

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

% *Judgment reserved on :04.08.2015*
Judgment delivered on : 11.08.2015.

+ CRL.A. 737/2013

MAAN SINGH ALIAS PAPPY

..... Appellant
Through Mr. Mukesh Sharma, Mr.
Narender Gautam and Mr.
Manisha Tanwar, Advs.

Versus

STATE

..... Respondent
Through Mr. Varun Goswami and Ms.
Kusum Dhalla, APPs for the
State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 02.02.2013 & 06.02.2013 respectively wherein the appellant stood convicted for an the offence under Section 307/34 of the IPC as also for the offence under Section 27 of the Arms Act. He had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.50,000/- and in default of payment of fine to undergo SI for one

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year for his conviction under Section 307 of the IPC; out of this total amount of Rs.50,000/- Rs.30,000/- had to be paid to the victim. For his conviction under Section 27 of the Arms Act, he had been sentenced to undergo RI for a period of three years and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo SI for six month. The sentences were to run concurrently. Benefit of Section 428 of the Cr.PC had been granted to the appellant.

2 The version of the prosecution was unfolded in the statement made by the complainant Bheem Singh. He was examined as PW-4. His version was that on 28.07.2010 at about 10:45 pm when he was coming home after getting his mobile phone recharged, he found that a crowd had gathered outside his house. His younger brother Ghanshyam (PW-5) was also present. On inquiry, he was told that the accused Maan Singh @ Pappy had come along with his two friends and had threatened Ghanshyam that since he had deposed against him in a previous case, he would be killed. Thereafter PW-4 & PW-5, while returning to their home, were again accosted by the appellant and his two friends. The appellant fired a gun shot upon them as a result of which PW-4 received an injury on his left shoulder. Efforts to apprehend the accused and his

accomplices were fruitless. The appellant had also fired 3-4 gun shot in the area. He managed to escape.

3 PCR call was made. The injured was removed to the DDU hospital. His injuries were opined to be grievous.

4 In the course of investigation, the appellant was arrested. The appellant had in fact been arrested in FIR No. 114/2010 registered at PS Crime Branch and in the course of that investigation, he had made a disclosure statement disclosing his involvement in the present case. He was formally arrested in this case.

5 The crime team was summoned. From the spot, three empty cartridges and a metallic piece had been lifted. One metallic piece had also been retrieved from the left shoulder of PW-4. The exhibits had been sent to the CFSL i.e. both to the Biology Division and Ballistic Division. Ballistic division however did not support the version of the prosecution and it was noted that the empty cartridges could not be matched with the country-made pistol alleged to have been recovered from the accused. The Biology Division had noted that there was human blood on the shirt of PW-4. The MLC of PW-4 had been proved as Ex.PW-2/A.

6 In the statement of the accused recorded under Section 313 of the Cr.PC, he had pleaded innocence. His submission is that he has been falsely implicated in the present case because of the enmity which was brewing between him and PW-4 & PW-5, both of whom were brothers.

7 On the basis of the aforementioned evidence collected by the prosecution, the appellant had been convicted and sentenced as aforementioned.

8 Learned counsel for the appellant at the outset has pointed out that there are inherent discrepancies in the version of the prosecution and the prosecution has not been able to prove its case to the hilt. PW-4 & PW-5 are admittedly interested witnesses, both of whom are brothers and admittedly there was an earlier litigation pending inter-se the parties and PW-5 (Ghanshyam) had deposed against the appellant in another case in which he had been acquitted which has led to the false implication of the accused in the present case. PW-4 & PW-5 have given inconsistent versions. Their testimony is wholly suspicious. It cannot be relied upon. Benefit of doubt must accrue in favour of the appellant. To support this submission, learned counsel for the appellant has placed reliance upon a judgment of this Court in (2009) 5 SCR 848 Mahtab Singh and Anr Vs.

State of U.P. Submission being that the testimony of an interested witness has to be scrutinized very carefully and in this case, both PW-4 & PW-5 had implicated the appellant for the success of this false case. There is also no explanation as to why public persons who were present at the spot have not been examined which again throws doubt on the version of the prosecution and to support this submission, he has placed reliance upon AIR 1999 SC 3883 Sukhar Vs. State of Uttar Pradesh. Submission being that even as per the prosecution, the incident had occurred at 10:45 PM. The PCR call was made at 12:20 AM. There is no explanation for this delay. This is a concocted version. Attention has also been drawn to the MLC Ex.PW-2/A. It is pointed out that no blood had been noted by the doctor. The Biology Division has not fully supported the version of the prosecution. The trial Judge has noted that the recovery of weapon of offence does not stand established and that is why the appellant stood acquitted for the offence under Section 25 of the Arms Act.

