SUPREME COURT OF INDIA

Akil @ Javed

Vs.

State of NCT of Delhi

Crl.A.No.1735 of 2009

(Swatanter Kumar and Fakkir Mohamed Ibrahim Kalifulla JJ.)

06.12.2012

JUDGMENT

FAKKIR MOHAMED IBRAHIM KALIFULLA, J.

1. First accused is the appellant before us. The challenge is to the judgment of the Division Bench of the High Court of Delhi in Criminal Appeal No.134/2003 dated 16.09.2005. The High Court by its common judgment in Criminal Appeal No.166/2003 preferred by the second accused and Criminal Appeal No.134 of 2003 preferred by the appellant before us confirmed the conviction of the appellant for offences under Section 302 as well as under Section 392 read with Section 34 IPC.

2. The genesis of the case of the prosecution was that one Shama Parveen was living in House No.A-32/15, Main Road No.66, Maujpur, that while she was using the first floor as her residential premises she had her own shop in the ground floor where she was dealing with air-coolers and the business of real-estate. She had three sons living with her apart from her mother. In another portion of the same premises her maternal uncle one Mohd. Jamil (Mammu) was having his own business. One Salvinder alias Kake friend of Shama Parveen used to frequently visit her house. On 27.10.1998 Shama Parveen returned back to her house along with Salvinder after making certain purchases from the market and after her return appellant and two other persons entered her house and they were armed with revolvers and also a knife. After entering the house they enquired about Mammu and when Shama Parveen replied that he had gone to fetch vegetables the accused snatched a gold ring, locket and cash amounting to Rs.100/150 from Salvinder.

They demanded the keys of the almirah of Shama Parveen and out of force when she handed over the keys the accused opened the almirah and removed sum of Rs.15000/- kept in the almirah apart from sum of Rs.2,50,000/- kept in the locker. They also removed a mobile phone and some other ornaments apart from ear rings and a necklace from the person of Shama Parveen. While so, Mohd. Jamil alias Mammu also entered the house and another friend of Shama Parveen, namely, Nasreen and her husband Jeeta also came there. Shama Parveen's mother was already present in the house. After committing robbery, the appellant stated to have attempted to molest Shama Parveen and when Salvinder protested to such an attempt of the appellant questioning as to why even after removing the valuables they are indulging in such molestation, the appellant stated to have retarded towards him asking him to shut up and also simultaneously fired a shot on his forehead. Salvinder stated to have fell down on the bed. The three accused thereafter stated to have left the place with the robbed items and cash by locking the door outside the house. After 10-15 minutes one of the sons of Shama Parveen, namely, Danish entered the house who untied all the victims and thereafter the injured Salvinder was taken to the hospital where he was declared 'brought dead'. Based on the statement of Shama Parveen the police registered a crime under Sections 392/354/302 read with Section 34 IPC at Police Station Seelampur, Delhi.

3. Be that as it may, based on a secret information the appellant and the second accused were arrested by officials of the Special Cell, Lodhi Colony from Sunlight Colony, Seema Puri while they came there in a vehicle bearing Registration No.DL-2C-B 1381. Pursuant to the arrest when a search was made on the person of the second accused a loaded country-made pistol was recovered from his pant pocket. On the personal search made on the appellant he was also found in possession of another country-made pistol along with live cartridges. Cases were registered against them under the Arms Act vide FIR No.717 and 718/1998 at Police Station Seema Puri. Further recoveries were also made from the person of the appellant, namely, a gold chain and a 'Rado' wrist watch. Based on the further investigation it came to light that they were involved in the incident on 27.10.1998 at the residence of Shama Parveen. The investigation further revealed apart from the appellant and second accused two other accused were also involved but they continued to remain absconding and, therefore, they were declared as proclaimed offenders.

4. The trial Court framed charges against the appellant and the second accused under Section 392/34, 302/34, 354 and 411/34 IPC. The trial Court ultimately convicted the appellant as well as second accused for offences under Sections 302

read with 34 and 392 read with 34 IPC. They were acquitted of the offence under Section 354 IPC as there was no evidence against them. The appellant and the second accused were imposed with a sentence of life imprisonment for the offence under Section 302 read with 34 IPC apart from a fine of Rs.5000/- each and in default to undergo rigorous imprisonment for one year. They were also imposed with a sentence of 10 years rigorous imprisonment for the offence under Section 392 read with 34 IPC apart from a fine of Rs.5000/- each and in default to undergo rigorous imprisonment for one year.

5. The Division Bench having dealt with the appeal of the appellant in extentso ultimately found that the second accused could not be roped in for the offence falling under Section 302 read with 34 IPC though his conviction under Section 392 read with 34 IPC could be confirmed. The Division Bench of the High Court, therefore, partly allowed the appeal of the second accused and he was acquitted of the charge under Section 302 read with 34 IPC while his conviction under Section 392 read with 34 IPC was confirmed. The appeal preferred by the appellant, however, came to be dismissed. Being aggrieved of the said judgment of the Division Bench the appellant has come forward with this appeal.

