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IN THE HIGH COURT OF DELHI

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Judgment reserved on : 04.05.2009

Judgment delivered on: 25.05.2009

CRL. APPEAL NO.957/2008

SUNIL NAYAK ...Appellant
Through : Mohd. Salim, Advocate and
Mohd. Tarbez, Advocate.

versus

STATE ...Respondent
Through : Mr. Pawan Sharma, Advocate.

CRL. APPEAL NO.1008/2008

SHESH BAHADUR PANDEY ...Appellant
Through : Mr.Anupam S.Sharma, Advocate.

versus

STATE ...Respondent
Through : Mr. Pawan Sharma, Advocate.

CRL. APPEAL NO.1012/2008

HIMANSHU @CHINTU ...Appellant
Through : Mr.K.B.Sinha, Senior Advocate
with Mr.Ranbir S.Yadav, Advocate.

versus

STATE ...Respondent
Through : Mr. Pawan Sharma, Advocate.

CRL. APPEAL NO.1041/2008

RAMESH @DUDHIA ...Appellant
Through : Mr.Ratnakar Dash, Senior Advocate
with Mr.Anuvrat Sharma, Advocate.

versus

STATE ...Respondent

Through : Mr. Pawan Sharma, 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? Yes
3. Whether judgment should be reported in Digest? Yes

: PRADEEP NANDRAJOG, J.

1. On 8.7.2006, at about 9:34 PM information was received at the police control room, recorded in the entry form Ex.PW-3/A, noted by HC Dharampal PW-3, from the mobile number 9210325051 wherein Rohit PW-7 informed about a person having been shot at A-450 Shastri Nagar. HC Dharampal forwarded the said information to PS Sarai Rohilla, where ASI Dhyan Singh PW-2, recorded DD No.31/A, Ex.PW-2/A, at about 9:46PM.

2. On receipt of copy of Ex.PW-2/A SI Subhash Chand PW-24, along with HC Vijay Pal PW-19 and Const.Sudhakaran, reached the spot. At the spot they met Raju PW-11, the brother of the person injured and SI Subhash Chand recorded his statement Ex.PW-11/A as per which Raju stated that at around 9.20 PM, when his brother Murari with his friends Rohit and Monty and he i.e. Raju were standing in front of Ahuja

Clinic, Himanshu, who is also a resident of A Block, came on his motorcycle and threatened Murari that he would kill him. That Himanshu went away but returned after 5-10 minutes with other persons on motorcycles. These included Ramesh Dudhia a resident of E-2 Block Shastri Nagar, Shesh Bahadur Pandey a goon of Bharat Nagar, and Fundy a resident of J.J.Colony, Wazirpur. That thereafter Himanshu pointed out Murari to Ramesh Dudhia, who, on being instigated by Pandey and Fundy, shot at Murari, with a country made pistol and thereafter all fled away. That Rohit and Monty had removed his brother to Paramarth Hospital in a TSR where after first aid given to him, in a PCR van his brother was removed to Hindu Rao Hospital. That Chintu i.e. Himanshu used to tease the girlfriend of his brother Murari.

3. On being informed that the injured had been taken to Hindu Rao Hospital, leaving Const. Sudhakaran at the spot, SI Subhash Chand and HC Vijay Pal proceeded to Hindu Rao Hospital where they learnt that the injured Murari had died. SI Subhash Chand collected his MLC Ex.PW-30/A which recorded that Murari was 'brought dead'. At the hospital itself, SI Subhash Chand made an endorsement Ex.PW-24/A on the statement Ex.PW-2/A of Raju and handed the same to HC Vijay Pal for the registration of an FIR. HC Vijay Pal returned to the

police station and handed over the statement and the endorsement to ASI Dhyan Singh PW-2 who registered the FIR Ex.PW-2/B at 23:50 hrs.

4. SI Subhash Chand returned to the spot from the hospital, where he met Inspector Vikram Singh PW-35, who had in the meantime also reached the spot and since it was a case of murder, had taken over the investigation.

5. Inspector Vikram Singh went to Hindu Rao Hospital at around 2.00-2.30 AM, where he met Rohit and Sukhvinder @Monty. He took them to the police station where he recorded the statement Ex.PW-7/A of Rohit and the statement Ex.PW-8/A of Sukhvinder under Section 161 Cr.P.C. as per which statements, the two narrated substantially the same facts implicating the appellants as were already disclosed by Raju in his statement Ex.PW-2/A.

6. After recording the statements of Rohit and Sukhvinder, Inspector Vikram Singh returned to the spot where the crime was committed and summoned a photographer Rajinder Soni PW-15, who took photographs Ex.PW-15/1 to Ex.PW-15/4 of the spot; negatives whereof are Ex.PW-15/5 to Ex.PW-15/8. Inspector Vikram Singh lifted blood, blood stained soil and earth control from the spot as recorded in the seizure

memo Ex.PW-24/B. He also prepared a rough site plan Ex.PW-35/1, at the instance of Raju noting thereon spot 'A', spot 'B' and spot 'C' where blood was lifted, the deceased was sitting with his friends and his brother and where a street light was installed, respectively.

7. The dead body of Murari which had been seized at Hindu Rao Hospital on the intervening night of 8th and 9th July, 2006 was sent to the mortuary of the hospital and on 9.7.2006 Dr.C.B.Dabbas PW-5 of Hindu Rao Hospital conducted the post-mortem on the dead body. On the post-mortem report Ex.PW-5/A Dr.C.B.Dabbas recorded the following injury:-

“One firearm entry wound round in shape, measuring 2.2 X 2.2 cm and surrounded by collar of abrasion in area of 3x3 cm located over the left side lateral; aspect of chest, 19 cm outer to midline and 12 cm outer to left nipple and 120 cm above left heel. The wound is surrounded by singeing blackening and tattooing.”

