

\$~R-22 and 23 (Part-A)

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

% **Date of Decision: 5th August, 2015**

+ CRL.A. 269/2015

VIRENDER @ VEERU

..... Appellant

Through: Mr. Manoj Ohri, Sr.Adv. with
Mr.Javed Alvi and Mr. Siddharth,
Advs.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State
with SI Roshan Lal, from PS
Nangloi.

+ CRL.A. 267/2015

KAMAL

..... Appellant

Through: Mr. Javed Alvi, Adv.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State
with SI Roshan Lal, from PS
Nangloi.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J (ORAL)

The judgment under challenge dated 03.01.2014 convicts Virender @ Viru and Kamal under Section 302 read with Section 34 of the Indian Penal Code (for short "IPC") for murder of Sanjeev Tyagi @ Sanjay. Appellant Virender has also been convicted under Section 27 of the Arms Act, 1959.

2. By order on sentence dated 13.01.2014, Virender and Kamal have been sentenced to imprisonment for life, fine of Rs.1 lac and in default of

payment of fine to undergo Simple Imprisonment for a period of six months. Fine collected shall be paid to the parents of deceased Sanjeev Tyagi as compensation under Section 357 of the Code of Criminal Procedure, 1973 (Cr.P.C. in short). The appellant Virender has been also sentenced to Rigorous Imprisonment of five years, fine of Rs.2000/- and in default to undergo Simple Imprisonment for seven months for the offence under Section 27 Arms Act. The sentences are to run concurrently and Section 428 Cr.P.C. would apply.

3. It has not been disputed and is not under challenge that the deceased Sanjeev Tyagi had suffered firearm injuries on 14.05.2007 at about 7:30 PM at his shop located at RBZ-81, Nihal Vihar, Delhi. Post-mortem on the dead body of Sanjeev Tyagi was performed by Dr. Manoj Dhingra (PW-2) on 15.05.2007 at about 2:00 PM. PW-2 has deposed that Sanjeev Tyagi aged about 28 years was brought to the hospital by Inspector Ishwar Singh on 14.05.2007 at about 8:15 PM and was declared as brought dead. As per the post-mortem report (Ex.PW-2/A) and the deposition of Dr. Manoj Dhingra (PW-2), the deceased had suffered the following injuries:

- “1. Lacerated wound over left temporal region above ear 8x5 cm with fractured underlying bones exposing brain matter
2. Star shaped lacerated wound over occipital region 1.5x1.5cm in size with fractured underlying bones edges everted.
3. Oval shaped entry wound over right iliac region 2x.15 cm in size with bruising of surrounded edges, cavity deep.”

PW-2 opined that the cause of death was carnio-cerebral damage as a result of firearm injuries and the time of death was approximately 18 hours. PW-

2 testified that he had received 11 (Eleven) inquest papers/ documents. He had sealed and handed over the recovered bullet lead to the Investigating Officer (IO). We shall be referring to the testimony of Dr. Manoj Dhingra (PW-2) and the port-mortem report (Ex.PW-2/A), subsequently, when we examine the contention raised that the report Ex. PW2/A records that the injuries were a result of “rifled firearm” as this contradicts the eye-witness testimony of Mahender Pal Tyagi (PW-1).

4. The primary and the core issue raised in the present appeal relates to the credibility and truthfulness of the testimony of Mahender Pal Tyagi (PW-1), who has indicted the two appellants as the perpetrators who had committed the said offence, along with others.

5. Mahender Pal Tyagi (PW-1) has deposed that he had three children and the deceased Sanjeev Tyagi was his second son. His third child, Ajeet had been arrested and was in judicial custody in a murder case of one Pawan. After arrest of his son Ajeet, the present appellants had started threatening them stating that they shall take revenge (*“khoon ka badla khoon se lenge”*). They would come with others at night on motorcycles and extend threats.

