HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on: 13.07.2022
Pronounced on: 31.08.2022

Crl A(D) No. 4/2021
c/w
Crl Ref(L) No. 2/2021
Crl A (AD) No. 10/2022
Crl R No. 13/2022

Sarwar Khan ...Appellant/Petitioner(s)

Through :- Mr. Abhinav Sharma, Sr. Advocate with
Mr. Muzaffar Iqbal Khan, Advocate

v/s

Union Territory of J&K .....Respondent (s)

Through :- Mr. Adarsh Bhagat, GA
Mr. A. P. Singh, Advocate
Mr. M. Zulker Nain Choudhary,
Advocate for mother and brother of the deceased

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

JUDGMENT

Per Oswal-J

1. The judgment dated 29.01.2021 passed by the court of learned Principal Sessions Judge, Poonch (hereinafter to be referred as the trial court), whereby the appellant has been convicted for commission of offence under sections 304-I RPC and 27/30 Indian Arms Act, along with the order dated 30.01.2021 by virtue of which the appellant has been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- for commission of offence under section 304-I RPC and further rigorous imprisonment for five years and also to pay a fine of Rs. 5,000/- for the commission of offence

under section 27 of the Indian Arms Act, is the subject matter of appeal filed by the appellant-Sarwar Khan. An acquittal appeal has also been filed by the Union Territory of the Jammu and Kashmir bearing Crl A (AD) No. 10/2022 against the acquittal of the appellant of the charge under section 302 RPC. The brother and mother of the deceased have also filed a revision petition bearing Crl R No. 13/2022 against the aforesaid judgment and prayer has been made for convicting the appellant for commission of offence under section 302 RPC.

2. The judgment has been impugned by the appellant/accused on the ground that there was no cogent evidence regarding the commission of offence against him and further that there was no link connecting the appellant with the commission of offences.

3. In the acquittal appeal and revision petition, the contention of the appellant-Union Territory of Jammu and Kashmir and mother & brother of the deceased is that the appellant was required to be punished for commission of offence under section 302 RPC instead of 304-I RPC and further that the appellant was required to be sentenced with death penalty

4. **Contentions of Appellant**:

Mr. Abhinav Sharma, learned senior counsel assisted by Mr. Muzaffar Iqbal Khan representing appellant/accused has vehemently argued that the case of the prosecution was based upon circumstantial evidence and the prosecution has miserably failed to establish that the appellant had killed the deceased by firing from the 12 Bore Rifle and the prosecution also could not prove the motive behind the killing of the deceased. He further argued that even if, it is assumed that the deceased was killed with the gunshot of the appellant, even

then the prosecution has not been able to demonstrate that the appellant had either any intention to kill the deceased or cause such bodily injury, which in the ordinary course of circumstances, would have led to the death of the deceased. He also laid stress that the complete chain of the circumstances as projected by the prosecution during the trial could not be proved by the prosecution, as such, the appellant could not have been convicted even for commission of offence under section 304 Part-1 RPC. He also submitted that the prosecution is required to prove its case beyond reasonable doubt and the prosecution cannot derive any benefit out of the weakness of the defence of the appellant. Learned counsels for the appellant has relied upon the judgments of Apex Court in ***Shivaji Chintappa Patil v. State of Maharashtra*****, (2021) 5 SCC 626 and** ***Sharad Birdhichand Sarda v. State of Maharashtra*****, (1984) 4 SCC 116.**

5. **Contentions of U.T of Jammu & Kashmir as well as Mother& Brother of the deceased:**

Per contra, Mr. Adarsh Bhagat, learned Government Advocate representing Union Territory of Jammu and Kashmir has vehemently argued that no doubt there was no eye witness to the occurrence in the instant case but nonetheless, the onus to establish before the trial court as to under what circumstances the deceased sustained gunshot injury was upon the appellant, once the prosecution discharged its initial burden of proving that the appellant and deceased had gone together to Forest for hunting and thereafter the dead body of the deceased was found in the forest having gunshot injury from the gun of the appellant.

6. Mr. A. P. Singh, learned counsel appearing for the brother and mother of the deceased argued that it is established that the appellant/accused and the deceased were last seen together and further that the deceased had received the gunshot injury from the gun of the appellant and these circumstances are sufficient enough for convicting the appellant under section 302 RPC. Mr. Singh laid much stress upon the statement made by the appellant under section 342 Cr.P.C. and further argued that the false reply given by the appellant under section 342 Cr.P.C. provides a missing link, if any, in the chain of circumstances against the appellant. It is contended by Mr. Singh that the appellant had killed the deceased as there were inimical relations between deceased and appellant, as such, he is required to be convicted under section 302 RPC. He placed much reliance upon the judgments of Apex Court in **Sukhpal Singh v. State of Punjab (2019) 15 SCC 622** and **Sabitri Samantaray v. State of Odisha, 2022 SCC OnLine SC 673**.

7. Heard and perused the record.

Prosecution Case:

8. The prosecution story as it emanates from the charge-sheet is that on 20.03.2011 at 8.00 O' Clock, an information was received from a reliable source that one Maroof Ahmed S/o Lal Khan and Sarwar Khan-appellant S/o Sultan Khan resident of Thanamandi along with their 12 Bore Rifles had gone for hunting cocks at Dunar forest near Dera Gali. At around 6.00 p.m in the evening, they were in the search of prey. Sarwar Khan/appellant noticed the movement of prey and he fired in the bushes thinking that there were cocks but in fact there was Maroof Ahmed Khan, who was also in the search of prey. The bullet fired by Sarwar Khan, appellant herein, hit Maroof Ahmed

and he died on spot. The appellant was aware that Maroof Ahmed was also with him and the said movement could be of Maroof Ahmed but despite that he fired. Pursuant to this information, FIR bearing No. 16/2011 for commission of offences under sections 304 RPC and 27/30 of Arms Act was registered at Police Station Surankot. After registration of FIR, Investigating Officer went on spot and the dead body of the deceased was taken into custody, Two 12 bore guns, empty cartridges, live cartridges four in number were seized. Blood stained clay and simple clay were collected on spot. The alleged guns and cartridges were sealed on spot and later on they were got resealed by the Tehsildar, Surankote. Clothes of the deceased as well as the alleged guns were also sent to Forensic Science Laboratory (FSL) for its examination. Appellant was arrested on 28.03.2011. The post-mortem of the deceased was also conducted. Statements of the witnesses were recorded. Later on, a Special Investigation Team (SIT) was also constituted and it transpired that the place where the body of the deceased was lying was visible from the position of the appellant, from where the appellant fired upon the deceased and even the movement of small birds could be noticed. It also transpired that the deceased was a dealer of a ration store and was also a member of political party and having a good reputation in the area. The appellant and the deceased were neighbours. Sometimes back, the brother of the appellant was a candidate in NAC elections and the deceased had supported his opponent, who was later on declared successful. The appellant had threatened that he would avenge it. It also transpired that once appellant visited the ration store of the deceased and demanded 10 Kg of sugar that was beyond permissible quota. The deceased refused to accede to

the said request and the appellant then threatened that he would face the consequences of his leadership. More so, 3/4 years ago, the cattle of the appellant had entered into the fields of the maternal uncle of the deceased and the mother of the deceased forbade the appellant from bringing the cattle in their field. The appellant abused the mother of the deceased and thereafter, the brother of the appellant came along with gun to kill them but some people intervened and because of this enmity, the appellant persuaded the deceased to accompany him for hunting purpose on the pretext that other associates had already gone for the same and both of them took their 12 bore guns along with cartridges and went to the Dunar Forest area in a Maruti Car belonging to the deceased. In fact, the appellant had hatched a plan and deliberately took the deceased in the forest area and it was at 5.40 PM the appellant killed the deceased from a distance of 42 feet. The appellant left his gun near the dead body and travelled 13/14 kms on foot to reach his home.

9. After conclusion of the investigation, SIT proved the offences under section 302 RPC and 27/30 of the Arms Act against the appellant. The charge-sheet was filed on 18.05.2011. The charge for commission of offences under section 302 RPC and 27/30 Arms Act was framed against the appellant on 12.10.2011. The prosecution cited as many as 49 witnesses, out of which 43 witnesses have been examined. Some witnesses were examined by the trial court invoking the provisions of section 540 Cr.P.C. Pw-7 Orangzab, PW-10 Shakeel Ahmed, PW-16 Abdul Hamid, PW-18 Ghulam Rasool, PW-24 Mohammed Aslam, PW-26 Kaneeza Bee, PW-27 Naseeb Shah, PW-29 Mohammed Shafi, PW-30 Bagga Khan, PW-38 Mohammed Akseer were declared hostile and despite cross-examination nothing incriminating against

appellant could be extracted by Learned Public Prosecutor during their cross-examination. PW 19 Wazir Hussain, PW-20 Latief Shah, PW-21 Basharat Hussain, PW-22 Shahid Iqbal and PW-23 Mohammed Aslam, PW-35 Majid Ali have deposed nothing against appellant. PW- 17 Tariq Rashid also has stated nothing and his statement is based on hearsay. PW-33 Mohammad Bashir Khan has made statement on the bases of his assumptions. PW-41 Mohammad Sayeed Khan as Tehsildar Surankote resealed the clothes and cartridges. In order to appreciate the issues raised by the parties, it would be apt to have the brief resume of relevant portion of the prosecution evidence.

