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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 293/2001**

% Date of Order: 13th March, 2009

NAVEEN KUMAR Appellant
Through: Sheikh Israr Ahmad, Advocate

versus

STATE Respondent
Through: Ms. Richa Kapoor, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J.

1. Vide judgment and order dated 9.4.2001 the appellant has been convicted for the offence of murdering Arjun.
2. We note that Arjun died as a result of receiving a single gun shot wound. The weapon of offence could not be recovered.
3. The appellant has been convicted on the basis of the testimony of PW-1, PW-2 and PW-4 and the fact that his T-shirt, which he was wearing at the time of his arrest, was found to be stained with blood and as per the report of the serologist was

opined to be human blood of group 'A'; the same blood group as that of the deceased. Lastly, the learned Trial Judge has held that the presence of the appellant at the site was established and thus the defence was falsified.

4. Pertaining to the last circumstance used by the learned Trial Judge, we fail to understand the purport of the last sentence in para 11 of the decision to the effect: *'presence of accused has been proved on record which falsifies his defence'*.

5. We do not find that the appellant had taken or raised the plea of alibi.

6. We are thus left with the testimony of PW-1, PW-2 and PW-4 and the presence of human blood on the T-shirt of the appellant which was opined to be of group 'A' i.e. the same blood group as that of the deceased.

7. PW-1 Amad deposed that on 29.1.1998 he was in his office at South Extension and was informed that his brother Arjun had met with an accident. He came to the house and did not find his brother and learnt that he had been removed to the hospital. When he reached home his brother Mahesh told him that the appellant had fired at Arjun.

8. PW-2 deposed as under:-

"On 29.1.1998 I along with my brother Arjun and one other brother Dinni, were present at the house at about 12 noon. Accused Naveen present in the court (correctly identified) came

and asked for my elder brother Durgesh. I told him that he has gone out for duty. Naveen came inside and sat by my side. He brought out something which was in a wooden case and placed the same on my cot. I felt sleepy and went in drowsiness while my brother Arjun was standing. Suddenly I heard a bang. I felt gun powder entering my eyes. Naveen ran away from the spot along with the weapon of offence. I ran after hi. I stopped him on the way in a gali. I asked him as to why he had attacked my brother, whereupon he said that he had no intention to attack, and it had occurred by chance. I and Naveen accused removed Arjun to hospital. My uncle Ashok also reached the hospital after being informed by somebody and on seeing my uncle Ashok Naveen left the hospital. Arjun had received injuries on his face.

XXXXXXX by H.O.Bhaskar counsel for accused.

I do not know what statement mine was recorded by police. My statement was recorded by police at hospital on 29.1.1998. I stated before the police that Dinni was present at the house when Naveen came. Confronted from statement Ex.PW-2/DA where it is not so recorded. I have told the police that I have told Naveen that my brother had gone for duty. Confronted from Ex.PW-2/DA where it is not so recorded. I had told the police and Naveen came and sat by the side confronted with statement Ex.PW-2/DA where it is not so recorded. I do not remember whether I told the police that Naveen had brought out something which was in a wooden case and place the same on a cot. Confronted Ex.PW-1/DA where it is not recorded I have told the police that I felt sleepy and went in drowsiness while my brother Arjun was standing confronted with Ex.PW-2/DA where it is not so recorded. I have told the police that I felt that gun powder entering into my eyes. Confronted from statement Ex.PW-2/DA where it is not so recorded. I felt gun powder on my face also. I have stated before the police that Naveen had ran with the weapon of offence confronted with

Ex.PW-2/DA where it is not so recorded. I have stated before the police that I alone had ran after the Naveen confronted from statement Ex.PW-2/DA where it is not mentioned that he alone ran after the Naveen. I do not remember whether I had stated before the police that I had asked Naveen as to why he had attacked my brother thereafter he said that he had no intention to attack and it had occurred by chance, confronted with Ex.PW-2/DA where it is not so recorded. I had stated before the police that my uncle Ashok had reached the hospital after words. Confronted with statement Ex.PW-2/DA where it is not so recorded. I have stated before the police that Naveen left the hospital on seeing my uncle Ashok. Confronted from statement Ex.PW-2/DA where it is not so recorded.

