

\$~R-41 & R-41B (Part A)

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

Date of decision: 07th October, 2015

+ **CRL.A. 1581/2014**

HARI PRAKASH alias KALA Appellant
Through Mr.M N Dudeja, Adv. with Mr.
Puneet Khurana, Mr. Sachit
Setia and Mr. Chandan Rai
Chawla Advs.

versus

THE STATE NCT OF DELHI Respondent
Through Ms. Aashaa Tiwari, APP with
Insp. Ram Sunder and SI Rohit-
PS Maurya Enclave

+ **CRL.A. 673/2015**

STATE Appellant
Through Ms. Aashaa Tiwari, APP

versus

PAWAN BAJAJ alias PAMMA Respondent
Through Ms. Purnima Maheshwari, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K.GAUBA

R.K.GAUBA, J. (ORAL):

1. On 20.12.2008, some time before 9.10 PM, Dhanpat Rai resident of BA-97, Shalimar Bagh, Delhi-52 received gunshot injuries at a place opposite Income Tax Colony near *Sabzi Mandi* on outer ring road near the police station Maurya Enclave (hereinafter referred to as “the police station”) and when taken to Dr. Baba Saheb Ambedkar Hospital, Rohini by the PCR staff, he was declared brought dead as per medico legal record (MLC) (Ex.PW-19/A) at 9.30 PM. On the basis of available information, Inspector Ram Sunder (PW-38) got the FIR no. 47/2008 (Ex. PW-26/A) registered. The investigation resulted in the report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) being submitted in the court of Metropolitan Magistrate on 26.03.2009 whereby trial of two persons was sought in the Sessions Court for offences punishable under Sections 302/120-B/34 of Indian Penal Code, 1860 (IPC) and under Section 25/27 of Arms Act. The said two persons put to trial in Session Case No.103/2011 included the appellant Hari Prakash @ Kala son of Maher Singh, shown as accused no. 1 (A-1) and Pawan Bajaj @ Pamma, shown as accused no. 2 (A-2).
2. The report under Section 173 Cr.P.C. was followed by two supplementary reports dated 30.11.2009 and 11.05.2010. The said reports, read together, would indicate that, besides A-1 and A-2, the investigating police had also arrested a juvenile, who we shall hereinafter refer to as “T”, on the allegations that he had assisted, aided and abetted Hari Prakash @ Kala (A-1) in committing the crime, at the instance of Pawan Bajaj @ Pamma (A-2).
3. The investigation had also statedly revealed involvement of one

Satish Dabas in the crime. Satish Dabas, however, could not be arrested. He was eventually declared a proclaimed offender on 04.11.2009.

4. The trial was held on charge for offences punishable under Section 120-B IPC and Section 302 read with Section 120-B against A-1 and A-2. In addition, A-1 was also put to trial on the charge for offence under Section 27 of the Arms Act.

5. The trial concluded with judgment dated 16.09.2014 holding that the prosecution had succeeded in bringing home the guilt of A-1 for the offence under Section 302 read with Section 120-B IPC. The concluding portion of the judgment would not state clearly as to what was the result of the charge under Section 27 of Arms Act. But, it is clear from the discussion in the judgment that the trial Court was not satisfied as to the evidence led about the use of the firearm, which had allegedly been recovered from Hari Prakash @ Kala (A-1), in the commission of the murder of Dhanpat Rai.

6. The prosecution was, however, held to have failed in bringing its case against Pawan Bajaj @ Pamma (A-2) and thus he was acquitted.

7. By order dated 26.09.2014, A-1 was sentenced to imprisonment for life with fine of Rs.10,000/- and in default to further undergo simple imprisonment for one year with benefit of Section 428 Cr.P.C.

