

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A.NO.63/2001**

Date of Pronouncement 1st July, 2009

DEVI DAYAL @ RAJU Appellant
Through: Mr.K.B. Andley, Sr. Advocate with
Mr.Anil Kumar Verma, Ms.Ashu
Rani and Mr.Sushil Kumar, Advs.

Versus

STATE Respondent
Through: Mr.O.P. Saxena, APP for State

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

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

G.S. SISTANI, J:

1. The appellant has been convicted under Section 307 of the Indian Penal Code by a judgment dated 11.01.2001 passed by the learned Additional Sessions Judge in FIR No.329/94, P.S. Greater Kailash, Delhi and sentenced to suffer Rigorous Imprisonment for seven years and to pay a fine of Rs.5,000/-, in default of the payment of fine the appellant was directed to undergo a further Rigorous Imprisonment for a period of six months.
2. The present appeal is directed against the aforesaid judgment dated 11.1.2001 and order on sentence dated 19.1.2001.
3. The facts of this case as noticed by the learned Additional Sessions Judge are that on 25.12.1994 at about 7.15 p.m., Subhash Madan, PW-1, was sitting at his shop. The appellant came at the shop and asked Subhash Madan to come out of the

shop. The appellant then whipped out a countrymade revolver and fired a shot which hit Subhash Madan in his chest. Thereafter the appellant fled away. Subhash Madan was removed to a hospital by Lala Ram, Bachu Singh, Raju and Rakesh. An intimation about the admission of Subhash Madan in the hospital was given to the police at Police Station, Greater Kailash and DD No.17-A was recorded. PW-9, SI Badruddin Khan and PW-4, Constable Kirpal Singh then went to the AIIMS where Subhash Madan was declared unfit for making a statement. PW-9, SI Badruddin Khan, recorded the statement (Ex.PW-5/1) of Rakesh Kumar (PW-5) and made an endorsement thereon and sent it to the police station for registration of the case. Subhash Madan remained unfit for making a statement till 02.01.1995. Applications were made from time to time to the Doctor by the I.O. to find out the condition of the injured. Ultimately when Subhash Madan was declared fit, his statement was recorded on 2.1.1995 wherein he stated that he was shot at by Devi Dayal. Although the appellant was arrested and he made a disclosure statement, however, nothing was recovered in pursuance of the disclosure statement.

4. Learned counsel for the appellant submits that the Additional Sessions Judge has failed to appreciate the evidence on record and the judgment and order of conviction is based on surmises and conjectures. It is submitted that the I.O., SI Badruddin Khan has clearly deposed that neither the revolver was recovered nor empty shell of the cartridge of the bullets fired were recovered. The blood stained clothes were also not seized and, thus, no

reliance can be placed on the story of the prosecution. Learned counsel for the appellant submits that in the case of **Harpal Singh Vs. Devinder Singh** reported at 1997 CrL. L.J. 3561, it has been held that :

"If the clothes worn by the injured or the victims were not recovered by the investigating team that perhaps would have provided a handle to the defence to attack the prosecution case."

5. It is further contended that the Sessions Court has failed to appreciate the fact that PW-1, injured, had clearly admitted in his statement that he was conscious and in a shock for about 45 minutes after the incident, whereas his statement was recorded by the police on 02.01.2005. The delay would lead to show that the whole story has been concocted by the prosecution in collusion with the injured to falsely implicate the appellant in a criminal case. It is also submitted that a police post was approximately 100 yards away from the place of alleged incident and in case the injured was conscious for 45 minutes after the alleged incident, there was no reason to record the statement of PW-5 and the statement of PW-1 (victim) should have been recorded to register the FIR. It is submitted that the statement of the injured should have been recorded at the time of his admission in the hospital by the I.O. Further since the injured has categorically deposed that Lala Ram, Bachu Singh, Raju and Rakesh were present at the spot, there was no reason for the I.O. to only record the statement of PW-5, Rakesh Kumar. Counsel for the appellane further submits that even the Doctor, PW-7, deposed that he never opined with respect to the nature of

injuries, the presence or absence of the bullet in the body of the injured.