8. Dr.C.B.Dabas recorded on the post-mortem report the trajectory of the wound from left to right and upwards and that the injury was a fire arm entry wound of ammunition discharge from a rifled firearm fired from a point blank range. Dr. Dabbas recovered a copper coated lead tipped bullet from the body of the deceased. After the post-mortem, along with the report, the clothes of the deceased and the blood sample of the deceased on a piece of gauze, the bullet was handed

over to Inspector Vikram Singh who took possession of the same as recorded in the memo Ex.PW-24/C.

9. Accused Himanshu was apprehended from the red light at Chowki No.2, K.D. Marg on 9.7.2006 at about 10.00 PM.

10. On 16.7.2006, information was received by Inspector Vikram Singh that accused Sunil Nayak @ Fandi was apprehended and remanded to judicial custody at Tihar Jail in another case. After moving an application and seeking permission from the Court of the learned Metropolitan Magistrate, police custody of Sunil Nayak was obtained by Inspector Vikram Singh and Sunil Nayak was formally arrested in the instant FIR on 18.7.2006.

12. Accused Ramesh Dudhia was arrested on 26.7.2006 in another case by Inspector M.H. Khan, PW-23 of PS Gulabi Bagh. On being interrogated by Inspector M.H.Khan, he made a disclosure statement Ex.PW-6/A, wherein he disclosed about his involvement in the murder of Murari and inter-alia stated that he had thrown the desi katta with which he had shot Murari in a gutter at AB Block Shastri Nagar. The said information was conveyed to Inspector Vikram Singh who took custody of Ramesh Dudhia on 26.7.2006 and the same day Ramesh Dudhia led Inspector Vikram Singh to a gutter (ganda nala) at AB Block Shastri Nagar and pointed out a place, from

where a country made pistol Ex.P-21/1 was recovered and Inspector Vikram Singh seized the same in the presence of SI Subhash Chand, as recorded in the seizure memo Ex.PW-24/J.

13. Accused Shesh Bahadur Pandey was arrested by the Special Cell of Delhi Police on 16.8.2006 and said fact was conveyed to Inspector Vikram Singh who took the necessary steps to obtain the police custody of Shesh Bahadur Pandey and managed to have the same only on 16.10.2006, on which date Shesh Bahadur Pandey was formally arrested in the instant case.

14. On 4.9.2006 SI Mahesh Kumar PW-25, under the instructions and instance of SI Subhash Chand PW-24 prepared the site plan to scale Ex.PW-25/A.

15. Inspector Vikram Singh sent for ballistic examination, two sealed parcels, one containing the country made pistol Ex.P-21/1 recovered at the instance of accused Ramesh Dudhia on 27.7.2006 and the other containing the bullet recovered from the body of the deceased at the time of the post-mortem and handed over to Inspector Vikram Singh as per seizure memo Ex.PW-24/C. Shri K.C.Varshney PW-31, gave a report Ex.P-31/A that no opinion could be given whether the bullet was fired from the country made pistol

Ex.P-21/1 because the individual characteristic of striations detected on the bullet were insufficient for comparison.

16. It is not clear as to on what basis co-accused Sunil Kumar (who has been acquitted by the learned Trial Judge) became a suspect. But it is on record that he was arrested on 9.11.2006.

17. Five accused i.e. the appellants and Sunil Kumar were charged for having committed an offence punishable under Section 302/34 IPC i.e. for having murdered Murari in furtherance of their common intention. Appellant Ramesh Dudhia was also charged for the offence punishable under Section 27 of the Arms Act.

18. When the trial commenced, a criminal writ petition registered as Crl.W.P. No.350/2007, certified copy whereof is Ex.PW-7/A was filed in this Court under the signatures of Rohit Kumar PW-7 and his father Vijay Kumar, in para 4 and 5 whereof it was pleaded as under:-

“4. That on 8.7.2006 a murder has taken place near the house of the petitioner and petitioner No. 2 as a responsible law abiding citizen became witness to the murder which has rather resulted in suffering, harassment, murderous assault and the police instead of protecting the life and liberty of the petitioners in collusion with the associates of the accused in murder case harassing the petitioners not to depose in the Court in the said murder case against the accused persons. The police has registered the FIR No. 289/2006 under Section 302/34 IPC at Police Station Sarai Rohilla. The petitioner No. 2 is a vital eye witness of the murder case

in which the known criminal of the area namely Ramesh Dudhia and one Pandey are the main accused. Copy of the FIR with its true English translation is annexed as ANNEXURE-A to this petition.

5. That the associates of the above said persons namely Jeetu etc. who are known bad elements of the area have thereafter started extending serious alarming threat to the petitioner No. 2 with dire consequences in case petitioner No. 2 deposes in the Court in the said murder case. Initially the petitioners have avoided such threats presuming that they are safe in the hands of the police but later on the threats perception increased of even kidnapping and murder of petitioners. These facts were orally informed to the local police who ensured the petitioners of their safety.”

19. Prayer made in the writ petition was to provide security for Rohit Kumar and his father Vijay Kumar as they claimed that they were being threatened by the associates of appellant Ramesh @Dudhia and appellant Shesh Bahadur Pandey. It was pleaded that Rohit PW-7 is a vital eye-witness to the murder of Murari and that Ramesh @Dudhiya and Shesh Bahadur Pandey are known criminals of the area.

