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IN THE HIGH COURT OF DELHI AT NEW DELHI

R-67

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CRL.A. 835/2014

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Date of Decision: 6th February, 2018

MANOJ @ LEKHRAJ

..... Appellant

Through: Ms. Inderjeet Sidhu, Advocate
(DHCLSC)

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP with Insp.
Raj Kumar, I.O.

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

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This appeal is directed against the impugned judgment dated 19th April 2014 passed by the learned Additional Sessions Judge-II (North-West), Rohini Courts, Delhi in Session Case No. 38 of 2013 arising out of FIR No. 262 of 2012 registered at Police Station (PS) Mangol Puri convicting the Appellant, Manoj @ Lekhraj, for the offence under Section 120B read with Sections 302, 307 IPC and Section 27 of the Arms Act. This appeal is also directed against the order on sentence dated 28th April 2014 whereby for the offence under Section 302 IPC, the Appellant was sentenced to rigorous imprisonment (RI) for life and a fine of Rs. 2 lakhs and in default to undergo simple imprisonment (SI) for a period of six months; for the offence under Section 120B IPC read with 302 IPC, RI for life and a fine of Rs. 5,000, and

in default, to undergo SI for a period of 15 days; he was sentenced to undergo RI for a period of five years and fine of Rs. 2,000 and in default of fine, to undergo SI for a period of one week for the offence under Section 307 IPC; RI for a period of five years and fine of Rs. 2,000 and in default to undergo SI for a period of one week for the offence under Section 27 of the Arms Act.

Case of the prosecution

2. The case of the prosecution began with DD No. 34A dated 17th July 2012 was received at PS Mangol Puri which notes that at around 4.35 pm Duty Constable posted at Sanjay Gandhi Memorial (SGM) Hospital had communicated through telephone that one Tinku a resident of J-1169 of Mangol Puri had been brought by his friend, Pradeep (PW-15) in an injured condition having been shot by a firearm to the SGM Hospital. The MLC No. 11751 of 2012 (Ex.PW-29/A) noted that Tinku was brought dead. The DD noted that this information was then passed on to Inspector Raj Kumar (PW-30) the Investigating Officer (IO).

3. PW-30 who proceeded to SGM Hospital along with Sub Inspector (SI) Robin Tyagi (PW-27) and Head Constable (HC) Chander Bhan (PW-5) obtained the said MLC and met PW-15 who was found under treatment in the same hospital.

4. Interestingly, the MLC of deceased, Tinku (Ex.PW-29/A) showed that he was brought dead there by PW-15 at 4.30 pm whereas MLC of Pradeep (Ex.PW-12/B) showed that he was brought to the same hospital at 5 pm by Constable (Ct.) Jitender (PW-26). It must be mentioned that PW-15 was

himself injured in the attack having received simple injuries on his right fore arm.

Investigation

5. PW-30 went along with PW-15 from the SGM hospital to the place of the incident, i.e., main road SGM Hospital, Opposite K Block School, near Andh Kalyan Sanstha, Drain Mangol Puri, Delhi. The crime team also reached at the spot.

6. PW-30 observed blood spots on the road near K Block School, on divider and on the road going towards Andh Kalyan Sanstha. The photographs were taken by the crime team of the scene of crime. SI Anil Kumar (PW-1) who was in-charge of the crime team as well as Ct. Sandeep (PW-2), Photographer were present there gave their statement to PW-30. According to PW-2, he took a total of 19 photographs.