6. It is further contended that PW-5, Rakesh Kumar, at whose instance the FIR was registered has become hostile whereas he is the only alleged eye-witness to the incident. PW-5 has deposed in Court that he was never present at the spot and had gone to the market to purchase spare parts and that the occurrence did not take place in his presence. PW-5 has also denied having made any statement to the police and rather stated that the police had obtained his signatures on some blank papers in the hospital. Thus it is argued that the prosecution has been unable to prove its case. It is further contended that the statement of PW-3, Devender Grover, who is the brother-in-law of the deceased is unreliable and cannot be trusted being an interested witness and further his conduct is questionable and would show that instead of accompanying the injured to the hospital, he left the spot to make a telephone call to the wife of the injured.
7. It is also argued that there was no provocation, motive or intention to commit the offence and the story of the prosecution cannot be relied upon as there is nothing on record to show that there was prior enmity or motive to commit the offence.
8. Learned counsel for the appellant has relied upon the case of ***State of Punjab Vs. Bhajan Singh***, reported at 1975 CrL.L.J. 282 in support of his plea that in criminal prosecution mere suspicion by itself cannot take the place of proof to warrant a finding of guilt of the appellant.

9. It is contended that there were material contradictions in the evidence of the prosecution and, thus, the same cannot be relied upon. Learned counsel has labored strenuously to buttress his argument that the learned Sessions Court had failed to consider his arguments as to why the statement of the injured was not recorded when he was conscious.
10. Mr. O.P. Saxena, learned counsel for the State, *per contra*, submits that the State has been able to establish their case beyond any shadow of doubt and which stands corroborated by the statement of the eye-witness, PW-3, Devender Grower; the statement of the injured PW-1; and the medical evidence. Thus the appeal is liable to be dismissed as such.
11. In this case, prosecution has examined nine witnesses, however, no evidence was led by the defence. The victim, Subhash Madan, PW-1 in his evidence has stated that he is running an automobile workshop and has a civil dispute pending with his landlady – Smt.Rattan Devi and several civil cases are also pending between them at Tis Hazari Courts. He further deposed that on 25.12.1994 at about 7:15 p.m. he was sitting at his shop when appellant, Devi Dayal @ Raju, the grandson of the landlady came and asked him to come outside. He thereafter whipped out a country made revolver from his shirt and fired a shot at his chest and thereafter he ran away from the spot. The servant of Subhash Madan i.e. Lala Ram and others Bachu Singh and Raju, were present at the shop. Subhash Madan was taken to the hospital by his neighbour's servant Mahender and his servant, Bachhu Singh. This witness also deposed that the father

of the appellant was notorious and a bad character in the area, who had since died, and had also threatened him to vacate the shop. During cross-examination, this witness has stated that he became unconscious after 45 minutes at his shop and therefore he could not tell as to who took him to the hospital. He further stated that there was a police post in front of Blue Bells School near Jamrudpur, which is about 100 yards from his shop and Police did not come to his shop till he was conscious. He also stated that he regained consciousness in the hospital on 1.1.1995. S.I. Badrudin came to the hospital on 2.1.1995 and recorded his statement. He further deposed that bullet was seized by the doctor in the hospital. His wearing apparels were also taken by the doctor, but sweater with the hole was kept by him and which is still in his possession.

12. PW-2, Smt. Laxmi Madan, wife of the victim in her statement has reiterated that her husband is running an automobile workshop and Smt.Rattan Devi is the owner / landlady of the shop, civil litigation is pending between Smt.Rattan Devi and her husband regarding the shop. She has further deposed that Smt.Rattan Devi used to collect the rent and subsequently she had refused to accept the rent and her husband started depositing the rent in Court. On 25.12.1994 at about 7:15 or 7:30 p.m. one servant came to her house and informed that her husband has been injured by Raju, who is the grandson of the landlady, Rattan Devi. During cross-examination, she stated the name of the servant who informed her, as Rakesh. When she reached the shop, her husband had been taken to the hospital.

