

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

Judgment reserved on : 11.11.2013

% *Judgment delivered on :25.11.2013*

+ CRL.A. 743/2009

PREM CHAND

..... Appellant

Through

Mr. Rajesh Khanna, Adv.

versus

STATE (NCT OF DELHI)

..... Respondent

Through

Ms. Richa Kapoor, APP

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The appellant is aggrieved by the impugned judgment and order of conviction dated 08.07.2009 whereby the appellant has been convicted under Section 302 of the IPC as also under Section 25 read with Section 27 of the Arm Act. He had been sentenced to undergo imprisonment for life specifically stating that the appellant shall not be considered for parole till he has served twenty years of incarceration. He was also sentenced to pay a fine of Rs.50,000/- in default of payment of fine to undergo simple imprisonment for a period of six months. No separate sentence had been passed under Sections 25 and 27 of the Arms Act.

2 The case of the prosecution is based on the statement of the deceased Rajesh Yadav @ Talli. On the fateful day of 28.11.2003 he was gun shot by the appellant in the Tis Hazari Complex on his way to the lock up after he had gone to attend a hearing as an under trial in FIR No.102/2002 PS Jahangirpuri. As per this version (Ex.PW-1/B) when the deceased reached in front of the lock up one person from behind him fired a bullet at him; the appellant Prem Chand was specifically named as the assailant; further version of the deceased being that after firing the appellant ran towards the road leading to the Central Hall of Tis Hazari; he was over-powered by two persons and his pistol was snatched. Further version being that since the deceased was an eye-witness in FIR No.66/2001, P.S. Jahangirpuri in which there were five accused persons namely Mahender Pehlwan and his accomplices; the deceased had been threatened through Mahender Pehlwan and Mohd. Akhtar that he should not depose in this case against Mahender Pehlwan else he would be killed; version of the deceased being that the appellant had shot him on the instructions of Mahender Pehlwan and Mohd. Akhtar. This statement had been recorded at the Hindu Rao Hospital by SI Sanjay Bhardwaj (PW-30) after the deceased had been declared fit for statement

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by Dr. R.N. Sahai (PW-1).

3 Ex. PW-1/B had formed the basis of the rukka (Ex.PW-30/A), pursuant to which present FIR (No.331/2003) under Section 307 of the IPC) was registered. After recording the statement, PW-30 returned to the spot. Crime team was summoned. The photographs of the scene of crime were taken. At the scene of crime some hitting marks of bullets on the road were noted; an Alto car was also found parked and its rear side window glass had been hit by a bullet.

4 The appellant been left in the custody of HC Vijender (PW-4) and Hari Dutt (PW-5). They had been medically examined as they had also sustained injuries at the time when they had tried to overpower the appellant.

5 Accused was arrested vide memo Ex.PW-16/B by ASI Baldev (PW-16). The pistol (.30 caliber) recovered from the appellant was proved as F1. Sketch of the pistol Ex.PW-4/A was prepared. This pistol had a magazine with seven chambers; one live cartridge and one empty were found in the pistol. A katta (.315 bore) and seven live rounds of the katta and one live round of the pistol (F-1) were also recovered from the personal search of the appellant and taken into possession. Sketch of the

katta was proved as Ex.PW-4/C.

6 On 29.11.2003, the investigation was handed over to Inspector Rajbir Singh (PW-25); Statement of the witnesses including the eye-witnesses ASI Hari Dhar (PW-4), ASI Bijender Singh (PW-5), constable Jag Mohan (PW-7) and constable Ramesh (PW-13) were recorded. Statements of constable Pushpender (PW-14) and Constable Suresh (PW-21) were also recorded.

7 Since the deceased had succumbed to his injuries on the same day, the FIR was converted to one under Section 302 of the IPC.

8 The post mortem on the victim was conducted on 04.12.2003. The following injuries were noted upon the victim:

1. *An oval shape lacerated punctured wound on (R) side lumbar re region of size 0.8 cm x 0.9 cm x? placed 18 cm below inferior angle or right scapula (R), 7 cm right of mid line. There was collar abrasion around 1-2 mm with inverted margin and bruising around 2-3 mm (entry wound). No burning, blackening, tattooing seen around it.*

2. *An oval punctured lacerated wound on (R) side lower back, 3 cm above (R) iliac done, 26 cm below inferior angle of right scapula at 7' O clock position from it. Size 0.8 cm X 0.9 X ? margins inverted with collar of abrasion 1-2 mm around it (entry wound).*

3 *An oval punctured lacerated 0.7 cm X 0.6 X ? placed 2.0 cm below umbilicus at 4-5 O'clock position left side with grazed abrasion 2.0 cm on its outer part, margins inverted (entry wound)*

4 *A split laceration 1.8 cm x 0.6-0.8 x with margin everted with fat coming out, bruising around seen on right side front of chest (lower part) 11 cm below right nipple at 5' O clock position. No burning, blackening or tattooing seen (Exit wound).*

5 *Grazed abrasion 1.5 cm x 0.5 cm just above public symphysis in mid line, no burning, blackening or tattooing seen around it.*

9 Cause of death was opined as haemorrhagic shock consequent to the cumulative effect of fire arm injuries 1, 2 and 3, which were sufficient to cause death in the ordinary course of nature. All injuries were ante-mortem.

10 The exhibits which included earth control had been lifted from the spot and deposited in the Malkhana on 28.11.2003; they had been sent to the FSL for examination. The FSL furnished its reports dated 11.10.2004 and 18.01.2005. Scaled site plan Ex. PW-22/A was also prepared by Sanjay Bhardwaj (PW-30).

