

**Neutral Citation No. - 2024:AHC-LKO:67054-DB**

**Reserved**

**Court No. - 1**

**Case :- CAPITAL CASES No. - 2 of 2022**

**Appellant :- State of U.P.**

**Respondent :- Vijay Prakash Sharma And Another**

**Counsel for Appellant :- G.A.**

***Connected with***

**Case :- CRIMINAL APPEAL No. - 2504 of 2022**

**Appellant :- Vijay Prakash Sharma**

**Respondent :- State Of U.P. Thru. Prin. Secy. Home, Lucknow**

**Counsel for Appellant :- Nadeem Murtaza, Aditya Vikram Singh**

**Counsel for Respondent :- G.A., Ajeet Kumar, Dinesh Kumar  
Tripathi**

***with***

**Case :- CRIMINAL APPEAL No. - 2524 of 2022**

**Appellant :- Dheeraj Sharma**

**Respondent :- State Of U.P. Thru. Prin. Secy. Home, Lucknow**

**Counsel for Appellant :- Aditya Vikram Singh, Nadeem Murtaza**

**Counsel for Respondent :- G.A., Ajeet Kumar, Dinesh Kumar  
Tripathi**

**Hon'ble Attau Rahman Masoodi, J.**

**Hon'ble Ajai Kumar Srivastava-I, J.**

**[Per Attau Rahman Masoodi, J.]**

**Prelude**

- (1) Two accused persons, namely, **Vijay Prakash Sharma** and **Dheeraj Sharma**, were tried by the Additional Sessions Judge/ Fast Track Court-II, Lucknow in Sessions Trial No. 579 of 2005 : *State of U.P. Vs. Vijay Prakash Sharma and another*, arising out of Case Crime No. 196 of 2005, under Sections 302, 307/34 of the Indian Penal Code, 1860 (in short, referred hereinafter as '**I.P.C.**'), Police Station Hazratganj, District Lucknow.
- (2) Vide judgment and order dated 13.09.2022, the Additional Sessions Judge/Fast Track Court-II, Lucknow, convicted both accused persons, **Vijay Prakash Sharma** and **Dheeraj**

**Sharma**, under Sections 302/34 I.P.C. and vide judgment and order dated 16.09.2022, sentenced them under Sections 302/34 I.P.C. to be hanged to death till they are dead and a fine of Rs.5,00,000/- each, in default of payment of fine to undergo additional two months' imprisonment, however, both accused persons were acquitted under Section 307/34 I.P.C. It was also directed that on payment of the aforesaid fine by the accused persons, Rs.8,00,000/- would be paid to the legal heirs of deceased Kapil Gupta as compensation in terms of Section 357 of the Code of Criminal Procedure, 1973.

- (3) Aggrieved by the aforesaid conviction and sentences, accused, **Vijay Prakash Sharma**, has preferred Criminal Appeal No. 2504 of 2022 : *Vijay Prakash Sharma vs. State of U.P.*, whereas accused **Dheeraj Sharma** preferred Criminal Appeal No. 2524 of 2022 : *Dheeraj Sharma Vs. State of U.P.*
- (4) Capital Case No. 2 of 2022 arises out of the Reference made by the learned trial Court under Section 366 (1) of the Code of Criminal Procedure, 1973 to this Court for confirmation of the death sentence of convicts/appellants **Vijay Prakash Sharma** and **Dheeraj Sharma**.
- (5) Since the above-captioned capital sentence reference and criminal appeals arise out of a common factual matrix and impugned judgment/orders dated 13.09.2022 and 16.09.2022, we proceed to decide the same by the common judgment.

#### **Prosecution Case**

- (6) Shortly stated, the prosecution case runs as under :-

**I** Informant Uday Swaroop Bhardwaj (P.W.1), resident of Niralanagar, Police Station Hasanganj, Lucknow, was an architect and builder. An agreement was executed between him (P.W.1) and Krishna Kumar Gupta

(deceased), resident of C-160 Sector-D, LDA Colony, Kanpur Road, Police Station- Krishnanagar, Lucknow, for construction of shops and office on the place situated above Basant Talkies near Mayfair Tiraha, Hazratganj, which was purchased from Kuber Finance by Krishna Kumar Gupta (deceased). As per agreement, P.W.1 had started the construction work of shops on the aforesaid place.

**II** Convict/appellant Vijay Sharma was the owner of Bajrang Security Agency and V.I.P. Security Agency and its office was situated appurtenant to other portion of the aforesaid place of construction.

**III** P.W.1-Uday Swaroop Bhardwaj gave a written complaint (Ext. Ka.1) in the Police Station Hazratganj, district Lucknow, stating that construction of shops was almost completed in the aforesaid place. During construction, convict/appellant Vijay Sharma often used to come and threatened Krishna Kumar Gupta (deceased) that the construction place of shops belongs to Kuber Finance Company upon which Rs.17,00,000/- of him was outstanding and in lieu thereof, he (deceased Krishna Kumar Gupta) would have to give three shops to him (convict/appellant Vijay Sharma). On this matter, Krishna Kumar Gupta (deceased) used to say that he had bought this place, therefore, he (convict/appellant Vijay Sharma) did not have any right on it.

**IV** On 16.04.2005, when he (P.W.1), Krishna Kumar Gupta (deceased), his son Kapil Gupta (deceased) and his friend Rajeev Dixit (P.W.2) were working in the gallery near the stairs of first floor of office and shop, then, around 3:00 p.m., convict/appellant Vijay Sharma and his son Dheeraj

Sharma (convict/appellant) came and told to Krishna Kumar Gupta (deceased) that Rs.17,00,000/- was outstanding against Kuber Finance; they (convicts/appellants) had talked to Kuber Finance; and therefore, he (deceased Krishna Kumar Gupta) would have to give three shops to them (convicts/appellants). On this, Krishna Kumar Gupta (deceased) told them (convicts/appellants) that they did not have any right on it. On this matter, the discussion amongst them started increasing and then convict/appellant Dheeraj Sharma (son of convict/appellant Vijay Sharma) said that these people would not accept this and by saying this, convict/appellant Dheeraj Sharma ran and picked up a double barrel gun from his office and gave the gun to his father Vijay Sharma (convict/appellant), saying to finish their work today and then they would be able to get shops. Thereafter, Vijay Sharma (convict/appellant) shot with gun on the chest of Krishna Kumar Gupta (deceased), who was sitting on a chair, as a consequence of which, he (deceased Krishna Kumar Gupta) remained sitting on the chair. Seeing this, Kapil (deceased) got into a tussle with Vijay Sharma (convict/appellant) and grabbed his hair. Thereafter, Vijay Sharma (convict/appellant) stuck Kapil (deceased) and shot in his chest, as a consequence of which, Kapil (deceased) got injured and fell there. After that Vijay Sharma (convict/appellant) started loading the gun again. On seeing this, he (P.W.1) and his friend Rajeev Dixit (P.W.2) ran backwards in fear to save their lives. Thereafter, Vijay Sharma (convict/appellant) fired a shot at them with the intention to kill them, but they (P.W.1 and P.W.2) quickly reached gallery, therefore, bullet did not hit them. Thereafter, he (P.W.1) hid himself in the office and from there, he also heard

two more shots of fire. Thereafter, he (P.W.1) started informing his friends and the police through his mobile phone. He (P.W.1), thereafter, looked from his office window towards the road and saw that Vijay Sharma (convict/appellant) was going towards Mayfair Tiraha (intersection) while waving the gun in his hand.

V P.W.1 (informant) had also stated that due to the firing opened by Vijay Sharma (convict/appellant), panic spread in the market and the shopkeepers quickly closed their shops and started running away and there was silence due to which public order was disrupted and normal life came to standstill. When the police came and made efforts to restore the normal life, then people started coming out of fear. P.W.1 had further stated that when he came out, he saw that police took away Krishna Kumar Gupta and his son Kapil (deceased). After some time, he (P.W.1) came to know that Krishna Gupta and his son Kapil died.

- (7) The evidence of Head Moharrir Satyapal Dixit (P.W. 6) shows that on 16.04.2005, at 04:25 p.m., informant Uday Swaroop Bhardwaj (P.W.1) and Ramesh Singh son of Vishwanath Singh came at Police Station Hazratganj, district Lucknow and Uday Swaroop Bhardwaj (P.W.1) lodged his written F.I.R. at Police Station Hazratganj, district Lucknow, on the basis of which Case Crime No. 196 of 2005, under Sections 302, 307, 34 I.P.C. was registered against the convicts/ appellants. His evidence also shows that he prepared the chick F.I.R., a perusal of which shows that the distance between the place of the incident and the aforesaid police station was 500 metres.
- (8) S.I. Shyamakant Tripathi (P.W.9) was the Investigating Officer of the case. In his examination-in-chief, he deposed that on

16.04.2005, he was posted as Inspector-in-charge at police station Hazratganj and he was on duty along with police personnel to maintain law and order in the vicinity of police station. At about 03:10 p.m., he received information through wireless that firing took place in Basant Cinema Building. On this information, when he reached Basant Cinema Building, he saw that there was stampede and also there was an atmosphere of chaos all around. When he along with police personnel reached on the first floor of the building, he saw that a man sat on a chair in the gallery with his neck hanging in an injured condition; other man was also lying in the gallery in an injured state; and blood of both persons was oozing out. Both these persons were sent for treatment to Medical College along with police force. Thereafter, on being inquired on the spot, informant Uday Swaroop Bhardwaj (P.W.1) told him about the incident. He recorded the statement of informant Uday Swaroop Bharwaj (P.W.1), who informed him that he lodged the F.I.R. about the incident and the incident took place in the presence of him, his friend and other persons.

