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Delhi High Court

Case No: Murder Reference Appeal No. 4 of 1975

Chandrika Prasad APPELLANT

Vs

The State RESPONDENT

Date of Decision: Sept. 8, 1975

Citation: (1975) RLR 551

Hon'ble Judges: S.I. Rangarajan, J; R.N. Aggarwal, J

Bench: Division Bench

Advocate: B.B. Lal, O.P. Dutta and I.D. Ahluwalia, for the Appellant;

Judgement

S. Rangarajan, J.

(1) This is a reference made by the Addl, Sessions Judge (Shri N. L. Kakkar) to confirm the sentence of death imposed on the appellant (Chandrika Prasad) who was the first accused for committing the murder of Madhu Khanna. An appeal has also been preferred against the conviction and sentence. The second accused (Naginder Kumar Rastogi), who was charged with having abetted the said offence of murder, was acquitted ; there is no appeal against the said acquittal.

(2) The case for the prosecution is that the appellant was a tenant under Smt. Shakuntala Devi (P.W.1) of one room in house No. 619/GI/B situate in Ram Nagar, Shahdara on a monthly rent of Rs. 35. Public Witness 1, her husband Manak Chand Khanna (P.W.14) and other members of their family including their daughter Madhu Khanna (deceased) lived in a portion of house No. 1401, which had been taken on rent. The family of the deceased consisted of her parents, brother Arun Kumar Khanna (P.W.9) and five other sisters including Suman Khanna (P.W.2) ; one of them, who is married, has been living in Etawah. The deceased and members of her family used to come to house No. 619, one lane away from house No. 1401 (the distance is said to be fifty two yards only), to use one of the two latrines there as well as to dry clothes on the roof of that house.

(3) The appellant, aged 22, was employed as a Signaller in the Railways. The deceased, 19 years old, was studying in B.A. class in a local college. It is alleged that the appellant used to tease the deceased and pass indecent remarks against her. When the deceased complained to her mother about it both Public Witness s. 1 and 14 tried to make the appellant understand and that the should behave properly ; he did not however desist from behaving improperly. At about 6 p.m. on 18-5-72 P. Ws. 1 and 14 went to the house of the appellant and asked him to vacate the house; half an hour thereafter he came to where they resided and threatened ; "Agar Aiynada Makan Khali Karne Ko Kahoge To Achha Nahin Hoga" (if you ask me to vacate the house in future it will not be good for you).

(4) On 19-5-1972 at about 12 noon the deceased and Public Witness 1 went to the house bearing No. 619 for drying the clothes ; Public Witness 1 had gone to the roof for this purpose; the deceased went to the latrine, on the ground floor, when the former heard the voice of the deceased reprimanding the appellant : "Agar Turn Esi Harkate Phir Karoge To Tumhe Chappal Se Maroongi" (if you behave in this way for a second time I would beat you with Chappals). Immediately thereafter Public Witness 1 came to the ground where the deceased was present. The appellant, on seeing Public Witness 1, went inside his room and brought a pistol declaring that he "would not leave them". Meanwhile Suman Khanna (P.W.2), the elder sister of the deceased also came to the spot. The appellant fired on the chest of the deceased. Both Public Witness s. I and 2 raised an alarm. The appellant tried to escape from the main gate with the pistol in his hand but it is alleged he was apprehended at the gate of the house itself by Kailash Chand Gupta (P.W. 7) and Mohinder Pal (P.W. 8), who are residents of the same mohalla. They over-powered the appellant and snatched the pistol from his hand. A telephonic report was given by Public Witness 7 to the Police control room; the record of that report, which was received at the Police control room at 12.20 p.m., is Ex, Public Witness 15/A and was to the effect that a person had tired a shot (at some one) near the "Delhi Rolling Steel", Loni Road, Ram Nagar. A report was made by Public Witness I to the S.I. Police, Shri Hardev Singh (P.W.16), which was dispatched at 1.30 p.m. P.W. 2 telephonically informed her father, who was working in a bank at Connaught Place ; he went to the Shagun Engineering Works at Darya Ganj to fetch his son Arun Kumar and reached the scene at about 1.30 p.m. and learnt about the incident.

(5) The deceased, who was shot at the chest, fell down and died. Her clothes became blood-stained and were found to contain human blood on serological examination.

(6) There can be no doubt on the medical evidence that she had died of the injury caused by a pistol. The Assistant Director Physics, CFSL. C.B.I, cum Asst. Chemical Examiner (P.W. 23) found that the soft tissues and skin, which were taken from the person of the deceased, contained lead on the inner peripheri of the hole in the skin. The Balliatics Expert Dr. O.P. Chugh (P.W. 25) found that the pellets, about 75, which were taken from inside the body of the decease, could have been fired by the pistol, an unlicensed one, which is said to have been recovered from the accused. The wad pieces and lead pellets

were the outcome of a cartridge which was fired from the pistol. The 12 bore firing cartridge (Ex. P. 16) had been fired from the country made pistol (Ex. P.9).

P.WS7 and 8 were among the witnesses for the prosecution who turned hostile.

