

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

Judgment Reserved on: February 26, 2016

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Judgment Delivered on: March 22, 2016

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CRL.A. 106/2016

PRAVEEN DHAMA

..... Appellant

Represented by: Mr.R.S.Juneja, Ms.Amandeep
Kaur, Advs.

versus

THE STATE OF DELHI

..... Respondent

Represented by: Mr.Varun Goswami, APP for
State with Insp.Mukesh Jain, SI
Ishwari Prasad, SI Amit
Verma, PS Gokalpuri.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Praveen Dhama @ Shunty has been convicted for the offence of murder of Tinku vide the impugned judgment dated December 22, 2015 and directed to undergo imprisonment for life and to pay a fine of ₹20,000/- for the offence punishable under Section 302 IPC vide the order on sentence dated January 07, 2016. The learned ASJ has convicted Praveen on the testimony of the two eye-witnesses Braham Dev PW-1 and Jaipal Rana PW-2 besides the recovery of the pistol from Praveen returning a finding that the FSL report clearly established that the deceased suffered injury from the shot fired by Praveen from his pistol of .315 bore.

2. Learned counsel for Praveen assailing the impugned judgment contends that the rough site plan and the scale site plan do not tally. From

the site plans one cannot make out from where Praveen allegedly fired the shot and where Tinku received the shot. The scaled site plan was not prepared at the instance of any eye-witness. From the testimony of Subhash PW-11 and Amit Rana PW-15 it is proved that both the alleged prosecution eye-witnesses Jaipal Rana and Braham Dev were not present at the spot when the incident took place. Despite the claim of the eye-witnesses that they were present at the spot, the investigating officer found no eye-witness at the spot, did not record their statement and sent the rukka from the hospital. There are contradictions in the testimonies of the two alleged eye-witnesses. Further the investigating officer does not support the version of the two eye-witnesses. Once the presence of two alleged eye-witnesses at the spot is doubtful then appellant is entitled to the benefit of doubt. Even as per the witnesses, real brother of the deceased was present at the spot who was aged 17 years but for reasons best known to the prosecution he has not been examined as a witness. The alleged recovery of pistol is not connected with the offence committed and the learned Trial Court wrongly relied upon the FSL report to connect the appellant with the offence committed.

3. Learned APP on the other hand contends that both Braham Dev and Jaipal Rana were natural witnesses being the cousin brother of the deceased and the owner of the factory where the deceased was working. Immediately after witnessing the incident, they ran after the accused which would not give rise to an inference that they were not present at the spot. There being no contradictions in the testimony of the two eye-witnesses and their versions being duly corroborated in material particulars, the appeal be dismissed.

4. The prosecution case hinges on 5 material witnesses Braham Dev

PW-1, Jaipal Rana PW-2, the two eye-witnesses, Amit Rana PW-5 who made the PCR call and Subhash PW-11 who took the deceased to the hospital besides the investigating officer SI Ishwari Prasad PW-19. To be able to base the conviction of Praveen on the testimony of the two eye-witnesses, we make an endeavour to re-construct the scene as deposed by the witnesses.

5. Subhash PW-11 R/o H.No.48, Gali No.4, H-Block, Ganga Vihar deposed that on the day of incident i.e. June 25, 2011 he was at his residence on the roof top when around 10.00 PM he heard a sound of bullet fire and he came downstairs. He saw Tinku lying in the gali near the factory with blood around him. From the workers he heard that Shunty had caused bullet injuries to Tinku. He reached the house of Amit Rana, son of Jaipal Rana and brought Amit to the spot. Amit made a call to 100 number and then went to the main road. Subhash picked up Tinku, put him in an auto-rickshaw, took him to GTB hospital and got him admitted there.