6. Mahender Pal Tyagi’s (PW-1) deceased son Sanjeev Tyagi used to run a Kiryana store opposite their house and on 14.05.2007 at about 7:30 PM, he alongwith his wife Kiran Devi, was present and sitting on a cot while Sanjeev Tyagi was sitting in the shop. He had noticed that the appellants Virender and Kamal alongwith 2-3 others had come from 50 Ft. Road, fired shots at Sanjeev Tyagi who was sitting in his shop and then they ran towards the transformer side. They were brandishing the weapons and avowing that “whatever they had to do, they have done.” PW-1

immediately rushed to the shop and found that Sanjeev Tyagi had fallen down from a chair and was in a pool of blood. He had made a call to the police on number 100 and Sanjeev Tyagi was taken to Sanjay Gandhi Memorial Hospital (SGM Hospital) in a PCR Van but he expired on the way. Many public persons had also gathered at the spot. His statement (Ex.PW-1/A), which was signed by him at point 'A' was recorded and on the next day site plan (Ex. PW18/C) was prepared at his instance and statement of his wife was also recorded. Subsequently, scaled site plan (Ex. PW 9/A) was prepared.

7. Mahender Pal Tyagi (PW-1) was extensively cross-examined on 13.01.2011, 20.04.2011, 17.12.2011, 03.03.2012 and 23.05.2012 by different counsel who had appeared for the accused including the present appellants. In response to one of the questions, PW-1 accepted the suggestion that the appellant Kamal is the real brother of Pawan for whose murder his son Ajeet has been arrested and was facing trial. He denied the suggestion that the appellant Kamal had been named because PW-1's son was in custody and facing trial in the murder case of Pawan. Mahender Pal Tyagi (PW-1) also accepted it as correct that one Brijesh, his neighbour and relative, was present when the PCR van had arrived, but, he did not know whether Brijesh had accompanied his injured son to the hospital in the PCR Van. No police complaint regarding threats extended by appellants Virender and Kamal was made. He voluntarily added that PW-1 had not paid any heed to the said threats.

8. The challenge to the testimony of Mahender Pal Tyagi (PW-1) is primarily based upon the information recorded in the Police Control Room (for short "PCR") vide form Ex.PW-14/A. This exhibit refers to a call

made by Mahender Pal Tyagi (PW-1) from telephone No.9210014170 at 7:34 PM that three boys had shot his son. The form also gives address, RBZ-115, Nihal Vihar. The aforesaid communication to the Police Control Room was proved by W/Ct. Sushma (PW-14), who was then posted as a call attendant in the police headquarter. She had deposed about the call received by her from Mahender Pal Tyagi (PW-1) at 7:34 PM.

9. We would turn down, if not spurn the contention of the appellants, that Mahender Pal Tyagi's (PW-1) identification of the two appellants as the perpetrators, should be disbelieved as the names of the perpetrators are not mentioned in Ex.PW-14/A. The contention infers that Mahender Pal Tyagi (PW-1) did not name the three assailants in his call to the PCR, by name, as he did not know or he could not identify them. The inference and assumption is farcical and imaginary. It was not necessary for Mahender Pal Tyagi (PW-1) at that stage to name these culprits nor was it necessary and required for the person receiving the call to enquire and question Mahender Pal Tyagi (PW-1) about the names of the perpetrators. The call was made to the control room to inform that crime had been committed and police should immediately visit the spot. On the other hand, the aforesaid communication by Mahender Pal Tyagi (PW-1) from his mobile phone No.9210014170 reflects and indicates that PW-1 had possibly seen the occurrence and he was an eye-witness as he had informed that three boys had fired at his son, as a fact stated in his statement (Ex.PW1/A). It is noticeable even the name and details of his son are not mentioned in Ex.PW-14/A. Mahender Pal Tyagi (PW-1) in his statement (Ex.PW-1/A) has specifically identified and named the two appellants i.e. Virender and Kamal as the persons who alongwith others had come from the 50 Ft. Road, shot his son and then ran away brandishing the weapons and stating

that they had done, what they wanted to do. We have gone through the examination-in-chief of PW-1 and his extensive cross-examination over two years and we do not find any reason or ground to disbelieve or discard the core version given by him implicating the appellants.

