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

% *Date of Decision : January 23, 2009*

+ **CRL.A. 38/2008**

BRIJESH KUMAR Appellant
Through: Mr. Sanjay Sharma, Advocate

versus

THE STATE NCT OF DELHI 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?
3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J.** (Oral)

1. Heard learned counsel for the parties.
2. At 11:50 AM on 7.8.2002 at P.S. Shahdara, DD Entry No.9-A, Ex.PW-14/A was recorded by the duty officer, ASI Poonam Tomar, to the effect that an information has been received from Const. Murari on telephone that at a shop B-50 near Harkishan Public School a person named Sonu has been shot at. Soon thereafter vide DD No.10-A, Ex.PW-14/B, recorded at 11:55 AM same information was received and recorded.
3. SI Rang Lal PW-23, accompanied by two police

officers, one of whom was Const. Rambir PW-13, left for the spot where Sonu was stated to have been shot; as disclosed in the DD Entry, and on reaching the site of the occurrence learnt that the injured named Rajiv was removed to GTB Hospital. SI Rang Lal proceeded to GTB Hospital and in the meanwhile Const. Rajender PW-16, also reached soon thereafter along with a copy of DD No.10-A.

4. The injured was declared unfit for statement and hence his statement could not be recorded.

5. Evidenced by Ex.PW-1/A, the MLC of Rajiv Jain, he was admitted at GTB Hospital at 11:45 AM. As recorded in the MLC, he was brought by his brother Pradeep Jain PW-5.

6. PW-1 Dr. Pancho Lapcha examined the injured whose name was disclosed as Rajiv Jain and pertaining to the history of the injury recorded on Ex.PW-1/A:- *"Alleged h/o gun shot injury, history given by brought by."* He noted on the MLC that the patient was gasping and had an entry wound on the right chest in infraclavicular region and an exit wound on the right arm. He referred the injured for emergency surgery. Unfortunately, before any medical assistance could be rendered, Rajiv died at around 12:25 noon.

7. Const. Lakhbir, on duty at GTB Hospital informed the

duty officer at the police station that Rajiv Jain had died, which information was recorded vide DD No.32-B at 1:15 P.M.

8. Since Sanjay Jain PW-2, the brother of the deceased, was at the hospital, SI Rang Lal recorded the statement, Ex.PW-2/A, of Sanjay Jain and made an endorsement thereon, Ex.PW-23/A, and forwarded the same to the police station for registration of a FIR. Ex.PW-2/A and the endorsement Ex.PW-23/A were transmitted from the hospital to the police station by Const. Rajender PW-16, upon which PW-8 ASI Kishan Dutt, registered FIR Ex.PW-8/A at 2.25 PM.

9. In his statement Ex.PW-2/A, Sanjay informed that he was a resident of House No.B-95 Gali No.1, Jyoti Colony, Shahdara and that at House No.D-50, West Jyoti Nagar, Shahdara they had a shop, at the rear of which work of powder coating used to be conducted. That they were three brothers and all used to manage the shop and the work of powder coating. He stated that his brother Rajiv Jain @Sonu was at his seat in the retail shop and that he i.e. Sanjay was standing on a slab of the shop. The time was around 11:00 AM. A boy named Brijesh (accused) came there. That he knew Brijesh quite well as Brijesh was residing in the neighbourhood; two streets away and used to visit the shop for making purchases. He stated that

Brijesh had a conversation with his brother and started abusing his brother, telling him that he i.e. his brother was defaming him in the locality and that today he would not spare his life. So stating, Brijesh took out a *katta* (country made pistol) and fired at his brother and fled. He i.e. Sanjay raised a hue and cry that his brother had been shot at and ran after the assailant. On hearing his cries, his younger brother Pradeep Jain and some workers doing powder coating reached the shop. That he continued to run after the assailant but could not catch him. That when he came back to the shop his brother Pradeep Jain, with the help of a neighbour Ashish had already removed Rajiv Jain on a scooter to GTB Hospital.

10. The police took possession of MLC Ex.PW-1/A and sent the dead body of Rajiv Jain for post-mortem to UCMS and GTB Hospital, where post-mortem was conducted by Dr.S.K.Verma PW-4, who prepared the post-mortem report Ex.PW-4/A.

11. We have noted the injuries on the deceased as recorded in the MLC, in para 7 above; we note the injuries recorded in the post-mortem report Ex.PW-4/A. The same read as under:-

“1. An oblique firearm entry wound, oval in shape of size 3.8 x 2.0 cms placed on Rt. shoulder posteriorly

11 cms below the tip of Rt. shoulder and 3.5 cms from post axillary fold. Blackening present around the margins that were inverted. No tattooing seen. The wound was going anteriorly and to the left passing through the upper arm, Rt. chest cavity and Rt chest wall making an exit wound, tangential oval in shape of size 4.2 x 2 cms in Rt. midclavicular line 5 cms below the lower border of Rt. clavicle and 3 cms to the Rt of midline. Blood was present all along the track.

