

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

RESERVED ON : 20th SEPTEMBER, 2013

DECIDED ON : 25th NOVEMBER, 2013

+ CRL.A. 250/2003

JOGINDER SINGH @ MOR Appellant

Through : Mr.Rajeev Gaur ‘Naseem’, Advocate.

versus

STATE OF DELHI Respondent

Through : Mr.Lovkesh Sawhney, APP.

+ CRL.A. 327/2003

KULDIP KUMAR @ RAJU LANGDA Appellant

Through : Mr.Anurag Jain, Advocate.

versus

STATE OF DELHI Respondent

Through : Mr.Lovkesh Sawhney, APP.

AND

+ CRL.A. 63/2005

SUNIL @ GANJA Appellant

Through : Mr.Sitab Ali Chaudhary, Advocate.

versus

THE STATE Respondent

Through : Mr.Lovkesh Sawhney, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Joginder Singh @ Mor (A-1), Kuldip Kumar @ Raju Langda (A-2) & Sunil @ Ganja (A-3) impugn a judgment dated 01.04.2003 of learned Addl. Sessions Judge in Sessions Case No. 38/98 arising out of FIR No. 339/95 PS Janak Puri by which they were convicted under Sections 307/34 IPC and 25/27 Arms Act. By an order dated 02.04.2003, they were sentenced to undergo RI for five years with fine ₹ 10,000/- each under Sections 307/34 IPC; RI for one year with fine ₹ 1,000/- each under Sections 25/27 Arms Act. The sentences were directed to operate concurrently.

2. Allegations against the appellants were that on 08.06.1995 at about 09.30 P.M. at Mangal Bazar Road, Uttam Nagar, Delhi near Sharma Hotel, they in furtherance of common intention attempted to murder Jai Bhagwan by firing at him. The first shot aimed at Jai Bhagwan missed and hit Nagendu who sustained injuries. They fired again and the shot hit the complainant Jai Bhagwan on his chest. The police machinery came into motion after Daily Diary (DD) No. 36 (Ex.PW-15/A) was recorded at 10.00 P.M. on 08.06.1995 at Police Post, East Uttam Nagar on information from PCR that 'firing' was going on behind Arya Samaj Road Temple. The investigation was assigned to SI R.D.Yadav who with

Const.Ram Kumar and other police officials went to the spot. The injured had already been taken to DDU Hospital. SI R.D.Yadav collected MLCs of the victims Jai Bhagwan and Nagendu and lodged First Information Report after recording Jai Bhagwan's statement (Ex.PW-6/A). Scooter No. DL-4 SC 9623 found at the spot was seized. During the course of investigation, statements of the witnesses conversant with the facts were recorded. A-1 to A-3 were arrested and pursuant to their disclosure statements, A-2 and A-3 recovered country-made pistols. Exhibits were sent to Forensic Science Laboratory (FSL). Ashwani and Sanjiv Sethi charge-sheeted along with A-1 to A-3 were discharged vide order dated 15.01.1999 and the State did not challenge the discharge order. A-1 to A-3 were duly charged and brought to Trial. To bring home their guilt, the prosecution examined twenty-two witnesses. In their 313 statements, the appellants pleaded false implication and denied their complicity in the crime. After hearing the contentions of the parties and appreciating the evidence on record, the Trial Court, by the impugned judgment, convicted A-1 to A-3 for the offences mentioned previously. Being aggrieved, they have preferred the appeals.

3. Appellants' counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. PW-7 (Lekh

Raj) and PW-19 (Ramesh Mehta) were falsely introduced as eye witnesses though they were not present at the spot. The Trial Court fell in grave error to place reliance on their tainted version. They lacked credibility being interested witnesses and having criminal antecedents. Complainant Jai Bhagwan himself was involved in number of criminal cases and was Bad Character (BC) of the area. The recoveries are doubtful. The country made pistol recovered was not connected / linked with the crime. The concerned doctor who medically examined Jai Bhagwan was not produced to prove the nature of injuries suffered by him. The investigation is tainted and unfair. Adverse interference is to be drawn against prosecution for withholding Nagendu, the other injured. The counsel adopted alternative argument to release the appellants for the sentence already undergone by them in case they were found guilty. Learned Addl. Public Prosecutor supporting the judgment urged that it is based upon fair appraisal of evidence and warrants no interference. Despite all efforts to procure Nagendu's presence, he could not be traced and examined.