7. Thereafter, PW-30 recorded the statement of PW-15 under Section 161 of the Code of Criminal Procedure 1973 (Cr PC) on 17th July 2012 itself. The said statement (Ex.PW-15/A), which constituted the *rukka*, was to the effect that PW-15 was working as a Sweeper but for the past one and half months, he was unemployed. PW-15 was a resident of J-1193-1994, Mangol Puri, Delhi and the deceased, Tinku, was residing in the opposite house at J-1169 along with sister Guddi. Tinku was a close friend for over two and half years. On that date, i.e., 17th July 2012 Pradeep (PW-15) called Tinku to accompany him to purchase a remote for a Videocon television set. They then went to the Mangol Puri Chowk but the TV shop did not have the

remote and therefore, they decided to return home. They were passing through the main road on which SGM hospital was located when around 3.45 pm in front of Aastha Mandir, a boy on the motorcycle came in front of them. He slowed down the motorcycle, and from the right side of his Capri-like pant took out a pistol like weapon, aimed and fired at Tinku. Tinku attempted to run away in an injured condition. He fell on the other side of road near the Kalyan Sanstha and was bleeding continuously. PW-15 then lifted Tinku and took him in a rickshaw to the SGM hospital. There they were met by Ct. Jitender (PW-26) who got them admitted. The *tehrir* below the statement of PW-15 noted that DD No. 34A had been received by PW-30 and he was told that Tinku had been brought dead to the hospital. At that stage there was no disclosure by PW-15 about the person who might have fired on Tinku.

Post mortem

8. The post-mortem of the deceased was performed by Dr. Vivek Rawat along with Dr. Manoj Dhingra (PW-12) at 11 am on 19th July 2012. The external injuries noted were as under:

- “1. Firearm entry wound 3cm x 1.7cm cavity deep, oval shaped, over right side of chest, 7.3cm medial from right nipple. 7 cm from sterna notch. Blackening & tattooing seen around the wound margin. Track of wound extends through space between 4 & 5 intercostals space, going downward & medially piercing the mediastinum, pericardium & heart then to stomach, spleen then gets lodged in the space between 8th & 9th intercostals space along the posterior axillary line
2. Abrasion 4cm x 3cm over right side of nasal ala.
3. Abrasion 3cm x 2cm over left cheek prominence.

4. Abrasion 4cm x 3cm over right frontal eminence area.

5. Abrasion 2.5cm x 1.5 cm over front of left half of chin.”

9. On internal examination, the following injuries were noted:

“Heart: - laceration 2.3cm x 1.3 cm, cavity deep seen over lateral wall of right ventricle with laceration 2 x 1 cm cavity deep over anterior aspect of apex of heart.

Abdomen: - Laceration 2 x 1cm, cavity deep seen over back aspect of fundus and laceration 1.5cm x 1cm cavity deep seen over back aspect of lower part of body of stomach.”

10. The opinion as to the cause of death was shock as a result of Injury No. 1 “which could be possible by projectile discharge from a fire arm weapon capable of discharging such a projectile.” The time since death was estimated at about two days.

Further statement of PW-15

11. According to PW-30, on 19th July 2012 PW-15 came to the PS and gave another statement (Ex.PW-15/DX). He now stated that he felt sorry that that although the main target of the attack was himself (PW-15), Tinku became the victim. Therefore, he had decided to speak the truth. He stated that the Appellant who was a resident of G Block in Sultan Puri was known to him and he was opposed to an illicit relationship between PW-15 and Sonam, a daughter of one Ram Saran, landlord of PW-15. The family of the Appellant was in talks with Ram Saran to get him married to Sonam. The Appellant had objected to PW-15 having the relationship with Sonam and asked him to end it. On 17th July 2012 at 3.45 pm the Appellant had come on his

motorcycle, aimed his firearm and fired at PW-15 but PW-15 managed to avoid it. The bullet found the chest of the deceased Tinku. PW15 stated that the Appellant was a wrestler and PW-15 feared that he may become the next target of the Appellant's attack. Therefore, PW-15 decided to come clean about the truth.

12. After recording the above second statement of PW-15, on 19th July 2012 he also recorded the statement of one Saheed Khan (PW-20) who came to the PS and gave the registration number of the motorcycle on which the person who had fired upon the deceased had arrived at the spot.

