

\$~R 8 & 9

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

%

*Date of Judgment: 3<sup>rd</sup> July, 2017*

+ CRL.A. 651/2015

SAHIBE ALAM @ NAKTA

..... Appellant

Through: Mr.Arvind Kumar and Mr. Ankit  
Aggarwal, Advocates

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP for the State  
along with SI Arvind Kumar, P.S.  
New Usman Pur.

+ CRL.A. 412/2015

FAISAL @ SIBHU

..... Appellant

Through: Mr. Kaushal Yadav and Mr. Rupesh  
Shahi, Advocates

versus

STATE (NCT) OF DELHI

..... Respondent

Through: Mr. Rajat Katyal, APP for the State  
along with SI Arvind Kumar, P.S.  
New Usman Pur.

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

**HON'BLE MR. JUSTICE CHANDER SHEKHAR**

**G.S.SISTANI, J. (ORAL)**

1. Present appeals have been instituted under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against the judgment of the Trial Court dated 02.03.2015 in Sessions

Case No.30(1)/10, FIR No.252/10, Police Station New Usmanpur and the order on sentence dated 03.03.2015, by which the appellants have been sentenced to imprisonment under Sections 302/34 IPC for life and a fine of Rs.5,000/- each and in default of payment of fine, the appellants have been sentenced to simple imprisonment for one month each.

2. Both Mr. Arvind Kumar, learned counsel appearing for the appellant Sahibe Alam @ Nakta in CrI.A.651/2015 and Mr. Kaushal Yadav, learned counsel appearing for the appellant Faisal @ Sibhu in CrI.A.412/2015 have raised common arguments.
3. Before the rival submissions of the learned counsels of the appellants can be considered, we deem it appropriate to notice the case of the prosecution.
4. The case of the prosecution, as noticed by the learned Trial Court, is as under:

*“1. On 07.08.2010 at 10.45 p.m., PW-22 HC Narayan Singh, Duty Officer, PS New Usmanpur received a wireless message from police control room that three boys fled towards Shastri Park after shooting a person. He recorded the said information into rojnamcha register vide DD No. 37A Ex.PW22/A and sent a copy thereof to PW-11 ASI Satyapal Singh through PW-14 Ct. Subodh for appropriate action.*

*2. Thereafter, PW-14 Ct. Subodh handed over a copy of DD No. 37A to ASI Satyapal Singh at Zero Pusta.*

*3. On receipt of DD No. 37A, PW-11 ASI Satyapal Singh alongwith PW-27 Ct. Dharmender reached at pusta road, opposite A-Block, Village Garhi Mandu, Delhi where he found blood on the patri (pavement). On enquiry, he came to know that the injured Bobby was taken to hospital by his son through CATS Ambulance. He did not find any eye witness on the spot. He directed patrolling staff to guard the scene of occurrence. He alongwith PW-27 Ct. Dharmender*

*reached at GTB Hospital. He obtained MLC No. B-3675/10 of Bobby s/o Sh. Prakash r/o. 120, Gali No. 6, Garhi Mandu, Delhi Ex.PW18/A.*

*4. According to MLC Ex.PW18/A, Bobby was brought to the Casualty of GTB Hospital by CATS, Alfa-16 on 07.08.2010 at 11.15 p.m. with alleged history of gun-shot around ½ hour back. PW-18 Dr. Banarsi, CMO, GTB Hospital, Delhi examined Bobby and declared him brought dead.*

*5. PW-11 ASI Satyapal Singh inspected dead body of the deceased. He observed gun shot injuries under the left eye and left side of the chest of the deceased. He observed an injury on the right side of the chest which appeared him to be the exit point of the bullet. He observed injury on the right hand of the deceased. He met PW-6 Sumit S/o Sh. Ajit Singh @ Bobby. He made enquiry from him. He came to know that PW-6 Sumit was an eye witness. ”*

5. The learned counsels for the appellants submit that the learned Trial Court has erred in passing the impugned judgment as the Trial Court has wrongly appreciated the facts and the judgment and the order on sentence is contrary to law. Learned counsels contend that the appellants have been falsely implicated in the case. It has been strongly urged before this Court that PW-6 Sumit is not an eye witness. His presence is doubtful at the spot of the incident for the reason that two MLCs have been prepared within a span of five minutes. As per the first MLC, the name of the deceased has been shown as ‘unknown’ and subsequently the word ‘Bobby’ has been added. Both the MLCs contain incorrect address of the deceased and had PW-6 been present, he would have informed the correct address. It is also contended that in case PW-6 was present at the spot of the incident, he would have reacted in a different manner. PW-6 did not inform the PCR, he did not inform the relations, he did not make any

attempt to save his father, thus his presence has not been established and, on this ground alone, the appeals are liable to be allowed and the impugned judgment and the order on sentence set aside.

6. The learned counsels have also submitted that the examination-in-chief of PW-6 was not concluded on the first date and the matter was adjourned at the request of the counsel for the State only with a view to tutor this witness. His examination-in-chief on the first date of hearing did not refer to two other persons, which were introduced by PW-6 when he entered the witness box after the matter was adjourned and he was tutored by the State. Learned counsels submit that it is to lend support to the case of the prosecution that on the second date of hearing two unknown persons were introduced who were subsequently examined as PW-8 Vipin Kumar and PW-9 Nazarul. PW-6 in his statement under Section 161 Cr.P.C. which was recorded soon after the incident at 12:35 A.M. also did not mention the presence of any other person.
7. Learned counsels submit that PW-6 is not a truthful witness. His testimony would show that he shifted his stand more than once inasmuch as that this witness has testified that he did not make a call to the PCR as he did not have a phone and in the later part of his examination, he had testified that he had made a call to the PCR from his own phone which was in his possession for the last two-and-a-half years. Counsels further submit that PW-6 could not have identified the appellants and it is highly improbable that on the date when the appellants were produced in Court as a co-incidence on the same date as claimed by PW-6, he had gone to the Court to meet his lawyer and he was shown the two appellants outside the Court No.63, where he happened to be present. Counsels contend that the statement so made

is a tutored statement and thus, unreliable. Counsels also submit that the rough site plan which has been placed on record does not show as to where PW-6 was standing when the incident took place, although in the site plan prepared subsequently on scale, the place where PW-6 was standing has been identified. Counsels submit that this submission would gain importance as the draftsman has testified that PW-6 was not present when the site plan was being prepared.

