

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

% **Crl. Appeal No.12 of 2010**

+ **Date of Decision: 28th January, 2011**

VICKY MAKAN **...Appellant**

! **Through: Mr. Vijay Aggarwal and Mr. Gurpreet Singh, Advocates.**

Versus

\$ **STATE** **...Respondent**

^ **Through: Mr. Pawan Behl, APP**

WITH

% **Crl. Appeal No. 36 of 2010**

MADAN LAL **...Appellant**

! **Through: Mr. Subhash C. Bhuttan, Advocate**

Versus

\$ **STATE** **...Respondent**

^ **Through: Mr. Pawan Behl, APP**

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

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

JUDGMENT

P.K.BHASIN, J:

The two appellants in these appeals have been convicted under Section 304/34 IPC by the learned Additional Sessions Judge, Delhi and have been sentenced to undergo rigorous imprisonment for 8 years and also to pay fine of Rs. 1 lakh each with default stipulation of further six months simple imprisonment. Feeling aggrieved by the judgment of conviction dated 30th November, 2009 and order on sentence dated 15th December, 2009 passed by the trial Court the

two convicted accused had filed separate appeals but both of them were heard together and, therefore, are now being disposed of by this common judgment.

2. The relevant facts leading to the prosecution of the two accused –appellants and their conviction are that on 12th April, 2007 an information was flashed to Moti Nagar Police Station police control room (PCR) regarding some firing incident at House No. 1/28, in which one person had been shot at Moti Nagar, New Delhi. That information was recorded at the police station as DD No. 82- B (Ex.PW-3/B) and Sub Inspector Ashutosh Kumar (PW-18) was deputed to look into the matter. He accordingly went to the said house in Moti Nagar along with one constable and there he came to know one Jagdish Lal Sachdeva resident of the house had been shot and had already been removed to Kalra Hospital. SI Ashutosh Kumar then left the constable at the spot and himself went to Kalra Hospital where he found Jagdish Lal Sachdeva admitted. Since the injured was declared by the doctor to be in a position to give his statement SI Ashutosh recorded his statement (Ex.PW-7/A). On the basis of that statement SI Ashutosh Kumar the police registered a case under Section 307/34 IPC. Jagdish Lal Sachdeva was, however died on 13th April, 2007 and, therefore, the case was converted into one under Section 302/34 IPC. The statement Ex.PW-7/A of the deceased Jagdish Lal Sachdeva, thereafter, was treated as his dying declaration. What was narrated by the deceased to SI Ashutosh

Kumar in his statement Ex.PW-7/A has been noticed by the trial Court and the same is re-produced below:-

“.....Mai Apne Makan Ki Uppar Ki Sedio Se Chad Raha Tha To Char Sidi Chadne Ke Bad Mujhe Peechhe Se Dahine Kulhe Par Goli Mari, Ye Bat Samay Karib 11.15 Baje Rat Ki Hai, Jo Maini Bhagte Huye Pechhe Se Teen Admiyo Ko Dekha Jinko Mai Penchant Hun Jisme Ek Vicky Makan, Madan Lal Kabari Ewam Tisere Ko Samne Aane Par Pehchan Sakta Hun. Ho Sakta Hai Ki Wah Anil Kapoor Ho, Jo Raju Karnal Wa Anil Kapoor Ne Pahle Bhi Jan Se Marne Ki Dhamki Dee Thee.....”

3. During the investigation the police had also recorded the statements of the son and daughter-in-law and brother of the deceased who were examined during the trial as PWs 7, 1 and 8 respectively. All of them had claimed that the deceased had informed them on the way to hospital that when he had turned around after being shot he had seen three persons running away and the accused-appellants were two of them. The statement made to them has also been treated as oral dying declaration of the deceased by the prosecution and relied upon during the trial. Since the appellants had been named by the deceased in his statement Ex.PW-7/A as well to his son, daughter-in-law and brother the police arrested them. No other person could be booked.

