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

% *Judgment delivered on: 27.09.2017*

+ **CRL.A. 118/2016**

SULEMAN alias PILLU Appellant
Through: Mr. Ajay Verma, Adv.

Versus

STATE OF NCT OF DELHI Respondent
Through: Ms. Rajni Gupta, APP for State.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

1. The appellant has been convicted for the murder of one Ibrahim under section 302/34 Indian Penal Code, 1860 ("IPC") and sentenced to life imprisonment, and to pay a fine of Rs.1,00,000/- in default of payment of which he is to undergo simple imprisonment for a period of one year.

2. The prosecution's case is that on the 25th April, 2008 at about 8.05 pm, the local police concerned received an information that a boy Ibrahim has been shot by firearm near Street No. 2, near Hanuman Temple, Mauzpur, Seelampur, Delhi. According to his father Aslam (PW1), Ibrahim had quarreled with the appellant Suleman two days earlier on the 23rd of April, 2008. However, the matter was resolved with the intervention of well

wishers; hence no report of the quarrel was lodged with the police. According to Aslam, on the day of the incident, Suleman had been loitering about his house and had asked Aslam twice about the whereabouts of Ibrahim. Aslam was a resident of Mohalla Bajrang, Mauzpur, Seelampur. Around 8 p.m. Aslam came out of his house and saw Suleman, the appellant, along with 2-3 others grappling with Ibrahim. The appellant exhorted his accomplices to finish off Ibrahim, and they shot Ibrahim with a country-made pistol (*katta*) and assaulted him with *gupti* in his stomach and on his feet. While trying to avert injuries from being inflicted on Ibrahim, Abdul Salam (PW2), the uncle of the deceased, also sustained injuries. On account of the grievous assault, Ibrahim fell down at the spot. The appellant and his accomplices/companions escaped from the area whilst firing shots in the air. Ibrahim was taken to GTB Hospital where he was declared dead upon arrival. On receiving the information at 8.05 pm, the police made a Daily Diary (DD) No. 26-A. The case was assigned to ASI Laik Ahmed. Head Constable (HC) Krishan Kumar went to the spot and found two slippers (*chappals*) covered with blood lying at the spot. HC Mahender Singh also arrived there. While he was left there to guard the crime spot, the other two policemen went to the GTB hospital. They collected MLC No. C-1712/2008. Statement of PW1 was recorded. The Investigation Officer (IO) prepared a rukka and on the basis of that rukka an FIR was registered under Sections 302/34 of the IPC. The Crime team inspected the place of crime; photographed it; collected earth sample and prepared *pulandas* of the same. A site plan was also prepared on Aslam's intimation. The appellant Suleman was arrested on the same day whilst three other persons namely Javed, Janu @ Nafis and Jaigam @ Babloo were arrested on 04.05.2008

upon the statement of the appellant. The latter three too disclosed similar facts as disclosed by Suleman. The postmortem of Ibrahim was conducted on 27.04.2008. Separate disclosure statements of all the accused were recorded. However, all of them refused to participate in the TIP proceedings. Suleman, the appellant and Jaigam @ Babloo opted to not lead any evidence. Accused Jaigam pleaded not guilty and argued that he was falsely implicated in connivance with the complainant and the police. Janu @ Nafis pleaded that he had never met Suleman nor was any weapon recovered at his instance. All the co-accused, i.e., Janu @ Nafis, Jaigam @ Babloo and Javed were acquitted due to insufficient evidence against them. Javed and Janu were acquitted on the ground that the link between them and the alleged crime between could not be proved by the prosecution and there was doubt about the recovery of a knife from either Javed or Janu @ Nafis. The Trial Court found that the prosecution did not prove its case beyond all reasonable doubt regarding Javed, Janu and Jaigam or that they or any of them had committed murder punishable under Section 302/34 IPC, in furtherance of their common intention or in furtherance of common intention with Suleman. Accordingly, they were acquitted of the offences under Sections 302/34 IPC. Janu was also acquitted of the offence of possessing and using a knife, under Section 25/27 Arms Act.

3. The first ground of challenge by the appellant is that that the weapon of offence, i.e., sword/*gubti*, as alleged by PW-5 was never recovered, nor was the pistol which is alleged to have been used in the murder. The learned counsel for the appellant submits that the case against the appellant has not been proved beyond reasonable doubt because the firearm which the

appellant allegedly used to shoot the deceased was never recovered and only a knife as opposed to a “*gupti*”, was recovered at his instance. He submits that the sharp *gupti*/sword was never recovered and that knives were planted on the accused, and this raises doubts about the prosecution’s case. Furthermore, there are contradictions between the statements of PW-1 and PW-2 regarding when they reached the spot i.e. during the occurrence of or after the incident; if it was the latter, then they could not have witnessed the incident.

