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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 12/2013

Reserved on: January 16, 2018

Decided on: February 19, 2018

NAVAL KISHORE @ NAVAL

..... Appellant

Through: Mr. Raj Pal Singh, Advocate.

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru and Ms. Kusum
Dhalla, APPs

Inspector Sunil Kumar, PS Anand Parbat.

AND

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CRL. A. 184/2013 & CRL.MA. 6795/2017

DEVENDER @ PAPPU & ANR

..... Appellants

Through: Mr. K. Singhal, Advocate.

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru and Ms. Kusum
Dhalla, APPs

Inspector Sunil Kumar, PS Anand Parbat.

CORAM: JUSTICE S. MURALIDHAR

JUSTICE I.S. MEHTA

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. These appeals are against the impugned judgment dated 9th October 2012

passed by the learned Additional Sessions Judge-01, Central, Tis Hazari Courts, Delhi in Sessions Case No.11/2011 arising out of FIR No.03/2011 registered at PS Anand Parbat convicting the Appellants for the offence under Section 302 read with Section 34 Indian Penal Code ('IPC') and additionally, the Appellant Chander Prakash @ Chhotu (A-3) for the offence under Section 27(1) of the Arms Act.

2. These appeals are also directed against the order on sentence dated 12th October, 2012 whereby the Appellants were sentenced to rigorous imprisonment ('RI') for life for the offence under Section 302 read with Section 34 IPC. A-3 was sentenced with fine of Rs.1.5 lakhs and, in default of payment of fine, to further simple imprisonment ('SI') for three years. A-1 – Naval Kishore and A-2 – Devender @ Pappu were sentenced to a fine of Rs.75,000/- each and, in default of payment of fine, to undergo SI for one year. For the offence under Section 27(1) of the Arms Act, A-3 was sentenced to RI for five years with fine of Rs.15,000/- and, in default of payment of fine, to undergo SI for six months.

Case of the prosecution

3. A call was received by the Police Control Room ('PCR') at 2.35 am on 16th January 2011 from one Senthil Kumar stating that a quarrel had taken place in front of 15/80, Gali No.5, Punjabi Basti. The PCR form is marked as Ex.PW-15/A. Another call was made at 2.36 am, by one Naseem stating that a quarrel had taken place in front of 3/98, Punjabi Basti, Gali No.5, Anand Parbat. The PCR form in this regard is marked as Ex.PW-34/DA. In the PCR form (Ex.PW-15/A), it is further noted in the right-hand column

that when the PCR van reached the spot at around 3.05 am it was noticed that Babloo, son of Kishan, had had a fight with 3-4 boys and the injured had been taken to the Lady Harding Hospital. Subsequently, it was noticed that at 3.35 am on 16th January 2011 that at Lady Harding Hospital the doctor had declared the injured dead and that there were three bullet wounds in the back and there were injury marks on the wrist. It was further mentioned at this time that Devender, Chander Prakash and Naval had fled from the spot.

Post-mortem

4. The Medico-Legal Certificate ('MLC') of the deceased (Ex.PW-17/A) showed that he was brought to the hospital by Head Constable ('HC') Krishan Chand (PW-36) at 3.20 am on 16th January 2011. Two firearm injuries were noticed on the anterior abdominal wall each of diameter 1 cm near lateral border of rectus abdominus; a contaminated wound on the left hand; cut skin on the proximal palmer crease of the left hand; 10 cm long cut mark on the right cheek and 5 cm long cut mark on the anterior aspect of the left leg.

5. The post-mortem was conducted by Dr. Devender Kumar Atal (PW-35). In his report (Ex.PW-35/B), *inter alia*, two firearm entry wounds in the abdomen were noticed apart from several other contused, lacerated, and incised wounds. Firearm exit wounds on the left chest wall and right chest wall was also found. While removing the clothes of the deceased from his back, a firearm projectile, i.e. a metal-jacketed bullet except on the tip of 3 cm length and 2.5 cm circumference, was recovered in a distorted condition.

The cause of death was stated to be shock as a result of multiple injuries to the chest and abdomen “caused by rifle firearm from a close range”. The two firearm entry wounds along with their corresponding exit wounds were stated to be fatal in the ordinary course of nature collectively as well as separately.

Investigation

6. On receipt of the PCR information, PW-36 reached the spot at Gali No.5, Punjabi Basti, Anand Parbat and found the deceased in an unconscious condition. Parking the van about 50-60 yards away from the dead body, since the *gali* (street) was narrow and a van could not pass through, PW-36 along with the help of public persons removed the injured and shifted him to the Lady Harding Hospital in the police van itself. According to PW-36, Anju (PW-3), the wife of the deceased, and Virender (PW-2), the brother-in-law of the deceased, and the mother-in-law of the deceased accompanied the deceased in the police van, apart from two other public persons.

