

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

**RESERVED ON : 18th April, 2012
DECIDED ON : 12th JULY, 2012**

+ CRL.A.NO.781/2009 & Crl.M.(Bail)1890/2011

DALIP @ PAPPU Appellant.
Through : Ms.Purnima Sethi, Advocate.

versus

STATE ...Respondent.
Through: Mr.Sanjay Lao, APP for the State.

**CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. The appellant-Dalip impugns the judgment dated 01.09.2009 and order on sentence dated 07.09.2009 of the learned Additional Sessions Judge in session case No.24/2009 by which he was convicted for committing offence punishable under Section 302 IPC and sentenced to undergo imprisonment for life with fine of ₹50,000/-. He was further sentenced to undergo rigorous imprisonment for three years with fine of

₹10,000/- for committing offence punishable under Section 27 of the Arms Act. Both the sentences were to operate concurrently.

2. The prosecution alleged that Daily Dairy (DD) entry No.19A (Ex.PW-1/A) was recorded at 8:35 P.M. at police station Anand Parbat by Head Constable Raj Bhadur Singh on getting an information from lady Constable Shashi of PCR about a firing incident at House NO.506, Deepak Dairy, Baba Farid Puri. The investigation was assigned to SI Jitender Tiwari who with Constable Dalvir Singh reached the spot and came to know that the injured had already been taken to Anand Nursing Home, Patel Nagar. In the meantime Constable Suman handed over copy of DD No.27A (Ex.PW-1/DA) recorded at police station Anand Parbat at 9:45 P.M. to SI Jitender Tiwari (IO) and he came to know that the injured had been admitted at Ram Manohar Lohiya Hospital (RML). On reaching there, he (the IO) collected the MLC of injured Bharat Bhushan who was declared unfit for statement. From the hospital, the investigation officer returned to the spot and met Rajesh Kumar @ Titoo who claimed to have witnessed the incident. The IO recorded his statement and sent the rukka for registering the case under Section 307 IPC. He also prepared site plan and seized the blood from the spot.

3. Complainant (Rajesh Kumar) informed the IO that the accused Dalip had caused injuries by firing at Bharat Bhushan.

4. On 11.06.2003 Bharat Bhushan succumbed to the injuries in the hospital and DD No.2A (Ex.PW6/A) was recorded in this regard. The IO collected the death summary and death report and sent the body to the mortuary at DDU hospital. He conducted inquest proceedings. Dr.L.K.Bahrui (PW-16) conducted post-mortem of the body. The

Investigating Officer recorded the statements of concerned witnesses including that of PW-8 (Maya), PW-14 (Desh Raj) and PW-15 (Rajinder), sisters and brothers of the deceased, respectively.

5. During the investigation, the IO sent exhibits to Forensic Science Laboratory (FSL) and subsequently collected the reports. On the night intervening 13/14.06.2003 the accused was apprehended and on his formal search, two live cartridges were recovered from the right side pocket of the pant. He was interrogated and his disclosure statement was recorded pursuant to which he led the police team to the Military Area near Farid Puri and got recovered a country made pistol from underneath the stones near the tree. The country made pistol to contain a fired cartridge. After completion of investigation, a charge-sheet was filed against the accused for committing the offences punishable under Section 302 IPC and under Section 27 Arms Act. The accused was duly charged and brought to trial.

6. To prove its case, the prosecution examined 25 witnesses. The statement of accused was recorded under Section 313 Cr.P.C. The accused besides denying the correctness of the factual position, with which he was confronted, alleged that a false case has been registered against him.

7. After appreciating the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment held the accused responsible for the murder of Bharat Bhushan. Aggrieved by the said judgment, the appellant has preferred the appeal.

