

* **HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 20.05.2009
Judgment delivered on: 22.05.2009

+ **Crl. Appeal No.498/2007**

MAHABIR SINGH @ MAHAVIR SINGH Appellant
Through : Mr. K.B.Andley, Sr. Adv. with
Mr. M.L.Yadav, Advocate

VERSUS

STATERespondent
Through : Mr. Pawan Sharma, Advocate

CORAM :-
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

PRADEEP NANDRAJOG, J.

1. Four accused were sent to trial pertaining to the death of Ved Pal @ Jitu Pehlwan who, on 20.8.2003, was shot in front of gate No.3, L Block, Madanpur Khadar.

2. Vide impugned judgment and order dated 18.7.2007 3 accused have been acquitted. The 4th i.e. the appellant, has been convicted for the offence punishable under Section 302 IPC as also the offence punishable under Section 25 and 27 of the Arms Act.

3. At 7:51 PM on 20.8.2003 a relayed wireless message was received at PS Sarita Vihar, contents whereof were noted vide DD No.12-A, Ex.PW-9/DA, that Ved Pal @ Jitu Pehlwan son of Shyam Lal had been shot in front of gate No.3, L Pocket, Madanpur Khadar. The message was sent by HC Ram Niwas PW-22 posted at the police control room who had received the message from telephone number 26946587.

4. On receipt of information, ASI Mahender Kumar PW-15 and Const.Bhagnath PW-10 proceeded to the place of the offence. The SHO of PS Sarita Vihar Inspector G.L.Mehta PW-26 was patrolling in the area. He also received the information and reached the spot.

5. A body was lying on the spot. A royal Enfield motorcycle bearing registration No.DL 3SX 0375 was at the spot.

6. Inspector G.L.Mehta met Kashmir Singh PW-5 at the spot, who handed over a statement in writing, Ex.PW-5/A, informing that at 7:30 PM, Ved, Kripal, Rishipal and he were riding two motorcycles being driven by Kripal and Ved respectively. When they reached the house of Suraj Bhan, Kartar, Azad, Mahavir and Surender fired at them from the roof of Suraj's house. Ved was hit by bullets and fell down. They managed to escape.

7. Based on the statement the FIR was registered. At the spot, Inspector G.L.Mehta prepared the rough site plan Ex.PW-20/C and lifted control earth, blood stained soil and a shoe as recorded in the memo Ex.PW-5/B. The motorcycle DL 3XS 0375 at the spot was seized vide memo Ex.PW-5/C.

8. Statements of Kripal Singh PW-8, the person who had given the telephonic information as also Rishipal PW-14 were recorded the same day under Section 161 Cr.P.C.

9. Since Ved Pal had died soon after the incident, evidenced by the fact he was declared brought dead at the hospital, the body was sent for post-mortem. Dr. Jayant PW-3 conducted the post-mortem on 21.8.2003 and noted 3 bullet entry wounds; one on the frontal region of the scalp; the second on the right upper anterior chest wall and the 3rd at the back. All entry wounds had tattooing. 3 bullets, one from the skull, the second from the chest and the third from the abdominal cavity were recovered and handed over to the investigating officer on 21.8.2003, soon after the post-mortem was conducted.

10. The accused were apprehended.

11. Since 3 co-accused have been acquitted and qua them the State has not come up in appeal; findings qua them having attained finality. Thus we need not note the

incriminating evidence sought to be brought on record against 3 accused. We shall be noting the incriminating evidence brought on record against the appellant.

12. After the post-mortem was conducted on 21.8.2003, supplementary statement of the complainant as also Rishipal and Kripal Singh were recorded as per which they gave a change version. In their earlier statements they had informed that the accused had fired from the roof top. But, guided by the post-mortem report which evidenced that the deceased was shot thrice at point blank range; evidenced by tattooing of the skin where the bullet entered, each of the three stated that after initial firing from the roof top, the accused came down and fired shots at them from a point blank range.

13. The appellant was arrested on 23.8.2003 and on interrogation by Inspector G.L.Mehta made a statement that the country made pistol Ex.P-3 with which he had fired 3 shots could be got recovered by him as also the 3 empty cartridges. He stated that after committing the crime he had crossed river Yamuna by swimming across and the country made pistol fell in the water of the river. Pursuant to the said disclosure statement Mahavir took the investigating officer to the spot at the river bank wherefrom he claimed to have swam across. No weapon could be recovered. Mahavir was further interrogated

on 26.8.2003 and his supplementary statement Ex.PW-23/J was recorded. As per this statement he informed that actually, the pistol and the cartridge were hidden, at a spot next to a cremation ground on the banks of river Yamuna. In the presence of Ajit Singh PW-17 Mahavir led the investigating officer to the cremation ground and from the place, not visible to the naked eye, got recovered a country made pistol Ex.P-3 and got recovered 3 empty cartridges which were seized vide memo Ex.PW-17/B.