8. It is also contended by the learned counsels for the appellants that PW-6 was not present at the spot as during cross-examination, he could not answer the material questions with regard to the place of the incident and as to whether there were stairs or not. Learned counsels for the appellants also contend that PW-8 and PW-9 have also turned hostile as they have not supported the case of the prosecution, they have not identified the appellants as the persons who were involved in the shoot-out and, thus the appellants are entitled to benefit of doubt. Attention of this Court has been drawn to the testimony of PW-9, who has testified that after the incident, PW-6 was called and in case the testimony of this witness is to be relied upon, it would categorically establish that PW-6 was not present at the spot of the incident. While placing reliance on the DD entry No.37-A, learned counsels contend that as per this DD entry, three boys had shot one person, however, no effort was made by the State to either establish the identity of the third person or to investigate as to who was the third person. Learned counsels contend that the case of the prosecution is not believable as the post-mortem report of the deceased shows undigested food, however, there is no evidence on record to show that the deceased had consumed food and neither is there any evidence on record to show that the deceased and PWs-8 and 9 had jointly consumed liquor at the

place of the incident. Attention of the Court has also been drawn by the learned counsels for the appellants to the testimony of PW-11 SI Satyapal Singh, who has testified that after he reached the spot of the incident, he did not find any family members of the deceased nor PW-8 or PW-9 were available. Learned counsels for the appellants also contend that the weapon of offence has not been recovered which would in any way connect the appellants to the crime.

9. Mr. Rajat Katyal, learned counsel appearing for the State submits that careful reading of the evidence on record of PWs-8 and 9 would establish the presence of the appellants at the place of the incident. A complete reading of the evidence of PWs-8 and 9 would also establish that a scuffle had taken place between one Chaudhary and Sibhu (appellant in CrI.A.412/2015). Mr. Katyal also submits that it is not in dispute that PWs-8 and 9 are not eye witnesses to the shooting, but they are witnesses to show that the appellants, PWs-8 and 9 and the deceased were present at the place of the incident. The evidence of PWs-8 and 9 also establishes that a scuffle had taken place and thereafter the deceased was shot by the appellants herein. Mr. Katyal submits that the presence of PW-8 is established by the fact that a call was made to the PCR by PW-8. There is no cross-examination of the appellants with regard to the fact that no PCR call was made by him. Mr. Katyal submits that although a doubt is sought to be created with regard to the two MLCs, but in fact no question was put to the Doctor, who proved the MLC. Additionally, testimony of PW-6 is reliable and trustworthy. PW-6 is an eye-witness whose presence is established by the testimony of PW-10 K.K. Kaushik, the driver of CATS ambulance. Learned counsel for the State has also placed reliance on the CATS ambulance form in which it has been stated that

Sumit (PW-6) had accompanied the deceased in the ambulance, although the learned counsels for the appellants have contended that this document was prepared on the next date and thus, it was not free from any manipulation. Mr. Katyal further submits that an adverse inference is to be drawn by the Court that the appellants had refused to Test Identification Parade (TIP).

10. We have heard learned counsels for the parties, carefully examined the testimonies of the witnesses and given our thoughtful consideration to the matter.
11. The main thrust of the arguments of the learned counsels for the appellants is that PW-6, the son of the deceased, was in fact not present at the time of the incident. Closely connected to this submission is the submission that PW-8 and PW-9 are planted witnesses. Learned counsels for the appellants have, thus, submitted that the testimonies of PW-8 and PW-9 cannot be relied upon; their testimonies are not trust-worthy. Elaborating their arguments further, the learned counsels for the appellants have also drawn the attention of the Court to two MLCs. It was contended before us that in case PW-6, the son of the deceased, was present at the spot of the incident and had removed his injured father to the hospital, he would have given the correct particulars while the MLC was being prepared. It is submitted that the MLCs do not contain the correct particulars of the deceased. In the column of name, initially it was typed “unknown” and subsequently, the name Bobby has been entered.
12. It has also been submitted that PW-6 was not present at the spot in view of the fact that he did not make a call to the police neither he called his family members. Relying on the evidence of PW-9, counsels have contended that PW-9 has testified that after the

incident, PW-6 was called. The contention of the learned counsels for the appellants is to be considered based on the testimonies of three material witnesses being PW-6 Sumit (son of the deceased and the eye-witness in the present case), PW-8 Vipin Kumar and PW-9 Nazarul.

