

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

+ **Crl.A. No.0677/2010**

% **Date of Decision: 24.11.2010**

Manoj Kumar Appellant
Through Mr.I.A.Alvi, Advocate for the appellant

Versus

State (NCT of Delhi) Respondent
Through Mr. Lovkesh Sawhney, APP for the State

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR.JUSTICE S.L.BHAYANA

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The appellant has challenged his conviction in the above noted appeal in Sessions Case No.119 of 2007 arising from FIR No.95 of 2007, under Section 302 of Indian Penal Code read with Sections 25/54/59 of the Arms Act, PS Nangloi, by the judgment dated 3rd April, 2010 and his sentence by order dated 6th April, 2010 to life imprisonment along with a fine of Rs.5,000/- for offences punishable under Section 302 of Indian Penal Code and in default of payment of fine to further undergo rigorous imprisonment for 6 months.

2. The brief facts as contended by the prosecution are that on 1st February, 2007 at about 10:45 pm the appellant after an altercation with Ujaghar Singh who was running an STD Booth in front of House No.C-16/1, Street No.14 on the back side of Raja Public School, Nihal Vihar, Delhi fired a shot at him. The sister of the deceased, namely Laxmi with whom the deceased was living, on hearing the altercation came out and witnessed firing of the shot by the accused on deceased Ujaghar Singh.

3. The sister of the deceased, Mrs.Laxmi raised alarm and also chased him but the appellant succeeded in fleeing. The injured younger brother of Mrs.Laxmi was taken by her along with her brother-in-law, namely, Sh.Samarjit to Sanjay Gandhi Memorial Hospital, Delhi where he was declared brought dead.

4. The case of the prosecution is that on receiving the information a DD No.27 was recorded in the Roznamcha by the duty officer on 1st February, 2007 which was forwarded to PW17, ASI Joginder Pal for enquiry and he went to the place of incident along with PW11, Constable Balwan Singh. On reaching the spot i.e. the premises of PW1, Mrs. Laxmi, PW23, Sub Inspector Jai Prakash was also found along with PW14, Constable Khem Chand. Since the injured brother of Mrs.

Laxmi, namely, Ujaghar Singh had already been removed to Sanjay Gandhi Memorial Hospital, Delhi. PW23, SI Jai Prakash along with PW17, ASI Joginder Pal and Constable Balwan Singh went to Sanjay Gandhi Memorial Hospital, Delhi and left Constable Khem Chand at the spot. On reaching the Sanjay Gandhi Memorial Hospital, Delhi, it transpired that Ujaghar Singh had already died. His dead body was shifted to mortuary. Mrs. Laxmi was taken back to her house after she received news of the death of her brother. At her house, Sub Inspector Jai Prakash made an endorsement in DD No.27 and sent the Rukka for registration of FIR and a case under Section 302 of Indian Penal Code was registered on 2nd February, 2007 with Police Station Nangloi.

5. From the information culled and on the basis of investigation, appellant was apprehended and he allegedly confessed to the crime. On the basis of his disclosure statement, Katta (local fire arm) which was used in committing the offence was recovered with one empty shell. At the instance of the accused/appellant, one live cartridge was also recovered which was seized by the prosecution and sent to FSL for analysis.

6. The charge sheet was filed against the accused/appellant and the case was committed to the Court of Sessions as the offence was punishable under Section 302 of Indian Penal Code and was triable

exclusively by the Sessions Court. A charge under Section 302 IPC was framed against the appellant to which the appellant did not plead guilty and claimed trial. During the trial the prosecution examined 27 witnesses. The investigating officer of the case, Inspector Ishwar Singh, could not be examined as he died on 10th March, 2008 during the pendency of the case. The statement of the appellant was also recorded under Section 313 of Criminal Procedure Code in which he denied his involvement and stated that he had been falsely implicated, however, he did not opt to lead any evidence in defence. The Sessions Court after considering the pleas and contentions and the evidence on record of the case acquitted the appellant of the charge under Section 25/54/59 of the Arms Act, however, convicted the appellant under Section 302 of Indian Penal Code and awarded life imprisonment along with a fine of Rs.5,000/- and in default of payment of fine to further undergo rigorous imprisonment for 6 months by orders dated 3rd April, 2010 and 6th April, 2010 which are challenged by the appellant in the present appeal.

7. Learned counsel for the appellant relied on depositions of various witnesses on record and has contended that the prosecution has failed to make out the offense against the appellant. Referring to information received at Police Control Room, it is submitted that information was received on 1st February, 2007 between 2316 hours and 2315 hours. Relying on Ex.DX which is a Form 1 of Police Control Room, it is stated

that the Police Van had reached the spot at 11.18 p.m. on the same day and the report was received from the Police Van at 11.25 p.m.

