

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

RESERVED ON : 14th January, 2013.

DECIDED ON : 29th January, 2013.

+ CRL.A.694/2010

NOOR SALAM

....Appellant

**Through : Mr.R.M.Tufail, Advocate with Mr.Farooq
Chaudhary & Mr.Vishal Raj, Advocates.**

versus

THE STATE (GOVT. NCT OF DELHI)

....Respondent

Through : Mr.M.N.Dudeja, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant-Noor Salam impugns the judgment and order on sentence passed in Sessions Case No.1/2010 arising out of FIR No.326/2005 registered at PS Timarpur by which he was convicted for committing offence punishable under Section 307/34 IPC and sentenced to undergo RI for eight years with fine ₹ 20,000/- and in default of payment of fine to further undergo SI for six months.

2. The police machinery came into motion on 01.07.2005, when Daily Diary (DD) No.78B was recorded at PS Timarpur at about 11.10 P.M. on getting information that a person had been shot at Nand Lal

jhuggies, Mukherjee Nagar Police Picket and taken to Aruna Asaf Ali Hospital. The DD (Ex.PW9/A) was assigned to SI Rajneesh who with Const.Bijender reached the spot. No eye witness was present there. He proceeded to Aruna Asaf Ali Hospital and obtained MLC of the injured Samir Ul Hasssan and recorded his statement. He disclosed to the Investigating Officer that he was taken to the spot by Noor Salam, Noor Alam and Hafaz. At about 10.45 P.M. suddenly Noor Salam caught hold of him from behind and when he tried to rescue himself, Hafaz assaulted him with fists and made him to fall on the ground. Noor Salam exhorted Noor Alam to shoot and kill him. On that, Noor Alam took out a gun and fired at his face. When he got up and tried to run away, Noor Alam fired another shot which hit him on his back. When he raised alarm, people gathered and the assailants fled the spot.

3. The Investigating Officer went to the spot. The crime team was present. Scene of incident was got photographed. First Information Report was lodged under Section 307/34 IPC. During the investigation, the Investigating Officer recorded statements of witnesses conversant with the facts. Efforts were made to recover the weapon of offence but in vain. The exhibits were sent to Forensic Science Laboratory, Rohini. After collecting the results, a charge-sheet was submitted against the assailants.

The accused Hafaz was declared Proclaimed Offender. Noor Alam and Noor Salam were duly charged and brought to trial.

4. The prosecution examined sixteen witnesses. Their 313 Cr.P.C. statements were recorded. Noor Salam examined himself in defence. On appreciation of the evidence and documents on record and considering the rival contentions of the parties, the appellant- Noor Salam, and Noor Alam were convicted and sentenced by the impugned judgment.

5. At the outset, it may be mentioned that co-accused Noor Alam had filed CrI.A.1232/2010. However, during the course of arguments, he opted not to challenge the findings of the Trial Court on conviction and it was affirmed.

6. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The prosecution was unable to establish and prove appellant's motive to inflict injuries on the victim. The weapon of offence was not recovered. The complainant and the appellant were known to each other prior to the incident. Had there been hostile relations between the two, the injured must not have volunteered to accompany them to an isolated spot. There is inconsistency if the victim was fired from close/distance range. The victim was not unconscious when he was medically examined. He did not

disclose the name of the assailants to the doctor. He was fit for statement which demonstrates that he did not suffer any fatal injury. The duration for which he remained in the hospital has not come on record. The appellant was falsely implicated in this case. Only role attributed to him was that he exhorted the co-accused to fire at the victim.

7. Learned APP while supporting the judgment urged that it did not call for interference. The deposition of PW-1, Mohd.Samir-ul-Hasan/ injured has remained unchallenged and un-rebutted. The appellant did not opt to cross-examine him on any fact. His statement is in consonance with medical evidence. Pursuant to their pre-plan, the assailants took the victim to an isolated spot to inflict fatal injuries.