2. Ventrisection wound over Lt. medial malleolus."

12. Proceeding to the spot on the day of the incident itself, rough site plan Ex.PW-23/C was prepared by SI Rang Lal. Blood samples, earth control, blood stained earth, blood stained pulses, blood sample from the road were lifted and seized vide seizure memo Ex.PW-2/B. The accused was apprehended the same day at 8:00 P.M. from his sister's house.

13. Investigation continued. Statements of persons under Section 161 Cr.P.C. were recorded.

14. On 27.9.2002 SI Mukesh Jain PW-10 went to the spot as directed by SI Rang Lal and as per information given by Sanjay Jain PW-2, and on his pointing out, prepared the site plan Ex.PW-10/A.

15. Since arguments have been advanced in appeal today with reference to the site plan, we may note that the same shows the house No.D-50 is a corner house and the shop inside the precincts of the house is in the right corner. The shop

opens towards a road on the west. The said road runs from the south to the north. The northern boundary of the shop abuts a road running from the west to the east. In the site plan, the rest of the house i.e. at the rear of the shop as also towards its southern side has been shown as a factory. (We may note that according to the prosecution the factory is the place where powder coating job is done, reference whereof has been made in the statement Ex.2/A).

16. The place wherefrom the assailant fired at Rajiv has been marked at 'A' on the road on which the shop opens. The said point 'A' is on the road leading from the south to the north and is just at the opening of the shop on the road. It is towards the northern boundary of the shop. The place where Rajiv was shot has been marked at point 'B' which is within the shop, at a distance of approximately $\frac{1}{3}^{\text{rd}}$ of the length segment of the shop from the opening on the road in front. The place where Sanjay Jain was standing has been shown at point mark 'C'; which we note is towards the southern direction from point 'A', i.e. where the assailant is stated to have fired from. The point is just in front of the southern boundary of the shop at its junction with the road in the front.

17. As per PW-20 SI Ashvir Singh and Investigating

Officer SI Rang Lal PW-23, the appellant was arrested from the house of his sister at around 8:00 PM on 7th August 2002 i.e. on the day of the incident.

18. As per PW-20 and PW-23 the appellant made a disclosure statement Ex.PW-20/A in which he disclosed that he could get recovered the *katta* wherefrom the fatal shot was fired on deceased Rajiv Jain and informed that the same could be recovered from a drain near a corner of a street in Jagat Puri.

19. Since arguments have been advanced with respect to two facts disclosed in Ex.PW-20/A, the disclosure statement of the appellant, we note the said facts disclosed in Ex.PW-20/A.

20. It stands recorded in the disclosure statement that before going to the shop of Sonu the appellant had purchased corex medicine from a medical store at Durga Puri Chowk. The second statement recorded is that 5/6 months ago the appellant had purchased the weapon of offence from a Muslim boy at Garh Mukteshwar.

21. As per PW-20 and PW-23 no recovery could be effected from the drain, wherein as per disclosure statement Ex.PW-20/A, the weapon of offence was thrown.

22. The appellant was further interrogated and as per PW-20 and PW-23 he made a second disclosure statement

Ex.PW-20/C in which he stated that the weapon of offence was hidden in bushes near a bus stand in front of Jagat Puri colony near a red light and that the appellant could get the same recovered.

23. The appellant led PW-20 and PW-23 to the bushes near the bus stand of Jagat Puri and got recovered a polythene sheet in which the *katta* and two cartridges were wrapped. One cartridge was spent and the other was a live cartridge. The same were seized vide seizure memo Ex.PW-20/E and before they were sealed a sketch, Ex.PW-20/D, of the *katta* was prepared by PW-20.

24. The witnesses to the incident, cited as witnesses of the prosecution, were Sanjay Jain PW-2, Bhagwat Prasad PW-3, Pradeep Jain PW-5 and Ashish Jain PW-6.

25. Since submissions have been made during hearing of the appeal with reference to the testimony of said witnesses, we propose to note their testimony.