8. The learned counsel for the appellant Mr.I.A.Alvi has asserted that when PCR had gone to the spot Mrs.Laxmi, the sister of the deceased, had told that her brother had received injuries due to gunshot and he was removed to Sanjay Gandhi Memorial Hospital, however, she had not told as to who had injured her brother. Referring to DD No.27 dated 1st February, 2007 which has been exhibited as Ex.PW22/A, the learned counsel contended that while intimating the police by wireless on the basis of which the said DD entry was made, it was not intimated as to who had injured the deceased.

9. The learned counsel for the appellant has also relied on MLC which was exhibited as Ex PW5/A dated 1st February, 2007 showing the time of arrival as 11.45 p.m., stipulating that the deceased was brought dead in casualty and he was brought by Smt.Laxmi wife of Sh. Sant Ram, sister of the deceased. According to the learned counsel for the appellant, even before the concerned doctor at Sanjay Gandhi Memorial Hospital, Mangolpuri, Delhi, it was not disclosed by Smt. Laxmi, sister of the deceased that her brother had been shot by the appellant. Emphasis has also been laid on the fact that MLC Ex.PW5/A

only stipulates one incised wound on the right side of the neck of the dimension 6 cm x 1.5 cm whereas post mortem report vide Ex PW13/A, dated 2nd February, 2007 bearing No.90 of 2007 which was performed at 2.30 p.m. by doctor Vijay Kumar showed three external injuries which are as follows:-

1. Dislocation of upper central incisor tooth.
2. Incised looking lacerated wound on ® side of Neck just below mastoid region of size 6cm x 1.5cm x cavity deep. Abraded caller of size 0.5 cm present all around the circumference. Margins were inverted. (ENTRY WOUND OF FIREARM)
3. Lacerated wound on the back of neck just below posterior hair line 0.5cm x 0.5cm x cavity deep margins are inverted. (EXIT WOUND OF FIREARM)

10. According to the learned counsel for the appellant till 12.06 am the only thing disclosed was that deceased was injured and had died of a sharp weapon, as the name of the appellant was not disclosed. According to him in fact the name of the appellant was introduced later on and he has been implicated falsely.

11. The learned counsel for the appellant after referring to the testimonies of PW-1, Smt.Laxmi wife of Sh.Santram (sister of deceased) and PW-25, Shri Vishnu has contended that even in the examination-in-chief of said two witnesses there are contradictions and in view of the contradictions in the depositions of said two witnesses who are the

alleged eye witnesses, the appellant cannot be convicted as these witnesses are not reliable. According to him whereas PW-1, Smt. Laxmi stated that when she heard the altercation with her younger brother, she came out of her house and saw accused firing gun shot on the neck of her brother whereupon she raised alarm and even chased the accused along with one Sh.Vishnu, PW-25, however, he succeeded in running away and thereafter she with her brother-in-law Sh.Sawarjit Prasad, PW-4 shifted the injured brother in Rickshaw to Sanjay Gandhi Memorial Hospital, Mangolpuri, Delhi whereas Sh.Vishnu PW-25, deposed that he was standing outside his shop when a boy came and the deceased started talking with that boy. Thereafter, he left for the house and later on a tenant living near his house told him that someone had fired at Ujaghar Singh and the appellant present in the court was the person who was talking with the deceased Ujaghar Singh on that date. He also deposed that he had identified the appellant before the police as the person who was talking with the deceased Ujaghar Singh. The said witness was declared hostile and was cross-examined by the Additional Public Prosecutor as well as by the counsel for the accused. On the basis of these testimonies, it is contended that on account of inherent contradictions in the statements of these two witnesses who are alleged to be eye witnesses, no reliance can be placed on them to implicate the appellant.

12. The learned counsel for the appellant next contended that merely on the basis of live cartridges and a fired cartridge allegedly recovered along with Katta at the instance of the appellant which recoveries have been disbelieved by the trial court, in absence of the pellet or, bullet which had allegedly killed the deceased, not being recovered by the respondent, the appellant cannot be linked with the commission of the offence. Relying on recovery memo Ex. PW-14/A, it is submitted that blood at the scene of the crime was lifted with the help of cotton and blood stained earth was also lifted and sent for investigation. Reference has also been made to Ex.PW-14/B another recovery memo in respect of a cap which was lying at a distance 5 to 6 ft from the place of incident. According to the plea of the learned counsel for the appellant since the recoveries have been disbelieved, on the basis of blood recovered from the place of incident and the blood stained cap found near the place of incident, the appellant cannot be linked with the commission of offense. The only evidence on which the prosecution has relied on is the testimonies of PW-1, Smt.Laxmi and PW-25, Sh.Vishnu which are unreliable and therefore, there is no cogent evidence to implicate the appellant and consequently, the impugned orders dated 3rd April, 2010 and 6th April, 2010 are liable to be set aside and the appellant is entitled to be set free.

