

\$~R-37

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

+ **CRL.A. 184/2012**

Date of decision: 28.04.2015

PRADEEP PASWAN Petitioner
Through Mr. Bhupesh Narula, Adv.

versus

STATE (GOVT. OF NCT) DELHI Respondent
Through Ms. Aashaa Tiwari, APP for the
State,
Insp. Davendra Rathi, PS Sarai
Rohilla.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J. (ORAL)

1. Pradeep Paswan, in this appeal, challenges his conviction under Section 302 of the Indian Penal Code, 1860, for having committed murder of his friend Ashok in the intervening night of 2nd and 3rd March, 2009 at Railway Line near Harijan Basti, Gali no.10, New Rohtak Road, Delhi. The impugned judgment convicting the appellant Pradeep Paswan is dated 23.08.2011 and the order on sentence imposing punishment of imprisonment for life and a fine of Rs.6,000/- is dated 02.09.2011. In default of payment of fine, the appellant shall undergo simple imprisonment for three months.

2. Learned counsel for the appellant has submitted that this is a case of circumstantial evidence and not of direct evidence. The Trial Court has erred in relying upon the oral dying declaration made by the deceased Arun as the complainant, Jai Ram (PW-5), had turned hostile and disowned his earlier statement to the police (Ex. PW-5/A). In these circumstances and in view of such contradictions, the trial court should not have relied upon the testimony of Vicky (PW-6). Statement of Vicky (PW-6) under Section 161 Cr.P.C. was recorded on 06.03.2009, three days after the incident, and thus, his presence at the spot and his deposition regarding the oral dying declaration is unreliable and should be disbelieved. Evidence of last seen is weak and should be rejected. The statement of Suraj Singh (PW-7) under Section 161, Cr.P.C. (Ex. PW-7/E) was recorded on 16th March, 2009 and even as per the deposition of Pintu Tiwari (PW-1) and Kalim (PW-2), the deceased Ashok, the appellant Pradeep and one Chotu were residing together in a room at house no. 364/2, Gali No.8, Nehru Nagar, Anand Parvat, Delhi. The appellant as well as Chotu were missing. Chotu was not cited as a witness and has not deposed in the court. Thus, this would create a doubt for Chotu could well be the perpetrator. Recovery of the alleged knife and blood-stained clothes at the instance of the appellant is disputed. The recoveries, it is highlighted, were affected nearly 13 days after the occurrence and are for this and other reasons, unbelievable. The police during the period between 3rd March, 2009 to 16th March, 2009, had explored and scanned the room in question, and the articles could have been easily planted. Recovery of knife as alleged was from an open space.

Further, as per the FSL report (Ex. PW-21/B, Ex. PW-21/C and Ex. PW-21/E), human blood was found on the knife and on the clothes as well, but the blood group could not be ascertained. PW-7 Suraj Singh, the landlord, has not supported the recovery of clothes, etc. Motive has not been established.

3. On the question whether the deceased Ashok had met a homicidal death due to stab injuries in the intervening night of 2nd and 3rd March, 2009, we have unimpeachable evidence in the form of the MLC of deceased Ashok (Ex. PW-8/A) and the post mortem report (Ex. PW-4/A). The MLC (Ex. PW-8/A) records the time of arrival of the deceased in Hindu Rao Hospital, Delhi (H.R. Hospital, for short) as 12:45 am on 3rd March, 2009. Deceased Ashok was brought to the hospital by SI Ram Karan (PW-3). The MLC mentions that on local examination, the following external wounds were noticed:

- I. One large deep laceration longitudinal right anterior chest (8x3 inches). Ribs cut and Lung parenchyma visible through the wound. Gush of air coming through wound with each breath.*
- II. Transverse laceration over lower neck 2 cm. long.*
- III. Laceration over web between thumb and index finger of right hand.*
- IV. Laceration lateral aspect of left hand.*
- V. Laceration 2 cm. long over right mandible area.*
- VI. Laceration 2 cm. long over right clavicle area.*
- VII. Laceration 1 cm. long below left nipple.”*

The said MLC was proved by Dr.Madhup Garg (PW-8), who was working as CMO, H.R. Hospital. He had deposed that the patient was initially admitted as an unknown person brought by S.I. Ram

Karan (PW-3). The MLC records that SI Ram Karan (PW-3) had informed that the deceased was found lying on the roadside in an injured condition. On admission, the unknown patient was unconscious. PW-8 has testified that the patient, during his treatment, had disclosed his name as Ashok Sahu, s/o Jageshwar Sahu. This fact was duly recorded in the MLC (Ex. PW-8/A). This is factually correct and is apparent when we examine the said MLC.