20. Needless to state, the prosecution hinged, for success, on the testimony of Rohit PW-7, Sukhvinder PW-8 and Raju PW-11 who claimed to be eye-witnesses for the reason the prosecution could gather no other incriminating evidence against the accused; the report of the ballistic expert pertaining to the country made pistol which was recovered

pursuant to the disclosure statement of appellant Ramesh
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@Dudhia did not link the same to the bullet which was recovered from the body of the deceased due to insufficient characteristics of striations. Thus, no useful purpose would be served in noting the testimony of the witnesses of the prosecution save and except the testimony of Dr.C.B.Dabbas PW-5, Rohit PW-7, Sukhvinder PW-8, Raju PW-11, HC Vijay Pal PW-19, SI Subhash Chand PW-24 and Inspector Vikram Singh PW-35; more so for the reason, as would be evidenced herein after, arguments urged during hearing of the appeal require the testimony of said witnesses to be considered.

21. Dr.C.B.Dabas PW-5 deposed that he had conducted the post-mortem of the deceased on 9.7.2006 and the post-mortem report Ex.PW-5/A was prepared by him. Relevant for purposes of consideration of submissions made by learned counsel for the appellants is the statement made by Dr.C.B.Dabas during cross examination, in reference to the post-mortem report where it was mentioned that 300 gms of semi-digested food was present in the stomach of the deceased, that this evidenced the deceased having consumed food between 1½-2½ hours before his death.

22. Rohit PW-7 deposed that on 8.7.2006 at about 9-9:30 PM he was on his way to his house on his motorcycle when he met Murari and Monty. The three started chatting. At

that time, accused Himanshu with another person came on his bullet motorcycle and threatened Murari saying “main tujhe maarunga”. Thereafter he went away. He i.e. Rohit asked Murari as to what had happened, but before Murari could answer, his brother Raju came to call him. At that time, Himanshu returned with 5-7 other boys on 4-5 motorcycles. Himanshu pointed at Murari and said “yeh tha”. Thereafter, one boy got down from the motorcycle and shot Murari. All persons fled immediately on their motorcycles. Thereafter, he i.e. Rohit called the PCR at No. 100. Raju, Monty and he arranged for a TSR and while Raju went to inform his parents, Monty and Rohit took Murari to the hospital. On the way, at Shakti Nagar red light they saw a PCR van and requested the PCR officials to accompany them. Murari was first taken to Parmath Hospital where they were asked to take him to Hindu Rao Hospital. At Hindu Rao hospital, Murari was declared brought dead. Police met them at the hospital, from where they i.e. Monty and he were taken to the police station where the police recorded their statements.

23. Rohit PW-7, correctly identified accused Himanshu in the court but as regards the other appellants as also the co-accused Sunil who has been acquitted, he did not identify them as those who had accompanied Himanshu on the date of

the incident. On being cross-examined by the learned Additional Public Prosecutor, he denied having stated to the police anything about the involvement of Ramesh Dudhia, Pandey or Sunil @ Fundi in the offence. He admitted that some time back his father and he had filed a Writ Petition before the Delhi High Court seeking police protection from the accused in the present case because on 10.12.2006 he had been beaten by one Jeetu and his associates and was threatened not to depose against the accused in the instant matter. He admitted that on 26.2.2007, his father was threatened by Jeetu and his associates to stop him i.e. Rohit from deposing in the court in the matter. He admitted that Ex.PW-7/A was a certified copy of the petition filed by him and his father. He denied that he told the police, as recorded in his statement under Section 161 Cr.P.C. that when Himanshu pointed out Murari, Fundy @ Sunil Nayak exhorted “mar saale ko goli” and thereupon Ramesh Dhudia fired a shot at Murari.

24. Since no submissions were urged at the hearing of the appeal with reference to the cross examination of PW-7, we do not note the cross examination of PW-7, save and except that the piercing cross examination by learned counsel for Himanshu, failed to dent the credibility of the testimony of PW-7. Needless to state, the witness did not implicate any

other co-accused in the commission of the offence. He simply stated that Himanshu was accompanied by many other persons and that the co-accused were not a part of the group.

25. Sukhvinder @ Monty PW-8, deposed that on 8.7.2006, at about 9.20 PM, he along with Rohit, Murari and Raju was standing in front of Ahuja Clinic when appellant Himanshu came on a motorcycle with another boy and threatened to kill Murari and went away. He returned after 5-10 minutes with 7-8 other persons on 5/6 motorcycles. Himanshu pointed out Murari to one of the boys, who took out a revolver and fired a shot at Murari. Thereafter the said boys fled away. They called the PCR at number 100. Since the PCR did not come within sometime, Rohit and he i.e. Sukhvinder shifted Murari in a TSR to be taken to a hospital. On the way, they requested officials of a PCR van stationed at Shakti Nagar crossing to accompany them to Parmath Hospital. At Parmath Hospital they were told to remove the patient to Hindu Rao Hospital, where the doctors declared him brought dead. Thereafter they were taken to PS Sarai Rohila where his statement was recorded.

26. Since Sukhvinder did not implicate the other co-accused i.e. did not identify them as the ones who were present with Himanshu and deviated from a statement

recorded by the police under Section 161 Cr.P.C., he was got declared hostile and was cross examined by the learned Additional Public Prosecutor. On being cross examined by the learned Additional Public Prosecutor he denied that he told the police that Fundy @ Sunil exhorted saying “maar saale ko goli” at which Shesh Bahadur Pandey shot Murari. He denied that he told the police that he knew Ramesh Dudhia, Sunil @ Fundy and Shesh Bahadur Pandey. He was confronted with his statement under Section 161 Cr.P.C. where aforesaid was recorded. He denied having said so.