13. On behalf of the appellant, it is also contended that no motive as alleged by the prosecution has been established. According to the prosecution, there was a quarrel some time back between the appellant and 3-4 boys which was deposed by PW-21, Head Constable Sh.Rajinder. From the testimony of the head constable Sh.Rajinder, according to the learned counsel, what transpires is that there had been a quarrel between the Sh.Mukhram and Raju and an alleged misbehavior of Sh.Mukhram with head constable Rajinder. Sh.Mukhram and Raju are not connected in any manner to Smt.Laxmi or any other family member of the deceased Ujaghar Singh and consequently on the basis of the alleged quarrel on 31st December, 2006 and 1st January, 2007, it could not be held that the appellant had any grudge against the deceased Ujaghar Singh so as to shoot and kill him.

14. According to appellant, PW-25 was also a suspect and even the sister of the deceased was not known to Sh. Vishnu. In the circumstances it is contended that it was the case for conducting the tests identification parade which was not done by the respondent and therefore the identification in the court by the sister of the deceased was valueless. According to appellant if PW-25 was also a suspect and was kept in the police station for one or two days, which fact has also been admitted by the said witness, there was nothing to let him off and implicate the appellant.

15. Emphasis has also been laid on the allegation that there was insufficient light at the scene of the crime and the sister of the deceased could not have seen and identified the appellant. It is contended that PW-2, Shri Prem Singh in his cross examination had admitted that one could not identify any person in the street after the sunset unless the said person was known. The plea of insufficiency of light was also advanced on the basis of the testimony of PW-16, HC Vijay the photographer who deposed that he took photographs with the help of an emergency light. Deposition of PW-7, SI Mahesh Kumar was also referred to deposing that there was no bulb on the electric pole in the street and when the said witness had reached there the bulb on the roof was not on. Referring to PW 7/A it was asserted that the distance between the place where the deceased was allegedly fired upon and the sister of the deceased was 750 cm and only with the alleged roof light, she could not have seen the accused and identified him. Reliance was also placed on (2005) 10 SCC 614, Hem Raj & ors Vs State of Haryana where it was held that in absence of any evidence regarding the light available at the place of occurrence, version of the eyewitness that he had seen the accused attacking the deceased from a distance of 30 feet at night with only a tube light 20 feet away was not relied on. The said precedent has also been relied on by the appellant in support of his plea

that FIR was not immediately lodged after the deceased was declared brought dead at the hospital.

16. According to learned counsel for the appellant, PW-25, Shri Vishnu had turned hostile and there are contradictions between the testimonies of the sister of the deceased and the said witness. In the circumstances on the basis of the sole testimony of the sister of the deceased whose statement was also recorded one day after the incident, without corroboration on material aspects with reliable evidence, the accused/applicant cannot be convicted. The conviction of the appellant is also sought to be set aside on the ground that all the incriminating facts were not put to the accused under section 313 of CrI.P.C.

17. The leaned counsel contended PW-25 Vishnu had deposed against the appellant and that prior to incident on 1st February, 2007 the appellant had come to the spot which facts were not put to the appellant under Section 313 of the Criminal Procedure Code. It was also asserted that medico legal report and post mortem report are contradictory inasmuch as medico legal report stipulated that injuries were from a sharp edged weapon whereas the post mortem report does not indicate so and there is apparent and inherent inconsistency between the two. Reliance was placed on 2009 (4) JCC 2544, 'Sanjay

Kumar Gupta v. State of Govt. of NCT' holding that if the testimonies of the witnesses are inconsistent on crucial aspects, such testimonies become unreliable and it would not be proper to sustain conviction on the testimonies of the such witnesses.