Version of PW-2

7. A key witness to the occurrence was Virender (PW-2) who stated that he was sleeping in his house, which was G-17, Gali No.5, Punjabi Basti, and at around 2.40 am he got up after hearing the sounds of a quarrel. After opening the door of his house, he noticed that a quarrel was going on in front of the house of Prem (PW-6) located at a distance of four houses from his own house. He noticed that his brother-in-law, the deceased Dalip @ Babloo, was caught hold of by Devender @ Pappu (A-2) from behind whereas Chander Prakash @ Chhotu (A-3) had a *katta* in his right hand and

was pointing it at the deceased. Naval Kishore @ Naval (A-1) was assaulting the deceased with an iron *patti*. PW-2 claimed that he rushed to save the deceased but A-3 had fired a shot from the *katta*. The deceased was already lying on the road as he was already assaulted by the accused persons.

8. PW-2 then rushed to call his sister Anju (PW-3), the wife of the deceased. When PW-2 and PW-3 returned to the spot, they noticed that the deceased was lying in a pool of blood. PW-2 noticed A-1, A-2, and A-3 escaping from the place of occurrence on a motorcycle behind the *gali* from where the murder had taken place. He claimed to have seen the incident in a street light as there was an electric pole near the place of occurrence. PW-2 claimed that PW-6 emerged from his house and gave a call to the police and thereafter the PCR van reached the spot.

9. In his statement to the police, PW-2 claimed that he had heard A-3 say that the deceased should be eliminated. He stated that A-2 had pushed the deceased to the ground and A-3 had fired a shot at the deceased. He further stated that the accused persons had told PW-2 that if anybody tried to depose against them they would also meet the same treatment.

Version of PW-3

10. The other eye witness was Anju (PW-3), the wife of the deceased. She claimed that about four days prior the incident, i.e. on 12th January 2011, A-2 and A-3 had threatened to kill the deceased within three days. However, no complaint was made to the police in that regard. She further claimed that

on 15th January 2011, at around noon, the three accused attacked the deceased and PW-3. She claims to have made a PCR call and also lodged a report in PS Anand Parbat.

11. PW-3 claimed that on the intervening night of 15th-16th January 2011, at about 2.40 am, PW-2 asked her to open the door and informed her that A-1, A-2, and A-3 had killed her husband after firing upon him. As they left her house and were going towards the place of the incident, PW-3 claims to have seen the three accused fleeing from the spot on a red-coloured TVS motorcycle. As they reached the spot they saw the deceased lying in front of the house of PW-6 in a pool of blood having been injured by a bullet. The door of the house was open but at that time PW-6 was in the bathroom. Thereafter, PW-6 made a call to the PCR and the police reached the spot. She claimed that she along with PW-2, PW-6, and his father, Ramesh Chand (PW-9), took the deceased to the Lady Harding Hospital where he was declared as having been brought dead.

Arrests and recoveries

12. The investigation of the case was entrusted to Inspector Birender Kumar Singh (PW-37), the Investigation Officer ('IO'). At about 7.35 am, when he received FIR No.3/2011 registered under Section 302/34 IPC, he reached the spot along with Constable Suresh (PW-11). He prepared a rough site plan (Ex.PW-30/C). There, Prem (PW-6) and his father, Ramesh Chand (PW-9), met PW-37 and their statements were recorded by him.

13. On 17th January 2011, PW-37 conducted the inquest on the dead body and prepared inquest report (Ex.PW-37/A). At that time Hoshiar Singh (PW-

1) brother of the deceased was also present and his statement was also recorded by PW-37.

14. On 20th January 2011, at around 11.10 pm, PW-37 received secret information that A-1 and A-2 would come near Anand Parbat Market. Thereafter, PW-37 along with SI Bal Mukund (PW-24), Ramvir (PW-8) and Ct. Shamsheer left PS to apprehend the accused. At 11.20 pm, they noticed two persons coming towards the fruit market. They were apprehended on the pointing out of the secret informer as A-1 and A-2. Nothing was recovered from A-2 while a mobile phone and a two rupee coin were recovered from A-1.

15. A-1, in his statement, is supposed to have disclosed that he had thrown a weapon of offence, i.e. a knife, near the CNG pump on Military Road while fleeing from the spot on a motorcycle. Both A-1 and A-2 informed that A-3 was in the possession of country made pistol/*katta* and offered to get him arrested and recover the said weapon. A-2 further stated that A-3 was in the possession of a red-coloured motorcycle which belonged to A-2 and that he could get it recovered.