13. The statement of PW-3, Davender Grover, is reproduced below

“In the year 1994, I used to reside in house No.628/D, Govind Puri. On 25/12/1994, at about 6 p.m. I went to the shop of my Sandu – Subhash Madan at Jamrudpur. He runs an automobile shop under the name and style of Madan Automobiles. Subhash was sitting in a chair inside the shop. Five/ six boys were working in the shop. At about 7 or 7:15 p.m. the accused present in the court today came to the shop of accused Subhash Madan. (The witness has pointed out towards accused Devi Dayal alias Raju present in the Court). I heard the voice of a gun-shot. The accused was having a country made revolver in his hand. He ran away from the shop. At that time, I was standing out of the shop. I went inside the shop and found that Subhash Madan had sustained gun injury in his chest. Some mechanics removed him to the hospital.”

14. In his statement PW-4, Constable Kirpal Singh has deposed that on 25.12.1994 he was posted as a constable at the Police Station Greater Kailash. He had gone to AIIMS Hospital and found one Madan was admitted at the hospital after sustaining a bullet injury. He was declared unfit for statement by the doctor on duty.

15. PW-5, Rakesh Kumar, is the person at whose instance the FIR was registered. In his statement before the Court he has denied that the occurrence took place in his presence. He has also denied that his statement was recorded by the police. Since he had resiled from his statement made under section 161 Cr.P.C.

he was allowed to be cross-examined by the learned Public Prosecutor. In his cross-examination he deposed that he knows the appellant, who was present in the Court. He also correctly called the name of the appellant, as Raju (the grandson of the landlady of Subhash Madan). On being shown his statement Ex.PW-5/1, he identified his signatures at point 'A', however, he denied that the statement was recorded by the police at his instance or that he signed it after knowing its contents. He further deposed that he did not state to the Police that on 25.12.1994 at about 7:15 p.m. Subhash Madan, Raju alias Manjum Ali, Lala Ram and he were sitting in the shop and in the meanwhile landlord's son, Raju, who was known to him came there. He was then confronted with the portion of the statement Ex.PW-5/1, where it was so recorded. He denied the suggestion that Raju fired a shot in the chest of Subhash Madan with the weapon and that thereafter Raju ran away. This witness was confronted with the portion of his statement where it had been so recorded.

16. PW-7, Dr. Sujoy Pal, has deposed that on 25.12.1994, he had examined Subhash Madan, who was brought to the hospital by one Rajinder Kumar with the alleged history of gun-shot injury on his chest. Subhash Madan was complaining of severe chest pain and having difficulty in breathing. On examination, he found Subhash Madan conscious but he had no recordable blood pressure and had a very feeble pulse. He further deposed that ante-wound of the gun shot was on the left side of the chest in the third inter-coastal space in the para-sternal region and no

exit wound could be identified. On auscultation, no heart sounds could be appreciated. The injury caused was a gun shot injury and this witness labelled it as dangerous. He has further deposed that in this connection the M.L.C. is Ex.P.W-7/1 which is in his handwriting and bears his signatures at point –A and the same is correct. On 25.12.1994 at 8:30 p.m., the patient was declared by him as unfit for statement. Endorsement in this regard is Ex.P.W. 7/2 which is in his handwriting and bears his signatures at point-A. In his cross-examination, PW-7, did not deny the suggestion that in the MLC he had not opined whether the injury was dangerous / simple/ grievous. He further stated that this was because he referred the patient for further opinion to senior resident of Cardio-thorasic and vascular surgery department.