Prosecution Evidence:

10. **PW-2 Rashied Khan** stated that he does not know the appellant. It was in the year 2011 that he heard on the date of occurrence that Maroof Khan has been killed. He went on spot and the Police had already arrived there. Thereafter, he came to Thanamandi and he was shown the rifle and the cartridges by the Police and he was told that Sarwar Khan had fired the shot. He proved the seizure memo (EXPW-02) of the clay and blood stained clay. He also proved the seizure memo of the rifle (EXPW-02/A) and identified the rifle and cartridges shown to him in the court. He also proved the recovery memo (EXPW-02/B) of dead body.

In cross-examination, he stated that he had signed the papers in the night at Thanamandi hospital, those were prepared by ASI Munshi Khan. He cannot say about the number of guns and cartridges. He cannot read Urdu. He also does not know as to which gun belongs to appellant or deceased. He also cannot say about the cartridges as to which cartridge was of which gun. Police had shown him an empty cartridge and told him that the appellant had killed

Maroof Khan. He had not seen Sarwar Khan firing shot towards Maroof Khan. He further stated that it appears that signatures on the statement recorded under section 161 Cr.P.C are not his signatures. Someone had tried to copy his signatures but could not do so properly.

11. **PW-3 Mansoor Ahmed Khan** stated that he knows the appellant. They came to know that the appellant had shot the deceased Maroof Khan. When they reached on spot, no one was there. When they received the dead body, they found that there was one injury upon the head and there were marks of pellets on the back. One pellet had also hit the face. Prior to death, the deceased had met him and told him that there was threat to his life and he also told that threat was from some people from Thanamandi but names of those persons were not told. Clothes were seized in his presence and he proved the seizure memo (EXPW-4-1K). He admitted the contents of the receipt of the dead body (EXPW-4-1K-I). He also identified the clothes shown to him.

In cross-examination, he stated that he had himself seen the injuries on back and face of the deceased. This is correct that injuries on the face can be caused when the weapon is fired from the front and the injuries on the back may be caused when the weapon is fired from the back. The deceased was his cousin. He had not stated in his statement recorded by the Police that the appellant had shot at deceased but Police was telling the same. ASI, Munshi Khan had prepared the seizure memo of clothes. He had not seen any hole on the shirt of the deceased. The shirt of the deceased was examined and it was found that there was no hole on the back of the shirt.

12. **PW-4 Irfan Khan**(wrongly mentioned as Mohammed Khan in the judgment) stated that the deceased was known to him and he also knows the appellant.

On 20.03.2011, the appellant and the deceased had gone for hunting at Dhera ki Gali Forest in the Maruti Car from Thanamandi. During hunting, Maroof Khan was hit by the bullet fired by Sarwar Khan/appellant and he died. He went on spot. Dead body was recovered. Rifle and cartridges were seized. Post mortem of the deceased was conducted at Thanamandi. Thereafter, the dead body was handed over to his brother. He admitted the seizure memo (ExP-4-1K) of the clothes and also admitted the receipt of dead body (ExPW-4-1K/1).

During cross examination stated that he had not seen the appellant firing the bullet and had also not seen the bullet hitting the deceased. He had made the statement on the basis of hearsay. He expressed ignorance about the number of cartridges seized on spot. Both the rifles were seized but the seizure memo was not prepared on spot. Jackets and Pant were not seized in his presence.

13. **PW-5 Mohammad Aroof Khan** (Brother of the deceased) stated that he knows the appellant. On 20.03.2011, the appellant had taken his brother to jungle on the pretext of hunting and after firing a shot at him, left the place. There was Army camp and Forest Office near the place of occurrence. The appellant did not ask the Army or the Forest Officials to save the life of the deceased. When the appellant came out of forest, he met with one boy, namely, Ateeq Mir. The said boy enquired from the appellant as to where was he and he replied that he had come for his own work. The appellant travelled 12 kilometres from Thanamandi and shifted his family from there. The appellant used to threaten his brother because the deceased was having political rivalry with the brother of the appellant as his brother had supported one independent candidate. After reaching Thanamandi, the appellant

informed the Police. The elder brother of the appellant had threatened their mother that if they would not withdraw their case from the High Court, then her younger son would be killed. His statement was recorded under section 164-A Cr.P.C. He identified his signatures on the same.

In cross-examination, he stated that his statement was recorded on 4th of April. Statement which he has given in the court today is based on hearsay and the persons from whom he had heard this, their statements were also recorded in the court. They are Attar Nawaz, Khalid Khan and Mohammad Khan. He had not mentioned this fact in his statement recorded under section 164- A Cr.PC. The complaint was made in the Police Station, Janipur with regard to threats advanced by the brother of the appellant. He had not mentioned about Atiq Mir in his statement recorded under section 164-A Cr.P.C because he came to know about that after his statement was recorded under section 164-A Cr.P.C. He has made reference about Atiq Mir for the first time in his statement in the court. He had requested the Police for recording their statements again but the Police did not record their statements again. He had also gone to DGP and Home Commissioner regarding that. The fact that has been mentioned in his statement recorded under section 164-A Cr.P.C that Sarwar Khan told the Police that he fired at fowl but bullet hit Maroof Khan, was made on the basis of FIR. Whatever was within his knowledge was stated by him in his statement recorded under section 164-A Cr.P.C. He went to Home Commissioner so that his statement could be recorded again because certain important facts were not mentioned in his earlier statement. The Home Commissioner wrote to DIG of Police Rajouri in that regard and also informed him on telephone for getting his statement

recorded again. The appellant after being defeated in election had threatened that he would kill his brother at such place where he would not even get a drop of water. This fact has not been narrated in his statement made under section 164-A Cr.P.C. In the first FIR, it was stated that appellant fired thinking that there was fowl but the deceased was killed. In the second FIR, it was stated that things were visible from far off place also at 6:00 PM. He narrated the details of the litigation. In a reply to a question that when the appellant and his brother were having political rivalry then why the deceased went with the appellant for hunting, he replied that the appellant came to their house in the morning and asked the deceased to accompany for hunting as others were also joining them. This fact has not been narrated in the statement recorded under section 164-A Cr.P.C. This statement is also based upon hearsay.

14. **PW-6 Ateeq Ahmed** stated that the deceased and appellant were known to him. On 20.03.2011, he along with his family was proceeding towards Dhera Gali. The appellant met him at Parali Katha. He was going to Thanamandi. He stopped his Car and enquired from him as to where he was going. The appellant replied that he was there only. Thereafter, he went away and the appellant went towards Thanamandi.

In cross-examination, he stated that he had not narrated in his statement that his younger brother was also accompanying him, who was 8-10 years old. They had all seen the appellant but Police did not enquire from them. Investigating Officer had called him in Thanamandi Bazar. Investigating Officer, Munshi Khan recorded his statement. No one was present when his statement was recorded by the Investigating Officer. The Investigating Officer

had recorded his statement while sitting in his vehicle. He had left his house at 05:15 PM and reached Dhera Gali at 06:15 PM.

15. **PW-8 Mohammad Zaman** stated that he knows the appellant. On 20.03.2011, he was standing on a road and was waiting for a bus. Maroof Khan (deceased) stopped his Maruti Car. He was asked by the appellant and deceased to accompany them in the car as they were going for hunting. As he was accompanied by his family so, he did not sit in the Car. They went away in the car. The appellant was sitting on the front seat. His statement was recorded by the Police.

In cross-examination, he stated that he waited for 10 minutes for a vehicle. A bus was going from Rajouri to Buffliaz. He does not remember the number of the bus. He had not taken ticket. Maroof Khan (deceased) was driving the Car but he does not remember the number of vehicle. He had not gone himself for getting his statement recorded but Police had come to him. Someone had told the Police that vehicle was stopped before him. Maroof Khan was not related to him. His statement was recorded in the house of Sarpanch and statement of Ourangzeb was also recorded there.

16. **PW-9 Nazir Hussain** stated that he was posted as SPO in Police Station, Surankote. On 24.03.2011, he had seen the appellant in the Police Station, Surankote. His pant and jacket were blood stained and Police seized them. He proved the seizure memo (EXPW-9-NH) of clothes.

In cross-examination, he stated that his statement was recorded by ASI, Munshi Khan. He told him that he was a Government employee and should not be cited as witness. He signed as per instructions of Munshi Khan but he was not willing to sign. Munshi Khan had removed the clothes. The hands

and feet of the appellant were also blood stained. There were blood stains on the face as well. He is illiterate and cannot read the seizure memo. No civilian was present at that time in the Police Station. The contents of the seizure memo were not read over to him and he had only signed. The jacket and pant shown in the open court are not blood stained.