27. We note that the cross examination by counsel for accused Himanshu has failed to bring out anything to discredit the testimony of PW-8. On being cross-examined by counsel for the other accused, PW-8 deviated from his testimony in examination-in-chief wherein he had stated that apart from Murari, his brother as also PW-7 and he were present in front of Ahuja Clinic when Himanshu came with a boy on a motorcycle and threatened to kill Murari. In cross examination he stated that Raju was not present at that time and that Raju came soon after said words were spoken and that he was present when the second visit was made by Himanshu with his other friends. He also stated that he had met Raju at the

police station and that Raju's statement was recorded at the police station.

28. Raju PW-11, deposed that on 8.7.2006 at about 9.15-9.20 PM, he along with his brother Murari and his friends Rohit and Monty were standing in front of Ahuja Clinic, when appellant Chintu (Himanshu) with one more person came on his motorcycle and threatened to kill Murari. That Chintu went away and returned after 5-10 minutes, with 5/6 other persons on motorcycles. Himanshu pointed out Murari to appellant Ramesh Dudhia. Appellants Shesh Bahadur Pandey and Fundy instigated Ramesh Dudhia by saying 'Maar saley ko'. Thereupon appellant Ramesh Dudhia took out a pistol (katta) from his right pant pocket and placing it on the left chest of Murari fired a shot at him. Thereafter they all ran away from the spot. Monty and Rohit took Murari to the hospital in a TSR. He i.e. Raju, telephoned and informed the police. His statement Ex.PW-11/A was recorded in the police station on the same night.

29. On being cross-examined he stated that on the day of the incident his brother Murari had returned home at around 9 PM. While Murari was waiting for the food to be cooked, somebody called him outside. He went outside without eating his food. After 5/7 minutes their mother sent him to call Murari

as food had been cooked. That Ramesh Dudhia had fired at Murari while sitting on the motorcycle which was stopped across Murari and that the bullet was fired from the right side to the left on the left side of the chest. That he had called the police from an STD booth. That the police met him at the STD booth and from there took him to the spot. From the spot he was taken to the police station. His complaint was recorded at the spot. That he did not go to the hospital with his brother as he was to make the call to the police. That he had signed all the documents in the Police Station.

30. HC Vijay Pal PW-19 deposed that on 8.7.2006, on receipt of copy of DD No.31A, at about 9.46 PM, he accompanied SI Subhash Chand to the spot which was outside Ahuja Clinic. They found a boy named Raju who informed that his brother had been shot at. At the spot, SI Subhash Chand recorded the statement of Raju. Leaving behind Const.Sudhakaran, he and SI Subhash Chand left for Hindu Rao Hospital where the IO obtained the MLC of Murari and prepared the rukka and sent him with the rukka for registration of the FIR. After registration of the FIR he returned to the spot with a copy of the FIR and handed over the same to Insp. V.S.Rana, the SHO of the police station who had reached the spot.

31. With respect to the cross examination of HC Vijay Pal, the only thing worthwhile to note is that he stated that he does not remember whether he had stated before the IO that the tehrir was recorded before he and SI Subhash Chand left the hospital. We note that as a matter of fact, in his statement recorded by the IO, HC Vijay Pal has stated that the tehrir had been given to him at the hospital so that he could get the FIR registered. The same has been recorded by the learned Trial Judge within brackets at the place where aforesaid cross examination of the witness has been recorded.

32. SI Subhash Chand PW-24 deposed that on 8.7.2006 he was posted at Police Station Sarai Rohila, and on receiving a copy of the DD No. 31-A, he along with HC Vijay Pal reached the spot i.e. Khurana Tent wali gali in front of Ahuja clinic, A block, Shastri Nagar. Blood was found lying on the spot. They met Raju, brother of the injured at the spot and he recorded his statement Ex.PW-11/A. Raju informed them that the injured had been removed to Hindu Rao Hospital. He reached Hindu Rao Hospital and collected the MLC Ex.PW-30/A which declared the patient brought dead. He endorsed the statement of Raju and sent the same for registration of an FIR through HC Vijay Pal PW-19. Thereafter, the investigation of the case was conducted by Insp. Vikram Singh Rana PW-35.

33. In cross examination he denied that he never went to the hospital and took Raju to the police station. He denied that he fabricated everything at the police station.

34. Insp. Vikram Singh PW-35 deposed that on 8.7.2006, at about 9.40-9.45 PM he received information about the incident and reached the spot at H No A-450, Khurana Tent Wali Gali, Shastri Nagar in front of Ahuja clinic. There he learnt that the injured had been already removed to the hospital. He met SI Subhash Chand at the spot who recorded the statement of Raju PW-11 in his presence. Thereafter SI Subhash Chand and HC Vijay Pal went to the hospital. On their return from the hospital he was informed that the injured had expired and that SI Subhash Chand had already sent the endorsed statement of Raju for registration of an FIR. Thereafter he i.e. Insp. Vikram Singh took over the investigation of the case. He got the place of occurrence photographed. He lifted the blood, blood stained soil and earth control from the spot and seized them vide seizure memo Ex.PW-24/B. He prepared rough site plan Ex.PW-35/1 at the instance of Raju. He got the post-mortem conducted on the body and seized the sealed parcels received from the doctor who conducted the post-mortem. That he arrested the accused Himanshu at around 10.00 PM on 9.7.2006 at the pointing out of the complainant. His

motorcycle No. DL-8ST-8140 was also seized and deposited in the maalkhana. He arrested accused Sunil @ Fundi on 18.7.2006 and interrogated him. He arrested accused Ramesh Dudhia on 27.7.2006 and interrogated him. On his disclosure and pointing out he seized a desi katta claimed to have been used in the commission of the offence vide Ex.PW-24/J. That accused Shesh Bahadur Pandey was arrested by him on 16.10.2006.