10. We have examined the scaled and un-scaled site plan marked Ex. PW-18/C and PW-9/A respectively. The site plans specifically indicates the location of the residence of Mahender Pal Tyagi (PW-1) and the shop where Sanjeev Tyagi was sitting when he was killed. It indicates the movement of perpetrators and the route taken by them to run away from the spot. They had come from the north direction and after shooting and killing Sanjeev had proceeded and passed in the front of the house where PW-1 and his wife Kiran were sitting on the cot. PW-1 has stated that the distance between his house and the shop where Sanjeev Tyagi was killed was about 25-30 Ft. (cross-examination of PW-1 on 23.05.2012). Similarly, the fact that Mahender Pal Tyagi (PW-1) did not accompany and take his son Sanjeev to the hospital in the PCR Van, cannot be a ground to hold that his testimony is make belief and an eye-wash. PW-1 in his cross-examination has accepted the fact that at that time he was perplexed, agitated and was behaving like a mad person. This is understandable and should be accepted. ASI Ratan Lal (PW-13) has deposed that on 14.05.2007 he was posted with the PCR Van West Zone and at about 7:45 PM, had received a message that at RBZ-115, Nihal Vihar three boys had killed the caller's son, and had reached the spot. However, the Van could not enter the street as it was narrow and the van had to be parked outside. Persons present had brought the injured, who was then taken to SGM Hospital where the doctors had declared that he had died. Thereafter, PW-13 came back to the spot and his statement was recorded.

11. During the course of hearing, learned counsel for the appellants had relied on *State of Andhra Pradesh vs. Punati Ramulu and Ors.*, 1993 CrL.J. 3684, to urge that the information/ communication by Mahender Pal Tyagi (PW-1) recorded in the PCR form Ex.PW-4/A should have been treated and recorded as an FIR. We are unable to accept the said submission; as the aforesaid judgment has no application to the facts of the present case. In the said case, PW-22 the Circle Inspector had received information about the occurrence but no entry was made in the Daily Diary or in the general diary. Subsequently, when PW-1 returned to the police station alongwith a written complaint, an FIR was registered. Referring to specific facts, the Supreme Court observed that the FIR should have been registered on the basis of the information which had been given to PW-22 by the Constable who was first present and had furnished details on the basis of which the Circle Inspector had proceeded to the spot for the purpose of investigation. In the facts of the present case, Mahender Pal Tyagi (PW-1) had made a telephone call to the PCR i.e. the police control room to inform that three boys had shot his son. This communication to the PCR was then communicated to the PCR Van, and subsequently to the local police who reached the spot and recorded the statement of PW-1 (Ex.PW-1/A) and thereafter, the FIR was registered. In the statement Ex.PW-1/A, PW-1 has certainly referred and named both the appellants Virender and Kamal as one of the perpetrators who had come to the spot alongwith the firearms. Noticeably the identity of the victim and his status after the firing were not indicated. FIR could not have been registered on the call made to the PCR, for requisite details were to be gathered and the factual assertion had to be confirmed. If the contention of the appellants is accepted then whenever a call is made and allegation regarding

commission of an offence is communicated to the PCR, an FIR must be registered. This proposition as a universal affirmative rule is *ex facie* unacceptable and untenable. It would depend on facts of each case. Even otherwise the contention overlooks the legal position that communication to the PCR need not elaborate and disclose details in entirety. Registration of an FIR ensures that police investigation begins and comes into motion once a cognizable offence has been committed. This is the object and purpose. What is clearly noticeable and apparent is the fact that Mahender Pal Tyagi (PW-1) had witnessed the occurrence, having seen three boys come and fire shots at his son sitting in the shop and thereafter they had crossed him when he was sitting on a cot outside his residence. PW-1 had made a telephone call to the PCR and informed that three boys had fired shots at his son. PW-1 had identified and named the two appellants in his statement Ex.PW1/A which was recorded shortly after the occurrence.

12. Learned counsel for the appellants has submitted that there is delay in recording of the FIR (Ex.PW-3/B). The FIR was recorded at 10:45 PM on 14.05.2007 after the statement Ex.PW-1/A was recorded and *rukka* was sent at about 10:30 PM by the ASI Jai Prakash (PW-30) through Ct. Sukhbir Singh (PW-10). The time difference between 7:30 PM and 10:45 PM is not too distant or long to accept the contention.