14. On 14.10.2003 the pistol Ex.P-3 and the bullets which were recovered from the body of the deceased were sent to a ballistic expert for opinion. As per opinion Ex.PW-26/I it was opined as under:-

“RESULT OF EXAMINATION

- (1) The revolver .32” caliber marked exhibit ‘F1’ is designed to fire a standard .32” cartridge. It is in working order in its present condition. Test-fire conducted successfully.
- (2) The country made pistol .325” bore marked exhibit ‘F2’ is designed to fire a standard 8mm/.315” cartridge. It is in working order in its present condition. Test-fire conducted successfully.
- (3) The .32” cartridges marked exhibits ‘A1 & A2’ are live ones and can be fired through .32” caliber firearm.
- (4) The 8mm/.315” cartridge cases marked exhibits ‘EC1 to EC3’ are fired empty cartridges.

- (5) The bullets marked exhibits 'EB1 & EB2' correspond to the bullet of 8mm/.315" cartridge.
- (6) No opinion can be given regarding exhibit 'EBR3' due to insufficient data.
- (7) The .32" cartridge marked exhibit 'A1' above was test fired through the revolved .32" caliber marked exhibit 'F1' above.
- (8) The 8mm/.315" cartridge from laboratory stock was test fired through the country made pistol .315" bore marked exhibit 'F2', test fired cartridge case was marked as 'TC1' and the recovered test fired bullet marked as 'TB1'.
- (9) The individual characteristic of firing pin marks and breech face marks present on evidence fired cartridge cases marked exhibits 'EC1' to 'EC3' and on test fired cartridge case marked as 'TC1' were examined & compared under the Comparison Microscope Model Leica DMC and were found identical. Hence the exhibits 'EC1 to EC3' have been fired through the country made pistol .315" bore marked exhibit 'F2' above.
- (10) The individual characteristic of striations present on evidence fired bullets 'EB1 & EB2' and on the test fired bullet marked 'TB1' were examined & compared under the Comparison Microscope Model Leica DMC and were found identical. Hence the bullets marked exhibits 'EB1 & EB2' have been discharged through the country made pistol .315" bore marked exhibit 'F2' above.
- (11) The exhibits 'F1 & F2' / 'A1 & A2', 'EC1 to EC3', 'EB1' and 'EB2' are firearm ammunition as defined in the Arms Act, 1959."

15. There being no incriminating recoveries being effected pursuant to the disclosure statements made by the co-accused and in view of the FSL Report Ex.PW-26/I , it is apparent that to succeed, the prosecution was solely relying upon the

testimony of the alleged eye witnesses i.e. PW-5 Kashmir, PW-8 Kripal Singh and PW-14 Rishipal, as also the recovery of the country made pistol Ex.P-3 pursuant to the disclosure statement of the appellant and the FSL Report opining that the 3 bullets which were recovered from the body of the deceased were fired from the said country made pistol.

16. The learned Trial Judge has acquitted the 3 co-accused holding that the testimony of the 3 eye witnesses did not inspire confidence. The reason is that in their first statement made to the police they had stated that the firing took place from the roof top when the deceased and others were driving on motorcycles and were on the main road, and only in their supplementary statements recorded on 26.8.2003, had given changed versions of initial firing being from the roof top followed by the accused coming down and firing at contact range. The fact at the post-mortem of the deceased was conducted on 21.8.2003 has been held to be crucial, for the reason on said date, it became apparent that the shots were fired at the contact range and not from a distance. Thus, since the dead body spoke for itself, finding material improvements made by the 3 alleged eye witnesses; improvements being guided by the post-mortem report, the learned Trial Judge, rightly in our opinion, held that the eye witness account was not

creditworthy.

17. Qua the appellant, the learned Trial Judge has held that his disclosure statement leading to the recovery of the weapon of offence and the same being linked to the bullets recovered from the body of the deceased was sufficient evidence to convict the appellant.

18. At the hearing of the appeal, learned counsel for the appellant urged that since the eye witness account has failed, the appellant cannot be convicted for the offence of having murdered the deceased. Counsel argued that in view of the disclosure statement of the appellant and the recovery of a country made pistol at his instance, the appellant can be convicted for the offence punishable under Section 25 and Section 27 of the Arms Act.

