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

RESERVED ON : 28th MARCH, 2014
DECIDED ON : 02nd JULY, 2014

\+ **CRL.A.No. 1024/2011**

MAN MOHAN VIKAL ..... Appellant

Through : Mr.Ramesh Gupta, Sr.Advocate with Mr.Mukesh Kalia & Mr.Karan Sachdeva, Advocates.

versus

THE STATE OF NCT OF DELHI ..... Respondent

Through : Mr.Lovkesh Sawhney, APP.

\+ **CRL.A.No.1124/2011 & CRL.M.B.No.2830/2014**

NEPAL CHAND ..... Appellant

Through : Mr.Mukesh Kalia, Advocate with Mr.Karan Sachdeva, Advocate.

versus

THE STATE NCT OF DELHI ..... Respondent

Through : Mr.Lovkesh Sawhney, APP.

AND

+ **CRL.A.No.1099/2011**

RAJESH BHATI ..... Appellant

Through : Mr.Mukesh Kalia, Advocate with
Mr.Karan Sachdeva, Advocate.

versus

THE STATE NCT OF DELHI ..... Respondent

Through : Mr.Lovkesh Sawhney, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Man Mohan Vikal (A-1), Nepal Chand (A-2) and Rajesh Bhati (A-3) impugn a judgment dated 30.07.2011 of learned Addl. Sessions Judge in Sessions Case No. 88/08 arising out of FIR No. 146/05 PS Bhajanpura by which they were held guilty under Section 120B read with Section 307 IPC; A-3 was in addition convicted under Section 307 IPC. By an order dated 04.08.2011, they were sentenced to undergo RI for ten years with fine ₹ 50,000/- each under Section 120B read with Section 307 IPC; A-3 was further sentenced to undergo RI for ten years with fine

₹ 50,000/- under Section 307 IPC. The substantive sentences were to operate consecutively.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 27.04.2005, SI Virender Singh Punia on receipt of Daily Diary (DD) No. 14-A along with Const.Chander Prakash went to the spot i.e. A1/5, Bhajanpura, near Khajuri Red Light, main Wazirabad road, and came to know that after the firing incident, the victim had already been taken to GTB Hospital in a PCR van. After reaching at GTB hospital, SI Virender Singh Punia collected MLC of injured Tara Chand who was unfit to make statement. At about 09.50 P.M. when he (Tara Chand) became conscious, the Investigating Officer after recording his statement (Ex.PW-2/A), lodged First Information Report. The crime team was summoned at the spot and two empty cartridges and one bullet were seized. The crime scene was photographed. On 02.05.2005, Mahender Mittal was arrested and pursuant to his disclosure statement, it emerged that a conspiracy was hatched with Satish Bansal against the victim - Tara Chand involving A-1 to A-3 and others. Call details were collected and on 06.05.2005, Mukesh was arrested. A-2 and A-3 who were arrested in some case in Loni were arrested after issuance of production warrants on 23.06.2005. A-2 was identified by the prosecution witnesses in the Test

Identification Proceedings whereas A-3 could not be identified. Subsequently, A-1, Satish Bansal and Sanjay were also arrested. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted against Mahender Mittal, Satish Kumar Vasant, Satender, Mukesh Kumar Goyal, A-1, A-2 and A-3; they were duly charged and brought to trial. It is relevant to note that vide order dated 21.04.2007, Sanjay was discharged. The prosecution examined 17 witnesses to substantiate their case. In 313 statements, the accused persons denied their involvement in the crime and pleaded false implication without examining any witness in defence. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, convicted the appellants for the offences mentioned previously. Mahender Mittal, Mukesh Kumar Goyal, Satish Kumar Vasant and Satender were acquitted of the charges. It is pertinent to note that State did not challenge their acquittal.