13. ASI Jai Prakash (PW-30) has deposed that on 14.05.2007 he was marked DD No. 23-24 Ex.PW-12/A and PW-12/B for verification and he alongwith Ct. Sukhbir (PW-10) and Ct. Subhash had reached RZB-115, Nihal Vihar and came to know that injured had already been taken to the hospital in a PCR Van. Blood was scattered at the spot. He had recorded the statement of Mahender Pal Tyagi (PW-1) which was signed by him at

point A. He had left Ct. Subhash to guard the spot and proceeded to the hospital with Ct. Sukhbir. He collected the MLC of Sanjeev Tyagi who had been declared as brought dead. He made necessary endorsement, prepared the *rukka* and had sent it to the police station for registration of the FIR with Ct. Sukhbir. Thereafter, he came back to the spot. Subsequently the investigation was taken over by Inspector R.S. Malik, who had also filed the charge-sheet. Inspector R.S. Malik had appeared as a witness before the trial Court on 26.07.2012 and his examination-in-chief was partly recorded. However, Inst. R.S. Malik died and his deposition could not be completed. In these circumstances, the deposition of ASI Jai Prakash (PW-30) has assumed significant importance for he has deposed as to the police investigation. ASI Jai Prakash (PW-30) in his cross-examination has stated that he had reached the spot at about 8:00 PM and had reached the hospital at about 9:20 PM, where he did not find any public or family member. He had collected the MLC of the deceased Sanjeev Tyagi, sealed parcel containing the clothes with the seal of SGM vide seizure memo Ex. PW-10/A and had then prepared the *rukka*.

14. Learned counsel for the appellants has questioned the aforesaid narration of the facts and time by ASI Jai Prakash (PW-30) and Ct. Sukhbir (PW-10) by making the reference to the PCR information form Ex.PW-14/A. We have already referred to the initial information which was recorded by W/Ct. Sushma (PW-14) on the call of Mahender Pal Tyagi (PW-1) at 7:34 PM on 14.05.2007. The said form records that at 7:51 PM the PCR Van had communicated to the PCR that one person who had suffered the bullet injury was being taken to the hospital. Local police had reached the spot as per form Ex.PW14/A at 8:10 PM. Thereafter, there is an endorsement at 8:23 PM which records details of the deceased; he had

two bullet wounds on the head and the thigh and one Brijesh and ASI Jai Prakash from PS Nihal Vihar, were together and the names of the assailants had not been ascertained.

15. The aforesaid noting in the PCR at 8:23 PM, indicates that ASI Jai Prakash had proceeded to the hospital after he came to know that the deceased Sanjeev Tyagi had been taken to SGM Hospital in the PCR Van. The form Ex.PW-14/A records that the Van had reached the place of occurrence in question only at 7:51 PM and thereafter the deceased was taken in the PCR van to the hospital. The details mentioned in Ex.PW14/A communicated and recorded contemporaneously would be the correct and true narration of the events and reflect movement of the local police including ASI Jai Prakash. Thus, the recording at 8:23 PM in the PCR form (Ex.PW14/A) that the details of the assailants were yet be ascertained. It is apparent to us that ASI Jai Prakash was still to interact and meet Mahender Pal Tyagi (PW-1), the eye-witness who had communicated the first information to the PCR as is recorded in the Ex.PW-14/A. The time gap between 7:51 PM when the PCR Van reached the spot and had taken Sanjeev Tyagi alongwith Brijesh to the hospital and the visit of ASI Jai Prakash (PW-30) at the hospital at about 8:23 PM is rather short. It is apparent and would be fatuitous to hold that ASI Jai Prakash after reaching the place of occurrence at about 8 PM and then the SGM Hospital by 8:23 PM had an opportunity and chance to interact and ascertain facts from Mahender Pal Tyagi (PW-1). This small diversion and variation according to us would not affect the testimony of Mahender Pal Tyagi (PW-1). After the occurrence and information was communicated to the local police, events were taking place at a fast pace with the deceased being taken to the hospital in an injured condition as he was still alive. It was reasonable and

proper for ASI Jai Prakash (PW-30) to first proceed to the hospital and ascertain facts. Only thereafter he did meet the family members, who had remained at their residence. PW-30, it is apparent from Ex.PW14/A, had almost immediately left for the SGM Hospital and returned to the place of occurrence to ascertain details and had then interacted with Mahender Pal Tyagi (PW-1).