35. On being cross examined as to how he learnt that the injured was first taken to a hospital at Shakti Nagar and thereafter to Hindu Rao Hospital. He stated that the said fact was disclosed by a caller on the mobile phone of Raju and that Raju in turn passed on said information to him.

36. The defence examined two witnesses. Sh. K.C. Kalra DW-1 deposed that he was the Resident Manager from Total TV Channel. That the CD Ex.DW-1/B pertained to the news telecast by their channel in the night of 8.7.2006 and that Ex.DW-1/A was the transcript thereof.

37. Sh. Atul Katiyar, DW-2, Addl. DCP, deposed that he had seen the CD Ex.DW-1/B and that the same contained his visuals and his voice.

38. Vide impugned judgment and order dated 30.9.2008, convicting the appellants and acquitting co-

accused Sunil Kumar, the learned Trial Judge has held the testimony of Rohit PW-7, Sukhvinder PW-8 and Raju PW-11, unequivocally implicated appellant Himanshu as the instigator. That the testimony of the three witnesses corroborated each other as to the manner in which the crime was committed. Noting that Rohit PW-7 and Sukhvinder PW-8, refused to admit the presence of the other co-accused when the crime was committed, learned Trial Judge has held that there was no **reason to disbelieve Raju, who, had disclosed the names of all the appellants to the police soon after the incident, which fact,** according to the learned Trial Judge reassure the Court about the truthfulness of his testimony. Noting that though Raju had referred to the presence of accused Sunil, but assigned no role to him, the learned Trial Judge has acquitted Sunil and has convicted the appellants, holding that the testimony of Raju establish that the deceased was shot at by Ramesh at the instance of Himanshu and that Shesh Bahadur Pandey and Sunil Nayak had exhorted Ramesh to shoot Murari. Thus, appellants Himanshu, Sunil Nayak and Shesh Bahadur Pandey have been convicted with the aid of Section 34 of the Indian Penal Code. The learned Trial Judge has convicted Ramesh @ Dudhia for the offence punishable under Section 27 of the Arms Act, holding that an unlicensed

firearm was recovered at his instance and that the same was used in the commission of the crime.

39. Pertaining to the conviction of Ramesh @ Dudhia for the offence punishable under Section 27 of the Arms Act 1959, it is apparent that the use of a firearm in contravention of Section 5 of the Act is a sine qua non for the commission of the offence. Since the FSL Report pertaining to the bullet recovered from the body of the deceased and the country made firearm recovered at the instance of Ramesh has remained inconclusive and no witness has identified the firearm Ex.P-21/1 as the one they had seen in the hand of Ramesh when the crime was committed, we hold that Ramesh @ Dudhia cannot be convicted for the offence punishable under Section 27 of the Arms Act. But, since an unlicensed firearm was recovered at his instance, it is apparent that he possessed the same and hence we hold that Ramesh is liable to be convicted for having committed an offence punishable under Section 25 of the Arms Act, for which offence we sentence him to undergo rigorous imprisonment for 3 years and to pay a fine in sum of Rs.2,000/-; in default of payment of fine to undergo simple imprisonment for 1 month. The impugned judgment, is modified accordingly to said extent.

40. Learned counsel for the appellants urged that the FIR is ante-time. The submission was predicated on the admission of Raju PW-11, at whose instance the FIR was registered, who, on cross examination stated that he had signed all the documents in the police station. The second submission urged was that the three alleged eye witnesses namely PW-7, PW-8 and PW-11 have been cross examined by the learned Public Prosecutor and therefore their credibility is seriously in doubt. Third submission made was that of the five accused one has been acquitted and that if PW-11 could falsely implicate the said accused i.e. Sunil, there is no reason not to doubt his falsely implicating the other accused i.e. the appellant. It was fourthly urged that the testimony of PW-5 clearly established that the deceased had taken meals 1½ to 2½ hours prior to his death, from which it could safely be gathered that the deceased had taken his dinner. Drawing attention to the fact that the reason given by PW-11, the brother of the deceased, to be at the spot was his mother directing him to call the deceased for dinner, it was urged that the justification given by PW-11 to be at the spot was patently false. Drawing our attention to the testimony of PW-7 to the effect that PW-11 was not present, when the first alleged altercation took place as also the admission of the fact by PW-