26. Sanjay Jain PW-2, deposed that their family was running a kiriyana shop and was carrying on work of powder coating at B-50, West Jyoti Nagar. That the work of powder coating used to be conducted from behind the shop. That the deceased Rajiv Jain was his brother. That Rajiv used to sit at

kiryana shop. On 7.8.2002 at about 11:15 AM, during the day time, he was standing near a tea shop and Rajiv was sitting at the kiryana shop. At that time accused Brijesh came to the shop. He knew Brijesh as he was living in the neighbourhood and used to visit the shop to purchase goods. He stated that when Brijesh arrived at the shop he started abusing Rajiv Jain stating that Rajiv Jain had defamed him in the locality and so stating he took out a country made pistol and fired at his brother Rajiv Jain. He deposed that the bullet hit his brother on the right side chest. He stated that since Brijesh attempted to flee, he chased him while shouting that his brother was hit by a bullet. On hearing his noise, his younger brother Pradeep Jain arrived. He deposed that the accused could not be apprehended despite best efforts made by him and succeeded to flee. He deposed that he came back to the shop and learnt that with the help of one Ashish, his younger brother Pradeep Jain had taken his injured brother Rajiv Jain to the hospital on a scooter. He also went to the hospital where police met him and he gave a statement to the police which is Ex.PW-2/A and that it bore his signature at point 'A'. He deposed that after about one hour of reaching the hospital his brother Rajiv expired. He deposed that police officials brought him to the place of occurrence and at his

instance the Investigating Officer prepared the site plan and lifted blood and blood stained earth which were seized in his presence as recorded in the memo Ex.PW-2/B. He identified his signatures on the memo at point 'X'. He deposed that Brijesh was arrested in his presence as per arrest memo Ex.PW-2/C which bore his signature at point 'X'.

27. Sanjay Jain was cross examined and on cross examination he stated that there was no tea shop nearby his shop. He admitted knowing the accused prior to the occurrence. He admitted that there was no dispute with the accused prior to the occurrence. He was partially cross examined on 31.5.2004. His cross examination continued on 2.8.2004. On said date, on being again questioned as to where was he standing at the time of the occurrence, he responded by saying that he was standing on the slab outside his shop and that his brother Rajiv Jain was present inside the shop. He stated in his cross examination that he was outside the shop when the accused came to the shop. He stated that the accused remained at the shop for one to two minutes. On being questioned as to how long did he chase the accused, he responded that he chased the accused for about 4-5 minutes. He went on to state that when he came back to the shop he saw that many persons had gathered outside the shop,

but could not recollect their names. On further cross examination, he stated that the opening of the shop was towards the western direction and that the accused ran towards the south side on the road.

28. Bhagwat Prasad PW-3 deposed that on 7.8.2002 at around 11:00 AM he was proceeding to collect his dues and while on the way back he went to the factory of one Sunil Sharma but could not meet him. He said that he proceeded to shop of Sanjay which was in front of the factory of Sunil Sharma and that the accused was present at the shop of Sanjay and that he i.e. the accused was exchanging hot words with Sanjeev. That the accused threatened to see Sanjeev and fired a shot from a *katta* in his hand. He stated that Rajiv Jain brother of Sanjay Jain took Sanjeev to the hospital. He deposed that he followed them on his cycle. He stated that the person who was hit was known as Sonu. Since the witness was probably confusing on the names, at that point of time, the learned APP requested to cross examine the witness.

29. Deviating a little from the statement of PW-3, we want to record that if a witness is not able to recollect a fact which is sought to be proved by the prosecution, the witness should not be declared hostile and permission be sought to

cross examine the witness. The correct approach is to seek leave of the Court to put a leading question or a suggestion to the witness. We are so recording because we are coming across large number of matters where we are noticing that a witness who is not able to correctly recollect a fact is immediately cross examined by the public prosecutor, of course, with the permission of the Court. This is not a correct approach in law.

30. Reverting back to the deposition of Bhagwat Prasad PW-3, he deposed that it was correct that the accused fired a shot at Sonu and not at Sanjay. He deposed that in the earlier part of his deposition he had committed a mistake when he said that the person shot at was Sanjay. He went on to depose that Sanjay chased the accused but could not apprehend him and hence returned. He deposed that he and Sanjay followed the victim to the hospital.

31. On being cross examined by the counsel for the accused he deposed that the factory of Sunil was at a distance of 1/1.5 kms from his shop and that he was having business dealings with Sanjay for last 1 year. He deposed that Sanjay, Sonu and accused were present when he reached Sanjay's shop. He deposed that Rajiv, elder brother of the victim also came there and he saw Rajiv a second after the shot was fired. He

deposed that the police recorded his statement at around 4:00 PM at the spot. He deposed that he remained at the hospital till 3/3:30 PM and that the police did not meet him in the hospital.

32. PW-5 Pradeep Jain, deposed that on 7.8.2002 while he was working in a room adjacent to their shop at House No.D-50, West Jyoti Nagar, clarifying that the shop is situated in the house, clarifying further that they were doing powder coating at that time, he deposed that his younger brother Rajiv @ Sonu was sitting at the shop and at about 11:15 AM he heard a bang (Dhamaka) and hence came out of the shop. He saw his elder brother Sanjay Jain running after accused Brijesh shouting that the accused had shot his brother Rajiv Jain. He deposed that he saw his brother Rajiv Jain lying smeared in blood near a bag of dal and a stool. He deposed that neighbours gathered on hearing the gun shot and one Ashish a neighbour, also came there. He deposed that with the help of Ashish he took his injured brother Rajiv in a two wheeler to GTB Hospital.