P.W.9 had further stated that after collecting chick F.I.R. and other papers, he commenced the investigation. After recording the statement of informant Uday Swaroop Bhardwaj, he got information from police station through wireless that accused Vijay Kumar Sharma was caught in front of Gandhi Ashram, upon which he also reached there, wherein he met with SSI Harendra Pratap Singh, police personnel and accused Vijay Prakash Sharma and also recovered Double Barrel Gun from Vijay Prakash Sharma (convict/appellant). He also recorded the statement of Vijay Prakash Sharma. Thereafter, he reached the place of occurrence and on the pointing out of informant, he inspected the place of occurrence and prepared the site plan (Ext. Ka. 17). He also collected the tiles stained with blood;

tiles without blood; concrete with blood; and without blood from the place of occurrence and prepared recovery memo of it (Ext. Ka. 6). Apart from it, he also took possession of a black iron chair on which deceased Krishna Kumar Gupta was sitting and blood was present thereon after he being shot. By taking possession of that chair, the blood-soaked cushion was cut and all were sealed under recovery memo (Ext. Ka. 7). He also recovered an empty cartridge, wad (*tickli*), *dafti* and a bullet from the spot under recovery memo (Ext. Ka. 8). Thereafter, he recorded the statement of witnesses of recovery memo, namely, Riyaz and Asfaq. On 17.04.2005, he recorded the statement of Rajeev Dixit (P.W.2) and Bharat (P.W.3); statement of Sub-Inspector Ramkrishna Singh Yadav, who collected the hair of accused under recovery memo; the statement of Constable Sri Ram, who brought the dead bodies for post-mortem; statement of Virendra Kumar Mittal and Virendra Prakash Bansal. On 18.04.2005, he recorded the statement of witnesses of *panchayatnama*, namely, Virendra Kumar Mittal, Rajesh Dubey, Kamlesh Kumar Verma and Ajay Pratap Singh.

On 20.04.2005, he got information about the surrender of accused Dheeraj Sharma in the Court. On 23.04.2005, he recorded the statement of Smt. Pushplata, wife of deceased Krishna Kumar Gupta and also the statement of Nidhi Gupta, daughter of deceased Krishna Kumar Gupta. On 03.05.2005, he recorded the statement of accused Dheeraj Sharma in District Jail, Lucknow. On 25.05.2005, he recorded the statement of Ms. Monika, daughter of deceased Krishna Kumar Gupta. On 09.06.2005, he recorded the statement of Smt. Meghna, wife of Kapil Gupta. He proved the recovery memo Ext. Ka. 15, which was in relation to recovery of one D.B.B.L. gun, three live cartridges, one empty cartridge 12 bore and the arrest of the accused under Sections 302/307/34 IPC by SSI

Shri Harendra Pratap Singh, which was written by SI Shri Rajkumar Singh.

In his cross-examination, P.W.9 had deposed that after 2-3 minutes in getting the information through wireless, he reached at the place of occurrence and at that time, informant Uday Swaroop Bhardwaj (P.W.1) was not present at the place of occurrence. Both witnesses Asfaq and Riyaz were present at the place of occurrence and both of them were present along with him at the place of occurrence about one hour and he prepared the recovery memos in their presence. He also deposed that he himself signed all the packets exhibited in the Court but he could not get signature of any witnesses thereon. He further deposed that only a double barrel gun was used in the incident. He further deposed that he did not sealed the chair but he sealed blood stained cloth of the chair. He further deposed that after reaching on spot till completion of all the formalities on spot, informant Uday Swaroop Bhardwaj was present, however, he could not make him witness in any documents prepared on the spot. He was present about 5-6 hours at the place of occurrence. He further deposed that when he was present on spot, F.I.R. of the incident was already lodged. When he got information from wireless, case was not registered. He got chik F.I.R. of the case on the spot after one hour of the incident. He denied that F.I.R. was lodged ante-timed by him. He had not arrested accused Vijay Sharma but accused Vijay Sharma was arrested by SSI Harendra Pratap Singh.

- (9) The evidence of S.I. Harendra Pratap Singh (P.W.10) shows that on 16.04.2005, he, while posted as S.S.I. in police station Hazratganj, district Lucknow, got information through wireless R.T. set that firing was occurring on the first floor of the cinema hall at Mayfair Tiraha near Basant Cinema in which two people



have died. On this information, at about 03:10 p.m., he, S.I. Ashok Kumar and other police personnel were going towards the place of occurrence and when he reached in front of the showroom of Gandhi Ashram, he saw that Vijay Sharma armed with a gun was coming from the cinema side and some people from the public were running behind him by shouting 'catch-catch'. When they signalled the accused Vijay Sharma to stop, he got very nervous and stopped and no clear voice was coming from his mouth. When he was questioned, after washing his face with water and feeling normal, accused Vijay Sharma told his name as Vijay Prakash Sharma, son of Bajrangi Sharma and also told that he runs a security agency. P.W.10 had also stated that accused Vijay Sharma was arrested at 04:10 p.m. and one D.B.B.L. gun, one empty cartridge and one live cartridge were recovered from his possession under recovery memo (Ext. Ka.18). The recovered items were sealed and sent for Forensic Science Laboratory.

In cross-examination, P.W.10 had stated that signature of accused Vijay Sharma was not present in the sealed packet of gun and cartridges. He also stated that he could not say the name and address of any independent witnesses who refused to give statement. While preparing recovery memo, S.H.O. had come to the spot and also interrogated the accused. The signature of S.H.O. was not present on recovered items. The Inspector-in-Charge, after recovery of gun and during preparation of recovery memo, told him that FIR of the incident has already been lodged in the police station. One and half hours took place in preparing the recovery memo. S.H.O. came at about 5:15 p.m. on the spot. He denied the suggestion that S.H.O. caught the accused along with gun from his house and on his direction, recovery memo was prepared.

- (10) The evidence of P.W.7-Asfaq Ali alias Guddu shows that he was residing at 120/24, Lalbagh, Hazratganj, Lucknow since birth. On 16.04.2005, on coming to know the incident and on calling by the police, he went to Basant Cinema Building, wherein from the first floor, police took possession of pieces of tiles, pieces of blood stained tiles, pieces of bloodless tiles, blood stained concrete, without blood concrete, blood stained iron chair, one empty cartridge 12 bore and one plastic wad (tikli) and prepared recovery memo of it and sealed it and the Inspector put his signature on it.

In cross-examination, P.W.7 had stated that by sending a Constable, he was called by the police at the place of occurrence. He did not know the accused person prior to the incident but the accused was present at the place of occurrence.

- (11) The evidence of P.W.8-Ram Krishna Yadav shows that on 16.04.2005, he was posted as Sub-Inspector at police station Chowk. The proceeding of *panchayatnama* of the dead bodies were made by him at Medical College in the presence of witnesses Virendra Kumar Bansal, Virendra Kumar Mittal, Kamlesh Kumar Verma and Ajay Pratap Singh. The *panchayatnama* was prepared by Head Constable Mahatam Yadav on his dictation. After completion of proceeding of *panchayatnama*, he handed over the deadbodies for post-mortem to Constable 1040 Sriram. He also stated that since the deadbodies were lying in safe custody in the mortuary of Medical College, therefore, he could not deem it appropriate to seal the deadbodies.

- (12) The evidence of P.W.11-Digvijay Singh shows that on 14.06.2005, he was posted as Inspector-in-Charge at police station Hazratganj, district Lucknow. He took the investigation of Case Crime No. 196 of 2005, under Sections 302, 307/34

I.P.C., police station Hazratganj, district Lucknow. After going through the investigation report of earlier Investigating Officer and also after completion of other proceedings, he submitted charge-sheet No. 84 of 2005 against the accused persons, Vijay Prakash Sharma and Dheeraj Sharma.

In cross-examination, P.W.11 had stated that he did not receive the report of forensic laboratory till the submission of the charge-sheet nor he received the report of ballistic expert.

- (13) The evidence of P.W.12-Anwar Jamal shows that on 12.08.2005, he was posted as Ballistic Expert in Forensic Science Laboratory, Mahanagar, Lucknow. On the said date, he received a letter of S.S.P., Lucknow dated 11.08.2005 along with two sealed bundles and one sample seal. On opening bundle no.1, he found D.B.B.L. 12 bore gun, bearing No. 4810D/2, one empty cartridge 12 bore, one live cartridge 12 bore and one license book. The D.B.B.L. Gun and cartridge 1/2005 fired from D.B.B.L. were marked as E.C.1 and live cartridge was marked as L.C.1. Licence Book was marked as L-2.

P.W.12 had further stated that on opening of bundle no.2, he found four 12 bore Shaktiman Express cartridges, one ball-shot, three plastic cartridges and three cardboard boxes. The fired cartridges were marked as EC2, EC3, EC4 and EC5 and ball-shot was marked as M-1. He also stated that percussion cap was absent in EC-5.

P.W.12 had further stated that after examining, he reached to the conclusion that (i) cartridges in question i.e. E.C.1 and E.C.3 marked as 1/2005 were fired from the left barrel of DBBL Gun No. 4810-D/2; (ii) the cartridge in question i.e. E.C.2 marked as 1/2005 was fired from the right barrel of DBBL Gun No. 4810-D/2; (iii) on comparison of the cartridges in question EC1 with

the DBBL Gun, there is lack of sufficient personal characteristics to do so; (iv) on comparison of the cartridges in question EC5 with the DBBL Gun, no comparison marks were found; (v) it is not possible to give opinion whether ball-shot in question marked as M.1 is the part of three pieces of plastic fence and three pieces of cardboard of boxes and cartridges in question marked as EC1 and EC5 or not. He proved the report of Forensic Science Laboratory dated 16.08.2012.