4. I have considered the submissions of the parties and have examined the record. The occurrence took place at about 09.30 P.M. and Daily Diary (DD) No. 36 (Ex.PW-15/A) was recorded at Police Post East Uttam Nagar at 10.00 P.M. The Investigating Officer went to the spot. He

collected the MLCs of both the victims at DDU Hospital. After recording Jai Bhagwan's statement (Ex.PW-6/A), he lodged First Information Report at 12.50 A.M. by making endorsement (Ex.PW-22/A) thereon, promptly without delay. Nagendu's MLC (Ex.PW-4/A) records the arrival time of the patient at 10.15 P.M. Jai Bhagwan was taken to DDU Hospital at 10.10 P.M. as recorded in the MLC (Ex.PW-4/B). The FIR was registered on the statement of the complainant in which he gave vivid detail of the incident as to how the assailants had arrived at the spot by Scooter No. DL-4 SC 9623 at 09.30 P.M. where he had gone to purchase 'subzi'. He further disclosed that A-1 and A-2 fired at him with country made pistols and he sustained gunshot injuries on chest. He was able to escape the first shot which hit a servant working at Sharma Hotel. The assailants fled the spot. Since the FIR was lodged soon after the incident promptly, there was least possibility of fabrication of a false story in a short interval. A-1 to A-3 were named in the FIR and specific role was ascribed to them. In his Court statement, PW-6 (Jai Bhagwan) proved the version given to the police at the first instance without major variations and deposed that on 08.06.1995, he had gone to Sharma Hotel, Mangal Bazar for purchasing 'subzi'. When he was present outside the hotel at about 09.30 P.M. all the accused persons arrived on a two wheeler Scooter

No. DL-4 SC 9623. A-1 fired the shot aiming at him but it hit a boy at the hotel as he bent down. Thereafter, the shot fired at him by A-2 hit on the left side of chest and he started bleeding from mouth. A-3 who drove the two-wheeler scooter exhorted A-1 and A-2 to kill him (*'maro sale ko'*). After the incident, he was medically examined at DDU Hospital and his statement (Ex.PW-6/A) was recorded. The assailants had previous acquaintance with him. In the cross-examination, he elaborated that the first shot was fired from close range and at the time of second shot, A-2 was standing near him. He admitted his involvement in many criminal cases but volunteered to add that he was acquitted in those cases. He further admitted that he had no previous dealings with A-1. He was semiconscious when the doctor examined him after he was taken to the hospital by Gopal. He admitted that he was Bad Character (BC) of the area but denied that injuries were caused to him by unidentified assailants to whom he was unable to recognise due to darkness. It appears that despite lengthy and searching cross-examination, no material discrepancy could be elicited to discard the version of the victim. No ulterior motive was assigned to him for falsely implicating the appellants. The injuries were not self-inflicted or accidental in nature. The victim had no sound reasons to spare the real assailants and to falsely rope in the innocent for

the injuries sustained by him. The injuries on his body establish his presence at the crime scene. PW-1 (Gopal) corroborated his version to the extent that he had taken Jai Bhagwan to the hospital in injured condition. PW-2 (Satish Chand) had taken Nagendu, a karigar at his dhaba, to DDU Hospital. There is no variance and conflict between the ocular and medical evidence. PW-5 (Dr.Puneet Chhibar) who medically examined Nagendu vide MLC (Ex.PW-5/A) was of the opinion that he suffered 'grievous' injuries. PW-4 (Sant Ram) from DDU Hospital proved the MLC (Ex.PW-4/B) prepared by Dr.Tresa by which Jai Bhagwan was examined and the nature of injuries was opined 'dangerous'. In MLC's (Ex.PW-4/A & Ex.PW-4/B), the injuries were described as 'gunshot' injuries.

5. PW-7 (Lekh Raj) and PW-19 (Ramesh Mehta) claimed to have witnessed the occurrence, however, their presence at the spot appears doubtful. Their names do not find mention in the victim- Jai Bhagwan's statement (Ex.PW-6/A). None of them reported the incident to the police. Neither did they interfere in the scuffle nor did they take the victims to the hospital. Their conduct is quite unnatural and unreasonable and is not in accord with the acceptable human behaviour. It makes their presence at the spot highly suspicious. However, exclusion of their evidence would

not dilute the cogent and reliable testimony of most natural witness PW-6 (Jai Bhagwan), the injured, which is accorded a special status in law. In the case of ‘*State of Uttar Pradesh vs. Naresh and Ors.*’, (2011) 4 SCC 324, the Supreme Court held :

“The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein.”

6. In the case of ‘*Abdul Sayed Vs. State of Madhya Pradesh*’, (2010) 10 SCC 259, the Supreme Court held :

“The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in

order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness".

7. Efforts were made to summon and examine injured Nagendu but he was not traceable. It cannot be said that the prosecution did not intentionally or deliberately produce him in the Court for giving evidence. No adverse inference can be drawn against the prosecution on that account. The fact remains that Nagendu who sustained injuries was taken to DDU Hospital and was medically examined by PW-5 (Dr.Puneet Chhibar). PW-2 (Satish Chand) categorically deposed that on 08.06.1995, he took Nagendu who used to work at his dhaba to make chapatti, to DDU Hospital in injured condition. This independent public witness has no reasons to make false statement. It is not necessary to multiply witnesses to prove a prosecution case. The Courts are concerned with quality and not with quantity of evidence and in a criminal trial, conviction can be based on the sole evidence of a witness if it inspires confidence. Country-made pistol (Ex.P1) with cartridge (Ex.P2) and country-made pistol (Ex.P3) with cartridge (Ex.P4) were recovered pursuant to A-3 and A-2's disclosure statements, respectively. As per CFSL report (Ex.PW-22/D), cartridge (Ex.P2) was fired from the country-made pistol (Ex.P1). It could not be ascertained if the cartridge (Ex.P4) was fired from the country-

made pistol (Ex.P3) as it was not in working order and its firing pin was missing. Non-recovery of the crime weapon is not fatal to the prosecution case and does not discredit the testimony of the injured.