13. PW-6 has testified that he was residing with his family. His father used to run a buffalo cart and he used to help him in his work. On 07.08.2010 at about 10.30 p.m. he along with his father was coming from the fields towards Yamuna Khadar and was going to their house. When his father crossed the road opposite A-Block, Village Ghari Mandu, Bhajanpura, Delhi and the witness was crossing the road and was on the *patri* in between the road, two persons on a black motorcycle came from the side of Khajoori Chowk. Sahibe Alam was pillion riding the motorcycle while Faisal @ Shibbu was driving the motorcycle. Sahibe Alam, who was the pillion rider, fired three shots from the pistol on his father, upon which his father fell down on the *patri* in an injured condition. When he tried to chase the accused persons, the pillion rider pointed out the pistol towards him and fled away towards Shastri Park. Subsequently, Public persons gathered there and someone made a telephone call at No.100. PW-6 has further testified that thereafter, an ambulance arrived at the spot and he took his father to GTB Hospital in the ambulance. His father was declared brought dead. He identified both the accused persons in Court. His statement was also recorded by the police in the hospital Ex.PW-6/A.
14. The examination-in-chief of this witness was then deferred from 23.05.2011 to 07.06.2011. On the subsequent date, this witness testified that his father was also known as Bobby. On 07.08.2010 he had gone to call his father from the fields in Yamuna Khadar. Two

other persons were also present. The site plan was also prepared on his pointing out. He had identified the dead body of his father and also identified his thumb impressions on Ex.PW-6/B. PW-6 has also testified that on 10.09.2010 he had gone to Karkardooma Court Complex to meet his counsel in connection with the present case. On the said date, the SHO along with two Constables and two other persons were coming outside the Court Room No.63. He then identified the two persons as the assailants who had come on the motorcycle and the person of short height was driving the motorcycle while the tall one was the pillion rider on the date of the incident. The tall one had fired on his father which resulted in his death. He also testified that he came to know of the name of the tall person as Nakta and the short one as Shibbu in the Court as disclosed by the SHO.

15. PW-6 was cross-examined at length by the learned counsels for the respective appellants. In his cross-examination, PW-6 testified that on the date of the incident, he had accompanied his father since morning. He is an illiterate person. He and his father did not have any mobile phone on the date of the occurrence and neither is a telephone installed at their residence. He testified that Nazarul and Vipin @ Raju developed friendship with his father 4-5 days prior to the occurrence and even started taking his father along with them since morning. On the day of the incident, Nazarul and Vipin had taken his father from the residence at about 12.30 p.m. or so. His father did not inform them as to where he was going with Nazarul and Vipin. His father was not under the influence of liquor. He was not aware if his father had gambled on that day or not. He also testified that the Bhainsa was left for grazing in the morning. He denied that any abuses were hurled at the place where his father was consuming liquor. He also testified

that no quarrel had actually taken place in his presence. But he had seen Nazarul and Vipin with his father at the riverbed and Vipin and Nazarul were following him and his father when his father was shot dead. They were at a distance of 20-25 paces. The public had informed the PCR at No.100. He also testified that the police had reached the place of occurrence before he left for the hospital. The ambulance was also called by the public gathered at the spot. He could not give the names of the persons who had called the PCR and the ambulance but testified that the ambulance reached the spot within 5-10 minutes of the firing. He accompanied his father to the hospital in the ambulance. His father was bleeding profusely. His clothes had blood stains but he did not hand over the clothes to the police. He was wearing an Underwear and Vest.

16. During the cross-examination, he could not answer with regard to the width of the road. This witness has also deposed that the family members were informed by him on telephone of his Chacha from his own phone. He then testified that he also made a call to the police as also to the ambulance from his phone. He disclosed his mobile phone connection as 9650412845. The phone was in the name of his father and he was using it for the last 2-2½ years. PW-6 also deposed that the divider of the road was about 1 or 2 feet wide. His father was at a distance of 10-12 steps from him when he was shot dead. PW-6 was holding the Bhainsa and standing on the divider of the road while his father had crossed the road and he was waiting for the traffic to pass.
17. PW-6 was recalled for examination by the Trial Court to identify the motorcycle. His testimony with regard to the motorcycle reads as under:-

*“I have seen the motorcycle No.DL 7S AX 0592, make Achiever, Hero Honda in the judicial parking in the*

*presence of Ld. Presiding Officer, Defence counsel, both accused persons etc.*

*Court Question. Can you identify the motorcycle on which the accused persons, as per your deposition, came and fired at your father?*

*Ans. Yes.*

*Court Question. Whether the motorcycle No.DL 7S AX 0592 make Achiever, Hero Honda, red colour is the same motorcycle?*

*Ans. The colour of the motorcycle on which accused persons came on that day was black. I had seen the oil tank of black colour. It was night. I cannot say exactly that this is the same motorcycle..... ”*

18. PW-8 Vipin Kumar has testified that he used to drive Phat Phat Sewa. On 07.08.2010 in the evening, he along with one Nazarul, Bobby and few other persons were consuming liquor in Yamuna Khadar near Khajoori Pushta. When he reached Yamuna Khadar, a quarrel was going on amongst few persons. Others including deceased Ajeet Singh @ Bobby pacified the matter. The persons involved in the quarrel were Shibbu and Chaudhary. After the matter was pacified, all the persons present dispersed. After some time, he had left Yamuna Khadar. He then received a call from Nazarul who called him at the spot where Ajeet Singh @ Bobby was murdered. When he reached the spot, Sumit told him that two persons on a motorcycle had fired upon his father. He immediately made a call to No.100 and an ambulance came at the spot. Ajeet Singh @ Bobby was removed to GTB Hospital. Later on, he came to know that Bobby had died.
19. At that point of time, at the request of the learned APP for the State, this witness was permitted to be cross-examined by the prosecution, as

he had not deposed about some material aspects of the case. In the cross-examination by the learned APP for the State, he testified as under:-

*“I became friendly with the deceased & Nazrul a few months prior to the incidents. It is correct that Nazrul used to ply TSR scooter while Ajeet Singh @ Bobby used to ply the bullock-cart. It is incorrect to suggest that when Bobby was pacifying the matter one of the boy pushed Bobby with the result that Bobby fell down on the ground. It is correct that one of the persons who was quarrelling was being called by the name of Nazrul. It is incorrect that verbal dual had taken place between Ajeet Singh @ Bobby & said Nakta or that Bobby picked up a danda and gave danda blow on the person of Nakta or that the persons present there pacified the matter between them or that I along with Nazrul separated Bobby from Nakta or that I had stated such facts to the police in my statement mark A. (confronted with the statement mark A portion A to A where it is so recorded)*