In cross-examination, P.W.12 had stated that out of cartridges sent for examination, he found that one cartridge was fired from one barrel of said DBBL Gun and two cartridges were fired from another barrel but he could not give any definite opinion on two cartridges whether it was fired or not. All the cartridges were made by Shaktiman Company. In the report, no definite opinion on report nos. 3, 4 and 5 was given. He denied that report nos. 1 and 2 were different from the facts. He also denied that report was not prepared by him.

- (14) The evidence of P.W.13-Nidhi Bansal, daughter of Krishna Kumar Gupta (deceased) shows that Vijay Sharma used to live in the building as a security guard. He used to cause disturbance while coming and going on the road and had a dispute with her father (deceased) that his money was invested in Kuber Finance so give him 2-3 shops. Vijay Sharma used to visit her house to threaten her father. Vijay Sharma had told her father to give him shops else he would kill him. On the day of incident, her father and brother had gone to the under-construction building, whereafter on argument, Vijay Sharma with the help of his son shot her father and brother. Her father and brother died at the place of occurrence.

Further she has stated that she was a housewife and her mother was also a housewife. Both were financially dependent. Her

brother was married and his wife's name was Meghana. Her father was not an I.A.S. but he used to do a job. Neither she nor her mother has a bank account. She do not know whether her father purchased any property from any peron or Kuber Finance. She did not receive any reward for the contract that she had made with her father.

In cross-examination, P.W.13 had stated that her father had taken power of attorney from her. It is true that after giving the power of attorney, she did not go to her father's office. She and her mother never opened any account in Kuber Company. She got a call at home that accident had occurred. She do not know who took them to the hopsital.

(15) Going backwards, the autopsy on the dead body of deceased Krishna Kumar Gupta was conducted on 17.04.2005, at 09:10 a.m. by Dr. Prabhu Nath (P.W. 4), at Dr. Shyma Prasad Mukherjee Hospital, Lucknow, who found on it the following ante-mortem injuries :-

- (1) Firearm injury 2 cm x 2 cm x chest cavity wound present over right firing and present sematic Rt nipple. Margins are inverted blackening and tatooing is present wound all around with collar of abrasion ring present around the wound.
- (2) Firearm wound of exit 2.5 cm x 2 cm x Chest cavity deep present in posterior lateral aspect of Rt. Back chest, 5 cm below Rt inferior of the scapula, Margins are everted.
- (3) On opeing ecchymosis present undernath (sic.) fracture of sternum and fracture of 5 to 6 ribs on Rt side of back and underneath the injury and fracture Rt lung with pleura lacerated, the track of ecchymosis extends from (sic.) Rt side chest. The direction of firearm injury is straight from front of Rt. Side of chest up to downward to Rt side of back of chest about one litre clotted & fluid mixed blood present in chest cavity.
- (4) Firearm injury entry wound 2 cm x 2 cm x chest cavity deep present (sic.) of left side of chest 5 cm (sic.)

margins are inverted, blackening & tatooing present all over the wound with collar of abrasion ring present around the wound.

- (5) Firearm (sic.) left side of abdomen, 12 cm above left scapular (sic.) left side of back of shoulder, extending from above to downward.

On opening ecchymosis is present underneath above vertebral injury fracture of 4<sup>th</sup> & 5<sup>th</sup> ribs on left side of chest present underneath the fracture and injury in left lung with pluera, heart and peritonium, diaphragm left side, both intestines lacerated, about one litre of clottd & fluid mixed blood present on chest & abdominal cavity.

The cause of death spelt out in the postmortem report was due to shock and haemorrhage as a result of ante-mortem firearm injuries.

- (16) In his deposition before the trial Court, Dr. Prabhu Nath (P.W.4) reiterated the said cause of death and stated that the deceased could have died at 03:00 pm on 16.04.2005 and injury Nos. 1 to 4 were attributable to firearm. He also stated therein that injuries suffered by him were sufficient in the ordinary course of nature to cause death.

- (17) The autopsy on the dead body of deceased Kapil Gupta was conducted on 17.04.2005, at 09:15 a.m. by Dr. Ashok Kumar Yadav (P.W. 5) at Dr. Shyma Prasad Mukherjee Hospital, Lucknow, who found on it the following ante-mortem injuries :-

- (1) Firearm wound of entry 2 cm x 2 cm x abdominal cavity deep present on right side of back 10 cm above the right iliac crest, 8 cm lateral to the mid line. Blackening and tatooing and charring present all around the wound. Margins are inverted with collar abrasion ring present all around the wound.
- (2) Firearm wound of exit – 3 cm x 3 cm x abdominal cavity deep present on lateral aspect of left side of abdomen, 17 cm below the left nipple. Margins are everted, loops of putentive coming out of the wound.

On opening ecchymosis present underneath including small intestine & ascending colon & Transverse colon are lacerated (sic.). Two litres of blood and mixed fluid present in abdominal cavity, direction of firearm wound, entry & exit is in straight line, straight from right side towards upwards & forwards upto left upper part of abdomen.

- (3) Firearm wound of entry – 2 cm x 2 cm x chest cavity deep present on blood aspect of left side of back 8 cm below the inferior angle of left scapula and 10 cm lateral to mid line. Margins are inverted blackening, tatooing and charring is present all around the wound. On opening the injury No.3 ecchymosis present underneath the above mentioned injury. Fracture of the rib on left side present underneath the fracture of injury in left (sic.) and (sic.) lacerated trail of (sic.) chest, right (sic.) one metallic (sic.) one litre of clotted blood.
- (4) Contusion with abrasion 3 cm x 3 cm present on postero lateral aspect of chest right side 5 cm the inferior angle of right scapula.
- (5) Abrasion – 3 cm x 2 cm present on back of right elbow joint on opening injury no. (4) & (5) ecchymosis present underneath the injuries.

The cause of death spelt out in the postmortem report was due to shock and haemorrhage as a result of ante-mortem firearm injuries.

- (18) Dr. Prabhu Nath (P.W.5), in his deposition, had reiterated the said cause of death and stated that the deceased could have died at 03:00 pm on 16.04.2005 and all the injuries were attributable to fire arm. He also stated therein that injuries suffered by him were sufficient in the ordinary course of nature to cause death.
- (19) The case was committed to the Court of Sessions in the usual manner, where the appellants were charged on counts mentioned in paragraph-1. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.
- (20) During trial, in all, the prosecution examined thirteen witnesses which are as under:-

P.W.1	Uday Swaroop Bhardwaj	Informant/eye-witness
P.W.2	Rajeev Dikshit	Eye-witness
P.W.3	Bharat	Eye-witness
P.W.4	Dr. Prabhu Nath	Conducted post-mortem of the deceased Krishna Kumar Gupta
P.W.5	Dr. Ashok Kumar Yadav	Conducted post-mortem of the deceased Kapil Gupta
P.W.6	Satyapal Dikshit	On the basis of written report of informant (P.W.1), chik F.I.R. has been prepared.
P.W.7	Asfaq Ali	Witness of recovery from the place of occurrence
P.W.8	H.C.P. Ram Krishna Yadav	Conducted <i>panchayatnama</i> of deadbodies of both the decease Krishna Kumar Gupta and Kapil Gupta
P.W.9	Shyamakant Tripathi	Investigating Officer of the case
P.W.10	S.I. Harendra Pratap Singh	Arrested convict/appellant Vijay Prakash Sharma and also recovered D.B.B.L. Gun and cartridges from his possession
P.W.11	Digvijay Singh	Submitted charge-sheet against both the convicts/ appellants Vijay Prakash Gupta and Kapil Gupta
P.W.12	Anwar Jamal	Submitted ballistic report
P.W.13	Nidhi Bansal	Daughter of deceased Krishna Kumar Gupta and Kapil Gupta

(21) The prosecution, in order to prove its case, has also produced following documents :-

Description of documents	Dated	Exhibits
Written Report	16.04.2005	Ext. Ka. 1
Post-mortem report	17.04.2005	Ext. Ka. 2, 3
F.I.R.	16.04.2005	Ext. Ka. 24
Copied Report	16.04.2005	Ext. Ka. 5



Recovery memo of bloodstained tiles and without blood tiles and blood stained concrete	16.04.2005	Ext. Ka. 6
Recovery memo of bloodstained iron chair	16.04.2005	Ext. Ka. 7
Recovery memo of empty cartridge 12 bore, plastic wed (tikli), <i>dafti</i> and bullet	16.04.2005	Ext. Ka. 8
Police Papers No. 211, A 12/1	16.04.2005	Ext. Ka. 9
Constable paper no. 13	16.04.2005	Ext. Ka. 10
Photonash	16.04.2005	Ext. Ka. 11
Police paper No. 211, A, 14/1	17.04.2022	Ext. Ka. 12
U.P. Constable/ Police A-10/1	17.04.2005	Ext. Ka. 13
Photonash	17.04.2005	Ext. Ka. 14
Papers Number	17.04.2005	Ext. Ka. 15
Recovery Memos police	16.04.2005	Ext. Ka. 16
Site plan	16.04.2005	Ext. Ka. 17
Recovery Memo D.B.B.L. Gun	16.04.2005	Ext. Ka. 18
Charge-sheet	14.06.2005	Ext. Ka. 19
Forensic Science Laboratory Report	16.12.2005	Ext. Ka. 20

(22) The accused/appellants were examined under Section 313 of the Code of Criminal Procedure, wherein they had denied the prosecution evidence and stated that a false case was lodged against them; in order to protect the real accused, case was lodged against them; they were innocent; due to misunderstanding, a case was filed against them under police pressure; in regard to P.W.12, who is the expert of Forensic Science Laboratory, they stated that P.W.12 is a departmental person, due to which he gave statement in favour of the Government; they denied their presence at the place of occurrence; and also denied to give clarifying evidence in defence.