8. Learned counsel for the appellant has challenged the findings and urged that the Trial Court fell into grave error in relying upon the

testimonies of PWs-8,14 and 15 who were family members of the deceased and were interested and partisan witnesses. They made vital improvements in their deposition in the Court. The independent public witnesses examined by the prosecution did not support its case and turned hostile. The Trial Court did not give any weightage/consideration to their independent version. Initially, the identity of the assailant itself was in doubt and subsequently the prosecution came up with the plea that the accused was also known as 'Pappu'. The accused had no motive to murder the deceased in the presence of his close relative, (Rajesh). The prosecution falsely alleged that the deceased had a love affair with the accused's sister to falsely implicate him in this case. The disclosure statement and recoveries were fabricated by the police in connivance with the deceased's relatives. No independent public witness was associated during the recoveries. The Trial Court, urged the counsel, ignored the variations, contradictions and discrepancies which emerged from testimonies of the material witnesses. The counsel pointed out that the whole story of the so-called dying declaration was a myth. It is the contention of the learned counsel for the appellant that even though the accused was well known to the entire family of the deceased, yet all of them remained tight lipped and failed to report the incident to the police.

9. Learned APP supported the findings of the Trial Court and urged that it does not call for any interference. All these prosecution witnesses i.e. PWs-8, 14 and 15 consistently testified that the deceased in his oral dying declaration made to them named the accused as the one who fired at him. Close relationship is not a factor to affect the credibility of a witness. If after careful analysis and scrutiny of the evidence, the

version given by such witnesses it appears to be clear, cogent and credible, there is no reason to discard it. The evidence of relatives cannot be registered merely because they are interested or are deemed to be partisan witnesses. APP further contended that the accused had strong motive to eliminate the victim as he nurtured grudge against him for having a love affair with his sister and a quarrel had taken place earlier on this issue. It is only on account of this episode, as an act of vengeance and retaliation, he committed the offence in question. He further submitted that in the peculiar facts, it is evident that the first endeavour of all close family members would have been to have the injured treated at the hospital. None of the close family member, could have been expected to proceed to the police station to lodge the report when the injured's condition was critical. The recovery of the weapon (of offence) pursuant to the accused's disclosure statement is another incriminating circumstance connecting him with the crime. The accused remained absconded for three days and failed to explain that circumstance too.

10. We have considered the submissions of the parties and have examined the Trial Court records. The homicidal death of Bharat Bhushan is not under challenge. The post-mortem report (Ex.PW.16/A) proved by Dr.L.K.Barua (PW-16) confirmed that it was a case of homicide. In his opinion, injury No.2 caused by fire arm projectiles was sufficient to cause death in the ordinary course of nature.

11. The prosecution case was based upon an eye witness account. Rajesh (PW-4), on whose statement (Ex.PW-4/A), rukka was sent for registration of the case, claimed that on 10.06.2003 at about 7:30 P.M. the accused (Dalip) met him near the spot and on his demand, he gave him

₹200/-. When the accused went ahead and reached near the crossing, Bharat Bhushan, his cousin met him and they both started talking. Apprehending the possibility of a quarrel between the two, he advised the victim to go home. He also stated that thereafter the accused took out a country made pistol like weapon and fired at Bharat Bhushan and fled the spot. PW-4, Rajesh however, while appearing as a witness in the Court, resiled from the statement (Ex.PW-4/A) and turned hostile. He disowned the statement (Ex.PW-4/A) completely and even denied his presence at the spot at the time of occurrence. He completely exonerated the accused and did not attribute any role to him in causing injuries to the deceased. In the cross-examination by learned APP, after seeking court's permission, he again denied the contents of statement (Ex.PW4/A) to have been made by him to the police. He even denied that he had met the accused or had seen the deceased in his company soon before the occurrence. He completely demolished the case of the prosecution.

12. The Trial Court heavily relied upon the circumstantial evidence i.e deceased's oral dying declaration, motive of the accused, recovery of the weapon of offence at his instance and medical evidence to base its conviction. Admittedly PWs 4, 14 and 15 being close relatives of the deceased are interested and partisan witnesses. The law does not proscribe reliance upon the evidence of closely related witnesses. However, it requires that evidence of such witnesses must be appreciated with care and caution. The firing incident did not occur in their presence and they came to know about it only when PW-4 (Rajesh) rushed to inform them about the incident. PW-4 (Rajesh) did not corroborate their

version and did not testify that he had gone to inform them about the firing incident at the hands of the accused.

