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

% Date of Order: 27th January, 2009

+ **CRL.A. 821/2005**

MATHAN SINGH Appellant
Through: Mr. D.M.Bhalla, 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.** (Oral)

1. On 9.8.2003 at 7:35 PM, DD Entry No.19-A, Ex.PW-4/A, was recorded noting the information that an informant has informed that a husband has shot his wife at House No.B-128, Gali No.8. The same happens to be the house of the appellant.

2. ASI Darshan Kumar PW-12, SI Lekh Raj PW-4, Const. Brijvir PW-15, Const. Shyam Lal PW-17 reached the spot pursuant to the information received. They found blood at two places. They saw that there were blood stains in and around the house. Two empty cartridges were seen lying on the floor. The appellant was found present in his house. ASI Darshan Kumar and Const. Brijvir remained at the spot and SI Lekh Raj accompanied by Const. Shyam Lal went to GTB Hospital as they learnt that two persons who were injured had been taken to the said hospital.

3. At the hospital, Shakuntala wife of the appellant, was admitted at 8:50 PM. She was examined by Dr.P.Ram who declared Shakuntala brought dead as per MLC Ex.PW-19/A.

4. Raj Kumar PW-10, was also admitted at the hospital and his medical condition was recorded on the MLC Ex.PW-25/A by Dr.Narender Singh PW-25 as under:-

“1. Multiple punctured wound with lateral fronto parietal region of scalp.

2. Fluctuating swelling over parietal lateral region of scalp.”

5. He noted that the patient was conscious and oriented. Since the patient gave history of the wounds to be the result of gun shot, Dr.Narender Singh referred Raj Kumar to the senior resident neuro surgeon.

6. Since Raj Kumar PW-10 was fit for statement, SI Lekh Raj recorded the statement Ex.PW-4/B of Raj Kumar, in which he named the appellant as the person who had fired upon his wife and at which firing even he i.e. Raj Kumar sustained pellet injuries. On said statement SI Lekh Raj made an endorsement thereon Ex.PW-4/C at 10:05 PM and sent the same through Const. Shyam Lal PW-17, for registration of a FIR. The FIR in question, Ex.PW-5/A, was registered at the police station by HC Surender Pal PW-5, soon thereafter.

7. Proceeding back to the spot SI Lekh Raj rejoined ASI Darshan Kumar, who, as noted above, had remained at the spot.

8. At the spot blood stained earth and control earth was lifted vide seizure memo Ex.PW-1/A. A chappal was seized vide seizure memo Ex.PW-1/B. A blood stained chunni was seized vide seizure memo Ex.PW-1/C. Two empty cartridges were seized vide seizure memo Ex.PW-1/D and sketch thereof was drawn vide Ex.PW-1/F. A double barrel gun was seized vide seizure memo Ex.PW-1/E. A rough site plan Ex.PW-1/G of the spot was prepared.

9. The appellant was arrested vide arrest memo Ex.PW-1/H at 1:30 AM.

10. Constable/photographer Rattan Singh PW-24, was summoned who took seven photographs Ex.PW-24/A to Ex.PW-

24/G of the spot; negatives whereof are Ex.PW-24/A-1 to Ex.PW-24/G-1.

11. The body of deceased Shakuntala was sent for post-mortem where Dr.S.Lal PW-13, conducted the post-mortem at 11:10 AM on 10.8.2003 and recorded the following ante mortem injuries on the person of the deceased:-

“ANTE MORTEM INJURY

1. Fire arm Entry Wound 7 x 5 cm, associated with Scattered multiple pellets wound in area of 22 x 16 cm present Rt. back of chest over scapular region 9.0cm below the tip of shoulder and 18.0 cm right to midline. No blackening, tattooing and seigning present around the muscles of posterior axillary wall and then enter the chest cavity through mid axillary line over 3rd intercostals space causing fracture of 3rd, 4th and fifth ribs after that enter the Rt lung over middle of upper lobe, just above the Inter Lobular Fissure and some of the pellets are recovered about 2.0 liter of blood present in chest cavity. Some of the pellets passes under the muscle and finally lodge in front of chest above the breast underneath of injury No.2.
2. Reddish Bruise 13 x 10 cm present on upper Rt. side front of chest just above the breast, 4.0 cm below the mid point of clavicle and one cm right to midline.
3. Bruise (Bluish in colour) 9 x 4 cm present on middle of Lt. arm over lateral aspect 11.0 cm below the tip of shoulder and 7.0 cm above the cubital fossae.
4. Bluish Bruise 10 x 5 cm present on lateral aspect of Lt. upper thigh 16.0 cm below the anterior superior iliac spine and 23.0 cm above the knee joint.
5. Surgical stitch wound 2.5 cm with 6 stitches present on Lt. side of forehead 3.0 Lt. to midline and 4.0 cm above the middle of Lt. eyebrow.”