6. We heard Mr. Subramonium Prasad, learned counsel for the appellant and Mr. B. Chahar, learned senior counsel for the respondent. The learned counsel for the appellant submitted that the case of the prosecution was based on the ocular evidence of the eye-witnesses and that almost all of them turned hostile insofar as identification of the accused, that PW.20 who alone identified the accused in his chief-examination also turned hostile in the course of the cross-examination. The learned counsel, therefore, contended that the evidence of PW.20 could not have been relied upon for the conviction and sentence imposed. The learned counsel then contended that the Courts below relied upon the articles recovered, namely, the jewels and the watch for convicting the appellant. According to learned counsel PW.17, who identified the articles, made it clear that those articles were already shown to her and, therefore, the reliance placed upon such recoveries was not justified. The learned counsel further contended that the recovery of arms from the appellant and the other accused were not connected to the offence and that no weapon was marked before the Court to connect the crime. By referring to the decision of this Court reported in Paramjeet Singh alias Pamma V. State of Uttarakhand - (2010) 10 SCC 439 in particular paragraph 10 of the said decision the learned counsel contended that however gruesome the offence may be, an accused can be convicted only based on legal evidence. The learned counsel also referred to Section 155 of the Evidence Act and contended that the version of

PW.20 in the light of his later version in the cross- examination relating to the identity of the appellant no credence can be given as that would defeat the very basis of the principle relating to conviction in a criminal case. The learned counsel also relied upon Suraj Mal V. State (Delhi Administration) - (1979) 4 SCC 725 for the proposition that where the witnesses made inconsistent statements in their evidence either at one stage or at different stages, the testimony of such witnesses becomes unreliable and unworthy of credence. The learned counsel, therefore, submitted that the reliance placed upon the version of PW.20 who made inconsistent statement about the identity of the appellant was wholly invalid and unreliable. The learned counsel, therefore, contended that the conviction and sentence imposed on the appellant are liable to be set aside.

7. As against the above submission Mr. B. Chahar, learned standing counsel for the State submitted that the relevant fact to be kept in mind is the criminality of the offenders involved in this case where out of four accused two of them continue to abscond even as on date who have been declared as proclaimed offenders. The learned counsel, therefore, submitted that the approach of the trial Court and the High Court in weighing the evidence of the witnesses and relied upon was well justified. The counsel for the State also brought to our notice the attempt of the Investigating Officer by moving the concerned Magistrate, who allowed him to interrogate the accused in the case under the Arms Act for 30 minutes, to hold a Test Identification Parade of the accused which included the appellant and the appellant along with the co-accused refused to participate in the Test Identification Parade. Further it was pointed out that their refusal to participate would result in drawing an adverse inference against them. But yet it is stated that the appellant and the other accused persisted in their refusal by stating that they were shown to the witnesses and that their photographs were also taken. The learned counsel submitted that such a stand of the appellant and the other accused was a lame excuse inasmuch as the information about the arrest of the accused was given to the Investigating Officer only on 4th November 1998 when they were formally arrested in the present case and that the Investigating Officer was thereafter allowed to interrogate the accused for about 30 minutes only and that too in the Court premises. The request of the Investigating Officer to hold Test Identification Parade was stated to be on the very next date, namely, 5th November, 1998. The learned counsel then submitted that the identity of the articles, namely, ‘Rado watch’ and ‘gold chain’ recovered from the appellant was duly identified by PW.14 and PW.17, the S.I. who conducted the search on the accused and the complainant respectively and that both of them were recovered on the same day.

The learned counsel, therefore, submitted that the conviction and sentence imposed on the appellant does not call for interference.

8. Having heard learned counsel for the appellant as well as the counsel for the State, having bestowed our serious consideration to the respective submissions, the material on record and the relevant provisions, we are convinced that the conviction and sentence imposed on the appellant does not call for interference.

9. When we consider the submissions of learned counsel for the appellant the same was two-fold. According to learned counsel the identity of the appellant vis-à-vis the offence alleged was not made out. As regards the recoveries it was contended that here again the same was not proved in the manner known to law. Since, in the impugned judgment the High Court has dealt with both the contentions in extenso and also with minute details, we are of the view that by making reference to various reasoning stated therein the contention of the appellant can be satisfactorily dealt with which we shall do in the later part of this judgment. In that respect it can be stated that the prosecution examined PWs.17, 19, 20, 23 and 25 as eye-witnesses to the crime. In fact such a claim of the prosecution was never in dispute. The narration of the event that occurred on 27.10.1998 at House No.A- 32/15, Main Road No.66, Maujpur, as described by those witnesses was not in controversy.

10. The sequence of events were that on that day at about 6:00 p.m three intruders in the age group of 20 to 22 years entered the place of occurrence and that out of the three persons two were armed with revolvers and one was possessing a knife. The description of those persons and their physical features were also mentioned by the complainant by stating that one of them was thin, whitish in complexion and had a cut mark on his right cheek. The other one was described as fair coloured, without moustaches and tall. The third person was described as a person with round face and well built. After entering the house they asked for the whereabouts of Mammu who was examined as PW.20. Thereafter, they snatched a gold ring from the person of deceased Salvinder and also a locket and cash of Rs.100/150 from him. Then they asked the complainant, who was in possession of the keys of the almirah, noticing the keys were in her hand bag, when she opened her hand bag to pay some cash to a juiceman. The intruders forced her to handover the keys of the almirah by threatening to shoot at her as well as her children with the revolver. Thereafter, they robbed cash kept in the almirah to the tune of Rs.15000/- and another sum of Rs.2,50,000/- in the locker and also a mobile phone and jewels kept in the almirah. They also stated to have removed Valiya, a gold chain and three

rings which the complainant was wearing. After robbing of the complainant's cash and jewels and other materials when the appellant attempted to molest the complainant the deceased stated to have raised a protest at which point of time the appellant stated to have shouted at the deceased by saying that he was talking too much by pointing the revolver towards him and shot him which snatched away the life of the deceased. According to the complainant, thereafter, they bolted the door from outside the house and left the scene of occurrence.