13. The crucial aspect to be considered is whether the victim was conscious and physically fit to make oral dying declaration to these witnesses. PW-4 (Rajesh) who had allegedly witnessed the occurrence did not claim if the victim was conscious and oriented after the firing incident and was in a condition to speak. He also did not claim in the statement (Ex.PW4/A) that the victim had made any oral dying declaration to him or to any of his relative and had accused the appellant for firing at him. He even did not disclose the presence of these witnesses at the spot and /or that they took him to the hospital. The occurrence happened at about 08:30 P.M. The rukka recorded on the statement of PW-4 was sent for registering the case at 11:25 P.M. after considerable delay of three hours. The injured had already been taken to RML hospital before the registration of the case. The informant in his statement did not disclose about any such oral dying declaration made by the deceased to any witness.

14. Admittedly, the injured was first taken to Anand Nursing Home. However, the investigating officer did not examine any doctor from that nursing home to ascertain the physical/mental condition of the victim to make any statement. Soon thereafter, the victim was taken to RML hospital and was admitted there at about 9:15 P.M. by PW-14 (Desh Raj). The MLC (Ex.PW-9/A) does not reveal if the victim was conscious and oriented. On arrival at the hospital, he was declared unfit for statement by Dr.Sanjeev Kumar. No dying declaration was made by the victim to the doctor who medically examined him at the first instance.

Nothing emerges from the record till which time the victim remained conscious to make the statement. In the inquest proceedings i.e. brief facts (Ex.PW24/E), death report (Ex.PW.22/A) there is no mention of any such oral dying declaration of the deceased.

15. PW-16 (Dr.L.K.Barua) in the cross-examination categorically stated that the deceased got bullet injury to the core of the heart. He was of the opinion that in case of a bullet injury in the heart like injury No.2 in the instant case, the injured could walk one-two minutes. However, in further cross-examination, he admitted that the injured in such case became unconscious. The prosecution failed to prove clinching evidence that after sustaining the bullet injury, the victim was in a fit condition to speak and make any such declaration. Other witness examined by the prosecution did not corroborate this circumstance. PW-2 (Vinod) completely turned hostile and denied knowledge of any such incident. In the cross-examination by APP, he denied the contents of statement mark 'A' recorded under Section 161 Cr.P.C. Nothing was suggested to him in the cross-examination about the physical condition of the victim after the occurrence. PW-3 (Poonam) also did not support the prosecution and denied that she made any statement (mark A-I) to the police. Similarly PW-5(Ajay Kumar) and PW-10(Jagdish Prasad Mahich) did not support the prosecution. Nothing was suggested to PW-10 in the cross-examination that the deceased's family members had reached the spot and any utterances were made by the victim to them naming the assailant. The learned APP instead suggested to the witness that the injured Vinod Kalu was crying and the public was saying that 'Pappu' had shot the bullet to him

16. Upon analysis of the evidence, it is clear that the prosecution could not establish that the victim was in a fit condition to make the oral dying declaration to his close relatives i.e. PW-4, 14 and 15. The deceased had got serious injuries which incapacitated him to speak. He never regained consciousness. These witnesses have given contradictory version as to under what circumstances the victim named the accused for the firing incident. PW-8(Maya) deceased's sister, deposed that PW-4 (Rajesh) uttered "*rush sister Maya, Dalip had killed Bharat Bhushan*", again and again and when she reached to his brother, he also told her that "*Dalip had shot bullet on his person*". In the cross-examination, she was confronted with her statement Ex.PW-8/A recorded under Section 161 Cr.P.C and it transpired that she made vital improvements in her deposition in the Court. She did not name Dalip in her statement Ex.PW8/DA and referred to the assailant as 'Pappu'. PW-14(Desh Raj) who did not take the victim to the hospital claimed that on hearing the cries of his sister Maya, he reached the spot and the victim was crying "*Maya, Dalip had hit bullet on him*". Again he was also confronted with his statement (Ex.PW-14/DA) recorded under Section 161 Cr.P.C where the facts did not find specific mention, PW-15 (Rajinder) merely stated that when they reached the spot, his brother Bharat Bhushan was crying "*Dalip @ Pappu had shot him*".