(23) On conclusion of the trial, the trial Court, vide judgment/order dated 13.09.2022, held the accused persons/appellants herein

guilty of committing the murder of two persons, namely, Krishna Kumar Gupta and Kapil Gupta and accordingly convicted the appellants herein for offences punishable under Section 302/34 I.P.C. The trial Court, observing the offences committed by the appellants herein to have been falling in the ambit of the rarest of rare cases, imposed sentence of capital punishment to the appellants herein for the offence punishable under Section 302/34 I.P.C.

- (24) Feeling aggrieved, convict/appellant Vijay Prakash Sharma, has preferred Criminal Appeal No. 2504 of 2022, whereas convict/appellant Dheeraj Sharma preferred Criminal Appeal No. 2524 of 2022.

**Submissions**

- (25) Learned Counsel representing the convicts/appellants addressed us on merits of the matter. He would urge that the order of conviction under Section 302/34 I.P.C. as passed by the trial Court is not at all sustainable. Substantiating this, he made the following submissions :-

- a) There are material inconsistencies and ambiguities in the prosecution's case. The prosecution examined P.W.1- Uday Swaroop Bhardwaj, P.W.2-Rajeev Dixit and P.W.3-Bharat as eye-witnesses, however, all of them have not supported the prosecution case and have turned hostile. Their testimonies are not in consonance with the allegations made against the appellants in the F.I.R. and lend no credence to the baseless prosecution case. P.W.1 has categorically denied the allegations levelled by him in the F.I.R. and has specifically stated that he had neither seen the accused persons at the place of incident extending any threats to the deceased persons nor was he a witness to alleged incident. P.W.1 had also stated that

he had given a written report about the alleged incident at the instance of the police personnel as dictated by the concerned police official. During cross-examination, P.W.1 has deposed that he was not present at the place of occurrence during the course of alleged incident, however, he was taken to the police station by police where he was made/pressurized by them to write a report against the appellants, as dictated by the police. P.W.2 has categorically stated that he had not seen the occurrence of the alleged incident and had arrived at the place of occurrence later upon hearing the sounds of 'firecracker'. Furthermore, P.W.2 has also denied that he has given any statement to the police officials implicating the appellants and has also denied the fact that he knows or had seen the accused persons/appellants at the place of the incident on the fateful day. P.W.3 has also not supported the allegations of the present case and categorically stated that he had not witnessed the alleged act of shooting at the deceased. In this backdrop, submission is that despite there being no support/corroboation of the alleged incident by P.W.1, P.W.2 and P.W.3 and the alleged eye-witness of the case and were declared hostile and in absence of any cogent evidence vis-a-vis the commission of the alleged offence by the present appellants, the trial court had proceeded to impose harshest punishment upon the appellants.

- b) The present case does not fall within the four corners of the wall inasmuch as the alleged incident took place in the heat of passion without any pre-planning nor did the appellants acted in a cruel manner. According to the learned Counsel, the appellants had been made an accused in the present case merely with the aid of Section

34 I.P.C. According to him, in order to invoke Section 34 I.P.C., it ought to be successfully shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act was done by him alone. Thus, the presence of the appellants at the place of occurrence is not established/proved by the prosecution in any manner whatsoever; none of the alleged eye-witnesses of the case have testified to have seen the appellants at the place of occurrence; there is no active participation or commission of any blatant act which manifests common intention by the appellants; and the false allegations, as levelled in the F.I.R., are not corroborated by any evidence brought on record. Thus, the trial Court has lost sight of the fact in not considering the aforesaid aspect of the matter while convicting the appellants under Section 302/34 I.P.C. by means of the impugned order.

- c) Highlighting the report of the post-mortem, testimonies of P.W.4-Dr. Prabhu Nath, who conducted the post-mortem of deceased Krishna Kumar Gupta as well as testimony of P.W.12-Anwar Jamal, who submitted the forensic science laboratory report, learned Counsel has submitted that P.W.4, in his testimonies, has specifically stated that the deceased died as a result of firearm injuries, however, no pellet or bullet was recovered from the body, which was also not established that the deceased was done to death at the hands of the accused persons. However, metallic pellet said to have been recovered from the body of the deceased Kapil Gupta (marked as R-1), however, the same was not used to

ascertain if it had been fired from the same gun shown to have been recovered from appellant-Vijay Prakash Sharma.

- d) The recovery of the alleged weapons from the appellant-Vijay Prakash Sharma is not reliable as the same has not been made in compliance of the Criminal Procedure Code and in absence of any independent eye-witness. Thus, the recovery of the alleged weapon from the appellant-Vijay Prakash Sharma cannot be said to be free from any suspicion of doubts.
- e) The investigation of the present case has been conducted in a most arbitrary and callous manner, which is illustrated from the fact that none of the police personnel, testifying the prosecution witnesses, has provided any explanation as to who provided the Test Cartridges-TC in order to conduct the Ballistic Examination of the alleged weapon. Moreso, no gun shot residue examination has been conducted so as to suggest that the appellant Vijay Prakash Sharma fired at the deceased person. Furthermore, no noting as to the presence of any gun-powder residue or charring of clothes of the deceased persons has been made which further goes on to show the cavalier manner in the present case was investigated. According to the learned Counsel, in absence of any finger print analysis, it cannot be conclusively said that the appellant Dheeraj Sharma even held the alleged weapon much less bringing it to his father appellant Vijay Prakash Sharma. It has been stated that the prosecution's case is that deceased Kapil Gupta allegedly caught hold of the hairs of Dheeraj Sharma, however, there is no evidence in order to corroborate the alleged act which creates a doubt over the presence of the appellant Dheeraj

Sharma at the place of occurrence. Thus, the conviction of the appellants is recorded on the basis of assumptions without material on record to convict the appellants.

- f) So far as the point of sentence is concerned, learned Counsel would urge that even taking the prosecution case on its face value, the offence against the appellants would not come within the ambit of rarest of rare cases, hence the capital sentence awarded to the appellants by the trial Court does not warrant.
- g) *Per contra*, Dr V. K. Singh, learned Government Advocate assisted by Sri Rajdeep Singh, learned A.G.A. representing the State, while supporting the impugned judgment of conviction, has submitted that though the informant P.W.1, P.W.2 and P.W.3, who are eye-witnesses of the incident, had turned hostile, yet their evidence cannot be totally discarded as it is well settled in law that the same can be relied upon by the prosecution as well as by the defence. According to him, the evidence of P.W.1, P.W.2 and P.W.3 clearly proves the first part of the incident and what he has stated in examination-in-chief cannot be disregarded and once that part of the testimony is accepted, their depositions, who are the eye-witnesses of the incident gains acceptance as he has vividly described the incident and the assault. According to him, the minor contradictions and discrepancies do not make their depositions unreliable.
- h) Learned Government Advocate has further stated that the trial Court have expressly affirmed the presence of the appellants at the place of occurrence and their involvement in the occurrence, based on the testimonies of prosecution witnesses. According to him, there is

specific accusation against the appellant Vijay Prakash Sharma of firing upon the deceased, which is supported by the Medical Legal Certificate conducted by Dr. Prabhu Nath (P.W.4) and Dr. Ashok Kumar Yadav (P.W.5), who confirmed the presence of firearm injuries on the persons of the deceased. Appellant Vijay Prakash Sharma along with his licence gun was arrested by P.W.10-SI Harendra Pratap Singh, hence such a recovery is admissible in evidence as an incriminating material against the appellants. Thus the prosecution has established its case beyond reasonable doubt and as such, the trial Court has rightly convicted the appellants.

- i) Learned Government Advocate has further stated that the appellants had killed two innocent persons only on account of enmity, hence the appellants who have committed such a heinous and gruesome crime, are not entitled to any leniency as the incident disturbed the public tranquility in the locality. The trial Court has rightly held the present case to be rarest of rare cases so as to award the death penalty to the accused. Thus, no interference would be warranted in the present case.

### **Discussion & Analysis**

- (26) We have heard learned counsel for the parties and perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statement of the appellants recorded under Section 313, Cr.P.C.; and the impugned judgment.
- (27) The case at hand is one of a very gruesome murder of two persons, namely, Krishna Kumar Gupta and his son Kapil Gupta on 16.04.2005 at around 03:00 p.m. in the first floor of Basant Talkies, Hazratganj, Lucknow. The F.I.R. of the

incident was lodged on the date itself i.e. on 16.04.2005 at 04:25 p.m. by P.W.1-Uday Swaroop Bhardwaj.

- (28) Before we proceed further, it would be apposite to remind ourselves that this is a case where eye-witnesses, namely, P.W.1-Uday Swaroop Bhardwaj, who is informant of the case, his friend P.W.2-Rajeev Dixit and his watchman P.W.3-Bharat, did not support the prosecution version of murder of two persons, namely, Krishna Kumar Gupta and his son Kapil Gupta and all of them turned hostile. Prosecution seeks to bring home the charge levelled on the appellants by relying on certain circumstances. No doubt the conviction can be based on circumstantial evidence inspite of hostility of eye-witnesses, provided such circumstantial evidence stood the well-settled test reiterated by the Apex Court by a catena of pronouncements time and again for sustaining conviction of accused. In this connection, we may refer the case of **Paramjeet Singh @ Pamma Vs State of Uttrakhand** : (2010) 10 SCC 439, wherein all the seven eyewitnesses have turned hostile, it was observed by the Apex Court that the case is to be decided keeping in mind that as all the eye-witnesses turned hostile, it remained a case of circumstantial evidence.
- (29) It would be pertinent to mention that even the evidence of a hostile witness is not washed off from consideration and by now it is settled principle of law, that such part of the evidence of a hostile witness, which is found to be credible, could be taken into consideration and it is not necessary to discard the entire evidence. Reference in this respect could be made to the judgment of the Apex Court in the case of **Bhajju v. State of M.P.** : (2012) 4 SCC 327, which reads thus:-

*"36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution*



*version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party."*

- (30) Similarly in the case of **Raja and others Vs. State of Karnataka**: (2016) 10 SCC 506, the Apex Court has held that the evidence of a hostile witness in all eventualities ought not stand effaced altogether. It was held that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record. In this connection reference may be made to case of **State of Rajasthan v. Bhawani & Anr.** : (2003) 7 SCC 291), **Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P.** : (2006) 2 SCC 450, **Mahesh v. State of Maharashtra** : (2008) 13 SCC 271, **Rajendra & Anr. v. State of Uttar Pradesh** : (2009) 13 SCC 480, **Koli Lakhman Bhai Chanabhai vs. State of Gujarat** : (1999) 8 SCC 624, judgment and order dated **26.11.2021**, **Hari & Anr. v. The State of U.P.** and a recent case titled as **Sudru Vs. State of Chattisgarh** : 2019 (8) SCC 333.