33. On being cross examined he stated that Rajiv was aged 18-20 years and was sitting in the shop since 7:00 AM. He stated that he used to start his work at the room at about 8:30 AM and that he used to work only on powder coating job. He stated that his brother Sanjay Jain also used to work on powder

coating. To the question as to what distance did he see Sanjay running after the accused, he responded that the distance was 30-35 paces. He stated that Sanjay was running towards the north. He stated that the door of his shop is towards the east and the door of the room opens towards the road (The witness was referring to the room/shop where powder coating job used to be done). He stated that their house was situated on the corner of the road and that there was a road on three sides of their house. He stated that there is no road at the rear side of the house. He stated that his brother Rajiv was not having any enmity with the accused. He admitted that his brother Sanjay Jain was arrested in a case connected with teasing of a girl and was produced before a Magistrate at PS Seelam Pur and that he was apprehended by the police of Shahdara.

34. The last eye witness examined by the prosecution is Ashish Jain PW-6, who deposed that on 7.8.2002 at about 11/11:15 AM he was present at his shop and heard a noise of gun shot. He came out of his shop and saw Sanjay Jain and 10/12 person running with Sanjay shouting "goli mar di, goli mar di". He deposed that he reached the shop of Rajiv Jain by which time Pradeep Jain had also reached and that Rajiv Jain was in an injured condition and was smeared with blood. He deposed that

Pradeep Jain and he took out Rajiv Jain from the shop and took him to GTB Hospital on a two wheeler. Rajiv Jain was admitted at said hospital where he died after about an hour. At that point of time he was cross examined by learned APP. Once again we note that there was no need to cross examine the witness. He appears to be failing in his memory and hence the correct thing ought to be, after seeking permission of the Court, to put a leading question or give a suggestion.

35. A suggestion was put to him by the learned Public Prosecutor whether while chasing the accused Sanjay was shouting "*Brijesh had shot dead Rajiv*", he denied having heard so. He stated that he knew the accused who was present in Court. He denied that he was won over by the accused.

36. On being cross examined by counsel for the accused he denied knowledge of any quarrel having taken place between the family of Rajiv Jain and some other persons about a girl a year ago. He denied any quarrel having taken place between Rajiv Jain and the accused prior to the date of the incident.

37. The appellant who was facing the charge of murder of Rajiv Jain i.e. for the offence punishable under Section 302 IPC, denied his involvement and either disclaimed knowledge or denied the incriminating circumstances and evidence put to him

while being examined under Section 313 Cr.P.C. To the last question as to whether he had something to say, he responded that the case against him was false; that the deceased was killed due to some enmity with a person whose girl was teased by the deceased and in respect whereof proceedings under Section 107/151 Cr.P.C. were pending and that he i.e. the appellant was falsely implicated.

38. The appellant examined Bishamber Singh DW-1, who deposed that the appellant was a son of his friend Tika Ram and that Tika Ram came to his house on 7.8.2002 and informed him that the police was searching for his son and that he told Tika Ram to produce his son in the Police Station and let inquiry be made. He deposed that on the same day he accompanied Tika Ram and Tika Ram's daughter to the police station where accused Brijesh was produced by all of them at Police Station Shahdara and that next day he learnt that the accused Brijesh was implicated falsely in a murder case.

39. On being cross examined by the learned Public Prosecutor, Bishamber Singh stated that he did not know the house number of Tika Ram. He stated that Kamlesh, daughter of Tika Ram had accompanied them to the Police Station. He

stated that he remained in the Police Station for about one to two hours. He denied deposing falsely.

40. By a cryptic decision, relying principally upon testimony of PW-2; holding that his presence at site cannot be doubted and that there was no reason to disbelieve PW-2; further recording that Rajiv Jain was hit on the chest with a bullet and the resultant injury was opined by the doctor to be sufficient in the ordinary course of nature to cause death; the learned trial Judge has convicted the appellant for having murdered Rajiv Jain. The appellant has been convicted for the offence punishable under Section 302 IPC. Sentence imposed is of imprisonment for life and to pay a fine in sum of Rs.10,000/-; in default to undergo simple imprisonment for two months.