16. As far as presence of PW-1 at the place of occurrence is concerned, it was natural and normal as his residence was situated at a distance of about 25-30 Feet. and it was late evening. PW-1 had not gone to the hospital in the PCR van. His presence is duly corroborated and supported by the factum that he is the person who had made a telephone call to the PCR, a fact which is mentioned in the form Ex.PW-14/A. We have also noted the contents of the details given by Mahender Pal Tyagi (PW-1) that three boys had fired the shots. Thus the narration in the *rukka* Ex.PW1/A, that ASI Jai Prakash (PW-30) had visited SGM Hospital after recording statement of Mahender Pal Tyagi Ex.PW1/A, should not be taken as sacrosanct. For ASI Jai Prakash (PW-30) had first visited the hospital at about 8:23 PM is clearly indicative that subsequently he had spoken and got details from Mahender Pal Tyagi (PW-1). This factual position gets corroborated from the *rukka*, as the endorsement was made at 10:30 PM and thereafter FIR was registered at 10:45 PM.

17. Learned counsel for the appellants has drawn our attention to the inquest papers in the form of death report Ex.PW-30/C and brief facts (Ex. PW-30/B). In the brief facts, it is recorded that at about 7:45 PM on 14.05.2007 PCR was informed about the firing and ASI Jai Prakash alongwith others had reached the spot. The PCR Van had already taken the

injured to the hospital, thereafter the local police reached the SGM Hospital hospital and found that Sanjeev Tyagi had died. On the basis of the statement of eye-witness and MLC, a case vide FIR No.429/2007 was registered. The post-mortem report mentions and gives number of inquest papers as 11 (Eleven). The Ex.PW-30/B specifically refers and mentions to the FIR and does not reproduce or narrate what was stated in the FIR. The contention that Ex. PW30/B does not mention names of the appellant, falters for it refers to the FIR number 429/2007 wherein names of the appellant are mentioned.

18. Learned counsel for the appellants has drawn our attention to the page numbers 396 to 401, 386 to 389 and 391 of the compilation. It is submitted that there is overwriting as at page number 396, as the numerical 10 has been changed to 11. Similarly overwriting can be seen on some other pages where page 4 has been correct/ overwritten as page 5, and 5 to 6 etc. It is submitted that the aforesaid pages numbers refer to the eleven pages which were sent alongwith inquest papers with the request for post-mortem. As per the said contention, papers at page Nos. 386-87 i.e. the *rukka* of two pages was given page number 1, and the FIR again of two pages was given page numbers 2 and 3. There is no overwriting on the said numbering, till page number 3. The change of pages numbers from 4 to 10 to 5 to 11 does not reflect and show any interpolation or foul play. The argument is also irrelevant and presumptuous. It is difficult to appreciate and understand the argument. There is a contradiction in the contention raised for paper No. 1 consists of the *rukka* which includes the statement made by Mahender Pal Tyagi (PW-1), which specifically named that appellants Virender and Kamal and Page Nos. 2 and 3 is the FIR which again narrates and records the names of the perpetrators as Virender and

Kamal. In case the appellants wanted to question and ascertain any details, Dr. Manoj Dhingra (PW-2) should have been cross-examined on these aspects. It is correct that when Dr. Manoj Dhingra (PW-2) was examined, the appellants did not know that Inspector Ishwar Singh who had prepared and signed the inquest papers would not depose in the Court, for he expired subsequently, but it would be farcical and inane to hold that it was not required and necessary to cross-examine PW-2 on this aspect. Testimony of each witness has to be examined and read. The appellant had full opportunity as well as the right to cross-examine Dr. Manoj Dhingra (PW-2) as he had received the inquest request along with relevant papers. Dr. Manoj Dhingra (PW-2) was not questioned on the said aspect and no suggestion that he had not received the copy of FIR along with the inquest papers, was given.

19. The post-mortem report (Ex.PW 2/A) records that Inspector Ishwar Singh had brought the dead body of Sanjeev Tyagi with the alleged history of gun-shots. The entry and exit wounds as well as the track was recorded. In his court testimony, Dr. Manoj Dhingra (PW-2) opined that the cause of death was cranio-cerebral damage as a result of firearm injury. Learned counsel for appellants has drawn our attention to Ex.PW2/A which records that the cause of death was cranio-cerebral injury as a result of rifled firearm injury. In brief history as per the inquest papers, Ex.PW2/A records that the deceased had alleged history of gun-shot injury. The latter noting is obviously incorrect as the papers or documents do not ascribe history of gun-shot injury. Dr. Manoj Dhingra (PW-2) in his cross-examination testified that it was not possible to opine on the bore of weapon used for the commission of offence nor he could opine as to the distance from which the shot was fired. The report Ex.PW2/A confirms that

