

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

Date of decision: 20th November, 2017

+ **CRL.A. 1359/2015**

KANTA PRASAD (PRESENTLY CONFINED IN JAIL)

..... Appellant

Through: Mr. K.Singhal, Advocate

versus

THE STATE GNCTD OF DELHI

..... Respondent

Through: Ms. Radhika Kolluru, APP with
SI Naresh Kumar, PS Kamala Market.

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

I.S.Mehta, J (Oral)

1. By way of the captioned appeal filed under Section 374 of the Code of Criminal Procedure, 1973, the appellant seeks to set aside the judgment dated 26th September, 2015 and order on sentence dated 30th September, 2015 passed by the learned Additional Sessions Judge, Tis Hazari Court, in FIR No. 72 of 2010 registered at Police Station Kamla Market under Sections 302/307 IPC and Sections 27/30 of Arms Act, whereby the appellant has been sentenced to undergo life imprisonment along with fine of Rs.10,000/- for the offence punishable under Section 302 IPC, in default of payment of fine, to undergo simple imprisonment for six months and rigorous imprisonment of further seven years and fine of Rs. 5000 for the offence punishable under Section 307 IPC, in default of payment of

fine, to undergo further imprisonment for 3 months, further simple imprisonment for six months for offence punishable under Section 30 Arms Act. These sentences have been ordered to run concurrently.

Case of the prosecution

2. In the instant case, the FIR No. 72 of 2010 was registered on the basis of the statement given by the complainant/injured i.e. Badri Prasad (PW-27), at LNJP Hospital to Inspector Vikramjeet Singh and SI Brajesh Mishra on 27th June, 2010. The complainant stated that on 27th June, 2010 at around 14:30 pm, the accused i.e. Kanta Prasad, who often used to visit Kotha No. 64 at G.B. Road, Delhi to meet a girl named Radhika (PW-22), had tried to forcibly take another girl named Sarla (PW-25) with him. When Sarla raised alarm and cried for help from the inmates of the Kotha, Badri Prasad (PW-27), the complainant herein tried to intervene and rescue Sarla, which infuriated the accused. The accused ran after Badri Prasad abusing him and also fired upon him and Badri Prasad sustained injury on his left shoulder. At that moment, two other inmates of Kotha named Babu Ram and Nissal @ Rishal (both deceased) came to save Badri Prasad. The accused open fire on all of them and shot Babu Ram at chest and Nissal @ Rishal at stomach. Thereafter, the accused tried to run away from the spot but he was apprehended by other inmates of Kotha and handed over to police. The injured Babu Ram died on the same date of the incident i.e. 27th June, 2010 in the hospital. The other injured Nissal @ Rishal's statement was taken on the same date, who succumbed to his injury and died in hospital on 30th June, 2010.

3. After the completion of investigation, the charge sheet was filed on 20th September, 2010 in the Court of Metropolitan Magistrate, Tis Hazari Courts, Delhi and vide order dated 20th September, 2010 the learned Metropolitan Magistrate took cognizance of offences punishable under Sections 302/307 IPC and Sections 27/30 of Arms Act against the accused- Kanta Prasad. The case was committed to the court of the learned Sessions Judge as the offences punishable under Section 302/307 IPC were exclusively triable by the court of Sessions.
4. Subsequently, the charge for the offences punishable under Sections 302/307 and Sections 27/30 Arms Act were framed against the accused person- Kanta Prasad on 10th November, 2010, to which he pleaded not guilty.
5. Thereafter, the prosecution has examined 33 witnesses and statement u/s 313 Cr.P.C. of the accused Kanta Prasad was recorded on 25th February, 2015, wherein the accused claimed to be innocent and stated that on the date of incident, there were three or four unknown persons at the Kotha No.64, who were creating nuisance in the Kotha. As per the accused, when he tried to stop those 3-4 unknown persons from creating nuisance, those persons quarrelled with him in which process he sustained injuries. He has further stated that during the scuffle, one of those persons snatched the revolver which was being worn by him in the holster and started firing indiscriminately and it was in this process that the injured in the present case sustained bullet injuries. He stated that after firing, those persons escaped from the Kotha and threw the revolver in the stair case. The accused ran after them and when he was at the stair case, he

picked up his revolver which was lying there. He claims that he was apprehended by the public due to mistake of fact. He has stated that he was falsely implicated in the present case in order to work out an untraced and blind murder case as the unknown assailants had already fled from the spot.