4. The death summary of deceased Ashok (Ex. PW-23/A) was prepared by Dr. Sandeep Aggarwal on 3rd March, 2009 and the report Ex. PW-23/A was proved by Dr. Omparkash, SMO, Department of Surgery, HR Hospital who had deposed as PW-23. He proved that Ex. PW-23/A was written and signed by Dr. Sandeep Aggarwal at point X. PW-23 identified Dr. Sandeep Aggarwal's handwriting and signatures as he had worked with him. Dr. Sandeep Aggarwal had since left the hospital.

5. The post mortem report (Ex. PW-4/A) was proved by Dr. C.B. Dabas, HOD, Forensic Medicine, H.R. Hospital who had appeared as PW-4. He had conducted the post-mortem examination of the dead body of deceased Ashok and had noticed 11 external injuries. These injuries included incised wounds on different areas of the body including face, neck, chest and the right arm. One incised wound had entered the chest and abdominal cavity. On internal examination, PW-4 found that 4th to 10th rib on right side of the chest had fracture and there were multiple incised cuts on both the lungs and short cuts on the diaphragm. The cause of death was haemorrhage and shock,

consequent to injuries caused by a sharp edged weapon and injuries no. 1 to 10 (collectively) were sufficient to cause death in ordinary cause of nature. Injuries were ante mortem and recent in nature. He opined that injury no.11 was a surgical wound.

6. The core issue raised in the present appeal pertains to the involvement of the appellant in murder of the deceased Ashok. The prosecution has primarily relied upon the oral dying declaration made by the deceased Ashok in respect of which Vicky Ratawal (PW-6) has deposed. Prosecution also relies upon the testimony of SI Ram Nath (PW-12). On the other hand, the appellant relies upon the testimony of Jai Ram (PW-5) who had turned hostile and did not affirm his statement to the police (Ex. PW-5/A), which became the substratum of the FIR.

7. In order to appreciate the controversy, we would first examine the testimony of Jai Ram (PW-5). He was working as a carpenter and was sleeping in his shop in the intervening night of 2nd and 3rd March, 2009. PW-5 accepted that at about 12 mid night, he heard someone shouting “save me, save me, save my life”. He woke up and opened the shutter of his shop. PW-5 saw that one person was lying on the road in an injured condition. One Vicky, their neighbour, was also present who informed the police control room, whereupon police of PS Sarai Rohilla came and had recorded the statement (Ex. PW-5/A), which was signed by him at point A. However, PW-5 turned hostile and deposed that he was not sure about the words uttered and stated by the said injured person. He averred that the injured person was not

stating anything when he saw him lying on the road. PW-5 was confronted with Ex. PW-5/A and his signatures on the same, by the Additional Public Prosecutor, who had cross-examined him, but PW-5 did not affirm and accept that the deceased had disclosed his identity and named one Pradeep, his friend, as the perpetrator. These facts are mentioned in Ex. PW-5/A.

8. Before we elucidate and scrutinize the court deposition of PW-5, we would like to refer to the testimonies of S.I. Ram Nath (PW-12) and Vicky Ratawal (PW-6) elaborately.

9. PW-5 has accepted that one Vicky, his neighbour, was present at the place of incident and the said Vicky had informed the PCR on telephone. Thus, presence of Vicky (PW-6) was accepted by PW-5. Vicky (PW-6) is also named in statement Ex. PW-5/A. Vicky (PW-6) has stated that in the intervening night of 2nd and 3rd March, 2009, he was sleeping in his house. He got up when he heard the shouts “save –save” and saw that people had gathered near his house. One person in an injured condition was lying on the road and was bleeding. PW-6 made a call at number 100. PCR van came and took the injured to the hospital. Before police had come, PW-6 had inquired and was told by the injured that he had been stabbed by one Pradeep. The injured had given his name and address of Nehru Nagar but PW-6 was unable to recollect the name of the injured. PW - 6 clarified that he did not personally know any Pradeep or the injured. In his cross examination, PW-6 accepted that Jai Ram (PW-5) was one of the persons who were present at the spot. PW-6 denied the suggestion that the injured was

not in a condition to speak and had not named Pradeep as the perpetrator.