*It is incorrect that accused Shibbu threatened Ajeet Singh @ Bobby by saying that he had already committed a murder and one more could take place and he is least concerned with the same. (confronted with the statement mark A portion B to B where it is so recorded)*

*It is incorrect that Nakta had asked Bobby to wait and threatened to face the consequences by using the words ‘TU YAHIN RAHA TUIHE ABI MAJA CHAKHATE HAIN’ (confronted with the statement mark A portion C to C where it is so recorded). It is correct that Shibhu & Nakta had left the said place.*

*It is incorrect that I had received any telephone call or that myself and Nazrul also proceeded towards pushta or that IO had stated so to the police in my statement mark A. (confronted with the statement mark A portion D to D where it is so recorded)*

*It is correct that son of Bobby had come there to call Bobby and that Bobby along with his son left the said place for his house.*

*It is incorrect to suggest that in the statement made to the police I had raised suspicion upon Shibbu & Nakta that they might have killed Bobby (confronted with the statement mark A portion E to E where it is so recorded).*

*It is incorrect to suggest that I have suppressed the said facts out of fear of the accused persons.*

*Both the accused persons Nakta & Shibbu are present in the Court today.*

*xxxxxx by Sh. SN Qureshi counsel for the accused persons*

*Deferred on the request of learned counsel for the accused.*

*On 10.08.2011*

*xxxxxx by Sh. SN Qureshi counsel for the accused persons*

*I received a telephonic call at about 10.00 pm when I was present at Khajoori Khas. The said call was made by Nazarul. It took about 5-7 minutes to reach at the spot. I made a call to the police and police reached at the spot in my presence. Son of the deceased Sumit was already present there when I reached at the spot. I did not accompany Bobby to the hospital. At that time Bobby was not conscious. Police had taken me to the police station from the spot itself. I came to know about the factum of death of Bobby at about 1.00 am (night) when Sumit came to the PS. Myself, Nazarul and Sumit all had put Bobby in the Ambulance for being taken to the hospital. My clothes as also clothes of Nazarul and Bobby got stained in lifting Bobby for putting in the Ambulance. Police did not seize the said clothes of ours.”*

20. PW-9 Nazarul has testified that he used to drive a TSR. He testified that although he did not remember the date, month and year of the occurrence, but it was about 10 months ago at about 9.45/10.00 p.m.

when he was present at Khajoori Pushta along with Raju. Bobby was also present but he had left the place. Two persons came on a motorcycle and the person who was pillion rider on the motorcycle fired gun shot on Bobby. Thereafter, the persons fled towards Shastri Park after committing the offence. He made a telephone call to Vipin @ Raju. Thereafter, Sumit son of Bobby was called at the spot. He along with Sumit removed the injured to GTB Hospital in a TSR. He deposed that the persons present in the Court are not the persons who fired the gun shot, as the persons who came on the motorcycle and fired the gun shot were of stout built.

21. At that stage, the learned APP for the State sought leave of the Trial Court to cross-examine PW-9 as he was not supporting the case of the prosecution on material aspects. The cross-examination of this witness by the learned APP for the State reads as under:-

*“xxxxxx by Sh.Pankaj Sanghi Addl.PP for the State*

*It is correct that the incident had taken place on 7.8.2010. It is correct that I knew Vipin TSR driver and Bobby @ Ajit Singh bullock-cart puller and in the evening of 7.8.2010, myself and Bobby went down from the red light of Khajoori and reached Yamuna riverbed where Vipin was consuming liquor. It is correct that myself and Bobby sat down with Vipin and we also started consuming liquor. It is correct that some other persons were also sitting by our side but it is incorrect that they were consuming liquor but they were playing cards.*

*It is correct that after some time, two out of the said persons started abusing each other and man-handling each other. It is also correct that the said persons were calling each other as Shibbu and Chaudhary. It is correct that deceased Bobby intervened and pacified both of them. It is wrong to suggest that a person out of the said gamblers pushed Bobby due to which he fell down on the ground (Confronted with the statement Ex.PW-9/A where it is so recorded). It is*

wrong to suggest that the associates of the said person who had pushed Bobby were calling the said person as NAKTA. It is incorrect to suggest that Bobby had picked up a danda lying nearby and gave one danda blow to NAKTA (Confronted with the statement Ex.PW-9/A where it is so recorded).

It is correct that the persons present there intervened and pacified Bobby and NAKTA. It is correct that myself and Vipin separated Bobby. It is wrong to suggest that one Shibbu present at the spot threatened Bobby that "SAALE MAINE EK MURDER TO KAR HI RAKHA HAI. EK OUR H JAYEGA KYA FARAK PARTA HAI" (Confronted with the statement Ex.PW-9/A where it is so recorded).

It is further wrong to suggest that NAKTA also threatened Bobby and uttered words "SAALE YAH! RAHA TUJHE ABHI MAJA CHAKHAE HAIN" and both of them left while abusing (Confronted with the statement Ex.PW-9/A where it is so recorded).

It is correct that myself, Vipin & Bobby again sat there and started consuming the remaining liquor. It is wrong to suggest that after some time, son of Bobby namely Sumit came to call him or that Bobby accompanied him for his house. (Confronted with the statement Ex.PW-9/A where it is so recorded). It is wrong to suggest that at the same time we also left the spot. However it is correct that Vipin received a telephone call and he started attending the said call. (Confronted with the statement Ex.PW-9/A where it is so recorded).