8, who, on cross examination also admitted said fact, it was urged that it was obviously a case where PW-11 was lying about being present and having witnessed the incident. Counsel urged that the evidence suggests that PW-11 was told something by some person and the entire version of PW-11 was based on hear say evidence. Drawing our attention to the testimony of Inspector Vikram Singh PW-35 to the effect that Raju PW-11 had a mobile phone with him, it was urged that the same probablized that Raju could have been receiving information from a third person. Further punching the credibility of Raju PW-11, it was urged that Raju was a clever witness who was conscious that his conduct of not accompanying his brother to the hospital would be questioned as unnatural and for said reason he gave a justification of not accompanying his brother to the hospital, by stating that he went to a PCO Booth to ring up the police. Counsel drew our attention to Ex.PW-3/A, the form filled up at the Police Control Room by HC Dharampal which showed that the informant was Rohit who had rung up from a mobile phone having number 9210325051. It was urged that obviously a call had been made to the police and where was the need for Raju to go to a PCO Booth to make another call. In any case, counsel submitted that the testimony of PW-35 established that Raju

had a mobile phone with him and even on said account there was no reason for him to go to a PCO Booth. Attempting to dig a final nail in the testimony of Raju, counsel submitted that Raju had deposed that Ramesh Dudhia had fired from the right side to the left on the left side of the chest of his brother. With reference to the post-mortem report Ex.PW-5/A and the testimony of PW-5, counsel urged that the same evidenced that the bullet pierced the left side lateral aspect of the chest of the deceased and travelled towards the direction in the right direction (upwards) i.e. towards the midline of the chest. Counsel urged that if the assailant fired from the right side on to the left side of the chest of the deceased, the bullet could not under any circumstances move towards the right side of the deceased. The fifth submission urged was that as per the post-mortem report Ex.PW-5/A, the deceased was 161 cm in height. The bullet had pierced the chest 12 cm below the nipple. As per the testimony of the alleged eye-witnesses, the deceased and the witnesses were on the steps outside Ahuja Clinic and the shot was fired by Ramesh while sitting on the motorcycle. That the shot was fired at contact range, is apparent from the post-mortem report, which records tattooing of the skin. Even PW-7, PW-8 and PW-11 have deposed that the shot was fired at contact range. Counsel

submitted that if the deceased of height 161 cms i.e. average height was sitting on the steps and assuming he stood up, if the assailant fired the shot while sitting on the motorcycle, the same could not have hit the deceased as noted in the post-mortem report. Thus, it was urged that the alleged eye witness account has not been able to explain the injury on the person of the deceased.

41. It has to be noted that the date of the incident is 8.7.2006. Raju PW-11, the brother of the deceased deposed in Court on 31.8.2007 i.e. after nearly 13 months of the incident. As recorded in his statement, Raju was 18 years old when he testified in Court. Obviously, his age was 17 years when he witnessed the incident. Thus, while evaluating the testimony of Raju, we would have to keep into account the immaturity of a person aged 17 years. His conduct at the relevant time would have to be evaluated keeping into account said fact i.e. his immaturity.

42. Is there sufficient evidence to conclude that the FIR was ante-time? It is no doubt true that Raju has stated during cross examination that he had signed all the documents in the police station. But, prior thereto, on being cross examined on the issue as to when did he first interact with the police he stated that the police brought him to the spot from the STD

booth. We note that Raju has been shown as a witness to the arrest of Himanshu. He has been shown as a witness to the personal search memo and the arrest memo, Ex.PW-11/C and Ex.PW-11/D respectively. We note that when he was cross examined on the factum of arrest of Himanshu, Raju stated that Himanshu was arrested and the police called him to chowki and he signed certain papers in the police chowki. It is apparent that Raju mixed up the facts pertaining to his having made the statement Ex.PW-11/A at the spot and having signed the same at the spot in the context of his having signed Ex.PW-11/C and Ex.PW-11/D at the police station. In this connection the testimony of SI Subhash Chand PW-24 and HC Vijay Pal PW-19 is important and needs to be noted. Both have categorically deposed that Raju's statement Ex.PW-11/A was recorded by SI Subhash Chand at the spot and thereafter both the police officers went to the hospital and after obtaining the MLC of the deceased, SI Subhash Chand wrote the tehrir Ex.PW-24/A on the statement of Raju and dispatched the same to the police station through HC Vijay Pal for FIR to be registered. We note that ASI Dhyan Singh PW-2 who registered the FIR at 11:30 PM has deposed that he registered the FIR Ex.PW-2/B when he received the rukka. We note that

ASI Dhyan Singh PW-2 has not been cross examined with reference to his said testimony.

43. Thus, we hold that there is no evidence wherefrom any conclusion can be drawn that the FIR is ante-timed.

44. Where a witness turns partially hostile, does not mean that the testimony of said witness has to be totally discarded. It is settled law that the principle *Falsus in uno, falsus in omnibus*, is not applicable in India for the reason, Courts in India have historically noted, the tendency of witnesses being gullible in India and exaggerating on facts. The rule of prudence followed by the Courts is to carefully sieve the testimony of such witnesses and to separate grain from chaff, and if corroborated on material particulars, on other aspects of the testimony, to accept the same. Thus, the second submission urged that the testimony of PW-7, PW-8 and PW-11 have to be thrown out, lock stock and barrel is rejected.

45. The fifth co-accused, Sunil, has not been acquitted because the testimony of PW-7, PW-8 and PW-11 has been disbelieved. Thus, the very foundation of the third submission by learned counsel for the appellants is missing. Sunil has been acquitted for the reason PW-7 and PW-8 have not even spoken about his being present. PW-11 has spoken about

Sunil being present, but has assigned no role to him. It is settled law that before a person is made liable for the act of another person, with reference to a common intention of both persons, not only is the physical presence of said person to be proved at the time of commission of the offence, but it has to be further proved that he has actually participated in the commission of the offence, in some way or the other, when the crime was being committed. Howsoever small it has to be, some participative act has to be proved in the commission of the crime. Obviously, Sunil had to be acquitted. This does not mean that PW-11 has lied.

