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

Reserved on: 30th October, 2017
Date of decision: 15th November, 2017

+ **CRL.A. 339/2016**

MOHD. SARFARAZ ...Appellant
Through: Ms. Sumita Kapil and Ms. Pooja Swami,
Advocates

versus

THE STATE (NCT) OF DELHI ...Respondent
Through: Ms. Radhika Kolluru, APP

WITH

+ **CRL.M.A. 11753/2017 IN CRL.A. 341/2016**

AHMED SHOUKEEN ...Appellant
Through: Ms. Sumita Kapil and Ms. Pooja Swami,
Advocates

versus

THE STATE (NCT OF DELHI)Respondent
Through: Ms. Radhika Kolluru, APP

WITH

+ **CRL.A. 348/2016**

ABDUL MIRAZ @ CHHOTU ...Appellant
Through: Ms. Sumita Kapil and Ms. Pooja Swami,
Advocates

versus

THE STATE (NCT) OF DELHI ...Respondent
Through: Ms. Radhika Kolluru, APP

WITH

+ CRL.A. 349/2016
MOHD. ISRAR ...Appellant
Through: Ms. Sumita Kapil and Ms. Pooja Swami,
Advocates

versus

THE STATE (NCT) OF DELHI ...Respondent
Through: Ms. Kusum Dhalla, APP

AND

+ CRL.A. 446/2016
AHMED NAFIS ...Appellant
Through: Mr. Arvind Kumar, Advocate

versus

STATE ...Respondent
Through: Ms. Kusum Dhalla, APP

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA

JUDGMENT
15.11.2017

Dr. S. Muralidhar, J.:

1. These five appeals are by the accused persons in FIR No.23/09 registered at PS Jamia Nagar against the judgment dated 29th February 2016 passed by

the learned Additional Sessions Judge-02-South East, Saket Court, New Delhi ('ASJ') in Sessions Case No.49/13 convicting Ahmed Nafees (A-1), Ahmed Shokeen (A-2), Mohd. Israr (A-3), and Mohd. Sarfaraz (A-4) for the offence under Section 302/34 IPC and Abdul Miraz @ Chhotu (A-5) for the offence under Section 302 IPC and under Section 27 of the Arms Act, 1959.

2. These appeals are also directed against the order on sentence dated 3rd March 2016 passed by the learned ASJ whereby

(i) A-5 was sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- for the offence under Section 302 IPC; and in default of payment of fine rigorous imprisonment ('RI') for six months. He was further sentenced to undergo RI for 5 years and to pay a fine of Rs.2,000/- for offence under Section 27 of the Arms Act and, in default of payment of fine, to undergo simple imprisonment ('SI') for 3 months.

(ii) The other four accused were sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- each for the offence under Section 302/34 IPC and, in default of payment of fine, to undergo SI for six months.

Reporting of the crime and investigations

3. The information about an incident of bullet firing, which happened at the Jamia Nagar Community Centre, was received at around 10.15 pm on 1st February 2009 by Head Constable ('HC') Rajender Kumar (PW6) from Java-55. PW6 made DD entry Ex.PW6/A in roznamcha Register No. A at Sl. No.25. The said DD was sent to Assistant Sub Inspector ('ASI') Bengali

Babu through Constable Raj Kumar (PW8). PW8 along with Constable Satish and ASI Bengali Babu reached the spot, i.e. Mujib Bagh Community Centre, Noor Nagar, Jamia Nagar and found that a blue colour Maruti van bearing number DL-9C-0661 with front and rear glasses and the side mirrors in a broken condition. On right side of the vehicle, some blood was found on the road.

4. On the same day, at around 10.50 pm, he received a message from Tara Chand, duty clerk at the Holy Family Hospital on telephone that one Shahnawaz, s/o Aslam, was admitted there with a bullet injury. PW6 then made a DD entry at Sl. No.26A (Ex.PW6/B) and sent it to ASI Bengali Babu through Constable Pawan.

5. When ASI Bengali Babu received the DD No.26A, he asked PW6 to remain at the spot. He along with PW9 proceeded to the Holy Family Hospital. PW8 stated that under his supervision, the spot was not tampered.

6. Pursuant to the same DD No.26A, Inspector Mahender Singh (PW-17) along with Constable Ram Phal proceeded to the Holy Family Hospital after lodging DD No.27A (Ex.PW-17/A). There PW 17 met ASI Bengali Babu and Constable Satish Kumar. ASI Bengali Babu handed over DD No.25A (Ex.PW6/A), DD No.26A (Ex.PW6/B) and the MLC of the injured Shahnawaz (Ex.PW3/D5) to PW-17.

