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

+ **CRL.A. 396/2002**

MAHABIR @ VIRENDER BHARDWAJ Appellant
Through: Mr.Muddassir Daiyyan and
Mr.Vineet Jain, Advocates.

versus

STATE (NCT OF DELHI) Respondent
Through: Ms.Radhika Kolluru, APP for State
with Insp. Raj Bala, P.S. South
Rohini, Delhi.

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

% **ORDER**
11.01.2018

1. Mr. Muddassir Daiyyan appears on behalf of the Appellant and states that he would be filing his *Vakalatnama* during the course of the day.

2. This is an appeal by one of the accused against judgment the dated 24th January, 2002 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No.24/2000 arising from FIR No.748/1999, registered at Police Station ('PS') Rohini convicting the Appellant for the offence under Sections 302/34 Indian Penal Code 1860 ('IPC'). It is also directed against the order on sentence dated 28th January, 2002 sentencing the Appellant to imprisonment for life and to pay a fine of Rs.3,000 and in default of

payment of fine, to undergo Rigorous Imprisonment for a period of two months.

3. At the outset it requires to be noted that there were two accused in the case. Accused No.1 (A-1) was Mahabir (the present Appellant) and A-2 was Mukesh, who was acquitted by the impugned judgement of the trial Court. A-1 who was convicted as noted hereinbefore has filed this appeal.

4. The case of the prosecution is that Aminuddin (PW-3), son of Abdul Kayum (deceased), was running a juice cum STD shop at Avantika Chowk, Sector-2, Rohini, Delhi having obtained a licence from the MCD. It is stated that PW-3, his father (the deceased), his younger brother Islamuddin (who was not examined) and his servant Rajesh Kumar (PW-18) used to sit in the said shop.

5. The case of the prosecution is that on 29th October, 1999 at about 8:30 pm A-1 and A-2 came to the shop of PW-3. A-1 stated that whereas only Re.1 per local call can be charged, PW-3 was charging Rs.2/- and that he would make a complaint against PW-3. Thereafter both A-1 and A-2 left the place.

6. The further case of the prosecution is that on the same day i.e. 29th October, 1999 at around 10:20 pm both A-1 and A-2 again came to the shop. This time A-1 threatened PW-3 and his kin stating that he belonged to the Birju Gang. Thereafter both A-1 and A-2 gave fist and slap blows to PW-3, his brother Islamuddin and his father Abdul Kayum. The persons present

there intervened but both A-1 and A-2 threatened the deceased stating they would return the next day.

7. The following day i.e. 30th October, 1999 at about 3 pm while PW-3 along with PW-18 were eating food at the shop, the deceased went outside to take water. At that time both A-1 and A-2 surrounded the deceased. A-1 asked A-2 to fire. A-2 aimed at the deceased with his country made pistol and fired a shot. However, the shot missed the deceased. Thereafter A-2 asked A-1 to stab the deceased with a knife. A-1 stabbed the deceased on his chest. As a result, the deceased fell to the ground. In the meanwhile, PW-3 and PW-18 tried to apprehend both A-1 and A-2 and in that process the country made pistol fell from the hands of A-. Both A-1 and A-2 ran away.

8. It is stated that PW-3 and PW-4 Mohd. Umar took the deceased to the Jaipur Golden hospital where he was declared brought dead.

9. The entire narration of the above facts was purportedly made by PW-3 to the police. He, therefore, was the star eyewitness. The other eye witness as per the above narration was Rajesh Kumar, working with PW-3, who was examined as PW-18.

10. PW-3 was examined in the Trial Court first on 4th September, 2000. On that date he resiled from his statement made to the police. He began his examination-in-chief stating that he knew A-1 and stated that A-1 used to visit the shop to make telephone calls and drink juice and that A-1 used to reside at C-Block, Avantika Chowk. PW-3 further maintained in his

examination-in-chief up to a point that A-1 came to the shop on 29th October, 1999 at 8 pm and complained to Islamuddin about overcharging for local calls. PW-3, however, claimed that he did not know A-2 and dissociated A-2 from all those events. Even the second threat of the night of 29th October, 1999 was attributed only to A-1 and not to A-2. He made it appear that it was A-1 who came back on 30th October, 1999 and fired at his father with the country made pistol and when that shot missed, it was A-1 who took out a knife and gave a blow to his father on his chest. He further stated that the police did record his statement which is Ex.PW-3/A. He also stated that he came back to the spot with the police and the recovery of the pistol and the two cartridges were made from the spot by the police. Since PW-3 was resiling from his previous statement as far as A-2 was concerned, the learned APP with the permission of the Court cross examined PW-3.