It is correct that after attending the said call, myself and Vipin proceeded towards Pusta from Yamuna riverbed. It is correct that when we reached Pushta we saw that a crowd had gathered across the road. It is wrong to suggest that myself and Vipin reached near the crowd and saw that Bobby was lying there in a pool of blood or that his son Vipin was also there and was weeping. (Confronted with the statement Ex.PW-9/A where it is so recorded).

It is further wrong to suggest that Sumit told us that motorcyclists had fired shot on his father. (Confronted with

*the statement Ex.PW-9/A where it is so recorded). It is wrong to suggest that Ambulance reached the spot on my telephone call (vol) we took Bobby to the hospital in a TSR (Confronted with the statement Ex.PW-9/A where it is so recorded).*

*It is correct that Bobby was declared brought dead by the doctor in the hospital. It is wrong to suggest that I had raised suspicion that Shibbu and NAKTA, who had threatened Bobby at Yamuna riverbed when they were gambling, had fired shot at Bobby (Confronted with the statement Ex.PW-9/A where it is so recorded).*

*It is wrong to suggest that I am deliberately suppressing the truth on account of having won over by the accused persons, in order to save the accused persons. It is wrong to suggest that I have stated the above mentioned facts to the police in my statement under section 161 CrPC EX.PW-99/A. The said statement has been read over to the witness wherein all the above facts are mentioned.*

*It is wrong to suggest that the accused persons present in the Court today had threatened Bobby as mentioned above. However, they are the same persons who were gambling. It is wrong to suggest that accused Shibbu and NAKTA present in the Court today had quarrelled with deceased Bobby on the day of occurrence.*

*It is wrong to suggest that accused NAKTA and Shibbu present in the Court today had abused, threatened and had beaten up Bobby on 7.8.2010 at Yamuna riverbed or that they had killed Bobby by firing shot upon him*

*xxxx by Sh. SN Qureshi counsel for the accused persons*

*Son of the deceased Sumit had come at the spot after about 10 minutes on the calling of Raju @ Vipin. Myself and Sumit had accompanied Bobby to the hospital while Vipin @ Raju had been taken away by the police for the purpose of enquiry. Statement of Sumit was not recorded by the police in my statement.”*

22. Another important witness is PW-10 K.K. Kaushik, Assistant Ambulance Officer, CATS. His testimony reads as under:-

*“In the intervening night of 7/8.8.2010, I was working as Assistant Ambulance officer in CATS ambulance No. Alpha 16. On that night at about 10.30 pm on receiving an information, I along with the ambulance reached at Garhi Mandu, Pushta road near Shastri Park, where I found an injured person. I checked him and found to be unconscious. His son Sumit was also present there. I immediately removed the injured to the GTB Hospital. His son Sumit also accompanied us to the GTB Hospital. My statement was recorded by the IO. I have brought the original Patient Assesment Proforma, the photocopy of the relevant page is Ex PW 10/A.*

*xxxxxxx by Sh SN Qureshi counsel for the accused persons.*

*Some persons were present at the spot when I reached there with the ambulance. We were two persons in the ambulance. Blood was oozing out from the injuries of the injured/ deceased. The injured/ deceased was shifted inside the ambulance by the son and two-three other persons present at the spot. Their clothes were got blood stained while shifting the injured inside the ambulance. I had not collected or seen any document to establish the identity of Sumit as son of the injured (Vol.) Sumit told me that he is the son of the injured. I had not verified the address of the injured/ deceased after admitting him in the GTB hospital. IO never met me in connection with the present case. Traffic was moving on the road when I shifted the injured to the hospital. The width of one side of the road may be 20-25 feet and it is three lanes road. I was instructed to go the spot by our control room. I cannot tell the name of the person who informed me to reach at the spot.”*

23. In addition to the above four witnesses, the prosecution also examined PW-4 ASI Rajender Prasad who testified that on receipt of Rukka through Const. Dharmender sent by ASI Satpal Singh, he recorded FIR No.252/2010, Police Station New Usmanpur through Computer

Operator. He identified his signatures on the computerized copy of the FIR.

24. PW-11 SI Satyapal Singh has testified that he was posted as ASI at Police Station New Usmanpur. On 07.08.2010 he had received DD No.37A (Ex.PW-11/A). He along with Const. Dharmender reached near Garimunda Village, A-Block, near Khajoori Chowk, Shastri Park and found blood spot on the *patri*. On enquiry, he came to know that the injured Bobby had already been taken to the hospital by CATS ambulance. Sumit son of the deceased had also accompanied the injured Bobby to the hospital. He directed the patrolling staff Const. Devender to remain present at the spot and he along with Const. Dharmender reached GTB Hospital where he found injured Bobby admitted with an alleged history of gunshot and was declared brought dead. He inspected the dead body and found the gunshot injuries near left eye and towards the left side of the chest and also found injuries towards the right side of the chest. He had then interrogated the son of the deceased and recorded his statement Ex.PW-6/A. He also prepared the Rukka and handed over the same to Const. Dharmender for registration of the case.
25. This witness was cross-examined in detail by the learned counsels for the accused persons as well. Attention of the Court was drawn, particularly, to cross-examination where this witness has deposed that he did not notice any other family member of the injured except the complainant in the hospital and he had not met any of the family members of the deceased when he returned to the spot from the hospital after sending the Rukka and he was not aware about any persons by the name of Vipin and Nazarul. He, however, had denied the suggestion that he had not met the complainant in the hospital or

that he had falsely introduced him as an eye-witness subsequently at the instance of the SHO.

