

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. No. 817 of 2008

Reserved on: December 15, 2014

Decision on: December 23, 2014

JAGAN

..... Appellant

Through: Mr. Dharmendra Vashishtha and
Mr. Sumit Kalra, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Isha Khanna, APP.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

23.12.2014

1. This appeal is directed against the judgment dated 11th September 2008 passed by the learned Additional Sessions Judge ('ASJ') in SC No. 18 of 2006 convicting the Appellant for the offence under Section 307 IPC and the order on sentence dated 15th September 2008 whereby the Appellant was sentenced to rigorous imprisonment ('RI') for 3 years and fine of Rs. 21,000 and in default to undergo simple imprisonment for 6 months.

The unfolding of events

2. The case of the prosecution is that SI Ramanand (PW-6) was posted at Police Station ('PS') Sangam Vihar on 9th October 2005 on emergency duty. On that day, he received DD No. 14B (Ex.PW-6/A) in which it was stated that firing had taken place at A-86, Tigri Colony,

Masjid Road. The PCR Form (Ex.PW-11/A) was filled up by Constable Suresh Chand (PW-11) at around 3.36 pm. It showed that information was received from phone No. 20060039 to the effect that at the spot there was an attack by a lot of people. It was confirmed by SI Brahm Prakash (PW-15) who was the Investigating Officer ('IO') that the intimation as recorded in the PCR Form was given by the Appellant (the accused) from his mobile phone No. 20060039.

3. When PW-6 reached the spot along with Constable Ajit Singh (PW-13), they found a crowd present there. Sohan Lal (PW-10) met them and gave a statement (Ex.PW-6/B) in which he stated that he resided at A-86, Tigri Colony. He stated that at around 3.30 pm a water tanker arrived in the street. He and certain others were fetching water from the water tanker. At that time, the Appellant came there to get water and placed his bucket in front of their buckets. When PW-10 protested, the Appellant took out his pistol and fired at PW-10. Immediately PW-10 ducked towards one side and the fire hit one Deep Chand (PW-14) who was standing behind PW-10.

4. Both PWs-6 and 13 stated that they found PW-14 at the spot with injuries and sent him to the hospital with Constable Rajmal (PW-9). PW-13 states that he removed PW-14 to the All India Institute of Medical Sciences ('AIIMS').

5. However, it appears that before the police reached there, PW-14 was first taken to a nearby clinic of Dr. Majhar Ahmed (PW-8). In his deposition PW-8 stated that PW-14 was brought to him by 2 to 3

persons between 3.30 and 4 pm on 9th October 2005. They informed PW-8 that PW-14 had sustained injuries due to falling on road. PW-8 states that he found a lacerated wound and put five stitches. In his examination by the learned Additional Public Prosecutor, PW-8 marked a photocopy of the register maintained by him at his clinic (Ex.PW-8/B). He maintained that PW-14 did not tell him that he had suffered any gun-shot injury.

6. When PW-14 returned to the spot, he met the police officials and then they took him to AIIMS. There he was examined by Dr. Parvez (PW-4) who prepared his MLC (Ex.PW-4/A). The time of arrival at AIIMS was noted as 5.12 pm. In the MLC PW-4 noted “alleged history of gun-shot injury on right knee when he was going to milk shop (milk dairy).” PW-4 further noted “Suture wound 4 cm long on right knee. (No exit wound).” He advised x-ray knee cap and noted the injury in MLC as simple. The x-ray report of the Radiologist of that day states “no fracture seen”.

7. In his cross-examination, PW-4 maintained that although he could not see the wound in the original condition, on seeing it he found that “the same was possible only through gun-shot.” He also stated that the injury of the said nature was not possible if the knee was struck against a metallic object or if the individual fell on a hard surface. PW-4 in his cross-examination further volunteered that the bullet was fired from a straight position from a level of 2 or 3 feet from the ground. He agreed that he was not a forensic expert. At the time PW-4 examined PW-14, the latter was wearing a half pant. According to PW-14 himself he was

wearing jeans at the time when the firing took place and he handed over the said jeans to the police at the spot and the handing over memo (Ex.PW-9/E) was prepared.

8. A significant feature of the case is that although the jeans was sent to the FSL for examination the police appears not to have received any report from the FSL about the holes found on the right knee area of the jeans. It is also not known if there was any blood stains found on the jeans. There was no FSL report on these aspects.