11 This is the gist of the case of the prosecution.

12 In the statement of the accused recorded under Section 313 Cr. P.C. he had pleaded innocence; submission being that he has been falsely implicated in the present case; he does not know any of the

accused neither Jagmohan, Naresh or Mahender Pehlwan; the weapon of offence has been planted upon him; he was made to sign false documents. In answer to the last question the defence set up by the appellant is that the deceased was trying to flee from police custody when the police officials fired upon him and killed him; to screen themselves against punishment they falsely implicated him; the doctors of the Hindu Rao Hospital has also obliged the police officials; in fact being on parole in Fir No.275/1998, P.S. Subzi Mandi; the appellant had come to surrender himself at the police station but has been falsely roped in.

13 No evidence was led in defence.

14 On behalf of the appellant arguments have been addressed by Mr. Rajesh Khanna, Advocate in detail; written submissions have also been filed. Eye-witness account as set up by the prosecution has been assailed. It is submitted that all the so-called eye-witnesses are police personnel; this was a custodial death. The National Human Right Commission (NHRC) has laid the guidelines to be followed in such an eventuality but none of those had been adhered for which there is no

explanation. It is pointed out that as early as 1997 and reiterated in subsequent communications, the Chairperson of the NHRC had recommended that a procedure has to be followed in cases of encounter deaths and guidelines had been conveyed through letter dated 29.3.1997; this being one such case there is no explanation by the investigating agency as to why this procedure was not adhered to. The eye-witness account of the police personnel is suspect. There is every reason to disbelieve their version. Further submission being that there was no explanation as to why DD No.17 which was the first information transmitted to the local PCR did not find the name of the appellant as even as per the version of the prosecution the appellant had been caught red handed at the spot; the rukka also does not mention the name of the appellant. The rukka was dispatched at 5.30 p.m. pursuant to which FIR was lodged. Incident had occurred at 11.43 a.m.; there was ample opportunity with the police to have fabricated the case in this intervening period which was only to implicate the appellant when the police officials themselves had killed the deceased in this encounter. Further submission being that if there was an eye-witness account, there was no reason for the investigating officer to have recorded the dying

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declaration of the deceased. The dying declaration even otherwise suffers from infirmities as it was recorded by the investigating officer and not by the SDM. The fitness of the deceased to have made a statement was also not adequately proved. Dying declaration thus cannot be relied upon. Submission being that the investigating officer had rushed the deceased to the hospital only so that the bullet with which the deceased had actually been fired upon could be removed. This is also substantiated by the fact that no blood was found on the spot; there was also no trail of blood from the spot to the alleged van in which the deceased was removed to the Hindu Rao Hospital. No earth control was picked up or sent to the CFSL. Reliance has been placed upon AIR 1976 SC 2263 Laxmi Singh Vs. State of Bihar. Submission being that where the blood stained earth had not sent to the chemical examiner, it created a dent in the version of the prosecution; the serological examination would have gone a long way to establish the version of the prosecution. Non-recovery of the empty cartridges from the alleged spot further falsifies the version of the prosecution for the reason that if gun shot was fired on the deceased the empties would have been recovered from the spot but no such recovery has been effected. Reliance has been

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placed upon AIR 1977 SC 2005 State of Punjab Vs. Pritam Singh to substantiate this submission; submission being that in that case where pistol shots were fired but there was no evidence to show that the pellets were recovered from the place of offence, the story of the prosecution was rightly disbelieved. The prosecution has also failed to show that the injuries suffered by the appellant were the bullets fired at from the pistol of the appellant; attention has been drawn to the testimony of Investigating Officer PW-25 who in his cross-examination had admitted that the .30 pistol which had been allegedly recovered from the appellant contained seven chambers in its magazine of which one bullet had hit the alto car, three bullets were fired at the spot which hit the ground and one bullet was fired by the shooter after he was caught; two cartridges were found in the chamber; all seven bullets stood explained; this also not being a case where the pistol had been reloaded; it is clear that the bullets from this weapon were not the result of the injuries suffered by the deceased. Submission of the learned counsel for the appellant being that this was a case where the deceased himself was a hounded criminal having 18 cases on his head; he had attempted to escape from the custody of the police when the police fired upon him; the appellant was

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not present at the spot. He has been falsely roped in. The defence of the appellant being that he had in fact gone to the court to surrender. Attention has also been drawn to the version of Satywrat (PW-32) who was the lock up in-charge who had admitted that no public person is permitted to sit in the lock up without written permission of the court or of the lock-up in charge and he had not given any permission for the entry of the appellant in the lock up meaning thereby that there was no explanation as to where the appellant remained between 11.30 a.m. upto 5.30 p.m. which was the time of his alleged arrest. The DD entry No.17 was allegedly recorded on the statement of H.C. Rajinder who has deliberately not been produced as a witness; adverse inference for withholding a material witness has to be drawn on this count also. The motive for the crime has also not been depicted; in fact the conspiracy angle has been rejected by the trial court as the trial court has acquitted all the other accused except the present appellant. Even as per the prosecution, there is no direct link of the appellant with the deceased. It was only through Mahender Pehlwan who has himself been acquitted. The X-ray plates of the deceased have also been suppressed; the X-ray of the deceased had in fact been conducted which is evident from the

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document Ex. PW-30/DX but had not been produced by the prosecution. This has only emerged in the cross-examination of PW-30; the X-rays of the deceased would have been gone a long way to explain the theory of the entry and exit wounds as admittedly the deceased had received three bullets injuries of which there was only one exit wound; whether the other two bullets remained in the body of the victim or not has neither been answered and nor explained by the prosecution. Reliance has been placed upon AIR 2000 2000 SC 3275 Navinchandra N. Majithia Vs. State of Meghalaya to support a submission that the investigating agency on all count must be fair and impartial. A person cannot be subjected to a criminal trial unless there is a substance and text in the charge-sheet. The case of the prosecution is dubious and suspicious on all counts; for which benefit of doubt accrues to the appellant.