4. Ms. Gupta, learned APP for the state submits that the deceased Ibrahim was assaulted by the appellant and his co-accused Javed, Janu and Jaigam at about 8.05 pm on 25.04.2008, when Suleman shot him twice through a firearm and the latter three assaulted him with a sharp-edged weapon. The postmortem report prepared on 26.4.2008 at about 11.45 am concluded that all injuries were ante mortem in nature and injuries No. 7 & 8 were caused by a firearm. Injury No. 1 was possible by the recovered knife while injuries No. 3, 8 and 9 were possible by a knife. It has recorded that there was a firearm entry wound of 2 cm x 1 cm near the mid line of the abdomen, 15 cm below in the abdomen and cause of death was recorded as hemorrhage shock due to ante mortem injury to abdominal organ and vessels, produced by the projectile of firearm and contributed by stab injury to abdomen produced by single sharp-edged weapon. All injuries were ante mortem in nature. Injuries Nos. 7 and 8 were individually and collectively were sufficient to cause death in ordinary course of nature. The firing of the shot from a firearm is attributed to Suleman, the appellant, which was sufficient to cause death in the ordinary course of nature. The CFSL report

recorded that one sealed paper packet contained one sealed small glass bottle which contained one bullet. It was marked as Ex. EB1. On physical examination it was found to be a fired soft nose bullet of .315 inch/8 mm caliber and the expert opinion was that it was fired through a country-made firearm (*Katta*). Counsel argues that the medical evidence as well as the testimonies of the prosecution witnesses support the sequence of events, and in the absence of any evidence to the contrary, there is no infirmity in the Trial Court findings.

5. The appellant argues that there was insufficient light at the time of the alleged murder since the electricity supply in the area concerned had ceased 15 minutes before the incident; therefore it was unlikely that anybody would have identified the appellant when the incident happened. He submits that PW1 and PW2 are in fact not eye witnesses, but have been planted at later stage, and that they would have had no way of identifying the appellant at such a late hour in the absence of adequate lighting. The counsel for the State refutes the said contention and refers to the finding of the Trial Court which observed as under:

“ 59. As mentioned above, the alleged incident took place at 8.05 p.m. Thus it was a time after sunset. Light is required to see the occurrence and identify the accused persons. IO PW-21 proved site plan of the place of occurrence as Ex. PW 21/A. PW-13 proved the scaled-site plan as Ex. PW13/A. In both site plans source of light has not been shown. PW-1 on this aspect in his cross-examination deposited that the street in front of their house is 15-20 feet wide. The Halwai shop is one side of the street and on the other side of street

there is Doctor's clinic. There was no light on the spot. The supply of electricity had failed since about 15 minutes prior to the incident. He could not tell when the supply of electricity was restored as he had taken his son to the hospital. However, he explained that all the four accused persons were at the spot and he could see them in the light of inverter which was working in the shop of milk vendor. He had told to the police in his statement that he had seen the accused persons in the light of the inverter but that statement was not found in his statement Ex. PW1/A, which was recorded by the police. He denied the suggestion that he did not see anybody causing injury to his son Ibrahim. PW-1 on this aspect deposed that the place of occurrence was about 25 feet away from the house of his brother. The assailants were running while firing and they were ahead of them by five feet. The assailants had run away towards the road which leads to Brahmpuri towards north side. They had come from west side of the crossing. He had chased and caught held one of them but he was able to free himself and then fled away. He was at a distance of about 15-20 feet from the assailants when he had seen their faces while they were running. At the time of the incident, some of the shops were closed and some were open. All the four shops situated at crossing were open. After the incident, shops were closed. There was street light on the crossing due to electric pole. The electric pole was near the shop of halwai. IO PW-21 in his cross-examination admitted that he did not show the electricity pole/source of light in the site plan."

6. The site plan further lends credence to the prosecution's case and no infirmity can be found in this regard.

7. The next ground of challenge by the appellant is that Aslam - PW-1, the father of the deceased, did not support the case of the prosecution i.e. PW-1 was declared hostile, therefore, his testimony was neither reliable nor trustworthy. The appellant relied on **Anand Kumar @ Beeru & Ors. vs. State, 2014 (1) JCC 495** wherein the Court observed that:

"23. It is this testimony of PW-2 which had to be decided on the touchstone of reliability. It is now well settled that merely because a witness has been declared hostile his evidence cannot be rejected in toto: it is not washed off altogether. However such an evidence has to be closely and cautiously examined, when a case rests upon an eye-witness account and it is a primary piece of evidence also being a case where the witness has been declared as adversarial to the version of the prosecution and has been permitted to be cross examined by the defence counsel the standard to judge his reliability is different."