17. **PW-11 Lal Khan** stated that he knows the appellant, who is his neighbour. The appellant is high headed and quarrels without any reason. The appellant had also beaten his wife and brother of appellant had come along with gun. His son was secretary in Congress party. Shabir Khan had given mandate to brother of the appellant without consulting Maroof Khan. His son got annoyed and was determined to defeat the brother of the appellant. The brother of the appellant lost election by one vote. His son had utilized all his power for the same. When the brother of the appellant was defeated, they were celebrating in the courtyard. The appellant while passing threatened that he would kill Maroof Khan (deceased) at place where he would not get water. Three–Four days prior to occurrence, the deceased had told him that a conspiracy had been hatched against him by Shabir Khan and the appellant. Some more persons of Thanamandi were also involved in the conspiracy. It was because of politics. After the defeat of the brother of the appellant, Shabir Khan and the appellant had become enemies of his son. He and his wife were invited for a party but he did not go there but his wife had gone. Elder sister-in-law of the appellant told his wife that there is no dispute between them and Maroof Khan (deceased) as they have resolved their differences but it was only a drama to kill his son so that no doubts could be raised. When they reached Thanamandi, everyone was telling that the appellant shot his son. The

appellant and the deceased had gone to forest in a Car and one more person boarded the vehicle. After 10-15 days of occurrence, he came to know that son of sister of the appellant, namely, Javed Khan also accompanied the appellant and the deceased for hunting and had taken gun along with him. He had alighted in their Mohalla. He had come from Dhera Gali, which is the place of occurrence.

In cross-examination, he stated that after the occurrence, one person had told him that Javed Khan was having gun in his hand and had come from place of occurrence. He alighted near bridge of Thanamandi in their Mohalla. That was told to him by Principal Manzoor Ahmed Ganai. His statement was recorded 4-5 days after the occurrence. In his statement recorded under section 161 Cr.P.C date mentioned as 03.05.2011 is wrong. He does not remember as to when the elections of Municipality Thanamandi were held. Perhaps, 5-6 months prior to occurrence, elections took place. They had not made any complaint to the Police with regard to threats given to his son. His son had told him that they were their own people and there was no need to worry. He had told about Shabir Khan to the Police but he does not know as to why it is not mentioned in the statement. It has been rightly mentioned in his statement under section 161 Cr.P.C that his son Maroof Khan (deceased) was alone in his home and the appellant had taken him for hunting in forest. This is correct because they had heard the same. On being asked about source of information, he named Attar Nawaz. (This name was disclosed after the witness enquired from his son). This is correct that his son had invited ministers for meals but Shabir Khan stopped them on the premise that the house of the deceased was located in the forest. Because of this reason,

enmity between the deceased and Shabir Khan increased. This is wrong that Ministers did not come to the house of the son for meals due to Sarwar Khan because Sarwar Khan was nothing. He does not know the time when the appellant took Maroof Khan to forest and also manner in which he was taken, as he was in Jammu. They on their own came to know about conspiracy because they were having enmity between them. He had not made any application to the Police with regard to conspiracy as his son was leader and he thought that his son would handle the issue on his own. They do not have any witness of conspiracy. They had heard that this conspiracy was hatched in the house of Badshah Khan. He cannot disclose the name of persons who had disclosed that to him.

18. **PW-13 Mir Baz** turned hostile and was cross-examined by Learned P.P and during cross-examination he admitted that the appellant and the deceased had gone to DheraGali forest for hunting where the appellant shot at the deceased with his gun and killed him. People were telling that both had gone for hunting and the appellant killed him but he has not seen the occurrence himself. He admitted that he has made the statement on the basis of hearsay.

19. **PW-14 Niyaz Ahmed-Inspector** in chief examination stated that he was posted as SHO at Police Station, Thanamandi in the year 2011. On 20.03.2011, at around 07:00 PM, the appellant came to him in his office and told him that Maroof Khan (deceased) had gone for hunting to Donar Forest and during hunting Maroof Khan was injured because of fire from gun. He along with police officials and Sarwar Khan proceeded towards Dhera Ki Gali. When they reached there, they found dead body of Maroof Khan. The police from Police Station, Surankote also arrived. During search, one torch,

one mobile phone, knife, muffler and key were recovered from the body of the deceased. Thereafter, dead body of the deceased was taken from Surankote to hospital where post-mortem of the deceased was conducted. The appellant was accompanying him but fled away taking advantage of darkness. During cross-examination, he stated that he had made the entry in the Daily Diary regarding statement made by the appellant that deceased was hit by bullet but he had not given copy of the report to Police Station, Surankote. He had not seized the knife and other articles recovered from the personal search of the body of the deceased but handed over to the legal heirs of the deceased. His statement was recorded by Investigating Officer on 27.03.2011 at Thanamandi. The appellant had told him that deceased had sustained a bullet injury and an attempt was made to save his life but he had not stated that the deceased was hit by his bullet. He remained in Police Station from 23.03.2011 till 27.03.2011. His statement was recorded after 7 days of occurrence. He did not request SHO, Police Station, Surankote to record his statement forthwith because he was busy in maintaining law and order. It is dense forest and due to darkness, it was not feasible to see a person from 50 yards. He cannot say as to whether a person is visible from 50 yards during day time.

20. **PW-15 Abdul Satar** stated that he knows the appellant and the deceased was also known to him. He heard that the deceased-Maroof Khan had fallen down. He went on bus-stand and came to know that the appellant and the deceased had gone for hunting and there was a rumour that the deceased had received gun shot from the appellant.

In cross-examination, he stated that perhaps, his statement was recorded after 1 month or 2 months. He had not seen the deceased and the appellant while

they were hunting but they had no enmity against each other and their relations were cordial.

21. **PW-25 Mushtaq Ahmed** stated that he knows the appellant present in the court. He does not remember the date but the police had come and enquired from him about the appellant. The relations between the appellant and the deceased were cordial and they were relatives. The police had obtained his statement but was not read over to him. How the deceased sustained injury was not known to him.

In cross-examination, he stated that police enquired from him 2-3 days after the Namaze Janaza of the deceased.

22. **PW-31 Attar Nawaz** stated that on 20.03.2011, he was at his home in Thanamandi and the deceased-Maroof Khan was also present at his home. The appellant came and asked him that they were going to Dhera ki Gali for hunting but the deceased stated that he cannot go as he has to go to Jammu but the appellant stated that they have to go today. The appellant had brought the gun. Thereafter, both the deceased and the appellant went towards forest at Dhera ki Gali. The deceased enquired as to where were other boys and the appellant replied that they have already proceeded towards place of hunting. He accompanied them till road and both of them proceeded in Maruti Car bearing No. JK02M-4960. He along with Haleem went towards Dhera ki Gali in the car and one police official told that the deceased had been hit by bullet. His statement was recorded after one month.

During cross-examination, he stated that after occurrence, he went to Dehradun where he was pursuing Engineering course and after his return from Dehradun, his statement was recorded by police on 03.05.2011. He had

gone to Dehradun after 15 days of occurrence and during that period, he remained at Thanamandi but the police did not record his statement during those days. Neither police came to his house nor he went to Police Station for recording his statement.

23. **PW-32 Khalid Khan** stated that on 20.03.2011, he along with his cousins Attar Nawaz and Maroof Khan was present at home and they were watching match on television. The deceased-Maroof Khan stated that he has to go for hunting at Donar Forest, Dhera Gali. After sometime, the appellant also came on spot and thereafter, both the appellant and the deceased went for hunting and they remained at home. In the evening, he received a phone call from his cousin that Maroof Khan had sustained bullet injury. He and his cousin went to Dhera Gali and they came to know from police that the deceased had received a bullet injury at the hands of Sarwar Khan and the appellant made this statement before the police at Thanamandi.

During cross-examination, he stated that he was watching television when Maroof Khan left for hunting. He does not remember who told him that the appellant-Sarwar Khan shot the deceased. They stayed for half an hour at Dhera ki Gali and thereafter, they came back in the vehicle of SDPO Thanamandi. In his presence, nothing was seized in the Police Station. Maroof Khan was a politician and a dealer of fair price shop. Earlier also, Maroof Khan used to go for hunting and other boys also used to go with him.

24. **PW-34 Azar Nawaz Khan** stated that he knows the appellant present in the court. It was in the evening and there was little darkness in the market. He saw the appellant with one more person accompanying him. He could not see his face. They were talking to each other. He only heard that who knows

Maroof Khan and what was he. He only heard that and went away. When he went home, he disclosed the same to Maroof Khan and he replied that it normally happens in politics and in case they succeed, then they would kill him. He was in Jammu when Maroof Khan died. On 20.03.2011, he heard that Maroof Khan was hit by bullet. His cousin told him that appellant Sarwar Khan had shot the deceased. He thought that conversation, that he heard was concerning it.

During cross-examination, he stated that he was passing alone through Thanamandi Bazar and no one was with him. Perhaps, it was in October, 2010 when he saw the appellant with another person. When he came back, thereafter, on 1st, 2nd, 3rd or 4th day, he did not disclose to the police about the conversation between the appellant and one unknown person. He did not know second person. He had not heard the conversation between Sarwar Khan and other person that Maroof Khan be killed.