17. PW-8, ASI Lal Chand has deposed that on 23.1.1995 he was posted as ASI in the Police Station Greater Kailash-I. S.I. Badrudin was earlier investigating into the case and on 23.1.1995 the investigation of the case was handed over to him. PW-8, deposed that he had formally arrested the appellant in this case as he was already in custody in another case and he got production warrants issued from the court. On interrogation the appellant made a disclosure statement that he can get the *Katta* recovered from the riverbed of Jamuna near Okhla where he had thrown the *Katta*. The appellant had taken him to the alleged place, but nothing was recovered as a lot of junk was lying there.
18. PW-9, S.I. Badrudin Khan has deposed that on 25.12.1994 he was posted at Greater Kailash Police Station as a S.I.. On receipt

of D.D. No.17-A he went to AIIMS along with constable Kirpal Singh, where he found Subhash Madan admitted in the hospital. He moved an application Ex.PW-9/2 for obtaining opinion of the Doctor regarding fitness of Subhash Madan for making the statement. The Doctor declared him unfit vide his endorsement Ex.PW-7/2. He recorded the statement of Rakesh Kumar Ex.PW-5/1 and made an endorsement thereon Ex.PW-9/3 and sent it to the police station for registration of the case. The FIR Ex.PW-9/4 was registered in the police station and he further came to the place of occurrence at village Jamrudpur along with Rakesh. He further deposed that the rough site plan Ex.PW-9/5 was prepared on the pointing out of Rakesh. This witness further deposed that he made an application dated 26.12.1994 Ex.PW-9/6 for recording of statement of the victim, who was declared to be unfit by the doctor from time to time and the endorsement were made at points 'A' and 'B' on Ex.PW-9/6. On 28.12.1994 he again moved an application Ex.PW-9/7 to find out the condition of the victim, Subhash Madan, however, the doctor opined vide endorsement at point 'A' of Ex.PW-9/7 that patient was unfit for making any statement. This witness further deposed that on 30.12.1994 he again moved an application Ex.PW-9/8 to the doctor, the opinion made by the doctor is at point 'A' on Ex.PW-9/8. However, ultimately victim, Subhash Madan, was declared fit for making statement on 2.1.1995 and the endorsement to this effect was made by the doctor at point 'A' on Ex.PW-9/9. Therefore, the statement of the victim was recorded.

19. The statement of the appellant was recorded under section 313 Cr.P.C.. In his statement the appellant stated that he had been falsely implicated in the matter.

20. The arguments of learned counsel for the appellant can be summarized as under:

- (i) The appellant has been falsely implicated in this case and the statement of the victim is unreliable.
- (ii) As per the statement of the victim, he was conscious for about 45 minutes after the incident, and his statement was neither recorded by the IO nor the doctor and statement was only recorded on 2.1.1995. Thus there is unexplained delay in recording the statement of the victim.
- (iii) The conduct of PW-3, Devender Grover is questionable inasmuch as, after the incident, instead of taking his brother-in-law to the hospital, he ran away from the spot to call the wife of the injured. The statement of PW-3 cannot be relied upon. Moreover, PW-3 is unreliable as he is an interested witness.
- (iv) The only eye witness i.e. Rakesh Kumar, is a hostile witness and no other eye witness was examined by the prosecution.
- (v) There was no motive for the commission of the crime.
- (vi) Neither the weapon of offence nor empty cartridges were recovered. Further the blood stained clothes of the victim were also not seized by the prosecution.

21. I have heard learned counsel for both the parties, analysed the material on record and given my thoughtful consideration to the matter.
22. The incident in the present case pertains to 25.12.1994. PW-1 (victim) has deposed that on 25.12.1994, at about 7:15 p.m., he was sitting at his shop when appellant Devi Dayal alias Raju (grandson of his landlady Rattan Devi) came there and dared him to come out of his shop. The appellant then whipped out a country made revolver from his shirt and fired a shot in the chest of the victim and the appellant ran away from the spot. Thereafter the victim was taken to the hospital by Mahender, servant of his neighbour and his own servant, Bachhu Singh.
23. It has been strenuously argued before me by the learned counsel for the appellant that the case of the prosecution is false and that no reliance should be placed on the version of the victim. It has been pointed out before me that as per the version of the victim, he was conscious for about 45 minutes after having received a gun-shot injury. It is further submitted that there was no reason for the investigating authority to wait till 2.1.1995 to record the statement of the victim and that there is unexplained delay in recording the statement of the victim. The statement of the victim was not also recorded by the Doctor.
24. PW-7, Dr.Sujoy Pal, Dept. of Surgery, AIIMS New Delhi, has deposed as to the nature of the injury suffered by the victim. The same is reproduced as under:

“On 25.12.1994, I examined Subhash Madan s/o Madan Lal, r/o shop no. B-134/1, Jamrudpur, New Delhi, who was brought to the hospital by one Rajinder Kumar with the alleged history of

gun-shot injury on his chest and was complaining of severe chest pain with difficulty in breathing. On examination I found that he was conscious but had no recordable blood pressure and very feeble pulse. The ante-wound of the gun shot was on the left side of the chest in the third inter-coastal space in the para-sternal region. No exit wound could be identified. On auscultation, no heart sounds could be appreciated. The injury caused was a gun shot injury and I labelled it as dangerous.”

25. Having regard to the testimony of PW-7, Dr. Sujoy Pal, AIIMS, in my considered opinion, the argument of the counsel for the appellant that there is unexplained delay in recording the statement of the victim lacks merit. Merely because a patient is conscious, it does not automatically imply that the patient is in a fit condition to give his statement. It is pertinent to note that the doctor has given a categorical finding that although PW-1, victim was conscious but the victim had no recordable blood pressure, had a feeble pulse, and on auscultation, no heart sounds could be appreciated. PW-7 has further deposed that at about 8:30 p.m., the patient was declared to be unfit to give any statement and an endorsement to this effect was made as Ex. PW 7/2. In view of the opinion given by the doctor, PW-7 as to the seriousness of the injury received by the victim, it can be safely said that PW-1, victim was not in a fit condition to have given a statement on 25.12.1994. Evidence of PW-9, S.I. Badrudin Khan, shows that he made repeated applications to the doctor seeking permission to record the statement of the victim, however, the same were turned down and time and again the victim was declared to be unfit to make any statement. As per the evidence of PW-9, he moved the first application Ex.PW-9/2 on 25.12.1994, however,

the doctor declared the victim, Subhash Madan to be unfit to make a statement. The endorsement of the doctor is Ex.PW-7/2. Another application Ex.PW-9/6, was made to the doctor on 26.12.1994, on which date also the doctor declared the victim, Subhash Madan unfit for making statement. Similar endorsements were made by the doctor at points 'A' and 'B' on Ex.PW-9/6. Another application Ex.PW-9/7 was made by S.I. Badrudin Khan on 28.12.1994, however, vide endorsement at point 'A' on Ex.PW-9/7, doctor declared the patient to be unfit for statement. Same remained the position on 30.12.1994 when S.I. Badrudin Khan moved another application Ex.PW-9/8. The evidence of PW-9, S.I. Badrudin Khan and the endorsements made by the doctor would show that the victim, Subhash Madan was unfit to make any statement from 25.12.1994 up to 1.1.1995. It was only on 2.1.1995 when his statement could be recorded. Thus to also say that the police post was approximately 100 yards away from the place of alleged incident, and the statement of the victim should have been recorded at the time of the incident or soon thereafter bears no weight as the victim was unfit to make a statement. Even otherwise also, no police personnel came at the spot of the incident before the victim was removed to the hospital. In the light of the above discussion, I find no force in the submission of learned counsel for the appellant that there is any unexplained delay in recording of the statement of the victim, Subhash Madan.

26. It would be relevant to note that the victim has not only identified the appellant in his examination-in-chief but has also