8. By his criminal appeal (no. 1581/2014), Hari Prakash @ Kala (A-1) has challenged the judgment and order on sentence awarded against him. By its criminal appeal (no. 673/15), the State questions the correctness of the conclusion reached by the trial Court through the impugned judgment acquitting A-2. It may be added here that another

criminal appeal (no. 671/15) had been preferred by Praveen Gupta son of the deceased, who has appeared as witness for prosecution (PW-1) in the trial, also seeking similar relief against Pawan Bajaj @ Pamma (A-2). The said criminal appeal, however, was disposed of by order dated 29.05.2015, as not pressed with liberty given to the said appellant to make his submissions at the time of hearing on the criminal appeal filed by the State.

9. The fact that Dhanpat Rai had died as a result of gunshot wounds received on 20.12.2008 at the aforementioned place has been proved through evidence which is beyond reproach. In fact, the appellant Hari Prakash @ Kala, as also respondent Pawan Bajaj @ Pamma, made it clear at the hearing that they do not contest the prosecution case to such effect.

10. For completion of narration, however, it may be noted that the factum of the death of Dhanpat Rai in the aforementioned manner is brought out clearly through the documents including PCR form (Ex.PW-28/A), *rukka* (Ex.PW-38/A), the MLC (Ex. PW-19/A) and the inquest papers including death report (Ex.PW-38/C), application for autopsy (Ex.PW-38/B) and the post-mortem examination report (Ex.P-Adv.2 & 3), the last mentioned documents admitted under Section 294 Cr.P.C.

11. The post-mortem examination report reveals that the deceased Dhanpat Rai had received the following injuries:

“1. Punctured laceration 1.2 x 1 cm with abraded collar all around in total area 1.75 x 1.4 cm in vertical manner over chest just 1 cm left to midline & about 14 cm below supra-sternal notch & 122 cm above heel. No tattooing, blackening seen. Margins are inverted.

2. *Punctured laceration 1 x 0.8 cm with contused – abraded collar around in total area 2 x 1.25 cm more on right side of wound, placed over right side chest about 4 cm right to midline & 9.5 cm below right nipple & 118 cm above right heel. Margins inverted. No tattooing, blackening seen.*
3. *Irregular punctured laceration of size 1.4x0.8 cm over lateral aspect of right chest at mid axillary line about 13 cm below axilla. Upper part of wound in area 0.8 x 0.8 cm shows everted & split type margin while lower 0.6x0.5 cm area shows somewhat inverted margins with abraded collar 1 cm x 1 cm over both sides in toto including wound. No tattooing, blackening seen.*
4. *Two lacerated perforated wounds about 1 cm apart each other over postero-medial aspect of right wrist, communicated to each other sub-cutaneously of sizes 1.25x1 cm & 1x 1cm. Later one has inverted margins & termed with averted margins. Abraded collar seen around later one. Underlying muscles and tendons crushed (exit and entry wounds of firearm respectively)”*

12. In the opinion of the autopsy doctor, all the above mentioned injuries were *ante mortem* in nature, had been caused by a firearm which are rifled, the range of firearm being beyond blast effect, the cause of death being shock and haemorrhage consequent upon injuries to heart, liver, lung and intestines. In the opinion of the autopsy doctor, the first three injuries were sufficient to cause death, in the ordinary course of nature, individually and collectively. It is necessary to note in this very context, that during the post-mortem examination, the autopsy doctor had recovered two bullets lodged inside the body. These bullets would be relevant for appreciating the effect of ballistics report referred by us later.

13. Given the nature of injuries suffered and almost instant death

that seems to have resulted therefrom, there can be no dispute about the fact that the death of Dhanpat Rai was a culpable homicide inasmuch as it can be safely inferred from the facts and circumstances that the assailant(s) intended to bring about his death.