16. The knife was recovered on 21st January 2011, at about 7.30 am, in the barren area opposite the CNG petrol pump on Military Road. There were blood-stained marks on the knife.

17. On 21st January 2011, secret information was received that A-3 had been arrested in FIR No.11/2011 under Section 25 Arms Act wherein he had disclosed his involvement in the present case. DD No. 15/A was lodged at

PS Anand Parbat and it was assigned to PW-37. A-3 was then arrested and his disclosure statement was recorded. A-3 disclosed that he had parked the motorcycle in F-Block, Mangolpuri. Pursuant thereto, his motorcycle was seized.

18. From the spot, two fired cartridges and two bullets were recovered. These were sent to Forensic Science Laboratory ('FSL') for its report. The *pullanda* containing biological exhibits was also sent on 28th February 2011 to the FSL. The scaled site plan was prepared on 18th March 2011.

Charge

19. At the conclusion of the investigation, a charge sheet was filed on 28th March 2011. By an order dated 21st October 2011, the following charge was framed against the three accused:

“That on 16.01.2011 at about 2:40AM, in front of H. No. 576, Gali no. 5, Punjabi Basti, Anand Parbat within the jurisdiction of PS Anand Parbat you above mentioned all the accused persons in furtherance of your common intention committed murder by causing the death of Dilip @ Bablu by giving him fire arm injury and thereby all of you committed an offence punishable under Section 302/34 IPC and within the cognizance of this court of Session.”

20. By a separate order on the same date, a charge under Section 27/54/59 Arms Act was framed against A-3, Chander Prakash.

Defence of the accused

21. The prosecution examined 38 witnesses during the course of the trial. No witnesses were examined on behalf of the Appellants. In his statement under

Section 313 Code of Criminal Procedure ('Cr PC'), while denying the circumstances against him, A-1 claimed to have been falsely implicated by PW-2 and PW-3 who he alleged were acting in collusion. He pointed out that the witnesses examined during the course of trial were either interested witnesses or police officials. A-1 claimed that the knife was falsely planted on him and that he has been falsely arrested in this case.

22. A-2 also denied the circumstances against him. He too claimed to have been falsely implicated by PW-2 and PW-3 and that all the witnesses who spoke to the incident were police witnesses or those related to the deceased. As regards A-3, he took the plea of alibi. According to him, at the relevant time he was with his in-laws in Wazirabad. A-3 denied that any country made pistol was recovered from his possession and that no motorcycle was recovered on his pointing out and it had been planted on him to falsely implicate him in this case.

Impugned judgment of the trial Court

23. By the impugned judgment dated 9th October 2012, the trial Court came to the following conclusions:

- (i) There was no delay on the part of the Complainant in giving the complaint. The delay, if any, was on the part of the police in registering the FIR. The mere fact that the police officials failed to perform their duties diligently or fabricated DD No. 18A are not sufficient to discard the entire prosecution case. In view of the law laid down in ***Bijoy Singh v. State of Bihar AIR 2002 SC 1949***, since in the present case there was a delay of about 10 hours in sending the

copy of FIR to the concerned Metropolitan Magistrate ('MM'), the version of the PWs had to be minutely examined.

- (ii) There was no merit in the contention that PW-2 was not present at the spot. Since the defence failed to adduce evidence to show that the mobile phone mentioned in the complaint belonged to PW-2, no adverse inference can be drawn against him. Although PW-2 was an interested witness, there was no reason to believe that he had any intention to falsely implicate them.
- (iii) The mere fact that PW-6 and PW-9 turned hostile and that the other neighbours, Om Prakash, Sharda, and Azad, were not examined were not sufficient to discard the testimonies of PW-6 and PW-9. In any event, the defence could have examined these witnesses.
- (iv) The failure to examine the two callers mentioned in the PCR records, Senthil Kumar and Naseem, was again not fatal to the case of the prosecution. It is possible that PW-6 may have informed the police while using the mobile phone of either of them.
- (v) As regards the seal of BMR, i.e. SI Bal Mukand Rai, being in the possession of PW-30, in the absence of any independent evidence, adverse inference cannot be drawn that the case property was sealed in the police station. However, in such a heinous crime, "such type of lapse was not expected from the investigating agency."