41. At the hearing held today, Shri Sanjay Sharma, learned counsel for the appellant has inter alia urged the following:-

(a) Presence of PW-2 at the spot at the time of the occurrence is doubtful and said fact stands established by his answers given in cross examination. Drawing our attention to the answer given by PW-2 on being cross examined, when he was asked to state the place

where the tea shop, referred to by him in his examination-in-chief, was situated, to which he responded: *"there was no tea shop near our shop"*, counsel urges that if there was no tea shop near the shop where Rajiv was fatally attacked: where was the question of Sanjay Jain standing near the tea shop as stated by him in his examination-in-chief. Further, counsel urges that on being questioned as to in which direction accused ran after firing, PW-2 responded that the accused ran towards south side. With reference to the testimony of PW-5, learned counsel draws our attention to the statement made by PW-5 Pradeep Jain, who when cross examined on the fact as to in which direction Sanjay ran, stated that he saw his brother Sanjay running towards north side of the shop. Elaborating this submission, with reference to the site plan Ex.PW-10/A, learned counsel further urges that the stated factory room wherein powder coating business was stated to be conducted by the Jain brother has not been shown in the site plan. Referring to the testimony of PW5, learned counsel draws our attention to the statement made by him that the door

of the shop where powder coating business was being conducted was towards East. Referring us back to the statement of PW-2 wherein he had stated that accused remained at the shop for only 1 and 2 minutes; with reference to the site plan and claim of PW-5 to have reached the shop where Rajiv Jain was shot and witnessed Sanjay chasing the accused, learned counsel urges that if everything happened within a minute or two as deposed by PW-2, it is improbable for PW-5 to have reached the site of the occurrence and witnessed anything meaningful.

(b) Second submission made by learned counsel is that PW-3 is a shaky witness, who had to correct himself on being cross examined by the Public Prosecutor. Counsel urges that PW-3 is not worthy of any credence is evidenced by the fact that even the learned trial Judge has not relied upon the deposition of PW-3.

(c) The next submission made by learned counsel for the appellant is that the ring of truth is to be found in the statement of Ashish Jain PW-6, who stated that he reached the shop of Rajiv Jain on hearing noise of gun

and did not see the assailant who had fired. Learned counsel urges that this statement of PW-6 appears to be the only correct statement made by him, because each witness was involved in his work and got attracted to the site of the incident on hearing the sound of the gunshot. Counsel urges that obviously, by the time they could reach the spot, the assailant would have fled.

(d) It is next urged by learned counsel that the learned trial Judge has not applied his mind to the medical evidence i.e. the MLC and the postmortem report of the deceased, which evidence that Rajiv Jain sustained injury on the shoulder; a non vital part of the body; learned counsel urges that the learned trial judge has parroted the statement of PW-2 that the injury was on the chest of Rajiv Jain.

(e) Learned counsel urges that the FIR being registered at 2.25 P.M. and the incident in question having taken place at around 11.15 A.M. evidences an unexplainable time gap between the time of the incident and registration of the FIR. It is urged that why were Sanjay Jain, Ashish Jain or Pradeep Jain not

examined by the Investigating Officer forthwith on reaching the hospital. Elaborating the submission, learned counsel further urges that obviously a belated FIR has been deliberately registered and within said time a false story has been cooked up against the appellant. Counsel urges that the true fact is that the family members of the girl who was teased by the deceased were the prime suspects and in fact were called to the Police Station but for unexplainable reasons were let off and the appellant was falsely implicated.

(f) It is urged that the first DD entry disclosed a cognizable offence punishable under Section 307 IPC and that a FIR ought to have been registered at 11.50 A.M. itself. Counsel urges that the police did not do so with the connivance of the Jain family.

(g) Pertaining to the arrest of the appellant, learned counsel urges that if indeed he was an offender, appellant would have run away and not hidden in the house of his sister; a place where presumably the police would visit to locate him. Counsel urges that the learned trial Judge has totally eschewed any reference

to the testimony of DW-2, for the reason, his testimony categorically establishes that the appellant surrendered voluntarily and was not apprehended by the police, as claimed.

(h) With reference to the disclosure statement of the appellant wherein he had disclosed having purchased corex medicine a short while prior to visiting the shop in question and having purchased the katta from a boy at Garh Mukteshwar; hedging the submission with caution; indeed it has to be so; learned counsel urges that it was the duty of the police to have investigated the said facts and vital linkages could have been made connecting the appellant to the crime if the shop keeper who sold the corex medicine corroborated appellant's presence in the area; as also linked the appellant to the weapon of offence if the person from whom appellant claimed to have purchased the same re-stated the said fact. Counsel urges, that if said person spoke to the contrary, the same would have been exculpatory of the appellant's involvement.