Arrest and recoveries

13. At around 6 pm on 19th July 2012 PW-30 received a secret information that the Appellant was present near 'S' Block chowk, Mangol Puri. PW-30 then proceeded to that spot along with certain other policemen in a private vehicle and on pointing out of the secret informer apprehended the Appellant. Upon his personal search one mobile phone of Huawei make, TATA Indicom was recovered. Upon his disclosure statement a motorcycle bearing No DL8S AH 8700 on which the Appellant was found sitting at the time of his arrest, was seized. This was the same motorcycle number as was disclosed by PW-15 to PW-30.

14. The Appellant is stated to have offered to get recovered the weapon of the offence. He led the police to the vacant land in front of his house and got recovered one country made pistol from beneath the sand. According to PW-30, the said country made pistol was found kept in a gunny bag when it was

recovered. Two live cartridges and one cartridge case (fired shell) was also found in the said gunny bag.

15. On the next day, i.e. 20th July 2012, PW-30 received information that one co-accused, Child in Conflict with Law (CCL) Sachin, was present in the area of Y Block, Mangol Puri. Along with HC Niranjana Singh (PW-22) and secret informer, PW-30 went there and found the CCL, Sachin, sitting near the water tank, Shamshan Ghat Road Drain, Opposite Y Block. He was then apprehended and a mobile phone of Virgin make of black colour was recovered from him. According to PW-30, this was the phone used by him to converse with the Appellant. Sachin, was the son of Ram Saran. PW-30 also collected the ownership record of motorcycle DL 8S H 8700 which was in the name of Babloo, the brother of the accused.

Charge sheet

16. Upon the completion of investigation, a charge sheet was filed on 13th September 2012. The charge sheet stated that PW-15 was having illicit relationship with Sonam who was sister of Sachin. According to Sachin, despite trying to dissuade PW-15 he did not listen. He disclosed this fact to the Appellant, Manoj, who was the younger brother of Babloo who was the son-in-law of Ram Saran's elder brother. Even Manoj, the Appellant herein could not persuade PW-15 to change his ways. The charge sheet further stated that Sachin knew that the Appellant had a country firearm and bullets and therefore, he and Manoj conspired to eliminate PW-15 to clear the way for Manoj marrying Sonam. Sachin then hatched a plan to that effect with the Appellant on 16th July 2012. Sachin overheard PW-15 and Tinku

conversing about purchasing the TV remote. He then called the Appellant over his mobile phone. The Appellant took his motorbike and kept following PW-15 and Tinku at J Block near Sanjay Gandhi Hospital and thereafter sought to quickly finish the task by firing upon PW-15 but by mistake killed Tinku.

17. A supplementary charge sheet was filed on 15th May 2013 upon receipt of the ballistic report from the Forensic Science Laboratory (FSL) which confirmed that the bullets found in the dead body of Tinku were fired from the pistol recovered at the instance of the Appellant.

Trial

18. By an order dated 12th March 2013 the trial Court framed the three charges against the Appellant. The first being for the offence of criminal conspiracy along with CCL Sachin (since juvenile) to commit the murder of PW-15 punishable under Section 120B; the second for committing the murder of Tinku punishable under Section 302 read with 120B IPC and; third for using the country made pistol for committing the murder thereby committing offence under Section 27 of the Arms Act.

19. On behalf of the prosecution, 30 witnesses were examined. Within six days of the filling of the supplementary charge sheet, i.e., on 21st May 2013, 22 of the 30 prosecution witnesses (PWs) were examined. This was the same day when an *Amicus Curiae* (AC) was appointed for the Appellant. The Court will dwell on this aspect subsequently in this judgment.

20. In his statement under Section 313 CrPC the Appellant claimed that he

has been falsely implicated by PW-15 who wanted to marry Sonam, with whom, the Appellant's marriage talks were on. The Appellant claimed that he was not present at the time of incident.

21. An additional statement was recorded of the Appellant on 15th April 2014 regarding mobile phone which was recovered on his personal search. He states that he was not using SIM No. 9213963548 at the time of incident. He was using the SIM No. 8750766126 which was issued in the name of his brother Anuj. Anuj had been called to the PS after he was asked to identify the Appellant's mobile phone. He identified the Samsung make mobile phone which was then returned to Anuj. A further statement of the Appellant under Section 313 Cr PC was recorded on 17th April 2014 where the Appellant stated that Mobile No. 9212733046 was being used by Babloo, elder brother of the Appellant.