15 Arguments have been refuted by the learned public prosecutor. It is pointed out that apart from the eye-witness account PW-13 constable Ramesh, PW-7 constable Jag Mohan, ASI Hari Dhar Tyagi (PW-4), ASI Bijender Singh (PW-5) are also corroborative of one another. The testimonies of const. Pushpender (PW-14), const. Suresh (PW-21) also support these eye-witness account; in fact their testimonies when read

together with the version of the aforementioned witnesses fully establish the version of the prosecution that it was the appellant who had killed the deceased. The dying declaration of the deceased recorded by PW-30 also cannot be faulted with. The injured had been removed to the Hindu Rao Hospital where after obtaining fitness from Dr. R.N.Sahai (PW-1) statement of the deceased was recorded. Attention has been drawn to the post mortem report of the deceased which was proved by Dr.Ashok Jayswal (PW-27); attention has also been drawn to his cross-examination which was to the effect that foreign material including the disintegrated lead of the bullet may have been resected during the surgery performed upon the victim. Submission being that this version of PW-27 adequately answers the submission of the appellant that there was no answer to the other two entry wounds in the body of the victim. Learned public prosecutor has also drawn attention of the Court to the report of the FSL and the findings therein; submission being that the piece of lead which had been recovered from the spot had in fact been fired from the pistol which had been recovered from the accused when he was caught red-handed. The motive of the crime has also been proved; it was the hiring of the present appellant to kill the victim as he

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was to depose as an eye-witness in a murder case in which Mahender Pehlwan and others were accused and in which subsequently the second witness had also turned hostile and Mahender Pehlwan and his other co-accused had been acquitted. Submission of the public prosecutor being that on no count does the judgment of the trial court call for any interference.

16 We have heard learned counsel for the parties. Record has been perused.

17 This is an eye-witness account. There are four eye-witnesses i.e. PW-13, PW-7, PW-4 & PW-5.

18 On the fateful day i.e. on 28.11.2003 PW-13 posted at the 3rd Battalion DAP had been assigned duty at the Tis Hazari Lock-up to produce under-trial in different courts. As a part of his duty he had taken the under-trials Rajedh Yadav @ Talli (deceased) to the court where he was required to be produced. He was produced before the concerned court at 11.20 a.m. While, PW-13 along with the deceased was returning back to the lock-up, he heard a gunshot. A bullet had hit one car parked outside the lock up. Immediately thereafter a second gun

shot was fired from a distance of about 2-3 feet; this bullet hit the deceased; the deceased looked back; a third gunshot was fired pursuant to which the deceased fell down on the ground. 5-6 gun shots had been fired in all. Two bullets had hit the deceased and other bullets had hit the ground. This was around 11.30 a.m. The assailant ran towards Central Hall, he was overpowered by the vigilance officers. PW-13 identified Prem Chand as the assailant. A pistol was also recovered from him; injury had been sustained by PW-13 and he was medically examined at the Hindu Rao Hospital. Dr.Amit Aggarwal (PW-15) had proved his MLC as Ex. PW-15/A evidencing simple injuries. The PCR had removed the deceased to the hospital.

19 In his cross-examination, he had stated that his duty started at 10.00 a.m. in the morning; he had alone taken the deceased to the courtroom for his production; similarly, PW-13 was alone while escorting back the deceased to the lock-up. He did not remember the name of the judge before whom the deceased was produced but he was a Sardarji. No person had met the deceased outside the court; he did not know the offence for which the deceased had been charged pursuant to

which he had been required to be produced before the court; he explained that the car was at a distance of 20-25 feet from the lock-up when the first bullet hit it; in all he heard 4-5 gun shots. Crowd had gathered there; people started running helter-skelter; the assailant Prem Chand fled from the spot after firing. PW-13 did not follow him; he did not take the injured to the hospital. He denied the suggestion that on the fateful day the deceased had escaped from his custody and they were running after him shouting 'pakro-pakro'. He denied the suggestion that the deceased had been hit by a gunshot either by a public person or some other police officer and Prem Chand had nothing to do with the case. He admitted that Prem Chand had been apprehended while PW-13 was still at the spot; PW-13 remained in the hospital for about half an hour for the medical aid which was administered upon him.

20 Relevant would it be to state that the cross-examination of PW-13 is confused; the defence sought to be set up appears to be three fold; the deceased was attempting to escape from the custody of PW-13 and people were running after him; the deceased had been hit by a public person; he had been attacked by a police personnel.

21 The learned defence counsel is not sure of the stand he proposes to adopt.

22 PW-7 was also posted in the 3rd Battalion and on the fateful day was on duty at the Mulakat Kharja of Tis Hazari, Lock-up. At about 11.30 a.m. when PW-13 was escorting back an under-trial after producing him in court he heard a gunshot fire. This shot was fired at the under-trial who fell down on the ground; a second shot was again fired; this hit the under-trial in his abdomen. The culprit started running towards court no.38; he was overpowered by PW-4 and PW-5 who were outside the gate of court no.38. On PW-7 raising alarm 'pakro-pakro' PW-4 and PW-5 caught hold of the assailant who had been identified by PW-7 as Prem Chand.

23 In his cross-examination, he explained that his statement was recorded by the investigating officer on the same day between 12.30 - 1.00 p.m. He admitted that his duty was on the iron jungla of the lock up upon which statement much emphasise has been laid by the learned counsel for the appellant. Submission being that if PW-7 was doing his duty inside the jungla there was little chance of him eye-witnessing the

incident which was admittedly outside the jungla. He denied the suggestion that the incident had not been taken place in his presence and he was not present at the spot.