6. The learned counsel appearing on behalf of the appellant has submitted that the case of the prosecution is based on the eye witness. The appellant also does not dispute the incident and has submitted that the death and injury received by the injured persons is in the process of self defence. Moreover, the injured/deceased succeeded in causing injury on the person of the appellant/accused.
7. The prosecution case is that the accused Kanta Prasad often used to visit Kotha No. 64 at G.B. Road, Delhi to meet a girl named Radhika (PW-22). On the date of the incident i.e. 27th June, 2010, the said accused Kanta Prasad visited Kotha No. 64 and tried to forcibly take another girl named Sarla (PW-25) with him. As per prosecution version, Radhika was already residing with the accused Kanta Prasad at his house. Subsequently, when the accused Kanta Prasad tried to take another girl Sarla, she raised hue and cry and sought help from the other workers of Kotha. On this, Badri Prasad (PW-27) tried to intervene, which infuriated the accused. The accused hurled abuses at Badri Prasad and fired on his person and Badri Prasad (PW-27) received bullet injury on his left shoulder. In the mean time, two other workers named Babu Ram and Nissal @ Rishal rushed to Badri Prasad (PW-27) and accused open fire on all of them and shot Babu Ram at chest and Nissal @ Rishal at stomach. Thereafter, the

appellant/accused tried to run away from the spot but he was apprehended and handed over to police. Consequently, the injured Babu Ram died on the same date of the incident i.e. 27th June, 2010 in the hospital and the other injured Nissal @ Rishal's died after making his dying declaration in hospital.

Motive

8. The prosecution has relied upon the statement of injured/eye witness Badri Prasad (PW-27), Radhika (PW-22), Sarla (PW-25) and other witnesses Balram (PW-29) and Arjun (PW-30) pertaining to the incident. The incident is also supported with the dying declaration of Nissal @ Rishal i.e. EXPW 21/B. In presence of the aforesaid statements of injured/eye-witness, eye-witnesses and dying declaration, though the motive bears important significance but at the same time failure to discover the motive of offence does not signify its non-existence. (See **Mulakh Raj etc. v. Satish Kumar and others**, AIR 1992 SC 1175)

Eye-Witness

9. The prosecution has examined injured/eye-witness-Badri Prasad, eye-witnesses-Radhika, Sarla, Balram and Arjun. The FIR No. 72/2010 is registered on the basis of statement of Badri Prasad. The complainant/ Badri Prasad has stated that he on the date of the incident was busy with cleaning job at Kotha No. 64, where the accused Kanta Prasad reached there and forcibly tried to take Sarla working in Kotha No. 64. On Sarla's resistance and saying "*Bhaiya Mujhe Bachao, Yaha Aadmi Jabardasti Apne Saath Le Jana Chahta*

Hai”, Badri Prasad intervened. On his intervention, the accused Kanta Prasad, who was under the influence of liquor exhorted Badri Prasad saying “*Nepali Apna Kaam Karo*” and started abusing Badri Prasad. Badri Prasad told the accused that he is calling Police and he went inside the hall at the middle floor of Kotha No. 64. The accused followed him and kept on abusing him. Thereafter, he immediately took out his revolver attached to his belt and fired on the person of Badri Prasad. The bullet hit on his left shoulder. After seeing the same, the co-workers at Kotha No.64 namely Babu Ram and Nissal @ Rishal reached at the spot and the accused Kanta Prasad fired shot on them. Babu Ram received bullet injury on his chest and Nissal @ Rishal received bullet injury on his abdomen. After causing bullet on their person accused tried to run away from the spot, but he was apprehended at the spot and he was handed over to the police.