18. Per contra, the learned Additional Public Prosecutor, Mr.Lovkesh Sawhney has contended that the case was registered at the instance of Sub Inspector and has relied on DD-27 dated 1st February, 2007 which was exhibited as Ex.PW-22/A. Referring to the said DD entries stipulating the relevant facts, the learned Additional Public Prosecutor has contended that it also categorically stipulated that PW-1, sister of the deceased was found in unconscious stage when the police officials had visited the residence. The said DD entry also incorporated that Laxmi Devi, sister of the deceased on coming to know about the death of her brother could not bear the news because of which her relatives had taken her back to the house as she had become unconscious. In the circumstances, it is asserted that the appellant cannot draw any benefit on account of any delay in recording the FIR. The incident of PW-1 becoming unconscious is also apparent from the testimony of PW-1 Laxmi Devi deposing categorically that on hearing about the death of her brother, she had became unconscious and she regained consciousness next day in the morning and she narrated the whole incident at 11/12 am when the police personal came to her house.

According to the learned Additional Public Prosecutor, the presence of the sister at home with whom the deceased was living at about 10.45 pm was natural and it cannot be inferred or contended that such a witness has been introduced.

19. Refuting the plea of the learned counsel for the appellant that at the place of incident there was no sufficient light and Smt. Laxmi could not have seen the deceased and the accused from a distance of 750 cms., it is contended very emphatically that on the basis of the record, it has been established that there was sufficient light. PW-1 Smt.Laxmi Devi had categorically deposed in her statement recorded on 24th April, 2008 that though there was no street light but outside the houses there were lights. She had stated that there was light installed outside her house and a light was also installed outside the house of the neighbour which is also apparent from the site plan exhibited as Ex.PW-7/A.

20. The learned Additional Public Prosecutor contended that to PW-1, sister of the deceased, it was not suggested on behalf of the appellant that the lights were not installed outside her house and outside the houses of the neighbors and there was no sufficient light so as to see the accused and the deceased. Rather a suggestion was given on behalf of the appellant that the bulb installed outside the house was of zero

watt which was not sufficient to see the accused and the deceased. Learned counsel for the appellant had also submitted that though Head Constable Sh.Vijay, PW-16 had deposed that he had taken the photographs between 12.45 pm to 1.10 pm in emergency light, however, this fact does not negate that at the time of the incident at 10.45 pm, there was not sufficient light for the PW-1 to see the assailant and the appellant firing at her brother because the intensity of light required to see someone is different than the intensity of light required for taking photograph. It is contended that though the light may not be sufficient for taking photograph but the lights outside the houses were sufficient to see the appellant at the distance of 750 cms. where PW-1 was standing where she had come after hearing the altercation between her brother and appellant.

21. Regarding the plea of the appellant that motive has not been established by the prosecution, it is contended that since there are two eye witnesses to the incident, the motive becomes redundant. Mr.Lovkesh Sawhney submitted that even if PW-25 Sh.Vishnu had become hostile, however, his testimony to the extent it has supported the version of the prosecution can be relied on. The said witness has stated that the appellant was the person who was talking with the deceased on that date. He had further stated that he was standing outside the shop of the deceased at 10.45 pm and at that time her

sister came to call him and thereafter he came back to his house and later on he came to know that the deceased had been fired upon. This part of the testimony of hostile witness PW-25 establishes that the appellant was present on 1.2.2007 at 10.45 pm and even PW-1 had come outside the house and thus corroborates the deposition of PW-1 to this extent.

22. Relying on testimony of PW-2, Sh.Prem Singh, it is contended that testimony of said witness also establishes the presence of PW-1 Smt. Laxmi Devi, sister of the deceased. According to the learned Additional Public Prosecutor, the said witness has also supported the deposition that he had heard a gun being fired and later on the brother in law and the PW-1, Smt.Laxmi had shifted the deceased to the hospital where he had died. According to the learned Additional Public Prosecutor the examination in chief of PW-2 was recorded on 25th April, 2008 when he categorically deposed on oath that he had heard the gun shot, however, in the cross-examination which was recorded about seven months later, he had become hostile and had denied that he had heard a gunshot or that he had seen any gunshot injury. He rather deposed that one could not identify any person in the street after sun set unless the person was known.

23. The learned Additional Public Prosecutor has sought affirmation of conviction and sentence of the appellant on the ground that if eye witnesses' account is trust worthy then it would not require any further corroboration and even if recovery of country made gun (Katta) is not connected to the crime as the recovery of Katta had not been believed by the Trial Court yet eye witnesses' account will be sufficient to inculcate the appellant.

24. Regarding not putting the alleged relevant facts to the appellant under Section 313 of the Criminal Procedure Code, it is asserted by the learned Additional Public Prosecutor that though all the relevant facts were put to the appellant, however, in case some facts have not been put to him, the appellant had to show that not putting the particular facts have gravely prejudiced him.