22. Inspector Ashok Kumar was examined as CW-1 to clarify that the aforesaid Mobile No. 9212733046 was issued in the name of Babloo, brother of the Appellant and that customer application form (CAF) for the said phone was issued to him. Rajeev Ranjan, Nodal Officer of Tata Teleservices Limited was examined as CW-2 to prove the CDR of the aforementioned mobile issued in the name of Babloo.

Impugned judgment of the trial Court

23. The trial Court delivered a 153 page judgment dated 19th April 2014 convicting the Appellant of the aforementioned offences. The trial Court believed the oral testimony of PW-15 and held it to be corroborated by the CDR of the mobile phone of the Appellant. The trial Court also believed the

evidence of PW-20 (Saheed Khan) which was in turn held to be corroborated by Ct. Jitender (PW-26). The recovery of pistol at the instance of the Appellant and the ballistic evidence which proved that the bullet that killed the deceased was fired from the said weapon were held to further link the Appellant to the crime. The trial Court held that there was no reason to disbelieve the police witnesses as regards the recovery of the country made pistol at the instance of the Appellant. The trial Court then proceeded to discuss the circumstances which, according to the trial Court, were proved beyond reasonable doubt and held the Appellant to be guilty in the manner indicated before.

24. By a separate order on sentence dated 28th April 2014 the trial Court sentenced the Appellant in the manner indicated above.

25. The Court has heard the submissions of Ms. Inderjeet Sidhu, learned counsel for the Appellant and Ms. Radhika Kolluru, learned APP for the State.

Absence of a fair trial

26. In the first place, the Court would like to dwell on the aspect of a fair trial. The charge of committing murder punishable under Section 302 IPC is a serious one. It entails the punishment of either the death sentence or imprisonment for life. In a case of such nature it is of utmost importance that an accused should get an effective opportunity of defending himself or herself at the trial.

27. Article 22 of the Constitution guarantees an accused the right to be

defended by a lawyer of the choice of the accused. However, it is trite that a majority of the criminal defendants in the trial Courts in our country belong to the economically weaker sections of the society. In acknowledgment of this, Section 304 Cr PC mandates that where it appears to the Sessions Court that the accused is not represented by a lawyer and that the accused does not have sufficient means to engage a lawyer, the Court shall assign a lawyer for his defence at State expense. This is further mandated by Article 21 of the Constitution read with Article 39 A of the Constitution of India as explained by the Supreme Court in *Madhav Hoskot v. State of Maharashtra (1978) 3 SCC 544*. The Legal Services Authorities Act 1987 (LSAA) also provides a statutory right to free legal aid..

28. However, the constitutional right of the undefended accused to have a lawyer at State expense at the trial cannot be defeated by providing legal aid counsel with little or no experience in handling a complex case involving a charge under Section 302 IPC. Secondly, even if an experienced counsel is assigned, unless such counsel is given sufficient time to prepare and handle the case, the constitutional promise would be an empty formality.

29. In the present case, the proceeding dated 21st May 2013 of the trial Court showed that none was present for the accused on that day. In fact that was the day when the prosecution evidence was to commence. The accused informed the learned trial Judge that his counsel, Mr. Harish Chander, had stopped appearing on account of an issue regarding payment. The accused then prayed that a legal aid counsel be assigned to him. On that very day, 21st May 2013, one Rajneesh Antil, Advocate who was present in the trial

Court was appointed as AC. Without giving him any time to prepare himself, the trial Court immediately proceeded with the examination of 21 PWs. These include the two main eye-witnesses in the present case, i.e., (PW-15 and PW-20). Among the list of witnesses was also Dr. Manoj Dhingra (PW-12) who conducted the post-mortem report. It can well be imagined that the legal aid counsel appointed on that very date would have had no time whatsoever to familiarise himself with a case involving a serious charge under Section 302 IPC.