8. I have considered the submissions of the parties and examined the Trial Court record. Daily Diary (DD) No. 78B (Ex.PW-9/A) was recorded at PS Timarpur at 11.10 P.M. on getting information that a person has been fired near Nand Lal jhuggi, Mukherjee Nagar. PW-9 (HC Ram Phal) recorded the said DD. At Aruna Asaf Ali Hospital, PW-11 (SI Rajneesh Sharma) recorded the statement of the injured Samir Ul Hassan (Ex.PW-1/A). In the statement, the victim named the appellant as one of the assailants and attributed specific role to him in the incident. He gave graphic details as to how and under what circumstances he was taken

to an isolated place and fired at. The occurrence took place at about 10.45 P.M. on 01.07.2005. The rukka was sent for lodging First Information Report under Section 307 IPC at 01.45 A.M. on the same night. There was no delay in lodging the First Information Report with the police. Since the FIR was recorded promptly, there was least possibility of its fabrication.

9. While appearing as PW-1, injured Samir Ul Hassan proved the version given by him to the police at the first instance without any variation. He testified that the accused persons were known to him. They all were natives of his village in Bihar. On 01.07.2005, in the evening the accused Noor Alam asked him that there was a programme of eating and dinner in the house of his acquaintance in Gopal Ganj and requested him to accompany him. At about 09.30 P.M., he along with the three accused persons (present in the Court) boarded a bus from Kamla Market for going to Gopal Ganj. Thereafter, the accused took him towards *ganda nala* to go to village Gopal Ganj. When they reached at *ganda nala* Mukhejee Nagar at about 10.45 P.M., it was dark and the place was an isolated one. Accused Noor Salam caught hold of him from his back. When he tried to free himself, the accused Hafaz hit him with fist blows and made him to fall on the ground. The accused Noor Salam exhorted Noor Alam '*Isko Goli Mar Kar Uda Do Taki Hamara Jhagra Hamesh Ke Liye Khatam Ho*

Jai’ and on that the accused Noor Alam took out a ‘katta’ and fired at his face below eye. He tried to run away but Noor Alam again fired at him on his back and he fell down. When he raised alarm of ‘*bachao bachao*’, people came there and the assailants fled the spot with the katta. The police recorded his statement in the hospital (Ex.PW-1/A).

10. The witness was examined on 13.12.2005. As per Court’s observation, he was brought to the Court for examination on a cot. The accused and their counsel stated that they did not want to cross-examine the witness. They were given an opportunity to cross-examine the injured but it was not availed. The testimony of PW-1, the injured, remained unchallenged. It is unclear as to why the accused or their counsel did not opt to cross-examine the witness on material facts. The record reveals that some witnesses were examined subsequently but were not cross-examined by the accused/counsel. Thereafter, an application was moved under Section 311 Cr.P.C. to recall those witnesses and they were cross-examined. Curiously, no attempt was ever made to recall PW-1 (Samir-Ul-Hassan) to cross-examine him. PW-1 (Samir-Ul-Hassan) expired in the village on 28.01.2007. The family members of the victim claimed that his death was due to the injuries sustained by him in the incident. However,

no cogent evidence came on record to show that there was nexus between the injuries and the death of the victim as no post-mortem was conducted.

11. I have no reasons to disbelieve the version given by PW-1 (Samir Ul Hassan) as to how he sustained injuries. No ulterior motive was assigned to him for making false statement. He had sustained grievous injuries on his body. Being an injured/victim, he must be interested to bring the real culprit to book and is not expected to let the real assailant go scot free.

12. The evidence of an injured witness cannot be disbelieved without assigning cogent reasons. The law on this aspect has been detailed in *State of Uttar Pradesh vs. Naresh and ors.* (2011) 4 Supreme Court Cases 324 as under :

“27. 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. (Vide Jarnail Singh v. State of Punjab, Balraje v. State of Maharashtra and Abdul Sayeed v. State of M.P.)”

13. Similarly in another case *Abdul Sayed vs. State of Madhya Pradesh* (2010) 10 Supreme Court Cases 259, Supreme Court laid down :

“28. 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.” [Vide Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P. (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P. and Balraje v. State of Maharashtra.]

29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

“28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his

presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In State of U.P. v. Kishan Chand a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.”