(i) It is urged, with reference to the MLC Ex.PW-1/A, wherein while recording the history of the injury being

gunshot injury; history being statedly given by *brought by*, counsel urges that Pradeep Jain PW-5 is the person referred to as “brought by” because his name has been recorded in the MLC under the column ‘name and address of relative or friend brought by’. Counsel urges that this shows that Pradeep Jain PW-5, did not know the name of the assailant at 11.45 A.M., the time recorded in the MLC as the time of admission of Rajiv Jain. It is urged that had Pradeep Jain known the name of the assailant he would have disclosed the same to the doctor who would have recorded the said fact in the MLC itself.

(j) With reference to the postmortem report and the injuries recorded by the doctor, learned counsel urges that the postmortem report shows a single gunshot wound at the right shoulder. Counsel urges that the shoulder is not a vital part of the body and the fact that the bullet did not pierce the heart or lungs shows that the death of the deceased was unfortunate, but certainly not the result of a fatal injury. An extended limb of the said submission is that the gunshot injury on the shoulder is 3.5 cm from the auxiliary fold i.e.

the upper most part of the shoulder; a non vital segment of the body. Counsel urges that in total disregard of the postmortem report the learned trial Judge wrongly treated the injury to be on a vital part of the body i.e. the chest. Counsel re-emphasizes that the injury is not on the chest but is on the auxiliary fold of the right shoulder.

42. Since the order is being dictated in the open Court, at this stage, we have asked Shri Sanjay Sharma, learned counsel for the appellant whether any submission made by him has gone unnoticed. Learned counsel very fairly and expressing gratitude to the court, states that every submission made by him has been noted.

43. We proceed to consider the submissions urged.

44. Pertaining to the first submission as noted in sub para (a) in para 41 above, we note that PW-2 has no doubt responded on being cross-examined that there was no tea shop near the shop where the crime was committed and that in his examination-in-chief he deposed that he witnessed the incident when he was standing at a place near the tea shop. But, every human being is prone to memory lapsing after

some time or incorrectly describing a particular incident. This does not by itself discredit the maker of the statement. It is worth noting that in his first statement Ex.PW-2/A made to the police immediately after the incident, PW-2 had informed that he was standing on the slab outside the shop. It is also important to note that on being further cross-examined on 2.8.2004 as to where was he when he claims to have witnessed the shooting, PW-2 categorically stated that he was standing on the slab outside his shop. The submissions of learned counsel pertaining to the contradiction in the testimony of PW-2 and PW-5 as to in which direction the accused ran and in which direction he was chased, in that, PW-2 stated that the accused ran towards the south and PW-5 stated that he saw his brother Sanjay running towards the north, is neither here nor there for the reason, more particularly when a witness sees his brother critically injured, an error of reference to the directions i.e. north, south, east or west can occur. Obviously, the assailant ran towards the south because the site plan shows that PW-2 was standing on the road towards the north. The assailant would not run towards the brother of his victim; the assailant would obviously run in the opposite

direction. The submissions pertaining to PW-5 reaching the spot after the assailant had run away are nothing but an attempt to fantasize the facts. The site plan Ex.PW-10/A shows house No.D-50 having a shop on the corner of two roads running from south to north and west to east. The shop is on the corner where the two roads meet. The rest of the house has been shown as the factory. The factory is the one to which PW-2 and PW-5 have referred to as the place where work of powder coating was being done by the family. That the two witnesses have referred to the same, sometimes as the shop or sometimes as a room, is no more other than an improper choice of a word to describe a work place. The site plan shows that the access to the place where powder coating work is done is from the road towards the northern boundary of the building i.e. the road running from the west to the east. To reach the shop where the deceased was injured would not take more than 15 to 20 seconds because the distance to be travelled is hardly 30 feet. Thus, there is no improbability in PW-5 reaching the site of the occurrence within less than a minute of hearing the gun shot. It may be noted that PW-2 has categorically stated that when he commenced the chase to apprehend the

accused he shouted that the accused had fired at his brother. We see no improbability in PW-5 responding spontaneously and reaching the site of the occurrence upon hearing a gun shot fire sound and the resultant commotion when PW-2 started shouting that Sonu has been shot.

45. The second submission that PW-3 is a shaky witness is predicated on the premise that PW-3 had to correct himself on being cross-examined by the public prosecutor. The argument is tenuous. It has no legs to stand on. As noted by us while referring to the testimony of PW-3 he started fumbling on names and corrected himself when he was cross-examined. We have noted above that there was no need to cross-examine the witness who was fully supporting the prosecution but was fumbling with reference to the names. He was referring to Sonu as Sanjay Jain. He was referring to one Sanjeev. The learned public prosecutor could have, with the permission of the Court, put to the witness a suggestion or a leading question. This was done when the witness was cross-examined by the learned public prosecutor. The witness corrected himself and stated that he committed a mistake when he stated that the person shot at was Sanjay and that in fact Sanjay chased the accused but

could not apprehend him. That the learned Trial Judge has not referred to the testimony of PW-3 does not mean that PW-3 is a shaky witness.