When Shri Hari Dev (P.W. 20) was hosted at the Police Station Shahdara he received a report (Ex. P. W.I I/A) on 19-5-1972, concerning this incident and he went to the scene of occurrence in a police vehicle along with three Constables including Public Witness 6 (Balwant Singh). He saw Madhu Khanna (deceased) lying in a pool of blood in the courtyard near the staircase and P. Ws. 1 and 2 weeping by her aide The appellant was having the pistol (Ex. P.9), Public Witness s 7 and 8 having been said to have caught hold of the appellant. The bushirt and pant (Exs. P.IO and 11) which the appellant was wearing then were seized. The appellant received minor injuries while he was apprehended and he struggled to escape. He was sen" for medical examination the next day.

(7) When the appellant was questioned u/s 313 Criminal Procedure Code . he admitted that he was a tenant in respect of a room in house No. 619 and that the said house belonged to Smt. Shakuntala Devi (P.W. 1). He admitted that Public Witness 1 was a tenant in house No. 1401, but he denied that she was in possession of another portion in house No. 619. The fact of Public Witness I issuing rent receipts to him was admitted by the appellant. The appellant, however, denied that Public Witness 1 and other members of her family used to visit house No. 619; he also denied having passed any indecent remarks against the deceased or having ever teased her. He claimed to have been in love with the deceased. Public Witness s. 1 and 14 did not go to him for evicting him from the house ; it was not true to say that he had gone to their house to tell them that if they wanted him to vacate it would not be good for them. On 19-5-1972 he had applied for leave the was due for duty that day between 6 a.m. to 2 p.m.) but the same had been refused according to Public Witness 19. He denied the prosecution version that Public Witness I and the deceased came together at about 11.45 a.m. on 19-5-72 to house No. 619. He denied the presence of Public Witness I but he said that the deceased was at his house. He did not fire the pistol on the chest of the deceased. It was the deceased"s brother Arun Kumar (P.W. 9) who fired with the pistol produced in the case but the deceased came between him and Public Witness 9 and was hit by the fire-arm in this manner. Public Witness 2 was not present either. It was not true that Public Witness s. 1 and 2 raised an alarm. He did not try to escape with the pistol, Public Witness s 7 and/or 8 did not apprehend him or catch him with the pistol or snatch the pistol from him. It was when Public Witness 9 tried to escape that Public Witness 1 created a false rumour that the appellant had fired with the pistol. He was only sitting close to the body of the deceased weeping and crying that the girl who would have been his wife but had been murdered by Arun Kumar. He had taken leave on 19-5-1972. The innumerable love letters which had been exchanged between him and the deceased had been destroyed by the police after this incident, when he was sitting in his room on 19-5-1972 the deceased, who was depressed, came to his room at about 11-15 a.m. The incident took

place only in the manner mentioned by him; he had been falsely implicated.

(8) It was vehemently contended by Shri B. B. Lal, learned counsel for the appellant, that by reason of the appellant having been acquitted by the same learned Additional Sessions Judge in sessions trial (No. 48 of 1974) on 19-11-1974 (the impugned Judgment was delivered on 14-2-1975) of a charge u/s 27 of the Arms Act, 1959, the prosecution cannot again seek to prove, in this case, that the appellant was in possession of the said fire-arm by reason of issue estoppel. It seems a pity that in spite of the decision of a Division Bench of this Court (to which one of us, S.Rangarajan, J.. was a party) in Jai Chand Vs. State, , decided on 20-9-1973), no effort is being to club the challan for the main offence (of murder) with the evidence under the Arms Act in order to avoid the inconvenience and difficulties to which detailed reference was made in the said judgment. The procedure adopted by the learned Additional Sessions Judge in this case of trying the case under the Arms Act and pronouncing a judgment much before the trial of the case of murder appears to be beyond comprehension. It was indeed necessary for the learned Additional Sessions Judge to have been mindful of the possible impact of an acquittal in the Arms Act case on the main offence, which is one of murder. But having given our anxious consideration to the arguments for the appellant based on the acquittal in sessions case (No. 48 of 1974) (a certified copy of which has been produced before us by the learned counsel for the appellant and is marked as Ex. C.1 all that can avail the appellant ; by reason of such acquittal, is that the prosecution cannot at the most again seek to prove in the murder trial that Kailash Chand Gupta (P.W.7) had snatched the pistol from the hands of the appellant. This is all the finding that was reached by the learned Additional Sessions Judge (Shri N. L. Kakkar) in paragraph 13 of the said judgment. But this is not of much assistance to the appellant, as our subsequent discussion would show. Public Witness s 7 and 8 who alone were examined in that case had turned hostile even then ; they were declared as hostile in the murder case as well.

(9) A Division Bench of this Court, to which one of us (S. Rangarajan, J.) was a party (State Vs. Ramesh Chand and Others, , decided on 6-8-1973) has pointed out that neither the prosecution nor defense could rely upon the testimony of a hostile witness to any extent. This question has since arisen before the Supreme; Court in Jagir Singh Vs. The State (Delhi), . P. N. Bhagwati, J., who spoke for the Court, pointed out that it is now well settled that when a witness, called by the prosecution, is permitted to be cross-examined on behalf of the prosecution the result of it is to discredit the testimony of that witness altogether and not merely to get rid of a part of this testimony.