8. Refuting the aforesaid contention, the respondent argues that the testimonies of two witnesses PW-1 and PW-2, i.e., Aslam and Abdul Salam - the father and uncle of the deceased Ibrahim, remains un-impeached to the extent, both had deposed, that Suleman had shot Ibrahim after exhorting his co-accused by saying "*Is saale ka kaam tamam kar dete hain*", and while his co-accused caught hold of Ibrahim, Suleman took out a country-made pistol and fired a shot at Ibrahim. PW-1 Aslam had stated that the appellant had come to his house at around 7.30-8 pm on 25.04.2008 and had called for Ibrahim and while doing so, he told him "*ab gale mil gaye hain, aisi koi baat nahi hai*". After sometime PW-1 and his brother (PW-2) Abdul Salam, on hearing a noise, came out of the house and saw that Ibrahim was

grappling with Suleman and one of the co-accused had caught hold Ibrahim from behind. Suleman exhorted his accomplices by saying “*Is saale ka kaam tamam kar dete hain*” and shot Ibrahim. This aspect of the evidence remains un-shattered. It supported the prosecution’s case that Suleman had shot the deceased by a firearm, the Trial Court found no reason to discard his statement. In ***Bhagwan Dass v. State (NCT of Delhi), (2011) 6 SCC 396***, the court observed as under:

"No doubt Smt. Dhillo Devi was declared hostile by the prosecution as she resiled from her earlier statement to the police. However, as observed in State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766 :

"The evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but can be subjected to close scrutiny and the portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

Similarly in Sheikh Zakir vs. State of Bihar AIR 1983 SC 911 this Court held :

"It is not quite strange that some witnesses do turn hostile but that by itself would not prevent a court from finding an accused guilty if there is otherwise acceptable evidence in support of the conviction."

In Himanshu alias Chintu vs. State (NCT of Delhi), (2011) 2 SCC 36 this Court held that the dependable part of the evidence of a hostile witness can be relied on. Thus it is the duty of the Court to separate the grain from the chaff, and the maxim "falsus in uno falsus in omnibus" has no

application in India vide Nisar Alli vs. The State of Uttar Pradesh AIR 1957 SC 366. In the present case we are of the opinion that Smt. Dhilllo Devi denied her earlier statement from the police because she wanted to save her son. Hence we accept her statement to the police and reject her statement in court.

The defence has not shown that the police had any enmity with the accused, or had some other reason to falsely implicate him."

9. Therefore, that portion of the testimony of hostile witness could be used which supports the case of the prosecution, provided it is coupled with other evidence of the prosecution. The Trial Court found that the testimony of PW-1 and PW-2 support each other's case, and after perusing the evidence on record, concluded that PW-1 and PW-2 had witnessed the crime and were not planted witnesses. The place of the incident was about 25 feet from the house of PW-1, therefore the presence of the father and uncle – the two witnesses, at that time of the evening could not be disputed under normal circumstances. Their being real brothers, could not be any reason to disbelieve their testimonies. PW-2 had deposed that he was present at his elder brother's house at the time of the alleged occurrence. A distance of about 25 feet can be covered within a few seconds in the case of an emergency. The Court reasoned that even if there was no street light at the place of incident, there was nevertheless sufficient light from the inverter installed at the *halwai* shop near it. Both the witnesses have specifically deposed that they saw the occurrence of the crime. Hence, there was no reason to disbelieve their testimony in this regard. The injury upon the hand

of PW-2 also supported the prosecution case that he was present at the time of the incident.

10. It is clear from the evidence on record that PW-1 and PW-2, had categorically stated that they saw Suleman fire upon the deceased, and this portion of their testimony was found trustworthy and reliable. Furthermore, the testimony of father (PW-1) who turned hostile cannot be entirely discarded if some portion of it supported the prosecution case. Reliance is placed upon ***Anand Kumar @ Beeru & Ors. Vs. State 2014(1) JCC 495.***

11. On the admissibility of testimony of hostile witness, the Trial Court relied upon the case of ***Anand Kumar @ Beeru & Ors. Vs. State 2014 (1) JCC 495*** wherein this Court held:

“ 23. It is this testimony of PW-2 which had to be decided on the touchstone of reliability. It is now well settled that merely because a witness has been declared hostile his evidence cannot be rejected in toto; it is not washed off altogether. However, such an evidence has to be closely and cautiously examined, when case rests upon an eye-witness account and it is a primary piece of evidence also being a case where the witness has been declared as adversarial to the version of the prosecution and has been permitted to be cross examined by the defence counsel the standard to judge his reliability is different.”