7. At the hospital, one Wasim (PW-1) met PW-17 who recorded the statement of PW-1 (Ex.PW-1/A). Thereafter, PW-17 made an endorsement

on the said statement, prepared the *rukka* and gave it to Constable Ram Phal (PW-14) for registration of an FIR. On 2nd February 2009, at about 12.50 am, the *rukka* was received by PW6 and FIR No.23/09 under Section 302/34 IPC (Ex.PW6/C) was registered. He also made endorsement on the *rukka*. PW-14 then went to the spot of the crime and handed over the FIR and *rukka* to PW-17, the Investigating Officer ('IO') of the case.

Deposition of PW-1

8. The case of the prosecution is built on the versions of PW-1 and PW-4. According to them on 1st February 2009, Wasim (PW-1) along with Shahnawaz (deceased) went to the shop of Mohd. Israr (A-3) at Batla House as the deceased wanted to buy a CBZ motorcycle. When they reached the shop, Ahmed Nafees (A-1), Ahmed Shokeen (A-2) and Abdul Miraz @ Chhotu (A-5) were also present there. After negotiation, the price of the motorcycle was settled at Rs.16,000/- and the balance to be paid in instalments of Rs.2200/-. According to PW-1, the deceased paid a sum of Rs.16,000/- to Israr and took the said motorcycle. At this, A-5 objected to the deal and started quarrelling with Shadab Ahmed (PW-4), the younger brother of the deceased. According to PW-1, while they were leaving the shop along with the motorcycle, A-1, A-2 and A-5 threatened the deceased and PW-4 with dire consequences. Thereafter, PW-1, the deceased and PW-4 returned to Jaitpur along with the motorcycle.

9. The case of the prosecution, as stated by PW-1, was that in order to celebrate the deal, Ahtesham had organized a party in his TV showroom at Taimur Nagar. PW-1 and the deceased went to the said TV shop where

Ahtesham, A-1, A-3 (Mohd. Israr) and A-5 were also present and were consuming alcohol. PW-1 and the deceased remained there for about 15-20 minutes. Thereafter, when Ahtesham closed the shop, they all started leaving.

10. PW-1 stated that when he and the deceased left the shop and reached near Bhopal Ground, Jamia Nagar, Ahtesham met them again and told them that A-1, A-2, A-3 and A-5 were not good persons; that they should not maintain any relationship with them and be beware of them. Thereafter, PW-1 and the deceased left for their house at Jaitpur. Ahtesham also departed. When PW-1 and the deceased reached Noor Nagar, they found that the road was not clear as some digging work was going on. So they turned back their van and started going towards the Community Centre at Mujib Bagh. Since there was a crowd on account of a wedding, the road was packed. They were compelled to stop the van.

11. PW-1 states that at that point, he noticed that PW-4 Shadab (the brother of the deceased) was standing in front of the Community Centre. He also noticed A-1, A-2, A-3, A-4 and A-5 coming towards the van in which they were travelling. PW-1 and the deceased got down from the van after seeing PW-4. At this point of time, A-1 exhorted the others, "*In dono ka kaam tamam kar do*". Thereupon, the five of them started beating up the deceased, PW-4 and PW-1. PW-1 stated that A-1 and A-3 caught hold of the deceased and A-2 and A-4 caught hold of PW-4 while A-5 was fighting with PW-1. All five of them started beating the deceased and PW-4. A-1 again shouted to A-5 that "*In dono bhaiyon ka kaam tamam kar do*" (finish both the

brothers today). Then A-5 took out a revolver from the left side pocket of his pant and fired at the deceased who received the bullet and fell down on the ground. Pandemonium then broke out and the accused started fleeing from the spot.

12. PW-1 stated that he apprehended A-5 after chasing him. However, A-1 and A-3 started beating and kicking PW-1 and freed A-5 from his grip. A-1, A-2 and A-3 fled away on a black coloured motorcycle. A-4 and A-5 fled away in a silver coloured van. According to PW-1, he chased the van for a distance and hit its glass on the left side with his fist and that the glass was thereby broken. PW-1 is stated to have received some injuries in that process. PW-1 and PW-4 stopped one passer-by vehicle and took the deceased to the Holy Family Hospital where the doctor declared him 'brought dead'.

Deposition of PW-4

13. PW-4 was the other eye witness who fully supported PW-1 on the material particulars. This included their going to the office of Ahtesham; about the deceased wanting to buy a motorcycle from Ahtesham at Jamia Nagar; that at the shop of Ahtesham, A-1, A-2, A-3 and A-5 were already present; that the deal for the said motorcycle was finalized at Rs.16,000/- and Rs.2200/- in monthly instalments for about 8 months; that A-1, A-2 and A-5 had objected to the deal and picked up a quarrel with him and; that A-1, A-2 and A-5 had threatened both the deceased and himself.