12. He opined that death was due to haemorrhagic shock resulting from the ante mortem injury on the chest and lungs caused by projectile of firearm. He opined that injury No.1 was sufficient to cause death in the ordinary course of nature. The salwar and the shirt worn by the deceased were handed over by him to the police who after seizing the same sent them for forensic examination to the Forensic Science Laboratory, Govt. of NCT Delhi.

13. The double barrel gun and the two empty cartridges which were seized from the spot were sent for forensic examination to the Forensic Science Laboratory Govt. of NCT Delhi and on 22.3.2004 the laboratory gave the opinion, Ex.PW-19/F, as under:-

"RESULT OF EXAMINATION"

1. The double barrel breech loading gun 12 bore marked exhibit 'F1' is designed to fire a standard 12 bore cartridge. It is in working order in its present condition. Test-fire conducted successfully.
2. The 12 bore cartridge cases marked exhibits 'EC1 & EC2' are fired empty cartridges.
3. Two 12 bore cartridges from laboratory stock were test fired through the right barrel & left barrel of double barrel breech loading gun 12 bore marked exhibit 'F1' and the test fired cartridge cases were marked as 'TC1' & 'TC2' respectively.
4. The individual characteristic of firing pin marks and drag marks present on evidence fired cartridge

cases marked exhibits 'EC1' & 'EC2' and on test fired cartridge cases marked as 'TC1' and 'TC2' were examined & compared under the Comparison Microscope Model Leica DMC. The marks on 'EC1' and on 'TC1' were found identical, the marks on 'EC2' and on 'TC2' were found identical. Hence the exhibits 'EC1' & 'EC2' have been fired through the right & left barrel of double barrel breech loading gun 12 bore marked exhibit 'F1' above.

5. The exhibits 'F1'/'A1 & A2' are firearm/ammunition as defined in the Arms Act, 1959."

14. The blood stained articles seized from the spot as also the clothes worn by the deceased when she was shot were also sent to the Forensic Science Laboratory for forensic opinion which sent a report Ex.PW-19/E on 11.3.2004 opining that blood of Group-A was found on all the samples sent, save and except that there was no reaction on the sample of the blood stained earth. Pertaining to the chappal seized from the spot it was opined that the blood was human but the group thereof could not be detected. The clothes of the deceased were reported to be having blood of Group A thereon.

15. The police recorded the statements under Section 161 Cr.P.C. of the three daughters and a son of the appellant and the deceased, namely Poonam PW-1, Mamta PW-2, Sonam PW-3 and Ankit Kumar PW-6.

16. On 17.9.2003 SI Mukesh Kumar, a draftsman, went to the site and with the help of SI Lekh Raj prepared the site plan Ex.PW-7/A.

17. Armed with the aforesaid material, the appellant was sent for trial and as per the charge sheet, the charge against the appellant was of having murdered Shakuntala and having made an attempt to murder Raj Kumar.

18. For unexplainable reasons the learned Trial Judge framed a charge against the appellant vide order dated 24.2.2004 only pertaining to causing death of Shakuntala by use of a firearm. The appellant was charged of having committed murder of his wife Shakuntala, an offence punishable under Section 302 IPC. No charge was framed against the appellant for the illegal use of a licensed firearm. No charge was framed against the appellant pertaining to the injuries caused to Raj Kumar.

19. Before we begin to re-charter the journey in appeal, we may note at the outset that learned counsel for the appellant has not disputed that the double barrel gun used was a licensed fire arm and that the appellant was issued the license in his name for the same and that the deceased was injured on a bullet being fired from the said fire arm i.e. does not question the opinion of the FSL Laboratory as recorded in Ex.PW-19/F and that

he also does not question the report of the said laboratory recording opinion with respect to the blood group detected on some of the seized items. Thus, that the deceased was shot at from the licensed double barrel gun of the appellant is not in dispute.