(10) Shri B. B. Lal, however, further argued that by reason of the above said acquittal of the appellant in the Arms Act case it will not be permissible for the prosecution to prove against the appellant in the murder trial that he had shot the deceased with the pistol. He relied upon the decision of the Supreme Court in Pritam Singh and Another Vs. The State of Punjab, which held :hat an acquittal of the accused in trial u/s 19(f) of the old Arms Act (corresponding to present section 27) was tantamount to a finding that the prosecution had failed to establish the possession of a certain revolver by the accused as alleged and

the fact of such possession could not be proved against the same accused in a subsequent proceeding between the State and himself, in a charge of murder, on the principle of issue estoppel. It would be necessary to notice the facts of that case, in so far as they are material for our present purpose : one of the accused, Pritam Singh Lohara, was alleged to have removed the license ed revolver in question from the person of one of the deceased in that case, namely, Chanan Singh Orara after his death. Pritam Singh Lohara had been acquitted in the prosecution under the Arms Act. In the later trial for murder an inference was sought to be raised against Pritam Singh Lohara that by reason of his being in possession of the licensed revolver of the deceased a presumption that he was connected with the murder should be drawn. It was in this context that Bhagwati, J., who spoke for the Court, pointed out, on page 422, that the alleged recovery of the pistol from the accused could not be pressed into service.

IN a later case before the Supreme Court, Gurcharan Singh Vs. State of Punjab, , it has to deal with a situation of acquittal under that Arms Act by a judgment pronounced on the same date as the conviction in the murder case. An observation was made Gajendragadkar, J. (as he then was), speaking for the Court, that if the order of acquittal under the Arms Act had been made before the judgment in the principal (murder) case then the prosecution would not be able to contend that the concerned accused was in illegal possession of the fire-arm in respect of which an acquittal had been made under the Arms Act case. Though the trial Judge had come to inconsistent findings in the two cases it was seen prima fade that the judgment in the murder case had been delivered earlier and could not, Therefore, affect the acquittal in the Arms Act case. The finding in the murder case, about the accused using the fire-arm was confirmed by the Supreme Court.

IN a still later case, Manipur Administration Vs. Thokchom, Bira Singh, , Ayyangar, J., who spoke for the Supreme Court (Gajendragadkar, C. J. was also a party to that bench) discussed the question, whether the authority of Pritam Singh had been shaken by reason of the observation of Lord MacDormott in Sambasivam v. Public Prosecutor, Federation of Malaya 1950 A.C. 458 (7), which was followed by Bhagwati, J. in Pritam Singh, having been dissented from in Ry. Connelly (1963) (3) All E.R. 510(8) and also by reason of the above-said decision in Gurcharan Singh. Ayyangar, J. explained the above decisions and held, that Pritam Singh was rightly decided.

(11) It has been felt by Cross that the principle of issue-estoppel is only gradually being developed by the courts ; it is not surprising, Therefore, some "uncertainty" is "discernible" in the leading judgments which speak of "general rules" (see Cross on Evidence, Fourth Edition, 1974 pp. 286-294 and 298-299). Dealing general with estoppels in the English Law Cross classifies them into those by record, deed and conduct. Among those by record, there may be "estoppel perrem judicatum" which in turn is known either as cause of action estoppel or estoppel by record inter parses ; the latter is known as issue-estoppel, Lord Denning, M. R. in Fidelit as Shipping Co., Ltd. v. V/o Exportchleb 1966 1 Q.B. 630 (9) regarded issue estoppel as an extension of the first: "Within one

cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again". The uncertainty in this area arises, however, by the statement of the law by Diplock L. J. in Mills v. Cooper 1967 2 Aer 100 (10) to the following effect :

"A party To civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defense, if the same assertion was an essential element in his previous cause of action or defense in previous civil proceedings between the same parties or the predecessors in title, and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion by that party in the previous proceedings has since become available to him."

LORD Reid and Lord Upjohn criticised the distinction made by Diplock L.J. in an earlier case Thoday v. Thoday (1964 page 181 at p. 198) between issue-estoppel and fact estoppel. But these distinctions and views concerning them may not be necessary to pursue in the context of this case. Reference to these aspects has been made in order to help comprehend the principle of issue-estoppel in England from where we seem to have borrowed it, and its growth.

(12) Since Sambasivarn and Connelly have figured in the decisions of the Supreme Court, noticed above the facts of those two cases may be noticed with profit. In the former, the appellant had been charged with two offences, carrying a fire-arm and being in possession of ammunition. He was acquitted of the second but a new trial was ordered of the first. At the new trial the prosecution relied on a statement of the appellant in which he said that he was both carrying a fire-arm and in possession of ammunition. He was convicted for carrying a fire-arm, but the Privy Council advised that his conviction should be quashed because the assessors had not been told that the prosecution, had to accept that part of the statement which was untrue. Lord MacDermott, whose observations were quoted by Bhagwati, J. in Pritam Singh, said :

"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after lawful Irial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all sub-sequent proceedings between the parties to the adjudication. The maximum res judicata pro veritate accipitur is no less applicable to criminal than to civil proceedings,"

IN the latter Connelly, who was charged with others and convicted of murder in the course of armed robbery had relied upon alibi since the jury had not been properly directed regarding the plea of alibi the conviction was quashed by the Court of Appeal. He

was convicted subsequently for robbery and this was restored by the House of Lords ultimately, which reversed the verdict of acquittal of the Court of Appeal. But the majority of the House of Lords had recognised the possibility of issue-estoppel in a criminal case. Cross, after referring to these decisions thinks (p. 298) that having regard to the very few authorities it would be rash to make predictions about the operation of issue-estoppel in English criminal law. The difficulty of "isolating an issue" in a criminal case was felt by Parker, C.J. in Mills v. Cooper (referred to already) and by Eveleigh J. in R.H. Maskell 1970 54 Cr. AR 429 (11). One way of meeting this difficulty, it has been suggested is the discretion to stay, even as one of us (S. Rangarajan, J.) pointed out in Jai Singh that the discretion to club the two cases may be made use of.