- (vi) The prosecution failed to prove that the accused were arrested at the pointing out of secret informer as deposed by PW-37. However, this lapse was not fatal to the case of the prosecution. Even the non-mention of the time of arrest and mention of mobile phone which was not belonging to any person in particular were lapses but were not sufficient to prove the innocence of the accused.
- (vii) The recovery of the knife was not pursuant to the information provided by A-1 that he had thrown it near the CNG pump on Military Road. The recovery is, therefore, not within the parameters of Section 27 Indian Evidence Act ('IEA').
- (viii) Further, the FSL report (Ex.PW-38/A) showed that no blood could be detected on the knife. Therefore, the testimony of PW-37 that there was blood at tip of the knife when it was seized did not inspire confidence. Even the opinion of the doctor who conducted the post-mortem as to the possibility of the knife being used to inflict the incised wounds found on the dead body was not taken. Therefore, the prosecution had failed to prove recovery of the knife within the parameters of Section 27 IEA.
- (ix) As regards recovery of the motorcycle, the witnesses in this regard, i.e. PW-7, PW-23, and PW-37, deposed that at that time, the motorcycle was locked and the key was not with the accused. Moreover, motorcycle was not recovered pursuant to the information furnished by the accused as regards the place where it was supposed

to be parked, i.e. parking area of F-2 Block of Mangolpuri. Hence, the recovery of motorcycle was not proved within the parameters of Section 27 IEA.

- (x) As regards recovery of the pistol from A-3, in the absence of any independent witnesses associated by PW-19 and PW-25, it would not be safe to believe the recovery of the pistol from A-3. That circumstance, therefore, was not proved.
- (xi) PW-2 had deposed that A-3 had fired a shot in his presence. He nowhere deposed that A-3 never fired a second shot. Since both shots were fired from the same pistol, this only meant that A-3 had fired the second shot as well. There was some confusion in the mind of PW-2 in this regard when he deposed in the Court. Reading his testimony as whole, it is plain that A-3 was the person who fired both shots at the deceased. Although PW-2 was a close relation of the deceased there was no need for him to falsely implicate the accused. PW-2 was, therefore, a trustworthy witness and could not be disbelieved.

24. The trial Court, therefore, concluded that the three accused were liable for the offence punishable under Section 302 IPC read with Section 34 IPC. It was held that although the prosecution had failed to prove the connected evidence such as recovery of knife, motorcycle and pistol, the sole testimony of PW-2 was sufficient to convict the three accused. The trial Court, by a subsequent separate order, sentenced the Appellants in the manner noticed hereinbefore.

25. This Court has heard the submissions of Mr. K. Singhal and Mr. Rajpal Singh, learned counsel for the Appellants, and Ms. Radhika Kolluru and Ms. Kusum Dhalla, learned APP for the State.

Law relating to eye witnesses

26. This was essentially a case which relied on eye-witness testimony, i.e. PW-2 (Virender Kumar), brother-in-law of the deceased, and PW-3 (Anju), wife of the deceased. However, since they happened to be interested witnesses the trial Court was expected to carefully scrutinize the version of the two eye-witnesses for inconsistencies, contradictions and improvements.

27. As explained in ***State v. Saravanan AIR 2009 SC 152***, the Court can overlook “minor discrepancies on trivial matters” which do not affect “the core of the prosecution case”. It is further explained in ***State of U.P. v. Krishna Master AIR 2010 SC 3071*** that “it is the duty of the Court to separate falsehood from the truth, in sifting the evidence”.

28. As regards interested witnesses, it was explained earlier in ***Dalip Singh v. The State of Punjab AIR 1953 SC 364*** as under:

“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 there 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.”

29. Again, in *Ashok Kumar Choudhary v. State of Bihar AIR 2008 SC 2436*, it was explained as under:

“The relationship per se does not affect the credibility of a witness. Merely because a witness happens to be a relative of the victim of the crime, he/she cannot be characterized as an "interested" witness. It is trite that the term "interested" postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive.”

30. It further explained in *Jayabalan v. Union Territory of Pondicherry (2010) 1 SCC 199* as under:

“We are of the considered view that in cases where the Court is called upon to deal with the, evidence of the interested witnesses, the approach of the Court, while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.”

31. The legal principles emerging from the above decisions can be summarized as follows:

(i) The evidence of the eye-witness should not be disbelieved on account

of trivial inconsistencies that do not affect the core of the prosecution case.

- (ii) It is the duty of the Court to separate the chaff from the grain by sifting out apparent falsehoods in the testimonies and arrive at the true version of events.
- (iii) The evidence of an interested witness who happens to be a close relation must be closely scrutinized for any improvements and inconsistencies. The mere relationship of the deceased will not automatically give rise to an adverse inference. If the evidence is otherwise trustworthy it should not be presumed that the interested witness would falsely implicate the accused without foundation being laid for such a false case.