24 No suggestion has been given to PW-7 about the defence which is now sought to be projected before this court; there was no suggestion that the deceased was attempting to flee when in an encounter he had been killed by the police personnel. This defence has emanated for the first time only in the statement of the accused recorded under Section 313 Cr. P.C; it is an afterthought. The submission that since PW-5 was on duty inside the jungla and he could not witness the incident is again a misreading of the version of PW-5 as merely because his duty was inside the jungla did not prevent PW-7 from coming out of the jungla to view the commotion which had been created and especially when he has explained in a later part of the deposition that this jungla was just about 1 ½ feet from the spot. This argument has no force.

25 PW-4 was posted as a Head Constable (Vigilance) at the Tis Hazari Complex; he was on civil clothes on the fateful day; his duty hours were between 10.00 a.m. to 5.00 p.m. In his deposition he has

explained that while he along with PW-5 was present at the outside of the CMM Court at room no.38 of the Tis Hazari Courts, he heard sound of firing coming from the side of the lock-up. He along with PW-5 came out and saw one person having a pistol in his hand running towards their direction. A police personnel, who was on duty outside the lock-up was shouting 'pakro-pakro'. PW-4 along with PW-5 overpowered that person who had a pistol in his right hand. Since the assailant was overpowered that person fired a gun shot which hit the road; the pistol was snatched from him. His personal search was taken. From his right side a loaded katta of .315 bore was recovered and seven live rounds of the pistol and one live round of .315 bore were also recovered. The Naib Court PW-14 and the driver PW-21 also reached there along with other police personnel. PW-4 had received injuries on his right hand; he along with PW-5 had gone to the Aruna Asaf Ali Hospital for medical aid and returned back to the lock up at 1.40 p.m. After the arrival of PW-30 the recovered articles i.e. pistol, katta and cartridges as also the accused were handed over to PW-38 the Chowki In-charge. Further deposition of the witness being that blood, earth control and blood stained earth were seized from the spot and sealed in

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pulandas; the same were seized vide separate seizure memos Ex.PW-4/E and Ex.PW4/F. Alto car was also seized vide memo Ex.PW-1/G.

26 In his cross-examination he stated that his statement was recorded in the lock-up of the Tis Hazari Court on 28.11.2003; he reiterated that he along with PW-5 had apprehended the accused; initially he had heard sound of two gunshots; thereafter one more gunshot was fired. He denied the suggestion that he had not witnessed the incident. He denied the suggestion that he had not described the incident in the manner in which it had occurred.

27 PW-5 has corroborated this version of PW-4. He was present along with PW-4 outside the court room no.38 when they heard gun fired shots. He reiterated that after the accused had been apprehended holding a pistol and on his search a loaded katta of .315 bore was also recovered from his right dub. He denied the suggestion that he along with the police had planted the weapon upon the accused or he along with PW-4 had fired the bullet upon the deceased and the accused had not fired at all.

28 Relevant would it be to state and as also conceded by the learned defence counsel PW-5 was the only witness to whom a suggestion has been given that it was the police who had fired upon the deceased; however no suggestion has been given even to this witness that the deceased was trying to flee from police custody upon which the police had fired which is the defence now propelled. No suggestion has also been given to the effect that in order to screen themselves the police officials have manipulated the record of this case and falsely implicated the accused or that the bullets pursuant to which the victim had died had been extracted from his body with the connivance of the doctors of the Hindu Rao Hospital who had obliged the police officials. No suggestion has also been given to the effect that the appellant had in fact come to the court to surrender himself. This defence which as noted supra had appeared only in the statement of the accused recorded under Section 313 Cr. P.C which was in the year 2009. If this was the true picture the accused would have laid out this defence right from the very inception of the trial and not six years after the date of the incident i.e in the year 2009. In this eventuality, this defence can be nothing but sham as it has been created at a later stage.

29 The aforesaid witnesses i.e. PW-13, PW-7, PW-4, PW-5 had eye-witnessed the incident. There were all police personnel; but this by itself is not a reason to discard their versions. All the aforementioned witnesses were consistent and trustworthy. Their direct eye-witnesses account of the incident is clear and unambiguous. Moreover their presence at the relevant time and relevant place was natural being a part of their routine duty; they were all performing their respective jobs at the Tees Hazari Court complex as per their duty roster. Each of these witnesses has explained his duty chart. It is thus not as if they were chance witnesses or had suddenly appeared in which case a doubt about their presence on the spot could have been cast. It is thus not a case where the police witnesses have been falsely introduced to pad up and bolster the case of the prosecution.

30 The observations of the Supreme Court in AIR 2007 (2) ALD (Crl.) 924 Girja Prasad (Dead) by LRs Vs. State of Madhya Pradesh are relevant and are extracted herein as under:-

“It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant

or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence.”

31 Even as way back as more than half a century ago, the Supreme Court in 1956 CrL. LJ 426 Aher Raj Khima Vs. State of Saurashtra had held:-

“The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefore. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration.”

32 In (1996) 3 SCC 338 Tahir v. State (Delhi) dealing with a similar question, the Apex Court has held as under:

“Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend

corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case.”

33 Versions of PW-13, PW-7, PW-4 and PW-5 are creditworthy and inspire confidence.

34 The site plan (Ex. PW-30/B) also matches the ocular version of these witnesses. Point A is the place where the deceased was first shot at; this was in front of lock-up gate. Point B is the place where the bullet marks 1, 2 and 3 were found and is also place the place where the accused was overpowered by PW-4 and PW-5. The alto car seized vide Ex.PW-1/G which had also been hit by a bullet was parked at point C which is approximately 18 meters from point A which was the point where the deceased was shot at. This document thus advances the eye-witness account.

35 Testimony of PW-14 and PW-21 is also relevant; they had not actually witnessed the incident but they were so closely connected with the transaction that their statements become relevant under the rule of *res-gestae*.

