

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

% Reserved on: 01.09.2009
Date of decision: 07.09.2009

+ CRL. A. No.417 of 2009

SANJAY KUMAR GUPTA ...APPELLANT
Through: Mr. Sumeet Verma, Advocate.

Versus

THE STATE, GOVT. OF NCT OF DELHI ...RESPONDENT
Through: Mr. Pawan Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE AJIT BHARIHOKE

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

SANJAY KISHAN KAUL, J.

1. The appellant, Sanjay Kumar Gupta, was charged with the offence under Section 302 of the IPC of committing the murder of deceased Mohd. Tabrez on 12.6.2004 with a *katta* (country made pistol) and for offence under Sections 25/27 of the Arms Act, 1959 (for short 'Arms Act'). On framing of charges he pleaded not guilty and claimed trial. In terms of the impugned judgement and order of sentence the appellant has been held guilty of both offences under Section 302 of the IPC and under Sections 25/27 of the Arms Act and sentenced to undergo rigorous imprisonment

for life and pay fine of Rs.2,000.00 for the offence under Section 302 of the IPC while for offences under Sections 25/27 of the Arms Act, has been sentenced to undergo RI for a period three years and pay fine of Rs.1,000.00 in respect of each of the two offences. The appeal has, thus, been preferred against the judgement dated 30.1.2009 and the order of sentence dated 2.2.2009.

2. It is the case of the prosecution that the appellant used to drive a bus while the deceased used to ply a rickshaw. About 10-12 days prior to the incident the deceased was stated to have purchased a mobile phone from the appellant for which some balance payment was outstanding which was not paid despite the demand. On 12.6.2004 at about 1:30/2:00 p.m. the appellant came to the shop of one Mohd. Maqbool (PW-2), who is the brother of the deceased complaining about the failure of the deceased to pay the balance amount to the appellant. The appellant was accompanied by his wife. The wives of the appellant and Mohd. Maqbool are sisters. The said PW-2 claims that he asked the appellant to reach his *jhuggi* and that he would bring the deceased there itself. The deceased, Mohd. Maqbool and one Afzal are stated to have gone to the *jhuggi* of the appellant where hot words are stated to have been exchanged between the appellant and the deceased. The appellant is stated to have brought out a country made pistol and fired at the deceased whereupon the deceased fell down in a pool of blood. Mohd. Maqbool attempted to

apprehend the appellant and raised an alarm whereafter many persons gathered and the appellant was apprehended at the spot. The country made pistol was snatched from the appellant and the appellant was apprehended. The police on arrival took the appellant into custody and the *katta* was handed over to the police. The deceased was rushed to Sanjay Gandhi Hospital where he was declared 'brought dead'.

3. The case of the prosecution is primarily based on the testimonies of Maqbool, PW-2 and Afzal, PW-3 both of whom were with the deceased and in the *jhuggi* where the incident took place. Thus, the testimonies of these two witnesses have to be examined carefully. PW-2 stated in the examination-in-chief what has been recorded hereinbefore. In the cross-examination PW-2 has categorically stated that the deceased, Afzal and PW-2 were inside the *jhuggi* of the appellant and that they had gone to make the payment of the money. The suggestion that the said three persons had come to beat up the appellant has been denied. The suggestion made that the *katta* was fired actually by PW-2 at the appellant and by mistake the bullet hit the deceased, who died, has been denied. It has also been stated that the single shot was fired inside the *jhuggi*. A suggestion has been made to these witnesses in cross-examination that he owed a sum of Rs.18,000.00 to the appellant which was the genus of the dispute and it has been stated that the deceased had informed PW-2 that he

had to pay some money to the appellant though the exact amount had not been disclosed. The deceased is stated to have been carrying the money along with mobile but the same was not handed over to the appellant as prior to that a quarrel broke out.