11. In his cross-examination by the APP, PW-3 first began by stating that although he had put his signature on his previous statement he had not read it before signing it. PW-3 also stated that he had not asked the Investigating Officer ('IO') to read over the statement to him. He offered an explanation that since he was perplexed due to death of his father he could not ask the IO to read over the statement. At the same time he stated that he had given the statement without any pressure and it was an entirely voluntary one. However, soon thereafter this witness went into a series of denials which require to be reproduced in full:

“.....It is incorrect to suggest that there is a toy shop near our shop. It is also incorrect to suggest that that shop was being run by one Mukesh. I have not stated these facts in my statement. (confronted with statement Ex.PW-3/A from portion

A to A where this facts has been recorded). It is incorrect to suggest that accused Mukesh now present in Court today is the same person who was running toy shop near our shop. I do not know if accused Mukesh now present in Court today is a friend of accused Mahavir. It is incorrect to suggest that accused Mahavir used to visit the shop of accused Mukesh. (Confronted from portion B to B of statement Ex.PW-3/A where it is so recorded). It is also incorrect to suggest that on 29.10.99, at about 8.00 PM, accused Mahavir when came to our shop for complaining about the excess charge of telephone call was also accompanied by accused Mukesh. I have not stated this fact in my statement. (Confronted from portion C to C of statement Ex.PW-3/a where this fact of accused Mukesh accompanying Mahavir is found mentioned). It is incorrect to suggest that I had stated that both the accused Mukesh and Mahavir were known to me prior to that day. I have not stated this fact in my statement. (Confronted from portion D to D of statement Ex.PW-3/A where it is so recorded). It is incorrect to suggest that accused Mukesh now present in Court today had complained about the excess charge of telephone call. I have not stated this fact in my statement. (Confronted from portion E to E of statement Ex.PW-3/A where it is so recorded). It is also incorrect to suggest that on that night at about 10.30 pm, accused Mahavir and accused Mukesh both had come at our shop. I have not stated this fact in my statement. (Confronted from portion F to F of statement Ex.PW-3/A where the name of accused Mukesh is also mentioned). It is further incorrect to suggest that only accused Mukesh and Mahavir had given us beatings with fists and blows. (Confronted from statement Ex.PW-3/A where it is so recorded). It is further incorrect to suggest that accused Mahavir and Mukesh had threatened to my father that they would see him tomorrow. I have not stated this fact. (Confronted from portion G to G of statement Ex.PW-3/A where it is so mentioned). It is also incorrect to suggest that on the day of incident, both Mukesh and Mahavir accused persons now present in Court today had come at our shop or that both the accused had surrounded my father or that accused Mahavir had exhorted co-accused Mukesh to fire

at him. I have not stated these facts. (Confronted from portion H to H of statement Ex.PW-3/A where it is recorded). (Vol. only accused Mahavir had come there). It is further incorrect to suggest that thereafter accused Mukesh took out a country made pistol and fired at my father which misfired or that thereafter accused Mukesh exhorted accused Mahavir to stab Abdul Qaum and he was stabbed by accused Mahavir. I have not stated this fact. (Confronted from portion J to J where it is so recorded). (Vol. only accused Mahavir had come there and had stabbed Abdul Qaum with knife). It is however correct that my father fell down at the bus stand and there was sufficient blood lying at the spot. It is incorrect to suggest that thereafter myself and Rajesh Kumar chased to apprehend Mahavir and Mukesh or that during the chase, the pistol fell down from the hands of accused Mukesh. I have not stated this fact in my statement. (Confronted from portion K to K of statement Ex.PW-3/A where it is so recorded). (Vol. the pistol had fallen down from the hand of accused Mahavir). It is incorrect to suggest that I am deposing falsely on the confronted portions of my statement as I have joined hands with accused Mukesh or that I am deposing falsely and not identifying accused Mukesh present in Court today as I have been won over by him.”