14. The evidence on record reveals that when the Investigating Officer (PW-38) with the accompanying officials including Constable Ravinder Kumar (PW-2) had reached the spot, he learnt that the deceased/victim had already been taken to the hospital by the PCR officials. He found, at the spot, car bearing registration number DL-8CH-7263, make Maruti Swift, in a stationary condition. It had telltale signs of it being the vehicle in use of the deceased at the time of fatal attack with firearm on his person, inasmuch as the right side window pane of the driver seat and the door at the said position had gunshots impact. The glass of the window panes of the vehicle was broken and glass pieces were found scattered around. At the scene of crime, the Investigating Officer found three spent cartridges, which were seized (vide memo Ex. PW-2/A). In addition, another spent lead was found beneath the vehicle and was also taken in possession (vide seizure memo Ex. PW-2/B). It may be mentioned that these four spent cartridges were later sent to forensic science laboratory (FSL), the report whereof was submitted with the supplementary charge-sheet to which we shall refer in due course.

15. The trial Court record shows that, on 21.12.2008, Praveen Gupta (PW-1) appeared before the Investigating Officer and his statement was recorded. It is the said statement which brought out his suspicion about the involvement of Pawan Bajaj @ Pamma (A-2) and Satish

Dabas, the proclaimed offender (PO) in the murder of Dhanpat Rai. The investigation initially does not seem to have made any progress. On 26.12.2008, Hari Prakash @ Kala (A-1) is stated to have been arrested by Inspector Sharat Chandra (PW-40), then posted in Inter-State crime branch office, Chanakyapuri. It is the case for the prosecution that PW-40 had a secret information that the person who had committed the murder of Dhanpat Rai on 20.12.2008 was expected to come on his black Pulsar motorcycle at about 5 PM with a firearm from Narela via G.T. Karnal Road on his way to Singhu Border. PW-40, accompanied by Constable Suresh and Head Constable Danvir Singh (PW-22), statedly had laid a trap and in the course of the said effort apprehended A-1. At the time of his arrest, A-1 was alleged to have been found having in his possession a pistol (Ex.P-18) with three live cartridges. On the basis of *rukka* (Ex. PW-32/E) sent by PW-40, case FIR no. 47/2008 of Police Station Crime Branch was registered under Section 25 Arms Act against A-1. It is stated that, during interrogation, A-1 made certain disclosures indicating his involvement in the murder of Dhanpat Rai on 20.12.2008. It may be added that the impression gathered by the investigating agency was that the pistol (Ex.P-18) which had statedly been recovered from A-1 at the time of his arrest on 26.12.2008 was the weapon of offence used in the murder of Dhanpat Rai on 20.12.2008.

16. During the course of investigation, Praveen Gupta (PW-1), his wife Priya Gupta (PW-16), Surender Taneja (PW-7) and Krishan Kumar Dixit (PW-8), the last being the driver of the deceased were examined by the Investigating Officer. The statements given by these

witnesses primarily brought out that A-2 and Satish Dabas (PO) had been engaged in a series of transactions with the deceased wherein the latter had passed on, by way of loans, certain amounts to the other two and had also been a partner in purchase of certain property. To be specific, it has been shown that in March, 2008, the deceased had advanced a loan of Rs.80 lakhs to A-2 and that the said loan was accompanied by an arrangement concerning property No.B-6/57-58, Sector-11, Rohini, the sale deed in which respect was executed in the name of Priya Gupta (PW-16) to secure the interest of the deceased. Similarly, in July/August, 2008, upon A-2 introducing the proclaimed offender to the deceased, the latter had advanced loans to the former in two instalments both in sum of Rs.25 lakhs, on terms inclusive of payment of interest. The loans thus advanced were repaid by way of some instalments for some period. Eventually, the proclaimed offender is stated to have offered security by handing over to the deceased four cheques of the total value of Rs.35.5 lakhs. Further, the deceased had joined A-2 in purchasing property No.G-17/43, Sector-15, Rohini for total consideration of Rs.90 lakhs in which the former was to have the share of 75%, the remaining 25% being of A-2, though the finance for such purposes in favour of the latter, to the tune of Rs.22.50 lakhs, was also provided, again in the nature of loan, by the deceased. Additionally, in October, 2008, at the instance of the proclaimed offender, the deceased had executed certain documents respecting his property B-1/30, Yamuna Vihar, which was under unauthorised occupation, in favour of the former, upon his assurances that he would arrange to sell it off and eventually pay Rs.4 crores to the deceased.