10. S.I. Ram Nath (PW-12) has stated that when he reached, a large crowd had already gathered at the spot. The deceased had been removed to HR Hospital in a PCR van. PW-12 met one eye witness, Jai Ram, and had recorded his statement (Ex. PW-5/A), which was signed by PW-12 at point B. Thereupon, PW-12 along with Ct. Sanjeev, had gone to HR Hospital and collected the MLC of the injured person named Ashok. The said Ashok was declared to be unfit for making a statement. On the basis of the statement of Jai Ram (Ex. PW-5/A), PW-12 had prepared a *Tehrir* (Ex. PW-12/B). Before leaving the hospital, PW-12 had collected blood sample, earth control, blood stains and seized them vide seizure memos Ex. PW - 5/B, C and D. The memos were signed by him at point B. The crime team which had inspected the crime scene also took photographs. After the death of Ashok, police investigation was taken over by Insp. Sunder Lal (PW- 25). S.I. Ram Nath (PW-12) along with Insp. Sunder Lal (PW-25) had searched house no.364/2, gali no.8, Nehru Nagar, Anand Parbat, Delhi on 6th March, 2009 and had recovered three photographs Ex. PW-7/B1 to Ex. PW-7/B3. We will be referring to the testimony of PW-12 subsequently, on the question of photographs and recovery. We are of the opinion that PW-12's testimony on the statement of PW-5 (Ex. PW-5/A) as recorded by PW-12 and signed by Jai Ram (PW-5), is the truthful and trustworthy account. Thus, we do not accept the testimony of Jai Ram (PW-5) and we believe and accept the

testimony of Vicky (PW6).

11. The fact that the deceased was known as Ashok has been established and proved beyond any doubt. On the said aspect, we have the testimony of Dukhan Sahoo (PW-9), r/o Village Shimli, PS Harlakhi, Distt. Madhubani, Bihar (brother-in-law of the deceased). PW-9 deposed that on 6th March, 2009, he had identified the dead body of Ashok (Ex. PW-9/A). He had also identified the photographs of Ashok, his wife and child (Ex. PW-7/B1 – B3). PW-9 further deposed that the deceased was residing in Delhi and used to ply rickshaw.

12. Pintu Tiwari, who testified as PW-1, was also a resident of Madhubani, Bihar. He identified the appellant Pradeep in Court and has stated that they belong to the same village and had studied together. Pradeep had migrated to Delhi in 1996 and was residing somewhere in Nehru Nagar, Delhi. Pradeep used to ply rickshaw of one Praveen and sometimes used to work at marriage functions. The deceased Ashok was residing with Pradeep in his room since Deepawali in 2008, after wife of deceased Ashok had left for her parental home. The appellant Pradeep knew the deceased Ashok and they were friends. There were financial transactions between the two as well. Their mothers were residents of the same village. After Deepawali in 2008, Ashok had sent Rs.2000/- to his wife in Jharkhand. PW-1 had filled up the money order form at the request of the appellant and the deceased. On 2nd March, 2009, at about 8.00 p.m., the appellant Pradeep, the deceased Ashok and one Chotu had

gone to a Dhaba near Liberty Cinema and purchased chicken. They went to a nearby vacant place and had consumed liquor. Ashok drank a lot and was completely intoxicated. They went away towards the Harijan Basti, Railway Line at about 9 p.m.. On 4th March, 2009, early morning, police from PS Sarai Rohilla had come and enquired about Pradeep Paswan from PW-1. PW-1 had informed the police about the relevant facts within his knowledge. PW-1 was not cross - examined inspite of opportunity and was re-called for cross - examination which was conducted on 24.01.2011. He was confronted with Ex. PW-1/DA, the statement of PW-1 under Section 161 Cr.P.C., wherein it is not recorded that the appellant Pradeep along with deceased Ashok and Chotu had purchased chicken for Rs.20. However, the factum that they had consumed liquor together was mentioned in the statement Ex. PW-1/DA.