The evidence of the eye-witnesses

9. As to what transpired on 9th October 2005 at around 3.30 pm is spoken to by several eye-witnesses. Ashwani (PW-1) states that when the water tanker came there, the Appellant removed the bucket of PW-10 and put his own bucket and due to that a quarrel started between the two. Thereafter the Appellant took out his gun and fired at PW-10. PW-10 ducked to avoid the bullet, which then hit PW-14 who was standing behind. In his cross-examination, PW-1 stated that the width of the street was about 10 feet. The water was drawn from the rear side of the water tanker which was in front of the house of the Appellant. He stated that PW-14 was standing at a distance of 1-2 feet from PW-10 at that time and that he saw PW-14 had sustained injury by the shot just below the knee on the front side. He claimed that PW-14 had started bleeding and he had seen the blood. However, PW-1 neither accompanied PW-14 to the hospital nor called the police. He nevertheless gave a statement to the police.

10. The second witness who speaks about what happened was Sukh Ram (PW-2), the father of PW-10. He too stated that when the quarrel took place between PW-10 and the Appellant, the latter took out his pistol and fired at PW-10 and the shot hit the right knee of PW-14 who was standing in the queue at the Mother Dairy which was just near the house of the Appellant. On the site plan (Ex.PW-2/DA), PW-2 pointed out mark 'X' as the place where the Mother Dairy was located. He denied the suggestion that they had tried to assault the Appellant and the Appellant in his defence fired in the air to scare them. He further stated that there was a stampede after the firing.

11. The third eye-witness was Mana Devi (PW-5), the mother of PW-10. She stated that when the quarrel took place between the Appellant and the PW-10, the Appellant took out a pistol and fired at PW-10. She stated that PW-10 did not get any injury as he escaped by sitting on the ground and the fired shot hit someone else residing in another street. In her cross-examination by counsel for the accused, PW-5 stated that it was not PW-6 who had recorded her statement. She admitted that the father of the Appellant had extended his shop by about 10 feet prior to the incident but denied the suggestion that she and her family members bore any grudge against the Appellant on that score. In her cross-examination she further stated as under:

“The shot was fired towards our house. I cannot say if injured Deep Chand was behind my son Sohan when the accused fired the shot. When the accused fired at my son, my son escaped himself by bending towards one side. I cannot say if my son bent towards left or right side. There were number of public persons

between me and my son when the shot was fired. I did not see blood at the spot.”

12. Importantly, as regards the recovery of the lead from the spot, PW-5 stated as under:

“On the next day of incident, the lead was recovered from the spot when the street was cleaned/swept by my daughter.”

13. PW-7, Om Prakash, spoke about the quarrel between PW-10 and the Appellant in front of the water tanker. He stated that the latter took out his pistol and fired at PW-10 and PW-10 in the meantime stepped aside to avoid the bullet which hit PW-14 who was standing behind. In his cross-examination PW-7 stated that there was a physical scuffle between the two which continued for some time. He stated that 25-30 public persons were present. He further clarified that PW-10 was his nephew.

14. The next eye-witness was PW-10 who simply stated that “someone made telephone call to the police at 100.” He further clarified that the Appellant was arrested at the spot. He stated in his cross-examination that he did not see holes in the pant of injured PW-14. He claimed that the cartridge was found at point Y in the site map (Ex.PW-2/DA).

15. Before evaluating the evidence of the above eye-witnesses, it must be recalled that the Appellant was acquitted by the trial Court of the offence under Section 324 IPC as the prosecution was unable to prove that he voluntarily caused hurt to PW-14. The trial Court concluded

that the firing of gunshot in itself was sufficient to attract the offence under Section 307 IPC “though bullet has not hit the Complainant but another person injured Deep Chand.” It was further concluded that since “there was no intention of accused to voluntarily cause hurt to injured Deep Chand, offence under Section 324 IPC is not attracted.” The trial Court appears to have proceeded on the basis that there was complete corroboration of the versions of the eye witnesses regarding the date, time and place of occurrence and also the fact that the quarrel took place between the Appellant and PW-10. It concluded that the failure to recover the blood that was present at the spot or on the bullet that was recovered from the place is immaterial since the eye witnesses had proved the same and the Appellant himself admitted that he was present at the spot and had fired the shot. PW-8 was treated to be a hostile witness whereas PW-4 was stated to be a reliable witness. The trial Court concluded that as the “accused was armed with revolver at the spot, it is difficult to believe that anybody or one or more person from the public would try to attack him.”