17. The above-mentioned monetary transactions are sought to be proved through oral testimony by Priya Gupta (PW-16) and Krishna Kumar Dixit (PW-8). Some of the property transactions connected to the said loans taken from the deceased by A-2 or the proclaimed offender are sought to be substantiated through the evidence of Surender Taneja (PW-7), Manish Sardana (PW-12), Lalit Khanna (PW-14), Savitri (PW-41), Jayanti Sharma (PW-42), and Arun Batra (PW-43). Akash (PW-17), the other son of the deceased, has also lent his voice in corroboration.

18. Though the averments that the deceased had advanced the loan of Rs.80 lakhs to A-2, or the claim that loan of Rs.50 lakh in two instalments was given to the proclaimed offender, are not supported by any documentary evidence, given the nature of the sale deeds of the immovable properties, contemporaneously executed and the four cheques statedly handed over by the proclaimed offender to the deceased, as proved by the banker Sandeep Yadav (PW-15), as indeed the admissions made by A-2 in the course of his statement under Section 313 Cr.P.C. respecting the loan liabilities, we proceed on the assumption that the loans were actually advanced in the manner stated by Praveen Gupta (PW-1) and further that there had been defaults in immediate, or timely, repayment thereof.

19. The prosecution case has been that Pawan Bajaj @ Pamma (A-2), and the proclaimed offender, had turned dishonest and were not interested in repayment of the loans of the huge amounts which had become outstanding, interest also having accrued thereupon and, in order not to be compelled to pay (as being pressed by the deceased),

they had conspired with each other to get him liquidated and, towards that end, had engaged the services of Hari Prakash @ Kala (A-1), described as a contract killer, who had served some time in jail on similar charges. It is alleged that pursuant to the said criminal conspiracy, A-2 had financed a motorcycle to be purchased by A-1 and had also given to him money to carry out the murder. A part of the money thus paid being passed on to the juvenile "T", for assistance as the motorcycle rider. It is alleged that in the course of hatching the criminal conspiracy, and its execution, all the said four persons had been in constant touch with each other, over their respective mobile phones and further that it was A-1, who had travelled on the motorcycle driven by the juvenile "T", on the night in question to the place of occurrence, a short distance away from the office in Sector-11, Rohini of PW-1 (also shared by the deceased). It is alleged that A-1 having intercepted the deceased, had used the firearm (Ex.P-18), firing several times at him causing the fatal injuries.

20. It is clear from the evidence on record that Hari Prakash @ Kala (A-1) himself did not have any motive of his own to kill Dhanpat Rai. The prosecution case was that he was a contract killer. No evidence concededly has been adduced to prove this assertion. Though reference has come in some documents, particularly in the disclosure attributed to the said accused, about his involvement in a case of murder prior to the case at hand. But then, the prosecution did not muster any evidence to support its case. No evidence has been led to show that A-1 had a history of involvement in cases of murder or that he would carry out executions for money.

21. There is no direct evidence available showing involvement of any of the aforementioned four persons in any specific act concerning the commission of murder of Dhanpat Rai. The circumstances on which the prosecution built its case against Hari Prakash @ Kala (A-1) primarily included the recovery of the firearm on which it hoped to connect him to the firing at Dhanpat Rai which had proved fatal. But then, the FSL report (Ex.P-X), based on the examination of the said weapon alongside the empty cartridges found at the scene of crime and the two bullets recovered from the dead body during the autopsy, has given negative result. To be specific, the three cartridge cases EC-1 to EC-3, all of 7.5 mm bore, recovered from the scene of crime could not be connected to the pistol allegedly recovered from A-1, the finding being they were not “identical” and, thus, could not be found as having been fired from the pistol in question (marked Ex.F-1 by FSL). The two bullets recovered from the dead body (marked EB-1 and EB-2 by FSL), one recovered from the spot and the other recovered from the dead body did not evince sufficient marks for an effective comparison or opinion. The other bullet (EB-3), recovered from the dead body showed the striation marks which were not identical with those produced on bullets test fired with the weapon statedly recovered from A-1. Thus, the ballistics expert concluded that the same had not been discharged from the said pistol.

