3 also saw a Matiz car which was parked by the side of the road and he saw the body of Mallu Bhaiya, the deceased, half inside the car and the other half was lying outside the same. PW-3 further saw that after starting the scooter, those persons drove it towards the road and took a turn to the right and drove towards the side of Dainik Bhaskar Press. PW-3 further deposed that at the time those persons left in the scooter they were "turning their heads back". Then PW-3 came outside his apartment and started shouting.

3. The further evidence of PW-3 is that he immediately ran towards the deceased and found there was no movement in the body. On hearing the shots and the shouts of PW-3, the nearby cable operator Brajendra Keshwani (PW-17), Umesh Singh (PW-2) and one Gopal Jain (not examined by the prosecution) came to the place of incident. Then PW-3 with the help of those persons put the deceased on the back seat of that Matiz car. PW-3 drove that car with PW-2 in the front seat to Marble Hospital and PW-3 got the report written in the hospital which is marked Exhibit P-11.

4. PW-3 is virtually the star witness of the prosecution.

5. Prosecution also relied on the evidence of Shishir Tiwari (PW-4) who was also on a scooter and was going to the house of the deceased to meet him. As he reached near the Bungalow of 3 Major General in front of Park Apartment, he also claimed to have heard three shots. Then he stopped his scooter and saw another scooter at a distance of 60-70 feet and that scooter "was started and three persons boarded it" and "that scooter took a turn to reach the road and drove past me." According to him that scooter was driven 2-3 feet away from him towards Bhashkar Press side. He claimed to have seen those persons who were on that scooter.

6. PW-4 claimed to have seen PW-3 with the help of PW-2, PW-17 and Gopal Jain lifting the deceased in the Matiz car and driving it away with Umesh Singh (PW-2). He saw three ladies standing near the spot and on being asked by him the wife of the deceased, Jareena Chowrariya (PW- 10), who was in tears, told PW-4 that the assailants had murdered the deceased. PW-4 then on his scooter went to the Marble Hospital.

7. About the presence of PW-4 at the place of occurrence, this Court has some serious doubts which shall be discussed later.

8. This is admittedly a case based on circumstantial evidence and the evidence of PW- 3 and PW-4 form the main plank on which rests the prosecution case of circumstantial evidence.

9. In this case charge sheet was filed against seven persons, namely, A-1 Shambhu, A-2 Sapna @ Shhjahan, wife of Sambhu, A-3 Govinda @ Gudda, A-4 Musheer Khan @ Badshah Khan, A-5 Basant Shiva Bhai Jadav, A-6 Sattanarayan @ Sattu Sen, A-7 Mehffooz @ Chotey, remained an absconder and never faced trial. A-7 is the brother of A-2.

10. As per the prosecution, A-1, A2, A3 & A-6 had paid money to A-4 and A-5 for killing the deceased and pursuant thereto A-4 and A-5 had shot the deceased from a close range. A-4 & A- 5 were arrested by the Jabalpur police at Ahmedabad. According to the prosecution A-4 & A-5 were seen before the occurrence in the company of A-1, A-2, A-3, A-6 & A-7 and after the occurrence, they were seen by other witnesses, namely, PWs.3 & 4 as going away from the scene of occurrence on a light blue coloured scooter along with the absconding accused Mehfooz (A-7). According to prosecution A-4 and A-5 were identified by witnesses in the T.I. Parade, their finger prints were found on the car and on the recovered scooter. They had suffered a disclosure statement and which had resulted in discovery of the weapon of assault and the Ballistic Expert had given the report, according to which it was proved that weapon of 6 assault recovered from the Appellants had been used by the deceased.

11. In this case the Trial Court in its judgment dated 13.10.2003 acquitted A-3 and convicted A- 4 and A-5 under Sections 302/120B of the Indian Penal Code read with Sections 25(1)(b)(a) and 27 of the Arms Act and they were awarded death penalty. A-7 being an absconder, trial against him did not commence. The Trial Court convicted A-1, A-2 & A-6 under Sections 302/120B and gave them life sentence.