6. The fact that Subhash got admitted Tinku in the hospital is corroborated by the MLC Ex.PW-12/A which notes "brought by Subhash". In his cross-examination he further clarifies that one boy Ajay informed him that the incident of bullet fire had occurred and thus he along with Ajay reached the spot in about 3-4 minutes. He stayed at the spot for a minute and then proceeded to Amit Rana's house which was at a distance of around 100 meters and it took him 2-3 minutes to walk. He further clarified in cross-examination that Amit Rana was with him when he reached the spot and at that point of time Braham Dev @ Bunty was not with them. The time was approximately 10.00 PM at that time. This fact is corroborated by the PCR call information proved as Ex.PW-10/A received at 22:05:13 hours on

June 25, 2011. The name of the informant was Amit Kumar, house number 113-B, H Block, New Ganga Nagar, Ganga Puri. The information received was “*Yahan par ek admi ko goli maar di hai*”. According to Subhash thereafter Amit left the spot and he hired an auto-rickshaw and took Tinku to GTB hospital. As per the MLC Ex.PW-12/A the time and date of examination after reaching the hospital is 10.45 PM on June 25, 2011. In cross-examination Subhash clarified that till the time he took the deceased to the hospital, neither Braham Dev nor Jaipal Rana were at the spot. Ajay who had informed him about the incident was the younger brother of the deceased Tinku who has not been examined. It is Ajay who had gone to Subhash and called him to the place of incident where after they went to call Amit Rana who made the PCR call. He admitted that till the time Police enquired from him in the hospital he was not aware who had caused bullet injury to Tinku except that from Ajay he had come to know that Shunty had caused that bullet injury to Tinku.

7. From the evidence of Subhash who was a relative of the deceased, it is evident that Ajay the younger brother of deceased Tinku was probably the eye-witness or in the vicinity when the incident took place and for reasons best known to the prosecution this witness was neither examined under Section 161 Cr.P.C. nor before the Court. Though Subhash admitted that Braham Dev and Jaipal Rana came to the hospital, however he stated that when Tinku was declared dead Jaipal Rana and Braham Dev were not present in the hospital. He however stated that statements of both Jaipal Rana and Braham Dev were recorded by the Police in his presence at the hospital. From the testimony of Subhash it is apparent that within around 5 minutes of the shooting he was at the place of incident where after he went

to call Amit Rana and was again at the spot when he hired an auto-rickshaw and took the deceased to the hospital. This entire exercise would have taken around 20-25 minutes at least if not more.

8. We now proceed to analyse the statement of Amit Rana PW-5 S/o Jaipal Rana, R/o H.No.113, Gali No.7, Ganga Vihar, Delhi-94. Amit Rana deposed that they were manufacturing juicer mixer bodies from their premises in Ganga Vihar. He had a mobile phone number 9818916368. On the date of incident i.e. June 26, 2011 at around 10.00 PM (night) he was taking dinner at his house when 2-3 boys and Subhash came to his house from the factory. The other two boys were Ajay and Rajesh. They informed that Shunty had caused firearm injury to Bunty. He rushed from his house to the factory where he saw Tinku @ Bunty lying in the gali near factory. He made a call to 100 number and then left the spot.

9. Amit Rana has been cross-examined by the learned APP and in his cross-examination by the learned APP this witness stated that Braham Dev @ Bunty was one of the workers who had come to his house on June 25, 2011 and conveyed him the information that Tinku had been caused a bullet injury. He further stated that Tinku had been removed in an auto-rickshaw by Braham Dev along with an associate to GTB. In cross-examination by the learned counsel for the accused, Amit Rana stated that the distance between his house and the factory was around 100-150 meters and he had made 100 number call from the spot. He reiterated that he accompanied Braham Dev to the spot and reached there within a minute. The Police had arrived in 5 minutes after he made the call. He further stated that he had seen one firearm (katta) lying on the spot which was taken in possession and custody by the Police. On this part of his testimony that a katta was lying on

the spot which was seized by the Police there is no re-examination of the witness conducted by the learned APP.