3. I have heard the learned counsel for the parties and have examined the file. The appellants' conviction is primarily based on the testimonies of PW-2 (Tara Chand) and PW-3 (Rakesh Kumar). The occurrence took place at around 07.20 P.M. The incident was reported to

the police in promptitude and Daily Diary (DD) No. 14-A (Ex.PW-1/B) came to be recorded at 07.25 P.M. at PS Bhajanpura. The investigation was assigned to Insp.Virender Singh Punia (PW-17). The victim was taken by PCR officials to GTB Hospital where he was medically examined by MLC (Ex.PW-5/A). MLC records the arrival time of the patient at 07.55 P.M. with the alleged history of 'gunshot injury' by SI Azad Mohammed of PCR and Rakesh, victim's son. PW-4 (Dr.Shuchi Bhatt) medically examined him by a detailed report (Ex.PW-4/A) and after examination of the X-ray, she found fracture of left fifth rib and right humerus. PW-5 (Dr.D.Mohanty) proved the report (Ex.PW-5/A) prepared by Dr.Punit Srivastava who had described the nature of injuries as 'grievous'. PW-6 (Dr.Devender Kumar) on perusing the MLC disclosed that on local examination, one entry wound was found present on the chest, left side and upper part. The exit wound was present over back of the left side. The injuries were not accidental or self-inflicted. The complainant had no reasons to fake the incident of sustaining injuries by firing. The victim – Tara Chand gave detailed account as to how his partner with whom he had carried on business in partnership hatched conspiracy with the appellants to murder him to avoid payment of ₹ 5 lacs. He also gave detailed account as to how and under what

circumstances, three assailants first criminally intimidated him and eventually fired at him twice.

4. As observed above, Mahender Mittal with whom the victim had dispute over payment of money was acquitted of the charges by the Trial Court. A-1 to A-3 were held guilty for hatching conspiracy to murder him (the victim). A-3 was further convicted for executing the conspiracy by firing at the victim. While appearing as PW-2, the complainant made vital improvements in his Court statement for which he was duly confronted in the cross-examination. The complainant did not give plausible explanation for major omissions in the statement (Ex.PW-2/A) given to the police at the first instance. It has come on record that during investigation, call details were collected by the prosecution. However, for the reasons known to the Investigating Agency, no witness from any service provider was cited and examined to prove the call details. No evidence was brought on record to prove ownership of a particular mobile phone with any of the appellants and about their conversation among each other and the victim for any sufficient duration at particular location. It is alleged that the assailants had arrived at the spot on a motorcycle. However, no such motorcycle was recovered during investigation. Neither PW-2 (Tara Chand) nor PW-3 (Rakesh Kumar)

themselves had witnessed A-1 and A-2 fleeing the spot on the motorcycle. Their statements were based upon the information given by some neighbour who had allegedly seen A-1 and A-2 fleeing the spot on the motorcycle soon after the incident. However, name of any such neighbour has not been disclosed. No such neighbour was examined to establish if he had seen A-1 and A-2 on the spot on any motorcycle. Hearsay evidence of PW-2 and PW-3 cannot be read into evidence.

5. On scrutinizing the testimonies of PW-2 (Tara Chand) and PW-3 (Rakesh Kumar), it transpires that for the first time on 27.04.2005, a telephone call was received by PW-2 (Tara Chand) and the caller revealed his name Man Mohan Vikal (A-1) who allegedly told him, "hum tumhare baap bol rahe hain". PW-2 (Tara Chand) did not reveal the time when the said telephone call was received or if it was on landline phone or mobile and what was its number. In the cross-examination, he informed that the threatening call was received in the afternoon on his mobile and it was heard keeping its speaker 'on' to enable his son to hear the conversation. The duration of the call was about 10 – 15 minutes. PW-3 (Rakesh Kumar) did not corroborate PW-2's version if he had heard the conversation when the speaker of the mobile was 'on'. He merely deposed that at around 12.40 P.M., his father received a telephone call in his