11. This sequence was consistently maintained by complainant – PW.17 before the Court which was fully supported by the other eye-witnesses, namely, PWs.19, 20, 23 and 25. When it came to the question of identifying the accused, out of the three only two, appellant and co- accused alone, were apprehended and proceeded against and they were in Court. Since the other accused was absconding and continue to abscond even as on date the trial Court proceeded with the trial. When it came to the question of such identification, the judgment of the trial Court as well as that of the High Court has elaborately considered and found that while the other witnesses could not identify the appellant and the other co-accused even in the Court. PW.20 was able to identify the appellant as the person who attempted to molest the complainant – PW.17 and when the deceased raised a protest the appellant shot him and thereafter the deceased fell down. Unfortunately, on 18.09.2000, the trial Court adjourned the case for cross-examination of PW.20 by two months. His cross-examination was conducted only on 18.11.2000 as the case was adjourned. The reason for the adjournment was a mere request on behalf of the appellant that his counsel was busy in the High Court. The High Court in the impugned judgment has stated that such a long adjournment provided scope for maneuvering.

12. In the course of cross-examination PW.20 made a different statement as regards the identity of the appellant by stating that he was tutored by Inspector Rajinder Gautam who met him before his examination-in- chief. In the light of the said development it was contended on behalf of the appellant that irrespective of the crime as described by the eye-witnesses taken place on the fateful day there was absolutely no legally acceptable evidence to connect the appellant with the crime. Learned counsel relied upon Section 155 of the Evidence Act in support of his submission. The learned counsel also relied upon the decisions reported in Paramjeet Singh (supra) and Suraj Mal (supra). We can also refer to some of the decisions reported in Kunju Muhammed alias Khumani and another V. State of Kerala - (2004) 9 SCC 193, Nisar Khan alias Guddu and others V. State of Uttaranchal - (2006) 9 SCC 386, Mukhtiar Ahmed Ansari V. State (NCT of

Delhi) - (2005) 5 SCC 258 and Raja Ram V. State of Rajasthan - (2005) 5 SCC 272 in respect of the said proposition of law.

13. Both the trial Court as well as the High Court ignored the inconsistency in the statement of PW.20 as regards the identity of the appellant and proceeded to rely upon what was stated by him in the chief-examination while convicting the appellant and ultimately imposing him the sentence. It is relevant to mention that the appellant as well as the co-accused were charged under Section 392 IPC as well apart from the charge under Section 302 read with 34 IPC. In fact, we find from the judgment of the trial Court that specific charge was framed against the appellant for the offences under Sections 302 read with 34 and 392 read with 34 IPC. They were charged under Section 354 read with 34 IPC and were acquitted for the said offence.

14. As we come back to the offence alleged against the appellant, as noted earlier, the charge was both under Section 302 read with 34 and 392 read with 34 IPC. Leaving aside the identity aspect dealt with by the Courts below, as far as the appellant and the other accused are concerned, another important factor which weighed with the Courts below to find them guilty was the identity of the materials which were recovered from the appellant and the co-accused on 03.11.1998 when the appellant and the other accused were arrested under the Arms Act. A 'Rado watch' and a 'gold chain' were recovered from the personal search of the appellant. Search was conducted by S.I. A.S. Rawat who was examined as PW.14. He testified such fact that the said recovery was made by him from the person of the appellant. PW.17 clearly identified both the articles as belonging to her which were stealthily removed from her possession. In so far as the said part of evidence is concerned (viz), as regards the recovery, it was contended that no public witness was joined at the time of arrest of the accused in spite of prior information which was available with the police. The said contention was rightly rejected by both the Courts below as unsustainable.

15. As far as the identity of the recovery of articles was concerned, the version of PW.14 was unassailable. It was only contended that the identity by PW.17, as regards the 'Rado watch', cannot be relied upon inasmuch as the same was not mentioned in the FIR. Here again, the Courts below righty rejected the said argument inasmuch as it was a very minor discrepancy and on that score such a diabolic offence committed by the accused cannot be ignored. The other contention that the material objects were shown to PW.17 is also trivial and that does not cause any serious dent in the case of the prosecution. In the said circumstance it

was for the appellant to explain as to how he came into possession of the articles whether it was owned by him or in what other manner those articles came into his possession. In this respect it was noted by the Courts below that in his statement under Section 313 Cr.P.C he did not even attempt to explain it away or claim ownership. He stated to have simply denied of the recovery made from him. In such circumstances, recoveries from the appellant along with the co-accused having been proved in the manner known to law, those were well established incriminating circumstances demonstrated before the Courts below and there was no contra evidence for the appellant and the co-accused to get rid off the offences alleged. Having regard to the said piece of evidence relating to the recoveries prevailing on record the presence of the appellant along with the co-accused at the place of occurrence in the manner described by the witnesses, namely, PWs.17, 19, 20, 23 and 25 was clinching enough to rope in the appellant along with the co-accused in the commission of the crime as alleged in the complaint and found proved against both of them.