36 PW-14 was the Naib Court posted in Court Room No.38 i.e. the Court of the CMM, Tis Hazari Court. On the fateful day i.e. at 11.40 p.m. he had heard a gunshot; he came out on the main road; he saw PW-4 holding hand of the accused Prem Chand; Prem Chand had a pistol in his hand; PW-5 had also overpowered the accused. PW-21 also reached there. In his cross-examination he reiterated that his duty hours were between 10.00 a.m. to 5.00 p.m.; he had heard the gunshot while he was inside the court room. These shots were also heard by learned Magistrate.

37 Nothing has been elicited in his cross-examination to dislodge this version.

38 PW-21 was the driver; he was also a member of the third battalion and was on duty on the fateful day. At about 11.40 a.m. he heard sound of gunshots; he rushed towards the premises where he saw PW-4 and PW-5 having apprehended one person whom he identified as the accused Prem Chand.

39 Both PW-14 and PW-21 had narrated facts so closely connected with the fact in issue i.e. the incident in question so as to form part of the

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same transaction and as such their statements are relevant and form components of the principal fact i.e the incident itself.

40 Section 6 of the Evidence Act reads as under:-

“Section 6- Relevancy of facts forming part of same transaction- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.”

Illustration (a) is relevant. It reads as under:

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

41 The principle of law embodied in this section enunciates the rule that declarations which are contemporaneous or almost contemporaneous with the transaction in issue i.e. the interval between two being so short and there being no opportunity for fabrication, such a declaration would be admissible as *res-gestae*.

42 These versions of PW-14 and PW-21 are admissible under Section 6 of the Evidence Act.

43 PW-32 was the lock-up In-Charge at Tis Hazari Courts. On 28.11.2003 at about 11.30 a.m. he heard a sound of a gunshot. He came out of his office; he saw several persons in front of the lock-up window; on inquiry he came to know that the staff of the Vigilance of the 3rd battalion had apprehended Prem Chand; the injured Rajesh @ Talli had been removed to the hospital. Local police arrived.

44 In his cross-examination after seeing the supplementary charge-sheet of the case FIR No.66/2001 he deposed that Rajesh along with one more person namely Anil Kumar @ Babloo was an eye-witness in the said case which was had been registered against Mahender Pehalwan, Naresh, Jagdish, Deepu and Sonu. In another part of his cross-examination he deposed that no public person can enter or sit in the lock-up unless a written permission is obtained from the lock-up In-charge or from the court; he had not given permission for the entry of Prem Chand in the lock-up. This part of the cross-examination of PW-32 has been highlighted by learned counsel for the appellant; submission being that there is no evidence to disclose as to where the appellant was kept in this intervening period between 11.40 a.m. (when the incident

occurred) and 5.30 p.m. which was the time of his arrest. If the lock-up In-charge had not permitted the appellant to sit in the lock-up where the appellant was kept in this intervening period not having been answered by the prosecution again throws a doubt on the veracity of the version sought to be set up by the prosecution.

45 To answer this argument, testimony of PW-16 apart from Investigating Officer is relevant. PW-16 was posted at the police post of Tis Hazari Court. On the fateful day after receiving information about the bullet firing in the Tis Hazari Court Complex he reached the spot at about 11.45 a.m. where he found PW-30 and other police personnel present. The accused was present at the spot; injured had been removed to the hospital. PW-16 had been left at the spot to protect the spot as also to retain the custody of the accused. His further version being to the effect that PW-30 thereafter came to the spot along with crime team and conducted their proceedings. The accused was arrested vide memo Ex. PW-16/B. The arrest memo evidences the time as 5.30 p.m.

46 PW-30 the Investigating Officer has corroborated the version of PW-16. He has deposed that on the fateful day of 28.11.2003 after

learning about the incident when he reached Tis Hazari police lock-lock up; he found the accused in the captivity of PW-4 and PW-5. He was informed that the injured had been removed to the hospital in the PCR van. PW-16 was asked to remain at the spot and to guard the accused who was kept in his custody.

47 Versions of PW-16 and PW-30 evidence that the accused after his apprehension was kept under the vigil and supervision of PW-16; PW-4 and PW-5 were also there except for the short time when they had gone to the Aruna Asaf Ali hospital to get medical aid. PW-15 is also corroborative on this score. He had medically examined PW-4. PW-30 had in the meanwhile gone to the hospital where with the permission of the doctor he had recorded the dying declaration of the deceased. Fitness was obtained at 12:30 pm. This dying declaration had become the basis of the rukka which was dispatched at 01:20 pm. PW-5 has also explained the he along with PW-4 had returned back from the Aruna Asaf Ali hospital at around 01:40 pm. Crime team was summoned; spot was examined; rough site plan was prepared; exhibits were lifted; earth control samples were also lifted as per seizure memo Ex.PW-4/E and

exhibited in Court as Ex.P-20; personal search of the accused was taken; seizure memos along with sketches of the weapons were prepared; disclosure statement of the accused was recorded and only then he was arrested. He was detained in the lock-up area; whether just outside it or somewhere close to the inside is immaterial. In this background his arrest at 05:30 pm is also by no standards a delayed arrest as has been argued. The submission that earth control was not lifted is also negated. Argument on these scores is mis-conceived.

48 PW-30 on reaching the hospital had obtained the MLC of the injured. AT 12:30 pm Dr.R.N.Sahai (PW-1) declared him fit for statement and report to the said effect was proved as Ex.PW-1/A. The endorsement of PW-1 on the dying declaration (Ex.PW-1/B) which had been recorded by PW-30 is at point 'A'; the deceased had signed at point 'B'.

49 Ex. PW-1/B had formed the basis of the rukka pursuant to which the FIR had been registered. This statement was read by the trial judge as a dying declaration.

50 Ex.PW-1/B has been perused. It reads as under:

“Statement of Rajesh Yadv @ Ralli S/o Sh.Diley Ram R/o E-1348, Jahangirpuri, Delhi, Age-32 years.