13. Kalim (PW-2) has deposed that he was running a rickshaw garage and was in the business of providing paddle rickshaw on hire. The appellant Pradeep was plying his rickshaw and used to reside in the house no.364/2, Gali no.8, Nehru Nagar, Anand Parbat, Delhi along with his friend, the deceased Ashok, and one Chotu. The appellant also used to work with a caterer in marriage functions. PW-2 had provided the rickshaw to the deceased Ashok on hire basis at the request of the appellant. On 02.03.2009, at about 7-8 P.M., the deceased Ashok had deposited the rickshaw in the garage and had left. Thereafter, PW-2 did not see him. The police from PS Sarai Rohilla had recorded his statement.

14. Suraj Singh (PW-7), has stated that the appellant, his friend Chotu and the deceased Ashok were living on the first floor of the house, which had been taken on rent by the appellant Pradeep. Since 2nd March, 2009, PW-7 had not seen Pradeep. On 3rd March, 2009, at about 5 P.M., police from PS Sarai Rohilla had come to his residence and made inquiries about Pradeep. PW-7 had asked the police to check Pradeep's room. Police had again met him on 6th March, 2009 and had searched Pradeep's room. At that time, three photographs were seized vide memo Ex. PW-7/A which was signed by PW-7 at point A. PW-7 had seen the three photographs out of which two photographs were of Pradeep and one was of deceased Ashok. On 16th March, 2009, police came along with the appellant and the room was searched again. However, PW-7 denied that the police had seized any incriminating material from that room though PW-7 admitted having signed the seizure memos Ex.PW-7/C and Ex.PW-7/D. He denied that the photographs (Ex. PW-7/B1 to Ex. PW-7/B3) were recovered in his presence. He denied that the appellant got recovered a polythene from his room containing a full sleeves blood-stained shirt of blue, white and black colour and blood stained pant of black colour vide seizure memo Ex. PW-7/C dated 16th March, 2009.

15. The appellant Pradeep, in his Section 313 Cr.P.C statement, has accepted as correct that he was residing at 364/2, Gali no.8, Nehru Nagar, Anand Parvat and used to ply paddle rickshaw and sometimes worked at marriage functions. Appellant Pradeep accepted that the deceased Ashok was his friend. However, he claimed that Ashok had

stayed with him for a month in 2005 and, thereafter, shifted to reside separately with his wife, leaving the Nehru Nagar address. He admitted the photographs, Ex.PW-7/B, 7/B2 and 7/B3 to be correct but claimed that the photographs were lying with one Pandey residing adjoining to house no.364/2 and not in his room. He claimed that he was falsely implicated on the basis of the photographs and he was innocent. He accepted that on 16.03.2009, he was lifted from the house of his sister Sheela.

16. Eight clauses of Section 32, Evidence Act, 1872 including sub-clause (1) are exceptions to the general rule of hearsay. Clause (1) to Section 32 of the Evidence Act recognises a dying declaration as a relevant piece of evidence, if the statement made by the deceased person relates to the cause of his death or to any of the circumstances of the transaction which has resulted in his death, in cases where the cause of death of that person is in question. It is not the mandate of law that a person who has made a dying declaration must be under expectation of death at the time when he made the statement. Section 32(1) specifically states that a dying declaration can be oral or in writing. An oral dying declaration could mean a verbal statement i.e. words spoken by the deceased before his death. Thus, the Legislature, by using the word 'oral' in Section 32 (1) has made its' intention clear and left no scope for any doubt concerning the relevance, admissibility and validity of oral dying declarations. Therefore, there is no bar to using oral dying declarations as evidence to prove the guilt of the accused.

17. The reason for making a hearsay dying declaration relevant is founded on the desideratum that the victim may be the only principal eye-witness to the crime and exclusion of his statement might nullify the ends of justice. The check emanating from the sense of impending death, the law recognises, would generally create a sanction equal to the obligation of an oath. It impedes and curbs false accusation and indictment. Dying declarations are admitted as they are declarations made in extremity and possibility of falsehood is minimized as one expects the mind to be induced by powerful consideration to speak the truth.