12. The High Court in its judgment dated 8.11.2004 partly confirmed the judgment of the Trial Court in confirming the death sentence against A-4 & A-5, but reversed the conviction of the other three accused, i.e. Shambhu (A-1), Sapna (A-2) and Sattanarain @ Sattu Sen (A-6) and the charge of conspiracy failed and they were acquitted.

13. Aggrieved by the conviction and death sentence imposed by the Hon'ble High Court, Musheer (A- 4) and Basant (A-5), filed two special leave petitions being Crl.A. Nos.1180 & 1181/2005 before this Court. The State Government also filed special leave petitions against the judgment of the Hon'ble High Court acquitting Gobind (A-3), being Crl. Appeal No. 1206/2005, as well as Shambhu (A-1), Sapna (A-2) and Satyanarain @ Sattu Sen (A-6) being Crl. Appeal No. 1204/2005. The State Government also filed an appeal against the dismissal of petition for enhancement of sentence of these accused being Crl. Appeal No. 1205/2005. The brother of the deceased had also filed a special leave petition along with an application seeking permission for filing the same being Crl. Appeal No. 4081/2005. That was dismissed by this Court by an order dated 18.04.2005 in view 8 of the appeals having been filed by the State Government.

14. On an analysis of the evidence of PW-3 and PW-4 the presence of PW-4 in the place of occurrence is very doubtful. PW-4's evidence is that he was coming to meet the deceased Asim Chansoriaji. They were known to each other for the last 20 years and PW-4 had a very good friendly relations with the deceased. PW-3 is a close relation of the deceased and lives in the same apartment where the deceased stayed. PW-4 also admitted that he knows PW-3.

15. From the evidence of PW-3 and PW-4, it is clear that they were present at the place of occurrence at the same time.

16. PW-3 saw the accused persons from a distance of "20 steps" while PW-4 saw the accused persons from a distance "60-70" feet. The accused persons were allegedly identified by PWs 3 and 9

> "4. However in his evidence PW-3 never stated that he saw PW-4 in the place of occurrence. PW-3 also stated that after coming to the place of occurrence he was shouting that the deceased had been shot at. Hearing his shouts "at first cable operator Kesharwani came out there at the incident site. After him Umesh, who lives in my apartment came out. After Umesh then came Gappu of Jain family, who also reside in our same apartment and then came out my wife and after her when we were lifting Mallu Bhaiya to put him in the car then his wife Zarina also arrived there"."

17. In view of the evidence discussed above it is absolutely natural for PW-4 to immediately talk with PW-3 to find out about the incident. But there is no evidence of that. PW-3 never whispered anything about the presence of PW-4 at the place of occurrence. On the other hand, evidence of PW-3 is that he with the help of PW-2, PW-17 and Gopal Jain (not examined) put the body of the deceased, half of which was hanging outside the Matiz Car, in

the back of that car and some of those persons sat in the car and PW-3 drove the car to the hospital.

18. PW-4, an athlete, and in his Tracksuit was obviously having a sound physique. It is wholly improbable that PW-4, who was known to PW-3 and was at the place of occurrence and saw PW-3 shouting for help for putting the body of the deceased in the car will not come forward to help PW-3 especially when he was very friendly with the deceased, having a long standing relationship of 20 years. This is very very un- natural. It also very un-natural for PW-4 to remain at the place of occurrence as a passive spectator and watch the incident of PW-3 taking the deceased in that Matiz car to the hospital with help of others who had come to the place of occurrence much after he was there.

> "Evidence of PW-4 is that after PW-3 left for the hospital he talked with the ladies who came to the place of occurrence after the incident and thereafter went to the hospital. In the hospital also PW-4 did not talk with PW-3."

19. If one reads the evidence of PW-3 and PW-4 it would appear that one is totally insulated from the other as if they are strangers and reside in different islands. This is totally improbable. Unfortunately in the appreciation of evidence neither the High Court nor the trial Court has considered this glaring improbability in the prosecution case.