9 Arguments have been refuted. Learned Public Prosecutor has pointed out that the impugned judgment calls for no interference. The trial Judge has carefully scrutinized the evidence and testimonies of PW-
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4 & PW-5 and has given a reasoned judgment.

10 Arguments have been heard. Record has been perused.

11 The star witnesses of the prosecution are PW-4 & PW-5.

12 PW-4 is the complainant. He has on oath deposed that on 28.07.2010 at about 10:45 PM when he was returning home after getting his mobile phone recharged, he saw a crowd gathered there. His brother (PW-5) was already present there. On inquiry, he learnt from PW-5 that the appellant had extended threat to kill PW-5 as PW-5 had deposed against the appellant in another matter. After 10-15 minutes when PW-4 & PW-5 were returning home, the appellant again accosted them; he was on a motor bike with two other accomplices. The appellant fired at him as a result of which PW-4 received a bullet injury on his left shoulder. His brother tried to apprehend the accused but the accused managed to flee away. A phone call was made at 100 number. After about 10-15 minutes, a PCR van reached the spot and took him to the DDU Hospital.

13 In his cross-examination, he has stated that he did not know the result of the earlier case pending between him and the appellant. He admitted that at the place of incident, there are residential houses and

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street on both sides. He reiterated that he has gone to Balaji Mobile Centre and there are other shops on that road as well. It took him 5-10 minutes to reach Balaji Mobile Centre from his house. He admitted that he was not present when the accused had first extended the threat to his brother. They had left the spot at about 10:45 pm.

14 PW-5 was the brother of the victim. He has also deposed that on 28.07.2010 at about 10:20 pm when he along with his brother were coming back to his house and had hardly crossed 50 steps from Balaji Mobile Centre, the appellant along with his two accomplices extended threat to PW-4 as PW-4 had deposed against him in another criminal matter. Thereafter the accused managed to flee away. After about 10-15 minutes, appellant along with the same boys again came on the motorcycle. Appellant fired a gun shot. PW-4 received a gun injury on his left shoulder. PW-4 made a call at 100 number. Police came there. Crime team was also summoned.

15 In his cross-examination, he admitted that the appellant had threatened him that he would kill him as he had deposed against him. He could not state as to whether passersbys had heard the threat or not. The appellant has fired from his left hand. 20-25 persons had gathered on the

spot at the time of firing. His brother had got blood stains on his clothes and blood fell on the ground also. PCR was informed by his brother. PW-5 admitted that there was a criminal case pending inter-se the parties in which PW-5 had deposed against Maan Singh but he did not know the fate of that case. He denied the suggestion that the accused has been falsely implicated in the present case.

16 Testimony of PW-4 & PW-5 has to be tested on the anvil of cogency and coherency keeping in view the fact that both the brothers i.e. PW-4 & PW-5 are witnesses who would be interested in the success of the case.

17 PW-4 had deposed that the time of incident was 10:45 pm. He had deposed that when he reached the spot, his brother was already standing there and his brother (PW-5) informed him that he received threat at the hands of the accused. This is not the version of PW-5. PW-5 had stated that both the brothers were going back towards the house when the appellant came on his motorcycle and extended a threat to his brother (PW-4) meaning thereby that both the brothers were present together at the time when the threat was extended by the appellant to PW-4. These versions of PW-4 & PW-5 are in conflict. According to PW-4, threat

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had been extended to Ghanshyam; PW-4 was not present at that time. According to PW-5 both the brothers were present when the threat had been extended. Threat, as per PW-5, had been extended to PW-4 and not to him as is the version of PW-5.

18 Further version of PW-4 is that he had reached the spot at 10:45 pm where his brother informed him that the accused had extended threat to him. 10-15 minutes later the accused came to the spot and fired a gunshot upon PW-4. He reported the matter to the PCR. Time of reporting the incident would thus approximately would have been 11:00 pm. The report of the PCR (Ex.PW-5/A) however notes that the call to the PCR was made by PW-4 at 12:20 pm. There was a gap of 1:20 minutes.

19 Learned defence counsel has submitted that this is also the version of PW-4. He has also approximated the time of the incident at about 11:00 pm when his brother had made a call to the PCR.

20 Learned defence counsel has highlighted this argument to support a stand that the unexplainable delay of 1 hour 20 minutes in reporting the matter to the PCR is unjustifiable; it was well for the reason that a story has been concocted upon in this intervening period by both the

brothers and this was for the reason that the brothers had an earlier enmity with the accused.

21 Let us now examine this angle. Both PW-4 & PW-5 have admitted that there was a case pending inter-se the parties and as per the prosecution, PW-5 had deposed against the appellant which was the cause of the enmity brewing between the parties. Although on record, PW-5 stated that he is not aware as to whether in that case, the appellant had been acquitted or not, yet the learned Public Prosecutor under instructions had conceded that the appellant was acquitted in that matter.