16. Therefore, the entire case was about the Appellant attempting to kill PW-10 thus attracting the offence under Section 307 IPC. If PW-14 was not standing behind PW-10 as claimed, then the prosecution case regarding the Appellant attempting to kill PW-10 cannot hold. The Appellant never denied that he had opened fire. The only question, as correctly formulated by the trial Court, is whether he opened fire in the air in defence as claimed by him or whether he fired at PW-10 which then missed the target and hit PW-14.

17. The above eye-witnesses, who have deposed, except PW-1, are related to PW-10 and are, therefore, interested witnesses. For e.g., PW-2 is the father, PW-5 is the mother and PW-7 is the uncle of PW-10. If the Appellant was the one who had fired at PW-10, it is not explained why it was he (and not PW-10 or any of his relatives) who gave the first call to the PCR at 3.35 pm itself about the firing. Their evidence has to be accepted with some caution and the Court would be justified in seeking corroboration by other independent evidence. This important aspect was not kept in view by the trial Court.

The evidence of PW-14

18. The evidence of PW-14, the injured witness, becomes critical to the entire case of the prosecution. PW-14 stated that he had a steel *dolchi* with him for carrying the milk. He clarified that the Mother Dairy had two sides open. One was towards the *gali* and other was towards the main road. When the quarrel started between the Appellant and PW-10, the line was broken and he was around 12 to 13 feet away from the Mother Dairy when he was hit by the bullet. PW-14 stated that when he was hit by the bullet, he was facing towards PW-10. The latter was standing in front of his house. He subsequently clarified that he was standing behind PW-10 at a distance of 2 feet. He stated that 50-60 persons present when the Appellant had fired but there was no public person in between him, PW-10 and the Appellant. Importantly PW-14 stated that “the police did not prepare any site plan of the spot at my instance. Police had seized my pant in PS. I do not remember the time when it was seized. It was evening/night time. I was wearing Ex.P6 at the time of incident.” PW-14 stated that the bullet had crossed after

touching his knee and it had not pierced through his leg. He admitted that the injury was on the right side, i.e., outer part of his knee. He clarified that he was first taken to the local doctor. However, PW-14 was unable to walk. He did not know how he was taken to local doctor, i.e., on foot or in any vehicle. He admitted that "I did not disclose the doctor as to who had fired and caused injury." From the local doctor, the police took him to the PS and from there they took him to AIIMS. After he was taken to the PS from the local doctor, the police made the Appellant sit at the PS. After discharge from AIIMS he was brought to the spot by the police. He denied that he had received the injury on his leg in the melee after firing in the air by the Appellant.

19. The sentence in the cross-examination of PW-14 that has been repeatedly stressed by learned counsel for the Appellant is that "I was standing at point A in photograph Ex.PW-14/DA at the time of incident." The said photograph Ex.PW-14/DA produced by the Appellant in the trial Court shows that the shop of the Appellant is virtually abutting the Mother Dairy booth. The point A is exactly in front of the Mother Dairy. In his answer PW-14 is clear that PW-10 was standing in front of his house and the Appellant was on the side of the shop which are opposite to each other. It was not possible therefore, for PW-14, if he was at point A in front of the Mother Dairy, to be also standing behind PW-10 because the house of PW-10, which admittedly is A-86, is on the opposite side of the Mother Dairy which incidentally has not been specifically highlighted by the SI Brahm Prakash (PW-15) who prepared the site plan. It was indicated at point X by one of the PWs during examination in Court but in fact it was not shown in the

site map prepared by PW-15. It is unfortunate that the site map does not give the correct picture of the scene of crime. Importantly, it was necessary to show in the site plan where exactly, at the time of firing, the Appellant, PW-10 and PW-14 were standing. This crucial aspect is missing in the site map.

20. The second problem with the site map is that it has not been prepared at the instance of PW-14, who would have been in the best position to tell the police where the Appellant, PW-10 and PW-14 were standing. The third difficulty is that it should have been easily possible for the IO to have the photographs of the scene of crime taken forthwith to give a precise idea of where exactly the Mother Dairy was located, where the house of the Appellant, i.e., A-91/92, was located and where the house of PW-10, Sohan Lal, i.e., A-86 was located. The spot where the bullet was recovered, shown by PW-10 to be point Y in the site plan, is contradicted by PW-5 who stated that it was recovered “when the street was cleaned/swept by my daughter” the following day.