25. **PW-36 Maqsood Hussain Shah** stated that he knows the appellant. On 20.03.2011, the deceased called him at 12:00 in the morning and thereafter, he went to Thanamandi. He had taken one work from Municipality. He further stated that he had been working with Maroof Khan at ration shop for the last 16 years. Maroof Khan told him that he was going to Jammu and in his absence, he should get that work done. He taunted the deceased as if he was going to Jammu on foot because he forgot his car in bazar. He replied that first of all he is going to his Aunt's house and thereafter, he would go to Jammu. He came back on the same day and at 08:00 clock, his neighbour called him and enquired where was Maroof Khan and he replied that he had gone to Jammu but he in turn replied that Maroof Khan had not gone to

Jammu but he has received a gun shot from Sarwar Khan in Donar Forest. He was lying on the ground. Two years ago, the deceased was sitting at his shop. Mohammad Latief was working as accountant. He was also there. They were distributing sugar. Meanwhile, Sarwar Khan came and demanded 10 Kgs of Sugar as there was marriage and he had to give the same in the marriage. Maroof Khan told him that he could be given only sanctioned quantity. Sarwar Khan stated that he was not begging and was just asking for more. Maroof Khan told him that he would not give even 1 Kg more than the sanctioned quantity. Sarwar Khan received 5 Kgs of sugar and told Maroof Khan that he would face consequences of his leadership.

During cross-examination, he stated that his statement was recorded on 03.05.2011. During that period, he remained at Thanamandi and he was not called by the police and he also himself did not go to the police. In his statement, it is not mentioned that Maroof Khan was doing one work of Municipality and he was deputed for completion of work. The conversation with army man is also not mentioned in the statement recorded under section 161 Cr.P.C. He was connected with the family for the last 22 years. He had come to the court along with Aroof Khan and he was working with Aroof Khan. He was getting Rs. 5000/- as salary from Aroof Khan. When the appellant left, Maroof Khan told him that he had enmity with Sarwar Khan.

26. **PW-37 Mohammad Aaleem** stated that he went to the Police Station along with Aroof Khan in connection with the case. The appellant was in the Police Station. He enquired from the appellant as to what he did. The appellant replied that he could not understand and he committed a mistake and due to mistake, he fired.

During cross-examination, he stated that he went to Police Station 3/4 days after occurrence. This is correct that on 24.04.2011, he went to Police Station and enquired from the appellant as to why he killed Maroof Khan. In response to the question of the court, he stated that the appellant met after 3/4 days after occurrence not 30-35 days as mentioned in the statement recorded under section 161 Cr.P.C.

27. **PW-39 Razia Begum (Mother of the deceased)** stated that she knows the appellant and the appellant has murdered his son. She was at Jammu on the day of occurrence. Her brother-in-law told her that Maroof Khan had sustained bullet injury at the hands of Sarwar Khan. She told him that the deceased did not sustain bullet injury but he was targeted with bullet as they were on inimical terms. They were in the search of opportunity to kill the deceased and when they got an opportunity, they killed her son. One year prior to the occurrence, the appellant had told them that Maroof Khan had defeated his brother in election and they would kill him. The appellant had also beaten her because their cattle entered in their fields and when she went to evict the cattle, the appellant hit her with the lathi on her arms. His brother namely Mohammad Khan also brought out his gun. It was the conspiracy of Shabir Khan and 2-3 other persons including Badshah Khan. When she went on spot, no one was there. She did not see any bush or tree there. His son received two bullet injuries. One from the front side and other from the back side and the Doctors mentioned the same in the post-mortem.

In cross-examination, she stated that she went on the place of occurrence after 5 days along with her husband and son. What she has stated above was hearsay. She was telling the fact from her heart. She had got recorded the fact

of conspiracy against Shabir Khan in her statement under section 161 Cr.P.C but police has not mentioned. She had stated before the police that her son had defeated the brother of the appellant in the election and thereafter, he was threatening to kill her son but the police has not written the same. A perusal of the statement recorded under section 161 Cr.P.C reveals that it is not mentioned in her statement. She did not make any complaint when she was beaten by the appellant. She does not remember when her statement was recorded because her son had died. She was having knowledge that Shabir Khan and others were having enmity with her son but despite that she did not make any complaint with the police. Three days prior to the occurrence, the deceased told her that Shabir Khan and others including the appellant were conspiring to kill him. This fact was narrated to her by the deceased when he moved towards Thanamandi. She asked the deceased to get security and he replied that when he returns back after 2-3 days, then he would take security. This fact has not been mentioned in the statement by the police. A number of instances have not been mentioned by the police in her statement. When the police did not record the facts narrated to them, then they reported to DIG and on whose directions, the investigation was transferred. Her statement was not recorded in the said investigation. They are satisfied with the investigation conducted by the DIG and it has been rightly mentioned that there were no bushes at the place of occurrence but small bushes were there. The second investigation was conducted after about one month of first investigation. She does not want to disclose the names of persons who had conspired with Shabir Khan. Once, her son had invited Ministers Ghulam Ahmed Mir, Naz and Madan Lal for tea at his residence. The above mentioned persons did not

permit the Ministers to take tea due to militancy on the ground that house of Maroof Khan was situated near Forest and because of that, she has stated that the conspiracy was hatched. Her statement was recorded on 06.05.2011 during second investigation. She has not mentioned the fact in her statement that the deceased had sustained bullet shots one from the front side and other from the back side.

28. **PW-40 Azad Ahmed, Naib Tehsildar** stated that in the year 2011, he was posted as Patwari Halqa Draba and he prepared copy of Khasra Girdawari and ShajraTatima (Akas) of place of occurrence as per identification by the police. During cross-examination, he stated that he prepared the site plan of the occurrence and there was dense forest on spot. No one is visible from a distance of 50-100 yards and there were big and small trees.

29. **PW-43 Dr. Bashir Ahmed Malik** stated that in the year 2011 he was part of the team that conducted the post-mortem of the deceased. As per the post-mortem report, opinion of the Board was that the deceased had died due to fire arm injuries releasing multiple pellets and some piercing in skull causing extensive damage to the brain substance and intracranial haemorrhage and death. The certificate was exhibited as EXPW-43.

In cross examination he stated that he had recovered the pellets and handed over the same to the Police. The pellets were kept in container sealed with adhesive plaster and signatures of the Medical Officer were put upon the same before handing over the same to the Police. He cannot say whether the receipt of those pellets was taken or not. The bullet was neither fired from long distance nor from point blank range. The distance may be between 10 to 15 metres. The injuries inflicted on the deceased are possible only by one fire.

Two pellets from the brain matter were recovered and no pellet had crossed the body from one side to another. He had not investigated the gun. The duration of the injury was 4 to 24 hours. He had not seized the clothes of the deceased and also did not hand over the same to the Police as it is not mentioned in the certificate. He had not counted the holes of the pellets on the clothes of the deceased. This fire was not self inflicted. The pellets, after sealing, were sent to FSL through the Police after proper receipt.

30. **PW-44 Dr.Nissar Hussain** stated that he was one of the members of the Board, who had conducted the post-mortem of the body of the deceased. The certificate stood already exhibited as EXPW-43. During the cross examination, he stated that duration of the injuries was from 4 to 36 hours. He has not seen the gun. He had given the history of the occurrence on the basis of the Police and Public report. In the post-mortem report, it is mentioned that two pellets were recovered from the brain of the deceased and the same were handed over to the Police against proper receipt. In the present case, the distance between the fire arm and the body may be between 10-20 yards. The gun was not shown to them. Clothes of the deceased were seized and handed over to the Police. They had not inspected the place of occurrence. He cannot say that the deceased if brought in time and treated in a good hospital could have been saved. However, he was having injuries in the brain, which can cause instantaneous death. On being questioned by the Court, he stated that the death of the deceased was caused due to fire arm injuries by the multiple pellets. The injuries were on the left side temporal region of the brain, thus, from the location of the injuries it can be said that they have been caused from the left side of the deceased.

31. **PW-46 Munshi Khan** stated that he knows the appellant. In March, 2011, he was posted in the Police Station, Surankote and had investigated the FIR No. 16 of the year 2011 registered under section 304 RPC and 27/30 Arms Act. He had gone to Donar near Dhera ki Gali. 12 bore guns were also lying with the dead body. The photography was done. He had prepared the site plan and also seized the clay as well as blood stained clay. The weapons were seized. The dead body was brought on the road and thereafter, it was taken to Thanamandi for post-mortem. He requested the Medical Officer SDH, Thanamandi for conducting the post-mortem on 23.03.2011. Thereafter, Medical Board was constituted and he prepared fard surathal of the dead body. After the post-mortem, he prepared the receipt of the dead body and handed over the body for last rites. Fard surathal is exhibited as EXPW-46. On the request of PP, two guns and blood stained clothes were shown to the witness and he identified the same. He also identified the clay as well as blood stained clay. Thereafter, a letter was obtained from the Medical Officer with regard to seized material for FSL, Jammu. Record was obtained from the Revenue Department and the statements of the witnesses were recorded and the appellant was arrested on 23.03.2011. Thereafter, the investigation was transferred to some other person on 01.04.2011. Seizure memos have been prepared by him those have already been exhibited. When the post-mortem of the deceased was conducted, some pellets were recovered from the head of the deceased and the said pellets and X-ray were sent to FSL through the Doctor.