It seems rewarding, in the light of the facts of this case, to have a look at an old English case, also cited by Cross : The Queen v. Ollis 1900 2 Q.B. 758 (12). Cross has also referred to yet another, R v. Norton 1910 5 Cr. A.R 197(13), in the same connection. Oilis had been charged and acquitted of obtaining a cheque by false pretences from one Ramsay. He was subsequently charged with obtaining cheques from others by similar false pretences. Ramsay gave evidence at the second trial also. Oilis was convicted and this was confirmed by a majority of the Court for Crown cases Reserved. The unanimous view of the Court was that the acquittal had no bearing on the admissibility of Ramsay"s evidence. The jury might have acquitted, in the first case, on a variety of grounds such as : the pretences were not made as alleged, or that the accused has no intent to defraud, or that the pretences did not cause the prosecutor to part with his property.

It seems appropriate to end this discussion of the English cases by a reference to the most recent English case : R v. Hogan 1974 2 All E.R. 142 (14). Hogan had unsuccessfully pleaded self defense to a charge of causing grievous bodily harm; the injured person died subsequently and he was prosecuted for murder. Though he was finally acquitted he was held to be estopped from denying that he had caused bodily harm to the deceased without lawful excuse and intent to do so. This is a question which Ayyangar. J. left open in Manipur Administration; it does not fall for decision in this case either, to what extent issue-estoppel can be used by the prosecution against the accused.

(13) Though issue-estoppel has been made applicable to India by the Supreme Court, as noticed already, the extent and manner of use seems somewhat uncertain. It is in this context that reference may usefully be made to what Ramaswami, J. explained, speaking for the Supreme Court in Piara Singh Vs. The State of Punjab, . The principle of issue-estoppel, it was pointed out, is different from the principle of either double jeopardy incorporated in Article 20(2) of the Constitution or autrefois acquit as embodied in section 403 of the old Criminal Procedure Code (section 300 of the amended Criminal Procedure Code .). The principle of issue-estoppel; Ramaswami, J. pointed out, is a totally different principle : where an issue of fact had been tried by a competent court on a former occasion and a finding has been reached in favor of the accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused but as precluding the reception of evidence to disturb that

finding of fact when the accused is tried subsequently even for an offence different from that in respect of which section 403(2) of the old Criminal Procedure Code . could be invoked. In a sense, it was more restrictive than double jeopardy and autrefois acquit, by reason of the acquittal itself a further trial for the same offence would not be barred, but evidence in another sense would be since if an issue had been decided by the Court in favor of an accused person in judicial proceedings against the State, that finding would have finality and cannot be tried again in another proceeding between the same person and the State, even for an offence different from that for which he was tried formerly. Ramaswami, J. pointed out (at page 964) that since there was no finding in the previous case that the evidence of the accomplice was false, there was no impediment in acting on his testimony when it was found reliable and had been corroborated. These observations appear reminiscent of Diplock, J. in Mills.

(14) We may at this stage revert to another decision of the Supreme Court where the principle of issue-estoppel was not applied to yet another kind of situation in Sekendar Sheikh and Another Vs. State of West Bengal, . The trial court had acquitted the accused in that case on the ground of falsely personating another and presenting a document for registration, of an offence punishable u/s 82(e) of the Indian Registration Act but had found him guilty of forging same valuable security of an offence punishable u/s 467 Indian Penal Code . Shah, J., speaking for the Court, rejected the argument that the same evidence which was not accepted for convicting the accused for an offence under the Indian Registration Act should not be accepted to convict the accused for an offence under the Indian Penal Code because an item of evidence may corroborate charges for more offences than one, and acquittal of the accused for one such offence will not render that item of evidence inadmissible in assessing the criminality of the accused for another offence corroborated thereby. The following observations of the Judicial Committee of the Privy Council in Malak Khan v. King Emperor 1945 L.R. 72 I.A 305 (17) were also quoted with approval by Shah, J. :

"The Sessions Judge, it was said, had acquitted the appellant of robbery : he was, Therefore, not guilty of that offence ; no appeal had been taken against that acquittal and Therefore no Court was entitled to take into consideration the allegation upon which the accusation of robbery was founded even as corroborative "evidence" in another case. Their Lordships cannot accept this contention. The learned Sessions Judge did not in fact find the accusation baseless ; he only found the crime not proven. But even if he had disbelieved the whole story of the recovery of the stolen property from the appellant, his finding would not prevent the High Court from weighing its value and if they accepted its substantial truth from taking it into consideration in determining whether another crime had been committed or no".

That was a case where the accused was charged by the Court of Session for offences of murder and robbery. He was acquitted by the trial Judge of the offence of robbery and convicted for the offence of murder. The High Court in appeal against the order of conviction relied upon the evidence which was material to both the charges of robbery

and murder, a corroboration of the guilt of the accused for the offence of murder. It was held by the Judicial Committee that the High Court could probably accept the evidence as corroborative of the accused for the offence of murder, even though that evidence was not accepted by the trial Court on the charge of robbery. But it may be noticed that in both these cases the acquittal and conviction were in the course of the same trial.