Analysis of the evidence of PW-2

32. The key witness of the prosecution in the present case is PW-2. From the site plan of the area, it is seen that the residence of PW-2 is G-17, Gali No.5, Punjabi Basti, Anand Parbat, Delhi. However, in his cross-examination, PW-2 states that he had vacated the said house after the death of his father but he could not recall when his father had expired. He went on to state that “I even do not remember the date, month when he expired. Presently, I am residing at the house of my sister along with my mother. I had not handed over any document to the police to show that at the time of incident I was residing at G-17. Nor I have brought the same today in the Court. I am not in the possession of any document to show that I was residing at that time at G-17.”

33. From the rough site plan (Ex.PW-30/C), it can be seen that G-17 is two doors down from 5/167 (the house of PW-6 who turned hostile). The rough site plan shows the spot 'X' right in front of G-17 as "the place where eye witness was present". If PW-2 was not residing in G-17 at the relevant time, there was no occasion for him to be present in front of G-17 to view the incident. It must be recalled that PW-6 did not support the case of the prosecution and denied that he had actually witnessed the occurrence.

34. The scaled site plan (Ex.PW-16/A) shows G-17 as the house of Manak Chand. The spot 'B' in the scaled site plan, from where the PW-2 witnessed the incident, is shown slightly down the road from where the spot 'X' figures in the rough site plan. The important distinction is that the rough site plan is prepared on 16th January 2011, i.e. on the very date of the incident, whereas the scaled site plan was prepared on 30th March 2011 by SI Mahesh Kumar (PW-16) on the instruction of IO Virender Kumar Singh (PW-37) after visiting the site on 18th March 2011. The place where the crime is said to have taken place is shown in front of 576, Gali No.5 and is more or less similar to the location shown in the rough site plan.

35. The rough site plan does not indicate where the house of Babloo was whereas in the scaled site plan it was shown at a spot perpendicular to the houses of the accused and G-17.

36. The relevant portion of the deposition of PW-2 reads as under:

“After opening my door, I saw that my brother-in-law Dalip @ Babloo was caught hold by accused Devender from behind whereas accused Chander Prakash @ Chhotu had a katta in his

right hand and he had pointed out the same at my brother-in-law Dalip @ Babloo whereas accused Naval was assaulting my brother-in-law by the means of the patti, which was of iron. My brother-in-law Dalip was trying to save himself. I rushed towards him to save my brother-in-law. However, accused Chander Prakash had fired a shot from the katta which he was carrying. Dalip was already on the road as he was being assaulted by the accused persons. I rushed to call my sister Anju. When I along with my sister rushed back to the place of occurrence, I saw my brother-in-law was in pool of blood and I saw accused Chander Prakash, Devender and Naval were escaping from the place of occurrence on motor-cycle from the gali behind where murder had taken place. I had seen the incident in the street light was there was electric pole near the place of occurrence.

Prem also came out from his house. Prem had informed the police on 100 number. PCR van reached the spot. Since the street was narrow, we took injured Dalip @ Babloo to the PCR van on the cot. PCR van took the injured to Lady Harding Hospital. I and my sister Anju accompanied the PCR officials. After checking doctor declared him brought dead. I made a statement to the police in the hospital. My statement is mark Ex.PW-2/A which bears my signatures at point A. I do not know why the accused persons had killed my brother in law. (Vol. They might have some enmity with him). I am not aware if some litigation was going on with my brother in law and the accused persons.

Accused persons fled away from the spot on the red colour TVS Motor Cycle. On the spot, two empty cartridges and one piece of chain of wrist watch having yellow colour was also found on the spot.

Though, two empty cartridges were recovered yet only one shot was fired in my presence.”

37. At this stage of the deposition, the learned APP, with the permission of the Court, sought to cross-examine PW-2. He now added a crucial statement

that when PW-2 rushed towards the deceased to save him, A-3 stated that “let Dalip be eliminated today”. He further added that when A-3 fired a shot, the deceased was caught hold of by A-2 and the deceased was lying on the road and A-3 put his leg on the chest of the deceased and thereafter fired a shot. However, PW-2 even at this stage was insisted that:

“Accused had fired only one shot in my presence. It is wrong to suggest that Chander Prakash had fired twice at Dalip. It is wrong to suggest that I stated before the police that Chander Prakash had fired again and due to which Dalip fell down on the road. (Confronted with portion B to B of Ex. PW-2/A wherein it is so recorded).”