During cross-examination, he stated that FIR was registered on the basis of information received from the source. He started investigation on the basis of

the FIR. His statement was deferred as objection was raised that the site plan was torn. Thereafter, the witness was again cross-examined on 02.03.2017 and he stated that he has prepared the site plan of the place of occurrence situated at Dhera Gali, Donar Forest near Bhera Gul and submitted the same before the court. The same was exhibited as EXPW-MK. He stated that FIR was registered at 08:15 at evening at Police Station, Surankote and immediately, they went on spot. It took 45 minutes to reach on spot. He started the proceedings at 08:30 PM. Thereafter, he again stated that information was received in the Police Station at 06:15 PM and they reached on spot at 08:30 PM. The time mentioned in the FIR as 08:15 was actually 06:15 PM. He further stated that in March, the darkness begins at 07:30 PM. The weapons have been shown in the site plan but it is not mentioned that they were seized. He has not mentioned in the site plan as to whom these guns belong to as that was the matter of investigation. Number 1 marked in the site plan was the place where dead body of the deceased was lying. The distance between the place of fire of shot and dead body is about 42 feet and it was dense forest. The appellant was not with him at that time. He identified the place of fire on the basis of footprints and leaves had also fallen but it is not mentioned either in the site plan or in the Daily Diary. This is correct that the appellant was arrested on 23.03.2011. He took him to the place of occurrence on the same date. After arrest on 23rd of March, the appellant was brought at Police Station, Surankote. The weapon was not got identified from the appellant but he had orally identified. The clothes worn by the appellant were also seized but it is not mentioned in the seizure memo that those clothes were worn by the appellant at that time. The gun along with empty cartridges as

well as live cartridges was seized on 20.03.2011 at Donar, Dhera Gali and the same was sealed and was marked as A.B.C. It was already marked as 'O' and exhibited as EXPW-2A. The seal was not opened and the same was got resealed from the Tehsildar. They came to know about the ownership of the gun only during investigation. No supurdnama of seal was prepared of the seal. In seizure memo EXPW-2A, it is not mentioned that both guns were lying on the same place. In site plan, place from where the guns were recovered is not mentioned. He got recorded the statement of brother of the deceased-Mohammad Aroof Khan under section 164-A Cr.P.C and he identified his signatures on the same. Seizure memo of the clothes worn by the appellant was prepared on 24th of March. Both guns were sent to ballistic expert but he does not know as to whether the report was received or not. He had sent the blood stained clothes of the appellant to get the information about the blood on them. They had sent the clay, blood stained clay and stone to FSL. He did not mention about blood groups but letter was written to FSL in routine and expert opinion was sought. The pellets recovered from the body of the deceased were sealed and sent to doctors for FSL examination and he had not seized the same. The empty cartridges were recovered by him from place of occurrence. He himself had not sent the empty cartridges as well as pellets to ballistic expert so as to know that pellets came out from which cartridge. He had initially conducted the investigation and in response to the question by the defence, he stated that he was handed over the FIR under section 304 RPC and he had not reached to the conclusion as to whether offence under section 302 RPC is made out or not. He had conducted the investigation with regard to the FIR under section 304 RPC and he cannot say

that whether the investigation was heading towards section 302 RPC or under section 304 RPC.

32. **PW-47 Farooq Hussain Shah-Inspector** stated that he knows the appellant. He investigated the present case from 01.04.2011 to 20.04.2011. He got recorded the statement of brother of the deceased under section 164-A Cr.P.C. Besides him, he had recorded the statements of Basharat Khan, Shahid Iqbal and Khalid Khan under section 164-A Cr.P.C. He also recorded the statement of son of the Aunt of the deceased, namely, Imran under section 161 Cr.P.C but wife and mother of the deceased refused to make their statements on phone and earlier also they had not come. He had also conducted the mock-drill on the nishandehi of the appellant with regard to place from where the bullet was fired and the place where the dead body of the deceased was lying. Three test fires were conducted and it was found that there was a distance of 42 meters between the place of fire and the place where the body of the deceased was lying. The impact was found around 12 inches. He had converted offence under section 304 RPC to 302 RPC on the basis of earlier investigation, statements of the witnesses and other circumstances. Thereafter, he was transferred and the investigation was conducted by the SIT.

During cross-examination, he stated that statement of Mohammad Aroof Khan under section 164-A Cr.P.C was recorded after 15 days of occurrence. He had stated in his statement that he was in Jammu on the day of occurrence and he had received the information there only. He had stated in his statement recorded under section 164-A Cr.P.C that the bullet was fired under mistaken impression that there was a fowl but bullet hit the deceased-Maroof Khan. It is not mentioned in the statement that on what basis this statement was made

by him. He had not investigated the matter because the appellant had stated that they had gone for hunting and it was evening and he fired thinking that there was a fowl but the bullet hit the deceased. That enquiry was already conducted by earlier Investigating Officer and it is mentioned in the Daily Diary but he does not remember the number of the Daily Diary. He had also made similar enquiry and it is mentioned at serial Number 22 of the Daily Diary dated 12.04.2011. When this enquiry was made, the appellant was arrested. Then, the enquiry was made after he was brought out from the custody. He had not recorded the statement of appellant separately. He had taken the appellant on remand. From the record, it is evident that the appellant was in Judicial Custody on 05.04.2011. He further stated that he was not in a position to reply as to how he conducted the enquiry from the appellant on 12.04.2011 when he was in Judicial Custody. He also did not conduct enquiry from Forest officials and Army personnel in Dhera Gali. He had also not conducted the investigation about threat which has been mentioned in the statement of PW-Mohammad Aroof Khan. He has not recorded the statement of police personnel during investigation that showed that appellant disclosed that he fired under impression of fowl but the bullet hit the deceased. The mock-drill was conducted by Investigating Officer-Munshi Khan. During mock-drill, he had not got any Magistrate with him. From where the bullets were brought for mock-drill must be known to the earlier Investigating Officer or SDPO in whose supervision the mock-drill was conducted. Prior to him, investigation was conducted under section 304 RPC. The basis for converting the offence to 302 RPC was mentioned at Page No. 22 of Daily Diary dated 12.04.2011. It was mentioned that he, earlier Investigating

Officer and then Dy.SP visited the place and after verifying again, it was found that the deceased-Maroof Khan S/o Lal Khan and the appellant had gone for hunting the fowls at Donar Forest. While they were busy in searching the fowls, they got separated from each other. Both of them started walking and the appellant-Sarwar Khan on the basis of political and earlier domestic enmity took advantage and when the deceased-Maroof Khan came in front of him at distance of about 40 feet, the appellant fired upon him from his 12 bore gun in order to kill him and seriously injured him and thereafter, he left his gun along with deceased and he covered a distance of 13 Kms within 1 ½ hours and firstly came to his residence and thereafter, he informed the police at Thanamandi. He further stated that there was distance of 42 feet and not only human being but a fowl was also visible. There was small tree between the appellant and the deceased but everything was visible. The mock test was also conducted and as the impact of the fire was up to 12 inch, as such, the appellant intentionally fired a shot at the deceased. The appellant was taken on spot and it was found that place where the dead body of the deceased was lying was visible. The appellant also admitted the same. In case, the appellant had no intention to murder then in that case, he would have definitely informed the Army personnel where the Medical Officers were present and could have informed the Forest employees present at Dhera Ki Gali. These facts clearly demonstrated that the appellant had planned for the murder of the deceased. The appellant had also beaten the brother of the deceased, namely, Maroof on his ration store as he gave less sugar. In election, the deceased had not helped the appellant's party and the appellant had threatened that at appropriate time, he would teach a lesson to the

deceased. He had recorded the statements of witnesses under section 161 Cr.P.C on 05.04.2011 i.e. 15 days after the occurrence. He also informed the parents of the deceased but they did not come.

33. **PW-48 Mastaj Ahmed, Inspector** stated that he was posted at Police Station, Poonch. Earlier, DIG Jammu vide order dated 02.04.2011 constituted one SIT and thereafter on 20.04.2011, another SIT was constituted, in which he was also the team member. In-charge of the team was Dy. S.P Pardeep Singh. On 03.05.2011, he examined the place of occurrence where the firing had taken place and he could not found bushes including small bushes. Even small articles were also visible. He also recorded the statements of some witnesses under section 161 Cr.P.C.