14. PW-4 further deposed that on being called by A-3, he reached the

Community Centre, near the Barat Ghar at around 9.45 pm. Within 5-7 minutes, all the accused reached there. PW-4 also stated that PW-1 and his deceased brother Shahnawaz were passing by and got down from the van. As soon as they came towards him, A-1 exhorted his associates to kill both the brothers. PW-4 too stated that A-1 and A-3 caught hold of the deceased whereas A-2 and A-4 caught hold of PW-4 and A-1, at that point, again exhorted them to kill both the brothers. PW-4 confirmed that upon hearing this, A-5 took out a country-made revolver ('*katta*') from the left side pocket of his pant and fired a shot at the deceased who fell down on the ground. Pandemonium then broke out.

15. PW-4 had confirmed that PW-1 tried to catch hold of A-5 but A-1 and A-3 hit PW-1 with fists and kicks and managed to help A-5 escape. A-4 and A-5 started fleeing from the spot in a silver colour Maruti van and, upon noticing them, PW-1 hit the windows of the van with blows and the glass of the window was broken.

16. PW-4 further stated that A-1, A-2 and A-3 fled away on a black colour motorcycle. PW-1 took the deceased to Holy Family Hospital where he was declared 'brought dead'. Thereafter, PW-4 rang up his father, who reached the Holy Family Hospital.

Defence evidence

17. In their respective statements under Section 313 Cr PC, A-1, A-2, A-3 and A-4 all maintained that each of them had been falsely implicated. Apart from this, A-4 examined himself as DW1 and claimed not to know the

deceased or his family members. A-4 stated that on 1st February 2009, he never went to the Community Centre and had remained at his tea stall. In his cross-examination by the Addl PP, he claimed that he did not know the house of the deceased was at Okhla Vihar. He stated that Mohd. Tariq was known to him but denied that he was a witness to his arrest in this case. He claimed not to know if the deceased had any quarrel with Israr (A-3) regarding the purchase of the motorcycle and that he did not know any Rubaya. He, however, admitted that A-1 and A-2 were his relatives both being sons of his aunt (‘bua’). He, however, claimed not to know Chhotu (A-5) or Israr (A-3).

18. The other defence witness was Mohd. Akhtar who claimed to have known Sarfaraz (A-4) to be running a tea stall and that he never heard of any criminal case against him except the case on hand. He claimed to have seen A-4 being taken away by the police. In this cross examination, he admitted that he did not lodge any complaint to any higher officials of police regarding the arrest of A-4 and that he had no knowledge that a Maruti car or motorcycle which were involved in the crime were recovered at the instance of A-4.

Findings of the Trial Court

19. The learned Trial Court, on analysis of the evidence, came to the following conclusions:

- (i) From the deposition of Dr. Shiva Prasad (PW-16) it stood proved that the deceased Shahnawaz died a homicidal death.

The death was on account of haemorrhagic shock due to

hemothorax and blood loss caused by the gunshot wound. It was the first of six injuries noticed during the post-mortem by PW-16.

- (ii) The testimonies of PW-1 and PW-4 proved that that the gun shot was fired by Abdul Miraz @ Chhotu (A-5).
- (iii) Despite best efforts, the weapon of offence could not be recovered. However, the non-recovery of this weapon was not fatal to the case of the prosecution since the eye witnesses had seen A-5 firing the country-made revolver on the deceased.
- (iv) The motive for the murder was the purchase of motorcycle by the deceased from Israr (A-3). The accused had objected to the deal and in this connection, A-1, A-2 and A-5 had had a fight with PW-4. The documents executed by A-3 in respect of the sale of the motorcycle in the form of Forms-29 and 30 (in duplicate) and cash receipt were proved by the prosecution.
- (v) Both PW-1 and PW-4 saw A-5 firing upon the deceased with the *katta*. There was no license for the country-made revolver. Therefore, it is proved that A-5 had also committed an offence under Section 25 of the Arms Act.
- (vi) A-5 committed the offence punishable under Section 302 IPC, instigated by A-1 to kill the deceased and his brother.

(vii) A-2, A-3 and A-4 also actively participated with each of their roles being consistently described by the eye witnesses. In particular, it stood proved that while A-1 exhorted his associates to kill both brothers, A-1 and A-3 caught hold of Shahnawaz and A-2 and A-4 caught hold of Shadab Ahmed (PW-4) and A-5 took out the katta from his left side pant pocket and fired on the deceased. Consequently, except A-5, the remaining accused had committed the offence punishable under Section 302/34 IPC.