20. Taking into account the aforesaid factual background it is very doubtful whether PW-4 was at all present at the place of occurrence having regard to the evidence of PW-3.

> "Therefore, identification by PW-4 of the scooter and the accused A-4 and A-5 in the T.I Parade becomes doubtful and no reliance can be placed on that."

21. Coming to the question of assessing the evidence of identification of the accused persons by PW-3 and PW-4, this Court is of the opinion that identification by PW-4 cannot be relied upon at all inasmuch as this Court has grave doubts about the presence of PW-4 at the place of occurrence.

22. So far as identification by PW-3 is concerned, the Court must take into consideration the extremely limited opportunities which PW-3 had of seeing the accused persons.

23. It is the prosecution case that A-4 and A-5 are hired criminals and are not persons of the locality. Prosecution has not also claimed that A-4 and A-5 were known to PW-3 from before.

> "From the evidence of PW-3 it is clear that PW-3 only had a fleeting chance of seeing A-4, A-5 and A-7 when they were obviously in a hurry to board the scooter and escape from the scene. Assuming that there was street light, as is the claim of the prosecution, it is obvious the accused persons were fleeing from the place of

occurrence on the scooter. Therefore, excepting a fleeting glance PW-3 had very little chance of seeing A-4, A-5 and A-7."

24. The evidence of PW-3, that A-4, who was driving the scooter, was repeatedly looking back is highly improbable for the following reasons:

> "i) A-4, being a hired man, was new to the place. Obviously he was not acquainted with the topography of the area. Therefore, he would be very busy in finding his way out of the place of occurrence and would concentrate on that;
>
> ii) A-4 was driving the scooter, it is difficult for the driver of the scooter in a new area to repeatedly look back. Being hired criminals, as is the prosecution case the accused persons will not do anything to facilitate their investigation;
>
> iii) It is not the prosecution case that the accused persons were given a chase and therefore there was no reason for them to look back. The only evidence of PW-3 is that he was shouting that Mallu Bhaiya had been killed by the assailants. A-4 was mere a spectator, assuming but not accepting that A-4 was present at the place of occurrence."

25. The Court must remember that PW-3 is a highly interested witness, being a very close relative of the deceased. That by itself, of course, is not a ground to discard his evidence. But it is a golden rule that in such a situation, the evidence of PW-3 has to be weighed very carefully and cautiously before accepting the same.

26. Applying these principles, in the facts of the case, the evidence of PW-3 that while driving the scooter A-4 was repeatedly looking back becomes highly doubtful.

27. It may be pointed out that identification test is not substantive evidence. Such tests are meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. (See *Matru Alias Girish Chandra vs. The State of Uttar Pradesh*[1] at para 17)

28. It is also held by this Court that identification test parade is not substantive evidence but it can only be used in corroboration of the statements in Court. (See *Santokh Singh vs. Izhar Hussain and Anr.*[2] at para 11)

29. Recently in the case of *Amitsingh Bhikam Singh Thakur vs. State of Maharashtra*[3] this court held on a consideration of various cases on the subject that the identification proceedings are in the nature of tests and there is no procedure either in Cr. P.C., 1973 or in the Indian Evidence Act for holding such tests. The main object of holding such tests during investigation is to check the memory of witnesses based upon first impression and to enable the prosecution to decide whether these witnesses could be cited as eye witnesses of the crime.

30. It has also been held that the evidence of the identification of accused for the first time is inherently weak in character and the court has held that the evidence in test identification parade does not constitute substantive evidence and these parades are governed by Section 162 of Code of Criminal Procedure and the weight to be attached to such identification is a matter for the courts.