(15) By reason of Public Witness s. 7 and 8 having turned hostile their evidence cannot be relied for the purpose of proving that Public Witness 7 had snatched the pistol from the hands of the appellant. In terms of Pritam Singh, Gurcharan Singh and Manipur Administration the fact which the prosecution has sought to prove in this case, namely, that the pistol was seized by Public Witness 7 from the accused, may even be left out of consideration even though it seems arguable in terms of Piara Singh, Sekander Sheikh and Malak Khan and some of the English decisions that if there is corroboration of the evidence of Public Witness s. 7 and 8, which was disbelieved or held not sufficient for a conviction under the Arms Act case, the same may still be taken into account along side the evidence of Public Witness s. 1 and 2. It might be even stranger if there is fresh evidence. Without going in the above aspect it seems sufficient for the purpose of this case to hold that even without taking into account the fact that the pistol was seized by Public Witness 7 from the accused it is possible to act on the evidence of Public Witness s. 1 and 2 that the appellant shot at the deceased with the same pistol (Ex. P. 9).

(16) There seems to be no force in the contention of Shri B. B. Lal that by reason of the acquittal of the appellant for the offence under the Arms Act the prosecution is debarred from proving in this case that the same pistol was used by the appellant for firing at the deceased. Though the charge framed in Sessions case No. 48 of 1974 was to the effect that the appellant was in unlawful possession of the said pistol and he had unlawfully used it by firing at the deceased as a result of which she died, the finding of the learned Additional Sessions Judge was based on there being no evidence of the appellant having been in possession of the pistol when the Police came for arresting him. It was, Therefore, observed by him as follows :

"In view of this evidence it is not made out that the accused was in possession of the un-licensed pistol Ex. P. 9."

P.WS.1 and 2 were not examined in the Arms Act case. In these circumstances as the observations of Ramaswami, J. in Piara Singh, referred to above, will show there can be no legal impediment to acting on the evidence of Public Witness s. 1 and 2 which is to the effect that it was the appellant who shot the deceased with the pistol (Ex. P. 9).

(17) In any view of the matter, Therefore, it does not seem possible for Shri B. B. Lal to contend that merely by reason of the appellant having been acquitted of the charge u/s 27 of the Arms Act (on the finding that it had not been proved that the pistol had been recovered from him by Public Witness 7) the appellant should be acquitted of the charge of murder in this case, without more, and that the prosecution is disabled, for that reason

alone, to prove that the deceased was shot by the appellant with the same pistol. That the deceased was shot with the said pistol can admit of no doubt whatever; the pistol (Ex. P. 9) recovered in whatever manner has been proved conclusively to be the one from which the cartridge (Ex. P. 16) and the pellets recovered from inside the body of the deceased, could have been fired. What has to be considered further is whether the positive testimony of P. Ws. 1 and 2, which has been adduced by the prosecution in this case, can be safely acted upon along with the other evidence and attendant circumstances and whether the same is sufficient to bring home the guilt to the appellant as charged, regardless of the fact of the said pistol having been alleged to have been taken by Public Witness s. 7 and 8 by over-powering the appellant.

(18) The direct testimony of Public Witness s. 1 and 2 (mother and daughter) in this case may now be considered. The mother (P.W. 1) came in for a considerable amount of criticism at the hands of Shri B. B. Lal on various grounds. The most prominent attack which he mounted on her evidence, we thought, was that she and her daughter (deceased) would not have gone to house No. 619 for drying the washed clothes by the mother or for the deceased easing herself especially when, on the prior evening the accused uttered a threat to the parents of the deceased that it would not be good for them if they asked him to vacate the house; the demand to vacate was made because the accused had not desisted from teasing and behaving improperly with the deceased even after he had been asked to desist from doing so. In support of the above contention reliance has also been placed upon what was elicited during the cross-examination of Public Witness 20 that there was no pile of wet clothes in the courtyard and that he did not take any such clothes into possession from anywhere. But before any such comment can be made on behalf of the appellant at least Public Witness 1 (or any other concerned person) ought to have been questioned as to whether the wet clothes had been left at the spot when Public Witness 20 arrived or had been removed from that place by Public Witness 1, or any one else. In the absence of any such questions directed to Public Witness 1, or to any other concerned witness, regarding this fact, the comment does not appear legitimate. Regarding the question whether it was likely that the deceased and Public Witness I would have still gone to house No. 619 the day following the accused''s threat on the previous day it is necessary to appreciate the kind of facilities that the deceased and her family had in house No. 1401 and those available in house No. 619 Public Witness 14 swore that house No. 619, owned by his wife (P.W. 1) was in their occupation except one room which alone was in occupation of the appellant as a tenant. The evidence of Public Witness 1 is not very clear whether the appellant was the only tenant in the house at that time, but it was elicited in cross-examination as follows :

"The doors of other occupants of the house were closed at that time" (p. 22).

IT is in the evidence of Public Witness 10 (who had also said that though he was having a shop near the scene he had not heard of any love affair between the appellant and the deceased) that Public Witness s. 1 and 14 had been tenants in house No. 619. But how many were there has unfortunately not been made clear. It appears that Public Witness s.