4. It is important to note at this stage itself that neither any money nor the mobile were found on the deceased after his death. PW-2 has stated that he had not taken out the money and the mobile from the pocket of the deceased. The PW-2 who was present in the *jhuggi* has also stated that "I cannot say as to on what account the dispute between the two took place". He has, however, categorically stated that Afzal was also present there and that a lot of hue and cry was raised during the quarrel as a result of which the public persons had gathered at the site. It has been specifically denied that Afzal was not present at the time of the incident. The said witness stated that the police also recorded the statement of the public persons though the witness did not know the name of such persons. Once again, it is important to note that no such public witness has been produced by the prosecution.
5. The testimony of PW-3, Afzal, in his cross-examination has supported what has been deposed by PW-2. However, in the cross-examination he has made the following statement:

"I do not know whether we had gone to make the payment of remaining amount to the accused or we had gone to settle the matter. I did not enter the hutment of the *jhuggi* of accused. I kept standing

near the staircase. I did not go to the first floor of the *jhuggi* or my Mami even after hearing the sound of fire. It is wrong to suggest that nothing happened in my presence. The deceased was fired in my presence.”

6. The aforesaid shows that on the one hand PW-3 claims to be inside the *jhuggi* and assisted in the apprehension of the appellant while in the same breath he has stated that he never entered the hutment or the *jhuggi* of the appellant and kept standing near the staircase. The incident happened on the first floor of the *jhuggi* and he has stated that he did not go to the first floor even after hearing the sound of fire (gunshot). Immediately thereafter, once again, the witness has denied the suggestion that he did not happen to be present and he affirmed that the deceased was fired at in his presence. The aforesaid jumbling up of the narration of the incident by PW-3 becomes vital in the present matter as PW-2 was not only an interested witness being the brother of the deceased but the allegation of the defence was that it was actually PW-2, who had fired the shot at the appellant which accidentally hit the deceased. The admission made in the cross-examination by PW-3 shows that he was not present inside the *jhuggi* and thus only the appellant, the deceased and PW-2 were present in the *jhuggi*. He has reaffirmed this fact by stating that he did not even go to the first floor of the *jhuggi* where the incident took place even after hearing the sound of fire (gunshot).

7. If this testimony is compared with what has been stated by PW-2 it belies the statement alleging presence of PW-3 in the *jhuggi* and it appears that PW-3 was waiting at the ground floor. Another important aspect of the testimony of PW-2 noticed above is his statement that the deceased had accompanied him with the money and with the mobile to settle accounts with the appellant. If this was so, there was no reason for any altercation. The appellant would have been more than happy to receive the money. If the money would have been carried along with mobile the same would have been found on the body of the deceased. PW-2 has stated that he had never removed the money and the mobile from the pocket of the deceased. The fact remains that no such money or mobile phone was recovered from the body of the deceased, nor the money or the mobile phone were recovered from the personal search of the appellant as is apparent from the personal search memo of the appellant (Exhibit PW-2/G) which reveals only Rs.102/-, one purse and an impounding slip of the driving license were recovered from the appellant when the appellant was arrested.
8. It is equally important to note that the *katta* was not recovered from the appellant by the police nor has any material evidence been led to connect the *katta* to the appellant other than the testimonies of PW-2 and PW-3. It is the version of these two witnesses that the *katta* was in the hand of the appellant who fired the same and on the

attempt of the appellant to run away from the spot was apprehended by PW-2, PW-3 and other public persons at the site and that PW-2 snatched the *katta* from the hand of the appellant. The connection of the *katta* with the appellant has not been established other than this testimony and if this testimony is in doubt then no such connection is established especially as no public witness has been examined. The trial court on the testimonies of these two witnesses has, in fact, found that the deceased had not gone to meet the appellant accompanied by PW-2 & PW-3 with the object of repaying the balance money as alleged by PW-2. Thus, the trial court itself has found inconsistencies in the testimonies of PW-2 & PW-3. There are, however, two facts, which have weighed with the trial court in convicting the appellant.