4. The trial Court framed a charge under Section 302/34 IPC against the accused persons but finally convicted them under Section 304/34 IPC since the bullet was hit upon the buttock of the deceased and not on any vital organ and the autopsy surgeon had also not found the injuries sustained by the deceased to be sufficient to cause death in the ordinary course of nature. The appellants were convicted

by the trial Court solely relying upon the two dying declarations of the deceased. The two convicted accused have felt aggrieved and so have filed appeals before this Court while the State has accepted the acquittal of the accused-appellants for the offence under Section 302 IPC.

5. Learned counsel for the appellants did not dispute before this Court that the death of the deceased Jagdish Lal was homicidal. That fact even otherwise is duly established from the evidence of the autopsy surgeon PW-16 Dr. Anil Shandilya.

6. Learned counsel for the appellants had, however, strongly criticized the trial Court's finding to the effect that prosecution had been able to establish that the deceased had made three reliable dying declarations. Counsel contended that the statements attributed to the deceased as his dying declarations as spoken by his son and daughter-in-law and then SI Ashotosh cannot be accepted to have actually been made by the deceased since these witnesses have made inconsistent and improved statements in Court. It was also the submission of the counsel that even if it is accepted by this Court, as has been accepted by the trial Court, that the deceased had made such statements before these three witnesses all that would stand proved is that the deceased had seen three persons including the two appellants running away and that circumstance by itself cannot be sufficient to hold them guilty for the offence of murder. In support of these submissions learned counsel for the appellants

placed reliance upon one judgment of the Supreme Court in “Vindo Samuel vs. Delhi Administration”, AIR 1992 SC 465 wherein also the evidence against the accused was that he had been seen running away from the place of incidence and the Hon’ble Supreme Court had held that that circumstance was not sufficient to establish that the person who was seen running away from the scene of crime had actually killed the deceased. One judgment of this Court in “Rakesh Kumar @ Mukri vs. State of NCT of Delhi”, 2007 (2) JCC 1636 was also cited. Learned counsel further argued that since the deceased did not claim to have seen any of the three persons firing at him or having any fire arm with him it also cannot be said to have been established as to who out of the three persons had actually fired at him and, therefore, none of them could be convicted and that too by invoking Section 34 IPC. All these infirmities in the prosecution case, according to the counsel for the appellants, were sufficient enough to extend the benefit of doubt to both the appellants.

7. On the other hand, learned public prosecutor while supporting the trial Court’s judgment had submitted that all the three dying declarations of the deceased were consistent as far as the involvement of the appellants are concerned and had been rightly accepted by the learned trial Court despite the fact that there was some enmity between the deceased and the appellants. Learned prosecutor had also stated that apart from the evidence of two dying

declarations of the deceased there was no other evidence adduced by the prosecution to establish its case.

8. Since the only evidence adduced by the prosecution to secure their conviction of the accused-appellants was that of the dying declarations of the deceased statements made by his son and daughter-in-law and the investigating officer have been minutely and carefully examined by me. As far as the brother of the deceased, PW-8 Kewal Kishan, is concerned he had not supported the prosecution case to the effect that the deceased had said in his presence on the way to the hospital that he had seen the accused-appellants running away when he had turned around to see who had shot at him. The trial Court has accepted the evidence of the son and daughter-in-law of the deceased. In my view, the statement of the son of the deceased(PW-7 Sachin Sachdeva) relied upon by the prosecution as well as the learned trial Court for proving the first dying declaration of the deceased is unreliable. He had deposed that on the way to Kalra Hospital his father had said before him, his wife(PW-1) and his uncle Kewal Kishan(PW-8) that the accused-appellants had shot at him. However, he had not claimed so when his statement was recorded by the police during the investigation under Section 161 Cr.P.C. with which he was duly confronted during his cross-examination on behalf of the accused. He had claimed before the police that his father had told him that he was shot while he was climbing stairs to reach his house and when he had turned around he saw the accused-