10. We now analyse the testimony of PW-1 Braham Dev, the maker of the FIR and the cousin brother of the deceased Tinku. Braham Dev in his examination-in-chief deposed that he was working in the factory situated at H-113, Ganga Vihar at the time of incident. On June 25, 2011 at around 10 PM he was working inside the factory and his cousin Tinku who also used to work in his factory was eating food. Praveen @ Shunty came from outside and abused him and Tinku, calling them outside the factory. He and Tinku came out of the factory when a physical fight ensued between Praveen and Tinku. He intervened on which Praveen @ Shunty uttered “*aaj tera kaam tamaam kar dounga*”. Praveen took out a country made pistol from his pant and aimed at Tinku. He rushed to intervene but was pushed aside and Praveen fired on Tinku. The bullet hit Tinku’s chest and Tinku fell on the ground. Praveen tried to run away when he and Jaipal Rana who was also present at the spot and witnessed the incident ran after Praveen to apprehend him but Praveen succeeded in running away and they could not apprehend him. When they returned at the spot by that time Tinku had already been removed to GTB hospital by some people accompanied by one Subhash. Thereafter he and Jaipal Rana reached GTB hospital. He got his statement Ex.PW-1/A recorded on the basis of which FIR was registered. He spoke about lifting of blood samples, blood stained earth and earth control picked up from the spot and seized. He further deposed that he, Jaipal Rana and Police officials went to the house of Praveen where he was not found. While returning they saw Praveen present at a juice shop situated near Joharipur toll tax. Police apprehended Praveen at his instance. From the

search of Praveen, a country made pistol was recovered which was loaded with a fired empty cartridge. From his left side pocket two live cartridges were recovered. He was arrested and the weapon along with the fired empty cartridge and live cartridges was seized. He identified the weapon recovered from the possession of Praveen in the Court and the clothes of the deceased.

11. In his cross-examination Braham Dev admitted that when call at 100 number was made neither he nor Jaipal Rana was present at the spot. He clarified that since they had chased the assailant which was the entire gali the distance whereof he could not describe, they were not present when the call was made. According to this witness gali in front of the factory H-113 was around 3 steps wide, however he could not tell the length of the gali. He stated that he covered the entire gali and a further little distance and searched the assailant for about 10 minutes and by the time he came back the body of the deceased had been removed by brother-in-law of his cousin Dev Raj namely Subhash along with 2-3 persons. He stated that he and Jaipal were together when they searched the assailant after the chase. Dev Raj and his wife Neetu used to reside in gali No.6 whereas factory was in gali No.8. According to Braham Dev, the distance between his residence in gali No.3 and the factory was about 1 or 2 minutes walk. He admitted that the factory H-113 was located in a gali which was closed on one end.

12. Jaipal Rana PW-2 in his examination-in-chief stated that at around 10.30 PM on June 25, 2011 he was busy doing work in the factory along with 3-4 boys including Braham Dev @ Buntty and Tinku. At that time Shuntty @ Praveen arrived and gave a call to Braham Dev and Tinku. There was an exchange of hot words between Braham Dev & Tinku and Shuntty on the other side in the gali outside the gate of factory. On hearing exchange of

words he came out of the factory and saw Shunty uttering words “*aaj mein tumhe dekhun ga*”. Shunty took out a weapon which appeared like a pistol from his right side pocket and aiming at Tinku fired a shot. The shot fired hit Tinku on his abdomen/ stomach. Shunty tried to run away, so he and Braham Dev chased Shunty but were unable to apprehend him. When they reached back at the spot, Subhash and some other relatives of Tinku had removed him to GTB hospital. He and Braham Dev then reached GTB hospital. Police officer who was present in the hospital accompanied them to the place of occurrence where they lifted blood, blood stained earth and earth control. Then he accompanied the Police to search Shunty and went to his house. Father of Shunty was available but Shunty was not present at his house. When they proceeded and came to the road they noticed Shunty was present at a juice shop and was taking juice. Police apprehended Shunty. A firearm pistol was recovered from his possession from his right side of the pant and the pistol contained an empty cartridge. He identified the clothes of the deceased.