21. A piece of evidence that could have corroborated the versions of PW-10 and his relatives is the FSL report on the holes and blood stains, if any, on the jeans worn by PW-14 when he received the injury. Obviously the injury to PW-14 must have resulted in blood coming out and staining the jeans. Matching the blood group of the stains, if any, on the jeans with the blood group of PW-14 would have been crucial to the case. So also, whether the hole in the jeans was as a result of the entry of a bullet. Admittedly, as spoken to by SI Brahm Prakash (PW-

15), “the pant of the injured was got sent to FSL. I do not know regarding contents of the FSL report.” No effort was made, to follow up the matter with the FSL and obtain a report. On the other hand, the jeans seems to have been returned to the IO by the FSL without a report since it was produced in the Court. Also, although it is claimed that PW-14 was found injured with a bleeding wound, no blood was recovered at the spot. Thus, the failure of the police to get the above aspects investigated raises serious doubts whether the incident took place in the manner projected by the prosecution and spoken to by the eye-witnesses.

Other unanswered questions arising from the evidence of PW-14

22. When carefully perused, the testimony of PW-14, the injured eye witness, raises several questions. He admitted that he did not tell PW-8, i.e., Dr. Majhar Ahmed who treated him first that he had received a gun-shot injury. PW-8 stated in Court that PW-14 had sustained injuries due to a fall but in his statement to the police (Ex.PW-8/A) he stated that PW-8 received a gunshot injury. The register (Ex.PW-8/B) did not show that there was any treatment for a gun shot. In his cross-examination PW-8 stated that PW-14 had sustained injuries due to falling on the road and not due to firing.

23. Dr. Parvez (PW-4) who treated PW-14 at AIIMS stated that it was gun-shot injury. PW-4 in his cross-examination stated that “the bullet was fired from straight position and the height of the injury from the ground was between two and half and three feet. The shot must have been fired from the level two or three feet. It was also possible that the

shot might be fired from a level of five or six feet.” Yet PW-4 stated that he was not a forensic expert. Therefore, the said evidence does not inspire much confidence. With the wound being already stitched up when he saw it, it could not have been possible for PW-4 to categorically state that it was a gun-shot injury.

24. This leads to another aspect, viz., the absence of the evidence of a ballistic expert who would helped the Court understand from where the bullet must have been fired if it were to hit PW-14, if he was standing behind PW-10. The entire case of the prosecution hinged on fixing correctly the position of PW-14 in relation to the direction of the fired bullet. If PW-14 was not standing right behind PW-10 as claimed, but elsewhere, then the entire case that the Appellant aimed his pistol and fired at PW-10 and when the latter ducked, it hit PW-14, must fail. Only a ballistic expert would have been able to ascertain what the trajectory of the bullet might have been if PW-14 was hit near the right knee. In the absence of such evidence, coupled with PW-14 stating that he was standing at point ‘A’ in front of the Mother Diary, there is a more than reasonable doubt whether in fact the pistol wielded by the Appellant was aimed at PW-10 with PW-14 standing right behind him.

25. If indeed PW-14 had been hit by a bullet, then the recovered lead should have been examined for any skin or blood marks. Yet, it appears that the bullet was not examined by the FSL for this. The report of the FSL dated 7th April 2006 (Ex.PX) only matches the bullet with the firearm recovered from the Appellant. The deformed bullet marked was shown to correspond to the bullet of 7.65 mm cartridge. However, the

bullet was not examined for any blood stains or skin marks.

The PCR call messages

26. The trial Court overlooked another aspect of the evidence of PW-14 to the effect that there was a scuffle between the Appellant and PW-10 for some time after which the Appellant “opened fire.” The PCR call records between 15:35 and 16:45 hours also confirmed that there was a quarrel going on between two parties. Yet another unanswered point is the intimation regarding the incident being given by the Appellant himself from his mobile phone No. 20060039. IO PW-15 confirmed that “it is correct that intimation regarding the incident as recorded in PCR form was given by accused from his telephone no. 20060039.” The said phone number also figured in the PCR form itself. It has been shown by the Appellant through certified copies of the PCR messages received from his mobile phone that he had made three calls. The third message from the Appellant was to the effect that a fight was going on in front of his shop. Yet the IO did not seek to meet the Appellant first and record his statement. It is not understood why the IO did not do so.

27. There were in fact several messages received in the PCR as is evidenced by Ex. PW-11/A. When the message was transmitted to the PCR van at 15:50 hours the report was about a quarrel going on in regard to filling of water between the two parties and one of them had opened fire. There was another message at 16:02 hours to this effect. Further messages recorded at 16:05 hours and 16:22 hours showed that the police were informed by the public that PW-14 was hit by a bullet as a result of being fired at by the Appellant. It is possible that in the

melee it must have been presumed that the injury of PW-14 must have been as a result of the firing, although as correctly held by the trial Court that was not the intended consequence. In any event the messages were not to the effect that the Appellant had aimed his pistol at PW-10.