12. The Trial Court also relied upon the decision of this Court in the case of ***State v. Sejappa (Karnataka) 2008 Cri.L.J. 3312*** which held:

“27. As far as the acceptance of evidence of the hostile witness is concerned, it is a well settled law that part of the hostile witness which goes well

*with the prosecution case can be accepted and rejecting only that portion of the evidence which does not support the prosecution case. Therefore, applying such yardstick in the instant case, it cannot be said by any stretch of imagination that the evidence of PW-1 has to be ignored in totality merely because of a witness not supporting the prosecution case in certain minor aspects which do not have any bearing on the core of the prosecution case. ****Therefore, on the very same analogy of accepting the evidence of a hostile witness to the extent that it supports the prosecution case, the testimony of PW-2 also will have to be accepted in regard to that part of the evidence, which supports the prosecution case.”*

13. Lastly, the appellant submits that no motive was proved by the prosecution in the present case and if at all any motive existed, it was not established by the prosecution. However, the Court would note that in the cross examination, the exhortation by Suleman “*Is saale ka kaam tamam kar dete hain*” was never questioned by the defense. Therefore, insofar as the exhortation was made by Suleman, coupled with the previous quarrel between him and the deceased, the motive for revenge was shown. This evidence remained un-assailed and there is no reason to disbelieve it. The State placed reliance upon **Sat Paul v-s. Delhi Administration AIR 1976 SC 294** wherein the Supreme Court held:

41. The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him; it ignores the hard truth that another equally important object of cross-examination is to elicit admissions of facts which would help build the case of the cross-examiner. When a party with the

leave of the court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultiness of the memory in the case of such a witness would be another object of cross-examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross-examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic attitude or otherwise, the court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way.

14. PW1 and PW2 also testified to revenge being the appellants' motive for killing Ibrahim, pursuant to their altercation two days ago on 23rd April. The appellant argued that there were contradictions apropos the alleged weapon used in the fatal assault on Ibrahim. The witnesses have deposed that the alleged incident was committed by a sword/*gupti*, however, the prosecution had planted the same and showed recovery of two knives from the accused persons; the so-called *gupti* or sword was never recovered nor was the country-made pistol with which Suleman is stated to have fatally wounded Ibrahim. This non-recovery of weapon would not be fatal to the prosecution case qua the appellant because of the overwhelming evidence against him and the eye-witness testimony of PW1 and PW2. In his cross-

examination, the PW-1 had admitted that a quarrel had taken place between the appellant and his son Ibrahim. PW-2 had deposed that the said quarrel between Suleman and Ibrahim had been compromised due to the intervention of Suleman's maternal uncle. PW-2 denied that the deceased Ibrahim had beaten Suleman or that during the compromise PW-1, PW-2 and the deceased had admitted to the latter's mistake. He also denied the suggestion that no compromise had taken place on 23rd April or that no quarrel had ever taken place or that the story of a quarrel was concocted for the purposes of proving previous enmity and for falsely implicating the accused persons in this case. In view of the evidence it is clear that the prosecution has proved that Suleman had motive to eliminate the deceased Ibrahim.

15. In light of the aforementioned evidence and discussion, it is evident that minor contradictions/ discrepancies in prosecution evidence would be required to be ignored as these are bound to occur due to subjective individual perceptions and observations, hence the Court would act upon that part of the testimony which may be reliable and trustworthy.

(See *Ramesh vs. State of Himachal Pradesh (HP) 2004(4) Crimes 60; Appbhai and another vs. State of Gujarat, AIR 1988 SC 696 and Leela Ram (Dead) through Duli Chand vs. State of Haryana (SC) 1999(4) R.C.R. (Criminal) 588*)

16. This court notes that the factum of FIR not being sent to the area MM was not fatal to the prosecution case. Section 157 of Cr.P.C. requires for a copy of FIR is required to be sent to Area M.M. This fact was mentioned by the Duty Officer in the FIR and a copy of the FIR was proved by PW-22 as

Ex.PW22/A. He proved rukka as Ex.PW22/B and stated that ASI Suresh who actually recorded FIR had expired. In FIR Ex,PW22/A, it has, inter alia, been mentioned that copy of the FIR was being sent to Area MM by Special Messenger HC Satbir Singh. The mere non-examination of the Special Messenger would not result in an improper investigation so as to result in any advantage to the present appellant.

17. The Court notes that the impugned judgment is based upon cogent evidence, reasoning, after appreciation of the evidence on record, and there is no reason to interfere with the same. The appeal is without any merit. Accordingly, it is dismissed.

NAJMI WAZIRI, J.

SIDDHARTH MRIDUL, J.

SEPTEMBER 27, 2017/acm