20. We begin our re-chartered journey with reference to the statement Ex.PW-4/B made by Raj Kumar to SI Lekh Raj. It reads as under:-

“Statement of Raj Kumar S/o Sh. Kripa Ram R/o B-112, Gali No.8, Phase 10, Shiv Vihar, New Delhi aged 38 years.

I along with my family reside at the above noted address and carry on retail business from a shop in the house. I belong to Village Jaitpur, Thana Bhorankala, Distt. Muzaffarnagar, U.P. Opposite my house is the house of Mathan Singh who resides in said house along with his family and is an employee of Delhi Police and that he has with him a licensed gun. Today i.e. 9.8.2003 at around 7:00 PM I was sitting on a charpai at the door of my house. The door of the house of Mathan Singh is opposite the door of my house. Mathan Singh and his wife Shakuntala were fighting. Mathan Singh had a gun in his hand. When Shakuntala was running towards the door to go out Mathan Singh fired a shot from behind which hit Shakuntala and as a result of the same she fell down. Pellets from the bullet hit me on my head and neck as a result whereof I fell down. A police van came to the spot and took me and Shakuntala to GTB Hospital. I learnt that Shakuntala has died. Appropriate action be taken against Mathan Singh.”

21. Needless to state the information as recorded in the statement disclosed the commission of a cognizable offence of having murdered Shakuntala.

22. At the trial, the children of the appellant and the deceased, namely Poonam, Mamta, Sonam and Master Ankit were examined as PW-1, PW-2, PW-3 and PW-6. They did not support the prosecution. Each one of them stated that they were not present in the house when their mother was shot at. Poonam PW-1, Sonam PW-3 and Ankit PW-6 stated that when their mother was shot at, their father was in the house of their Bua.

23. Raj Kumar PW-10, was examined on 11.8.2008. He deposed as under:-

“PW-10 : Sh. Raj Kumar S/o Sh. Kirpa Ram aged 39 years, business-man R/O B-112, Gali No.8, Phase-10, Shiv Vihar, Karawal Nagar, Delhi, on S.A.

On 9.8.2003 at about 7 p.m. I was sitting outside my house on the cot. House of Mathan Singh is situated opposite/in front of my house where he was residing with his family. Mathan Singh is working in Delhi Police. He is present in the court today. The witness has correctly identifies him. Mathan Singh was having a licensed gun. He and his family were quarrelling with each other on that day. At the time of quarrelling, Mathan Singh was having gun in his hand. When his wife run away outside from the house, Mathan Singh fired on her back. She sustained injuries and fell down. I raised the alarm then he again fired, resulting which I also received

injuries by the pallets. I fell down. Police came at the spot as I informed the PCR. They took me to the GTB Hospital. Wife of the accused Shakuntala were also removed to the hospital. There I came to know that she died. My statement was recorded by the police which is Ex.PW-4/A which bears my signatures at point A."

24. His cross examination was deferred at the request of learned counsel for the accused. He was cross examined on 22.3.2005 i.e. after nearly 7 months of his examination-in-chief.

25. In cross examination he started supporting the appellant, in that, back-tracked from his earlier deposition, wherein he had deposed that his statement Ex.PW-4/A was recorded by the police and that it bore his signatures at point A. He back-tracked from his earlier testimony wherein he had stated of having witnessed the appellant fire on the back of his wife and the witness also sustaining pellet injuries. In cross examination he stated that at the time of the occurrence he came out of his house when he heard a voice coming from the house of the appellant and that he did not see anything. He stated that suddenly something hit him and as a result he fell unconscious, in that, darkness appeared before his eyes. He stated that signatures at point A on Ex.PW-4/B were not his. He denied having made any statement to the police. He stated that on 11.8.2004 i.e. when he deposed as the witness of the

prosecution the IO met him outside the Court and made him read the statement Ex.PW-4/B with instructions that he was to give evidence in light of what has been recorded in Ex.PW-4/B.

26. Noting that the witness was turning turtle, the Court examined Raj Kumar and drew his attention to his deposition recorded on 11.8.2004. He was asked to explain the variation in his stand and in particular of his signatures on Ex.PW-4/A at point A. He responded: *May be I had signed Ex.PW-4/A as I was not fully conscious at that time. My earlier statement before the Court was told to me by the IO and today whatever I have stated today is correct.*

27. The appellant examined his sister Hardesh Devi DW-1, who deposed that on 9.8.2003 appellant was in her house for a 'Rakhi' to be tied in advance because 12.8.2003 i.e. the day of Raksha Bandhan, was a little prior to Independence Day and that the appellant had told her that being on duty on 12.8.2003 he could not make a visit to her house for Raksha Bandhan ceremony to be performed.