(viii) The stand of A-4, who examined himself as DW1, that he was not present at the scene of crime was belied by both the eye witnesses (PWs 1 and 4) clearly speaking of his presence. They were also consistent that A-4 caught hold of PW-4.

20. For all of the aforementioned reasons, the trial Court convicted A-5 for the offence under Section 302 IPC and Section 25 of the Arms Act. The remaining accused persons were convicted for the offence under Section 302/34 IPC. By a separate order on sentence dated 3rd March 2016, the trial Court awarded sentences to each of the accused, as noticed hereinbefore.

Submissions of counsel

21. This Court has heard the submissions of Ms. Sumita Kapil, learned counsel appearing for A-1, A-2, A-3 and A-5 and Mr. Arvind Kumar,

learned counsel appearing for A-4. Ms. Radhika Kolluru, and Ms. Kusum Dhalla, learned APPs appeared on behalf of the State.

22. It was submitted by Ms. Sumita Kapil, learned counsel for the Appellants that:

- (i) The trial Court failed to note the arguments of the defence. The judgment was perfunctory and failed to scrutinize the evidence of the witnesses and the submissions made at the bar. Reliance was placed on the decision in *Mukhtiar Singh v. State of Punjab AIR 1995 SC 686*.
- (ii) There were numerous inconsistencies in the testimonies of PW-1 and PW-4. PW-4 was an interested eye witness and had inimical relationship with the accused persons. The presence of the two eye witnesses at the spot was highly doubtful.
- (iii) While PW-1 stated that he and the deceased had gone to the shop of Israr (A-3) at Batla House where the deal for purchase of motorcycle had been finalized, PW-4 stated that the deal was finalized at Taimur Nagar at the shop of Ahtesham. The distance between the house of the deceased, PW-1 and PW-4 and Taimur Nagar was 30 minutes plus 15 minutes further to Batla House whereas PW-1 claimed that it was at a distance of 8 km. This was totally contradictory to the testimony of PW-4.
- (iv) It was improbable that PW-1 and the deceased reached the Community Centre where PW-4 was also allegedly present. Despite the contention that there was a marriage function going on and the road was packed, no independent witness was examined. Moreover, it

was impossible for A-5 and A-1 to flee in a van. It was strange that three of the accused would go in a motorcycle and two in a van from such a crowded place.

- (v) The car driver who took PW-1, PW-4 and the deceased to the hospital was never examined.
- (vi) There were two vans. One in which the deceased and PW-1 had come which was blue in colour and the other, in which the accused had fled away which was silver in colour. The memo of seizure of the silver coloured van showed that there was no damage to the glass which according to PW-1 was broken by his banging his fist against the glass. This is belied by the testimony of Maqsood (PW-18), who took the van on *superdari* as well as Constable Ram Phal (PW-14), SI Vijay Pal Singh (PW-11) and HC Raj Kumar (PW8).
- (vii) Despite Ahtesham being a crucial witness, he was not made one. The IO failed to seize the mobile phones even though PW-1, PW-4 and the deceased were carrying mobile phones. They also failed to bring on record the CDR or the location of the phone which could have been pertinent to the present case. Although the mobile phone of A-4 was seized, neither the CDR nor the location of his phone was brought on record by the prosecution. In fact PW-1 and PW-4 did not first call the police, PW-19 Dr. Azim Khan called the PCR at 9.30 pm, much before PW-1 and the deceased reached the SOC. The presence of PW-4 was highly improbable and his testimony was totally in contradiction to that of PW-1.
- (viii) Once the eye witness account is disbelieved, the motive is required to be examined. The weapons purportedly used by the accused was not

recovered. Further, since both eye witnesses (PWs 1 and 4) contradict each other, the prosecution case was not proved.

- (ix) The sample of blood from the seats of the van at the site was not sent for examination; Tara Chand, the duty clerk, was not examined; the PCR police official was not examined. The cell phones of PW-1, PW-4, the deceased and the accused for location and CDRs were not seized. No negatives of the photographs taken at the site which were misplaced. The site plan failed to mention the position of the accused, the witnesses, the cars and other stationary objects.
- (x) It was evident that the investigation was conducted in a shabby manner and the incident was scripted by the IO sitting at the PS.
- (xi) As far as medical evidence is concerned, the kind of wounds suffered by the deceased were improbable to be caused from a distance of 4 ft., the maximum dispersion of pallet was on the forehead, 35 cm from the entry wound. If there is no singeing of the hair, then the distance had to be more than 60 cm.
- (xii) The testimony of PW3 was intended only to aim to protect PW-4.

