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

DECIDED ON: 07.02.2012

+ **Crl.A.571/2009**

MADANPAL alias MADAN Appellant
Through: Mr. K.B. Andlay, Sr. Advocate
with Mr. M.L. Yadav, Advocates.

versus

STATE OF DELHI Respondent
Through: Mr. Sanjay Lau, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% This judgment will dispose of the appeal challenging a judgment and order of the learned Additional Sessions Judge dated 7.9.2009 in Sessions Case No.100/2003. By the impugned judgment, the Trial Court convicted the appellant Madan Pal for committing the offence punishable under Section-302 IPC and sentencing him to undergo imprisonment for life and also directed payment of ₹ 30,000/- as fine with a default sentence.

2. This matter was heard today since the appellant has been in custody for more than seven years.

3. The prosecution case is that on 11.03.2003, Police Station Nand Nagri received intimation around 08:00 PM about the shooting incident at 228, Gali No.8, Ganga Sahai Colony, Budh

Vihar, Mandoli, Delhi. The concerned PS deployed personnel to the spot where it was found that one Sudesh, daughter of PW-4, the informant (Maya Devi), has been shot. The statement (rukka) of Maya Devi was recorded at 09:45 PM; that formed the basis of the FIR (Ex.PW-2/A). Maya Devi implicated the appellant as the one responsible for the shooting incident. It was alleged by her that the appellant had some ill intention towards Sudesh; he was apparently the brother of the tenant who used to reside in a portion of Maya Devi's premises. She also stated that Sudesh had been engaged recently and that on the day of incident, the accused suddenly entered their house and shot at Sudesh stating, "tum meri nahi ho to kisi aur ki bhi nahi hogi". On the basis of these allegations, police registered the FIR and conducted investigation, during the course of which, the appellant was arrested. Upon being charged with committing the offence, the appellant pleaded not guilty and claimed trial.

4. The prosecution, during the trial, relied upon the testimonies of 16 witnesses and several exhibits which included the postmortem report, FSL report and seizure memos evidencing recoveries of articles, said to be connected with the crime. On appreciation of all these, the learned ASJ, by his impugned order, concluded that the prosecution had established the appellant's guilt beyond reasonable doubt and convicted him for committing the offence and sentenced him in the manner described previously.

5. It is argued on behalf of the appellant by learned Sr. counsel Mr. K.B. Andlay that the Trial Court has discarded the testimonies

of alleged eye witnesses PW-6 and 7, who claimed that they were present at the time of the incident. Elaborating on these, it was urged that similarly presence of PW-5 is highly suspected. The learned counsel argued that contrary to the testimony of PW-4, PW-5 alleged that the motive for the offence was that the appellant's bhabhi (sister-in-law) had been allegedly caught stealing some articles from their house which led to their being asked to vacate the premises. According to PW-5, submitted the counsel, this formed the motive. On the contrary, PW-4 had stated that the alleged motive of the appellant for the murder was the deceased's spurning his love and the further event of her getting engaged to someone else. It was submitted that the Trial Court ought to have taken cognizance of the fact that when there was conflicting eye witnesses' depositions as to the sequence of events and even the motive, it was unsafe to rely upon the testimony of PW-4, who was vitally interested, being the relative of the deceased. In these circumstances, the false implication, submitted the counsel, could not be ruled out.

6. It was next urged that during the recording of the testimony of eye witness, the appellant's counsel had suggested that the real offender was one Rahul and had relied upon letters exchanged between him and the deceased. Counsel submitted that the Trial Court completely overlooked these materials which had cast a doubt on the veracity of the testimonies of prosecution witnesses as to the identity of the real offender.