26. The prosecution has also examined Const. Shyamlal as PW-12 who was posted as Photographer in the Crime Team and had taken the photographs of the spot.
27. SI Mukesh Kumar Jain was examined as PW-13 who was posted as a Draftsman and deposed that he inspected the spot, took measurement and prepared rough notes of the spot on the pointing out of Insp. R.K. Khatana. In his cross-examination, he deposed that the complainant Sumit had not accompanied them to the spot.
28. PW-15 Const. Pankaj testified that he was posted as a Constable at Police Station New Usmanpur on 13.08.2010 and on receipt of secret information that Sahib Alam @ Nakta, who was wanted in this case, would pass through Rajiv Vihar, Wazirabad Road at about 7.30 p.m. On reaching Rajiv Vihar, Wazirabad Road and on pointing out by the secret informer, Sahib Alam @ Nakta, whom he identified in Court, was apprehended and arrested vide Arrest Memo Ex.PW-15/A. His personal search was also conducted vide Memo Ex.PW-15/B. The disclosure statement made by the accused is Ex.PW-15/C.
29. PW-16 Const. Om Prakash has testified that he was posted as a Constable at Police Station New Usmanpur on 12.08.2010. On the said date, he joined the investigation of this case along with IO Insp. R.K. Khatana and SI Girish Chander. On the basis of the secret information received, the police party reached Nanaksar at about 7.00 p.m. and on pointing out by the secret informer, Shibu @ Faisal was apprehended vide Arrest Memo Ex.PW-16/A. His personal search was conducted vide Memo Ex.PW-16/B. He was interrogated and his disclosure statement was recorded being Ex.PW-16/C. On 13.08.2010,

on pointing out by Faisal, the motorcycle No.DL-7S-AX-0592 Hero Honda was seized (Ex.PW-16/E) from outside the house of the accused at Gali No.17, Sri Ram Colony, Rajiv Vihar. On re-examination, PW-16 identified the motorcycle which was taken on *superdari* by the father of the accused Shibu @ Faisal.

30. The testimony of PW-18 Dr.Banarasi, CMO, LBS Hospital, Delhi reads as under:-

*“On 07.08.2010, I was posted as CMO at GTB Hospital, Delhi. On that day, at about 11.15 p.m., patient Bobby S/o Prakash, Male, 45 years was brought to the Casualty of GTB Hospital with the alleged history of gun shot about half an hour back. He was medically examined by me vide MLC No. B-3675/10. The patient was not responding and could not be revived despite efforts. The patient was declared “brought dead”. The MLC is in my hand and the same is Ex.PW18/A, which bears my signatures at point A.”*

31. The post-mortem examination of the deceased was done by PW-19 Dr. Thejaswi, Senior Resident, Department of Forensic Medicine, AIIMS. His detailed report is Ex.PW-19/A. He found following ante-mortem injuries on the body of the deceased:

*“**Injury No.1:** Gun shot entry wound measuring 0.7 cm x 0.7 cm circular in shape is present on the left lateral side of the chest in the anterior axillary fold, 135 cm from left heel, 12 cm from left acromion, 19 cm from midline. Abrasion ring is present around the entry wound. The direction of the wound track being upwards, backward and medially. The wound track was 25 cm deep. The bullet penetrated left upper lobe of the lung with about 1 litre blood present in the left pleural cavity.*

*The bullet fractured left scapula in the infra spinous region, resulting in the exit wound measuring 1 X 0.7 cm on the left shoulder of the back, 11 cm from midline and 6 cm above the lip of the lower angle of the left scapula. Just below the injury a small bullet measuring 1.5 cm X 0.7 cm, silver coloured is present and it is marked bullet No. 1.*

***Injury No.2:*** Entry wound measuring 2.2 cm X 1.5 cm oval in shape with abrasion ring present on the left maxillary 1.5 cm below the left lower lid, 4 cm from midline and 159 cm from the left heel

*The direction of the wound track is backwards medially and upwards fracturing left maxilla body and greater wing of sphenoid after the missile, deformed bullet measuring 1.5 cm x 0.7 cm, silver coloured is seen and is 'Marked X' and labelled as bullet No.2. The depth of the wound track is 15 cm.*

***Injury No. 3:*** Entry wound measuring 0.7 cm diameter, circular in shape, 3.5 cm below the ulnar styloid process of the left hand with abrasion collar present. Powder soot is present. The direction is downwards, forwards and laterally fracturing the underlying bones. The wound track is 5.5 cm in length with exit wound 0.5 cm X 0.5 cm everted with irregular margins present on the palmer aspect of the left hand, 4 cm below the wrist joint and 5 cm above the middle meta carpo phalangeal joints.”

32. PW-19 Dr. Thejaswi opined that the cause of death of the deceased was shock as a result of gun-shot injury to the face and chest. Injury No. 1 and 2 were independently and singly sufficient to cause death in the ordinary course of nature.
33. PW-24 SI Girish Chand has also testified that he along with Const. Om Prakash had on the basis of secret information reached near Nanaksar Gurudwara, Wazirabad Road and apprehended Faisal @ Shibu.
34. PW-28 ACP Raj Kumar Khatana in his testimony, *inter-alia*, has testified that the motorcycle bearing No.DL-7S-AX-0592 was found parked in the Gali outside the House No.C-715, Gali No.17, Rajiv Vihar, Sri Ram Colony and the said motorcycle was recovered on the pointing out of accused Shibbu. He identified his signatures at point 'B' on the Seizure Memo Ex.PW-16/E. He has also testified that he

along with SI Girish and accused Shibbu went to Karkardooma Court and he produced the accused before the concerned Court in muffled face. He also moved an application for conducting TIP of accused Shibbu vide application dated 13.08.2010 (Ex.PW-26/B) and identified his signatures at point 'A'. According to this witness, accused Shibbu was produced before the Link MM, but the accused refused to join the TIP. The witness has also testified that based on secret information, accused Nakta was also arrested from Khajoori Chowk. No public witness agreed to join the proceedings. It has also been testified that the accused Nakta was produced before Court in muffled face on 16.08.2010, but he also refused to participate in TIP proceedings.