7 and 8 had also been tenants in house No. 619 previously, but they were admittedly not there at the time of the occurrence. It has also been brought out in the examination of Public Witness 14 that though there are two latrines in house No. 1401 one of them was out of use; the other latrine has to serve a number of other tenants. There is also a small length of wire outside the door of Public Witness 14''s house in house No. 1401 for drying up the clothes. No question was directed to Public Witness 1 regarding how she found it necessary to go to house No. 619 to dry washed clothes. It may well be that the number of clothes that she had to dry up were more than which were possible to hang for drying on that small wire opposite their tenanted portion of house No. 1401. In the absence of further questioning on this aspect no comment seems legitimate or even possible. There is nothing improbable in both the mother and daughter having gone to house No. 619, the former for drying the clothes on the roof of the house and the latter to use the latrine therein.

(19) Public Witness 2 stated that she was returning from the mills nearby after having gone there to telephone her father in connection with the wire which had been received from her sister who was married and was living in Etawah stating that no one may be sent to Etawah to bring Public Witness 2''s sister. Her evidence on this particular aspect has been corroborated by Public Witness s. 1 and 14. She had no doubt referred to having heard an alarm from house No. 619 but could not say who was raising the alarm. The alarm, she thought, was a mixed one, with many voices; she could not be sure whether it consisted of male voices or female voices. From these statements an inference was sought to be drawn that Public Witness 2 should have arrived there much later, after some persons had gathered there. That is not her evidence before the court. She did claim to be an eye witness to the shooting. When she reached the house she saw the appellant holding a pistol in his hand and aiming it at the deceased; the shot he fired hit her chest and she fell down. Both she and her mother shouted "Maar Diya Maar Diya" when the appellant tried to run away and was apprehended by both Public Witness s. 7 and 8. But it was elicited from her, in cross-examination, that she had not seen her mother coming from the roof nor the accused coming from the room with the pistol; she was confronted with the statement made by her u/s 161 Criminal Procedure Code . (Ex. D.A.) to the following effect :

"After a short while I also came to his house on hearing the noise and my mother also came down stairs on hearing the voice of Madhu Khanna. Chandrika Prasad went into his room and brought a pistol and fired a shot on the chest of Madhu."

She denied having made such a statement. It does not seem to us that if she had really seen her mother also coming down from the stairs and the appellant going to the room she should be withholding that part of her evidence falsely; we are unable to appreciate what she or the prosecution would gain by her suppressing that part of the testimony, if she had really made such a statement. The incident was a quick moving one. In the version regarding the incident which P.W. 1 gave earlier to Public Witness 20, soon after the occurrence, Public Witness 1 had merely said, in the context of the appellant firing a

shot at the deceased, that Public Witness 2 also reached there in the meantime ; she had also referred, significantly, to herself and Public Witness 2 crying "Maar Diya Maar Diya". This simultaneous alarm must have been an immediate reaction to the shooting; this certainly means that Public Witness 2 was also present at the time of the shooting.

(20) Regarding her statement that she heard voices, they appeared mixed and she could not even say whether it was a mixture of male and female voices, we are inclined to think that this was due to her suddenly and unexpectedly hearing what she believed to be "voices" when she was returning to her residence from the Mills after telephoning to her father. She had not much time to think and identify what she believed to be "voices"; her evidence is very clear, so it is of Public Witness 1, that she had come into house No. 619 before the actual shooting and had joined Public Witness I is raising an alarm of the description noticed. This is a circumstance which does not suggest that she came later ; on the contrary, these are the hall marks of truthful witnesses. Being an educated lady the above is consistent with her endeavor to describe faithfully what she saw and heard, rather than to repeat, parrot like, what she had been told to say.

(21) The absence of blood stains on their clothes, indicating that they did not rush to the help of the deceased after she was shot, is explainable in the context of the accused still having the pistol with him and his earlier threat that he would not leave them.

(22) We are also impressed by this circumstance, namely, that the statement of the mother of the deceased (P.W. 1), which was recorded by Shri Hari Dev (P.W. 20), is full of details which are significant like herself and Public Witness 2 having raised the alarm together and, even more important, that the appellant set his pistol near the chest of the deceased when it was shot. A perusal of the site plan (Ex. Public Witness 21/A) along with photographs (Ex. Public Witness /A-1 to Ex. Public Witness /A-8) shows that the amount of vacant space near the latrines in house No. 619 is itself narrow; according to Public Witness 20 the distance between the staircase and the room occupied by the appellant is only 3 paces. There is one room adjoining the latrines and behind it is the staircase. The head of the deceased has been shown in the site plan as lying near the staircase, her face was upwards and the toes nearer the latrines than the room of the appellant in which he lived. The entire vacant space was just sufficient for two cots being put there. The fire-arm must in the very nature of things have been fired from a close distance ; in the murder of the deceased according to Public Witness 1"s statement (Ruqqa), the pistol was held very near the chest of the deceased. It would appear from the evidence of the doctor (P.W. 3) as well as of the Ballistic Expert (P.W. 25) that on the left side of the chest, where there was a circular punctured wound, the surrounding skin was blackened and charred round the margins of the wound. Since charring involves an element of burning, by flame or heat, it is the same thing as scorching, it is seen from the evidence of Public Witness 25 that if there was blackening of the skin the target should have been 2 or 3 feet ; if there was scorching the wound could be up to 3 to 4 inches away. As many as 75 metallic balls were found on cutting the lung and heart tissues ; the penetration of so many balls within such a narrow area; also shows unmistakenly the very

close range of the target. There cannot be any doubt in these circumstances that the pistol was also fired from such a close range and this by itself affords corroboration of the details mentioned in the Ruqqa (Ex. Public Witness `/A).