25. This Court heard the learned counsel for the parties in detail and have also perused the trial court record specially the testimonies on record and the documents proved. The appellant was charged with causing death of Ujagar Singh by opening fire on his person from the country made pistol on 1st February, 2007 at about 10.45 pm at Gali Sareaam, near the house No.C-1/1, Chandan Vihar, Nihal Vihar, Delhi within the jurisdiction of police station Nangloi. According to the prosecution, there are two eye witnesses to the incident of firing the gun

by the appellant on the neck of Ujaghar Singh, brother of PW-1. The two eye witnesses are Smt.Laxmi PW-1, sister of deceased Ujaghar Singh and PW-25 Sh.Vishnu, Merely because one of the eye witnesses i.e. Smt.Laxmi, PW-1 is the sister of the deceased, will not make her testimony unreliable or such that it would require corroboration. The Supreme Court in Rajesh Kumar v. State of H.P., AIR 2009 SC 1 had held that there is no proposition in law that relatives are to be treated as untruthful witnesses. It has been further held that on the contrary reason has to be shown for the plea of partiality that relative witness had reasons to conceal actual culprit and falsely implicate the accused. It cannot be held that a related witness necessarily has to be an interested witness. The witness is interested only when he or she has to derive benefit from the result of litigation in decree in civil cases, or in seeing accused person punished. Testimony of a witness who is a relative of the deceased cannot be rejected on the ground that he is likely to implicate the accused which is otherwise cogent and credible. When any incident happens in the dwelling house the most natural witness would be the inmates of that house. This cannot be disputed that the incident had taken place outside the house where the deceased was living with his sister, PW1 who is the eyewitness. It is un-pragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen anything or had been present. The over insistence on witness of having no relation with the victim often results in criminal justice being withheld. The relative witness in a manner will be an

interested witness, however, an interested witness is not necessarily an unreliable witness and partisanship by itself is not a valid ground for outrightly discarding him or rejecting his testimony at the very threshold. It is also not an invariable rule of law that the evidence of interested witness can never form the basis of conviction, unless corroborated in material particulars, by independent evidence.

26. Though the learned counsel for the appellant had contended that PW-25, Sh.Vishnu was also a suspect and had been kept for one or two days in the police station, however, that does not show in any manner that PW-1 Smt.Laxmi had any reason to conceal PW-25 Sh.Vishnu and falsely implicate the accused/appellant. The said witness had rather turned hostile. Had the said witness been a culprit, as is sought to be contended by the learned counsel for the appellant, he would not have turned hostile. Investigation by the police authorities from Sh.Vishnu for one or two days at the police station rather reflects thorough investigation done by the prosecution and not implicating the appellant merely on the basis of the statement of Smt.Laxmi PW-1 who categorically deposed that on 1st February, 2007 at about 10.45 pm she had heard the voice of her brother having altercation with someone in front of her house and the person with whom her brother was having altercation had fired upon him. She identified the appellant correctly. She had also deposed that she had raised alarm and chased the accused, however, he had run away. According to her, her neighbor,

Sh.Vishnu, PW 25 had also chased the appellant, but he succeeded in running away. Though Sh.Vishnu in his statement as PW-25 admitted that the appellant was present at 10.45 p.m. outside the shop of the Ujagar Singh, deceased, however, he had turned hostile and did not admit that he chased the accused along with the sister of the deceased.

27. This is no more res-integra that if a prosecution witness turns hostile then his testimony is not to be treated as effaced or washed for altogether. The Apex Court has held in a number of cases that it can be accepted to the extent the testimony of the hostile witnesses is found to be dependable on a careful scrutiny of the entire evidence. Reliance for this proposition can be placed on Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389: 1976 SCC (Cri) 7: AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233:1976 SCC (Cri) 566: AIR 1977 SC 170; Syad Akbar v. State of Karnataka, (1980) 1 SCC 30: 1980 SCC (Cri) 59: AIR 1979 SC 1848; Khujji v. State of M.P, (1991) 3 SCC 627: 1991 SCC (Cri) 916: AIR 1991 SC 1853.

28. Though, PW-25 had turned hostile, however, from his testimony, it can be inferred that the deceased Ujagar Singh was talking to the appellant and at that time the sister of the appellant had also come out of the house. This part of the testimony of hostile witness PW-25 rather corroborates the testimony of the sister of the deceased that there was

conversation between her brother Ujaghar Singh and the appellant and on hearing the voices she had come out. This rules out the possibility of sister of the deceased being introduced as a witness later on.