- (31) We may also gainfully refer the case **State of Gujarat v. Anirudh Singh** : (1997) 6 SCC 514, wherein the Apex Court observed as under :-

*"Every criminal trial is a voyage in quest of truth for public justice to punish the guilty and restore peace, stability and order in the society. Every citizen who has knowledge of the commission of cognizable offence has a duty to lay information before the police and cooperate with the investigating officer who is enjoined to collect the evidence and if necessary summon the witnesses to give evidence.*

*He is further enjoined to adopt scientific and all fair means to unearth the real offender, lay the charge-sheet before the court competent to take cognizance of the offence. The charge-sheet needs to contain the facts constituting the offence/s charged. The accused is entitled to a fair trial. Every citizen who assists the investigation is further duty-bound to appear before the Court of Session or competent criminal court, tender his ocular evidence as a dutiful and truthful citizen to unfold the prosecution case as given in his statement. Any betrayal in that behalf is a step to destabilise social peace, order and progress."*

(32) Keeping the above stated settled position in view, in the instant case as the eye-witnesses have turned hostile thus, it is to be considered whether evidence on record establishes the involvement of appellants in murder of Krishna Kumar Gupta and Kapil Gupta at the touchstone of circumstantial evidence. It is well-settled that conviction can be based on circumstantial evidence alone but for that prosecution must establish chain of circumstances, which consistently points to the accused and accused alone and is inconsistent with their innocence. It is further essential for the prosecution to cogently and firmly establish the circumstances from which inference of guilt of accused is to be drawn. These circumstances then have to be taken into consideration cumulatively. They must be complete to conclude that within all human probability, accused and none else have committed the offence.

(33) In case of **Hanurnant v. The State of Madhya Pradesh**, [1952] 3 SCR 1091 the Apex Court laid down fundamental and basic principles for appreciating the circumstantial evidence. The Hon'ble Supreme Court observed:-

*"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be*

*consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."*

- (34) In a landmark judgment of Supreme Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra**, AIR 1984 SC 1622, Hon'ble Supreme Court held as under:-

*"152. 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 Sahebaro Bobade V State of Maharashtra 1973 CriLJ1783 where the following observations were made:*

*Certainly, it is 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.*

*153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence".*

- (35) In **Joseph vs. State of Kerala** : (2000) 5 SCC 197, the Apex Court has explained under what circumstances conviction can be based purely on circumstantial evidence. It observed:-

*"16. It is often said that though witnesses may lie, circumstances will not, but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by the peculiar facts and circumstances of each case. The whole effort and endeavor in the case should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the accused."*

- (36) The similar principle was reiterated in **State of Rajasthan v. Kashi Ram** : (2006) 12 SCC 254, **Ganesh Lal v. State of Rajasthan** : (2002) 1 SCC 731, **State of Maharashtra v. Suresh** :(2000) 1 SCC 471 and **State of Tamil Nadu v. Rajendran** : (1999) 8 SCC 679, **Padala Veera Reddy v. State of Andhra Pradesh**, (AIR 1990 SC 79), **Vijay Shankar Vs. State of Haryana**:(2015) 12 SCC 644, **Raja @ Rajinder Vs.**

**State of Haryana : (2015) 11 SCC 43 and State of Himachal Pradesh Vs. Raj Kumar : (2018) 2 SCC 69.**

- (37) Bearing in mind the aforesaid legal principles, we would have to examine — (i) whether the circumstances relied by the prosecution have been proved beyond reasonable doubt; (ii) whether those circumstances are of a definite tendency unerringly pointing towards the guilt of the accused; (iii) whether those circumstances taken cumulatively form a chain so far complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused; (iv) whether they are consistent only with the hypothesis of the accused being guilty; and (v) whether they exclude every possible hypothesis except the one to be proved.
- (38) Having enumerated the incriminating circumstances relied by the prosecution, we shall now examine — (a) whether the above-mentioned circumstances have been proved beyond reasonable doubt; and (b) if so, whether they, individually or cumulatively, unerringly point towards the guilt of the two accused, or any one of the two accused, and rule out all other hypothesis except the one to be proved.
- (39) Insofar as the construction of the shops situated in the first floor of the Basant Cinema by the deceased Krishna Kumar Gupta through contractor/architect P.W.1 is concerned, the same has been proved by the testimony of P.W.1. Nothing material could come out from his cross-examination nor any such suggestion has been given to them as may cast a doubt on his deposition in respect thereof. P.W.1 has specifically stated in his examination-in-chief that in 2001, he had entered into a registered agreement with Krishna Kumar Gupta and his co-owner for construction of shops on the land which was

purchased by Krishna Kumar Gupta from Kuber Finance Company through registered sale deed. P.W.1 has also stated that he knew the appellant Vijay Sharma, who runs a security agency on the first floor left to the stairs. Informant (P.W.1) had alleged in F.I.R. that during construction, convict/appellant Vijay Sharma often used to come and threatened Krishna Kumar Gupta (deceased) that the place of construction of shops belongs to Kuber Finance Company upon which Rs.17,00,000/- of him was outstanding and in lieu thereof, he (deceased Krishna Kumar Gupta) would have to give three shops to him (convict/appellant Vijay Sharma). On this matter, Shri Krishna Kumar Gupta (deceased) used to say that he had bought this place, therefore, he (convict/appellant Vijay Sharma) did not have any right on it. Informant P.W.1 has further alleged in the F.I.R. that on 16.04.2005, around 3:00 p.m., convict/appellant Vijay Sharma and his son Dheeraj Sharma (convict/appellant) came and told to Krishna Kumar Gupta (deceased) that Rs.17,00,000/- was outstanding against Kuber Finance; they (convicts/ appellants) had talked to Kuber Finance; and therefore, he (deceased Krishna Kumar Gupta) would have to give three shops to them (convicts/appellants). On this, Krishna Kumar Gupta (deceased) told them (convicts/ appellants) that they did not have any right on it. On this matter, the discussion among them started increasing and then convict/appellant Dheeraj Sharma (son of convict/appellant Vijay Sharma) said that these people would not accept this and by saying this, convict/appellant Dheeraj Sharma ran and picked up a double-barreled gun from his office and gave the gun to his father Vijay Sharma (convict/appellant), saying to finish their work today and then they would be able to get shops. Thereafter, Vijay Sharma (convict/appellant) shot with gun on the chest of Shri Krishna Kumar Gupta (deceased), who was sitting on a chair, as a consequence of which, he (deceased Krishna Kumar Gupta)

remained sitting on the chair. Seeing this, Kapil (deceased) got into a tussle with Vijay Sharma (convict/appellant) and grabbed his hair. Thereafter, Vijay Sharma (convict/ appellant) stuck Kapil (deceased) and shot in his chest, as a consequence of which, Kapil (deceased) got injured and fell there.

- (40) There was no dispute to the fact that the deadbodies of Krishna Kumar Gupta and his son Kapil Gupta were found from the gallery situated in the first floor of the Basant Cinema Talkies, Hazratganj on 16.04.2005.
- (41) All the aforesaid evidence establishes the fact that there was a dispute of shop between the appellant Vijay Sharma and deceased Krishna Kumar Gupta vis-a-vis appellant Vijay Sharma demanded three shops out of total constructed shops from deceased Krishna Kumar Gupta on the pretext that Rs.17,00,000/- was outstanding with Kuber Finance and land on which the Krishna Kumar Gupta constructed the said shops was purchased by him from Kuber Finance, therefore, in lieu of Rs.17,00,000/-, three shops out of total constructed shops be handed over to him, which, as per P.W.1, denied.
- (42) Apart from the above, as regards the death of Krishna Kumar Gupta and his son Kapil Gupta being homicidal and a consequence of multiple injuries caused by fire arm, no serious challenge is there to the findings returned by the trial Court. Hence we accept the finding that the death was homicidal and a consequence of injuries caused by use of fire arm. Likewise, there is no challenge to the finding that blood etc. was collected from the place of occurrence i.e. first floor of the Basant Cinema thereby confirming that murder took place there.
- (43) We would first like to take up the statement of P.W.1-Uday Swaroop Bhardwaj, who is the eye-witness and informant of

the case and lodged the written report at police station Hazratganj, district Lucknow, on the basis of which F.I.R. was lodged. His evidence shows as under :-