the deceased had suffered two fire arm injuries as a result of firearm projectile wounds. One bullet had made an exit wound as is apparent from the post-mortem report. Second projectile was recovered and handed over to the IO with the sample seal and sent for CFSL examination. The ballistic report was taken on record by the trial court, without any objection, under Section 293 Cr.P.C. The report is not under challenge. Report records that individual characteristic of striation mark on the fire bullet Ex.EB-1 were insufficient for comparison and opine whether it was discharged through country made pistol of .315 bore or not? Thus, as per the ballistic report striation marks on the lead bullet were not sufficient for comparison and opinion. The ballistic expert pertinently on examination of the lead did not opine that the lead/ projectile was fired from a rifled firearm or a gun, and could not have been fired from the weapon/ fire arm which was sent for examination. We would, therefore not place reliance on the opinion of Dr.Manoj Dhingra (PW-2) as recorded in Ex.PW-2/A that the cause of death was a result of a rifled fire arm injury. The ballistic report does not support this opinion. This conclusion finds support from the *Modi's Medical Jurisprudence and Taxicology 23rd Edition* at pages 714 and 715 wherein under the heading firearm wounds, it is elucidated; *"the size of the entrance wound due to a bullet gives no direct measurements of the size of the bullet, because the perforation is made with the skin under tension. After the bullet presses through, the skin tends to return to its former size and the margins of the wound contract when the range is short, the perforation or the entry hole is enlarged due to pressure of gases."*

20. Virender was arrested on 15.05.2007 by the Haryana police from a place near Jhajjar and FIR No. 202/2007 was registered. A country made pistol Ex.P-3 was recovered vide seizure memo Ex.PW-23/E. This pistol

was sent for forensic examination and as per ballistic report admissible under section 293 Cr.P.C, it was found to be in working order. A mis-fired cartridge recovered from the spot (mark Ex.A-1) was also sent for ballistic forensic examination. However, the ballistic report opines that due to insufficient data no opinion could be given whether the cartridge A-1 had been fired through the pistol Ex.P-3 recovered from the appellant Virender. No rifle cartridge was recovered from the scene of crime.

21. On behalf of Kamal, our attention was drawn to the averments made in the charge-sheet which refers to the disclosure statement of co-accused including Virender to the effect that Kamal was not involved and had not participated in the occurrence. We do not find any force in the said contention for several reasons including the bar and prohibition created by Section 24 to 27 of the Evidence Act. This apart, Mahender Pal Tyagi (PW-1) in his testimony has specifically identified Kamal and aforesaid affirmation cannot be rejected or erased due to the purported statement of co-accused including Virender before the police. In fact the statement could be a result of a consented and collective effort to save Kamal, brother of Pawan who had earlier suffered homicidal death. The statement can be attributed to an attempt to neutralise the motive i.e. revenge for the death of Pawan.

22. Learned counsel for the appellant Kamal submits that no recovery or disclosure statement is attributed to Kamal. It is not mandatory or required that every person accused of an offence must make a disclosure statement etc. This would not affect the ocular and eye witness account given by PW-1, who had seen the occurrence.

23. We have already referred to the two site plans Ex. PW-9/A and PW-

18/C. As per the scaled site plan, the distance between the two spots was 10.27 meters. PW-1 in his cross-examination has given the distance as 25-30 Ft. ASI Jai Prakash (PW-30) was cross-examined on the said aspect and has stated that the house of PW-1 was at a distance of 10-15 steps away from the shop i.e. the place of occurrence. He has also deposed that anyone sitting at the point where the PW-1 was sitting, would have seen the occurrence at points A and B in the site plan Ex.PW-18/C. What is important is that the perpetrators had come from the opposite direction and had first fired at the deceased who was sitting in the shop and then had moved ahead to cross the house of the PW-1. The occurrence had taken place in the month of May at about 7:30 PM. We, therefore, reject the contention that the PW-1 could not have seen the occurrence because of the distance at which he was sitting. We also reject the contention that PW-1 being about 65 years of age suffering from bad eye-sight, could not have possibly seen and recognized the perpetrators.