28. In view of the fact that the two FSL reports, noted hereinabove, were not questioned by the appellant before the learned Trial Judge; it being not in dispute that the weapon of offence is a licensed gun, license holder whereof is the appellant; learned Trial Judge has, with reference to the testimony of PW-

10, held that the charge against the appellant of having murdered his wife stands fully established.

29. The plea of alibi has been negated by the learned Trial Judge with reference to the deposition of the police witnesses who deposed that the appellant was in the house when they reached and that he was apprehended from the spot. Learned Trial Judge has believed the testimony of PW-10 as per his examination-in-chief.

30. At the hearing held today, Sh.D.M.Bhalla learned counsel for the appellant, has made various submissions which are being noted one by one and are being dealt with simultaneously rather than to make a list of the submissions and thereafter deal with the same.

31. Referring to the testimony of PW-4 SI Lekh Raj learned counsel submits that PW-4 SI Lekh Raj, has deposed that on 9.8.2003, DD No.19-A, Ex.PW-4/A, was entrusted to him at 7:00 PM, but the DD entry was recorded at 7.35 PM. Counsel further urges that as per SI Lekh Raj he left for the site along with ASI Darshan Kumar, Const. Sharma and Const. Brijvir, but the fact was that no Const. Sharma went to the spot. Thus, counsel urges that PW-4 has deposed falsely.

32. The submissions are neither here nor there. Deposing of an incident after more than a year thereof can

always result in a memory lapse with respect to the exact time. 7.30 PM being stated to be 7.00 PM as the time of departure is a trivial discrepancy and has to be ignored. Further, that SI Lekh Raj said that Cont.Sharma accompanied him along with ASI Darshan Kumar and Const. Brijvir, the fact of the matter being that Const. Sharma was not a part of the police team is again the result of an imperfect recollection. In this connection we note that SI Lekh Raj has categorically deposed that when they reached the house of the appellant, ASI Darshan Kumar and Const. Brijvir remained at the spot. He has further deposed that after he recorded the statement of Raj Kumar at the hospital he sent the same through Const.Shyam Lal for getting the case registered.

33. Learned counsel has again referred to the testimony of SI Lekh Raj where he has further deposed that when they reached the house immediately on receipt of DD No.19-A, Mathan Singh, the appellant was present in the house. He has further deposed that the appellant was arrested vide arrest memo Ex.PW-1/H, which records the time of arrest at 1:30 AM (the next day). Learned counsel draws our attention to the fact that the appellant was lodged in the police lock up at around 4:00 AM on 10.8.2003. With reference to the testimony of ASI Darshan Kumar PW-12 who has deposed that accused Mathan

Singh was in his custody, counsel urges that it is apparent that the appellant was apprehended as per said witness much prior to 1:30 AM the next day, and hence the arrest memo Ex.PW-1/H becomes a doubtful document and probablizes the defence. Learned counsel draws our attention to the statement of the appellant under Section 313 Cr.P.C. wherein he stated that he was at the house of his sister and learnt about his wife being shot when his daughter Poonam gave a telephonic call and that he immediately reached GTB Hospital and that he was illegally arrested by the police when he went to the hospital.

34. The submissions afore-noted have somewhat baffled us; we confess. We do not understand the logic thereof. We do not understand as to what consequences flow. No recovery has been made from the appellant when he was apprehended. If the place of arrest was to be doubted, the recovery would have come under a cloud. This is not the case here. Besides, what has been stated by the police officers is that when they reached the spot the appellant was present. He was not allowed to leave the spot by ASI Darshan Kumar till SI Lekh Raj came back and after the FIR was registered, the appellant was formally arrested at the spot. That he was detained in the police lock up at the police station at around 5.00 AM is obviously a result of the police personnel completing the proceedings at the spot and

thereafter bringing the appellant to the police station and putting him inside the police lock up.