9. The first fact taken into account is that the pant and the shirt of the appellant were found to have bloodstains. The shirt had bloodstains of a blood group of the deceased while insofar as the pant is concerned it could only be verified that the blood was human. This established fact coupled with, admittedly, some dispute having occurred where hot words were exchanged, have been held by the trial court to be conclusive to prove that the *katta* was fired by the appellant and not by PW-2. The second factor which has weighed with the trial court is that the bullet shot had hit the deceased in front of right side of the chest and thus the bullet wound was forced from the front. The trial court

concluded that the entry of the bullet was such that it could be fired by a person standing just opposite and thus it could not be that the bullet was fired by PW-2 at the appellant and by mistake hit the deceased.

10. Learned counsel for the appellant has explained that if what is stated by PW-2 would have been correct, PW-2 would naturally have tried to save his brother or handled his body and the bloodstains would have come on the clothing of PW-2. No such bloodstains were found. The bloodstains were found on the clothes of the appellant which, if at all, would support the theory that it is the appellant who was helpful and was framed by PW-2. Learned counsel also drew our attention to the postmortem report (Exhibit PW-12/A) to contend that the entry wound was on the right side of the chest but the exit wound was on the back of the left side of the chest. Thus, the bullet wound was diagonal and not a straight one. The testimony of PW-12, Dr. V.K. Jha, who conducted the postmortem establishes "singing and tattooing present spreaded up to the front of chest upper side" (on the right side of the chest) showing that the firing had taken place from a close range.
11. On appreciation of evidence as discussed aforesaid as also the testimony of the IO, PW-21 as also ASI, Roop Chand, PW-15 clearly show that the incident took place on the first floor room where the blood was found. The wound was caused by the country made pistol which was recovered.

However, other than testimonies of PW-2 & PW-3 there was no evidence produced to link the weapon to the appellant.

12. We have discussed the testimonies of PW-2 & PW-3 in detail which are the relevant testimonies relied upon to convict the appellant and if the same are inconsistent then the benefit of doubt has to go to the appellant. We find that even the trial court has found inconsistencies in the testimonies of the said two witnesses. It belies the story as set up by PW-2. We also cannot lose sight of the fact that the defence set up is that it is PW-2 who fired the bullet at the appellant and by mistake hit his brother, the deceased. No independent witnesses have been examined. We do not find that the conviction of the appellant can be sustained on the two grounds as set out in the impugned judgement.
13. The trial court has assumed that the wound is a straight one and directly on the right side of the chest. The wound has been inflicted from a close distance but then the *jhuggi* itself was a small one measuring approx. 7 ft. X 6 ft. The wound, as apparent from the testimony of PW-12 and the postmortem report, is a diagonal one and not a straight one. Thus, one of the reasons for the trial court to have accepted the versions of the firing of the *katta* by the appellant cannot be sustained. Insofar as the blood being found on the clothes of the appellant is concerned there could be more than one situation where such blood could have been so found including an effort of the appellant to handle the body of the deceased if his version was to be

accepted of the firing by PW-2. This can hardly be the sole ground on which the case can be said to have been proved beyond all reasonable doubt against the appellant. The conviction of the appellant is dependent on the testimonies of PW-2 & PW-3. Once their testimonies are found to be inconsistent on crucial aspects including about presence of PW-3 in the room and the very object of the visit (to repay the amount to the appellant) the testimonies of these two witnesses become unreliable and it would not be proper to sustain the conviction of the appellant based on the testimonies of these two witnesses.

14. The alternative plea of the learned counsel for the appellant on the issue of the offence being one under Section 304 Part-II of the IPC relying upon the pronouncement in Pappu @ Hari Om Vs. State of Madhya Pradesh 2009 (4) SCALE 521 needs no further discussion as we have found that the appellant is entitled to the benefit of doubt in view of the testimonies of PW-2 & PW-3 being inconsistent and not trustworthy.
15. The appellant is accordingly acquitted giving him the benefit of doubt and be released forthwith, if not wanted in any other case.

SANJAY KISHAN KAUL, J.

SEPTEMBER 07, 2009
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AJIT BHARIHOKE, J.