Analysis and reasons

23. The evidence of PW-1 and PW-4, both of whom were eye witnesses, does not suffer from any major contradiction as far as the actual incident of firing is concerned. The specific details of the incident viz., who held whom and who fired the gun, are consistently spoken to without any material contradiction. From the evidence of both eye witnesses, the presence and relative positions of each of the accused at the scene of crime and the role played by each of them stands conclusively established.

24. The two eye witnesses survived extensive cross examination. Therefore, the minor omissions and improvements over the statements made previously to the police will not discredit their testimony.

25. There is no incongruity as far as place of the deal is concerned. The Court has been shown the map of the concerned area. The distance between Taimur Nagar, where the shop of Ahtesham was located, and Batla House Chowk, where Israr's shop was located, is not so far that it renders improbable the time frame as indicated by the witnesses, within which it could be traversed.

26. It is also not unusual that since the road was dug up at Noor Nagar, PW-1 and the deceased would take a U-turn and reach the Community Centre, Mujib Bagh. The eye witnesses are consistent on the fact that there was a marriage function which made it impossible for the vehicle to move. It was contended on behalf of the Appellants that the claim that PW-1 banged on and broke the glass of the side window of the silver coloured van as the accused were fleeing was belied by the fact that when PW-16 took the van on *superdari*, he did not find any broken glass. The Court has viewed the photographs of the said van taken at the time of handing it over to PW-16. The side glass windows do appear to have cracks and, this substantially corroborates the statement of PW-1.

27. It was sought to be contended that the front and rear glass of the blue coloured van used by the deceased and PW-1 were also broken and there

were blood stains on one side and that this raised doubts as to what exactly happened. It was suggested that the deceased was perhaps killed even while he was in the blue coloured van to begin with. However, it is seen that on this aspect there was no effective cross-examination of the IO. In fact, there was no alternate theory put forth by the defence in the cross-examination.

28. Likewise, the failure to examine Tara Chand, the duty clerk, or the PCR police official or the failure to seize the cell phones of PW-1, PW-2 and the deceased as well as of A-4 for locations and CDRs fades to insignificance when the eye witness testimonies of PW-2 and PW-4 inspire confidence and do not even remotely suggest that they are not speaking the truth. There are some minor contradictions in the testimony of the father, PW-3, when compared to the testimony of PW-1. An alternate theory was put forth that PW-4 was upset about his brother having an affair with a girl named Rubaya. But all suggestions put to the witness in this regard did not elicit anything positive in favour of the accused so as to discredit the evidence of PW-1 and PW-4. For the same reason, the failure to recover the unlicensed firearm that was used to kill the deceased does not discredit the eye witness testimony.

29. On the other hand, the medical evidence completely corroborates the eye witness testimony as regards the death occurring due to the gunshot wound. It was sought to be contended that the maximum dispersal of the pellets was found on the forehead 35 cm from the entry wound and such dispersal is possible on such wider area only if the fire arm hit from the range of 32 ft. No question in this regard has been put to any ballistic expert and therefore,

it cannot be said that there was no fire arm used at all when the fact remains that there were pellet dispersion injuries. The mere fact that singeing of the hair is not present will not mean that the fire arm was not used at close quarters.

30. Likewise, regarding the arrest of A-1, A-2, A-3 and A-5, while HC Satish states that he went in a Tavera, PW-3 stated that they went in a three-wheeled scooter. This is not a major contradiction so as to discredit the entire case of the prosecution. Likewise, the failure to examine Bengali Babu, ASI, does not in any way shake the solid testimonies of the two eye witnesses, i.e. PW-1 and PW-4.

31. Again, as far as Mohd. Sarfaraz (A-4) is concerned, his role has been clearly established by the testimonies of PW-1 and PW-2. The defence evidence led by him hardly inspires confidence. It was rightly rejected by the trial Court. There can be no denying that the case of the prosecution, as it stands, proved that A-5 was guilty of committing the offence of murder under Section 302 IPC whereas the other accused were guilty of the offence under Section 302/34 IPC. Lastly, although the trial Court may not have listed out the arguments of the defence, it has meticulously dealt with each of them in the impugned judgment.

32. The impugned judgment, viewed from any angle, is not shown to be suffering from any major infirmity which calls for any interference.

33. The appeals are accordingly dismissed. The bail bonds of the Appellants,

who are out on bail, are cancelled. The Appellants will surrender forthwith failing which, they shall be taken into custody to serve the remainder of their sentence. The pending applications are also disposed of.

S. MURALIDHAR, J.

I.S. MEHTA, J.

NOVEMBER 15, 2017

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