presence in the shop. The caller had abused and threatened his father. He further disclosed that the caller had told his father to pay ₹ 5 lacs which he owed to Mahender Mittal. The caller also asked his father to come at Usman Pur to settle the matter or else he would have to face the consequences. On this, his father told that he would not go there and asked the caller to come at the shop to settle the dispute. In the cross-examination, the witness was confronted with the statement (Ex.PW-3/DA) recorded under Section 161 Cr.P.C. where all these facts did not find mention. As discussed above, no such call details were placed on record or proved as per law. A-1 was not known to PW-2 (Tara Chand) and PW-3 (Rakesh Kumar) prior to the incident. No Test Identification Proceedings were conducted to enable PW-2 (Tara Chand) and PW-3 (Rakesh Kumar) to identify him. Identification of A-1 for the first time in the Court becomes suspect as the Investigating Officer did not give cogent reasons for not holding TIP proceedings when A-2 and A-3 were asked to participate in the TIP proceedings. Complainant's conduct after receiving the threatening call is unreasonable as he did not lodge report with the police. He even did not attempt to contact Mahender Mittal or any of his relatives with whom he had prior acquaintance to confirm if A-1 was acting at his behest and was threatening to get ₹ 5 lacs which Mahender

Mittal allegedly owed to him. Thus, no criminality can be inferred against A-1 for the alleged threatening call which remained unproved.

6. The second stage involving the appellants is when after about 20 minutes they came to complainant's shop and informed him that A-1 was the caller on the telephone. PW-2 (Tara Chand) highlighted that A-1 claimed that he had to take ₹ 5 lacs from Mahender Mittal. A-3 told him to remain present at the shop and they would come by 08.00 P.M. there. A-2 threatened him "agar tu sham ko dukaan par nahi mila to teri khopdi uda denge". PW-3 (Rakesh Kumar) testified that after about 20 minutes, three boys came at the shop. Two of them gave their names as Man Mohan Vikal and Mukesh. The third one refused to disclose his name. In Court statement, he identified and recognized all of them as A-1, A-2 and A-3 and clarified that A-3 had wrongly given his name as Mukesh at that time. A-2 was the assailant who had declined to disclose his name. He stated that the three accused asked his father to accompany them to Usmanpur to settle the dispute as Mahender Mittal was sitting there. When his father refused to go, A-3 told his father that they would bring Mahender Mittal in his shop and he should remain present there at about 08.00 P.M. A-2 extended threats to kill him if he did not obey. Thereafter, all the assailants went away abusing his father. Apparently, both PW-2

(Tara Chand) and PW-3 (Rakesh Kumar) have given inconsistent version regarding the conversation that took place between the appellants and the victim. Despite open threat, the PWs did not bother to report the incident to the police. They even did not try to contact Mahender Mittal. Rather they conveniently continued to sit at the shop to wait for the arrival of the assailants. It is relevant to note that Mahender Mittal and others have already been acquitted of the charges. Allegations against A-1, A-2 and A-3 were that they hatched conspiracy and were Mahender Mittal's henchmen acting at his behest. The complainant did not produce on record any document to show if Mahender Mittal owed any money to him or he had demanded any such amount from him any time. No proceedings whatsoever were initiated against Mahender Mittal by the victim to recover the alleged dues. Contrary to that, Mahender Mittal had lodged a complaint with the police and the complainant – Tara Chand was called in the police station for making payment to Mahender Mittal. None of the appellants was armed with any weapon at that time. The Trial Court did not record conviction for criminal intimidation. A-3 was not named in the FIR and for the first time in the Court statement, the witness stated that he had wrongly given his name as 'Mukesh'. Mukesh was acquitted by the Court.