It is stated that I lives at the aforementioned address and at present is in jail No.4,Tihar Jail in JC in different-different cases. Today, after appearing in the Court No. 216, Tis Hazari Courts in FIR No.100/02 under Section 307 IPC P.S. Jahangirpuri when I was returning to the Tis Hazari Lock Up in the custody of a constable of 3rd Battalion when at about 11.30 a.m. when I reached in front of lock-up, one person had fired a gunshot upon me from my back side; when I turn towards him he fired gunshot upon me in front; I identified the shooter who is Prem Chand resident of Mukhmailpur village Delhi; companion of Mahender Pehlwan, who fired more gunshot and fled towards Central Hall side road; some ahead he was caught hold by two persons and pistol was snatched from him. I am a witness in a murder case FIR No.66/01, P.S. Jahangirpuri; in which Ajay was murdered and myself and Anil Babaloo were also injured. In that case Charanjeet, Sonu, Dinesh Deepu, Naresh, Jagdish Dubey and Mahender Pehlwan are accused. 10-12 day ago Mahender Pehlwan and Mohd. Akhtar had threatened me through their companion Naresh and Jagdish Dubey lodged in Jail no.4 that either you turn hostile otherwise you will be killed. I have full doubt that aforementioned Prem Chand had attacked me by gunshots on the asking of Mahender Pehlwan and his companions. I received injuries on stomach, chest and back by gunshot. PCR van has taken me to the Hindu Rao Hospital where now my statement is written. Legal action be taken against all the aforementioned.

Statement is heard; it is correct.”

51 This document is in the handwriting of PW-30 and has been attested by the doctor PW-1. It was recorded at about 12.30 p.m. The
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fact that fitness of the victim was obtained prior to recording the statement of the deceased was corroborated by PW-1 who had also in his deposition stated this statement was recorded in his presence and had been initialed by him at point A.

52 In his cross-examination PW-1 has stated that the patient had collapsed at 1.00 p.m. at which time his condition has come very poor. The vehement submission of the learned counsel for the appellant on this score being that a fitness given at 12.30 p.m. when the patient had collapsed at 01:00 pm was clearly at the behest of the investigating officer as the patient in these circumstances could neither have been fit physically or mentally to make a statement.

53 This submission of the learned counsel for the appellant is not borne out from the record. Admittedly, the incident had taken place at 11.40 a.m.; there were three bullets injuries inflicted upon the injured. Initially the case was registered under Section 307 of the IPC. The MLC of the injured (Ex. PW-6/A) evidences that at 11.50 p.m. when he was examined he was conscious and cooperative; his pulse was low but his blood pressure was recorded as 100/60. There is no doubt that his

post mortem suggests that he had collapsed at about 1.00 p.m. but that does not dent or wipe away the otherwise cogent version of PW-30 and PW-1 that the victim was in fact fit to give his statement. Ex. PW-1/A was the fitness certificate granted to the victim by a reputed doctor of Hindu Rao Hospital; he was an independent witness; he had no reason whatsoever to give an incorrect version; PW-1 has categorically stated that Ex. PW-1/B was recorded before him after the fitness had been granted by him; moreover patient had not been declared dead till 07:40 pm on 28.11.2003.

54 There is also no doubt that the courts do not normally encourage a dying declaration to be recorded by the investigating officer but even if a dying declaration is recorded by the investigating officer there is no blanket bar that such a piece of evidence cannot be read. It must be remembered that at the stage when Ex.PW-1/B was recorded the case had been registered under Section 307 of the IPC. It was not as if that the deceased was on the verge of death. It was in the nature of a complaint. The doctor, both, in his ocular testimony and documentary evidence stated that the victim was fit for statement. No suggestion has

also been given either to PW-1 or PW-30 or that the victim was not in a fit state of mind to give his statement.

55 In AIR 2000 SC 2480 Gulam Hussain & Anr Vs. State of Delhi, the Apex Court has held as under:-

“Section 32 of the Evidence Act is an exception to the general rule of exclusion of hearsay evidence and the statement made by a person written or verbal of relevant facts after his death is admissible in evidence if it refers to the cause of his death or any circumstances of the transactions which resulted in his death. At attract the provisions of Section 32, the prosecution is required to prove that the statement was made by a person who is dead or who cannot be found or whose attendance cannot be procured without any amount of delay or expense or he is incapable of giving evidence and that such statement had been made under any of the circumstances specified in sub-sections (1) to (8) of Section 32 of the Evidence Act.

It is well settled that dying declaration must be dealt with caution for the reason that the maker of the statement had not been subjected to cross-examination. There is no rule of law or rule of prudence that dying declaration cannot be accepted unless it is corroborated.”

56 The dying declaration in the present case is even otherwise corroborated by the eye-witness account as discussed supra. It is not the sole piece of evidence relied upon by the prosecution. The dying declaration being authentic and there being no reason whatsoever on the

part of a professional i.e. a doctor of a reputed government hospital to have made a wrong statement; this dying declaration could be nothing but the truthful narration of the incident by the victim. This dying declaration had specifically named the appellant. Thus the argument that why the rukka did not mention the name of the accused is also an argument which holds no water; the dying declaration in fact become the basis of the rukka. It has also detailed the motive for the crime; the motive being that since the victim was an eye-witness in case FIR No.66/2001 which has been registered against Mahender Pehlwan and his other accomplices; it was at his behest that the appellant had fired gunshots upon the victim. All these aforementioned facts had become the basis of the rukka. The rukka had been dispatched at 1.20 p.m. i.e. within a span of 1 ½ hour from the time of the incident. There could also be no possibility for manipulation or fabrication. Read in its entirety and in this background the dying declaration is one more vital piece of evidence against the accused.