38. The Court finds that the trial Court has only extracted the first sentence of the above paragraph that the accused had fired only one shot on the deceased. It has failed to extract the next sentence where, despite the APP’s suggestion to PW-2 that A-3 had fired twice, he denied that suggestion. He in fact denied having told the police anything to that effect in his previous statement.

39. It appears that a supplementary statement was recorded of PW-2 on 25th March 2011, more than two months after the incident and when he was confronted with that statement, he stated “I do not remember whether the police had recorded my statement on 25.03.2011 or not”. This statement was marked ‘A’ and the trial Court noted at this time of deposition as under:

“After explaining and read over the said statement to the witness, witness states " I do not remember whether I stated so before the police or not. I have not made any statement to the police in March 2011." The statement is mark A.

It is wrong to suggest that I had made the said statement to the

police. It is wrong to suggest that I am deliberately concealing the said fact. It is wrong to suggest that accused persons had threatened that if anybody try to depose against them, they would meet the same fate. It is wrong to suggest that I stated before the police that accused persons had threatened that if anybody try to depose against them they would met the same fate. (Confronted with portion A to A of mark A wherein it is so recorded).

It is wrong to suggest that due to lapse of time I had forget some facts, thus, I am unable to recall the same.”

40. In the impugned judgment, the trial Court appears to have overlooked this aspect of the matter. In this cross-examination by the counsel for the accused, PW-2 maintained that the police had recorded his statement only once, i.e. on 16th January 2011, at the hospital. According to PW-37, he recorded the statement of PW-2 only as regards the identification (Ex.PW-37/C) on 17th January 2011 after the inquest was completed.

41. A perusal of Ex.PW-2/A, which constituted the *rukka*, reveals that it was recorded on 16th January 2011 by SI Sunil Kumar (PW-30). In the Section 161 Cr PC statement, PW-2 has clearly stated that A-3 fired upon the deceased for a second time but he was very categorical while deposing in the trial that he had not made that statement. In his further cross-examination, he stated that he had told the police about the injured having been taken after the PCR had reached, but this fact is not recited in Ex.PW-2/A.

42. Another important aspect was that in his previous statement to the police (Ex.PW-2/A), PW-2 only stated that the three accused fled from the spot

whereas while deposing in the trial, he mentioned that they fled away on a red-coloured TVS motorcycle. In the considered view of the Court, this cannot be said to be just a minor improvement. As a result of this improvement, the entire evidence pertaining to the circumstance of recovery of the motorcycle becomes doubtful.

43. In his deposition in the trial PW-2 stated that A-3 had fired a shot after putting his leg on the body of the deceased whereas this fact has not been mentioned in Ex.PW-2/A is also significant because the dead body clearly had two bullet wounds with two corresponding exit wounds. If the eye-witness account is not corroborated by the medical evidence, it raises serious doubts as to whether PW-2 was in fact an eye-witness to the happening.

44. The house of the deceased is not shown in the rough site plan whereas it is shown in the scaled site plan. This has a bearing on the appreciation of the depositions of PW-2 and PW-3. It is significant that when PW-2 witnessed the incident, he did not raise an alarm as, according to him, there was no occasion to do so since the shot had already been fired. He further offers an explanation that he did not do so as the accused themselves had told him to call his sister as they had killed his brother-in-law. The trial Court itself notes that these explanations furnished by PW-2 “are not much convincing”.

45. When the deposition of PW-2 in the Court is compared with his first statement to the police, the discrepancies become even more evident. He states that he ran to inform his sister and when they returned, they found the deceased lying in an unconscious condition and by then “*Chander Prakash,*

Devender ve Naval wahan se bhag gaye the”. This, literally translated, means that by this time the three accused were already fled. He then claims that he along with PW-3 took the deceased to the hospital. The deceased was bleeding from two bullet wounds, there should have been bloodstains on his clothes as well as on the clothes of PW-3. However, in his cross-examination, he admits that his bloodstained clothes were not seized.

46. Another important facet which the trial Court appears to have overlooked is the following statement made by PW-2 in his cross-examination:

“It is wrong to suggest that I cannot read Hindi. (Vol. I can read but with some difficulty). I had not gone through my statement Ex. PW-2/A when I signed the same. Even the same was not read over to me. (Vol. However police recorded my statement when I made the same).”

47. Overlooking this, the trial Court has proceeded as if PW-2 himself made the statement and that he was aware as to what was stated therein.