“He was working as an architect builder since 1984. In 2001, he had entered into a registered agreement with Krishna Kumar Gupta (deceased) and his co-owner, by which he took contract for renovation of office as per the layout plan and he would get 40% of the entire share and 60% of the share would get Krishna Kumar Gupta (deceased) and others. The land, which was taken to construct shops and office, was belonging to Kuber Finance and its registration was done by Krishna Kumar Gupta (deceased). There was no office next to his office. He knew Vijay Sharma (convict/appellant), who runs a security agency on the first floor left to the stairs. His office was also on the under constructed first floor. The incident was of 16.04.2005. On that day, he was talking with a client in his office at Naza Building, wherein Dr. C.P. Awasthi, Bina Joshi and other staff were sitting. His clerk Bharat (P.W.3), who looked after the work of his site of Basant Cinema, came and told him that Krishna Kumar Gupta has come to the site and is calling him, however, he became late as he was talking to his client, then his clerk Bharat (P.W.3) again came and told him that Krishna Kumar Gupta (deceased) said that ‘whether he is coming or he should go’, upon which he immediately left his office by saying to Bina Joshi to talk with the client, he would return within fifteen minutes. He did not come back to his office and he reached home at around 11:00-11:30 p.m. He did not remember at what time they were sitting in gallery. In the gallery, he, Anil Gupta (deceased), Rajeev Dixit (P.W.2) were sitting. He called a man and ordered tea. No one else came there in front of him. Accused Vijay Sharma did not come in his presence there. He did not see Vijay Sharma (convict/appellant) the shot being fired. He did not sustain any injury in the incident. After the incident, when he came there, the police had already arrived, however, he could not tell whether the deceased were alive or dead at that time or where was the blood. He heard the sound of firing. He could not tell the number of shots of fire. After hearing the sound of firing, he informed



his officials and his friend Gustad through mobile. He did not see what the police did with the deadbodies. He tried to inform the police but the number was not available. His friend Rajeev Dixit informed by dialing 100 number to police. He scribed the report on his own handwriting on the dictation of the police and submitted to police station. He proved the written report (Paper No.A6/1-2) (Ext. Ka.1). The investigating officer had interrogated him. Neither he had told the Inspector that he had seen the incident with his own eyes nor told him the name of the accused.”

- (44) On the aforesaid testimonies of P.W.1, the trial Court had declared P.W.1 hostile, however, the learned trial Court permitted the Public Prosecutor to cross-examine P.W.1, who, in his cross-examination, had denied that he made a statement to the Investigating Officer that Dheeraj Sharma (convict/appellant) threatened to shoot the deceased and Vijay Sharma (convict/appellant) had shot in the chest. He also denied that he made a statement to the Investigating Officer that Vijay Sharma (convict/appellant) also fired upon him with intention to kill him and he hid. He denied that he saw the whole incident and on account of fear, he could not tell the correct facts. He also denied that he gave false statement on account of association with the accused. He further deposed that after taking tea, he went along with Rajeev Dixit (P.W.2) to underconstructed site situated ahead at the turn. He was busy in underconstructed office. After around 20-25 minutes, he heard a lot of noise from inside the office. When he reached there again at the noise, many people were gathered there. There were about 10-15 people. An office in the name of P.T.I. was also in front of the place of occurrence, upon which journalist also came to the spot. He did not see Vijay Prakash Sharma (convict/appellant) at the place of occurrence. The police forcefully brought him and his Clerk (P.W.2) in Jeep to the police station Hazratganj, where the police kept him till 11:30 p.m. and all the senior

police officers had come to the police station. He was forced to write a report on the incident against Vijay Prakash Sharma as instructed by some Inspector at night. Vijay Prakash Sharma was also caught in the evening and brought to the police station. P.W.1 has also stated that the police told him that the said Vijay Sharma has confessed to the crime, hence a report will have to be filed against him. Vijay Prakash Sharma was empty hand in front of him and he did not have a gun in his hand. The family members of the deceased Krishna Kumar Gupta had come to the police station and refused to file an F.I.R., however, he, out of compulsion, pressure as well as fear from the police, filed the written report against Vijay Prakash Sharma and his son.

- (45) P.W.2-Rajeev Dixit, who has been examined as eye-witness, has stated in his examination-in-chief before the trial Court that on 16.04.2005, he was sitting with P.W.1-Uday Swaroop Bhardwaj in his office at Naza Market, Hazratganj, Lucknow, wherein his watchman Bharat (P.W. 3) came and told Uday Swaroop Bhardwaj (P.W.1) that Vijay Kumar Gupta (deceased) is calling him in Basant Talkies, on which place office of Uday Swaroop Bharwaj was constructed. Thereupon, Uday Swaroop Bhardwaj (P.W.1) asked him to come with him to show his office. Thereafter, he went alongwith Uday Swaroop Bhardwaj (P.W.1) to his underconstructed office at Basant Talkies and when he reached there at around 01:30 p.m., 2-3 peoples were sitting there and the construction work was going on in the shops. While they were looking the office of P.W.1, they (P.W.1 and P.W.2) heard the sound of firecrackers, upon which they looked down and saw that the public was looking upward. Thereafter, they (P.W.1 and P.W.2) came out into the gallery to see from where the sound came from and when they reached in the gallery, they saw the crowd of 10-12 people gathered there and two people had been shot. Immediately thereafter, he dialled

100 number and informed the police about the firing and then in the stampede, he also came out. P.W.2 has also stated that he did not know Vijay Sharma (deceased) nor he saw the killing of Vijay Sharma. Therafter, he went home.

- (46) Based on the aforesaid statement of P.W.2, he was declared hostile and the trial Court permitted the learned Additional Government Counsel to cross-examine him. In his cross-examination, P.W.2 has deposed that the Inspector did not take any statement from him. He denied that he gave statement to the effect that he was present at the place of incident and Vijay Sharma (convict/appellant) had a tiff of words with K.K. Gupta (deceased) and during the same, Vijay Sharma (convict/appellant) may have shot K.K. Gupta (deceased). He did not see anyone fighting at the spot. He was in the office of Uday Swaroop Bhardwaj (P.W.1). He did not see that anyone had rushed to kill Uday Swaroop Bhardwaj (P.W.1). He denied that he has given false testimony because he has been in association with the accused. He also denied that he gave false statement due to pressure of the accused.
- (47) P.W.2 has further deposed in his cross-examination before the trial Court that neither he knew nor recognized Vijay Prakash Sharma and Dheeraj Sharma (appellants) present in Court. He stated that the day when he heard the sound like firecrackers and two persons were shot, Vijay Sharma and Dheeraj Sharma, present in the Court, were not present there nor he saw them. He left the spot before the police arrived. When he heard the sound of firecrackers, 20-25 people were already present in the office. He neither saw nor heard what were talking and what was happening inside the office. All of them on hearing the sound of firecrackers and saw two peoples were shot, a stampede broke out and everyone started running helter skelter.

- (48) P.W.2 was re-examined and in his re-examination, he stated that he did not remember the date, month and day of the incident. He was doing the business of Hospital equipments. His father was a retired engineer. Uday Swaroop Bhardwaj (P.W.1) used to work as builder. Uday Swaroop Bhardwaj used to work under his father when he was working as the Director of Agriculture University, on account of which, he also knew Uday Swaroop Bhardwaj (P.W.1). The office of Uday Swaroop Bhardwaj (P.W.1) was at Naza Market and his second office was at the building of Basant Talkies. He did not know Krishna Kumar Gupta (deceased). On the date of the incident, he went to the office of Uday Swaroop Bhardwaj (P.W.1). He denied to have knowledge that Krishna Kumar Gupta was constructing shops and office in the first floor of Basant Cinema. He denied to have knowledge that dispute regarding construction of shops might have taken place between Uday Swaroop Bhardwaj (P.W.1) and Krishna Kumar Gupta (deceased). He did not know Vijay Sharma (appellant) nor he has knowledge that Vijay Sharma was running V.I.P. Security Agency. He further stated that Uday Swaroop Bhardwaj never told him that Vijay Sharma (deceased) told him that he owed Rs.17,00,000/- to Kuber Finance and that he puts pressure on K.K. Gupta (deceased) to give him 2-3 shops. He accepted that at around 02:00 p.m., Uday Swaroop Bhardwaj had reached the office. He denied that he, Krishna Kumar Gupta (deceased) and his son Kapil Gupta (deceased) and Uday Swaroop Bhardwaj (P.W.1) were sitting on chair. He was sitting in the office of Uday Swaroop Bhardwaj (P.W.1). He further stated that no such thing happened in front of him that Vijay Sharma (appellant) came at the spot and told K.K. Gupta (deceased) that he (appellant Vijay Sharma) owed Rs.17,00,000/- to Kuber Finance and given him 2-3 shops. He denied that above thing happened in front of him; Krishna Kumar Gupta (deceased) did not tell Vijay

Sharma (appellant) in front of him that he bought the shops and he (Vijay Sharma) has no right on it. On seeing the statements so recorded under Section 161 Cr.P.C. by the Inspector, P.W.2 denied that he never gave such type of statements so recorded by the Inspector. P.W.2 has stated that when there was a stampede and people started running helter-skelter, he dialled '100 number' in public interest. There was chaos at the place where the incident took place and people were running here and there, therefore, he dialled '100 number' in the public interest. He stated that it is true that he came to know about the death of two people at the place of incident. He denied that he was present at the place of occurrence and saw Vijay Sharma (appellant) firing at Krishna Kumar Gupta (deceased) and his son Kapil Gupta (deceased). He also denied that on the instigation of Dheeraj Sharma (appellant), Vijay Sharma (appellant) shot Krishna Kumar Gupta and Kapil Gupta (deceased). He also denied that he gave false statement due to pressure of Vijay Sharma and his son Dheeraj Sharma (deceased).

- (49) In cross-examination, P.W.2 has stated that on 09.01.2007, he gave statement in the Court and on 19.01.2018, his second statement was recorded in the Court. In both the statements, he deposed that he did not see the incident. He stated that stampede took place on the first floor of Basant Cinema. He came out of the shop after hearing the sound of firecrackers and came to know that shots have been fired. He did not see anyone on injured condition at the place of occurrence. When he reached at the first floor, there was a crowd of 200-250 people. He did not see anyone there except the crowd. There were many labourers in the crowd armed with spades etc. He also saw fire arms in the hands of some people. At the spot, accused were not present. He knew the accused persons, however, he did not

know accused Vijay Sharma. He deposed that he gave statement without any pressure.