During cross-examination, he stated that during investigation on 03.05.2011, he recorded further statements of Haji Lal Khan, Khalid Khan, Maqsood Hussain Shah, Mohammad Aleem, Mohammad Aksar and Attar Nawaz Khan at the residence of the deceased. None of the above mentioned witnesses was an eye witness but had seen the appellant and the deceased going towards Dhera ki Gali. He cannot say as to whether Lal Khan was on spot or not. He recorded the statement of Lal Khan on the basis of hearsay. He also recorded further statements after two months from the earlier statements. In their investigation, it had appeared that there were no dense bushes between the place from where the appellant fired and the place where the dead body was lying and even small articles were also visible. Another thing that emerged during investigation was that earlier when the appellant and the deceased went for hunting, they were accompanied by others but on the day of occurrence, both appellant and the deceased went alone for hunting. He had

not recorded the statement of any witness who had earlier accompanied the appellant and deceased for hunting. He has not mentioned in the statement of Lal Khan that Javed Khan had also gone along with gun and he had come to their Mohalla from the place of occurrence at Dhera Gali.

34. **PW-49 Pardeep Singh Dy.SP** stated that in the year 2011, he was posted as SDPO, Surankote. In the instant case, initial investigation was conducted by ASI, Munshi Khan and later on, investigation was also conducted by Farooq Hussain Shah and during his investigation, offence was converted from 304 RPC to 302 RPC. DIG constituted a SIT and he was In-charge of that SIT. Some persons had gone to DIG and thereafter, DIG had changed two members of SIT and the proceedings were conducted before him. They again had gone to the place of occurrence for examination and the investigation conducted earlier was found to be correct. He had recorded the statements of some witnesses also under section 161 Cr.P.C. During his absence for some days, investigation was also conducted by ASI Mastaj Ahmed and thereafter, charge sheet was filed in the court. He had written one letter to team of doctors. He identified his signatures over the same. He also wrote one letter to Deputy Commissioner, Rajouri for verification of gun license. It also bears his signatures.

During cross-examination, he stated that because the place of occurrence was visible and further, because of election dispute, offence was converted to 302 RPC. Like this, there were other instances of enmity. He recorded the statement of Bashir Khan on 02.05.2011. The statements of Mohd. Khan and Azar Nawaz Khan were also recorded on same date. The statement of Javed Ali was also recorded. Statements have been recorded after one and half

months. He had not enquired from the witnesses as to whether from the day of occurrence till the day their statements were recorded, they remained at Thanamandi or not. He went to the place of occurrence on 27.04.2011. There is forest around the place of occurrence. The place of occurrence was visible. Investigating Officer has rightly prepared the site plan.

35. **PW Manzoor Ahmed Ganai, Principal Govt. Higher Secondary School Thanamandi** denied the statement made by PW-11 Lal Khan that he (the witness) informed him that son of sister of the appellant had also gone to forest along with gun and he came to their Mohalla from the place of occurrence at Dhera Gali.

36. **PW- Nazir Ahmed Assistant Scientific Officer, Ballistics FSL.** This witness was summoned by the Court by invoking the provision of Section 540 Cr. P .C. but the said witness had lost his eye-sight two years ago and he had brought his son along with him. He also produced photocopy of the certificate which was already part of the Court file in order to demonstrate the genuineness of the certificate. During chief examination, the witness heard the contents of the report and stated that the same are true and exhibited as EXPW-NA.

In cro**ss-**examination, he stated that he had not measured the length of the 12 bore guns because there was no query to that aspect. He has mentioned that the gun has been fired but the time of fire through guns and date of examination has not been mentioned as it is not possible to state with scientific accuracy the time elapsed from the time of fire. This is correct that he received these sealed packets from the FSL, Jammu and not from Magistrate. He was not a fingerprint expert, as such, he did not examine the

Butt Barrel Trigger. The seized material should have been sent to fingerprint expert.

37. **PW- Rajinder Singh** stated that in the year 2011 he was posted as Scientific Officer FSL Jammu. One sealed packet was forwarded by Medical Officer PHC Thanamandi, through ASI- Yash Paul. Packet A sealed contained two dark grey mutilated metallic pieces. They were put to various tests with the help of scientific aid and he issued the report bearing exhibited as EXPW-RSJ.

During cross examination, he stated that he had not examined the gun and the same has been examined by his colleague. He has not been shown the pellets in the open Court. In his certificate he has given the size of the pallet as No. 1 of 12 bore cartridge and has not examined the empty shell of the cartridge of size No. 1. He had not examined the 12 bore fired cartridge case from which these pellets were fired.

38. After the conclusion of the, the statement of the appellant was recorded under section 342 Cr.P.C. wherein the appellant took a plea that he had not accompanied the deceased to the jungle and had not fired upon the deceased. The appellant/accused examined one witness, namely, Wasim Azam, Patwari in his support. After the closure of defence evidence and hearing both the parties, the learned trial court convicted the appellant.

Appreciation:

39. The whole of the prosecution case is based upon the circumstantial evidence as there was no eye witness to the occurrence. It is settled law that when the prosecution case rests on the circumstantial evidence only, then the inference of the guilt can be drawn only when all the incriminating facts and

circumstances proved by the prosecution are found to be incompatible with the innocence of the accused. The chain of evidence must be complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. It is apt to take note of law laid down by Supreme Court when the prosecution story rests only upon the circumstantial evidence. In **Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116,** it has been held as under:

> **"153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
> (*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793] where the observations were made :
> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
> (*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
> (*3*) the circumstances should be of a conclusive nature and tendency,
> (*4*) they should exclude every possible hypothesis except the one to be proved, and
> (*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> **158.** It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor General relying on a decision of this Court in *Deonandan Mishra* v. *State of Bihar* [AIR 1955 SC 801] to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:
> "But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the accused as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation,. . . such absence of explanation or false explanation would itself be an additional link which completes the chain."
>
> **159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will**

> **amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied**:
> (*1*) various links in the chain of evidence led by the prosecution have been *satisfactorily proved*,
> (*2*) the said circumstance points to the guilt of the accused with reasonable definiteness, and
> (*3*) the circumstance is in proximity to the time and situation.
> **160.** If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in *Shankarlal case* [(1981) 2 SCC 35, 39] where this Court observed thus:
> **"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed.** A false plea can at best be considered as an additional circumstances, if other circumstances point unfailingly to the guilt of the accused."

40. The above mentioned decision has been consistently followed by Supreme Court in its numerous subsequent decisions including as latest as in "**Nagendra Sah v. State of Bihar"**, reported in **(2021) 10 SCC 725**.

41. As the prosecution has relied much upon the motive on the part of appellant, therefore, it would be proper to examine the law with regard to the relevance of motive for commission of crime when the whole prosecution story is based upon circumstantial evidence. In ***Babu v. State of Kerala*****, (2010) 9 SCC 189,** the Apex Court has observed that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. (Vide *Pannayar* v. *State of T.N.* [(2009) 9 SCC]).

42. Further in ***Shivaji Chintappa Patil v. State of Maharashtra*****, (2021) 5 SCC 626,** Apex Court has observed that **t**hough in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances.

43. From the allegations levelled against the appellant, it is evident that the prosecution case rests upon the following circumstances:

(1) That the appellant/accused was having inimical relations with the deceased on account of following three issues:

(a) That the brother of the appellant had contested election and the deceased had supported the other candidate as a result of which the appellant had threatened the deceased that he would avenge the defeat.

(b) That the appellant had visited the ration shop of the deceased and demanded 10 kg sugar that was beyond the permissible quota and when the deceased refused, the appellant threatened him that he would face consequences of his leadership.

(c) That 3/4 years ago, the cattle of the appellant had entered the field of the maternal uncle of the deceased and the mother of the deceased forbade the appellant from bringing cattle in the field. The appellant abused the mother of the deceased and the brother of the deceased brought the gun.

(2) That the appellant because of enmity with the deceased persuaded the deceased to go for hunting on the premise that other hunters had already proceeded for hunting and both of them went for hunting at Donar Forest, Dera Ki Gali on 20.03.2011.

(3) That on 20.03.2011 at around 5 PM the appellant fired upon the deceased from his gun at a distance of 42 feet as a result of which the deceased was injured and later on succumbed, when the deceased was visible from a place wherefrom the appellant/accused fired from his gun as there were no trees or bushes over there.

44. Now we would examine as to whether the prosecution has succeeded in proving the above mentioned circumstances or not.

Circumstance No. 1

45. So far as circumstance No. 1 is concerned, the prosecution has based its case upon the fact that because of enmity on three issues as mentioned above, the deceased was killed. So far as the defeat of the brother of the appellant in an election of NAC Surankote is concerned, the prosecution has examined PWs Lal Khan (father of the deceased), Razia Begum (mother of the deceased) and Mohd. Aroof Khan (brother of the deceased).