22. We cannot also ignore that, in the criminal case No.39/2 of 2008, arising out of FIR No.47/2008 of Police Station Crime Branch, the Additional Chief Metropolitan Magistrate by judgment dated 01.02.2013 (Ex.DW-1/B) concluded that the prosecution had not led

satisfactory evidence to bring home the allegation that A-1 had actually been found carrying the said pistol (Ex.P-18) in his possession on 26.12.2008. Even if we were to assume, for the sake of consideration of the prosecution case at hand, that the said weapon was actually carried by A-1 in his possession on 26.12.2008, the said fact, in the face of the negative report given by FSL respecting its use, cannot take the prosecution story any further.

23. The prosecution case and the evidence (of DW-20) has shown that Satish Dabas (PO) was using mobile phone no.9818515625. On the other hand, Hari Prakash @ Kala (A-1), at the time of his arrest in the case under Arms Act, was found carrying with him mobile phone instrument with SIM card of no.9213650050, as confirmed by the personal search memo (Ex.PW-32/C). It is the case of the prosecution that A-2 had, in his use, two mobile phones, one with SIM card of no.9213419208 and the other of SIM card no.9311119208. The second said number, however, is shown, by the evidence of PW-21, to be registered in the name of one Shivani Narula. There is no evidence adduced to show any connection between the said Shivani Narula and A-2. The trial court, however, accepted the case for the prosecution that the said number would be in the use of A-2 because of similarity of the last four digits of the two numbers.

24. For considering the case of the prosecution, we accept the averments about the aforementioned four specific mobile phone numbers as set out in the charge-sheet. The allegations based, *inter alia*, on the call detail records (CDRs) have been that on 05.12.2008 Satish Dabas (PO) had been in contact with A-2 nine times while the

deceased himself had called A-2, twelve times in the evening. That is the date when, per the evidence of prosecution (PW-1), Satish Dabas (PO) had tried to pull a fast one with the deceased by purporting to hand over to him money in the sum of Rs.20 lakhs kept in a bag which was later found to be containing only a pillow. It was also the case for the prosecution that the CDRs show that on 10.12.2008, the deceased Satish Dabas (PO), Pawan Bajaj @ Pamma (A-2) and Hari Prakash @ Kala (A-1) were moving around in the area of Sector-11, Rohini where the office of Pawan Bajaj @ Pamma (A-2) is located. It is the case of the prosecution that it was on the said day (10.12.2008), Pawan Bajaj @ Pamma (A-2) and Satish Dabas (PO) had arranged for A-1 to be shown the face of the deceased, so that he could be targeted. It was further the case for the prosecution that the CDRs show that, on 20.12.2008, there was an exchange of calls/SMS between Satish Dabas (PO) and Hari Prakash @ Kala (A-1) and further that Satish Dabas had sent an SMS to A-1.

25. Apparently, in the face of the provision contained in Section 25 of Evidence Act, we cannot take into account the disclosures attributed to the accused persons particularly when same are not shown to have led to discovery of any fact in their wake. The CDRs of the aforementioned mobile phones, except of Hari Prakash @ Kala (A-1), have been proved by the prosecution through the statements of Tarun Khurana (PW-20), Sanjeev Lakra (PW-21) and M N Vijayan (PW-34). Though, according to the public prosecutor for the State the CDRs and the relevant documents pertaining to the mobile phone of A-1 had also been submitted with the charge-sheet, the relevant witness was not

called upon to prove the same strictly, presumably on account of they having been overlooked.