16. At this juncture we feel it appropriate to refer certain conclusions of the trial Court as well as the High Court as regards the recoveries from the appellant and the co-accused to add credence to our conclusions. Such conclusions of the trial Court are found in paragraphs 18 to 27. The relevant portions are found in paragraphs 2, 18, 26 and 27. In the rest of the paragraphs, namely, 19 to 24 the trial Judge has referred to the decisions of this Court reported in State of Punjab V. Wassan Singh and others - AIR 1981 SC 697, Sohrab and another V. State of Madhya Pradesh - AIR 1972 SC 2020, Appabhai and another V. State of Gujarat - AIR 1988 SC 696, Bharwada Bhoginbhai Hirjibhai V. State of Gujarat - AIR 1983 SC 753, Sanjay alias Kaka V. State (NCT of Delhi) - 2001-(CR)-GJX-0071-SC, Ezhil Ors. V. State of Tamil Nadu - 2002 II A.D. (Cr.) S.C. 613, State of Maharashtra V. Suresh - (2000) 1 SCC 471, Nallabothu Venkaiah V. State of Andhra Pradesh - 2002 VI AD (S.C.) 521. The relevant findings are found in paragraphs 2, 18, 26 and 27 which read as under:

> "2. ….During personal search of accused Akil one Rado wrist watch and one gold chain were also recovered which were seized vide memo Ex.PW.14/A after being sealed with the seal of ASR. The articles were got identified from Smt. Shama Parveen before Sh. S.K. Sharma, Ld. M.M. on 28.1.99. Thus, the police pinned the murder and robbery upon them and booked them under sections 392/354/302/411/34 IPC. On 5.11.98, I.O. Inspector Rajinder Singh moved an application for holding test identification parade of both the accused persons. Both the accused refused to join TIP.

> 18. ….In the instant case SI A.S. Rawat stated that one country made pistol, two live cartridges, one rado watch and golden watch were recovered from accused Akil @ Javed. However, SI Jasod Singh stated that a golden chain was recovered from accused Murslim. The recovery memo shows that their goods were recovered from the possession of accused Akil.
>
> 26. The last submission made by the Ld. defence counsel was that no reliance should be placed on the identification parade of the goods in question because Shama Parveen, PW2, stated that she had identified the goods in the police station before joining the T.I.P.
>
> 27. If these goods do not belong to Smt. Shama Parveen, why did not the accused claim it? To whom these goods belong? In the court Shama Parveen has clearly, specifically and unequivocally stated that these goods belonged to her. Nobody has disputed this fact. The T.I.P. of goods like watch or chain is not that necessary. Such like goods can be identified by a person who uses it everyday. Identification or non-identification of such like goods before the T.I.P. is meaningless and does not carry much weight."

17. The High Court on its part has stated as under in paragraphs 10, 24, 25, 26, 27, 28 and 30.

> "10. Before we proceed to deal with the submissions as referred to above, what needs to be emphasized is that during arguments before us, it was not the case of the appellants that on the day of the commission of the offence, Shama Parveen and deceased Salvinder were not present in house No. A-32/15, Main Road no.66, Mauzpur, Delhi. It was also not their case that no robbery had taken place or Salvinder had not been murdered. We say so since on these aspects the witnesses for the prosecution were not subjected to cross-examination by the appellants. Even otherwise, the fact that Shama Parveen and Salvinder were present at the above mentioned house, the further fact that three persons had barged into that house, robbed the lady of her jewellery and other items, and thereafter, tried to outrage her modesty which when objected to by Salvinder cost him his life at the hands of one of the intruders, stand proved beyond doubt from the statements of PW- 17-Shama Parveen, PW-19 Gurmeet Singh, PW- 23 Noorjahan and PW-25 Smt. Gurdeep Kaur, all of whom, by and large deposed as per the FIR lodged by Shama Parveen to the police soon after the incident. Thus, to that extent, we

would be justified in saying that there was no challenge to the prosecution version. We may say at the cost of repetition that the only defense taken by the accused persons was that they were not the persons who committed either the robbery or the murder of Salvinder.

24. It is in evidence that on 3rd November, 1998 when the appellants were arrested under the Arms Act, certain recoveries were made from their persons. We are here concerned with the `Rado wrist' watch and a `gold chain' which were recovered from the personal search of accused Akil. It was S.I. A. S. Rawat who had conducted the personal search of the said accused after he was apprehended at Sunlight Colony. He appeared before the Trial Judge as PW-14 and testified to the effect that he recovered a `Rado' wrist watch and a gold chain from the person of accused Akil. It was not the case of appellant Akil that the said `Rado' wrist watch or gold chain were owned by him. Even in his statement recorded under Section 313 Cr. P.C, he made no such claim. He simply denied that any recovery was made from him. On the other hand, Shama Parveen, identified the two articles and claimed that they belonged to her. The recovery of articles Therefore stands proved from the evidence of these two witnesses.

25. It was next submitted by the learned counsel for the appellants that the prosecution though examined three witnesses namely, SI Satyajit Sareen (PW-3), SI Jasood Singh (PW-18) and SI A. S. Rawat (PW-14) to prove the recovery of 'Rado' wrist watch and 'gold chain' from accused Akil but it was only SI A.S.Rawat who spoke about the recovery of those articles from the accused. The other two were silent about the same. It was therefore contended that had the recoveries been actually effected as claimed by the prosecution all the three witnesses would have spoken about the same. Responding to the contention, it was submitted by learned counsel for the State, Ms. Mukta Gupta, that after the apprehension of both the appellants, the raiding party got divided into two groups and the search of the two appellants was taken separately. One raiding party was headed by SI Satyajit Sareen and the other by SI A. S. Rawat. It was for this reason that SI Satyajit Sareen was silent about the recovery effected from accused Akil. Learned counsel also pointed out that SI Jasood Singh was in the raiding party headed by SI Satyajit Sareen and that is why, he too was silent with regard to the recovery of a `Rado' wrist watch and a gold chain. The Explanation so tendered by the counsel is borne out from the evidence of SI Satyajit Sareen and SI Jasood Singh.