7. So far as third stage of the incident in which the complainant sustained injuries by firing, only A-3 was witnessed as the perpetrator of the crime. Both PWs have categorically stated that it was A-3 who fired at the victim twice with a pistol in his hand. It is true that in TIP proceedings both these witnesses could not identify and recognize A-3 as the assailant. Reasons for the same have been given and believed by the Trial Court. Due to threats extended by the assailants, the witnesses deliberately did not identify him in the TIP proceedings. They were, however, certain in their Court statements that it was A-3 who had fired at the victim. Their statements in the absence of any infirmities in the cross-examination cannot be disbelieved. The substantive evidence of identification is identification in the Court. They had no ulterior motive to falsely implicate A-3 for the vital injuries sustained by the victim. It is unclear as to what had motivated A-3 to fire at the victim. Nonetheless he cannot escape from the punishment for the injuries caused by him to the victim on his vital organ. Testimonies of PW-2 (Tara Chand) and PW-3 (Rakesh Kumar) cannot be discredited simply because the co-accused persons were acquitted on the same set of evidence. PW-2 Tara Chand had suffered grievous injuries is not expected to let the real culprit go scot free and falsely implicate an innocent one.

8. Regarding hatching of conspiracy by the appellants, in my view, the prosecution has failed to establish it beyond reasonable doubt especially when the main suspect Mahender Mittal at whose instance the appellants had acted was acquitted of the charges. The appellants were not having any prior acquaintance or animosity with the victim to eliminate him. They were not going to be benefited by just making an attempt to murder him. It appears that the main purpose of the assailant was to settle the dispute (if any) for recovery of the dues. A-1 and A-2 were not present at the spot at the time of occurrence with A-3 and had not provided any arms or ammunitions to him. There are no allegations of exhortation; they did not facilitate A-3 in the execution of the plan. No weapon was recovered at their instance. The vehicle on which the assailants had arrived was also not recovered. Call details among the assailants were not proved to ascertain if they were in constant contact with each other at any stage soon before the incident or after the occurrence. Simply because they had accompanied A-3 at the earlier stage which the prosecution failed to prove beyond reasonable doubt, no inference can be drawn that they had conspired with each other to fire at the victim. Mere identification of A-2 in TIP proceedings is not enough to establish criminal conspiracy as his presence at the second stage with A-1 and A-3

has not been established and the threat allegedly extended by him does not find mention in the statement (Ex.PW-2/A). Ex.PW-2/A does not disclose if any threat was extended by A-2. His name even does not find mention therein.

9. In the light of above discussion, conviction of A-1 and A-2 under Section 120B read with Section 307 IPC cannot be sustained and is set aside. A-1 and A-2 deserve benefit of doubt and are acquitted. They shall be released forthwith if not required to be detained in any other case.

10. For similar reasons, A-3's conviction under Section 120B read with Section 307 IPC is set aside. He is, however, held guilty for committing offence only under Section 307 IPC as he had fired twice from close range at the victim. The findings of the Trial Court under Section 307 IPC are based upon fair appreciation of the evidence and need no intervention and are affirmed. A-3's nominal roll dated 17.05.2012 reveals that he has suffered custody for one year and three days besides remission for three months and twenty five days as on 18.05.2012. Though he is involved in two criminal cases – S.T.No.1146/05, FIR No.782/2004 under Sections 147/148/149/302/307 IPC PS Loni, Ghaziabad, U.P. and FIR No.263/2002 under Sections 379/411/34 IPC PS New Ashok Nagar. Yet no conviction has been recorded so far. The

sentence order is modified to the extent that he shall undergo RI for ten years with fine ₹ 5,000/- and failing to pay the fine to undergo SI for one month under Section 307 IPC. He shall also pay compensation of ₹ 50,000/- to the victim – Tara Chand and it shall be deposited within fifteen days in the Trial Court to be released to the victim after due notice.

11. The appeals filed by A-1 and A-2 are allowed and appeal filed by A-3 is disposed of in the above terms. Pending application also stands disposed of being infructuous. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent jail for information.

(S.P.GARG)
JUDGE

JULY 02, 2014 / ***tr***