46. So far as PW-5 Aroof Khan is concerned, in his cross-examination, he has categorically stated that the fact that "the appellant after being defeated in election had threatened that he would kill his brother at such place where he would not even get a drop of water", has not been mentioned in his statement recorded under section 161 Cr.P.C. So far as PW-11 Lal Khan is concerned, he stated that perhaps 5/6 days prior to occurrence, election took place and they had not made any complaint to the Police with regard to the threats given to his son. PW-39 Razia Begum in her cross examination stated that she had stated before the Police that her son defeated the brother of the appellant in the election and thereafter he was threatening to kill her son but the Police had not written the same. She was confronted with her statement recorded under section 161 Cr.P.C. in which the above mentioned facts were not mentioned. These are the only three witnesses who have been examined by the prosecution with regard to the inimical relation between the appellant and the deceased on account of election of NAC Surankote. They are related and interested witnesses as well and their testimonies though cannot be rejected on the said ground but they are required to be examined cautiously. In view of the fact that no complaint was made with the Police with regard to the said

threats and also that they had not made any reference to such threats in their statements during the course of investigation, no reliance can be placed upon the said witnesses.

47. The other cause of inimical relation between the appellant and the deceased has been stated to be that the appellant demanded 10 kg sugar but the same was refused by the deceased and the appellant had threatened that he would face the consequences of his leadership. So far as this fact is concerned, the prosecution has examined PW-36 Maqsood Hussain Shah. In his deposition, he stated that two years ago, the deceased was sitting in his shop and he was also there. The appellant demanded 10 kg sugar that was refused by Maroof Khan(deceased) and appellant received 5 kg of sugar and told the deceased that he would see his leadership. The said witness is an employee of brother of the deceased i.e. PW-5 Aroof Khan and he was working with Aroof Khan and getting salary of Rs. 5000/- from him. He had also stated that he was associated with the family for the last 22 years. No date and month of such incident has been stated by the said witness and taking into consideration that he was working with the prosecution witness Aroof Khan and getting salary from him, it would not be safe to place reliance upon the said witness.

48. The third instance leading to the inimical relation between the appellant and the deceased was that when the cattle of the appellant trespassed into the field of the maternal uncle of the deceased, the mother of the deceased had forbidden the appellant/accused but the appellant abused the mother of the deceased and the brother of the deceased brought the gun. The only witness to the said circumstance is PW-39 Razia Begum who is the mother of the deceased. In her deposition before the court she stated that the appellant had

also beaten her when she had gone to evict the cattle of the appellant when they had entered in their field and the appellant hit her with the lathi on her arms. In her cross examination, she deposed that she had not made any complaint that she was beaten by the appellant. Here also, the witness has made a vague statement without mentioning the date, month and year of the incident, as such, the same cannot be considered as an instance leading to the inimical relation between the appellant and the deceased particularly when she had not made any complaint before the Police. The learned trial court also has not accepted the prosecution story that the appellant had motive to kill the deceased.

49. It will not be out of place to observe that PW-15 Abdul Sattar who was the neighbor of both the appellant and the deceased had stated that there was no inimical relation between the appellant and the deceased and their relations were cordial. To same extent, PW-25 Mushtaq Ahmed has also stated that the relations between the appellant and the deceased were cordial and they were relatives. The said witness was examined by the prosecution and was never declared hostile. In view of the above, we are of the considered view that the prosecution has failed to prove that the appellant had motive to kill the deceased.

Circumstance No. 2

50. The second circumstance as projected by the prosecution is that the appellant persuaded the deceased to go for hunting so as to materialize his plan to kill the deceased on the premise that other hunters had already proceeded for hunting on 20.03.2005. Admittedly, the parents and the brother of the deceased i.e.PW-11 Lal Khan, PW-39 Razia Begum and PW-5 Mohd. Aroof

Khan were in Jammu on the date of occurrence. PW-31 Attar Nawaz in cross-examination stated that on 20.03.2011, he was at his home in Thanamandi and the deceased-Maroof Khan was also present at his home. The appellant came and asked him that they were going to Dhera Gali for hunting but the deceased stated that he cannot go as he has to go to Jammu but the appellant stated that they have to go today. The appellant had brought the gun and thereafter, both the deceased and the appellant went towards forest at Dhera Gali. When the deceased enquired as to where were other boys, the appellant replied that they have already proceeded towards place of hunting. He accompanied them till road and both of them proceeded in Maruti Car bearing No. JK02M-4960. PW-32 Khalid Khan stated that on 20.03.2011, he along with his cousins Attar Nawaz and Maroof Khan were present at home and they were watching match on television. The deceased-Maroof Khan stated that he has to go for hunting at Donar Forest, Dhera Gali. After sometime, the appellant also came on spot and thereafter, both the appellant and the deceased went for hunting and they remained at home. Both PWs Khalid Khan and Attar Nawaz were the cousins of deceased Maroof Khan. Thus, there are two versions, one version of PW-31 Attar Nawaz who stated that the deceased enquired as to where were other boys and the appellant replied that they already proceeded towards the place of hunting and another version is that of PW-32 Khalid Khan, who stated that the deceased stated that he has to go to Dunar forest and after sometime appellant came and thereafter both of them went for hunting.The contradictions between the statements of both these witnesses are not only material but irreconcilable. Law is well settled that when there are two versions one favouring the accused and the other

against him, then the version favourable to the accused is to be preferred. **In *Devi Lal v. State of Rajasthan*, (2019) 19 SCC 447,** Apex Court has held as under**:**

> **"18.** On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. **Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.**
> **19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him.** All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

51. From the evidence, PW-8 Mohd. Zaman, it is established that both the appellant and the deceased had gone for hunting on 20.03.2011 in a car that was being driven by the deceased. Further PW-6 Ateek Ahmed stated that the appellant met him at Parali Katha and he was going to Thanamandi. PW-14 Niyaz Ahmed who was SHO of Police Station, Thanamandi has also stated that on 20.03.2011 at around 07 PM, when he was in his office, the appellant came to him and told him that Maroof Khan (deceased) had gone for hunting to Donar Forest and during hunting Maroof Khan was injured because of fire. The appellant has not been able to belie the statements made by Pw-6 Ateek Ahmed, PW-8 Mohd. Zaman and PW-14 Niyaz Ahmed, SHO. Thus, it is established that both of them i.e. the appellant and the deceased went for hunting together on 20.03.2011 but the prosecution has not been able to prove beyond doubt that the deceased was persuaded by the appellant to go for

hunting on the premise that the other boys had already gone there, in view of contradictory statements made by PW-32 Khalid Khan and PW-31Attar Nawaz.

52. In ***Kanhaiya Lal v. State of Rajasthan*****, (2014) 4 SCC 715,** Apex Court has held as under**:**

> 12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.
>
> 15. The theory of last seen-the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the appellant and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh* v. *State of Rajasthan* .

Circumstance No. 3:

53. The third circumstance that requires to be considered is as to whether the deceased was killed by the gunshot fired by the appellant from a distance of 42 feet, when the deceased was visible from a place, wherefrom the appellant fired from his gun. A perusal of the FIR reveals that the same was registered on the basis that the appellant noticed some movement but without ascertaining as to whether the said movement was of Maroof Khan who accompanied him, fired thinking that there was a prey. Initially, FIR was registered under section 304 RPC and as per the statement of the Investigating Officer PW-46 Munshi Khan who conducted the investigation till 01.04.201, he could not arrive at the conclusion as to whether offence under section 302

RPC was made out or not. The subsequent Investigating Officer PW-47 Farooq Hussain Shah who conducted the investigation from 01.04.2011 to 20.04.2011 converted the offence under section 304 RPC to 302 RPC on the basis of earlier investigation, statement of the witnesses and other circumstances, as is evident from his testimony. PW-46 Munshi Khan in his deposition has stated that there was dense forest at the place of occurrence and he prepared the site plan on the basis of the position of dead body and the marks of footsteps and leaves lying on the spot and at that point of time, he was not accompanied with the appellant. He calculated the distance as 40 feet on the basis of these observations, those were never mentioned either in the Case Diary file or in the Daily Diary. Rather he admitted that for the first time appellant was taken by him on spot on 24.03.2011. The statement made by the PW-47 Farooq Hussain Shah that mock test was conducted on spot when investigation was being carried on by PW-46 Munshi Khan is not corroborated by PW-46 Munshi Khan and there is no documentary evidence on record to that extent. PW-47 Farooq Hussain Shah, Investigating Officer stated that the appellant was taken on spot and it was found that the place where the dead body was lying was visible from the place wherefrom the appellant fired. No site plan has been prepared by him. The only site plan available on record is the one prepared by PW-46 Munshi Khan. He also admitted that there was a small tree between the appellant and the deceased but everything was visible. PW-47 Farooq Hussian Shah also admitted in his cross examination that PW Mohd. Aroof had stated in his statement under section 161 Cr.P.C. that the bullet was fired under mistaken impression by the appellant that it was fowl but the bullet hit Maroof Khan. He did not

investigate the matter because the appellant had stated that they had gone for hunting and it was evening and he fired thinking that it was fowl but the bullet hit the deceased. This enquiry was already conducted by the earlier Investigating Officer. PW-5 Mohd. Aroof Khan too has made a similar statement in the court but he simultaneously stated that this statement was made on the basis of FIR. PW-47 Farooq Hussian Shah had stated that when the deceased came in front of him during hunting, the appellant fired a shot at him. PW-44 Dr. Nissar Hussain has stated that on the basis of location of the injuries, the fire was shot from the left side, negating the story built by PW-47 Farooq Hussian Shah. PW-43 Dr. Bashir Ahmed Malik has stated that the injuries received by the deceased were not self inflicted. As per exhibit PW-2A, two 12 Bore Guns were seized on 20.03.2011 itself. Though the appellant during the course of trial tried to dispute the said recovery by cross examining the Investigating Officer that the weapons have not been shown in the site plan but nonetheless, it hardly makes any difference once the seizure memo has been prepared by the Investigating Officer and proved by PW-2 Rashid Khan. One very important witness is PW-14 Niyaz Ahmed, Inspector who has stated that the appellant came to him at 7PM and informed him that Maroof Khan had gone for hunting at Dunar Forest and during hunting, Maroof Khan was injured. More so, from the report of Ballistic Expert PW Nazir Ahmed, it is evident that 12 Bore SBBL Gun having Body No. 212 had been fired through and the fired cartridge sent for ballistic examination was fired through the above mentioned gun. As per the license, the gun belongs to Sultan Khan S/o Ramzan who happens to be the father of the appellant.