12. It is thus seen that this witness was resiling not only with regard to A-2 but even regarding A-1 on 4th September, 2000 itself. This is evident from the fact where he states that *“It is further incorrect to suggest that only accused Mukesh and Mahavir had given us beatings with fists and blows.”* and *“It is further incorrect to suggest that accused Mahavir and Mukesh had threatened to my father that they would see him tomorrow. I have not stated this fact.”* He even denied that both the accused came to the shop, surrounded his father and that A-1 had exhorted A-2 to fire at him. He simply stated *“I had not stated these facts.”* He again denied that A-2 had

taken out a country made pistol, fired at his father the shot which had misfired *“or that accused Mukesh exhorted accused Mahavir to stab Abdul Qaum and he was stabbed by accused Mahavir. I have not stated this fact.”* Through his further ‘volunteered’ statements, PW-3 made it appear that the incident involved A-1 alone and not A-2. He only admitted that *“my father fell down at the bus stand and there was sufficient blood lying at the spot.”* He denied the suggestion that he and PW-18 tried to apprehend A-1 and A-2 or that during their attempt, the pistol fell down from the hands of A-2. He substituted A-2 with A-1.

13. When the entire cross-examination of PW-3 by the APP on 4th September 200 is seen as a whole, PW-3 comes across as an untrustworthy witness. A witness who lies in respect of one accused cannot be expected to speak the truth about the other accused. This particularly so, when he tries to totally exonerate one accused and reconstruct the entire sequence of events as if that accused was not in the scene at all.

14. PW-3 was further cross-examined by counsel for A-1 on 17th October, 2000 i.e. more than a month after the aforementioned date. This time PW-3 totally resiled from his statement qua even A-1. PW-3 now stated: *“I do not know the name of the accused persons who had committed the murder of my father but they belong to Birju Gang. I had given my previous statement at the instance of the police and today I have given a voluntarily statement.... It is correct that on the last date of hearing, I had named the accused Mahavir at the instance of police. It is correct that till the registration of the case, I did not know accused Mahavir.”*

15. The Trial Court has in the impugned judgment acquitted A-2 Mukesh on the basis that PW-3 had not supported the prosecution case *qua* A-2. However, the Trial Court has reasoned that in so far as A-1 was concerned, PW-3 had supported the prosecution during his examination in chief on 4th September, 2000 and resiled from his statement only on the next date i.e. 17th October, 2000 when he was cross-examined by counsel for A-1. On that basis the Trial Court concluded that between these two dates i.e. 4th September, 2000 and 17th October, 2000 A-1 had managed to win over this eye witness i.e. PW-3 and therefore the deposition of PW-3 on 17th October, 2000 should be disbelieved and the statements made by him on 4th September, 2000 should be taken to be sufficient to bring home the guilt of A-1.

16. In the considered view of the Court, there was a misreading by the trial Court of the cross examination of PW-3 by the APP on the first date i.e. 4th September, 2000. This Court has reproduced that portion of the cross examination in full only to show that even on 4th September, 2000 PW-3 had already resiled from his previous statement not only against A-2 Mukesh but also against A-1 to some extent. Also, he was attempting to reconstruct the events by totally omitting A-2 and making it appear that A-1 alone committed the acts. Here again he was not being consistent, and resiled from his previous statement *qua* even A-1, as already noted hereinbefore. It was therefore incorrect for the trial Court to suggest that it was only on 17th October, 2000 that PW-3 resiled from his previous statement *qua* A-1. On 17th October, 2000 PW-3 was continuing in the same vein as he was on 4th September, 2000 when he had already begun resiling from his previous

statement *qua* even this Appellant i.e. A-1.

17. PW-3 was obviously an untrustworthy witness who did not hesitate to resile from his previous statement. He completely disowned the previous statement made by him explaining that it was not even read over to him before he signed it. It would be extremely unsafe to base the conviction of the Appellant on the evidence of such an untrustworthy witness. Strangely, although he was the son of the deceased, he did not support the prosecution for reasons best known to him. The Trial Court, in the considered view of this Court, ought not to have placed any reliance whatsoever on the evidence of such an untrustworthy witness.

18. The other eye witness was PW-18. However, right at the outset of proceedings, he had resiled from his previous statement and was declared a hostile witness. Even the trial Court has not placed any reliance on his evidence.

19. For some reason the prosecution did not examine Islamuddin, the other son of the deceased, who was also purportedly present at the shop when the incidents took place on 29th and 30th October, 1999. There being no other independent witness to these incidents, the trial Court ought to have concluded that there was no reliable evidence to find either of the accused guilty of the offences by which they were charged. The trial collapsed on the very first date i.e. 4th September, 2000 when PW-3 entered into the witness box.

20. For the aforementioned reasons the Court sets aside the judgment dated 24th January, 2002 convicting the Appellant for the offences under Sections 302/34 IPC and order on sentence dated 28th January, 2002. The Appellant is acquitted of the aforementioned offence. His bail bond and surety bond stand discharged. The appeal is allowed in the above terms.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 11, 2018

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