29. Thus the presence of sister of the deceased is established when the altercation had been going on between the appellant and the deceased. PW-1, Smt. Laxmi has categorically deposed that the appellant fired upon her brother. The post mortem report of the deceased exhibited as Ex.PW-13/A establishes that the cause of death was cranio cerebral damages consequent to fire arm injury which was ante mortem in nature. The post mortem was conducted at 2.30 pm on 2nd February, 2007 and the death was estimated to be 16 hours before post mortem which also reflects that the fire arm injury was caused to the deceased at about 10.30 pm on 1st February, 2007 which corroborates that a fire arm was fired on the brother of PW-1. The plea of the learned counsel for the appellant of difference in medico legal report exhibited as Ex.PW-5/A dated 1st February, 2007 at 11.45 pm describing incised wound on the right side of the neck and three injuries shown in the post mortem also does not dilute the case of prosecution in any manner. PW-5, Dr.Brajesh Singh had deposed in his cross-examination that since the patient was brought dead there was no significance of recording the history of the deceased and no detailed investigation was required. In the circumstances, if he has deposed that

the wound on the neck of the deceased could be by a sharp weapon whereas post mortem shows that cause of death was on account of cranco cerebral damages consequent to fire arm injury, the same does not create any doubt that the deceased was not fired upon by a fire arm. The evidence on record is to be considered as a whole. A criminal trial is not like a fairytale wherein one is free to fly to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime for which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of the crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused the Court cannot at the same time reject evidence which is ex-facie trustworthy on grounds which are fanciful or in the nature of conjectures.

30. Learned counsel for the appellant also tried to discard the testimony of PW-1, Smt.Laxmi on the ground that she has deposed that there had been only one external injury on the neck of her brother whereas post mortem report disclosed three external including dislocation of upper central incisor tooth. Considering the facts and

circumstances, this Court cannot term it as such an inconsistency between the statement of PW-1 and the post mortem report. The PW-1, Smt.Laxmi, sister of the deceased is not a medical expert and an injury by a fire arm on the neck of the deceased where the bullet had entered from one side and a wound of the bullet going out from the other side dislocating upper central incisor tooth not being noticed by the PW-1 and being considered only as a part of the main injury would not make her testimony unreliable. This would be nothing more than normal discrepancy and cannot be construed and visualized as a material contradiction. Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to the mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful witness may be. Horror on the part of the sister cannot be controverted by the appellant by any argument, on seeing her brother shot in front of her eyes. At that time her primary concern was to render him medical assistance to save his life and not to count the type and number of injuries. More the attachment between the brother and sister, more will be the shock seeing one of them being injured. On hearing the news of the death of the deceased, sister becoming unconscious is reflective of her attachment with her brother and in the circumstances at the time her brother was shot, if she had not counted whether he had one injury or three injuries will not make her testimony unworthy.

31. The learned counsel for the appellant for his proposition that the conviction of the appellant cannot be based on solitary testimony of the sister of the deceased, who is a close relation has also relied on AIR 1986 SC 313, State of UP v. Satish Chandra & Ors.; AIR 1983 SC 810, Ramji Surjya and Anr. v. State of Maharashtra; 2006 (4) Crime 77 SC, Bhimappa Chandappa Hosamani & Ors. v. State of Karnataka. In Satish Chandra (supra), it was rather held that it is not necessary in law that more than one witness should be examined to prove a fact but for this, a witness should be reliable. In the case relied on by the appellant, the accused were known to the sole witness and an application was filed for their identification, however, no orders were passed and the identification was not done. In these circumstances it was held that on the basis of the testimony of the sole witness, it could not be inferred that the sole relative witness was acquainted with the accused and on the basis of testimony of sole related witness, conviction had been set aside by the High Court, which was upheld by the Supreme Court. Apparently, the case of the appellant is distinguishable as the presence of the accused is not only established by the sister of the deceased PW-1 but it has been established even from the testimony of PW-25, Sh. Vishnu even though had turned hostile but a part of his testimony can be relied on. On the basis of the analysis of the testimony of the sister of the deceased it is found to be creditworthy. The appellant also has not cross-examined her on some material aspects.