31. In the instant case A-4 was apprehended on 05.12.2000 and was arrested on 06.12.2000 and the identification parade was held on 10.12.2000. It is admitted that A-4 was kept in open police custody for all these days from 6th December to 10th December, 2000 prior to his identification. About the identification by him PW-3 deposed that he recognized all the three persons in Court even though the fact remains that out of the three accused persons A-7 absconded and never faced trial. This is a clear discrepancy in the evidence of PW-3 about identification. It is an admitted position that A-4 is bald but in his evidence PW-3 admitted that during investigation the heads of the none of the persons were covered. Though in his evidence PW-3 has said that the persons were covered with a blanket upto the neck but PW-12, who held the identification parade, in his cross examination admitted that there is no reference of blanket in Ext. P-14 and Ext. P-16 which are the reports of T.I. parade of A-4 and A-5 respectively. This is a vital contradiction between the versions of witnesses identifying and the person conducting the T.I.
Parade.

32. In so far as the identification of A-5 is concerned that has taken place at a very delayed stage, namely, his identification took place on 24.01.2001 and the incident is of 29.11.2000, even though A-5 was arrested on 22.12.2000. There is no explanation why his identification parade was held on 24.01.2001 which is after a gap of over a month from the date of arrest and after about 3 months from the date of the incident. No reliance ought to have been placed by the courts below or High Court on such delayed T.I. parade for which there is no explanation by the prosecution.

33. At the Bar some decisions were cited about how the Court should consider the evidence in the test identification parade.

34. Mr. Lalit, learned senior counsel for the State relied on the decision in *Pramod Mandal vs. State of Bihar*[4] in order to contend that mere delay in holding the test identification parade will not prevent the Court from accepting the evidence when defence failed to impute any motive to the prosecution by way of cross examination for delay in holding the T.I. parade. In Pramod Mandal (supra) it was held that delay of one month in holding the T.I. parade was not fatal.

35. The aforesaid decision of this Court has to be appreciated in the factual context of that case. From the facts in Pramod Mandal (supra) it appears that dacoity had taken place in the house for about 25 minutes in which PW-4 sustained several injuries from the accused in trying to resist the dacoity. Therefore, PW-4 had sufficient opportunity to notice the

appearance and physical features of the accused and there was sufficient light. The Court found that the traumatic experience of PW-4 for a considerable period must have left the faces of the assailants firmly imprinted in his memory which could not be erased within a period of only 30 days. Under those circumstances, this Court held that the evidence in T.I. parade cannot be doubted.

36. But in the instant case the facts are totally different. Here PW-3 had nothing more than a fleeting chance of seeing A-4, A-5 and who hurriedly boarded the scooter while escaping from the place of occurrence. There is no evidence that PW-3 had any physical contact or confrontation with A-4 and A-5. Therefore, the ratio in Pramod Mandal (supra) cannot apply here.

37. However, the decision of this Court in *Soni vs. State of Uttar Pradesh*[5] is more relevant to the facts of the case in hand. In Soni (supra), the facts have not been discussed in the judgment which was rather brief but one thing is made clear that T.I. Parade was held after a lapse of 42 days from the date of the arrest of the appellant. This Court held that such delay in holding the T.I. parade by itself throws a doubt on the genuineness of such identification and we respectfully agree with the view that it is difficult to remember the facial expression of the accused persons after such a long gap in the facts of this case. Therefore, the alleged identification of A-5 after a gap of two months throws a doubt on the genuineness of such identification especially when PW-3 had very little chance to see either A-4 and A-5.

38. Learned counsel for the State relied very much on the evidence of finger print expert (PW-23).

> "It is well known that the evidence of finger print expert falls under the category of expert evidence under Section 45 of the *Indian Evidence Act, 1872*."

39. It will be noticed that under the Indian Evidence Act, the word `admissibility' has very rarely been used. The emphasis is on relevant facts. In a way relevancy and admissibility have been virtually equated under the Indian Evidence Act. But one thing is clear that evidence of finger print expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record.

40. In the instant case, PW-23 (finger print expert) claimed to have matched the transparent marked `C' with finger print marked `ka'. This according to him is the index finger of right hand of A-4 (Musheer alias Badshah). PW-23 when compared the transparent `F' with finger print marked `kha' it was found identical with the finger print mark of A-5's right hand ring finger.