withstood the incisive cross-examination. To say that the victim had fired on himself so as to falsely implicate the appellant also has no force. It is hard to believe that the victim would fire upon himself, that too on the chest area and endanger his own life, simply to falsely implicate the appellant. I find the statement of the victim to be trustworthy and reliable and the same finds corroboration from the statement of PW-3, Devender Grover, who has also stated that on the fateful day he had gone to the shop of the victim Subhash Madan and had heard the sound of a gun-shot. He had seen the appellant with a country made revolver in his hand and running away from the shop. He then found that the victim, Subhash Madan had sustained a gun-shot injury in his chest. It has been strongly urged before this court that firstly PW-3 is a partisan witness being the co-brother-in-law of the victim and his version cannot be relied upon and further the conduct of PW-3 was unusual to the extent that instead of removing the victim to the hospital, he went to telephone the wife of the victim. In my considered opinion, merely because a witness has been described as a close relation, it does not automatically imply that his version is to be discarded. It has repeatedly been held that reliance can be placed on the evidence of interested witnesses provided their evidence is truthful. However, before placing reliance on the evidence of interested witnesses a duty is cast upon Court to scrutinize their evidence carefully and minutely and with extra caution. The law with regard to the placing reliance on evidence of close relations and partisan witness has been a subject matter of various decisions

of the Apex Court. In Crl.A.No.470/2003, **Harish Vs. The State (Delhi)**, this Court noted several decisions of the Apex Court. It would be apt to reproduce relevant portion thereof:

*“41. It has been consistently held by the Apex Court that Courts must be cautious and careful while weighing such evidence given by witnesses who are partisan or interested, but such evidence should not be mechanically discarded. It will be useful to refer to the judgment of **Masalti Vs. State of Uttar Pradesh**, reported at AIR 1965 Supreme Court 202, relevant portion of which is reproduced below:-*

“14. Mr.Sawhney has then argued that where witnesses giving evidence in a murder trial like the present are shown to belong to the faction of victims, their evidence should not be accepted, because they are prone to involve falsely members of the rival faction out of enmity and partisan feeling. There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the court as genuine whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses; Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to, failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing

with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

42. Similar view has also been expressed in the case of **State of Punjab Vs. Karnail Singh**, reported at **AIR 2003 (90) Supreme Court 3613**.

8. We may also observe that the ground that the witnesses being close relatives and consequently being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh and others v. The State of Punjab (AIR 1953 SC 364) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:-

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - Rajasthan', (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

27. In so far as the argument of learned counsel of the appellant with regard to the conduct of PW-3 is concerned, it is often seen that different people show different reactions at the time of such exigencies. Some are known to scream for help; some are known to hide in fear; some become silent and are unable to talk even

for months at a time. Thus to say that the only reaction which PW-3, Devender Grover, could have had was to take the victim to the hospital cannot stand to reason. Further PW-3 has categorically stated that there were five or six boys working in the shop and he has also stated that the victim, Subhash Madan was taken to Sharma Nursing Home, Greater Kailash by those mechanics working at the shop. Simply because PW-3 did not accompany the victim to the hospital by itself cannot be a ground to disbelieve the evidence of this witness.

28. It has been submitted that the evidence of PW-2, Laxmi Madan (wife of the victim), cannot be relied upon as the same is hearsay. The wife of the victim has also deposed that she was informed by one of the servants that her husband has been injured by the grandson (Raju) of the landlady of the victim. This submission of learned counsel for the appellant is without any force in view of section 6 of the Evidence Act. In the case of **Gentela Vijayavardhan Rao v. State of A.P.**, (1996) 6 SCC 241, it has been held that:

15. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue “as to form part of the same transaction” becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however

slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae. In *R. v. Lillyman*¹ a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between the act of rape and the making of the statement. Privy Council while considering the extent up to which this rule of res gestae can be allowed as an exemption to the inhibition against hearsay evidence, has observed in *Teper v. R.*² thus:

“The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement.”

The correct legal position stated above needs no further elucidation.

29. Applying the aforesaid principles to the facts of this case, I find that the occurrence had taken place at about 7:15 p.m. PW-2 has deposed that on 25.12.1994 at about 7:15 or 7:30 p.m. one servant had come to her house and had informed her that her husband has been injured by Raju, who is the grandson of their landlady. Thus this information was supplied without any delay and there was no scope for fabrication. It was contemporaneous with the act and made soon after the incident and thus would be admissible under section 6 of the Evidence Act. It may be noticed

1 (1896) 2 QB 167 : (1895-99) All ER Rep 586.