26. It was also contended by the learned counsel for the appellants that the recovery of a `Rado' wrist watch and a 'gold chain' were liable to be disbelieved because no public witness was joined at the time the accused persons were arrested, even though, police had prior information of their arrival. The mere fact of non-joining a public witness, to our mind, will not ipso- facto make the evidence of the police witnesses suspect, unreliable or untrustworthy. In any case, we find from the evidence of SI Satyajit Sareen that after receiving the secret information, the police did make efforts to join public witnesses in the raiding party. As per him, they requested 4-5 passersby to join them but they all offered reasonable excuses for not joining. Significantly, no suggestion was put to PW-3 Satyajit Sareen in cross-examination that no public witness was asked to join the raiding party.

27. ….In the present case, as noticed above, SI Satyajit Sareen has specifically deposed that the persons from the public were asked to join the raiding party but none agreed. The facts of the two cases are therefore not comparable.

28. It was further contended by counsel for the appellant that before the complainant Shama Parveen identified the `Rado' wrist watch and 'gold chain' before the Metropolitan Magistrate, Shri S. K. Sharma (PW-13) those articles were shown to her in the Police Station. In support, reference was made to the cross- examination of Shama Parveen, where she has stated that these two items were shown to her in the Police Station and it was thereafter that she had identified those items in the Court. While it is true that Shama Parveen did say so in her cross- examination but we are not inclined to attach much importance to it. The reason is that PW-14 SI A.S. Rawat who conducted the personal search of appellant Akil stated in his evidence that after the articles were recovered from him, they were kept in a parcel and were sealed with the seal of ASR. On the other hand, the Metropolitan Magistrate PW-13 who conducted the TIP stated in his evidence that when the case property was produced before him for getting it identified, it was found sealed with the seal of ASR. The evidence of these two witnesses when read together goes to show that the seal was intact and it was opened only before the Metropolitan Magistrate. In this context, the evidence of Head Constable Purushotam Kumar PW 28 is also relevant. As per him, on 3.11.1998, the special staff of N/E had deposited in the Malkhana of police station Seemapuri, amongst other articles, a chain and a `Rado' watch

regarding which entries were made at Serial no. 3363 and 3364 of the Malkhana register. It was further deposed by him that on 28th January, 1999, the chain and the `Rado' wrist watch were transferred from the Malkhana of police station Seemapuri to the Malkhana of Police Station Seelampur vide Serial no. 3363 in connection with the case FIR No.777/98 under Sections 392/354 IPC. It follows from the testimony of this witness that the case property containing the `Rado' wrist watch and 'gold chain' all through remained in the police station Seemapuri, till it was transferred to Police Station Seelampur on 28th January, 1999 and on that very day, the TIP was got done before the Metropolitan Magistrate. Where then was there any occasion for the Investigating Officer of this case to show the case property to Shama Parveen in the Police Station before it was got identified by her? In any case, assuming it was so shown, how does this fact falsify her claim that the `Rado' wrist watch and the chain belonged to her? Once she had identified the articles as belonging to her the onus to prove that they did not belong to her or that they belonged to Akil or if they did not belong to him how he came to be in possession of the same, was on none else than Akil. He having failed to discharge that onus we find no reason to disbelieve Shama Parveen, moreso, as Akil has not claimed those articles to be his.

30. In view of Section 8, the conduct of accused Akil in having been found in possession of the robbed articles is a relevant fact which also connects him, as well as, accused Murasalin with the crime for they both worked as a team which is further borne out from the fact that they were found together when arrested in the case under the Arms Act and when the recovery of 'Rado' wrist watch and 'gold chain' was made."

(Emphasis added)

18. Having regard to the above conclusions of the Courts below, with which we fully concur, we are convinced that the conviction and sentence imposed on the appellant was well justified and we do not find any good grounds to interfere with the same.

19. In the earlier part of our judgment we have referred to the reliance placed upon by the trial Court as well as by the High Court on the evidence of PW.20 as regards the identity of the appellant. Both the Courts had made a pointer to the adjournment granted at the instance of the accused for the cross-examination of PW.20. The chief- examination of PW.20 was recorded on 18.09.2000 and for the

purpose of cross-examination the case was adjourned by two months and was posted on 18.11.2000. The reason for adjournment was a request on behalf of the appellant that his counsel was busy in the High Court. PW.20 identified the appellant as the person who attempted to molest the complainant PW.17 and that when the same was questioned by the deceased the appellant shot at him who fell down on the bed and who was later declared dead by the doctors. However, in the cross- examination PW.20 stated that the identity of the appellant on the earlier occasion was at the instance of Inspector Rajinder Gautam who tutored him to make such a statement.