19. The second submission made by learned counsel was that the bullets were recovered from the dead body of the deceased on 21.8.2003. The country made pistol was recovered on 26.8.2003. The bullets and the country made pistol were sent to CFSL Laboratory on 14.10.2003. It was urged that there is every possibility of tampering having taken place in the interregnum.

20. We deal with the second submission first for the reason if the same is found creditworthy we need not deal with

the first.

21. Unfortunately, in Delhi, we have only two Forensic Science Laboratories. One is the Central Forensic Science Laboratory at R.K.Puram. The other is the Forensic Science Laboratory at Rohini. The two laboratories are over-worked. They do not receive suspected samples for forensic examination at random. The procedure being followed is that the investigating officer writes letters which are entered in a register and as per priority position assigned to a request, the laboratory requisitions the samples which have to be analyzed. This explains the delay in all cases for having sent seized samples for forensic analyst after 2 months of the seizure.

22. What has to be considered is, whether there is scope to tamper with the seized articles in the instant case, as indeed, in every case.

23. PW-11, in-charge of the malkhana on the relevant dates has proved the entries in the malkhana register, Ex.PW-11/G.

24. The same evidence that the 3 bullets were duly deposited in the malkhana the same day they were handed over by the doctor after the post-mortem i.e. on 21.8.2003. The same further shows that the country made pistol recovered pursuant to the disclosure statement of the appellant was

deposited in the malkhana on 26.8.2003 i.e. the very day when it was recovered. The register shows that the pistol as also the 3 bullets were removed from the malkhana on 14.10.2003 i.e. the very day they were deposited with the Forensic Science Laboratory. Indeed, the FSL Report dated 5.5.2004, refers to the parcels containing the pistol and the 3 bullets being received under letter No.1290/R/SO/S.Vihar, dated 14.10.2003.

25. It is apparent that there is no scope for tampering.

26. The second submission made by learned counsel for the appellant is accordingly rejected.

27. We need but note only two decisions of coordinate Division Benches of this Court pertaining to the first plea.

28. In a recent decision dated 27.4.2009 disposing of a batch of criminal appeals, lead matter being CrI.A.No.974/2006

Zahid Vs. State, in para 48 it was observed as under:-

“48. A firearm which gets connected to a bullet recovered from the body of the deceased is extremely incriminating qua the person from whom the firearm is recovered unless he is able to satisfactorily explain his not being connected with the firearm when the crime took place. A firearm used as a weapon of offence establishes conclusively the presence of the firearm at the scene of the crime and since a firearm cannot move by itself, the owner or the possessor thereof must explain the circumstance under which the firearm reached the place of the occurrence and in the absence of any such explanation it would be permissible for the Court to presume that the owner or the possessor of the firearm was the offender.”

29. In the decision reported as 2005 (1) JCC 261 Nehru

Jain Vs. State NCT of Delhi, noting that the eye witnesses had turned hostile and that the only evidence linking the accused with the crime was the recovery of a firearm which was linked to the bullet recovered from the body of the deceased, in paras 14 and 15, it was observed as under:-

“14. There is nothing in cross examination which could possibly shatter or dislodge the opinion expressed by the witness either on the ground of deficient expertise of the witness or any other improbability whatsoever. The fact that the weapon used for firing the crime bullet was licensed in the name of the appellant and was recovered from his house with twenty live cartridges three of which were used for test firing by the expert is also firmly established by the evidence on record.

15. It was, in the above circumstances, difficult for the appellant to deny the use of the weapon in the commission of the crime. Confronted with this evidence, Mr. Tulsi, fairly conceded that in the absence of any explanation as to how the weapon came to be used for the commission of the crime, the other circumstances proved in the case including the presence of the appellant in the marriage procession at the time of the occurrence was sufficient to connect the appellant with the weapon as also the injury resulting in the death of the deceased, Vikram, the retraction of the statements made by PW-1 Sanjay Sharma and PW-2 Jameel notwithstanding. We have, in that view of the matter, no hesitation in rejecting the first limb of Mr. Tulsi's argument and holding that the trial court had correctly come to the conclusion that the deceased had died because of a bullet injury sustained by him in the head and that the said bullet had been fired by the appellant from the Smith & Wesson revolver licensed in his name and subsequently seized from his house.”

30. The appellant has failed to render any satisfactory explanation pertaining to the whereabouts of the firearm used

for commission of the offence at the time when the offence was committed. Thus, the appellant must admit to his guilt.

31. We find no merits in the appeal.

32. The appeal is dismissed.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

May 22, 2009
mm