22 There is a conflict in this version of PW-4 & PW-5 as well. Whereas PW-5 in his examination in chief has deposed that PW-4 has deposed against the appellant in a criminal case; PW-4 had stated that it was Ghanshyam (PW-5) who had deposed against the appellant in that criminal matter.

23 PW-5 had stated that his brother had received injury on his left shoulder. Blood was also noted on his injured brother. The MLC on the victim (PW-4) was conducted at 12:50 pm. This was at the DDU Hospital. At the cost of repetition, the incident was over by 11:00 PM; a gunshot injury was alleged to have been received by PW-4; there was

blood oozing out from his shoulder; he was removed to the DDU Hospital almost two hours later; time in the MLC is 12:50 PM. This Court has been informed that the DDU Hospital is at a distance of 3-4 kilometers from the spot.

24 Be that as it may, the details in the MLC are also relevant. The patient was found conscious and oriented. His vitals were stable. No bony injury was noted. This MLC was prepared in the Casualty Department and evidence of Dr.Narender Kumar examined as PW-6 is relevant on this count. PW-6 had deposed that he had examined the patient PW-4 who had an alleged history of a gunshot injury; blood was oozing from his wound which was 9-10 mm on the left shoulder. He was referred to the Emergency Surgery and Ortho Department. The doctor from the Ortho Department was examined as PW-2. He was Dr. Lalit Kishore. On examination of the patient, he found that there was an entry wound on the left shoulder joint; movement of the shoulder was however full and free; there was no distal neuro vascular deficit present. The patient was advised X-ray. The X-ray of the patient was conducted and a bullet like object was removed from his shoulder. The report of PW-2 (Ex.PW-2/A) dated 23.09.2010 reflects this.

25 A further perusal of Ex.PW-2/A shows that on the date of the incident itself, besides the fact that injured had come to the hospital almost 2 hours after he had informed the PCR (PCR as per PW-4 having being informed at 11:00 PM but Ex.PW-15/A which is the PCR report noting the time of first report is 12:20 AM i.e. after 1 hour 20 minutes); the injured was examined in the hospital at 12:50 AM. At the cost of repetition, his vitals were normal. His left shoulder i.e. the injured shoulder had a free and full movement. PW-6 had noted that wound suffered was approximately 9-10 mm. No immediate medical attention was required by the patient. The MLC further notes from the surgery side, the injury was noted to be simple.

26 The scientific report which is the report of the CFSL from the Ballistic Division (Ex.P-1) shows that three cartridge cases and one metal piece had been sent to the CFSL and when examined with the country-made pistol (alleged to have been recovered from the appellant), the individual characteristics on the cartridges cases and the test fired cartridges did not match; the report suggested that the three empty cartridges had not been fired through this pistol. This pistol as noted supra has been recovered from the accused when he was arrested in FIR

No. 114/2010.

27 The trial Judge in his judgment had recorded that the appellant stood acquitted in FIR No.114/2010. The Court had noted that there was no evidence on record to show that this country-made pistol belonged to the accused. The finding being returned that there was no evidence to show that a pistol was recovered in FIR No.114/2010; the weapon of offence in this case thus stood not proved. The accused was acquitted for the offence under Section 25 of the Arms Act in FIR No. 114/2010. The second reason for the rejection of this Ballistic report was that the empty cartridges on scrutiny did not match the test fired cartridges and hence it was concluded that these cartridges were not fired through this pistol. No opinion could be given on EBR-1 i.e. the metallic piece which had been referred for examination and which had been recovered from the spot. This Court also notes that the seizure memo (Ex.PW-14/H dated 02.08.2010) disclosed that a metallic piece had been recovered from the left shoulder of the accused and had been seized but this piece of metal had surprisingly not been sent by the Investigating Officer for examination to the Ballistic Division. This had been sent to the Biology Division of the CFSL. The report of the Biology Division did not note

any blood on this metal piece. The Ballistic Division also did not support the version of the prosecution.

28 Whether a witness can be termed as an interested witness or not depends upon the conclusion arrived at by a process of evaluation based on the broad probabilities of the case. Merely because both the witnesses of the prosecution (as is so in the instant case) are brothers and the victim also being one of the injured and there being history of admitted enmity between the appellant and the victim/eyewitness, would not by itself be sufficient to discredit the testimonies of PW-4 & PW-5.