41. According to PW-23, he lifted these finger prints while going to the police station on 1.12.2000 from the Bajaj Super Scooter which was associated with the case and also from the Matiz Car both of which were parked in the police station.

42. According to the finger print expert (PW-23) `C' was found on the right side of the rear mudguard of the scooter and `F' was found on the side glass of the Matiz car.

43. Before this Court can appreciate the relevance of those prints, the Court has to look to the substantive evidence on record. It is nowhere alleged by the prosecution that there was any altercation between the deceased and the accused persons at the scene of occurrence.

> "There is no whisper of any evidence that accused persons had any physical contact with the deceased or chased the deceased or dragged the deceased out of the car."

44. The evidence is only of hearing shots of fire arm and the further evidence is that the deceased was fired from a point blank range and he immediately fell down and in such a way as his body was half inside the car and half outside the same. Therefore, there is no prosecution evidence to the effect that A-4 and A-5 had any occasion to touch the car and that too with the ring finger. It is obvious that the accused, being hired criminals, according to the prosecution, must be busy in escaping from the scene of occurrence after the deceased had been shot from the point blank range and immediately the deceased fell down. There is no evidence of the deceased running away from his assailants or offering any resistance.

> "Having regard to this state of evidence the evidence of finger print on the car ceases to have any relevance."

45. PW-23 (Finger print expert) has not given any evidence of finger print on the alleged weapon of offence which was discovered pursuant to the statement of accused persons under Section 27 of the Evidence Act. Therefore, in the facts of this case and in view of the prosecution evidence the evidence of finger print expert does help the prosecution. Even if we accept the evidence of finger print expert on the scooter that by itself does not prove anything.

> "If certain persons are riding on the scooter, it may have the finger prints of the person who is riding the scooter. That by itself does not connect the persons with the crime."

46. In a case of circumstantial evidence, one must look for complete chain of circumstances and not on snapped and scattered links which do not make a complete sequence.

47. This Court finds that this case is entirely based on circumstantial evidence. While appreciating circumstantial evidence, the Court must adopt a cautious approach as circumstantial evidence is "inferential evidence" and proof in such a case is derivable by inference from circumstances.

48. Chief Justice Fletcher Moulton once observed that "proof does not mean rigid mathematical" formula since "that is impossible". However, proof must mean such evidence as would induce a reasonable man to come to a definite conclusion. Circumstantial evidence,

on the other hand, has been compared by Lord Coleridge "like a gossamer thread, light and as unsubstantial as the air itself and may vanish with the merest of touches". The learned Judge 27 also observed that such evidence may be strong in parts but it may also leave great gaps and rents through which the accused may escape.

> "Therefore, certain rules have been judicially evolved for appreciation of circumstantial evidence."

49. To my mind, the first rule is that the facts alleged as the basis of any legal inference from circumstantial evidence must be clearly proved beyond any reasonable doubt. If conviction rests solely on circumstantial evidence, it must create a network from which there is no escape for the accused. The facts evolving out of such circumstantial evidence must be such as not to admit of any inference except that of guilt of the accused. {See *Raghav Prapanna Tripathi and others vs. State of U.P.*[6] }.

50. The second principle is that all the links in the chain of evidence must be proved beyond reasonable doubt and they must exclude the evidence of guilt of any other person than the accused. {See: *State of UP vs. Ravindra Prakash Mittal*[7], - (Para 20)}

51. While appreciating circumstantial evidence, we must remember the principle laid down in Ashraf Ali vs. Emperor - (43 Indian Cases 241 at para 14) that when in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail.

52. The next principle is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and is incapable of explanation upon any other reasonable hypothesis except his guilt.

53. When a murder charge is to be proved solely on circumstantial evidence, as in this case, presumption of innocence of the accused must have a dominant role. In Nibaran Chandra Roy vs. King Emperor - (11 CWN 1085) it was held the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that whatever force a presumption arising under Section 106 of the Indian Evidence Act may have in civil or in less serous criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.