46. Pertaining to the third submission based on the deposition of PW-6 wherein he stated that he did not see the assailant, we wonder how there from it can be deduced that the other eye-witnesses also did not see the assailant. Let us recreate the scene after Rajiv Jain was shot at. Sanjay Jain started chasing the assailant and was shouting that his brother had been shot by the assailant. People started running towards the shop. Somebody's attention was devoted to the injured and hence he did not see the accused, who was fleeing. Somebody's attention was devoted to the accused being chased. Well, this is what usually happens. It has happened in the instant case. PW-6 Ashish Jain assisted in the injured being rescued is evidenced by his testimony when he stated that he assisted Pradeep Jain to take the injured to the hospital. It shows that the concern of PW-6 was the injured and hence his attention was devoted towards the injured and not towards the assailant who was being chased by Sanjay. In any case, testimony of PW-6 corroborates the testimony of Sanjay that Sanjay was present

at the spot when the incident took place. We repeat, Ashish Jain PW-6 has categorically deposed that when he heard the sound of the gunshot, he came out of his shop and saw Sanjay chasing the assailant.

47. In this connection we note that all eye-witnesses have corroborated each other vis-à-vis the presence of each other. We note that PW-3 Bhagwat Prasad has no concern with the family of the deceased, other than business dealings, and has no motive to falsely implicate the appellant.

48. Pertaining to the fourth plea urged and as noted in para 41(d) above, we dismiss the plea as worthy of no consideration inasmuch as the learned counsel has just not understood the nature of the injuries recorded in the post mortem report Ex.P-4/A, contents whereof have been noted by us in para 13 above. The injury is not on the axillary fold of the right shoulder. The entry wound is the point 11 cm below the tip of right shoulder and 3.5 cm from post axillary fold. This means that the bullet has entered at a place on the chest about 11 cm below the tip of the right shoulder at a distance of about 3.5 cm from post axillary fold. The path travelled by the bullet, as recorded in the MLC has to be the

internal wound: *going anteriorly and to the left passing through the upper arm, Rt. chest cavity and Rt chest wall making an exit wound, tangential oval in shape of size 4.2 x 2 cms in Rt. midclavicular line 5 cms below the lower border of Rt. clavicle and 3 cms to the Rt of midline.* Thus, a layman would obviously say that the shot has been fired in the chest. The charge against the learned Trial Judge of parroting the statement of PW-2 is thus incorrect.

49. The fifth submission pertaining to the delay in registration of the FIR is again a baseless charge. It is not in dispute that Rajiv Jain was fired at around 11.15 AM and was removed to the hospital where he died at around 1.00 PM on the same day. Would his near and dear ones be more concerned to rescue his life or would they be concerned with legal procedures? The answer is obvious: with the former. It would be too cruel for the police to trouble the near and dear ones who were running around in the hospital to ensure that Rajiv is saved. That Rajiv was in a critical condition is apparent from the fact that he died within an hour and a half of hospitalization. The statement Ex.PW-2/A of Rajiv Jain could only be recorded after a few minutes of 1.00 PM and forwarded thereafter to the police station for registration of

an FIR. Under the circumstances, the FIR being registered at 2.25 PM cannot give rise to an argument that there is an unexplainable delay in registration of the FIR. The question of there being any design is ruled out. We fail to appreciate the second limb of the fifth submission that between the time of the incident and registration of the FIR ample time was available to the brothers of Rajiv Jain to falsely implicate the appellant and that the prime suspects were the family members of the girl who was teased by the deceased and in respect whereof the deceased was even apprehended by the police. If that be so, the false implication would have been of a family member of the girl and not an innocent stranger. It is natural for the family members of a deceased to see that the real culprit is brought to justice and this is what has happened in the instant case. We note that the submission of learned counsel that the family members of said girl who was teased were the prime suspects and in fact were brought to the police station but for unexplainable reasons were let off is nothing but a figment of imagination. No suggestion has been given to the investigating officer that he had first apprehended the family members of the said girl and then had let them off.

50. The sixth plea noted in para 41(f) above has hardly impressed us. FIRs are never recorded on the basis of entries in the daily diary received through unknown informers who ring up the number 100 and the message is received at some PCR van and then flashed to the police station concerned. The reason is that this information, by its very nature, is cryptic. A FIR can be registered only when facts disclosed to the police show the commission of a cognizable offence.

51. The seventh submission made that the testimony of DW-1 and DW-2 shows that the appellant voluntarily surrendered before the police and was not apprehended has to be discarded without much reasoning because no suggestion was made to either police officer who was examined with respect to the arrest of the appellant, that the appellant had voluntarily surrendered. In the absence of any such suggestion given to PW-20 and PW-23, the two police officers who have deposed about the arrest of the appellant, the plea is not even worthy of any consideration.