29 However applying the test of coherency to the versions of PW-4 and PW-5, this Court is persuaded to hold that their testimonies do suffer from infirmities on not small but material particulars. These have been discussed supra. At the cost of repetition, PW-4 & PW-5 were not clear as to who was the person who had deposed against the appellant in the criminal case pending inter-se the victim and the appellant. Whether it was PW-4 or PW-5 was not clear. Both are contradictory on this score. Another material contradiction which this Court notes is that PW-4 had stated that Ghanshyam had already received threat at the hands of the appellant when he reached there; the appellant had come 10-15

minutes later (around 11:00 PM) and again threatened both the brothers and at that point of time, he had fired at PW-4. Version of PW-5 is different. He had stated that both the brothers were coming together when the appellant along with his two accomplices came to the spot and threatened PW-4. As per PW-5, threat was given to PW-4 and not to PW-5 which is the version of PW-4. Timing given by both the brothers was around 11:00 pm; the matter was thereafter reported to the PCR. The first call received in the PCR (Ex.PW-15/B) shows that it was received at 12:20 AM. There is an unexplainable delay of 1- ½ hours. This by itself may not be the reason enough to dislodge the version of the prosecution but other dents which have been successfully created by the accused in the version of the prosecution when cumulatively assessed lead this Court to draw this conclusion.

30 The victim as per the prosecution had received a gun-shot injury on his left shoulder. The DDU hospital was 3-4 kilometers from the spot. The incident having being reported to the police (as per prosecution) at 11:00 PM but the victim having being examined in the Casualty Department of DDU Hospital at 12:50 AM i.e. almost two hours later is again unexplained and this is especially when blood (as per

PW-5) was oozing out from the wound of PW-4. The Casualty Department and the Emergency Department of the DDU Hospital did not think it necessary to give immediate aid to the victim; it was not required; the wound suffered by PW-4 as per the doctor (PW-6) was 9-10 mm. The Surgery Department had noted the injury to be simple. The victim was referred to the X-ray department. The X-ray department had reported a small piece of metal in the left shoulder of the victim which report was given by the department on 23.09.2010 i.e. two months after the date of the incident. The medical evidence in fact shows that no medical aid was required to be given to the victim as no actual injury appeared to have been suffered by him.

31 The Ballistic Division of CFSL had exonerated the accused. The expert evidence adduced by them had opined that the empty cartridges did not match the individual characteristics of test fired cartridges which had been fired from the pistol alleged to have been recovered from the accused. Moreover, in that FIR No. 114/2010 offence under Section 25 of the Arms Act, the appellant stood acquitted. The trial Judge had noted all these facts in the correct perspective. The recovery of the weapon of offence did not stand proved. There was also no scientific evidence in

favour of the prosecution.

32 What therefore remains with the prosecution is the version of PW-4 of PW-5. This Court had already noted that there were inherent discrepancies in the versions of PW-4 and PW-5.

33 In this context the observations of the Apex Court in Mehtab Singh (supra) are relevant. They read herein as under:-

“In these circumstances, the evidence of PW-1 that he witnessed the incident further becomes doubtful as admittedly he was sitting under that attached roof about 40-45 paces away from the place of incident. It is true that the evidence of PW-1 being brother of the deceased could not have been justifiably thrown out as an interested witness but in the backdrop of totality of his evidence, in our considered view, his testimony could not have been safely relied upon and the trial court cannot be said to have committed any error in this regard. The vital omissions in his testimony also shake the trustworthiness of this witness.”

34 This Court again notes that the first reporting of the matter to the police was at 12:20 AM when the incident had culminated at 11:00 PM and the version of PW-4 & PW-5 being consistent that the PCR was informed at that time itself by PW-4 but the record of the PCR showing otherwise throws a doubt on the veracity of the version of the

prosecution. This creates a doubt on the truthfulness of the version of the prosecution and cannot rule out false implication of the accused especially in the backdrop that the accused and the victim were sharing admitted enmity against one another.

35 Learned counsel for the appellant has also drawn attention of this Court to the Crime Team Report (Ex.PW-7/A). In this report, it has been recorded that three empty cartridges had been lifted from the spot. There is no mention of any metallic piece having being lifted from the spot. However the site plan (Ex.PW-5/A) shows that apart from three empty cartridges, one piece of metal was also found at the spot. There is no mention of this one metal piece in the report Ex.PW-7/A. The seizure memo Ex.PW-8/B dated 29.07.2010 shows that apart from three empty cartridges, one metal piece had been seized. Why this did not find mention in the Crime Team Report again throws a doubt on the veracity of the version of the prosecution.

36 All these facts when taken cumulatively do dent the version of the prosecution. Rule of criminal jurisprudence is clear. The prosecution must prove its case to the hilt which it has failed to do so in the instant case. Benefit of doubt must accrue in favour of the appellant. Giving

him benefit of doubt, he is acquitted. He be released forthwith, if not required in any other case.

37 Appeal is allowed.

INDERMEET KAUR, J

AUGUST 11, 2015

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