46. Before considering the fourth submission urged, which, as noted above is a multi-prompt attack to the testimony of PW-11, it has to be noted that PW-7 and PW-8 have fully corroborated PW-11 with respect to the manner in which the crime was committed. The only difference is that PW-7 and PW-8 have not identified appellants Sunil Nayak and Shesh Bahadur Pandey and Ramesh Dhudia as the ones who participated in the commission of the crime, with further difference that said two witnesses have not deposed that anybody gave any exhortations.

47. Qua appellant Himanshu, all three i.e. PW-7, PW-8 and PW-11, have corroborated each other as to the role of Himanshu. All three have named him and identified him.

48. It was not seriously urged before us that the evidence on record establishes that PW-7 and PW-8 were present with the deceased and they had taken him to the hospital from the spot. Thus, on the testimony of said two witnesses, the role of Himanshu, who is the protagonist of the story is fully established. He is the principle architect of the offence. He cannot escape the consequences of his acts.

49. Pertaining to the role of Sunil Nayak, Shesh Bahadur Pandey and Ramesh @ Dhudia, the same has surfaced only in the testimony of PW-11. It assumes significance that Rohit PW-7, and his father Vijay Kumar had filed Crl.W.P.No.350/2007, certified copy whereof was proved as Ex.PW-7/A. The petition was filed soon before the trial commenced. In the said petition Rohit Kumar categorically pleaded that he was a witness to a crime in which Ramesh Dhudia and Pandey are accused and that both of them are known criminals of the area and that their henchmen were threatening him and his father to prevent him from deposing against them. No wonder in spite of his tell-tale pleadings in the writ petition, Rohit still chose not to speak a word against

Ramesh and Pandey in Court. It is apparent that Rohit and Monty @ Sukhvinder have been scared to death and this explains their departure from what they had told the police.

50. Since PW-7 and PW-8 have not ascribed any role to Ramesh @ Dhudia, Sunil Nayak and Shesh Bahadur Pandey, thus we have to find out the truth from the testimony of PW-11.

51. We have rejected hereinabove the plea that the FIR was ante-timed. The corollary thereof is that Raju's statement Ex.PW-11/A stands accepted by us as being recorded at the spot. The tehrir Ex.PW-24/A evidences that it was dispatched after PW-24 had visited the hospital; the same being dispatched from the hospital through HC Vijay Pal at 11:30 PM. The incident took place at around 9:30 PM evidenced by the fact that at 9:34 PM Rohit's information to the police control room was recorded vide Ex.PW-3/A by HC Dharam Pal. So soon after the incident Raju's statement having been recorded; leaving not much time for Raju to cook up and fabricate a story, is prima facie a circumstance to believe Raju.

52. The fact that Raju's statement Ex.PW-11/A stands established as having been written at the spot, if not more, proves that SI Subhash Chand PW-24 met Raju within less than 15 minutes of the incident at the spot. We note that no

suggestion has been given either to PW-7 or PW-8 that they rang up Raju and informed him to come to the spot. Thus, prima facie, we find good evidence on record to repel the argument that Raju's presence at the spot is doubtful.

53. That the deceased had consumed some eatables 1½ to 2½ hours prior to his death, evidenced by the post-mortem report and the testimony of PW-5 does not lead to the conclusion that the deceased had taken his dinner. It could be any eatables consumed by the deceased. On said fact alone, it is too tenuous to draw a conclusion that Raju stated an incorrect fact to justify his presence with his brother. What was the need for Raju to say so when he could have just said that being a younger brother, he was in the company of his elder brother. Well, had he said so, it would have been natural. Nothing turns on said fact. That PW-7, and on cross examination PW-8 stated that Raju was not present when the first altercation took place between Himanshu and the deceased and that Raju claimed to be present when the first altercation took place, does not mean that Raju has to be disbelieved. We cannot lose sight of the fact that witnesses are being threatened with impunity by criminals and gangsters and there is intrinsic evidence in the instant case of PW-7 and PW-8 being coerced into silence to a large extent. Thus, we

have to keep into account the mental stress of PW-7 and PW-8 when they deposed in Court. PW-7 and PW-8 have categorically deposed that before he was shot at, Himanshu had come to the spot on a motorcycle with another boy and had threatened Murari with death and that after 5-10 minutes, Himanshu returned with 5-7 boys on motorcycles and said 'yeh hai murari'. Even PW-11 has so deposed. There can be only two circumstances under which PW-11 could have testified to said fact. The first was that either PW-7 or PW-8 or both told him said facts or he saw the same himself. We find no suggestions have been given to PW-7 and PW-8 that they were the ones who told said facts to PW-11. No suggestion has been given to PW-11 that said facts were told to him by either PW-7 or PW-8. Thus, prima facie, said facts deposed to by PW-11 have to be accepted as his narratives which he saw with his eyes. It is of importance and hence is being re-emphasized by us that all these facts, pertaining to the first altercation find a mention in Raju's statement Ex.PW-11/A. That Raju has told the investigating officer and as recorded in his statement Ex.PW-11/A that Ramesh @ Dudhia shot his brother from contact range (the expression used in the statement is 'desi katta nikal kar Murari ki chhati par side mein lagaa kar goli maar di'), a fact corroborated from the post-mortem of the

deceased, as noted in the post-mortem report Ex.PW-5/A, the deceased had a tattooed entry wound of the bullet; meaning thereby that the bullet was fired from contact range, is of a nature that only an eye-witness could so state. We say so for the reason we find it to be a very minute detail pertaining to the commission of the crime which only an eye can notice and hence narrate at a later point of time. Relayed information i.e. hearsay testimony have the hallmark of minute details being missing.