7. It was submitted that the medical evidence in this case

conflicted with the eye witness' testimony. Here, learned counsel relied upon the testimony of the Doctor PW-1, Dr. S. Lal, who had stated that the cause of death was hemorrhagic shock as a result of ante mortem injury to neck vessels and lungs caused by projectile of fire arm. Learned counsel submitted that the sketch plan brought on the record in this case showed that the spot of occurrence revealed that the distance between the accused and the deceased was barely 4-5 feet. Therefore, the submission that the injury was not caused by a projectile, but due to splattering of pellets, is insubstantial. Learned counsel also highlighted that second injury spoken of by the Doctor (PW-1) could not have been caused by gun or country made pistol since it was the result of an assault by blunt weapon which even the witness conceded could have been caused with an iron rod or lathi. It was submitted that where medical evidence conflicts with ocular testimony, the Court ought to delve with caution, and erring on the side of the accused, should tend to accept the medical evidence over the deposition of the eye witness.

8. It was lastly urged that recovery of the country made pistol (katta) allegedly at the pointing out of the appellant from his house, and the empty cartridges from the open field cannot be believed. It was highlighted in this regard that the absence of charge under Section-25 of the Arms Act, completely falsified the prosecution's story about the recovery and the Trial Court committed an error in believing the prosecution.

9. Learned APP Mr. Sanjay Lau urged that the impugned

judgment does not disclose any substantial or compelling reasons which ought to be the only ground calling for the interference by this Court. It was submitted that the Trial Court, having regard to the overall circumstances, and the probabilities of the case discarded the testimonies of PW-6 & 7. Even the testimony of PW-5, submitted the learned APP, at best showed that he chanced upon the place of occurrence immediately after the incident. Therefore, he could not have been an eye witness. Counsel, however, submitted that the conviction impugned in this case can be justified entirely on the basis of the testimony of PW-4 who was consistent as well as credible.

10. It was pointed out that all of the broad and material particulars such as the identity of the assailant, the sequence and the narrative of events, which unfolded on the fateful day leading to the attack on Sudesh, the words used by the appellant at the time of the firing incident, were consistent with the earliest version recorded by PW-4 to the police i.e. in PW-4/A at 09:45 PM. Counsel emphasized that the police received intimation about the incident soon after it occurred at around 07:55 PM; reliance was placed upon PW-10/A, the PCR intimation received by the concerned Police Station in that regard. It was submitted that the police on reaching the spot found that the deceased had been rushed to the hospital and thereafter they proceeded to record the statement of PW-4. Counsel highlighted the fact that despite cross examination, Maya Devi did not budge from her earlier statement. All that the appellant managed to elicit was some uncertainty with

regard to the house number where the deceased and the mother (PW-4) used to live.

11. Learned APP submitted that so far as the argument regarding the medical evidence is concerned, PW-1 was re-examined; he clarified that injury no.1 was in fact caused by pellets of the fire arm. It was urged that so far as the other submissions with regard to the forensic or medical evidence are concerned, in the absence of any cross-examination of PW-1, the Court should not venture and speculate as to whether projectile injury was the result of some other form of attack or whether it was caused by the appellant. It was submitted that only when there is categorical and clear-cut conflict between the medical evidence and ocular testimony, that the Court would exercise caution and not in speculative matters as is urged on the appellant's behalf. Learned counsel also relied upon the testimony of PW-16, a ballistic expert, who supported the report placed on the record Ex.PW-14/D and stated that contents of this report were nowhere inconsistent with the testimonies of PW-1 and the eye witness narrative of PW-4.

12. It is evident from the above discussion that the earliest intimation received by the police about the incident was around 07:55 PM on 11.03.2003 - Ex.PW-10/A. The statement of PW-4 was recorded at around 09:45 PM (Ex.PW-4/A and 15/A). The appellant's name was consistently mentioned as the offender or culprit responsible for the attack which led to the death of Sudesh. Although, we agree with the contention of the appellant that the testimonies of PW-6&7 are unreliable (concededly this was also