52. The eighth submission made and as noted in para 41(h) above has somewhat baffled us. Was the learned counsel suggesting that by not bringing on record further

incriminating evidence the case of the prosecution should be discounted on the premise that if attempt to bring on record said incriminating evidence failed the accused i.e. the appellant would have been the beneficiary thereof? We wonder at the logic of the argument, for indeed we see none. No statement made by an accused to a police officer is admissible in evidence save and except what comes within the ambit of Section 27 of the Evidence Act. Thus, it would have been a useless exercise for the police to go about finding the shop keeper who sold corex medicine to the appellant. The corex medicine had no concern with the crime. Thus, its purchase or not, was irrelevant. Similarly, from whom was the weapon of offence purchased is immaterial.

53. At this stage, it would be of importance to note that learned counsel for the appellant has made as many as ten submissions, all of which have been noted in sub-paras (a) to (j) of para 41 above. As noted in para 42 above, we have asked Shri Sanjay Sharma, learned counsel for the appellant whether any submission has gone unnoticed. He has responded that all submissions urged by him have been noted. Learned counsel has not made any submission

pertaining to the disclosure statement Ex.PW-20/C pursuant where to PW-20 and PW-23, at the instance of the appellant and on his pointing out, made a recovery of a desi katta with a spent and a live cartridge, all neatly wrapped in a polythene sheet, from the bushes near the bus stand in front of the red light at Jagat Puri colony. Thus, the evidence of recovery of the katta at the instance of the appellant remains unquestioned.

54. The ninth plea urged and as noted in para 41 above is again an attempt to clutch on to a straw. That in the MLC Ex.PW-1/A while recording the history of the injury the doctor has recorded that the injury is a result of a gunshot, without naming who shot the injured, is neither here nor there because the job of the doctor is to note as to how has the injury been caused and not to go about recording as to who caused the injury. Who caused the injury is the concern of the police; to find out the person after investigation. That some doctors take care to question the patient or his relative a little more on the historical fact pertaining to the history of the injury and some question a little less is meaningless in the context of the requirement of a doctor to record as to

how was the injury sustained and as told by the patient or the person accompanying the patient.

55. The last submission made and as noted in para 41(j) needs no further discussion in light of our discussion pertaining to the submission made by learned counsel noted in para 41(d) above; our discussion being in para 48 above. We have already penned a fairly lengthy decision and hence we do not repeat. The injury is indeed directed towards the chest; the upper part of the chest and cannot be said to be directed towards a non vital part of the body.

56. The intention of the appellant is clearly revealed in his conduct. He came armed with a katta (a country made pistol) and without any provocation fired at Rajiv Jain who sustained a bullet wound and died in less than 1½ hours. The intention of an assailant who uses a firearm and the shot is directed towards the chest has to be, to intend causing the death of the victim.

57. Before signing off we must record a lapse on the part of the police in not charging the appellant for having committed an offence under the Arms Act for the reason he was in possession of and has used a firearm for which he did

not have any licence. We must also record our anguish at the cryptic decision written by the learned Trial Judge who has penned the decision as if he had to but convict the appellant. The decision which runs into 18 pages has noted the testimony of the witnesses till page number 10. From page number 11 onwards till page number 14, the law of evidence has been copied from a text pertaining to Section 3 and Section 101 of the Evidence Act followed by Section 300 of the Indian Penal Code. A cryptic analysis of the evidence has been made in the next three pages and that too with reference to the testimony of PW-2 and of Dr.S.K.Verma PW-4. Worthwhile or worthless, the submission urged by the counsel for the accused have to be dutifully noted and dealt with. The frivolous ones can be summarily rejected as the frivolous nature thereof would be self evident to any person with even rudimentary legal knowledge. The ones of substance have always to be dealt with, after bestowing a thought thereto, and in the light of the proved facts and the circumstances of a case.

58. The testimony of PW-2, PW-3, PW-5 and PW-6 corroborate each other that the deceased was shot at, inside the shop, around 11:15 A.M. on 7.8.2002. Their testimony

corroborates each other that all were present at or near the place of occurrence at said time. Presence of PW-2 and PW-3 at the spot is thus established. They have witnessed the crime being committed. There is no infirmity in their testimony. Testimony of PW-5 further corroborates the events narrated by PW-2 and PW-3, immediately after the appellant shot Rajiv Jain. Illustration 'A' to Section 6 of the Evidence Act makes, anything said or done by a by-stander at the time of the offence or so shortly after it as to form part of the transaction, a relevant fact.

59. We find no merits in the appeal which is dismissed.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

JANUARY 23, 2009

mm/vk