57 The post mortem on the dead body had been conducted at 4.00 p.m. on 04.12.2003. The injuries have been detailed supra; so also the cause of death.

58 External injuries show that there are three bullets injuries had been received by the victim. Injuries nos.2 and 3 were entry wounds; injury no.4 was an exit wound.

59 Learned defence counsel has vehemently argued that since there is only one exit wound obviously two bullets had remained inside the body of the victim but for the reasons best known to the investigating officer no X-ray of the victim had been conducted to find out whether these bullets were still inside the body or not for which an adverse inference has to be drawn; it was incumbent on the part of the investigating agency to produce this material evidence; the X-ray would have disclosed that the bullets lodged inside the body of the victim did not match the weapon of offence with which the victim had been injured and this would have falsified the version of the prosecution.

60 PW-26 Dr.Anil Aggarwal has deposed that a Board of doctors comprising of himself, Dr.Ashok Jayswal (PW-27) and Dr. K.L.Sharma

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had been constituted by the order of the ADM (PW-12) to conduct post the mortem upon the victim. Dr. K.L.Sharma was the Chairman of the Board and PW-26 was a member.

61 PW-26 has deposed that the examination of the dead body of the victim showed five external injuries of which three were fire arm injuries; first three wounds were entry wounds and the forth wound was an exit wound; injury no.1 to 4 were caused by fire arm projectile fired from a rifled fire arm.

62 In his cross-examination he has explained that no bullet or part of it was found inside the body as the victim had been already subjected to an operation; search was made for the bullets in the body; none could be found; he has gone on to explain that as reported in the post mortem report *“no fired bullet/remnants of fire arm projectile had been recovered from the abdominal cavity despite dissenting out all organs and intestinal loops meticulously. Likely to be expelled in the resected loops during surgery in the hospital.”*

63 Similarly the second doctor who was part of the post mortem team i.e. PW-27 after having reiterated the same version in his

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examination-in-chief, in his cross-examination has explained that efforts were made to detect the bullets by dissection of the body parts. He explained that an entry wound is usually smaller than the actual size of the bullet except when the injury is caused by a contact fire with the body.

64 The explanation furnished by PW-26 and PW-27 thus answers the query as to why remaining projectiles/bullets could not be found in the body of the victim. This was for the reason that surgery of the intestine of the victim had been conducted and as explained by PW-26, it was most likely that these bullets/projectiles had been expelled in the resected loops form during the aforementioned surgery. This was the opinion of a medical expert and having remained unchallenged, sets at rest the argument of the learned counsel for the appellant as to why no bullets/projectiles were found in the body of the victim.

65 The ADM had been examined As. PW-12 who had corroborated this version. He has identified letter Ex. PW-12/A which had been sent by him to constitute this Board. The Board had been constituted for the reason that the present was a case of custodial death. This has come in

the versions of PW-12, PW-26 and PW-27. Extra care and precaution had been taken by the investigating agency; there is thus no merit in the arguments of the learned counsel for the appellant that the NHRC guidelines have been ignored.

66 The X-ray of the dead body of the victim was not a part of the documents of the prosecution. PW-30 has in fact deposed that he cannot say whether any X-ray of the victim's body had been conducted or not. This was in answer to a specific query put to him. The patient was under medical care and supervision; it was not for the investigating officer to interfere with the medical treatment or the prognosis of the victim; X-rays of the dead-body was not a requirement; it was the decision of the doctors.

67 PW-25 was the second investigating officer. No question has also been put to him about X-ray not having been conducted upon the dead body. In fact this argument that the X-ray on the dead body would have shown that the bullets in the dead body were not the bullets fired from the alleged pistol is an argument which appears to have been developed only at the appellate stage. This argument did not find mention in the

trial court and the fact that it has been developed only at this stage is also evident from the fact that no cross-examination to this effect has been effected of any of the witnesses i.e. either of the medical experts or of the investigating officer to the effect that the bullets in the dead body was not the bullets fired from the pistol (F-1) Ex.PW-30/DX does not show that X rays of the dead body had been effected and thus the same have been deliberately withheld. This argument has to be noted only to be rejected.

68 PW-25 in one part of his cross-examination has admitted that no blood was found at the spot and the photographs have also not depicted any blood. He also admitted that the pistol which was recovered from the accused had seven chambers in its magazine of which one bullet had hit the car; three bullets were fired at the spot which had hit the ground; one bullet was fired after the shooter was caught and two cartridges were found in the chambers. Submission being that this is not a case where the pistol had been reloaded; the prosecution has thus failed to reconcile this version of PW-25 with the prosecution versions; from where did the three bullets injuries suffered by the victim emanate?

69 Version of the prosecution is that the deceased had been shot by the pistol which had been recovered from the right hand of the accused. This has been deposed in the ocular versions of PW-13, PW-7, PW-4, PW-5, PW-14 and PW-21; their ocular versions in fact explain and answer this argument completely. PW-13, PW-7, PW-4 & PW-5 had all corroboratively stated that they heard 4-5 gun shots from the pistol which was recovered red-handed from the accused. Out of the seven bullets in the magazine of F-1; the victim had suffered three bullet injuries; one had hit the Alto car which had a broken glass; one bullet was found intact; whether two bullets had hit the ground or three had hit the ground in this chaotic scene would definitely not amount to a discrepancy. This argument of the learned counsel for the appellant is also bereft of merit.

70 Further the Alto car as per PW-13 was stationed at a distance of 20-25 feet on the other side of the lock-up. This is also evident from the site plan Ex.PW-22/A. One bullet had hit the car; it had travelled this distance. Non recovery of the empties in this background is also of no consequence.

71 That apart, even presuming that there is a discrepancy between the ocular versions of the witnesses with the medical evidence, it is the ocular evidence which has to be given preference as medical evidence is only a corroborative piece of evidence.