18. Prudence and wisdom requires calibrated scrutiny before a dying declaration is accepted. On the question of reliability, precedents caution that the courts should be on guard to see that the purported dying declaration is not a result of tutoring or prompting or a product of imagination or vindictiveness. Court inquiry should determine that the deceased had the opportunity to observe and identify the assailant and was in a position to verbally make the statement attributed to him.

19. Oral dying declaration is considered as a weak piece of evidence by the Courts on account of its' nature. Therefore, Courts have evolved certain safeguards before they accept and rely on an oral dying declaration. Two important considerations before the Courts while weighing oral dying declarations are veracity of the statement itself and credibility of the witness claiming to have heard the statement considered to be a dying declaration.

20. A written dying declaration is more credible and reliable since the exact words uttered by the deceased are available which rules out possibility of confusion on account of memory lapses or failure on the part of a witness. Courts adopt a highly cautious approach while appreciating oral dying declarations and subject them to a closer scrutiny to ascertain the truth. Thus, when an oral dying declaration is relied upon, additional precaution and care is required to ensure that the witness, who had heard the dying person, has been able to repeat the words spoken by the deceased person or depose as to what was spoken. The deponent should pass the test and scrutiny of an honest and truthful witness. When a witness makes a truthful rendition of the gist of the spoken words of the deceased as to the cause of his death or the circumstances of the transaction which result in his death, an oral dying declaration has to be treated as a relevant fact under Section 32(1) of the Evidence Act (see *Bhogilal Chunilal Pandya v. State of Bombay*, AIR 1959 SC 356, *Nallapati Sivaiah v. SDO*, (2007) 15 SCC 465). A dying declaration can be in brief, and at times, a brief statement guarantees the truth. Dying declaration would not be rejected because it does not contain the details of the occurrence (see *State of Maharashtra vs. Krishnamurti Laxmipati Naidu*, 1980 Supp SCC 455; *Surajdeo Ojha vs. State of Bihar*, 1980 Supp SCC 769).

21. Truthfulness of the statement and the weight to be attached to an oral dying declaration are ascertained and determined on the facts and circumstance of each case. The time and place of incident, time and the place where the statement was made, proof that the deponent

was present and had heard the deceased, the deponent's ability to recollect, relation of deceased to the person to whom the statement was made, other pre and post-occurrence facts, etc are all relevant factors to be taken into account while deciding upon the credibility of the witness testifying to the factum of the oral dying declaration. Oral dying declarations are admissible but their reliability depends upon the attending and encompassing facts. An oral dying declaration can be relied upon when the court is satisfied that it was in fact made and does not suffer from the vices of imagination, speculation and distracting additions.

22. In the present case, we have applied the aforesaid principles to appreciate the dying declaration purportedly made by the deceased Ashok. We have appreciated and accepted the testimony of Vicky (PW-6) referring to the dying declaration made by the deceased Ashok as credible in the light of facts of the present case. The testimonies of Pintu Tiwari (PW-1), SI Ram Nath (PW12) and even Jai Ram (PW-5) and Ex. PW-5/A provide corroboration to and fortify the testimony of Vicky (PW-6).

23. Pintu Tiwari (PW-1) had testified that on 2nd March, 2009, at around 8.00 p.m., he saw the deceased Ashok along with the appellant Pradeep and one Chintu having liquor. The deceased Ashok had become completely intoxicated. At that time, the appellant Pradeep and the deceased were present together. Thus, before the occurrence, the appellant Pradeep and the deceased Ashok were last seen together. This fact when juxtaposed together with the dying declaration has a

compelling and telling effect.

24. Vicky (PW- 6), before the police arrived, had inquired from the injured and was told that one Pradeep had stabbed him. Injured had also given his name and particulars of his Nehru Nagar address but Vivky (PW-6) could not remember the same. PW-6 was a stranger and did not know any Pradeep or the injured. These facts could have been stated and narrated by this witness only if these were in fact disclosed by the deceased to him. In his testimony, Vicky (PW-6) has stated that the injured had given the address of Nehru Nagar. This fact also lends credibility to the testimony of PW-6 since he did not know the deceased or his address prior to the occurrence. This fact has been ascertained and found to be true. The statement of Vicky (PW-6) under Section 161 Cr.P.C. may have been recorded on 6th March, 2009 i.e. 3 days after the occurrence, but his presence at the spot and his interaction with the deceased Ashok is beyond any doubt. It is clear from the deposition of Vicky (PW-6) and S.I. Ram Nath (PW-12) that the deceased Ashok had named the culprit i.e. the appellant Pradeep and no one else. Jai Ram (PW-5) in his testimony and statement to the police has stated that Vicky (PW-6) was present at the spot and had called the police. It is correct that Jai Ram (PW-5) did turn hostile and has not supported the prosecution version in spite of his signatures on Ex. PW-5/A, which he admitted. However, this would not affect the prosecution case as Vicky (PW-6) has made an infallible and assuring court deposition. The surrounding facts like the timing when the declaration was made, Ex. PW-5/A which records the relevant