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”

14. There is no inconsistency between oral and medical evidence.

PW-7 (Dr.Vijay Khari) examined the victim at 11.45 P.M. In the MLC (Ex.PW-7/A) it is mentioned that the ‘patient’ was brought in injured condition with the alleged history of sustaining injuries by gunshots with country-made pistol by PCR. He proved the MLC (Ex.PW-7/A). In the cross-examination, he admitted that the alleged history was given by the patient himself. PW-16 (Ms.Kanta Yadav) from Trauma Centre also proved MLC Ex.PW-7/A and produced photocopies of the admission and

discharge records (Ex.PW-16/A1 to A3). She further informed that the patient remained admitted till 14.07.2005. On 31.08.2005, Dr.Nishant gave opinion about nature of injuries as 'grievous'. She identified his signatures at point 'B' on Ex.PW-16/A4. She also proved X-ray report Ex.PW-16/A5 prepared by Dr.Pankaj.

15. PW-6 (Amar Pal) whose name appears in the MLC Ex.PW-7/A deposed that when he was returning from village Gopalpur and reached the spot, he and Ravi heard noise of two fire from some fire arm. When they reached the spot, they found Samir Ul Hassan in injured condition and he was crying '*bachao bachao*'. On enquiry, the injured told him that one Noor Salam had brought him there on the pretext of '*Davat*' with Hafaz Alam and Noor Alam. He further told that Noor Salam along with Noor Alam and Hafaz Alam fired at him causing injuries. Ravi went to inform the police. PCR van reached the spot and took the injured to the hospital. In the cross-examination, he stated that the injured was not known to him previously. Statement of the injured was recorded in his presence. He remained in the hospital till 02.30 A.M. The statement of PW-6 (Amar Pal) is in consonance with the statement of the victim.

16. From the un-rebutted testimony of PW-1 (Samir Ul Hassan) coupled with medical evidence on record it stands established that injuries were inflicted upon the victim by the accused persons in furtherance of their common intention. In the statement Ex.PW-1/A, the victim did not assign motive impelling the assailants to inflict injuries. However, in 313 Cr.P.C.' statement, co-accused Noor Alam admitted that there were number of cases against each other. He was also assaulted by complainant's brother for which a case was registered. Several litigations for land were also pending between them and complainant party. It is true that the victim had voluntarily accompanied the accused persons. It appears that he was not aware of the evil designs of the accused when he was taken to an isolated place on the pretext to attend some dawat/party at the house of an acquaintance of Noor Alam. Moreover, proof of motive recedes into the background in cases where the prosecution relies upon an eye witness account of the occurrence.

17. Non-recovery of weapon of offence is not fatal. There is specific ocular and medical evidence to prove that the injuries were caused by gunshot. It is not mandatory for the doctor to record in the MLC or to make enquiry from the injured about the name of the assailant. Generally, the doctors on duty do not ask for the assailant's name.

Omission of the injured to disclose the assailant's name to the doctor does not discredit his testimony.

18. In the light of above discussion, it is held that the conviction under Section 307/34 IPC is based upon cogent evidence and is affirmed.

19. Counsel for the appellant prayed to modify the order on sentence and to take lenient view because the appellant has already remained in custody in this case for about three years. He was not armed with any weapon. The only role attributed to him is that of exhortation. He is not a previous convict. He has 70 years old mother to take care; his father has already expired; his brother died in 2008; he has eight children including 17 years old daughter to maintain them.

20. As observed above, the injuries sustained by the victim were 'grievous' in nature. He remained admitted in the hospital till 14.07.2005. Even when he was examined in the Court, he was unable to walk and was brought on a cot. Apparently, he did not recover from the injuries sustained by him till 13.12.2005. He was taken to an isolated place in a pre-planned manner and an attempt was made to murder him by firing at him twice.

21. Considering the aggravating and mitigating circumstances, order on sentence is modified and the substantive sentence of the

appellant is reduced from eight years to six years. Other sentences are left undisturbed.

22. The appeal filed by the appellant is disposed of in the above terms.

23. Copy of the order be sent to the appellant through Superintendent, Tihar Jail.

24. Trial Court record be sent back with the copy of the order.

(S.P.GARG)
JUDGE

JANUARY 29, 2013

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