26. To proceed further, we assume the CDRs inclusive those of the phone of Hari Prakash @ Kala (A-1), confirm the allegations made about the contact between the aforementioned persons on the dates and time in question. We also presume that the calls made, particularly on 10.12.2008, would show the presence of the aforementioned persons in the area where the office of PW-1 is located. But then, this circumstance, by itself, cannot give to the prosecution any strength inasmuch as the evidence also clearly shows that, except for Hari Prakash @ Kala (A-1), all the other above mentioned individuals including the deceased, Pawan Bajaj @ Pamma (A-2) and Satish Dabas (PO) and for that matter Praveen Gupta (PW-1), were well known to each other and had been in constant touch or even in social interaction with each other.

27. We cannot ignore that the evidence clearly shows that even mobile phone of Praveen Gupta (PW-1) was in regular touch with Satish Dabas (PO), this brought out during the testimony of not only Praveen Gupta (PW-1) but also of the Investigating Officer Inspector Ram Sunder (PW-38).

28. Therefore, unless something further were to be shown, such telephonic contacts by themselves cannot necessarily mean that a criminal conspiracy was being hatched qua Dhanpat Rai by the others.

29. The learned trial court has held that the prosecution had proved that Satish Dabas (PO) had a motive to liquidate Dhanpat Rai. We need not go into the correctness or otherwise of the said observation

since Satish Dabas (PO) is yet to stand trial. The learned trial court found the case against Hari Prakash @ Kala (A-1) brought home for the reasons that there was recovery of cash (Rs.15,000/-) from his house and also from the house of juvenile “T”, and there is evidence to show purchase of motorcycle by him and his presence in the area near the office of Pawan Bajaj @ Pamma (A-2) on 10.12.2008 and also in the area where the murder was committed on 20.12.2008.

30. The learned standing counsel for the State has fairly conceded that even the case against the juvenile “T” has failed at inquiry before the Juvenile Justice Board. The presence of Hari Prakash @ Kala (A-1) around the office of Pawan Bajaj @ Pamma (A-2) on 10.12.2008 or near the place of murder on 20.12.2008 could be for any reason, not necessarily pursuant to a criminal conspiracy.

31. The recovery of Rs.15,000/- from A-1, and the purchase of the motorcycle, are circumstances which are too innocuous to be treated as incriminating, also for the reason that it cannot clinch the issue since there is nothing to show that money had gone to A-1 from the hands of the alleged conspirators to whom motive is attributed.

32. The State sought the conviction of Pawan Bajaj @ Pamma (A-2) also on the above noted evidence and his alleged conduct of having closely followed the progress of investigation into the murder of Dhanpat Rai. We assume that A-2 had been taking interest in the process of the investigation. But, it cannot be ignored that he was closely acquainted with the deceased and, thus, his interest may not necessarily be that of a guilty mind.

33. For the foregoing reasons, in our judgment, the prosecution has

not proved its case against either Hari Prakash @ Kala (A-1) or Pawan Bajaj @ Pamma (A-2). In the result, we are unable to uphold the conviction of A-1 as recorded by the impugned judgment.

34. Thus, we allow the appeal of Hari Prakash @ Kala (A-1). We set aside the impugned judgment and order on sentence passed by the trial court against him. For the same reasons, the State appeal against acquittal of Pawan Bajaj @ Pamma (A-2) is dismissed.

35. Hari Prakash @ Kala (A-1) shall be released from custody forthwith in accordance with law, unless he is required to be detained in any other case.

36. The surety furnished by Pawan Bajaj @ Pamma (A-2) pursuant to earlier order is discharged.

(R.K.GAUBA)
JUDGE

(SANJIV KHANNA)
JUDGE

OCTOBER 07, 2015

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