54. That Rohit had rung up the police from his mobile number and had conveyed the fact of Murari being shot at, is not in dispute. Can it be a good enough justification to infer that Raju lied so as to create a ground by way of justification for not accompanying his brother to the hospital, because the natural conduct of a brother would be to keep company with his injured brother?

55. As noted in para 21 above, Rohit PW-7, deposed that after he called the PCR at number 100, Raju, Monty and he arranged for a TSR, Raju went to inform his parents and he i.e. Rohit and Monty took Murari to the hospital. This explains Raju parting company with his brother. We do not find Raju's conduct unnatural. He was a lad in his teens being 17 years of age when the crime took place. Finding his brother in the safe

hands of his friends and additionally for the reason that 3 people and an injured could not possibly sit inside a TSR, Raju parting company to inform his parents, is not an unnatural conduct. Raju claims to have gone to a PCO booth to ring up, but stated that he went to ring the police. Deposing after more than 1 year of the incident, young Raju, not remembering the purpose of his visit to the PCO booth is not of such magnitude that Raju has to be totally discredited. Obviously, while deposing in Court, Raju had the presence of police over bearing on his mind. Raju appears to have slipped up on a minor point. Admittedly, Raju has not made any call to the police. It reinforces the fact that Raju rushed to the PCO booth to inform his parents, but slipped up while deposing in Court, by stating that he rushed to the PCO booth to inform the police. That PW-35 saw Raju with a mobile phone in the police station does not lead to an inference that Raju had a mobile phone with him. As noted hereinabove, after Raju's statement Ex.PW-11/A was recorded by SI Subhash Chand, SI Subhash Chand left for the hospital. The defence has not examined Raju as to what he did thereafter. Thus, there is a possibility that Raju went home, which we note is not too far off from the place of the incident and picked up a mobile phone or that, somebody from his family, who got information of the offence,

came to the place of occurrence and Raju took a mobile phone from said person. We note that Raju has just not been cross examined on the point of his having a mobile phone with him. Had he been cross examined on said point, Raju would have given some explanation and in said circumstance, with reference to his answers, the issue could have been debated.

56. That Raju deposed that Ramesh fired from the right side, on the left side of the chest of his brother and the pistol was stuck towards the left of the left side of the chest and that the trajectory of the bullet is an entry on the left of the left side of the chest, moving towards the right, is not destructive of the testimony of Raju, in fact, it is in perfect harmony with the testimony of Raju.

57. Where two people stand face to face, the left side of one would be directly opposite the right side of the other. Extended parallel across, the left hand would meet the right hand of the person opposite and vice versa. That is why, while shaking hands, the same are crossed. Thus, with a pistol in his right hand, when the shot was fired by the assailant from contact range, the left side of the victim, who was facing the assailant, was obviously the side which came in contact. Whether the bullet would travel in the direction towards the left or the right, would depend upon the manner in which the

wrist is twisted. If twisted towards the left, the bullet will travel in the direction towards the right of the victim and vice versa. Thus, the submission predicated with reference to the trajectory of the wound of the deceased is wholly misconceived.

58. We fail to understand the logic of the fifth submission. The site plan Ex.PW-25/A shows that the deceased was shot on the first step outside Ahuja Clinic. Let us assume that the riser of the step was one foot. We note that the normal riser of a step is between 6 inches to 9 inches. From the post-mortem report of the deceased, it is apparent that his height was 161 cms. The entry of the bullet is about 120 cms above the feet of the deceased. As per PW-11, Ramesh @ Dhudia fired the shot while sitting on the motorcycle. A person on a motorcycle would be seated at a height of about 100 cms from the ground. The bullet which has pierced the body of the deceased has travelled in an upward direction. The extended hand of the assassin can safely cover the differential distance of 30 cms i.e. the height difference of the seat of the motorcycle on which the assassin was sitting and the body part of the deceased who was standing on the step, when the bullet was shot. It has to be

noted that a person who is sitting on a motorcycle would have his shoulder at least about 120 cms above the ground level.

59. We find no discrepancy in the eye witness account vis-à-vis the nature of injury and the manner in which the witness claims that the shot was fired. In fact, the aforesaid discussion shows the complete truthfulness of PW-11.

60. We hold that the testimony of PW-11 contains the nugget of truth and the same is truthful and without any blemish. The role assigned to the appellants is clearly emerging in the testimony of PW-11. We concur with the findings arrived at by the learned Trial Judge. We affirm the conviction of the appellants for the offence punishable under Section 302/34 IPC.

61. The appeals stand disposed of dismissing Crl.A.No.957/2008, Crl.A.No.1008/2008 and Crl.A.No. 1012/2008. Crl.A.No.1041/2008 is dismissed in so far it challenges the conviction of Ramesh @ Dhudia for the offence punishable under Section 302/34 IPC. The said appeal is partially allowed in so far Ramesh @ Dhudia has been convicted for the offence punishable under Section 27 of the Arms Act 1959. But, his conviction is modified for having committed an offence punishable under Section 25 of the Arms Act 1959, for which offence, he is sentenced to undergo

rigorous imprisonment for 3 years and to pay a fine in sum of Rs.2,000; in default of payment of fine to undergo simple imprisonment for 1 month. Needless to state, the sentences imposed upon Ramesh @ Dhudia shall run concurrently.

(PRADEEP NANDRAJOG)
JUDGE

(ARUNA SURESH)
JUDGE

May 25, 2009
MM