54. Same principles have been followed by the Constitution Bench of this Court in *Govinda Reddy vs. State of Mysore*[8] where the learned Judges quoted the principles laid down in *Hanumant Govind Nargundkar and anr. vs. State of Madhya Pradesh*[9]. The ratio in Govind (supra) quoted in paragraph 5, page 30 of the reports in Govinda Reddy (supra) are:

> "in cases where the evidence of a circumstantial nature, the circumstances which lead to the conclusion of guilt should be in the first instance fully established, and all the facts so established should be consistent only with the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words there must be a chain of evidence so complete as not to leave any reasonable doubt for a conclusion consistent with the innocence of the accused and it must be shown that within all human probability the act must have been committed by the accused."

55. The same principle has also been followed by this Court in *Mohan Lal Pangasa vs. State of U.P.*[10].

56. As noted above, along with the appeal of A4 and A5 against their judgment and order of conviction, in this case, several State appeals have been filed. A3-Govinda was acquitted by the trial court and also by the High Court. The State appeal against the same has already been dismissed by this court by an order dated 24.11.06. The State also filed an appeal against the order of acquittal by the High Court in respect of A1, A2 and A6. This Court finds that in acquitting A1, A2, and A6, the High Court has taken a plausible view. This Court in exercise of its jurisdiction under Article 136 is not inclined to take a different view.

[See *State of Haryana vs. Krishan*[11], paras 10 and 11, pages 211- 212 of the report and *State of Andhra Pradesh vs. S. Swarnatatha and others*[12], paras 25 and 26, pages 388- 389 of the report.]

57. As a result of acquittal of A-1, A-2, A-3 and A-6, the conspiracy theory of the prosecution in this case fails. A substantial part of the prosecution case has not been accepted on valid grounds either by the High Court or by this Court. Thus, a very vital part of the prosecution case is finally knocked off. As the prosecution fails to prove its case of conspiracy, the motive angle behind the alleged crime committed by A-4 and A-5 disappears. The prosecution case is that A-4 and A-5 are hired criminals and were engaged on payment by A-1, A-2, A-3 and A-6 for killing the deceased. The acquittal of A-1, A-2, A-3 and A-6 which is upheld by this Court casts a serious doubt on the entire prosecution and its case against A-4 and A-5 suffers a serious set back.

58. Considering the aforesaid facts and also going by the test of appreciation of circumstantial evidence as discussed above, this Court has to extend the benefit of doubt to A-4 and A-5 and cannot sustain the judgment and order of conviction of A-4 and A-5 under Sections 302/120-B of I.P.C read with Sections 25(1)(a)(b) and Section 27 of the Arms Act and consequently the death sentence awarded to them by the High Court is set aside. This Court is of the view that the so called circumstantial evidence against A-4 and A-5 does not constitute a complete chain which is consistent with the guilt of A-4 and A-5 and incompatible with their innocence.

59. Before parting, it may be noticed that in this case, it has been argued by the learned defence Counsel that in the matter of discovery of the weapon pursuant to the facts deposed by A-4 and A-5, the prosecution has not followed the safeguards which are statutorily engrafted in connection with a search under Section 100(4) and Section 100(5) of the Code of Criminal Procedure.

60. The learned Counsel argued that discovery pursuant to facts deposed under Section 27 of the Evidence Act can only become relevant if it is made following the safeguards under Section 100(4) and section 100(5) of the Code.

61. In *State, Govt. of NCT of Delhi vs. Sunil and another*[13], almost a similar contention has been negatived by this Court in Para 19 of the report. The learned judges held:

> "..recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code."

62. In doing so, the learned judges relied on a decision of this Court in Transport The *Transport Commissioner, A.P., Hyderabad and another vs. S. Sardar Ali, Bus Owner, Hyderabad and 41 others*[14]. It may be true that the decision in Sardar Ali was rendered in the context of Motor Vehicles Act, but the propositions in Para 20, at page 662 of the report are, if I may say so, based on sound logic.