30. The zeal of a trial Judge to ensure speedy justice should not defeat the constitutional guarantee of a fair trial, particularly in cases involving serious charges punishable with death or life sentence. Yet, that is precisely what the learned trial Judge has done in the present case. Incidentally, this very trial Judge had earlier committed a similar serious lapse and it resulted in a declaration of mistrial of another serious case involving the rape and murder of a three year old child. This was the case of *State v. Sanjay Kumar Valmiki 2014 III AD (Del) 505*. There again 17 PWs were examined on a single day by the same trial Judge after appointing an AC on the same day that the prosecution evidence was to commence. The trial Judge after holding the accused in that case guilty proceeded to recommend that he be sentenced to death.

31. In *State v. Sanjay Kumar Valmiki* (*supra*), this Court was constrained to set aside the judgment of the trial Court after referring to a large number of judgments including *Mohd. Ajmal Amir Kasab v. State of Maharashtra AIR 2012 SC 3565* where the Supreme Court observed as under:

“476.....It is common knowledge, of which we take judicial notice, that there is a great hiatus between what the law stipulates and the realities on the ground in the enforcement of the law. The abuses of the provisions of the Code of Criminal Procedure are perhaps the most subversive of the right to life and personal liberty, the most precious right under the Constitution, and the human rights of an individual. Access to a lawyer is, therefore, imperative to ensure compliance with statutory provisions, which are of high standards in themselves and which, if duly complied with, will leave no room for any violation of Constitutional provisions or human rights abuses.

.....

483. To deal with one terrorist, we cannot take away the right given to the indigent and under-privileged people of this country by this Court thirty one (31) years ago.

484. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.”

32. This Court in *Sanjay Kumar Valmiki v. State* (supra) after noticing the above decision observed as under:

“17. The above decisions make it abundantly clear that the right of an accused to a fair hearing may be vitiated by an “overhasty, stage-managed, tailored and partisan trial”. What has also been repeatedly

emphasised is that providing an accused with the services of a lawyer is not an empty formality. The accused has a right “to have the guiding hand of the counsel at every step of the proceeding”. In the present case, the failure by the learned trial Court to ensure that the accused was duly represented by a counsel even at the stage of the framing of charges was a serious infraction of his statutory and constitutional rights of access to justice.”

33. In the present case again the Court has no hesitation in holding that there has been a gross miscarriage justice with the trial Judge examining as many as 21 PWs on one day, i.e., 21st May 2013 on the very day that the AC was appointed for the Appellant thus giving him no time whatsoever to prepare himself to cross-examine the said PWs. However, for the reasons explained hereinafter, the Court is not inclined to send the matter for a re- trial.

Eye witness accounts unreliable

34. The present case has been projected by the prosecution as the case of direct evidence with there being two eye-witnesses, i.e. the injured witness (PW-15) and Shaheed Khan (PW-20) who is supposed to have *kabadi* shop on the road where the incident took place and from where he noted the number of the motorcycle which the Appellant was purportedly riding and which he stopped to fire upon the deceased.

35. The evidence of PW15 is first examined. In his deposition in the trial Court, PW-15 began by stating that at around 3 to 3.15 pm on 17th July 2012 he went to purchase a TV remote, accompanied by the deceased Tinku, to the TV Shop at S Block, Mangol Puri. While returning, when they reached the S Block, the Appellant came on the motorcycle on the road towards Y Block. The Appellant slowed down his motorcycle to a halt and then took

out a country made firearm (*katta*), pointed it towards them, and fired. PW-15 got out of the bullet's way and fell on the ground. Unfortunately, Tinku received the gun shot on his chest while PW-15 received superficial injuries caused by the lead pieces/pellets (*charre*) on his right hand. Thereafter, the Appellant ran away on his motorcycle with his *katta*. PW-15 raised an alarm for help. He thereafter took Tinku to the SGM hospital in a rickshaw. According to PW-15, somebody made a call to the police and Ct. Jitender (PW-26) met them at the entrance to the hospital.