35. With reference to the testimony of Raj Kumar PW-10, learned counsel draws our attention to his statements made in cross examination which we have already noted in para 25 hereinabove. In addition, counsel points out that the witness stated that the plinth of the house of the appellant is above the plinth level of his house and that unless one stood up at the plinth level of his house one could not see anything inside the house of the appellant Mathan Singh. Counsel urges that the public prosecutor did not cross examine Mathan Singh with respect to statements made in cross examination and hence whatever was stated by Raj Kumar in cross examination had to be accepted. Counsel urges that if testimony of PW-10 Raj Kumar has to be ignored, there is no evidence to link the appellant with the murder of his wife. Counsel further draws our attention to the testimony of Raj Kumar, who in cross examination, stated that several persons used to visit the house of the appellant. Counsel urges that the possibility of an outsider entering the house; picking up the licensed firearm of the appellant; thereafter shooting the wife of the appellant cannot be ruled out. The last submission made is with reference to the site plan Ex.PW-7/A which shows the place where

Shakuntala was shot at is, as recorded, at point 'B'. The same is just at the entrance of the house of the appellant i.e. at the point where the gali and the boundary of the house meet. With reference to the testimony of PW-10 learned counsel urges that if PW-10 has to be believed as per what he stated during examination-in-chief, the shot was fired when the deceased was outside the house. Learned counsel urges that the site plan discredits said testimony of PW-10.

36. As noted by us herein above PW-10 Raj Kumar was examined on 11.8.2008 and deposed fully in favour of the prosecution. He admitted having made the statement Ex.PW-4/A and having signed the same at point 'A' thereon. He was cross-examined after nearly seven months. He turned turtle. What has happened is obvious. He has been won over or threatened to depose to the contrary by the appellant.

37. The instant case brings out the importance of not deferring the cross-examination of an eye-witness and the need thereof to be conducted expeditiously. We hope and expect that henceforth, the Trial Judges would ensure that eye-witnesses are cross-examined the same day when they depose or at best within the same week.

38. In any case, that Raj Kumar lied when he was cross-examined is evident from the fact that he received superficial

pellet injuries as per the MLC Ex.PW-25/A. The doctor who examined him namely Dr.Narender Singh PW-25 has recorded thereon that the patient was conscious and oriented. He proved the MLC when he appeared as the witness of the prosecution. No suggestion was put to PW-25 that Raj Kumar was unconscious or unfit for making a statement.

39. We note that when questioned by the Court, Raj Kumar somewhat retracted his steps and did not deny that the signatures at point 'A' were not his. He tacitly admitted that the signatures were his.

40. The argument pertaining to the site plan and the place where Shakuntala was shot being shown at point 'B' and the statement of Raj Kumar in examination-in-chief that Shakuntala was shot at outside the house is neither here nor there because point 'B' is at the door of the house opening on to the road. A layperson would obviously say that Shakuntala was shot at outside the house. That the plinth level of the house of the appellant and that of the witness are different, is again a version of PW-10, during his cross-examination. The same has to be taken with a pinch of salt. We note that when the draftsman SI Mukesh Kumar PW-7 was examined and he proved the site plan, no suggestion was given to him that the plinth level of the two houses is different. That PW-10 stated that due

to the difference in the plinth level of the two houses, one could not from his house see inside the house of the appellant unless one stood up, is neither here nor there because Raj Kumar categorically deposed during examination-in-chief that he saw the appellant fire at his wife.

41. The residual argument as noted in para 35 above that the possibility of some intruder entering the house and using the fire arm to shoot at Shakuntala has to be noted and rejected. The appellant is the licensed owner of the weapon of offence. He admits the said fact. That his wife was shot at from the said weapon of offence is also admitted by him. He has not explained as to where he used to keep the licensed gun. He has not explained as to where he used to keep the ammunition thereof. The appellant was a Constable in the police and knew the importance of securing the security of his licensed gun so that the same does not fall in wrong hands. The plea of an intruder using the gun is nothing but a hog-wash.

42. The plea of alibi has to fail because of the testimony of PW-4, PW-12, PW-15 and PW-17, the four police officers who went to the site of occurrence on receipt of DD No.19-A and have deposed about the appellant being present in his house and apprehended from his house. That the children of the appellant

have deposed to the contrary is explainable. They have been won over by the appellant.

43. Before concluding we may note that where a licensed fire arm is used as a weapon of offence, unless the license holder thereof satisfactorily explains that the possession thereof was with some other person the presumption would be that he has used the weapon of offence more so when his presence at the scene of the offence stands established.

44. We find no merit in the appeal. The same is dismissed.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

JANUARY 27, 2009
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