13. In his cross-examination he has been confronted with various portions to show improvements made in his examination-in-chief before the Court. Jaipal Rana stated that his house was in Ganga Vihar itself and was about 5-7 houses away from his factory H-113, however H-113 was in Delhi whereas his house was in Loni, U.P. In his cross-examination he stated that he and Braham Dev chased the assailant for a distance of about 1000-1100 meters and returned after about 15 minutes, and when they came back after 15 minutes they found lot of public as well as Police at the spot. In his cross-examination he further stated that as soon as they reached the place of occurrence after the chase, Braham Dev remained at the spot and he

proceeded with the Police to the house of assailant which was within 10 minutes of reaching the spot. He further stated that he and Braham Dev both left the spot for the hospital. He was also confronted with his portion of the statement where exhortation of Shunty saying “*aaj mein tumhe dekh loonga*” was not recorded in his previous statement.

14. This brings us to the testimony of the investigating officer SI Ishwari Prasad PW-19. SI Ishwari Prasad stated that on receipt of DD No.26A Ex.PW-18/A informing that a person has been shot at house No.113 H Block, Ganga Vihar, he along with Constable Rajender went at the spot where they found that the injured had been removed to GTB hospital. Meanwhile Constable Naresh also reached the spot. He instructed Constable Naresh to safeguard the place of occurrence and he along with Constable Rajender went to GTB hospital. He collected the MLC of Tinku wherein alleged history of gunshot injury at H Block, Ganga Vihar, Loni at around 9.30 PM on June 25, 2011 was noted and Tinku was declared unfit for statement. Eye-witness Braham Dev @ Buntty Sagar met him in the hospital and he recorded his statement Ex.PW-1/A on the basis of which rukka was prepared and sent for registration of FIR. He came back to the spot along with Braham Dev where he found another eye-witness Jaipal Rana. He prepared the site plan Ex.PW-2/D at the instance of Jaipal Rana and lifted the blood, blood stained earth and earth control. He got the site inspected by crime team and photographed. Thereafter he along with Constable Rajender, eye-witnesses Braham Dev and Jaipal Rana went to the house of Praveen Dhama named in the FIR but did not find him at his residence. When they were coming back to the PS near toll tax, Johripur there was a juice shop, they found Praveen Dhama standing at the juice shop and was

identified by Jaipal and Braham Dev. On this Praveen Dhama was apprehended and from his right side pocket one country made katta was recovered. Besides the country made pistol, an empty cartridge case inside the pistol and two live cartridges from the left side pocket were recovered; which were sealed, and FSL form was filled up. On July 12, 2011 SI Mukesh Jain, draftsman PW-4 on his pointing out prepared the rough notes and handed over the scale site plan on July 13, 2011.

15. In his cross-examination SI Ishwari Prasad admitted that when he reached the spot he did not find any eye-witness. None of the public persons present came forward to pass on any information concerning the incident. Having reached the spot he stayed there for about 10-12 minutes till 10.40 PM. PCR had not arrived at spot till then. Constable Naresh had reached the spot by around 10.30 PM. He went inside the factory but found no document to show that the deceased was working in the factory. He admitted that he collected the MLC of the victim at around 11.00 or 11.05 PM and in the MLC name of one Subhash was mentioned, however he did not meet any Subhash in the hospital and the MLC mentioned that the incident took place at 9.30 PM. He further clarified that Subhash neither met him on the spot nor in the hospital on the day of incident.