20. It is also relevant to note that the said witness was not treated as a hostile witness in spite of diametrically opposite version stated by him as regards the identity of the appellant. Nevertheless, both the Courts below proceeded to hold that the identity made by PW.20 cannot be ignored. By relying upon Section 155 of the Evidence Act and also the decision reported in Paramjeet Singh alias Pamma (supra) and Suraj Mal (supra) learned counsel for the appellant contended that such a testimony of the witness is wholly unreliable. In Paramjeet Singh alias Pamma (supra), this Court held that howsoever gruesome an offence may be and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjecture. In the decision reported in Suraj Mal (supra) it was held that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses become unreliable and unworthy of credence and in the absence of special circumstance no conviction can be based on the evidence of such witnesses.

21. Apart from the above decisions relied upon by learned counsel for the appellant, we ourselves have noted in the decisions reported in Kunju Muhammed alias Khumani (supra), Nisar Khan alias Guddu (supra), Mukhtiar Ahmed Ansari (supra), Raja Ram (supra), wherein this Court has specifically dealt with the issue as regards hostile witness who was not treated hostile by the prosecution and now such evidence would support the defence (i.e.) the benefit of such evidence should go to the accused and not to the prosecution. In paragraph 16 of the decision reported in Kunju Muhammed alias Khumani (supra), this Court has held as under:

> "16. We are at pains to appreciate this reasoning of the High Court. This witness has not been treated hostile by the prosecution, and even then his evidence helps the defence. We think the benefit of such evidence should go to the accused and not to the prosecution. Therefore, the High Court ought not to have placed any credence on the evidence of such unreliable witness."

22. In Nisar Khan alias Guddu (supra) in paragraph 9 this Court has held as under:

> "9….We are of the view that no reasonable person properly instructed in law would allow an application filed by the accused to recall the eyewitnesses after a lapse of more than one year that too after the witnesses were examined, cross- examined and discharged."

23. In Mukhtiar Ahmed Ansari (supra), this Court in paragraphs 29 and 30 dealt with the hostile witness who was not declared hostile and the extent to which the version of the said witness can be relied upon as under:

> "29. The learned counsel for the appellant also urged that it was the case of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW 1 "hostile". His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.
>
> 30. A similar question came up for consideration before this Court in Raja Ram v. State of Rajasthan. In that case, the evidence of the doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the doctor and it was binding on the prosecution."

24. In the decision reported in Raja Ram (supra) a similar issue was dealt with in paragraph 9 and was held as under:

> "9. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now,

as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined."

25. We have referred to the above legal position relating to the extent of reliance that can be placed upon a hostile witness who was not declared hostile and in the same breath, the dire need for the Courts dealing with cases involving such a serious offence to proceed with the trial commenced on day to day basis in de die in diem until the trial is concluded. We wish to issue a note of caution to the trial Court dealing with sessions case to ensure that there are well settled procedures laid down under the Code of Criminal Procedure as regards the manner in which the trial should be conducted in sessions cases in order to ensure dispensation of justice without providing any scope for unscrupulous elements to meddle with the course of justice to achieve some unlawful advantage. In this respect, it is relevant to refer to the provisions contained in Chapter XVIII of the Criminal Procedure Code whereunder Section 231 it has been specifically provided that on the date fixed for examination of witnesses as provided under Section 230, the Session's Judge should proceed to take all such evidence as may be produced in support of the prosecution and that in his discretion may permit cross-examination of any witnesses to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

26. Under Section 309 of Cr.P.C. falling under Chapter XXIV it has been specifically stipulated as under:

"309. Power to postpone or adjourn proceedings.—

(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

Provided that when the inquiry or trial relates to an offence under Sections 376 to Section 376 D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.

(2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Explanation 1 – If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand.

Explanation 2 – The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

27. In this context it will also be worthwhile to refer to a circular issued by the High Court of Delhi in Circular No.1/87 dated 12th January 1987. Clause 24A of the said circular reads as under: "24A disturbing trend of trial of Sessions cases being adjourned, in some cases to suit convenience of counsel and in some others because the prosecution is not fully ready, has come to the notice of the High Court. Such adjournments delay disposal of Sessions cases.

The High Court considers it necessary to draw the attention of all the Sessions Judges and Assistant Sessions Judges once again to the following provisions of the Code of Criminal Procedure, 1973, Criminal Rules of Practice, Kerala, 1982 and Circulars and instructions on the list system issued earlier, in order to ensure the speedy disposal of Sessions cases.

1.(a) In every enquiry or trial, the proceedings shall be held as expeditiously as possible, and, in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. (Section 309 (1) Crl.P.C.).

(b) After the commencement of the trial, if the court finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable. If witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded, in writing. (Section 309 (2) Cr.P.C.).

2. Whenever more than three months have elapsed between the date of apprehension of the accused and the close of the trial in the Court of Sessions, an explanation of the cause of delay, (in whatever court it may have occurred) shall be furnished, while transmitting the copy of the judgment. (Rule 147 Crl. Rules of Practice).

3. Sessions cases should be disposed of within six weeks of their institution, the date of commitment being taken as the date of institution in Sessions Cases. Cases pending for longer periods should be regarded as old cases in respect of which explanations should be furnished in the calendar statements and in the periodical returns. (High Court Circular No. 25/61 dated 26th October 1961).

4. Sessions cases should be given precedence over all other work and no other work should be taken up on sessions days until the sessions work for the day is completed. A Sessions case once posted should not be postponed unless that is unavoidable, and once the trial has begun, it should proceed continuously from day to day till it is completed. If for any reason, a case has to be adjourned or postponed, intimation should be given forthwith to both sides and immediate steps be taken to stop the witnesses and secure their presence on the adjourned date.