(23) Having regard to the importance of the above details mentioned in the Ruqqa Shri B. B. Lal also challenged the correctness of the timings mentioned in the report of the proceedings of the Police on the Ruqqa (Ex. Public Witness 12/A) and in the F.I.R. (Ex. Public Witness 12/B), namely, that the report had been sent to the Police Station at 1.50 p.m. and that it was also sent from the Police Station outwards at 2.35. The entries in the daily diary of the Police Station, mentioned as reports 8 and 9 of the Roznamcha "A" show that in both the said documents (paras 2 and 3 of the printed record) the said timings have been mentioned under report 8-A and report 9-A at 1.50 and 2.35 p.m., respectively. All that has been suggested is that the present F.I.R. bore No. 765 whereas the previous F.I.R. (No. 764) had been registered in the Police Station at 10.30 a.m. and the subsequent one (No. 766) was registered only at 4.20 p.m. These facts were elicited in the cross-examination of Public Witness 12 who was the Officer on Duty at the Police Station on 19th May, 1972. But for this reason it does not follow that the F.I.R. in this case was ante-timed, what Shri B. B. Lal would really point out, namely, there was scope for ante-timing is not the same thing as its being actually ante-timed. Having given the matter our anxious consideration it does not seem to us that the evidence of Public Witness s. 1 and 2 has to be disbelieved. The Supreme Court has pointed out, on more than one occasion, that there is no rule that even the straight-forward evidence of relations of the deceased needs corroboration for sustaining a conviction (vide State of U.P. Vs. Paras Nath Singh and Others,).

(24) We could only look for circumstances, if there are any, which might render the evidence of Public Witness s. I and 2 inherently improbable or even suspicious. Shri B. B. Lal tried to show that Public Witness 2 was a chance witness. But Public Witness 2 has sufficiently explained the reason why she happened to pass along ; it was due to the receipt of a telegram from her sister from Etawah, about which she wanted to telephone from the Mills to her father, who was working in a bank in Connaught Place. Her father (P.W. 14) has also spoken about the fact that he had received the telephonic information from Public Witness 2 about the receipt of the telegram at 11.40 a.m. that day; later Public Witness 2 again telephoned P.W. 14 at about 12 noon concerning the deceased having been shot at by the appellant. That the telegram has not been produced will not be a vitiating circumstance when no question was even put to either P.W. 2 or Public Witness 14 suggesting that the telegram was not received. After receiving the second telephonic message Public Witness 14 picked up his son (P.W. 9) from Darya Ganj. They reached the scene together. P.W. I also said so. As against this evidence, Shri B. B. Lal relied upon the admission of Shri Sadhu Ram Inspector (P.W. 26), who stated in cross-examination that Public Witness 14 had reached the scene earlier (at 1.30 or 1.45 p.m.) than Public Witness 9 who reached the spot (at about 2.30 or 2.45 p.m.). But not much reliance can be placed on this statement made by the Inspector who" made a

statement about it for the first time when he was examined in the Court of Session on 4th October, 1974, nearly two years after the occurrence. Not even a suggestion was made to Public Witness 9 or to Public Witness 14 that the latter had reached earlier than Public Witness 9. On the other hand, the suggestion to P.W. 9 was that it was he who had shot at the appellant and that Madhu (deceased) came in the way and was hit. On this question again it is important that no such suggestion had been made concerning P.W. 9 being the so-called assailant till after Public Witness s 7 and 8 turned hostile. On the other hand when Public Witness 1 was cross-examined she had stated that her son Arun Kumar was not at the house when the incident took place. It is significant that the question, which was put to P.W. 1 in cross-examination, was answered as follows :

"IT is also incorrect that another boy of the gali had love affair with Madhu and she had renounced him and Madhu was fired at by some one while she was in the house."

(Emphasis supplied)

A suggestion of this kind was not likely to have been made if it was the appellant''s case that it was Arun Kumar who had shot at the deceased. Shri B. B. Lal sought to get over the effect of this suggestion by referring to a decision of the Gujarat High Court in Koli Trikam Jivraj and Another Vs. The State of Gujarat, where Desai, J., speaking for a Division Bench, observed that while the accused was entitled to a plea set up by the lawyer it cannot be said that the plea or defense which his lawyer puts forward must bind the accused. The reason for this was explained as follows : a lawyer who appears to defend the accused in a criminal court has no implied authority to make admissions against his client during the progress of the litigation either for the purpose of dispensing with proof at the trial or incidentally as to any facts of the case. It. was, Therefore, pointed out with respect rightly, that suggestions made in cross-examination are not evidence against the accused. The situation here is totally different since what has to be now appreciated is whether there is any merit in the accused''s version at the trial that the deceased was shot at by Arun Kumar (P.W. 9). The suggestion put to Public Witness 1, if anything, was only contrary to the present defense version. The accused may not be bound by that suggestion but it is still significant that the positive case which the accused set up, of Public Witness 9 having shot at the deceased while he aimed the shot at the accused by reason of her coming ahead of him in order to save the appellant is one which hardly merits serious consideration in these circumstances. But this is not to say that it will make up for any weakness, if there is any, in the prosecution case. The above discussion shows that the evidence of Public Witness s. 1 and 2 is quite credible and acceptable and has been rightly accepted by the learned trial Judge.