48. Another strange statement made by PW-2 is as under:

“I do not know whether my brother in law Dalip was facing numerous criminal cases. I know Dalip for the last more than two years when he married with my sister. Though, prior to that Dalip was residing in the same Gali, yet I had no relations/friendship with him. I did not know if Dalip @ Babloo remained in jail during the month of March, April, June and August 2010. Though, Dalip @ Babloo was residing in the same Gali, yet I do not know his house number. It is wrong to suggest that Dalip @ Babloo was also residing at Sadar Bazar. It is wrong to suggest that Dalip @ Babloo had married my sister after threatening her.”

49. The fact of the matter is that the deceased and A-3 were both together in jail in DD No.62B of 2007 under Sections 107/151 Cr PC. There is a history of criminal activities of the deceased.

50. The following deposition by PW-2 has again been overlooked by the trial Court:

“It is correct that after seeing Dalip in the pool of blood my sister had embraced Dalip @ Babloo. I also helped in shifting the deceased from the spot to the PCR Van. However, I did not sustain any blood mark on my clothes. I am not aware whether the clothes of my sister had any blood marks or not. Cot was fetched by me from the house of my landlord. Cot was lying in the street. There was no other person in the street except myself, my sister, Prem, his father and my mother when we shifted to Dalip in the PCR. It is wrong to suggest that my mother had also embraced Dalip after seeing him in the pool of Blood. My father also reached there.

I, Prem and his father put Dalip on the cot and took him to the PCR Van. Blood was oozing out from the body of Dalip when he was fired. When he was put in the PCR Van, blood was oozing out from his body.”

51. With blood oozing out from the body of the deceased, the failure to seize the bloodstained clothes of PW-2 and PW-3 is a serious lapse by the IO. Blood should have been even there on the cot and the PCR van. How this could be missed is beyond one's comprehension.

52. This has to be read along with the cross-examination of PW-30 who admits that he does not mention the presence of PW-2 and PW-3 in the PCR van. The answers given by him to this effect in his cross-examination are as

under:

“I did not get mentioned in my statement U/s 161 Cr. P.C. that one lady whose name was revealed as Anju, she was wife of injured and one male member, whose name was revealed as Virender were also in the PCR Van and they were ready to leave for the hospital. I had not mentioned this fact even my endorsement Ex. PW-30/B.

...

I had not stated in my statement U/s 161 Cr. P.C. that Virender and Anju who accompanied the deceased also met me in the hospital. Nor I mentioned this fact in the ruqqa Ex. PW-30/B. (Vol. However, in my statement I disclosed that Virender met me in the hospital).

I had not stated in my statement U/s 161 Cr. P.C. that in the mean time 3-4 neighbours of Virender also reached there, I also interrogated them: They told me that they had not seen the incident and reached the hospital being the neighbours, accordingly their statement was not recorded. Nor I mentioned the said facts in my endorsement Ex. PW-30/B.

I had not stated in my statement U/s 161 Cr. P.C. that the seal BMR was belonged to SI Bal Mukund Rai and said seal was with me at that time.

I had not stated in my statement U/s 161 Cr. P.C. that complainant Virender had explained me the spot, consequently, 'I also explained the same to Insp. B.K. Singh, who prepared the site plan at my pointing out.

I had not stated in my statement U/s 161 Cr. P.C. that I deposited the pullandas with MHC(M).

It is wrong to suggest that I had not stated the above all the facts to the IO in my statement U/s 161 Cr. P.C. or I have not mentioned the above facts in my endorsement Ex. PW-30/B

because I was not aware about the said facts or that I have made the improvements in my statement in this regard.”

53. The evidence of PW-2 must, therefore, be seen in the perspective of whether at all his presence at the scene of occurrence has been firmly established by the prosecution. In the first place, whether he resided at G-17 at all is in doubt because it is not indicated in the rough site plan which was prepared by the IO after his statement was recorded in the hospital. He gives a mobile number of 9582440322 in his statement to the police and yet that is not even his mobile number. He gives his address as G-17, Gali No.5 but although that house is shown it is not indicated that it is the house of PW-2. In fact, the rough site plan merely puts a mark where the eye witness was without mentioning that he was PW-2. The mobile number mentioned in the statement does not belong to PW-2. Further, PW-2 has not read the statement. It was also not read over to him but only his signatures have been taken. This explains why he has not been able to substantiate or stand by some of the crucial statements made by him in the previous statement to the police.