35. Undoubtedly, the testimony of the interested witness can be relied upon if found to be reliable and trustworthy. No enmity has been ascribed to PW-6 to discredit his testimony. It was held by the Full Bench of the Apex Court in ***Dalip Singh v. State of Punjab***, reported at ***AIR 1953 SC 364***, wherein it was observed as under:

*“27. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that here is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general*

*rule. Each case must be limited to and be governed by its own facts.*

*28. This is not to say that in a given case a Judge for reasons special to that case and to that witness cannot say that he is not prepared to believe the witness because of his general unreliability, or for other reasons, unless he is corroborated. Of course, that can be done. But the basis for such a conclusion must rest on facts special to the particular instance and cannot be grounded on a supposedly general rule of prudence enjoined by law as in the case of accomplices.”*

*(Emphasis Supplied)*

36. In the case of **Anil Kumar vs. State** reported at **ILR (1996) 2 Del 708**, the importance of interested witnesses has been discussed and it was held that the statement of a witness cannot be discarded and ignored simply because he happens to be a relation of the deceased. Relevant para 11 and 14 read as under:

*“11. We are sorry we are unable to agree with the contention of the learned counsel for the appellant. This is not the correct position of the law. The statement of a witness cannot be discarded and ignored simply because he happens to be a relation of the deceased. The relations of the deceased are the most natural witnesses inasmuch as man is a gregarious being. He lives and is expected to live in the company of his relations and friends. Thus if some calamity befalls a man, naturally it would be his or her relations only who would witness the same. Admittedly, there is no dispute with regard to the fact that the deceased was murdered during the intervening night of 25/26th February, 1986. The murder is alleged to have been committed at 2.00 a.m. in the night. Thus who could have been the other witness other than the wife of the deceased at such an odd hour of the night. Thus we are of the view that PW1 Smt. Ram Rati is the most natural witness in the circumstances of the case. Her testimony as such cannot be ignored and discarded simply because she happens to be the wife of the deceased.*

.....

14. It is manifest from above that there is no such law that the statement of a particular witness is liable to be flung to the winds simply because he happens to be a close relation of the deceased. The correct position of law is that there is no such bar. However, the Court while relying upon the statement of a close relation, so called interested witness, would be on its tiptoe and guard and would scrutinise the said statement more carefully. However, thereafter if it comes to the conclusion that the said statement is worth placing the reliance it would not hesitate from doing so simply because the witness is an interested one. After a careful scrutiny of the statement of PW1 Smt. Ram Rati, wife of the deceased, we are of the view that there is absolutely no reason whatsoever as to why her statement should not be relied upon. The learned counsel has failed to point out any infirmity or weakness whatsoever in her statement.

(Emphasis Supplied)

37. In the light of above, we have carefully examined the evidence of PW-6. We find the first submission so made by the learned counsels for the appellants that the evidence of PW-6 is not truthful and reliable to be without any force rather we find the evidence of PW-6 to be truthful and reliable. PW-6 has given a complete account as to how his father and he were retuning back and the manner in which the pillion rider fired three shots from his pistol on his father. His evidence is also truthful as he testified that someone had called No.100; the ambulance arrived and he took his father to the GTB Hospital in the ambulance. His evidence with regard to his presence at the spot is corroborated by the testimony of PW-10 K.K. Kaushik, the driver of the CATS Ambulance. PW-10 in his testimony, which we have extracted in para 22 above, has categorically testified that on the intervening night of 7/8.08.2010 at about 10.30 p.m. on receiving information he reached at Garhi Mandu, Pushta Road near Shastri

Park where he found the injured person. His son Sumit was also present there. This witness has categorically testified that he immediately removed the injured to the GTB Hospital and his son Sumit accompanied him to the hospital. The evidence of PW-10 also finds corroboration from the CATS Ambulance Form in which it is being stated that Sumit (PW-6) had accompanied the deceased in the ambulance. Furthermore, it is evident from the post-mortem report (Ex.PW19/A) that there were three gun shots sustained by the deceased which were on the left side of the chest, left side of face and on the left hand of the deceased. Matching of the injuries on the body of the deceased further corroborates the testimony of PW-6 Sumit.

38. As far as the submissions of the learned counsels for the appellants with regard to preparation of two MLCs and the fact that the address has been wrongly mentioned and also the word 'Unknown' was written are concerned. Although, we find it unusual that two MLCs were prepared in this case. Mr. Katyal, learned APP for the State has submitted that in one of the MLCs, which is the regular MLC, the name of the deceased has been rightly mentioned as Bobby son of Prakash at the address Garhi Mandu, Delhi and in another MLC, which Mr. Katyal explains, the initial columns were typed-written wherein in the column 'name' it says 'Bobby Unknown'. We are of the view that the word 'Bobby' could not have been added subsequently and in light of corroboration in the form of testimonies of PWs-8, 9 & 10, the appellants cannot derive any benefit of this discrepancy in the incorrect address, although we find that the house number is stated to be wrong but the area is correct. It may also be noted that the MLCs of the deceased stand duly proved and no question was put to the Doctor (PW-18) who proved the MLCs.

Hence, we do not find any force in the argument raised by the appellants and the same stands rejected.