72 In Solanki Chimanbhai Ukabhai v. State of Gujarat, AIR 1983 SC 484, the Supreme Court observed”-

“Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.” [Emphasis added]

73 In State of U.P. v. Hari Chand, (2009) 13 SCC 542, the Apex Court reiterated the aforementioned position of law and stated that:

“In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy.”

74 Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater

evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. It is only when the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, that the ocular evidence may be disbelieved; this is not so in the instant case.

75 PW-17 had deposited the sealed pullands handed over to him by investigating officer and by doctor in the Malkhana; H.C. Rajgopalan (PW-31) who was MHC(M) in the police station Subzi Mandi had received the sealed parcels which had been deposited by him in the Malkhana; on the same day. They were taken to the CFSL through Const. Rohtash (PW-24) and Const.Trilok (PW-17) vide RC. No. 69/21 and 71/21 respectively on 06.01.2004.

76 The CFSL vide its report prepared by A.K.Shrivastva (PW-36) had deposed that three parcels were received in the office of the CFSL for medical analysis on 13.01.2004. The serological report is Ex. PW-30/M dated 18.01.2005. As per this report, the fired cartridge (EC1) on comparison with cartridge cases (TC1 and TC2 i.e. the test fired

cartridge cases of the .30 calibre pistol F1) were identical establishing through this report that the empty cartridge (EC1) had been fired through this pistol (F-1). The CFSL had also opined that the remnant bullet lead (EBRI) which has been seized from the spot vide seizure memo (Ex. PW-1/C) was a part of the bullet of a .30 cartridge. Thus this scientific evidence on this score advances the version of the prosecution that the empty cartridges found in this pistol were fired from the pistol F-1; so also the fact that the lead of the remnant bullet recovered from the spot was a part of a .30 cartridge case i.e. the pistol F-1.

77 The CFSL vide its report (Ex.PW-30/K) dated 11.10.2004 had also confirmed that the clothes of the deceased i.e. T-shirt, woolen banian, pant and the underwear had human blood of group 'AB' which was the blood group of the deceased. These clothes of the victim i.e. his torn shirt and torn woolen banian had tears which as per the post-mortem doctor (PW-26) were the possible result of the bullet injuries. These are yet additional links in the chain of circumstances against the accused.

78 PW-38 H.C. Somvir Singh had removed the deceased to the Hindu Rao Hospital and got him admitted there. In his cross-examination he has stated that he had been asked by lock-up in-charge (PW-32) to remove the injured to the hospital and he had been taken in the lock-up van. Blood was oozing out from his pant and shirt; his clothes did not get blood stains; he cannot say whether blood fell on the ground or not.

79 This version of PW-38 explains why blood was not found at the spot. The injured had received bullet injuries; his MLC Ex.PW-6/A also shows that at the time when the victim was admitted in the hospital (11.40 a.m.) no bleeding was reported; the patient had been found to be conscious and cooperative. Thus, it was obviously not a case of excessive bleeding which would have left blood or blood trails at the spot. The argument of the learned counsel for the appellant on this count also has no force.

80 PW-16 was posted at PP Tees Hazari where DD No. 17 (which was the first information about the incident) was recorded by HC

Rajender. PW-16 has been examined on this aspect. Non-examination of HC Rajender is of no relevance.

81 Motive for the crime has appeared not only in the dying declaration of the victim (Ex. PW-1/B) but also in the documentary evidence which has been collected in the course of the investigation. Ex.PW-1/B has recited that the deceased along with Anil was an eye-witness in case FIR No.66/2001, police station Jahangirpuri registered under Section 302 IPC against accused Mahender Pehlwan and his co-accomplices. Ex.PW-1/B further recites that it was at the behest of Mahender Pehlwan that the accused has fired upon the deceased as he did not want him to depose as an eye-witness in his case. This version in the dying declaration has been corroborated by PW-19 who was the second eye-witness of FIR No. 66/2007.

82 PW-29 Chander Kant Babbar had produced the record of the FIR no. 66/2001 P.S. Jahangirpuri which shows that Mahender Pehlwan and his accomplices were acquitted vide judgment dated 20.12.2005. This record establishes that PW-19 had not supported the version of the prosecution.

83 The motive for the crime appears to be clear.

84 The defence of the accused has been projected in his statement under Section 313 Cr. P.C. which as noted supra was recorded in the year 2009 i.e. six years from the date of the incident. It was in this statement that he had for the first time stated that he had come to the court to surrender; he was on interim bail and having come to court to surrender he has been falsely roped in; the deceased was trying to escape and had been attacked by the police and it was the police personnel who had killed him in an encounter but the blame has been falsely foisted upon the accused.

85 At the cost of repetition, this defence has emanated only in the year 2009. There were 38 witnesses of the prosecution who had been examined. Except for PW-5 no other witness has been given any suggestion on this count. Even qua PW-5 only a half hearted suggestion has been given that the accused has been falsely roped in and it is actually PW-4 and PW-5 who had committed this crime. As noted supra, there was no evidence that the accused had come to surrender.

Even today before this Court on a repeated query his counsel is unable to answer as to in which court the appellant had come to surrender.

86 Record produced by PW-28 Satyavir Singh shows that the appellant Prem Chand was a convict in case FIR No.275/88 under Section 302 IPC, Police Station Subzi Mandi. He had been granted interim bail and had to surrender by 22.02.2000; he had not surrendered; he had in fact been declared as proclaimed offender. As such this defence of surrender, after a lapse of more than 2 ½ years and being bereft of any details as to in which court he had to surrender is nothing but a sham and fake defence.

87 On no count does the case of the prosecution suffer from any infirmity. Prosecution has been able to establish its case to the hilt. The appeal is without any merit. Dismissed.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

NOVEMBER 25, 2013

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