10. The incident took place on 27th June, 2010 and accused was apprehended at the same spot and the same date i.e. 27th June, 2010.
11. FIR No.72 of 2010 is registered on the basis of the statement given by the injured/eye-witness- Badri Prasad (PW-27/A) on the date of the incident. The MLC of injured/eye-witness Badri Prasad is EXPW 16/A. Both the co-workers/deceased Babu Ram and Nissal @ Rishal were taken to the hospital and deceased Nissal @ Rishal made disclosure statement on the same date of incident i.e. 27th June, 2010 and died on 30th June, 2010 and deceased Babu Ram died on the same date of the incident. The post mortem report of deceased persons i.e. Babu Ram and Nissal @ Rishal is EXPW 13/A and EXPW 14/A respectively.

12. The statement of injured/eye-witness Badri Prasad (PW-27) is natural, consistent and inspires confidence as his statement is quite natural and is consistent to the incident taken place on 27th June, 2010 at Kotha No. 64. The said statement is corroborated with the dying declaration of Nissal @ Rishal which is EXPW 21/B and eye-witnesses i.e. Radhika and Sarla. The dying declaration of Nissal @ Rishal is reproduced hereunder:

“Case FIR No. 72/10 U/S 302/307 IPC & 27/30 Arms Act, PS Kamla Market.

Statement of Nissal @ Risal S/o Pradeep Kumar R/o Irkhu Ward no. 3, Zila Sindupal Chowk, Nepal, Hall address Kotha no. 64 G.B. Road, Delhi aged 25 years u/s 161 Cr.P.C.

Stated that I live on the above address with my family and work as a sweeper in Kotha no. 64. Today on 27.06.2010, I was present at the kotha and around 2:30 pm one person namely, Kanta Prasad who used to come to meet Radhika on kotha, was trying to take Sarla with him, forcefully. Sarla asked Badri for help, so, he stopped Kanta Prasad and asked him to go but Kanta Prasad didn't and started abusing him. Badri threatened to call police and then they went in the hall. Kanta Prasad also went down to the hall while abusing and said “saale nepali, abhi tujhe Nepal bhejta hoon”, and then took out the revolver from his belt and shot Badri. Badri bent down and the bullet got into his shoulder. When I and Babu Ram ran to save Badri, Kanta Prasad abused us and said that he will send us also to Nepal with him and then shot us also. I got shot in the stomach and Babu Ram in his chest. When Kanta Prasad tried to escape from there, the boys working there and the crowd, caught him and started beating and took him down with them. They took me also along with them and

the police has also come. Arjun and Shambhu brought me and Baburam to the hospital in a TSR. Kanta Prasad with the intention to kill us had shot and injured us. Legal action should be taken against him. You recorded my statement. Heard it is correct.”

13. Moreover, the accused Kanta Prasad does not dispute the incident taken place in the said Kotha No. 64 and the statement of Badri Prasad (PW-27) goes against the accused. In this regard, the following observation in the decision of the Hon’ble Supreme Court in **Kartik Malhar v. State of Bihar**, [1995] Supp 5 SCR 239, are relevant:

“Conviction can be recorded on the basis of statement of single eyewitness provided two conditions are satisfied- firstly credibility of eyewitness is not shaken by any adverse circumstances appearing on record against him- secondly Court is convinced that eyewitness is truthful”

Expert Evidence

14. The prosecution has examined Dr. N.P. Waghmare, Assistant Director (ballistics), FSL Rohini, Delhi, who has proved the ballistic report i.e. PW-31/J. Moreover, the appellant/accused has not disputed the ownership of revolver (Exhibit F-1) used in the commission of the offence.