details in writing, corroborate and lend support to the statement of Vicky (PW- 6).

25. The testimony of Pintu Tiwari (PW-1), that on 4th March, 2009, during early morning, police from Police Station, Sarai Rohilla had come and enquired about the appellant and the testimony of Suraj Singh (PW-7), that on 3rd March, 2009 police from Sarai Rohilla had come and made enquiry about Pradeep, if accepted as correct, would support the prosecution version and not help the defence. This is a clear indication that the police was searching and looking for the appellant Pradeep.

26. It is also clear from the testimony of Pintu Tiwari (PW-1), Kalim (PW-2) and Suraj Singh (PW-7) that the appellant Pradeep was a friend of the deceased Ashok. The testimony of Suraj Singh (PW-7) corroborates and supports the prosecution version as he has deposed that the deceased Ashok, appellant Pradeep and Chotu were living on the first floor of the house which had been taken on rent to the appellant Pradeep. Thus, the fact that the deceased Ashok had named the appellant as the perpetrator after the occurrence, when Vicky (PW6) had the occasion to hear the dying declaration, is established beyond doubt and debate.

27. Learned counsel for the appellant has submitted that Chotu was never interrogated. He was a suspect and could well be the culprit. Chotu was not cited and examined as a witness. However, we do not believe that the aforesaid contention would result in acquittal of the

appellant Pradeep, for the reason that Vicky (PW-6) in categorical terms has stated that the deceased in his dying declaration had only named Pradeep and not anyone else. This fact is also proved from the testimony of S.I. Ram Nath (PW-12) who had recorded Ex.PW-5/A, which mentions that the deceased had given the name of the culprit as 'Pradeep'. In these circumstances, we do not think that there was involvement of Chotu in the crime in question.

28. The oral dying declaration in the present case gets sufficiently corroborated by the fact that the appellant Pradeep was a friend of the deceased Ashok. They were residing in Nehru Nagar. Moreover, appellant Pradeep was found to be missing and not traceable with effect from 3rd March, 2009 as per the deposition of Suraj Singh PW-7. The FIR in question was recorded at about 2:25 A.M. on 3rd March, 2009, which is before the deceased Ashok died in the hospital at 3:30 A.M. Time of death as 3:30 A.M. is recorded in death summary report (Ex. PW-23/A). Time of the death is also mentioned in the post mortem report (Ex. PW-4/A). It is clear from the testimony of Vicky (PW-6) that S.I. Ram Karan (PW-3) had reached the spot after sometime i.e. after the deceased Ashok had made the oral dying declaration. PW-6 had made the call at number 100. SI Ram Karan (PW-3) had stated that at about 12 midnight, he had reached the place of occurrence and saw that one person was lying injured having been stabbed in gali no.10, harijan basti, Sarai Rohilla. He along with his staff had reached the spot in a van and had removed the deceased to HR Hospital. By that time, as deposed by S.I. Ram Karan (PW-3), the

injured was unconscious and was unable to speak. Thus, there was a time gap when S.I. Ram Karan (PW-3) had reached the spot and the oral dying declaration was being made by the injured before Vicky (PW-6). We have considered the contentions raised by the appellant and record our inability to agree and accept the contention that the appellant is entitled to acquittal.

29. In these circumstances, we are inclined to affirm the conviction of the appellant Pradeep. We do not find any reason to reverse his conviction and sentence.

30. The appeal is accordingly dismissed. Trial court record will be sent back.

(SANJIV KHANNA)
Judge

(ASHUTOSH KUMAR)
Judge

APRIL 28, 2015
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