36. Since PW-15 was totally silent on the reason why the Appellant fired upon him, the Additional PP with the permission of the trial Court put some leading questions to PW-15. He now volunteered that on 17th July 2012 he did not disclose the name of offender. He disclosed it for the first time only on 19th July 2012. PW-15 further admitted that his landlord was Ram Saran and that the Appellant was the younger brother of the son-in-law of the elder brother of Ram Saran. PW-15 admitted that he was on “talking terms with Ms. Sonam the daughter of my landlord Ram Saran” and that the Appellant suspected PW-15 of having illicit relations with Sonam. He admitted that the Appellant had protested and warned PW-15 to discontinue talking to Sonam. He further stated that the Appellant was a wrestler and due to fear he did not disclose his name in his first statement.

37. In his cross-examination, PW-15 started by saying that he was an illiterate person. He was immediately confronted with his previous statement in which he had made the following statements:

- (i) about the Appellant stopping his motorcycle and firing upon PW-15 and the deceased

(ii) about statement having recorded on 18th July 2012 but in fact there was no such statement.

38. In his cross-examination PW-15 stated that he did not know the difference between a katta, a pistol or a revolver. He admitted that he did not call the police or even the family members of Tinku. He did not know the meaning of the word *Atmaglaani*, which is the word used in his subsequent statement dated 19th July 2012 to the police under Section 161 Cr PC. Interestingly, he said in his cross-examination as under:

“It is wrong to suggest that I had an affair with one Sonam d/o Ram Sharan. Vol. She is like my sister and used to tie a rakhi to me. I have not stated in my statement dated 18th July 2012 that “as I was having illicit relation with Sonam, Manoj was having a grudge on me and he told me to sever my relationship with Sonam.” Confronted with statement Ex.PW-15/DX-1 where it is so recorded. I am aware if the marriage talks of Sonam with accused Manoj were going on. It is wrong to suggest that I have falsely named accused Manoj in the present case since I wanted to marry Sonam the daughter of the landlord with whom there was a marriage talk of Manoj.”

39. PW-15 added that “I do not know if Manoj is a wrestler or not. Vol. I was told by the police officials regarding this fact. It is wrong to suggest that I could not identify the real culprit who had fired upon Tinku.”

40. The above answers makes this witness wholly unreliable for the simple reason that he completely changed the story about the Appellant objecting to his having illicit relations with Sonam. This was supposed to supply the motive for the crime. With the above change in the stand of PW-15, the prosecution case gets considerably weakened.

41. The second important aspect is that from his answers it is plain that PW-15 did not even know whether the Appellant was a wrestler. This was supposed to be the factor that induced PW15 not to disclose the name of the Appellant on 17th July, 2012. It is the police who told him that the Appellant was a wrestler. This obviously meant that the second statement recorded on 19th July, 2012 was not voluntarily made by the Appellant.

42. The third factor is that the Appellant claims to be illiterate; unable to sign his name and not even know the difference between a pistol, revolver and a katta. He did not know what was meant by *Atmaglaani* The term used in the second statement. This part of the cross-examination was as under:

“Q: What is the meaning of “Atmaglaani?”

Ans: I cannot tell.

I have not mentioned this word to the police.”

43. PW-15 claims to have made a statement to the police on 18th July, 2012 when in fact no such statement was recorded on that date. How such a witness could be stated to be trustworthy and reliable is not understandable.

44. During the course of the hearing, the Court was informed by the learned APP on instructions of the IO who was present in the Court that the CCL Sachin, who later became a JCL and was sent up for trial before the Juvenile Justice Board (‘JJB’), has been acquitted by the JJB. The acquittal of Sachin has not been challenged by the State in appeal. As a result, the entire story of the prosecution that Sachin and the Appellant conspired to eliminate PW-15 falls to the ground. With the JCL out of the picture, the evidence on record

would have to show that it is the Appellant alone who committed the offence.