- (50) P.W.3-Bharat, who is also examined as eye-witness, has stated before the trial Court in his examination-in-chief that he knew Uday Swaroop Bhardwaj (P.W.1), who is an Engineer. His office is near Basant Cinema Talkies. He took the contract for constructing shops, where he used to work as Gateman. About two years ago, it must have been 3-3:30 p.m., Gupta (deceased) and his son came to the site and told him to call Bhardwaj (P.W.1), upon which he called Bhardwaj (P.W.1) from the office. Thereafter, Bhardwaj (P.W.1) sent him to bring tea. The shop (security office) of Vijay Sharma (appellant) was on the second part of the site. Gupta and his son (deceased) and Bhardwaj (P.W.1) started having tea and he went to the second floor to see the work of the the labourers. There was no conversation between Vijay Sharma and K.K. Gupta in front of him. Vijay Sharma did not shot K.K. Gupta and his son (deceased) in front of him. There was no fight between them in front of him.
- (51) Based on the aforesaid statement, P.W.3 was also declared hostile, however, learned Additional District Government Counsel had requested and on his request, he was permitted to cross-examine this witness. P.W.3, in his cross-examination, has stated that after the incident, Inspector caught him and took him to the police station in his jeep. He stated that he could not tell the reason as to why the Inspector wrote in his statement about Vijay Sharma shot Krishna Kumar Gupta and his son. He denied to give such a statement to the Inspector. He ran away out of fear from there. He did not know whether Vijay Sharma and his son were caught or not. He denied that on account of pressure and fear of the accused, he did not tell the correct facts.

- (52) Apparently, P.W.9-Shyamakant Tripathi, who was Investigating Officer of the case, had presented P.W.1, P.W.2 and P.W.3 as eye-witnesses of the incident, however, they were declared hostile as all of them did not support the case of the prosecution, however, even then the prosecution has cross-examined them on being granted permission by the trial Court. Now, the question for determination whether the testimonies of P.W.1, P.W.2 and P.W.3 could be discarded in toto as they were declared hostile.
- (53) Hon'ble Supreme Court in a catena of judgments has held that the evidence of a hostile witness is not to be rejected in toto. Keeping in view this position of law, we examine the evidence on record available on record. P.W.1-Uday Swaroop Bhardwaj in his deposition has stated that he is doing the work of Architect Builder since 1984. In the year 2001, he had entered into a registered agreement with Krishna Kumar Gupta (deceased) and his co-owner. He had taken contract for beautification and renovation. As per the said agreement, the layout of the office etc. had to be prepared out of which he was to get 40% of the entire share and 60% was to be given to Krishna Kumar Gupta (deceased) and others. This land which was used to build a shop and office belonged to Kuber Finance and its registration was done by Krishna Kumar Gupta (deceased). P.W.1 has stated that he knew Vijay Sharma (appellant). Vijay Sharma (Sharma) ran a Security Agency and his agency was on the first floor, left to the stairs so as him. The incident took place on 16.04.2005. On that day, he was talking to a client in his office at Naza Building, where his Clerk Bharat (P.W.3), who looked after the work of his Basant Cinema Side, came and told him that K.K. Gupta (deceased) has come to the site and has called him. As he got late in talking to his client so his watchman Bharat (P.W.3) again came

and told that he (deceased Krishna Kumar Gupta) wanted to know whether he (P.W.1) came or he should go. He immediately left from there and reached the gallery. He did not remember at what time he was sitting in the gallery. However, he (P.W.1), Kapil Gupta (deceased) and Rajeev Dixit (P.W.2) were sitting. The statement of P.W.1 clearly establishes the fact that he was present at the place of occurrence.

- (54) PW-2 Rajeev Dixit stated in his examination-in-chief that on 16.04.2005, he was sitting with Bhardwaj (PW-1) in his office at Naza Market, Hazratganj, Lucknow when his watchman Bharat (P.W.3) came to call him and told him that Gupta (deceased) called him (P.W.1) in office of Basant Talkies. An office of Bhardwaj (P.W.1) was being built in Basant Talkies. He (P.W.1) told him (P.W.2) that let me show his office to him. He went with him (P.W.1) to the office of Basant Talkies. When he went there, 2-3 people were sitting there. He reached there at around 1:30 p.m. Construction work was going on in the building. Shops were being built. He showed him the shops and then took him to see his office. When they were watching the office, at the same time, the sound of firecrackers was heard. When they looked down, the public was looking upward, then they also came out into the gallery to see where the sound had come from and then in the gallery they saw that there was a crowd of 10-12 people there. When he went there, then he saw that two people were shot. P.W.2, in his cross-examination, has admitted that it is true that he had reached Bhardwaj's office at around 2:00 p.m. This witness further stated that he left the place of occurrence before the police arrived. It is clear from the statement of P.W.2 that he was present at the place of occurrence at the time of incident.

- (55) P.W.3-Bharat has stated in his statement that he knows Uday Swaroop Bhardwaj (PW-1). He is an engineer and his office is



near Basant Cinema Talkies. He had taken the contract to build shops and he used to work as a Watchman in the same. The incident happened about two years ago (witness statement recorded on 01.02.2007). It must have been 3:30 in the afternoon. Krishna Kumar Gupta and his son Kapil Gupta (both deceased) had come to the site. He asked him to call Bhardwaj (P.W.1). He called him from the office and brought him. Vijay Sharma's shop (security office) was in other side of the site. Gupta, his son and Bhardwaj started drinking tea and he went to the second floor to see the work of the labourers. According to Chik First Information Report (Exhibit Ka-4), the time of the incident was around 3:00 p.m. and it is clear from the statement of P.W.3 that he was present at the spot at the time of the alleged incident. It is clear from the statement of this witness also that Gupta (deceased) had come to the site with his son (deceased) at around 3:30 in the afternoon.

- (56) From close scrutiny of the testimonies of P.W.1, P.W.2 and P.W.3, it is established that all of them have proved their presence at the place of occurrence i.e. first floor of Basant Cinema Talkies, on the date of incident i.e. 16.04.2005.
- (57) P.W.1, P.W.2 and P.W.3, who are eye-witnesses of the incident, stated before the Court that neither they saw the appellants at the place of occurrence nor they saw them firing shooting. P.W.9-Shyamakant Tripathi, who is the Investigating Officer of the case, has stated before the trial Court that aforesaid P.W.1, P.W.2 and P.W.3 are the eye-witnesses of the incident. Thus, it is quite apparent that the presence of the appellant in the crime scene and the murder was not established by direct evidence. However, in this case, father and son were shot dead in broad daylight at around 03:00 p.m. in Basant Talkies, Hazratganj, a prominent place in Lucknow and the appellants have been named in the F.I.R., but before the trial Court, the informant

though was examined as P.W.1 but he has not named the appellants in committing the murder. In such a case, the point of determination before us whether such circumstances exist from which only one conclusion can be drawn that the deceased Krishna Kumar Gupta and his son Kapil Gupta have been murdered by the appellants and none else.

- (58) Informant P.W.1-Uday Swaroop Bhardwaj has stated before the trial Court that he heard the sound of fire, whereas P.W.2-Rajeev Dixit has stated before the trial Court that he heard the sound of firecrackers at the place of incident. P.W.2 has further stated that when he came out from the gallery to ascertain from where the sound came out, then he saw that 10-12 persons were gathered and when he reached there, then, he saw that two persons were shot. P.W.2 has also stated that he also dialled '100 number' to police. This establishes the fact that after the incident, the police, on the information of P.W.2, reached at the place of incident. This establishes the fact that P.W.2 was present at the time when the police reached at the place of occurrence and the version of P.W.2 to the effect that the police reached at the place of occurrence prior to him, is not trustworthy.
- (59) P.W.2, in his cross-examination, has also stated that he had seen firearms in the hands of some persons at the place of incident. P.W.1 has stated that he knew the appellant Vijay Sharma, who runs security agency and his agency was on first floor on the left. Thus, presumption can safely be drawn that since appellant Vijay Sharma was running a security agency, he must have had a fire arm and that fire arm (double barrel gun) must have also been in his office located at the place of occurrence. P.W.10-S.I. Harendra Pratap Singh, who arrested the appellant Vijay Sharma with D.B.B.L. Gun and cartridges, has stated before the

trial Court on 16.04.2005 (the day of the incident) at about 04:10 p.m., he recovered liscensed double barrel gun from the possession of appellant Vijay Sharma near the showroom of Gandhi Ashram. The evidence on record discloses that co-appellant Dheeraj Sharma, who is the son of appellant Vijay Sharma, was empty handed at the place of occurrence and during arguments between the appellant Vijay Sharma and deceased Krishna Kumar Gupta, appellant Dheeraj Sharma went to his security office, which was nearby to the place of occurrence, and brought double barrel gun and handed it over to his father Vijay Sharma, by which deceased was shot dead by the appellant Vijay Sharma.

- (60) Challenging the recovery point of the aforesaid gun, learned Counsel for the appellants has contended that neither site plan of recovery of weapon was prepared nor there was any independent witness of recovery memo of weapon. This argument of the learned Counsel for the appellants seems to be correct but at the same time, the evidence of P.W.10-S.I. Harendra Pratap Singh establishes the factum of recovery of double barrel gun from the possession of the appellant Vijay Sharma and he narrated the recovery site in his testimony in a clear words. No doubt, not preparing the site plan of recovery of fire arms is one of the irregularlity on the part of the prosecution during the investigation, but that itself cannot be a ground to wash off the entire prosecution case. The law is well settled that the testimony of police personnel should be treated in the same manner as testimony of other witnesses. Moreso, there is no principle of law that without corroboration by independent witnesses, the testimony of police personnel cannot be relied on. The presumption ought to be made that a person acts honestly applies as much in favour of a police personnel as of other persons.