Medical evidence

15. The prosecution has examined Dr. Ankita Dey (PW-13), to prove the post mortem report of Babu Ram i.e. EXPW-13/A. As per

EXPW 13/A, the cause of death was due to haemorrhage and shock consequent upon rifled fire arm injury to chest and abdomen. Injury no.2 i.e. rifled fire arm entry wound (0.5x0.5) cm present on right side of front of chest, was sufficient to cause death in the ordinary course of nature. All the injuries were antemortem and fresh in duration.

16. Furthermore, PW-14 Dr. Kulbhushan has proved the post mortem report no. 510/10 dated 1st July, 2010 pertaining to deceased Nissal @ Rishal i.e. EXPW 14/A. As per post mortem report of Nissal the cause of death was due to haemorrhage and shock consequent upon penetrating wound on abdomen vide injury no.1. The injury no.1 i.e. fresh entry wound of 0.8x0.6 cm present over right side of abdomen was sufficient to cause death in the ordinary course of nature and could be possible by a projectile discharged through some firearm weapon. All the injuries are antemortem.

17. The statements of PW13- Dr. Ankita Dey, PW14- Dr. Kulbhushan, PW16- Dr. Vikas Singh and PW18- Dr. Ritu have proved the post mortem report of the deceased persons i.e. Babu Ram and Nissal @ Rissal, the MLC of injured/eye-witness PW27- Badri Prasad and the MLC of the accused Kanta Prasad i.e. EXPW 18/B which connects the appellant/accused person with the commission of crime.

Dying Declaration of deceased Nissal @ Rishal

18. Inspector Vikram (PW-31) has proved the dying declaration of deceased Nissal @ Rishal which also connects the appellant/accused Kanta Prasad in commission of offence. The reliance is placed on the

decision of Hon'ble Supreme Court in *Nirmal Louis Major v. State of Karnataka*, (2007) 9 SCC 524 wherein the Apex Court upheld the conviction of the appellant/accused relying on the dying declaration of the deceased.

19. The contention of the learned counsel appearing on behalf of the appellant/accused, that injury caused on the person of Badri Prasad (PW-27) and on the deceased persons namely Babu Ram and Nissal @ Rishal are a result of the exercise of right of self defence, is without force.
20. It is a fact emerging on the record before this Court that the injured/eye-witness Badri Prasad (PW-27) and deceased persons Babu Ram and Nissal @ Rishal were unarmed and were on their respective duties at Kotha No.64 and were regular workers of the said Kotha. There is no explanation coming on record as to what kind of business brought the accused at Kotha No. 64 along with the loaded revolver and live cartridges. The evidence emerging on record is that when the appellant/accused, who was in a intoxicant condition was prevented from taking the girl named Sarla forcefully, he exhorted and abused Badri Prasad (PW-27) and fired on the person who were unarmed, resulting into causing of grievance injury on the person of Badri Prasad (PW-27) and causing death to deceased Babu Ram and Nissal @ Rishal and he himself suffered simple injury as shown in MLC of accused EXPW 18/B.
21. Therefore, the evidence on record is crystal clear that it was the appellant/accused who was the aggressor and caused injury on the person of Badri Prasad (PW-27) and committed murder of Babu Ram

and Nissal @ Rishal and the plea of self defence is not proved.

22. As discussed above, we find no infirmity in the impugned judgment dated 26th September, 2015 and order on sentence dated 30th September, 2015 passed by the learned Additional Sessions Judge, Tis Hazari Court, in FIR No. 72 of 2010 registered at Police Station Kamla Market under Sections 302/307 IPC and Sections 27/30 of Arms Act.
23. Consequently, the appeal of the appellant is dismissed.
24. LCR file be sent back forthwith along with a copy of this judgment.
25. No order as to costs.

**I.S.MEHTA,
(JUDGE)**

**S.MURALIDHAR,
(JUDGE)**

NOVEMBER 20, 2017