45. The prosecution story hinged heavily upon the conspiracy hatched by Sachin and the Appellant with Sachin informing the Appellant of the movements of the Tinku. There was no way that the Appellant on his own would have known that the Appellant and Tinku would be crossing the main road near the Sanjay Gandhi Hospital near the K-Block of Mangolpuri at that particular hour i.e. 3.45pm. At that hour there would be a lot of traffic. The Court has seen the site plan and is unable to understand how the Appellant could have timed the killing so perfectly so as to come on his motorcycle and intercept PW15 and Tinku on the main road at a particular spot; stop his motorcycle, take out his firearm and fire upon PW15.

46. The Appellant has no previous criminal record. He does not appear to be a person of criminal antecedents or adept at using a firearm. The prosecution has not proved that he was or is a wrestler. From his own showing, he appears to be *jalebi*-maker having a stall. It is impossible to expect a person of that background to be able to adeptly use the country-made revolver and that too by coming on a motorcycle and firing on another while sitting on the motorcycle. Further, it seems unlikely that the Appellant would choose such a busy thoroughfare to commit such a crime during broad daylight unless he was a person who was a trained professional shooter. Therefore, this version of PW15 appears to be wholly unbelievable.

Evidence of PW-20 unreliable

47. The trial Court also has concluded on a reading of the evidence of PWs 20 and 26 that they completely corroborate the version of PW15. PW20 was supposedly having a *kabari* (junk dealer) stall on the main road. Interestingly, neither in the rough site plan (Ex. PW-15/D) or the scaled site plan (Ex. PW-3/A) the location of the shop of PW-20 is indicated. Therefore, it is not clear from where he witnessed the Appellant. The photographs show that it is a wide road. PW-20 claims that he somehow had the mobile number of PW-26 stored in his phone. He states that on 17th July 2012 he was sitting in front of his shop when he heard the noise of a fire arm shot “from the other side of the road”. On hearing the noise, he saw a boy running and coming towards “other side of the road” and his clothes were smeared with blood. He noticed a boy on the motorcycle pointing something which appeared to be a pistol towards the boy who was hit. Thereafter the boy on motorcycle escaped towards the side of the police chowki. PW-20 claimed that he immediately noted the motorcycle number which was written in Hindi as DL 8S AH 8700.

48. Without an idea of the distance from which PW-20 was witnessing this, it is impossible to believe that he could within that short time, somehow note down the motorcycle number, and that too a number written in Hindi. From the police file, the learned APP has produced photograph of the motorcycle having the Hindi number plate on the rear. The alphabets “DL 8S AH” are all written in Devanagari script in such small letters, that it would be next to impossible for a person even from a distance of 3 feet to be able to read that number plate. While the Hindi lettering of ‘8700’ is fairly legible, it is simply not possible that PW-20 would have been able to read the alphabets

on top of it written in Devanagari script without a binocular or telescope. This itself makes this witness wholly unreliable.

49. PW-20 then claims that he immediately called up Ct. Jitendra (PW-26) to tell him that as he had noticed the firing upon a boy. In his cross-examination, he stated “I did not inform Constable Jitendra when I made a call to him about the number of the motorcycle. Vol: I told him after two days. I did not approach police prior to 19th July 2012.”

50. It is indeed a mystery why PW-20 would not immediately inform the police of having noted down the motorcycle number but do that only after two days. When this is compared with the deposition of PW-26, it gets even more curious. PW-26 claims that he received a call from PW-20 about a person being shot near the ashram of blind persons and giving him at that moment on 17th July 2012 the number written on the number plate of the motorcycle in Hindi. This contradicts PW-20 who states that he did not give this motorcycle number to PW-26 on 17th July 2012 when he called him first.