2 (1952) 2 All ER 447.

that section 6 of the Evidence Act lays an exception to the General Rule, that hearsay evidence is not admissible. The statement to PW-3 was made without premeditation or artifice and without taking into consideration the consequences. The statement was spontaneous, without any calculation and motive and thus admissible in evidence.

30. It has further been contended before me that the prosecution failed to produce several other witnesses present at the shop at the time of the incident, and in the absence of these witnesses, the case of the prosecution cannot stand. At this stage it would be appropriate to recall the words of the Apex Court in the case of **Sahib Singh Vs. State of Punjab**, 1996 (11) SCC 685, that it is not always possible to associate the public witnesses and this alone should not be a ground for acquitting the person. Reliance can also be placed on a judgment titled as ***Iswar Singh Vs. State***, 1985 CrI.C.J. 1625 in which it was observed as under:

“It is common experience that people are greatly reluctant to co-operate with the police in such matters for a variety of reasons and there is as such absolutely no reason to disbelieve the I.O. that public did not respond to join the investigation.”

31. Thus it has been repeatedly observed that public witnesses are reluctant to join for various reasons. Notwithstanding these judgments, it is of relevance that in the present case however, the prosecution had indeed examined Mr.Devender Grover and Mr.Rakesh Kumar, as witnesses, who were the natural witnesses and stated to be present at the spot of occurrence. It is not the quantity/number of witnesses, but the quality of evidence led by

the witnesses, that matters before a Court. There is no condition that the prosecution or the defence has to examine all the witnesses so as to substantiate their case or that all the persons present at the spot of the incident are to be examined as witnesses. If the court finds the evidence of even a single witness as reliable, convincing and trustworthy, then conviction may be based on the sole testimony of such witness also. Coming back to the facts of this case, as already observed above, PW-3, Mr. Devender Grover has whole-heartedly supported the case of the prosecution. No doubt the author of the FIR, PW-5, Rakesh Kumar did not support the case of the prosecution and was declared a hostile witness. He, however, admitted his signatures at point 'A' on his statement Ex.PW-5/1, which was recorded under section 161 Cr.P.C. PW-5 has denied the contents thereof. In my considered opinion, simply because PW-5 did not support the case of the prosecution, cannot be the sole ground to disbelieve the entire case of the prosecution. PW-9, S.I. Badrudin Khan in his statement has deposed that he had recorded the statement of PW-5, Rakesh Kumar and also that PW-5 was also with him when he reached the place of occurrence in village Jamrudpur. PW-9 also stated to have prepared the site plan, Ex.PW-9/5 on the pointing out of PW-5, Rakesh Kumar. Learned counsel for the appellant has been unable to show as to why should this Court not accept the testimony of PW-9 in so far as his deposition with regard to PW-5 is concerned. There is nothing on record to show as to why the evidence of PW-9 should be doubted. To say that under the given situation when all the persons present at the

shop were not produced as witnesses would have a bearing in this case, is in my opinion a baseless argument. In case the prosecution chose to not examine all the said persons, it was always open to the defence to have examined such witnesses.

32. Further I find no force in the submission of learned counsel for the appellant that in the absence of recovery of weapon of offence or the clothes of the victim being seized, the case of the prosecution must fail. The prosecution cannot be made to suffer on account of any negligence or inaction on the part of the I.O. In the case of **Leela Ram Vs. State**, AIR 1999 SC 3717, it has been held that any irregularity or even illegality during the investigation should not be a ground to reject the case of the prosecution as criminal justice cannot be made a casualty for the wrongs committed by the investigating officer. Similar opinion was expressed by the Apex Court in the case of **State of U.P. Vs. Hari Mohan & Ors.**, 2000 VIII AD(SC) 389 that defective investigation cannot be made a basis for acquitting the accused if despite such defects and failures in their investigation a case is made out against the appellant. On the same line, it has been observed by the Apex Court in the case of **State of West Bengal Vs. Meer Mohd. Umed and Others**, JT 2000 (9) SC 467, that:

“41. The function of the Criminal Courts should not be wasted in picking out the lapses in investigation and by expressing unsavoury criticism against investigating officer. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Effort should be made by Courts to see that criminal

justice is salvaged despite such defects in investigation.”