54. The first police officer who took the injured in the PCR van, i.e. PW-30, admits that in his own previous statement under Section 161 Cr PC he has not mentioned about PW-2 and PW-3 accompanying him in the PCR van. The deceased was blood-soaked and blood was oozing out from his body and PW-2 and PW-3 were supposed to have lifted him after PW-3 had in fact embraced the deceased and yet the bloodstained clothes, if any, of PW-2 and PW-3 have not been seized by the police. The deceased is supposed to have been placed on a cot and then taking him by PCR van and yet that cot

is not seized. The bloodstains on the PCR van also have not been seized. These are serious lapses which give rise to serious doubts as to the presence of PW-2 at the spot.

55. The evidence of PW-3 is also not very convincing. With her blood stained clothes not being seized, the prosecution deprived itself of an important piece of evidence that would have established her presence in the PCR van in which the deceased was taken to the hospital. In any event, she was not a witness to the attack on the deceased. She is supposed to have reached the spot after the firing took place.

No explanation for the bullet wounds

56. The Court is unable to subscribe to the analysis of this portion of the statement by the trial Court that when he mentioned about the deceased being pushed to the ground when A-3 fired a shot on him, that should be taken as a second shot. The trial Court observed:

“Thereafter, accused Chander Prakash fired a shot targeting the deceased, which hit in his abdomen. He further deposed that when accused Chander Prakash fired a shot, at that time, deceased was caught hold by the accused Devender and when Dalip was lying on the road, Chander Prakash put his leg and thereafter fired a shot with an intention to eliminate Dalip @ Babloo.”

57. The trial Court also appears to have overlooked the trajectory of the two shots and their respective entry and exit wounds and has failed to correlate it with the deposition of the eye-witness. From the autopsy report (Ex.PW-35/B), both entry wounds are in the abdomen with the exit wounds are in the

chest and not through the neck. For a person to be firing on either side of the abdomen is a bit strange. Only one of the assailants was admittedly holding a firearm. It is not clear how the firing took place. Unless the eye-witness is able to clearly explain that there were in fact two shots fired and how they were fired because of the trajectory of the two bullets, merely saying that he saw A-3 fire once upon the deceased would not stand corroborated by the medical evidence. If a person is lying on the ground when he is shot, the trajectory of the bullet would not be such that the entry wound is in the abdomen and the exit wound is in the chest. This trajectory of the bullet is not explained at all by A-3 firing upon the deceased while the deceased is lying on the ground with A-3 placing his foot on the chest of the deceased. This aspect of the matter has been completely overlooked by the trial Court. Therefore, even the medical evidence cannot be said to have corroborated what PW-2 had stated.

Lapses in investigation

58. The trial Court itself noticed that there have been serious lapses in the investigation by the prosecution. The recovery of the pistol, the recovery of the motorcycle, and the recovery of the knife have all been shown to be doubtful and therefore not proved. Whether at all the three accused left on a motorcycle is in serious doubt and therefore the recovery of the motorcycle in any event does not help the case of the prosecution. With there being serious lapses in the investigation, to base the conviction of the Appellants only on the sole testimony of PW-2, who does not inspire confidence, would not be prudent.

59. The two persons who called the PCR first i.e. Senthil Kumar and Naseem were not examined. Also, the mere mention in the PCR form of the names of the three accused cannot by itself settle the issues when it is not clear as to who gave those three names to the police. If the evidence of PW-2 is kept aside, mere giving of three names to the police by PW-2, when he himself had actually not witnessed the incident, would not carry the case of the prosecution any further. If he was saying what had been told to him to say by somebody else, and that somebody else has not been examined as a witness, the case of the prosecution will not stand proved only by the fact that the names of the three accused featured at the first instance to the PCR. It can at best be a corroborative piece of evidence if there is some credible convincing evidence.

60. Unfortunately for the prosecution, the other two witnesses who would have supported the prosecution case, PW-6 and PW-9, have both turned hostile. The incident happened right in front of the house of PW-9 and therefore he was in the best position to speak about it. Yet he did not support the prosecution. He was an uninterested witness whereas PW-2 was an interested witness. With the uninterested witness not supporting the case of the prosecution and the interested witnesses not inspiring confidence, the benefit of doubt in the circumstances should be given to the accused.

Conclusion

61. For the aforementioned reasons, the Court sets aside the impugned judgment of the trial Court and acquits the Appellants for the offence with which they were charged. The order on sentence is also hereby set aside.

62. The bail bonds and surety bonds in the name of A-1 and A-2 stand discharged. A-3 shall be released forthwith unless wanted in any other case. The Appellants shall fulfil the requirements of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

63. The appeals are accordingly allowed. The pending application also stands disposed of. The trial Court record be returned forthwith together with a certified copy of this judgment

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 19, 2018

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