51. The second inconsistency in the evidence of PW-26 is that he claimed to have met PW-15 and the injured Tinku near the gate of the SGM hospital and taken them to the emergency whereas the MLC shows that it was PW-15 who brought Tinku to the hospital at 4:30 pm. Only half an hour later did PW-15 get admitted and that too as having been brought by PW-26. A third strange fact is that PW-26 did not immediately disclose to PW-30, the IO, 17th July 2012 itself about the motorcycle number given to him by PW-26. It is apparent that no such number was noted by PW-20 or given to PW-26 on

17th July 2012. As noticed earlier, according to PW-30, PW-20 himself came to the PS only two days later to give them the number of the motorcycle. Interestingly in his previous statement to the police under Section 161 of the CrPC recorded on 19th July 2012, PW-26 is completely silent about PW-20 calling him on 17th July 2012 and giving him the number of the motorcycle on which the Appellant was supposed to have arrived at the scene of crime. This is another reason why PW-26 cannot be believed to be a trustworthy witness.

52. The Court is unable to conclude that either PW-20 or PW-26 is speaking the truth. The story of PW-20 noting the motorcycle number and then informing PW-26 about it is unbelievable. The Court, therefore, is unable to agree with the Trial Court about the trustworthiness and credibility of PWs-20 and 26 as well.

Recovery evidence

53. With the depositions of PWs 15, 20 and 26 not inspiring confidence, the case can no longer be one based on direct evidence as claimed by the prosecution.

54. The trial Court appears to have proceeded as if the case was one of circumstantial evidence. Learned APP placed considerable reliance on the single circumstance of recovery of the weapon of offence at the instance of the Appellant and the ballistic evidence which proved that the bullet which killed the deceased was fired from that weapon. Learned APP placed reliance on judgment dated 31st March 2016 of this Court in Criminal Appeal No. 498 of 2007 (*Mahabir Singh v. State*) to urge that even where

the eye-witnesses to an incident are disbelieved, conviction can still be returned on the basis of the sole circumstance of recovery.

55. To begin with, it must be noticed that the recovery was not in the presence of any independent witness but only police witnesses. There is also a discrepancy in how the recovery took place. According to PW-30, the weapon was found packed in a gunny bag under the sand in a plot opposite the house of the Appellant. The recovery memo in respect of the said pistol (Ex. PW-21/E) was witnessed by SI Robin Tyagi (PW-27) and HC Illa Khan (PW-21) and Ct. Jitendra (PW-26). PW-21 states that the Appellant took out a polythene bag after digging in a corner of a plot in front of his house and from a polythene bag a country-made pistol, two live cartridges was taken out. PWs 26 and 27 state that he took them to the vacant plot, dug the ground from where he got recovered the pistol. There is no mention of either a plastic bag or a jute/gunny bag. In their cross-examination both PWs 26 and 27 maintained that the pistol was not covered in a bag. The police witnesses themselves were inconsistent about the recovery of the *desi katta*. Further the recovery was from an open plot in front of the house of the deceased and no chance prints were recovered from the *katta*.

56. In any event, in the overall perspective of the case, where serious doubts have arisen about the credibility of the eye witnesses, it would be unsafe to base the conviction of the Appellant only on the basis of a single circumstance of recovery of the weapon of offence at his instance. The Supreme Court in *Mani v. State of Tamil Nadu (2009) 17 SCC 273* observed that "The discovery is a weak kind of evidence and cannot be

wholly relied upon and conviction in such a serious matter cannot be based upon the discovery.”

Conclusion

57. For the aforementioned reasons, the Court is unable to agree with the trial Court that the prosecution in this case has been able to prove the guilt of the Appellant for the offences for which he has been charged beyond reasonable doubt. The Court is of the considered view that the Appellant should be granted the benefit of doubt.

58. Accordingly, the impugned judgment and the impugned order on sentence of the Trial Court are hereby set aside. The Appellant is acquitted for the offences for which he is charged and tried. He shall be released forthwith unless wanted in some other case. The Appellant will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

59. The trial Court record be returned along with a certified copy of this judgment immediately. Another certified copy be also sent to the Jail Superintendent forthwith.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 06, 2018

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