63. In Para 20, page 662 of the report it was held when discovery is made pursuant to any facts deposed by the accused, the discovery memo prepared by the investigating officer is necessarily attested by independent witnesses.

> "But if in a given case, no witness is present or nobody agrees to attest the memo, it is difficult to lay down as a proposition that the discovery must be treated tainted or that the discovery evidence is unreliable. In such a situation, the Court has to consider the report of the investigating officer who made discovery on its own merits."

64. In para 21, this Court further elaborated this principle by saying when a police officer gives evidence in Court about discovery made by him on the strength of facts deposed by accused it is for the Court to believe the version, if it is otherwise shown to be reliable and it is for the accused to cross examine the investigating officer or rely on other materials to show that evidence of police officer is unreliable or unsafe.

65. Therefore, reliability of the materials discovered pursuant to the facts deposed by the accused in police custody depends on the facts of each case. If the discovery is otherwise reliable, its evidentiary value is not diluted just by reason of non-compliance with the provision of Section 100(4) or Section 100(5) of the Code.

66. The reason is that Section 100 falls under Chapter VII of the Code which deals with processes initiated to compel the production of things on a search. Therefore the entire gamut

of proceedings under Chapter VII of the Code is based on compulsion whereas the very basis of facts deposed by an accused in custody is voluntary and pursuant thereto discovery takes place. Thus, they operate in totally different situations. Therefore, the safeguards in search proceedings based on compulsion cannot be read into discovery on the basis of facts voluntarily deposed.

67. Section 27 starts with the word `provided'. Therefore, it is a proviso by way of an exception to Sections 25 and 26 of the Evidence Act. If the facts deposed under Section 27 are not voluntary, then it will not be admissible, and will be hit by Article 20(3) of the Constitution of India. [See *State of Bombay vs. Kathi Kalu Oghad*[15]].

68. The Privy Counsel in *Pulukori Kottaya vs. King Emperor*[16], held that Section 27 of the Evidence Act is not artistically worded but it provides an exception to the prohibition imposed under the preceding sections. However, the extent of discovery admissible pursuant to the facts deposed by accused depends only to the nature of the facts discovered to which the information precisely relates.

69. The limited nature of the admissibility of the facts discovered pursuant to the statement of the accused under Section 27 can be illustrated by the following example: Suppose a person accused of murder deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, but as a result of such discovery no inference can be drawn against the accused, if there is no evidence connecting the knife with the crime alleged to have been committed by the accused.

70. So the objection of the defence counsel to the discovery made by the prosecution in this case cannot be sustained. But the discovery by itself does not help the prosecution to sustain the conviction and sentence imposed on A-4 and A-5 by the High Court.

71. For the reasons discussed above, the Appeal filed by A-4 Musheer Khan @ Badshah Khan and A- 5 Basant Shiva Bhai Jadav are allowed. The judgment and order of conviction of the High Court dated 8.11.2004 passed in the Criminal Appeal No. 1761 of 2003 against them under Sections 302/120-B of I.P.C and under Sections 25(1)(a)(b) and Section 27 of the Arms Act is set aside. They are set at liberty forthwith, if not required to be detained in any other case.

72. All the appeals filed by the State of Madhya Pradesh are dismissed.

[1]*1971(2) SCC 75*	[2]*(1973) 2 SCC 406*	[3]*(2007) 2 SCC 310*	[4]*(2004) 13 SCC 150*
[5]*(1982) 3 SCC 368(1)*	[6]*AIR 1963 SC 74*	[7]*1992 Crl.L.J 3693(SC)*	[8]*AIR 1960 SC 29*
[9]*AIR 1952 SC 343*	[10]*AIR 1974 SC 1144*	[11]*(2008) 15 SCC 208*	[12]*(2009) 8 SCC 383*
[13]*(2001) 1 SCC 652*	[14]*1983 4 SCC 245*	[15]*AIR 1961 SC 1808*	[16]*1947 PC 67*