- (61) P.W.9-Shyamakant Tripathi, who is the Investigating Officer of the case, has recovered blood stained tiles, empty tiles, blood stained concrete and empty concrete in the presence of independent witness i.e. P.W.7-Asfaq Ali vide recovery memo Ext. Ka. 6, which has been proved by P.W.7 in the trial Court. Apart from it, P.W.7 has also proved the factum of recovery of a blood stained chair and blood stained cloth affixed on it by the Investigating Officer P.W.9. The Investigating Officer P.W.9 has also recovered four empty cartridges, three plastic tiklies and three wed from the place of occurrence in the presence of P.W.7, which also proved it before the trial Court. P.W.7 has also proved the sealed recovery memo Ext. Ka. 6, 7 and 8. P.W.9 has also proved his signature on the said recovery memo. The chair recovered from the place of occurrence was also produced before the trial Court, which has been identified by P.W.9.
- (62) P.W.12-Anwar Jamal, who is the ballistic expert and examined the articles sent by the police, has stated categorically before the trial Court in cross-examination that in his opinion, out of cartridges sent from the DBBL Gun, one cartridge was found to be fired from one barrel and two cartridges were found to be fired from the other barrel, however, there was no definite opinion regarding the remaining two cartridges whether they would fire or not. The evidence of P.W.12 establishes the fact that out of four cartridges recovered from the place of occurrence, three cartridges were definitely fired from the licensed two barrel gun recovered from the possession of the appellant Vijay Sharma. Apart from it, ballshot, wad and tiklies recovered from the place of occurrence may be dropped from the use of the said double barrel gun because as per the report of ballistic expert Ext. Ka. 20, all these items were part of 12 bore

cartridge. All these circumstances establishes that the contents of F.I.R., the report of ballistic expert Ext. Ka. 20, recovery memo Ext. Ka.8 and the statement of Investigating Officer P.W.9 are corroborated themselves. Thus, it seems that the deceased were killed by firing at the place of occurrence from the double barrel gun recovered from the possession of appellant Vijay Sharma.

- (63) The other significant factor to connect the appellants in the crime is that P.W.4-Dr. Prabhu Nath, who conducted the post-mortem of deceased Krishna Kumar Gupta, has proved the date and time of the death of the deceased Krishna Kumar Gupta and has stated that the deceased Krishna Kumar Gupta died on 16.04.2005 at about 03:00 p.m. on account of fire arm injuries. In cross-examination P.W.4 has stated that dimensions of both the injuries of deceased were the same and these injuries could be attributable to a firearm, whose dimensions are 2 cm. P.W.2 has further stated that blackening and tattooing were found all around on the outer surface of the wounds. His evidence clearly establishes the fact that the deceased were shot from very close range with a 12 bore gun. P.W.5-Dr. Ashok Kumar Yadav, who conducted the post-mortem of deceased Kapil Gupta, has stated that cause of death of Kapil Gupta (deceased) was due to excessive bleeding due to injuries sustained from fire arm before death, which, according to him, was sufficient to cause death. P.W.5, in his cross-examination, has stated that two entries existed on the body of the deceased were caused by firing two times and it could not be caused by one fire.

- (64) Thus, from the testimonies of P.W.4 and P.W.5, it is quite apparent that since the dimensions of the injuries sustained by both the deceased persons is approximately equal, which establishes that both the deceased were shot dead by one

firearm. Blackening and tattooing were present on all around on the outer surface of the wound, which also establishes that he was shot dead from firing close range. As per site plan, it reflects that the accused-appellant Vijay Sharma fired shots from a distance of 8 mts. which corroborates the ante-mortem injuries and also proved the guilt of the accused. Since a wad and piece of metal were found from the left lung of deceased Kapil Gupta, which conclusively established that the deceased was killed by a 12 bore cartridge.

- (65) From the aforesaid, it is established that the testimonies of PW-6 to P.W.11, which are found cogent and credible, can not be doubted on the ground that they are police officials, particularly when there are absolutely no reasons to indicate that why they would depose falsely against the appellants. In view of aforesaid facts it is clear that testimony of these witness is credible and inspires confidence and it can safely be acted upon.
- (66) Here we may consider the case put by the appellants. In their statements recorded under Section 313 Cr.P.C., the appellants had alleged that they are innocent and have been implicated in the case on misunderstanding of the police.
- (67) Considering the entire evidence on record, the version of appellants appears an afterthought and concocted, accordingly said defence version is discarded. Further, the conduct of appellants is quite inculpatory. As per appellants, the deceased were murdered by some unknown miscreants, but if it was so, they offered no satisfactory explanation that why they were trying to fled away with a DBBL gun instead of reporting the matter to police. As stated earlier the story made up by appellants that on misunderstanding of the police, they were implicated in the case were lying scattered, is also found false and concocted. Thus, it is clear that conduct of appellants is

highly incriminating. The recovery of DBBL gun, soon after the incident, from appellant Vijay Prakash and unnatural conduct of him are highly incriminating circumstances against the appellant.

- (68) Applying the ratio of above said pronouncement of Hon'ble Apex in the facts and circumstances of instant case and considering the evidence on record, it clearly emerges that all the incriminating circumstances have been cogently and firmly established and these circumstances are of definite tendency unerringly pointing towards guilt of the appellants. When these circumstances have been taken cumulatively, it forms a complete chain so that there is no escape from the conclusion that within all human probability, the murder of deceased Krishna Kumar Gupta and Kapil Gupta was committed by the appellants and none else. The circumstantial evidence is incapable of explanation of any other hypothesis than that of the guilt of the appellants and is inconsistent with his innocence.
- (69) In view of evidence on record we reach to the conclusion that conviction of appellants is based on evidence and there are no tangible reasons to interfere with the same and we uphold the conviction of the appellants as made out in the impugned judgment.
- (70) We now come to the question of death sentence. It is true that the constitutionality of a death sentence has been upheld by the Hon'ble Supreme Court. It is also true that Section 302 IPC provides for the imposition of a death sentence. But, it is equally true that it also provides for the imposition of imprisonment for life. The mere fact that a death sentence can be awarded does not mean that it has to be awarded. Particularly, when the alternative sentence of life imprisonment is an adequate punishment. One thing, however, is clear that

when there is choice between a death sentence and a sentence of life imprisonment, the latter is the rule and the former is the exception and, if we may say so, a very rare exception.

- (71) Now we proceed to examine the propriety of sentence imposed by the trial Court. The trial Court has awarded death sentence to both the appellants for their conviction under Section 302/34 I.P.C. and a fine of Rs.5,00,000/- has also been imposed on each of them. In default of payment of fine further imprisonment of two years has been awarded to all of them.
- (72) On due consideration of the facts and circumstances of the case, the death sentence awarded by learned trial Court appears excessive in view of the legal position that death sentence should be awarded in 'rarest of rare cases' and the Courts should follow the guidelines as laid down by Hon'ble Supreme Court in a series of judgments. The Apex Court in the landmark case of **Bachan Singh Vs. State of Punjab**, (1980) 2 SCC 684 has laid down the guidelines and the sentencing norms. In case of **Sunil Dutt Sharma Vs. State (Government of NCT of Delhi)** : (2014) 4 SCC 375, the Apex Court has reiterated the law relating to death penalty and has summarized the circumstances under which life imprisonment should be awarded instead of death penalty as follows
- (i) The young age of the accused;
  - (ii) The possibility of reforming and rehabilitating the accused;
  - (iii) The accused had no prior criminal record;
  - (iv) The accused was not likely to be a menace or threat or danger to society or the community;
  - (v) A few other reasons need to be mentioned such as the accused having been acquitted by one of the courts;
  - (vi) The crime was not premeditated;



(vii) The case was one of circumstantial evidence;

(73) Testing the facts of the instant appeal on the touchstone of guidelines as cited above and on consideration of the totality of circumstances, we are of the firm view that the present case does not fall within the category of 'rarest of rare cases' attracting death penalty due to presence of two factors; firstly, the present case, undisputedly is one of the circumstantial evidence and secondly, both the appellants have no prior criminal antecedent. Therefore, it appears expedient in the interest of justice that the extreme punishment of death penalty awarded to the appellants under Section 302/34 I.P.C. be substituted with sentence of imprisonment for life.

(74) In the result :-

**Criminal Appeal Nos. 2504 of 2022 and 2524 of 2022**

Both appeals are **partly allowed**. Though we confirm the conviction of the appellants, **Vijay Sharma and Dheeraj Sharma**, for the offence punishable under Section 302 read with Section 34 I.P.C. awarded vide impugned judgment dated 13.09.2022, however, we reduce their sentence awarded vide impugned 16.09.2022 from death penalty to imprisonment for the whole of the remaining natural life of the appellants, subject, however, to the condition that the appellants would be eligible to any commutation and remissions that may be granted by the Hon'ble President and the Hon'ble Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure for good and sufficient reasons.

**Capital Sentence No. 2 of 2022**

Reference made by the trial Court for confirmation of death sentence of the appellants-Vijay Sharma and Dheeraj Sharma is, decided accordingly with the sentence modified.

(75) Office is directed to transmit the record of the Trial Court and a copy of this judgment be sent to the Court concerned for information and necessary compliance through fax/e-mail forthwith.

**(Ajai Kumar Srivastava-I, J.)      (Attai Rahman Masoodi, J.)**

**Order Date : 27<sup>th</sup> September, 2024**  
lakshman