17. None of these witnesses informed the doctors at Anand Nursing Home or RML hospital about any such oral dying declaration by the deceased. They did not report the incident to the police. They did not inform the investigating officer, if any such dying declaration was made to them by the victim. The so-called dying declaration was not the basis of

registering the FIR. The IO did not record their statements at the hospital till the rukka was sent, at about 11:30 P.M. The investigating officer was not aware of any such disclosure by the deceased. Considering all these surrounding circumstances, no reliance can be placed on this vital circumstance without independent corroboration.

18. In '*Surinder Kumar vs. State of Haryana*' 2011(10) SCC 173, the Supreme Court observed that it is the duty of the Court to scrutinize the dying declaration carefully and ensure that it is not the result of the tutoring, prompting or imagination. Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. Likewise, where the deceased was unconscious and could never make any declaration, the evidence with regard to it is to be rejected.

19. The Court is conscious that proof of motive is not a sine qua non before a person can be held guilty of the commission of a crime. Motive being a matter of mind, is more than not, difficult to establish. But if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive. On scrutinizing the testimonies of the prosecution witnesses, in our considered view, the prosecution has failed to establish that the accused had been harbouring in his mind the suspicion that the deceased was having an affair with his sister and it actually prompted him to commit the crime. No cogent evidence has been led to infer that the deceased had an affair with the accused's sister or that there were strained relations between the two on that account. Independent public witnesses examined by the prosecution did not reveal any such love affair between the deceased and accused's sister. PWs 8,14 and 15 have given

inconsistent versions on this aspect. PW-14 (Desh Raj), deceased's brother, in the examination-in-chief did not testify any such motive of the accused to murder his brother. He did not depose if any quarrel had taken place earlier on this issue with the accused. In the cross-examination, he denied any dispute between the accused and the deceased on account of an affair with the accused's sister. PW-15(Rajinder) also did not give any particulars about the previous quarrel between the accused and the deceased on this issue. In the cross-examination, he came up with the plea that the dispute was compromised in writing due to the intervention of the police. However, no such compromise was placed on record. PW-8(Maya) did not corroborate PW-15 (Rajinder) that the matter was compromised due to the intervention of the police. The investigating officer PW-24 (SI Jitender Tiwari) did not investigate this aspect during investigation. No material emerged during the evidence that after the alleged compromise took place about six months before the incident, the accused had extended any threat to the deceased to kill him or that the later had continued his objectionable relationship with the accused's sister prompting him to seek revenge. The prosecution has, thus, failed to establish motive of the accused to commit the crime.

20. The prosecution relied upon the circumstance of recovery of the country made pistol used in the commission of the offence pursuant to the disclosure statement of the accused. The accused denied any such recovery at his instance. No independent public witness was joined at the time of the alleged recovery. Moreover, the alleged recovery took place from an open place accessible to the public at large. The place of recovery is alleged to be at a distance of 100 meters from the place of

occurrence. It is highly improbable that the accused would conceal the country made pistol under the stones near a tree at a distance of 100 meters from the place of occurrence. No such recovery was effected by the police prior to the arrest of the accused. The manner in which the accused was arrested is suspicious. The investigating officer was not aware about the name and description of the accused and only up on the features given by the secret informer, he is alleged to have been arrested during the night intervening 13/14.06.2003. The weapon of offence allegedly recovered pursuant to his disclosure statement was never shown to the material prosecution witnesses to prove that it was the same weapon used in the commission of the crime. The investigating officer did not investigate from where the accused had procured the weapon.