(25) We have only to advert to an argument of Shri B. B. Lal that in contrast with the absence of blood stains on the clothes of Public Witness s. 1 and 2 (already discussed) there were blood stains noticed by the Police (though not sent to serologist) on the clothes recovered from the appellant and that this shows that he must have sat near her and wept as stated by him. The presence of blood stains, if any, on the clothes of the

appellant, could be consistent with blood having splashed on him, for he was firing from such close range.

(26) In the final analysis it is seen that the following facts are in controvertible :

(1)The deceased was shot at by the appellant at about 11.45 a.m. in the courtyard of house No. 619 and that she died immediately thereafter due to being shot at by a pistol.

(2)The pistol (Ex. P. 9) was used for firing at the deceased, as stated by Public Witness s. 3 and 23.

(3)As indicated by the blackening of the skin round the injury on the left chest and, in particular, by the charring, the target must have been very near, within 3 to 4 inches, which is only confirmatory of the evidence of Public Witness 1 in this respect and contradictory of the accused''s version that the deceased came ahead of him when Public Witness 9 was firing at the accused, thereby implying that the distance between the appellant and the deceased was at least somewhat greater.

(4)The immediate arrival of the Police at the scene, the reporting about the incident without any loss of appreciable time, in which all the relevant details have been mentioned, help establish the truth of the prosecution version as deposed by Public Witness s. 1 and 2.

(5)There seems nothing improbable in Public Witness 1 and the deceased having gone to house No. 619 even on the day following the accused having uttered a threat to the parents of the deceased the previous evening that if he was to be evicted it would not be good for them, in the view that having regard to the fact that the deceased and Public Witness 2 were educated persons, the former studying in the final B.A. and the latter an M.A., they would have preferred to use one of two latrines in house No. 619 instead of the only latrine in house No. 1401 which had to be also used by several other tenants. It was only natural that Public Witness 1 had, in the circumstances, also gone along with the deceased, may be, for the purpose of drying the washed clothes.

(6)The version of the appellant that he and the deceased were in love with each other seems false; if that were so, Public Witness 10, a neighbouring shopkeeper whom we see no reason to distrust, is likely to have known about this if it were true ; he stated categorically that he had not known about any such thing,

(7)Having regard to the peculiar facts of this case, even in the view that the evidence concerning the pistol having been snatched by Public Witness 7 from the appellant is not to be taken into consideration against the appellant, the absence of this link in the prosecution case does not substantially, or even in any lesser manner, weaken the prosecution case, because of there being no doubt that it was the same pistol (Ex. P. 9) which was fired at the deceased and the direct testimony of Public Witness s 1 and 2 helps establish beyond any reasonable doubt that it was the appellant who was the

assailant

(27) It may be helpful to read what Denning, J. said of the degree of cogency which the evidence on a criminal charge must reach in Miller v. Minister of Pensions 1947 2 All E.R. 372(20) :

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyon Lord Maugham"s d the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor, which can be dismissed with the sentence "of course it is possible but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."

LORDMaugham"s definition of "reasonable doubt" cannot be bettered : "the doubt which men of good sense may reasonably entertain, not the doubt of a fool or of a person of weakness of mind" (17 Canadian Bar Review, 472).

INthe light of the above discussion we find that it is proved beyond reasonable doubt that it was the appellant who shot at the deceased with the pistol (Ex. P. 9) with the intention of causing her death and that the appellant was rightly found guilty of an offence punishable u/s 302 Indian Penal Code ., his conviction u/s 302 Indian Penal Code . is accordingly confirmed.

(28) So far as the question of sentence is concerned the learned Additional Sessions Judge has awarded the "death sentence in the view that the attack was brutal and that he deserved no leniency. The attack was no doubt brutal, but it seems to us that in all the circumstances of the case the ends of justice do not require the imposition of a death sentence. The murder does not appear to have been premeditated despite the earlier threat attributed to the appellant. Though the appellant behaved improperly towards the deceased he seems to have been irked, young as he was, by the deceased threatening to beat him with chappals; he was also the victim of lust. The death sentence is, Therefore, set aside and the appellant is sentenced to undergo rigorous imprisonment for life. The Cr. Appeal 85 of 1975 is dismissed and the reference to confirm the death sentence on the appella"nt is, Therefore, not accepted.

(29) Before we take leave of this case we feel obliged to say that most of the difficulties that were highlighted on behalf of the appellant mostly arose by reason of the course which the learned Additional Sessions Judge adopted of trying the Arms Act case much before the murder case without even trying them together. One of us (S. Rangarajan, J.) has already made observations in Jai Singh concerning the desirability of clubbing both the offences, as indicated already the remedies, in such a situation, would obviously lie in either "a stay" of one of the cases (as Cross has pointed out) or clubbing both the cases. The practice of separate trials of both the cases should not be merely continued for the

reason that such a course helps the judicial officers concerned to earn the benefit of some units of disposals especially when such a course is not only fraught with such difficulties, but involves needless extra time. Cases separately tried under the Arms Act are seen to be often truncated and dealt with in a slip-shot manner as was noticed in Jai Singh.

(30) A copy of this Judgment is directed to be sent to the learned Additional Sessions Judge who tried the case.