28. For the purpose of Section 307 IPC, the manner in which the case has been made by the prosecution is important to conclusively prove that the Appellant fired bullet at PW-10 which then hit PW-14. While the evidence is clear that there was no voluntary hurt caused to PW-14 by the bullet fired, it is not conclusive that the Appellant attempted to kill PW-10 by firing a gun at him. It is not clear that PW-14 was standing right behind PW-10. The evidence in other words is not entirely inconsistent with the innocence of the Appellant for the offence under Section 307 IPC.

Decisions cited by the APP

29. Ms. Isha Khanna, learned APP for the State has placed reliance on the decision in ***Sarju Prasad v. State of Bihar AIR 1965 SC 843*** wherein the Supreme Court emphasized that it is not necessary that an injury should actually be inflicted to any vital part and the absence of such injury would itself not be sufficient to take the act out of the purview of Section 307. Yet, the prosecution had to lead evidence which would lead to the inference that “the Appellant had a motive to kill the victim of his attack.” The question to be answered was whether “the Appellant intended to cause such injury as he knew to be likely to cause death or intended to inflict an injury which was sufficient in the

ordinary course of nature to cause death or that he knew that his act was so imminently dangerous that it must in all probability cause death or cause an injury as is likely to cause death”.

30. Ms. Khanna has also placed reliance on the decision of the Division Bench of this Court in *Surinder Pal @ Billoo v. State of Delhi 2009 Lawsuit (Del) 136* to urge that there was no law which prevented the Court from basing a conviction on the testimony of the eye-witnesses if they were reliable and trustworthy. However, in that case the injuries were caused by a knife and the witnesses were able to prove that the injuries had been caused by the Appellant after he stabbed the deceased who themselves gave him a danda blow. In the circumstances, it was held that it cannot be said that the Appellant inflicted injuries to the deceased in his defence. However, in the present case it is clear that there was a fight going on prior to the firing as is evident from the calls made to the PCR by the Appellant himself between 15:35 and 15:45 hours.

31. The third decision relied upon by Ms. Khanna is *State (NCT of Delhi) v. Prakash 2012 LawSuit (Del) 286*. This is in support of her contention that the plea taken by the Appellant in his bail application would also be relevant in considering whether his plea in his statement under Section 313 Cr PC is consistent and truthful. There is a handwritten bail application of the Appellant dated 10th October 2005 in which he stated that the injured and his other companions were the assailants and had attacked “the applicant and his family members and in order to save his life and property, the applicant had to fire in the air

and in the melee thereafter the injured fell down and sustained injuries due to fall and he was discharged from the hospital after first aid.” Ms. Khanna submitted that although the bail application referred to both the Appellant “and his family members” having been attacked, in his statement under Section 313 Cr PC he made no mention of his family members being also attacked. In his statement under Section 313 Cr PC, the Appellant stated that he “did not quarrel with anybody. However, some public persons were quarrelling and when I intervened they turned hostile to me and attacked me.” In the considered view of the Court, the mere fact that in his bail application, the Appellant stated that he and his family members were attacked whereas in his statement under Section 313 Cr PC he stated that he alone was attacked cannot be viewed as a major inconsistency. In answer to question No. 3 the Appellant stated that “it is incorrect. I did not give any beatings to Sohan Lal. When the crowd attacked me I ran towards my house and fired in the air. I did not aim towards any one and PW Deep Chand sustained injuries by falling when the crowd was running. I did not cause injury to PW Deep Chand.” The circumstances of the present case are, therefore, different from the factual context in the aforementioned decision.

32. All the above reasons persuade the Court to give the benefit of doubt to the Appellant. The Court is, therefore, unable to concur with the finding of the trial Court that the offence under Section 307 IPC has been proved by the prosecution against the Appellant beyond all reasonable doubt.

Conclusion

33. For the aforesaid reasons, this Court sets aside the impugned judgment dated 11th September 2008 and the order on sentence dated 15th September 2008 of the trial Court. The Appellant is acquitted of the offence under Section 307 IPC.

34. The appeal is allowed with no order as to costs. The bail bond and surety bond of the Appellant shall continue for a period of six months in terms of Section 437A Cr PC.

35. The trial Court record along with a certified copy of this order be sent to the trial Court forthwith.

S. MURALIDHAR, J

DECEMBER 23, 2014
dn/Rk