32. In *Ramji Surjya* (supra), the Supreme Court had held that even where there is only a sole eye witness of a crime, a conviction may be recorded against the accused, provided the Court who hears such witness regards it honest and truthful. It was also held that prudence requires that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness, where such witness is closely related to the deceased and the accused are those against whom some motive or ill will is suggested. In the case relied on by the appellant, there was inordinate delay in giving the first information to the police and there were other inherent inconsistencies in the evidence of the sole eye witness. The Court had also come to the conclusion that exaggeration on the part of the prosecution witness involving innocent persons should not be ruled out and, in these circumstances, the sole eye witness who was also related was not relied on for conviction. In the case of the appellant, the prosecution has given cogent reason for delay, which delay is also not much as the firing by the appellant was on 1st February, 2007 at about 10:45 PM and the sister had given the details to the police official next day in the morning at about 10:00 to 11:00 AM on regaining consciousness. This has also been established that on hearing about the death of her brother, the Pw-1 had become unconscious which fact had not been controverted on behalf of the appellant. The Trial Court has also relied on truthfulness of the said witness. In *Bhimappa Chandappa*, the Apex Court had held that to sustain conviction of sole eye witness's evidence, the Court has

to critically scrutinize the evidence. In that case, the sole eye witness had admitted that her thumb impression were taken on five blank papers by the police which created suspicion and even the nature of injuries of the deceased in that case must have brought out a lot of blood and absence of any blood on the clothes of the witness had also created suspicion besides several other circumstances, which had created doubt about the truthfulness of the sole witness. Even inconsistencies were found in the evidence of two police officials which gave rise to serious doubt about the time when the FIR was recorded and in these circumstances, the testimony of the sole eye witness was not relied on. Apparently the facts in the case of the appellant are different and distinguishable. The presence of the appellant is not dependent solely on the testimony of sister but PW-25 Vishnu, though he turned hostile, also proves the presence of the appellant at the time of incident and in the circumstances, it cannot be contended by the appellant that the testimony against the appellant is only of PW-1, Laxmi, sister of the deceased. The presence of the appellant and the sister was corroborated by the evidence of Pw-25 and consequently the the judgments relied on by the appellant is clearly distinguishable.

33. The learned counsel for the appellant has also relied on (2005) 10 SCC 614, Hemraj and Ors. v. State of Haryana to contend that in absence of any evidence regarding the light available at the place of

occurrence, version of the eye-witness that he had seen the accused attacking the deceased with a particular weapon from a distance of about 730 cms. with no street light operating would be unreliable. In Hemraj (supra) the facts were different. In the judgment relied on there was no evidence of light available at the place of occurrence and the deposition of eye witness that he had seen the accused attacking the deceased with particular weapon from a distance of 30 feet at night with only one tube light at a distance of 20 feet was held to be unreliable. In the case of the appellant, the facts are different. There was ample light in the street outside the houses, though, the public light was missing. The testimony of PW-1 and other witnesses established about the lights outside the houses. Perusal of the photographs taken although after 2-3 hours of the incident with emergency light also shows that there was sufficient light from the lights outside the houses for PW-1 to have identified the appellant from a distance of 750 cms. On the ratio of the said judgment, the appellant therefore cannot succeed in contending that there wasn't sufficient light for the sister of the deceased to identify the appellant. The plea of the appellant that photographs were taken with emergency lights and therefore there was not sufficient light to identify the appellant by the sister of the deceased cannot be accepted. First it is established that there were lights outside the houses though the street light was not there. The light from the electricity bulbs outside the houses may not be sufficient for taking photographs but it cannot be inferred in the circumstances that the

light was not sufficient for identification of person or seeing vividly appellant attacking the deceased which was witnessed by the sister from the distance of 750 cms. The intensity of light required to identify or see a person from the said distance will be much less than for taking photographs. In the circumstances, even this contention of the learned counsel for the appellant cannot be accepted.

34. The learned counsel has also tried to create doubt about the version of the eye-witness, sister of the deceased on account of no blood stains found on her clothes when she had taken her brother along with his brother-in-law Sawarjit Prasad. This is not disputed and has been established by post mortem report that there was one entry and exit wound on the neck of the deceased. If the deceased was taken by his sister, PW-1 and his brother-in-law Sawarjit Prasad then only one of them could have got the blood stains from the injuries on the neck, i.e., whosoever had been holding the deceased near the neck. Sawarjit Prasad who was examined as PW-4 deposed that he had shifted the deceased brother-in-law Ujagar Singh, who was lying injured, to SGM Hospital. Surprisingly, he was not cross-examined despite the opportunity given to the accused. Even PW-1 sister of the deceased was not cross-examined on the point that if her brother had been shot in the neck and was bleeding then how she did not get any blood stains on her clothes.