8. A-1 to A-3 had arrived at the scene after making preparation and were armed with deadly weapons. A-1 and A-2 participated in the crime by firing at PW-6 (Jai Bhagwan). A-3 facilitated the commission of crime and drove A-1 and A-2 on scooter No. DL-4 SC 9623 which was abandoned at the spot after the firing incident, to the scene of the crime. He also exhorted A-1 and A-2 to kill the complainant by uttering 'Maro Sale Ko'. After the crime, they all fled the spot together. Inference can be drawn from the proved circumstances that A-1 to A-3 shared common intention to eliminate Jai Bhagwan by firing at him. To justify conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. It is sufficient if there is present an intent coupled with some overt act in execution thereof. If the injury inflicted has been with the avowed object or intention to cause death, the nature, extent or character of the injury or whether such injury was sufficient to actually causing death are irrelevant factors for adjudging the culpability under Section 307 IPC. The nature of weapon used, the intention expressed by the accused at the time of the act, the motive for

commission of the offence, the nature and size of the injuries, the parts of the body of the victim selected for causing injuries and the severity of the blow or blows are important factors that can be taken into consideration in coming to a finding whether in a particular case, the accused can be convicted of an attempt of murder. In the instant case, A-1 and A-2 were armed with deadly weapons. A-1 had fired at Jai Bhagwan. However, he was able to escape by bending down and it hit an innocent helper – Nagendu, working at a hotel/ dhaba and caused grievous injuries on his body. The unsuccessful attempt to target PW-6 (Jai Bhagwan) did not deter the assailants and A-2 fired at PW-6 (Jai Bhagwan) and it hit him on his chest, a vital body organ causing injuries ‘dangerous’ in nature on his body. Apparently, A-1 and A-2 attacked PW-6 (Jai Bhagwan) to eliminate him. It is true, the victim was involved in number of criminal cases and was Bad Character (BC) of the area but that did not give licence to the appellants to take law in their hands and to put an end to his life. Discharge of Ashwani and Sanjiv Sethi for various reasons detailed in the order on charge has no impact on the appellants’ conviction as their involvement in the incident has been established beyond reasonable doubt. The findings of the Trial Court under Sections 307/34 IPC and under Sections 25/27 Arms Act are sustained / affirmed.

9. A-1 to A-3 were directed to undergo RI for five years with total fine ₹ 11,000/- each. A-3's nominal roll dated 26.09.2013 reveals that he has suffered incarceration for two years, four months and twenty days besides earning remission for seven months and twenty seven days. The unexpired portion of sentence is one year, eleven months and thirteen days. He is not a previous convict and has clean antecedents. His overall jail conduct was satisfactory. He was not armed with country-made pistol and did not fire at the victims. Considering the role in the incident, he deserves to be released for the period already undergone by him in custody. He shall however, pay fine ₹ 11,000/- (if not paid earlier) within fifteen days or else shall undergo default sentence.

10. A-1's nominal roll dated 27.09.2013 shows that he remained in custody for eleven months and fourteen days besides earning remission for three months and fourteen days. A-2's nominal roll dated 27.09.2013 reveals that he suffered custody for one year and twenty eight days besides earning remission for three months and fifteen days. They have clean antecedents and are not involved in any other criminal case. Considering these aspects, the sentence order is modified and the substantive sentence of A-1 and A-2 is reduced from five years to three years. Other terms and conditions of the sentence are left undisturbed.

11. In '*Ankush Shivaji Gaikwal vs. State of Maharashtra*', 2013 (6) SCC 770, the Supreme Court emphasized that victim is not to be forgotten in criminal justice system and Section 357 Cr.P.C. should be read as imposing mandatory duty on the Court to apply its mind to the question of awarding compensation in every case. The appellants have informed the Court that Jai Bhagwan has since expired. Accordingly, A-1, A-2 and A-3 are directed to deposit ₹ 40,000/-, ₹ 40,000/- and ₹ 20,000/- respectively as compensation before the Trial Court within fifteen days. The Trial Court shall issue notice to Jai Bhagwan's widow to receive the compensation and in case of her non-availability, the amount would be disbursed to his sons and daughters in equal proportions.
12. A-1 and A-2 are directed to surrender before the Trial Court on 02.12.2013 to serve the remaining period of sentence. The Registry shall transmit the Trial Court records forthwith. The appeals stand disposed of in the above terms.

(S.P.GARG)
JUDGE

NOVEMBER 25, 2013/*tr*