21. There are inherent defects in the prosecution case which make it unsafe to convict the accused. It is not certain who had got the injured admitted at RML hospital. In the MLC (Ex.PW9/A) there is mention that the deceased was admitted at RML hospital by his brother Desh Raj. The prosecution witnesses have, however, given contradictory version about the availability and presence of PW-14 (Desh Raj) with them. PW-8 (Maya) and PW-15 (Rajinder) testified that they took the victim in a van to RML hospital and PW-14 (Desh Raj) with his mother reached separately at RML hospital. PW-14 (Desh Raj), however, deposed contrary and testified in the cross-examination that he had gone to RML hospital from Anand Nursing Home in the van in which the injured/deceased was taken. The prosecution failed to reconcile the inconsistent versions. It is a mystery how and under what circumstances the deceased's mother reached RML hospital. PW-24 (SI Jitender Tiwari)

did not find any family member of the deceased at RML hospital during his visit there. None of the close relatives of the deceased informed the police about the occurrence. Even PW-4 (Rajesh) who had allegedly witnessed the occurrence did not report the incident to the police. When the IO reached the spot at the first instance, PW-4 (Rajesh) was conspicuously absent and he met the IO only on his return from the hospital. The prosecution witnesses deposed that Rajesh had left the spot to lodge a report with the police. However, no such report was lodged by him. He did not explain his absence on the spot soon after the incident. He even did not accompany the injured to the hospital. This unnatural and unusual conduct of the crucial witness makes his presence at the spot highly suspicious. When PW-24 (SI Jitender Tiwari) reached Anand Nursing Home he did not find any eye witness or close relative of the deceased present there. Prior to the sending of the rukka at 11:25 P.M., the investigating officer did not know if the deceased had made any oral dying declaration to his relatives. PW-4(Rajesh) in the statement (Ex.Pw4/A) did not inform the IO that the deceased was conscious and had made the oral dying declaration to his relatives.

22. In the case of '*Waikhom Yaima Singh vs. State of Manipur*' (2011) 13 SCC 125, the Supreme Court held that it is also to be seen that the deceased was very seriously injured, so much so that according to the witnesses he died immediately after allegedly making the said dying declaration, the time of which is not fixed by the prosecution. The most important circumstance about the dying declaration is that firstly, it is oral and secondly, there is no medical evidence suggesting that the deceased was in a fit medical condition to make such a dying declaration.

It is further observed that the oral dying declaration is a weak kind of evidence. There was absolutely no evidence about the fitness of the victim to make the said declaration. The facts of the instant case are akin to the facts of the above said judgment.

23. The independent public witnesses residing in the neighborhood of the deceased and accused did not depose in favour of the prosecution and turned hostile. PW-2 (Vinod), PW-3(Poonam), Pw-5 (Ajay Kumar) and PW-10 (Sh.Jagdish Prasad Mahich) were not examined or cross-examined by learned APP to ascertain the deceased's motive to commit the crime.

24. The material witnesses made vital improvements in their deposition before the Court. They narrated inconsistent version as to how and under what circumstances the deceased happened to be in the company of the accused and PW-4(Rajesh) soon before the occurrence. PW-8(Maya) stated that Pw-4(Rajesh) had come to her residence to call the deceased. However, PW-14(Desh Raj) stated that PW-4 (Rajesh) and accused-Dilip had called the deceased to meet them while standing in the street.

25. On account of aforesaid short comings, irregularities and lacuna on the part of the prosecution, in our considered opinion, it will not be safe to convict the appellant. The impugned judgment of the Trial Court cannot be sustained and is set aside. The appeal is allowed. The appellant be set at liberty forthwith in case he is not required in any other case.

26. All pending applications stand disposed of accordingly.
27. Trial court record be sent back forthwith.

(S.P.GARG)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

JULY 12, 2012
sa