54. In view of facts established by the prosecution that both deceased and the appellant went together for hunting and the injuries suffered by the deceased were not self inflicted, we have reached to an un-escapable conclusion that the deceased was hit by the shot fired by the appellant though the initial version as it appears from the FIR as also from the deposition of the Investigating Officers, PW-46 Munshi Khann and Pw-47 Farooq Hussain Shah is that the appellant had told them that he under mistaken impression about a prey, fired upon it but the shot hit the deceased but in his statement under section 342 Cr.P.C, the appellant has not taken any such plea.

55. It is doubtful as to whether from a place wherefrom the appellant allegedly fired upon the deceased, the deceased was visible or not. The Investigating Officer PW-46 Munshi Khan presumed the place of occurrence on the basis of footsteps and fallen leaves but neither the footsteps nor fallen leaves have been reflected in the site plan and also there is no evidence that the foot prints upon the soil were that of the appellant and he never made any statement that the deceased was visible from alleged place of firing. There is no mention in the site plan (EXPW-MK) that the place where the dead body was lying was visible. More so, PW-47 Farooq Hussain Shah stated that the deceased was taken to the place of occurrence on 12.04.2011 and further the place where the dead body was lying was visible from the place of fire. PW-47 Farooq Hussain Shah could not reply as to how he conducted the enquiry from the appellant on 12.04.2011, when he was in judicial custody. The other two Investigating Officers PW-48 Mastaj Ahmed and PW-49 Pardeep Singh have also assumed the place of occurrence as the one presumed by PW-46 Munshi Khan and none other than PW-46 Munshi Khan prepared the site plan.

Therefore the prosecution has not been able to prove beyond reasonable doubt that the place where the dead body was lying was visible from the place, wherefrom the appellant fired.

56. As there is no eye witness to the occurrence, so from the attending circumstances, it is to be examined as to whether the appellant had intention to kill the deceased. As we have already rejected the motive projected by the prosecution so it is to be examined as to whether the other circumstances establish the fact that the appellant intentionally killed the deceased or not. Both the appellant and the deceased had gone together and there is evidence on record that relationship between the appellant and the deceased were cordial though the parents and the brother of the deceased have stated otherwise but nonetheless, it becomes highly improbable that a person who is having inimical relation with the other person, would go for hunting with him who was armed with gun. The conduct of the appellant after an occurrence also becomes a relevant fact in terms of section 8 of the Evidence Act, so as to determine the culpability of the accused for committing the murder. In the instant case, as per PW-14 Niyaz Ahmed, Inspector, it was the appellant who informed him that Maroof Khan had gone for hunting in the Dunar Forest and during hunting, he was injured. More so, the appellant had left his gun at the place of occurrence near the body of the deceased. Had there been any intention on the part of the appellant to kill the deceased then he would have done at least something to conceal the commission of offence by him and also would not have left the gun at the place of occurrence which as per the prosecution belongs to the father of the appellant. The contention of the respondents is that the appellant did not try to save the deceased and could

have contacted the Forest officials or Army camp for help and not doing so points towards the guilt of the appellant. The contention is stated only to be rejected in view of testimony of PW-44 Dr. Nissar Hussain that the deceased was having injuries in the brain, which can cause instantaneous death.

57. **In *State of A.P. v. Rayavarapu Punnayya*, (1976) 4 SCC 382,** Apex Court has held as under:

> **"21.** From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. **The question to be considered at the first stage would be, whether the appellant has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the appellant and the death, leads to the second stage for considering whether that act of the appellant amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code**."

58. Applying the law laid down by the Hon'ble Apex Court to the present facts and circumstances of the case, we are of the considered view that the prosecution has miserably failed to prove the complete chain of circumstances so as to warrant conviction of appellant for commission of offence under section 302 RPC but equally true is that because of the act of the appellant, a death of human being has been caused and he knew the consequences of his act of firing the bullet.

59. The other contention of the victims i.e. mother and brother of the deceased is that the appellant by giving a false reply has provided the missing link in the chain of circumstances. Learned counsel for the victims has placed reliance upon the judgment of Apex Court reported in (2019) 15 SCC 622. The judgment is not applicable in the present facts and circumstances of the case, because in that case notwithstanding the fact that motive was not proved in the said case but the chain of circumstances was proved by the prosecution beyond doubt.

60. Similarly, in **Savitri Samantaray v State of Odisha** reported in 2022 SCC OnLine SC 673, the prosecution had succeeded in establishing intention of the appellants therein for commission of offence in light of the statements made by all the set of witnesses and the Hon'ble Apex Court had held that once the prosecution has successfully established the chain of events, the burden is upon of the accused to prove it otherwise.

61. In **Nagaraj v State of Tamil Nadhu, 2015 AIR Supp. SC 912**, the Hon'ble Apex Court has held as under:

> "15 In the context of this aspect of the law it is been held by this Court in Parsuram Pandey vs. State of Bihar (2004) 13 SCC 189 that Section 313 CrPC is imperative to enable an appellant to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the appellant, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the appellant, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem, as explained in Arsaf Ali vs. State of Assam (2008) 16 SCC 328. In Sher Singh vs. State of Haryana (2015) 1 SCR 29 this Court has recently clarified that because of the language employed in Section 304B of the IPC, which deals with dowry death, the burden of proving innocence shifts to the appellant which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304B that an appellant must furnish

credible evidence which is indicative of his innocence, either under Section 313 CrPC or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this clarification, refusal to answer any question put to the appellant by the Court in relation to any evidence that may have been presented against him by the prosecution or the appellant giving an evasive or unsatisfactory answer, would not justify the Court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the Statements under Section 313 assume significance to the extent that the appellant may cast some incredulity on the prosecution version. **It is not the other way around; in our legal system the appellant is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person appellant of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the Appellant because of what he has stated or what he has failed to state in his examination under Section 313 CrPC**."

62. Further in the latest decision of the Hon'ble Apex Court in **Shivaji Chintappa Patil v State of Maharashtra (2021) 5 SCC 626,** the Hon'ble Apex Court has held as under:

> "22. It could thus be seen, that it is well-settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the appellant.

> 23. ……..
>
> 24. **Another circumstance relied upon by the prosecution is, that the appellant failed to give any explanation in his statement under Section 313 Cr.P.C. By now it is well-settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the appellant. However, it cannot be used as a link to complete the chain**. Reference in this respect could be made to the judgment of this Court in Sharad Birdhichand Sarda (supra)."

63. In view of all what has been discussed above, we are of the view that the appellant had no intention to kill the deceased or to cause such bodily injury as is likely to cause the death of the deceased but nonetheless, it can be definitely said that the appellant was having the knowledge that this act may cause death of any human being particularly when he was accompanied by Maroof Khan.

64. We have examined the judgment passed by the learned trial court and we do not find any reason in the judgment for convicting the appellant under section 304-I RPC. In view of above discussion, we are of the view that the appellant was required to be convicted under section 304-II RPC, as such, we accordingly, modify the judgment dated 29.01.2021 and order dated 30.01.2021 passed by the learned trial court and alter the conviction of the appellant from section 304-I RPC to 304-II RPC for causing the death of Maroof Khan and further the sentence of rigorous life imprisonment awarded to him by the learned trial court is modified to rigorous imprisonment for 10 years. The sentence awarded for commission of offence under section 27 of the Arms Act is maintained. Fine component of the sentence awarded to the appellant shall remain the same. Appellant has already remained in custody

for more than 11 years, as such, appellant-Sarwar Khan be released forthwith, if he is not required in any other case.

65. The appeal filed by the appellant is disposed of accordingly. The appeal filed by the Union Territory of J&K and the revision petition filed by the victims i.e. mother and brother of the deceased are dismissed.

66. Reference is answered accordingly.

67. The record of the trial court be sent back along with a copy of this judgment.

(MOHAN LAL)
JUDGE

(RAJNESH OSWAL)
JUDGE

JAMMU
31.08.2022
Rakesh

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No