33. The appellant in his statement recorded under section 313 Cr.P.C. while disputing the case of the prosecution did not deny the fact that his grand-mother Smt.Rattan Devi is the landlady of the injured, who runs an automobile workshop. He also did not dispute that a number of civil cases are pending between the victim, Subhash Madan and Smt.Rattan Devi. The victim as well as his wife have also stated that disputes were pending between the victim and the landlady with regard to the shop in question and the same establishes the motive for the act committed by the appellant. It is hard to believe that the victim would fire upon himself and that too on the chest area, simply to falsely implicate the appellant endangering his own life. Thus the submission of counsel for the appellant that there was no motive for the appellant to fire at the victim is also without any merit.

34. The present appellant was convicted by the trial Court for the offence under section 307 IPC. It would be relevant to reproduce Section 307 herein:

“Attempt to murder .—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.”

Section 307 was elaborately discussed in the case of **State of M.P. Vs. Imrat & Anr.**, (2008) 11 SCC 523, wherein it was observed:

“11. 11.....

12. To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

13. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.”

This position was highlighted in *State of Maharashtra V. Balram Bama Patil*, reported at 1 (1983) 2 SCC 28; *Girija Shankar V. State of U.P.*, reported at 2 (2004) 3 SCC 793; *R. Prakash V. State of Karnataka*, reported at 3 (2004) 9 SCC 27; and *State of M.P. V. Saleem*, reported at 4 (2005) 5 SCC 554.

12. “15. In *Sarju Prasad v. State of Bihar* it was observed in para 6 that mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself sufficient to take the act out of the purview of Section 307.

16. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is the intention or knowledge, as the case may be, and not the nature of the injury. The basic difference between Sections 333 and 325 IPC is that Section 325 gets attracted where grievous hurt is caused whereas Section 333 gets attracted if such hurt is caused to a public servant.

17. Section 307 deals with two situations so far as the sentence is concerned. Firstly, whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and secondly, if hurt is caused to any person by such act the offender shall be liable either to imprisonment for life or to such punishment as indicated in the first part i.e. 10 years. The maximum punishment provided for in Section 333 is imprisonment of either description for a term which may extend to 10 years with a liability to pay fine.””

35. Applying the aforesaid principles and the law laid down by the Apex Court to the facts of this case, I find that in the present case

the appellant premeditatedly, armed himself with a gun, came to the spot, dared the victim to come out of his shop, and thereafter used the weapon as a dangerous weapon of assault and fired the victim in his chest from close proximity. Thus, *mens rea* was followed by *actus reus* inasmuch as that the appellant gave effect to his criminal intent.

36. In view of the evidence of the victim himself which is duly supported by the evidence of the doctor and shows that the appellant had suffered a gun-shot injury; taking into consideration that the victim was unable to make a statement till 2.1.1995, despite repeated attempts made by the I.O. to record his statement, being satisfied that the medical condition of the victim was such that he was unfit to make a statement; being satisfied that the evidence of the victim is reliable, trustworthy and has duly identified the appellant as the person who shot him; the evidence given by Mr.Devender Grover, who also corroborates the case of the prosecution; and lastly, the evidence of the wife of the victim would be deemed to be relevant and not hearsay, inasmuch as the statement made to her was contemporaneous, without any delay and spontaneous. The presence of the appellant at the spot and the fact that he fired a gun shot at the victim, stands duly affirmed by the evidence brought forth on record. Accordingly, I find no grounds to interfere in the impugned judgment dated 11.1.2005 and order on sentence dated 19.1.2005 passed by the learned ASJ in FIR No.329/1994, P.S. Greater Kailash, Delhi.

37. In view of the aforestated reasons, the appeal stands dismissed.

In case the appellant is on bail, he be taken into custody forthwith.

G.S. SISTANI, J.

July 1st , 2009
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