I have not seen Naveen firing at my brother. I have not stated before the police that at the time when Naveen came I was sleeping confronted from portion A to A of Ex.PW-2/DA where it is so recorded.

Blood was oozing out from the injuries received by Arjun. While I and Naveen were shifting Arjun in the auto rikshaw then the clothes of Naveen also got blood stained from the blood which was oozing out from the injuries of Arjun. My blood had only come on my shirt i.e. T-shirt. My shirt was not taken by the police in possession Police had taken the wooden case weapon into possession which was left by Naveen bear my cot. I do not know whether Naveen was knowing Arjun or not volunteered I had reached only 5-6 days back from village. I have not seen Naveen coming and playing visit to Arjun. I had also not seen Naveen paying visit to Durgesh as I was in the village. It is incorrect to suggest that I am deposing falsely and that Naveen was not involved in that incident at all. I do not know what was the nature of weapon of offence. Police has not asked me to recognize the weapon of offence. I was not known Naveen before the incident. I was no knowing Naveen by name also before incident. Police never called me to

identify the accused Naveen.”

9. PW-4 deposed as under:-

“I do not remember the date or month or the year. But it was about 1½ -2 years back, I was present at my jhuggi again said I had gone to the place of my work, when I came back someone told me that a quarrel had taken place at Gautam Nagar. I saw accused Naveen present in the Court taking my nephew Arjun Kumar to hospital. I do not know between whom the quarrel had taken place. My nephew Arjun was taken to AIIMS hospital. I went along with them. On the way my another nephew Kuldeep told me that Naveen had caused injuries to him but he has not told him that he caused his injuries by which object. But injuries caused him by Naveen. Accused Naveen left from the hospital. Arjun was admitted in hospital and he expired at about 4 P.M.”

10. The testimony of PW-1 shows that he was not an eye witness. He merely narrated what he was told by Mahesh i.e. his evidence is hearsay.

11. Kuldeep PW-2 has not deposed of any altercation or a fight between the appellant and Arjun. As per his testimony it appears to be a case where the appellant who probably had a country made gun had gone to show off and, God knows, what happened! The gun went off.

12. PW-2 has not deposed, much less has any other witness deposed of appellant's enmity with Arjun or for that matter with any other family member.

13. As deposed to by PW-2, after making an attempt to

flee the appellant came back and removed Arjun to the hospital. It appears to be a case where the appellant, on getting perplexed, when the gun went off, attempted to flee but returned to take Arjun to the hospital.

14. As deposed to by PW-4, said witness saw appellant remove Arjun to the hospital.

15. This explains the presence of blood on the T-shirt of the appellant.

16. PW-2 was the only person present in the jhuggi. We have noted his testimony in toto. We repeat, the witness does not say that any altercation or a fight took place. He categorically states that when the appellant came and sat inside the jhuggi on the cot he brought out something which was in a wooden case and placed the same on the cot. He goes on to depose that he felt sleepy and became drowsy and that he heard a sudden bang. Indeed, if there was an altercation between the appellant and Arjun, it certainly would have roused Kuldeep who as per his testimony was not in a deep slumber. He was drowsy.

17. There is no evidence as to how the gun went off. Whether it was accidental or whether the deceased was being inquisitive about the gun or whether the appellant was showing off the gun; we just do not know what happened.

18. Under the circumstances it cannot be said that the prosecution has achieved the requisite standard of proof wherefrom the only inference is the guilt of the appellant and his innocence is ruled out.

19. It would be a useless formality for us to embark upon an enquiry whether the evidence establishes the commission of an offence punishable under Section 304 A IPC, for the reason, said offence carries a maximum sentence of 2 years. The appellant has already undergone imprisonment for 5 years.

20. The appeal is allowed. The impugned judgment and order dated 9.4.2001 is set aside. The appellant is acquitted of the charge of having murdered Arjun.

21. The appellant is on bail. His bail bond and surety bond are discharged.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

MARCH 13, 2009
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