35. The next point raised by the learned counsel for the appellant is about not putting the statement of PW-25 and another aspect of appellant having visited the scene earlier under Section 313 of the Criminal Procedure Code to the appellant. Perusal of the statement under Section-313 of the Crl. Procedure Code reveals that the question as to why PWs have deposed against the appellant was put to the appellant as question No. 14 and the answer given was that all the witnesses have deposed falsely as they are interested witnesses and the appellant is innocent. In the circumstances, since the question was put in respect of all the witnesses, the learned counsel for the appellant is not justified in contending that about PW-25 deposing against the appellant was not put to him. In any case, the case of the appellant is not that each and every witness, who has deposed against the appellant, should have been put to him individually. If the plea of the appellant is that the case of each and every prosecution witness should have been put to him separately then, the appellant has to show as to how he has been prejudiced by putting the question under Section 313 of Crl. Procedure Code about the PWs deposing against him. The learned counsel for the appellant is unable to point out or show how the appellant got prejudiced on this account. The object behind Section 313 Cr.P.C is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on the maxim audi alteram partem which is one of the principles of natural justice. It has always been regarded unfair to rely upon any incriminating

circumstance without affording the accused an opportunity of explaining the said incriminating circumstance. The provisions in Section 313, therefore, make it obligatory on the court to put questions to the accused on the evidence and circumstance appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him. The object behind Section 313 Cr.P.C is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on the maxim audi alteram partem which is one of the principles of natural justice. It has always been regarded unfair to rely upon any incriminating circumstance without affording the accused an opportunity of explaining the said incriminating circumstance. The provisions in Section 313, therefore, make it obligatory on the court to question the accused on the evidence and circumstance appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-

examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him. Thus the broad principle is that all incriminating material circumstances must be put to an accused while recording his statement under Section 313 of the Code, but if any material circumstance has been left out that would not ipso- facto result in the exclusion of that evidence from consideration unless it could further be shown by the accused that prejudice and miscarriage of justice had been sustained by him.

36. In *Paramjeet Singh@ Pamma Vs State of Uttarakhan*, 2010 (10) SCALE 258 the Supreme Court had held as under:

25. If any appellate Court or revisional court comes across the fact that the trial Court had not put any question to an accused, even if it is of a vital nature, such an omission alone should not result in the setting aside of the conviction and sentence as an inevitable consequence. An inadequate examination cannot be presumed to have caused prejudice. Every error or omission in compliance of the provisions of Section 313 Cr.P.C., does not necessarily vitiate trial. Such errors fall within category of curable irregularities and the question as to whether the trial is vitiated, in each case depends upon the degree of error and upon whether prejudice has been or is likely to have been caused to accused. Efforts should be made to undo or correct the

lapse. (Vide: Wasim Khan v. State of Uttar Pradesh MANU/SC/0022/1956 : AIR 1956 SC 400; Bhoor Singh and Anr. v. State of Punjab MANU/SC/0109/1974 : AIR 1974 SC 1256; Labhchand Dhanpat Singh Jain v. State of Maharashtra MANU/SC/0161/1974 : AIR 1975 SC 182; State of Punjab v. Naib Din MANU/SC/0597/2001 : AIR 2001 SC 3955 and Parsuram Pandey and Ors. v. State of Bihar (2004) 13 SCC 189).

In the circumstances, for the foregoing reasons, it cannot be said that all the incriminating circumstances were not put to the accused/appellant under section 313 of the Criminal Procedure Code nor it has been shown or pleaded by the appellant as to how he has been prejudiced on account of not putting all the incriminating circumstances to him. In the circumstances, even this plea of the appellant cannot be accepted.

37. On perusal of the testimonies of all the witnesses and the record of the case, it has been established beyond any reasonable doubt that the deceased Ujagar was living with his sister PW-1 and running STD Booth and on the night of 1st February, 2007, he was fired upon by the appellant and injured Ujagar was taken to the hospital by his sister and his brother-in-law Sh. Sawarjit Prasad. The presence of the appellant was also established by PW-25 Sh. Vishnu, who though turned hostile, however, from his statement the presence of the appellant and PW-1

sister of the deceased is established. The Trial Court had also relied on the testimony of PW-1, sister of the deceased.

38. The learned counsel for the appellant has not been able to show that the findings of the Trial Court are unsustainable, illegal or perverse. This Court, on perusal of the evidence on record and the documents is of the opinion that the prosecution has successfully proved that the appellant had fired on the deceased Ujagar Singh, which led to his death and therefore, the appellant is guilty under Section-302 of Indian Penal Code. This Court therefore, upholds the conviction of the appellant. The appellant was also sentenced to undergo life imprisonment and a fine of Rs.5000/- and in default of payment of fine to undergo further 6 month imprisonment for the offence. The sentence of the appellant is also upheld by this Court. The appeal, is therefore, dismissed. Since the appellant is in jail, a copy of this decision be sent to him through the Superintendent, Central Jail, Tihar.

ANIL KUMAR, J.

S.L.BHAYANA, J.

November 24, 2010
vk/rs