appellants running away along with one other person whom he could identify on being shown. The statement of PW-7 in Court that his father had said that the accused-appellants had shot at him was, therefore, clearly an improved statement and appears to have been made after realizing that merely on the basis of the statement that his father had only seen the accused-appellants running away their conviction might not be possible. There is another reason also for not believing the evidence of PW-7. In the MLC, Ex. PW-15/B, the alleged history recorded by the doctor who had examined the deceased was that some persons had shot at the deceased from back while he was climbing stairs. This document also falsifies the statement of PW-7 that his father had said that the accused-appellants had shot at him since if actually that was so he would have informed the doctor accordingly. The evidence of PW-7 becomes unreliable also for the reason that even the brother of the deceased when examined by the prosecution as PW-8 had stated that the deceased had not said anything on the way to hospital as to how he had been shot at and by whom. No doubt, that witness was cross-examined by the prosecutor but his not supporting the prosecution story does introduce an element of doubt in the correctness of the statement of PW-7. In fact, PW-8 had stated in his cross-examination by the prosecutor that PW-7 Sachin had told him to give statement according to the prosecution case but he had told Sachin that he would only speak the truth in Court and, therefore, he had spoken the truth. Therefore, the evidence of PW-7 is of no help to the prosecution.

9. In my view, even the statement of the daughter-in-law in Court to the effect that her father-in-law had said on the way to the hospital that he had seen the two accused-appellants running away cannot be accepted since this information was not given by her to the doctor in the hospital where she claimed to have taken the deceased and that is evident from the MLC of the deceased referred to in the preceding paragraph. In the MLC of the deceased the history recorded by the doctor was that some persons had shot at the deceased from back while he was climbing stairs. PW-1 Smt. Isha Sachdeva had in her evidence admitted that her father-in-law had himself told the doctors that he had been shot from back while climbing stairs by some persons and that whatever her father-in-law had told to the doctors had been certified by her as well as her husband(PW-7) and uncle Kewal Krishan(PW8). It is, thus, clear that by the time the deceased had reached Kalra Hospital he had not informed anyone that he had seen the two accused appellants and one other person running away after he had been shot at and, therefore, the statement of PW-1 made during the trial that her father-in-law had said on the way to the hospital that he had seen the two accused – appellants running away does not inspire confidence.

10. As far as the statement of the investigating officer SI Ashutosh Kumar(PW-18) is concerned, the same also is not reliable. In his examination-in-chief he had deposed that after reaching Kalra Hospital he had recorded the statement of the injured Jagdish Lal

Sachdeva. In that statement Ex.PW-7/A the deceased had claimed that when he had turned around after being shot he had seen the two accused – appellants and one other person running away. In cross-examination he stated that he had recorded the statement of Jagdish Lal Sachdeva while he was being taken from emergency room to ICU and that at that time there was doctor but he had not asked that doctor to attest the statement of the deceased. In my view, it is highly improbable that PW-18 could have recorded the statement of the deceased while he was being moved to ICU. At that time the condition of the deceased must have been critical and the doctor would not have stopped taking the injured to ICU to enable the investigating officer to record his statement. There is another reason also for not considering the evidence of the investigating officer to be reliable and that reason is the non-examination of the doctor in whose presence he claims to have recorded the statement of the deceased.

11. I am also of the view, and as was submitted by the learned counsel for the appellants also, that even if the evidence of the investigating officer were to be accepted the only thing which can be said to have been established by him is that the deceased had seen the two accused – appellants and one other person running away after he had been shot at. That circumstance, in my view, by itself cannot be considered to be sufficient to hold the accused – appellants guilty for killing the deceased since he had not seen

anyone of them running away with any firearm and the police had also not been able to recover the weapon of offence. In this regard, the judgment of the Supreme Court in Vindo Samuel's case(supra), cited by learned counsel for the appellants, does help the case of the appellants since in that case the accused had been apprehended immediately after the incident of snatching of gold chain of a lady but since there was no recovery of the gold chain from his possession it had been held by the Supreme Court that just because the accused was apprehended while he was running away he could not be held guilty of having snatched the gold chain of the victim.

12. I am, therefore, of the view that the prosecution case cannot be said to have been established beyond reasonable doubt and based upon the evidence of the son and daughter-in-law of the deceased and the investigating officer the conviction of the two appellants cannot be sustained.

13. Both these appeals are accordingly allowed. The judgment and order of the learned Additional Sessions Judge under challenge in these appeals are set aside and both the accused – appellants are acquitted and are directed to be released from jail forthwith, if not required to be detained there in connection with any other case.

January 28, 2011

P.K. BHASIN,J