39. It was also contended by Mr. Katyal that an adverse inference is to be drawn by the Court that the appellants had refused TIP. In this regard the law is well settled. In the case of **Prem Singh vs. State of Haryana** reported at **2011 (10) SCALE 102**, the Hon'ble Supreme Court held that it is not open to the accused to refuse TIP and adverse inference can be drawn against the accused to corroborate the case of prosecution. Relevant para 13 reads as under:

*“13. The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. In my considered view, it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-Appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case.”*

*14. In the matter of **Shyam Babu v. State of Haryana** (2008) 15 SCC 418 (425) where the accused persons had refused to participate in T.I. parade, it was held that it would speak volumes, about the participation in the Commission of the crime specially if there was no statement of the accused under Section 313 Code of Criminal Procedure that he had refused to participate in the T.I. Parade since he had been shown to the witnesses in*

*advance. In the matter of Munna v. State (NCT of Delhi) AIR 2003 SC 3805 (3809) as also in the State of Haryana v. Surender AIR 2007 SC 2312; in Teerath Singh (D) by LR v. State 2007 (1) ALL LJ (NOR) 143 (UTR) the Supreme Court still further had been pleased to hold that if the statement of the accused refusing to participate in T.I. Parade which was recorded in the order of the Magistrate was missing under Section 313 Code of Criminal Procedure, it was held that it was not open to the accused to contend that the statement of the witnesses made for the first time in Court identifying him should not be relied upon.”*

(Emphasis Supplied)

40. In the case of **Anil Kumar’s case (supra)**, an adverse had been drawn against the accused on their refusal of TIP. Relevant para 23 reads as under:

*“23..... The accused for the best reasons known to him did not join the test identification parade and declined to join the same on the ground that he has been shown, to the witnesses in the police station. Thus an adverse inference is liable to be drawn against the appellant in favour of the prosecution that had he joined the test identification parade he would have been identified by the prosecution witnesses. In the above circumstances we feel that the onus was on the appellant to substantiate his assertion that he did not join the test identification parade as he had been shown to the witnesses, However there is no such evidence on record to substantiate the contention of the appellant.”*

(Emphasis Supplied)

41. In the light of the aforementioned dictum, we are of the considered view that the Trial Court had rightly drawn an adverse inference against the appellants on their refusal of TIP.
42. The next argument raised by the learned counsel for the appellants that PW-8 and PW-9 are planted witnesses; they have turned hostile and have not supported the case of the prosecution and they have also

not identified the appellants as the persons who were involved in the shootout. This submission of the learned counsels for the appellants is also liable to be rejected. Even though PW-8 and PW-9 have turned hostile, their evidence establishes presence of PW-6 at the place of the incident. It is settled law that the testimony of a hostile witness need not be disregarded in toto and the part of the testimony inspiring confidence may be relied upon. We need not burden this opinion with judicial pronouncements in this regard, suffice to mention that one may usefully refer to *Radha Mohan Singh @ Lal Saheb and Ors. v. State of U.P.*, (2006) 2 SCC 450 (paragraph 7); *Jodhraj Singh v. State of Rajasthan*, (2007) 15 SCC 294 (paragraphs 11 - 14); *Paramjeet Singh v. State of Uttarakhand*, (2010) 10 SCC 439 (paragraph 15 -20); *Raja v. State of Karnataka*, (2016) 10 SCC 506 (paragraph 32); and *Arjun v. State of Chhattisgarh*, (2017) 3 SCC 247 (paragraph 15). Similar view was taken by another Division Bench of this Court, of which one of us (G. S. Sistani, J.) was also a member in the case of *Ravinder vs. State of NCT of Delhi* (Crl. A. No. 1075/2016, decided on 08.05.2017) (Paragraphs 9 and 10) and also *State NCT of Delhi vs. Mohan* (Crl. A. 270/2016, decided on 05.06.2017) (Paragraph 22).

43. While we are in agreement with the submission made by the learned counsels for the appellants that PW-8 and PW-9 are not eye-witnesses, but on careful analysis of the testimonies of the said witnesses, it clearly stands established that PW-8, PW-9 and the deceased were present at the place of incident. Their presence further stands corroborated by the fact that a call was made to the PCR by PW-8 and the CATS ambulance came at the spot. It may also be noted that there

is no cross-examination on behalf of the appellants with regard to the PCR call having been made by PW-8.

44. The presence of PW-8 and PW-9 also stands reflected in the testimony of PW-6 where he testified that when he had gone to call his father from the fields in Yamuna Khadar, two other persons were also present. No doubt, PW-8 and PW-9 have not supported the prosecution on some material aspects. The cross-examinations by the learned APP for the State of both these witnesses have been extracted in paragraphs foregoing which give a clear indication that they resiled from the statements given by them earlier and seem to have been won over by the appellants. During the cross-examination by the learned APP for the State, PW-8 testified that he became friendly with the deceased and Nazarul a few months prior to the incident. While he testified that it was incorrect to suggest that when Bobby tried to pacify the matter one boy pushed Bobby with the result he fell down, but he testified that it was correct that one of the persons, who was quarrelling, was being called by the name Nazarul.
45. In his cross-examination by counsel for the appellants, PW-8 has testified that he alongwith Nazarul (PW-9) and Sumit (PW-6) had put Bobby in the CATS ambulance. A careful analysis of the testimonies of PW-8 and PW-9 also establishes that while they along with Bobby were drinking, a quarrel took place where appellants were also present and the deceased had tried to pacify the matter. Thus, the presence of the appellants also stand established. Minor contradictions if any, in the testimonies of witnesses which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Our view is further fortified by the view rendered by the Hon'ble Supreme Court in the case of *State of U.P. v.*

*Naresh* reported at (2011) 4 SCC 324, after considering a large number of its earlier judgments held as under:

“30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

*“9.Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.”*

*Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.”*

(Emphasis Supplied)

46. In the light of the above discussion, we hold that the prosecution has established its case beyond doubt against the appellants and we are in agreement with the conclusion arrived at by the learned Trial Court,

consequently, both the appeals are devoid of any merit and are accordingly dismissed.

47. Copy of this order be sent to Jail Superintendent, Tihar Jail, Delhi.

48. Trial Court Record be returned.

**G. S. SISTANI, J.**

**CHANDER SHEKHAR, J.**

**JULY 03, 2017**

//pst/ka