On receipt of the order of commitment the case should be posted for trial to as early a date as possible, sufficient time, say three weeks, being allowed for securing the witnesses. Ordinarily it should be possible to post two sessions cases a week, the first on Monday and the second on Thursday but sufficient time should be allowed for each case so that one case does not telescope into the next. Every endeavour should be made to avoid telescoping and for this, if necessary, the court should commence sitting earlier and continue sitting later than the normal hours. Judgment in the case begun on Monday should ordinarily be pronounced in the course of the week and that begun on Thursday the following Monday. (Instructions on the list system contained in the O.M. dated 8th March 1984).

All the Sessions Judges and the Assistant Sessions Judges are directed to adhere strictly to the above provisions and instructions while granting adjournments in Sessions Cases.

28. In this context some of the decisions which have specifically dealt with such a situation which has caused serious inroad into the criminal jurisprudence can also be referred to. In one of the earliest cases reported in Badri Prasad V. Emperor - (1912) 13 Crl. L.J. 861, a Division Bench of the Allahabad High Court has stated the legal position as under:

"….Moreover, we wish to point out that it is most inexpedient for a Sessions trial to be adjourned. The intention of the Code is that a trial before a Court of Session should proceed and be dealt with continuously from its inception to its finish. Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period…..

(Emphasis added)

29. In a decision reported in Chandra Sain Jain and others V. The State - 1982 Crl. L.J. NOC 86 (ALL) a Single Judge has held as under while interpreting Section 309 of Cr.P.C.

"Merely because the prosecution is being done by C.B.I. or by any other prosecuting agency, it is not right to grant adjournment on their mere asking and the Court has to justify every adjournment if allowed, for, the right to

speedy trial is part of fundamental rights envisaged under Art. 21 of the Constitution, 1979 Cri LJ 1036 (SC), Foll."

(Emphasis added)

30. In the decision reported in The State V. Bilal Rai and others - 1985 Crl. L.J. NOC 38 (Delhi) it has been held as under: "When witnesses of a party are present, the court should make every possible endeavour to record their evidence and they should not be called back again. The work fixation of the Court should be so arranged as not to direct the presence of witnesses whose evidence cannot be recorded. Similarly, cross-examination of the witnesses should be completed immediately after the examination in chief and if need be within a short time thereafter. No long adjournment should be allowed. Once the examination of witnesses has begun the same should be continued from day to day."

(Emphasis added)

31. In the decision reported in Lt. Col. S.J. Chaudhary V. State (Delhi Administration) - (1984) 1 SCC 722, this Court in paragraphs 2 and 3 has held as under:

"2. We think it is an entirely wholesome practice for the trial to go on from day-to-day. It is most expedient that the trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish. Not only will it result in expedition, it will also result in the elimination of manoeuvre and mischief. It will be in the interest of both the prosecution and the defence that the trial proceeds from day-to- day. It is necessary to realise that Sessions cases must not be tried piecemeal. Before commencing a trial, a Sessions Judge must satisfy himself that all necessary evidence is available. If it is not, he may postpone the case, but only on the strongest possible ground and for the shortest possible period. Once the trial commences, he should, except for a very pressing reason which makes an adjournment inevitable, proceed de die in diem until the trial is concluded.

3. We are unable to appreciate the difficulty said to be experienced by the petitioner. It is stated that his Advocate is finding it difficult to attend the court from day-to-day. It is the duty of every Advocate, who accepts the brief in a criminal case to attend the trial from day-to- day. We cannot over-stress the duty of the Advocate to attend to the trial from day-to-day. Having

accepted the brief, he will be committing a breach of his professional duty, if he so fails to attend. The criminal miscellaneous petition is, therefore, dismissed."

(Emphasis added)

32. In a recent decision of the Delhi High Court reported in State V. Ravi Kant Sharma and Ors. - 120 (2005) DLT 213, a Single Judge of the High Court has held as under in paragraph 3:

> "3. True the Court has discretion to defer the cross- examination. But as a matter of rule, the Court cannot orders in express terms that the examination-in-chief of the witnesses is recorded in a particular month and his cross-examination would follow in particular subsequent month. Even otherwise it is the demand of the criminal jurisprudence that criminal trial must proceed day-to-day. The fixing of dates only for examination-in- chief of the lengthy witnesses and fixing another date i.e. 3 months later for the purposes of cross-examination is certainly against the criminal administration of justice. Examination-in- chief if commenced on a particular date, the Trial Judge has to ensure that his cross-examination must conclude either on the same date or the next day if cross-examination is lengthy or can continue on the consecutive dates. But postponing the cross- examination to a longer period of 3 month is certainly bound to create legal complications as witnesses whose examination-in- chief recorded earlier may insist on refreshing their memory and therefore such an occasion should not be allowed to arise particularly when it is the demand of the criminal law that trial once commence must take place on day-to-day basis. For these reasons, the order passed by the learned Additional Sessions Judge to that extent will not hold good in the eyes of law and therefore the same is liable to be set aside. Set aside as such. Learned Additional Sessions Judge should refix the schedule of dates of examination of prosecution witnesses and shall ensure that examination-in-chief once commences cross- examination is completed without any interruption." (Emphasis added)

33. In a comprehensive decision of this Court reported in State of U.P. V. Shambhu Nath Singh and others - (2001) 4 SCC 667 the legal position on this aspect has been dealt with in extenso. Useful reference can be made to paragraphs 10, 11 to 14 and 18:

"10. Section 309 of the Code of Criminal Procedure (for short "the Code") is the only provision which confers power on the trial court for granting adjournments in criminal proceedings. The conditions laid down by the legislature for granting such adjournments have been clearly incorporated in the section. It reads thus:

309. xxxx xxxx xxxx

11. The first sub-section mandates on the trial courts that the proceedings shall be held expeditiously but the words "as expeditiously as possible" have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous stance to be adopted by the court at a further advanced stage of the trial. That stage is when examination of the witnesses begins. The legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section by using the words "as expeditiously as possible" has chosen to make the requirement for the next stage (when examination of the witnesses has started) to be quite stern. Once the case reaches that stage the statutory command is that such examination "shall be continued from day to day until all the witnesses in attendance have been examined". The solitary exception to the said stringent rule is, if the court finds that adjournment "beyond the following day to be necessary" the same can be granted for which a condition is imposed on the court that reasons for the same should be recorded. Even this dilution has been taken away when witnesses are in attendance before the court. In such situation the court is not given any power to adjourn the case except in the extreme contingency for which the second proviso to sub-section (2) has imposed another condition,

"provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing". (emphasis supplied)

12. Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone

can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court.

13. Now, we are distressed to note that it is almost a common practice and regular occurrence that trial courts flout the said command with impunity. Even when witnesses are present, cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. We make it clear that the legislature has frowned at granting adjournments on that ground. At any rate inconvenience of an advocate is not a "special reason" for bypassing the mandate of Section 309 of the Code.

14. If any court finds that the day-to-day examination of witnesses mandated by the legislature cannot be complied with due to the non-cooperation of the accused or his counsel the court can adopt any of the measures indicated in the sub-section i.e. remanding the accused to custody or imposing cost on the party who wants such adjournments (the cost must be commensurate with the loss suffered by the witnesses, including the expenses to attend the court). Another option is, when the accused is absent and the witness is present to be examined, the court can cancel his bail, if he is on bail (unless an application is made on his behalf seeking permission for his counsel to proceed to examine the witnesses present even in his absence provided the accused gives an undertaking in writing that he would not dispute his identity as the particular accused in the case).

18. It is no justification to glide on any alibi by blaming the infrastructure for skirting the legislative mandates embalmed in Section 309 of the Code. A judicious judicial officer who is committed to his work could manage with the existing infrastructure for complying with such legislative mandates. The precept in the old homily that a lazy workman always blames his tools, is the only answer to those indolent judicial officers who find fault with the defects in the system and the imperfections of the existing infrastructure for their tardiness in coping with such directions."

(Emphasis added)

34. Keeping the various principles, set out in the above decisions, in mind when we examine the situation that had occurred in the case on hand where PW.20 was

examined-in-chief on 18.09.2000 and was cross examined after two months i.e. on 18.11.2000 solely at the instance of the appellant's counsel on the simple ground that the counsel was engaged in some other matter in the High Court on the day when PW.20 was examined-in-chief, the adjournment granted by the trial Court at the relevant point of time only disclose that the Court was oblivious of the specific stipulation contained in Section 309 of Cr.P.C. which mandate the requirement of sessions trial to be carried on a day to day basis. The trial Court has not given any reason much less to state any special circumstance in order to grant such a long adjournment of two months for the cross-examination of PW.20. Everyone of the caution indicated in the decision of this Court reported in Rajdeo Sharma V. State of Bihar - 1998 Crl. L.J. 4596 was flouted with impunity. In the said decision a request was made to all the High Courts to remind all the trial Judges of the need to comply with Section 309 of the Code in letter and spirit. In fact, the High Courts were directed to take note of the conduct of any particular trial Judge who violates the above legislative mandate and to adopt such administrative action against the delinquent judicial officer as per the law.

35. It is unfortunate that in spite of the specific directions issued by this Court and reminded once again in Shambhu Nath (supra) such recalcitrant approach was being made by the trial Court unmindful of the adverse serious consequences affecting the society at large flowing therefrom. Therefore, even while disposing of this appeal by confirming the conviction and sentence imposed on the appellant by the learned trial Judge, as confirmed by the impugned judgment of the High Court, we direct the Registry to forward a copy of this decision to all the High Courts to specifically follow the instructions issued by this Court in the decision reported in Rajdeo Sharma (supra) and reiterated in Shambhu Nath (supra) by issuing appropriate circular, if already not issued. If such circular has already been issued, as directed, ensure that such directions are scrupulously followed by the trial Courts without providing scope for any deviation in following the procedure prescribed in the matter of a trial of sessions cases as well as other cases as provided under Section 309 of Cr.P.C. In this respect, the High Courts will also be well advised to use their machinery in the respective State Judicial Academy to achieve the desired result. We hope and trust that the respective High Courts would take serious note of the above directions issued in the decisions reported in Rajdeo Sharma (supra) which has been extensively quoted and reiterated in the subsequent decision of this Court reported in Shambhu Nath (supra) and comply with the directions at least in the future years.

36. In the result, while we upheld the conviction and sentence imposed on the appellant, we issue directions in the light of the provisions contained in Section 231 read along with Section 309 of Cr.P.C. for the trial Court to strictly adhere to the procedure prescribed therein in order to ensure speedy trial of cases and also rule out the possibility of any maneuvering taking place by granting undue long adjournment for mere asking. The appeal stands dismissed.