24. Submission that the prosecution relies upon a single or solitary eye-witness and it would not be safe and proper to convict two appellants on PW-1 testimony as he was inimically deposed, is devoid of substance and merit. A Division Bench of this court in ***Prakash vs. State Govt. of NCT of Delhi*** 2007 (93) DRJ 288 (DB) had examined the case law on the subject, whether an accused can be convicted on the testimony of a singular eye witness. Reference was made to the decision of the Supreme Court in ***Lallu Manjhi vs. State of Jharkhand***, (2003) 2 SCC 401 wherein evidence of witnesses were classified as: (a) wholly reliable, (b) wholly unreliable and (c) neither wholly reliable nor wholly unreliable. With regard to third category, the Court had opined that one should look for corroboration in material particulars by way of direct or circumstantial evidence before

acting upon a solitary eye witness's testimony. Thus, corroboration may be necessary when a witness is not wholly reliable, but if its evidence is unblemished and beyond possible criticism and the court is satisfied that the witness was speaking truth then conviction can be maintained on the basis of a single solitary witness. Reference was also made to the decision of Supreme Court in **Ram Ashrit Ram vs. State of Bihar** (1981) 2 SCC 60 wherein test of "close and severe scrutiny" was elucidated and held to be applicable. The division bench of this court had expounded the ratio in law in the following words:-

"20. The law as it stands, therefore, is that Conviction can be based on the sole testimony of a witness. There is no bar against it. However, the testimony of such a witness should be viewed with caution and circumspection. The appropriate test to apply would be the "close and severe scrutiny" test. If the witness is reliable, then it does not matter if he is partisan or interested or both. The evidence of a sole witness should be of sterling quality, natural and convincing enough to record a conviction. Ergo, if there is some doubt then a conviction ought not to be based on the testimony of a sole witness. There would, of course, be some notable exceptions, as for example in a case of sexual assault, but we are not concerned with such a case."

25. We have referred to the testimony of Mahender Pal Tyagi (PW-1), the eye-witness, who has deposed on the actual occurrence as well as the motive why the occurrence has taken place. It is accepted and admitted position that Ajeet son of Mahender Pal Tyagi (PW-1) was tried for murder of one Pawan, brother of appellant Kamal. Mahender Pal Tyagi (PW-1) has deposed that the appellants Virender, Kamal and their associates earlier threaten them that they shall take revenge. On the question whether Mahender Pal Tyagi (PW-1), was an eye-witness, we have referred to the factum that PW-1 was residing in the vicinity i.e. within 15-30 steps from the place of occurrence. PW-1 is the person who had made the telephone call to the PCR and had also informed that the assailants were three in

number. PW-1 in his statement (Ex.PW1/A) recorded by the local police shortly after the occurrence had named two appellants stating that he had seen them in the group which had fired the shots at Sanjeev Tyagi. There is sufficient corroboration as to the place of occurrence in the form of photographs, which are not doubted nor debated. There is also corroboration as the occurrence had taken place at about 7:30 PM and the deceased was taken to the hospital in the PCR Van which had reached the spot at about 7:45 PM.

26. Occurrence as per Mahinder Tyagi (PW1) was also witnessed by his wife Kiran Devi. However, Kiran Devi whose statement under Section 161 Cr. P.C. was recorded did not depose before the court as she had expired. The court cannot be oblivious to the fact that neighbours would have been reluctant to speak given the nature and manner of killing, wherein a fire arm was used and when the motive was to take revenge.

27. It is apparent to us that the killing/murder of Sanjiv Tyagi was intentional and deliberate. It was not a result of a sudden quarrel or unexpected flare up between Sanjiv Tyagi and a third person. Firing in the present case was specifically targeted and premeditated. When a crime of this nature is committed, it normally has an underline motive and cause. It is in this context that the assertions made by PW1 become relevant. We are conscious of the legal position that motiveless crime is still a crime and a bad motive does not create a liability because involvement of an accused in the *actus reus* has to be proved. Legally motive and intention are not interchangeable terms and motive should be distinguished from intention, but motive once established can be used as a corroborative circumstance as it refers to some ulterior object or reason to commit an offence. It adds

support to the finding of the court that the accused was guilty for the offence charged with.