16. From the statement of Subhash, it is clear that neither Braham Dev @ Buntty nor Jaipal Rana were at the spot till he took Tinku to the hospital. Further both Braham Dev @ Buntty and Jaipal Rana did not reach the hospital till Tinku was declared dead and reached only thereafter when their statements were recorded by the police. From the statement of Amit Rana and the suggestions given by learned APP, it is evident that Braham Dev @ Buntty went to his house to convey that Tinku had been caused bullet injury

and that Tinku had been removed in an auto-rickshaw by Subhash with an associate to GTB Hospital. Further as per Amit Rana the weapon of offence was recovered from the spot itself. As per Braham Dev, Praveen @ Shunty uttered "*aaj tera kaam tamaam kar doonga*" before firing whereas as per Jaipal Rana, Shunty uttered the words "*aaj mein tumeh dekhun ga*" before firing. As noted above, the exhortations attributed to Shunty by Braham Dev and Jaipal Rana before firing are major improvements in their statements before the Court. Further as per Jaipal Rana, Braham Dev stayed at the spot whereas he along with police went to search Shunty whereas as per Braham Dev both Braham Dev and Jaipal Rana along with police went in search of Shunty. According to SI Ishwari Prasad PW-19 he did not meet Jaipal Rana in the hospital and only met Braham Dev whose statement he recorded Ex.PW-1/A. As per SI Ishwari Prasad, he met Jaipal Rana at the spot only after he came back from the hospital. Though the case of Braham Dev and Jaipal Rana is that they were not present at the spot when Tinku was taken to the hospital because they chased Shunty however they came back to the spot in 20-25 minutes, but SI Ishwari Prasad, who on receipt of information, had reached the spot at around 10.25/10.26 pm stated that till 10.40 pm he did not meet either Braham Dev or Jaipal Rana at the spot.

17. As noted above the testimony of the two alleged eye-witnesses Braham Dev and Jaipal Rana does not inspire confidence about their presence on the spot at the time of incident. Conviction can be based on their testimony only if some corroboration to the same is available. However we find no corroboration to the testimony of these two witnesses from the other evidence on record.

18. As per rough site plan Ex.PW-2/D only two spots are mentioned A &

B; 'A' outside the factory and 'B' inside. In Ex.PW-2/D mark 'A' is the place and we note in vernacular "*Jahan shikayat-karta Bunty Sagar ne muljim Shunty @ Praveen Dhama dwara Tinku ko goli marna bayan huan hai*" and mark 'B' "*Veh sathan hai jahan se Tinku se muljim Shunty @ Praveen Dhama dwara awaaj dekar bahar bulaya thaa*" From this marked position it is not clear whether 'A' is the place from where Praveen fired shot at Tinku or Tinku received the gunshot or Braham Dev @ Bunty Sagar witnessed the incident. The scale site plan Ex.PW-4/A depicts three places of mark A, B & C all in the gali. Ex.PW-4/A was made at the instance of SI Ishwari Prasad by PW-4 SI Mukesh Jain and one wonders when the spots were not identified in the rough sketch plan by the eye-witness, how in the absence of eye-witness the same could appear in the scale site plan. Thus not only there are material contradictions and improvements in the testimony of material witnesses, there is no material to corroborate their presence at the spot.

19. The case against the prosecution is further compounded by the so-called recovery of weapon of offence i.e. country made pistol relied upon by the learned ASJ. The country made pistol was not recovered from the spot as per the eye-witnesses and the investigating officer though it was stated to be recovered from the spot by Amit. Further the fired cartridge case with which the test fired cartridge cases have been opined to tally was present in the pistol itself when the same was seized by the investigating officer. The cartridge case has not been recovered from the spot nor was the lead which had entered the body of the deceased recovered. Thus the weapon of offence recovered does not connect with the offence committed.

20. In view of the vacillating testimonies of the two eye-witnesses which

are not corroborated on material particulars, creating a doubt as to their presence at the spot, we are of the opinion that Praveen Dhama @ Shunty is entitled to benefit of doubt. Consequently, the impugned judgment of conviction of the appellant under Section 302 IPC and order on sentence are set aside. Praveen Dhama @ Shunty who is presently in custody be released forthwith.

21. Appeal is disposed of.

22. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

23. TCR be returned.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MARCH 22, 2016
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