held by the Trial Court) and there is even some merit in the submission that the testimony of PW-5 contradicts that of PW-4, yet what is important is that the latter witness has been consistent throughout about the material particulars. PW-4 no doubt gives a different story; she mentioned that the wife of Yogender, the accused's brother, had stolen some articles from their house which led to their being asked to vacate their house. However, this is not spoken of by PW-4 who was consistent with her version recorded under Section-161 Cr.P.C. By all accounts, PW-4 appears to be simple and an unlettered woman who could cogently recollect despite the trauma she underwent, the salient facts, witnessed by her. In her deposition - as well as in her earlier statement recorded under Section-161, Cr.P.C. which she did not contradict (nor was she confronted about the same by the appellant's counsel through cross-examination), the relevant details such as the identity of the accused; the sequence which led to the attack i.e. the appellant entering the house saying that if the deceased could not be his, she would be nobody else' and then proceeded to fire at her from almost point blank range, have been clearly brought out. We notice that the cross-examination on behalf of the appellant covered these as well as all other grounds as to several other facts such as which other tenants lived in the premises who were the neighbours of PW-4, how long she lived in the premises, the extent of her education, the nature of her husband's employment etc. However, in regard to the most relevant particular which concerned the incident, she was consistent as well as cogent.

13. The appellant's submission that PW-4, being the relative and the mother of the deceased, her testimony has to be viewed with suspicion does not impress us.

14. While, it is a fact that there could be given cases where family members, who deposed in Courts as eye witnesses can possibly introduce facts or events which did not occur, at the same time, there cannot be a thumb rule that such depositions are to be viewed with greater degree of skepticism. In this case itself the testimonies of PW-6&7 were not believed by the Trial Court. Similarly, we are not inclined to agree with the prosecution that PW-5 actually witnessed the incident. It is quite possible that he entered the premises after hearing the shot and might have been informed the event. However, these factors ought not to cloud the Court's mind in scrutinizing the evidence of PW-4 which has been so from an independent perspective. Her, consistent and clear narration of the events, which are also, corroborated by the FSL report and the medical testimony leave us with no manner of doubt. We are also fortified by the judgment of the Supreme Court in *Darya Singh & Ors. v. State of Punjab*, AIR 1965 SC 328, which stated that testimonies of family members cannot be discarded altogether and ought not to be subjected to greater degree of scrutiny than in the case of other witnesses on an assumption that they are interested witnesses. That brings us to the last limb with the appellant's submission that the ocular testimonies conflict with the medical evidence. This, in our opinion, is not only unpersuasive, it is in fact speculative. The cross-examination of

PW-1 does not reveal any hint on this argument. All that PW-1 stated was that injury No.2 was caused by projectile being shot from a fire arm. As to what is meant by said expression and whether it has reference to a distance from where a person is shot are matters which the appellant ought to have sought explanation or clarification from the concerned eye witness during the course of his cross examination. In the absence of such clarification, it will be idle for us to theorize that the injury caused by projectile necessarily has to be from greater distance than the one which was caused in the present case. Besides, we also noticed that in this case, the prosecution clarified that injury no.1 was caused by fire arm pellets in the re-examination of PW-1. Therefore, we are of the opinion that this argument of the appellant is unmerited.

15. As far as the submission with regard to the recoveries is concerned, this Court is of the opinion that regardless of the credibility of the recoveries (since in this case, there could be justifiably some doubts in that regard), having regard to the overall circumstances, as the country made pistol was recovered from the premises of the appellant himself, the fact remains that where eye witness' testimony is clear and has implicated the accused, that cannot be undermined by a false notes such as a failed attempt to establish or prove recovery. We also notice that the prosecution for their own reasons did not charge the appellant under Section-25 of the Arms Act.

16. Therefore, even though, there is some merit in this point, that would not ultimately enure to the benefit of the appellant.

17. So far as motive is concerned, even though, an attempt was made by the learned counsel for the appellant to attribute motive to one Rahul, this is a highly speculative area. The letters relied upon by the appellant in this regard are just some material introduced to cast some doubt on the prosecution's version; fact such as who Rahul is and where he lived are not known. Furthermore, we noticed that letters are not signed by the deceased in her name but she has adopted a pseudonym "Muskan". Apparently, these letters were addressed to one Rahul which is also perhaps an assumed identity or name. Therefore, this argument has no merit and is accordingly rejected.

18. In view of the above discussion, we are of the opinion that Appeal does not have any merit and has to fail; Crl. Appeal No.571/2009 is accordingly dismissed.

S. RAVINDRA BHAT, J

S.P.GARG, J

FEBRUARY 07, 2012

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