28. The crime in question was intentional and deliberate. It was not a result of a sudden quarrel or a dispute. It was intended and deliberate and the deceased was a specific target.

29. Learned counsel for the appellants has submitted that Mahender Pal Tyagi (PW-1) had a cause and reason to falsely implicate the two appellants because of the past history and motive. The motive as pleaded could well be the reason for false implication. We have examined and dealt with the said contention. He has relied upon the decision of the Supreme Court in *Om Prakash vs. State of Uttar Pradesh* (2008) 17 SCC 249 in support of his contention. We have considered the said decision. In the said case seven accused were found to be guilty by the trial Court but on appeal, conviction was sustained against one. Some of the convicted accused had expired. The Supreme Court noticed that seven shots were fired and three shots had hit the deceased. There was evidence that one gun was used. The empties recovered did not match and could not be connected with the gun allegedly used. Referring to the factual matrix, the Supreme Court acquitted the appellant, one in number, whose conviction had been upheld by the High Court, recording that the High Court had not analysed the evidence who had fired/ caused the fire arm injury, and six out of seven particularly those who had direct enmity had been acquitted. The aforesaid judgment proceeds on its own facts and as such no legal ratio applicable to the present case can be deciphered. It is correct that the trial court has acquitted Arjun, Anil Kumar, Pawan Kumar and Sandeep for detailed reason set out in the impugned decision and State has not filed any

leave to appeal and the legal heirs of the victim have also not preferred any appeal, but the trial court for acquitting the said accused has recorded that their names do not find mention in the FIR recorded on the statement made by Mahender Pal Tyagi (PW-1), immediately after the occurrence. Thus, the debate and doubt whether Mahender Pal Tyagi (PW-1) had made the court deposition implicating Arjun, Amit, Pawan and Sandeep at the behest and on instigation of others or out of vengeance as an afterthought. The present appellants have been specifically named in the Ex.PW-1/A and, therefore, the assertions against them stand on a different footing.

30. We have already referred to the ballistic report and the findings recorded therein. It is in the present case the death was due to firearm injuries. This is true and established beyond doubt. As per the prosecution version, a country made pistol Ex.P-3 was recovered from the appellant Virender when he was arrested Haryana, police. One empty mis fired cartridge was also recovered from the spot however, as per the ballistic report this mis fired cartridge because of insufficient data could not be connected with the pistol recovered from the appellant Virender. We do not think that the ballistic report justifies acquittal of the appellant Virender. Again, we would rely upon and refer to the said appellant's identification as the perpetrator in the FIR and the dock identification by of PW-1. Decision of the Delhi High Court *in* CrI. A.No.670/2008, decided on 26.03.2009 title ***Vinod vs. State***, proceeds on its own facts. In the said case two bullets were recovered from the spot, and an empty cartridge was found in the barrel of the country made pistol. They were sent for ballistic opinion but individual characteristic striation marks were insufficient for comparison. The finding of acquittal was not predicated on the said reason alone, albeit etched on several other findings and gaps. It would be

unintelligible and unsound to hold as a rule or ratio that if the ballistic report is inconclusive, the accused are entitled to acquittal. Conviction is possible and has been sustained even in cases where the weapon of the offence has not been recovered. Similarly, in CrI.A.No.522/2005 *Niwas @ Patel vs. State* decided on 31.08.2009, the appellant therein was acquitted after noticing that the doctor who had conducted the post-mortem had opined that the deceased had suffered rifled injury but the weapon allegedly used as per the prosecution was small barrelled. In these circumstances, it was held that the accused was entitled to benefit of doubt. This was, however, not the sole reason or ground for acquitting the accused and reversing findings of the trial court. There were several other factors which had culminated in the final finding. It was noticed that there was no evidence that the appellant had fired the fatal shot and that he was entitled to parity with the accused who had been acquitted. The said co-accused, and two other acquitted accused were identified as present at the spot with the appellant. We have dealt with the post-mortem report (Ex.PW2/A) in detail above and have rejected the plea relying on the said report.

31. In view of the aforesaid discussion, we do not find any merit in the present appeals. We uphold and sustain the order of conviction and order on sentence. The appeals are accordingly dismissed.

SANJIV KHANNA, J.

R.K. GAUBA, J.

AUGUST 05, 2015 *mr*