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

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CRL.A.689/2018

DHARMENDER @ KALE Appellant

Through: Mr.R.P.S.Yadav, Advocate with
Mr.Hira Singh Rawat, Advocate.

versus

STATE Respondent

Through: Mr. Hirein Sharma, APP for State.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL**

JUDGMENT

20.08.2018

Dr. S. Muralidhar, J.:

1. This appeal is directed against the Judgment dated 25th May, 2018 passed by the Additional Sessions Judge (West) in Sessions Case No.162/2017 arising from FIR No.495/2016 registered at PS Nangloi convicting the Appellant for the offence punishable under Section 302 IPC, Section 25(1B)(a) and Section 27(1) of the Arms Act while acquitting him of the offence under Section 201 IPC.

2. This appeal is also directed against the order on sentence of the same date whereby the Appellant was sentenced to imprisonment for life along with fine of Rs.10,000/-; and in default of payment of fine, to undergo rigorous imprisonment (RI) for a period of six months for

the offence punishable under Section 302 IPC; RI for five years along with fine of Rs. 5,000/-; and in default to undergo RI for three months for the offence under Section 27(1) of the Arms Act; and RI for three years along with fine of Rs.3,000/-, and in default to undergo RI for one month for the offence under Section 25(1B)(a) of the Arms Act. The sentences were directed to run concurrently. The family members of the deceased were referred to the District Legal Services Authority (DLSA) for grant of suitable compensation.

3. The charge against the Appellant was that at around midnight on 7th December, 2016 he murdered Yusuf son of Zameel (deceased) by firing a gunshot on his neck and later caused the evidence to disappear by removing the blood of the deceased from the spot by throwing of water from the water tank. He was also charged with having in his possession and using an unlicensed firearm thereby committing offences under Section 25(1B)(a) and 27(1) of the Arms Act.

4. The criminal justice process was activated when a call was made to the Police Control Room (PCR) at around 1:27 am on 7th December, 2016 that at a party which was taking place at the Community Hall near the Krishna Mandir on the Najafgarh Road, firing was taking place and two or three people have been injured. In the initial report recorded in the PCR form (Ex.PW2 colly.) the information recorded was to the effect that '*Rahul tent wale ka dost Kallu ne sharab pee kr*

shaadi main firing ki hai or Yusuf Nasim age 40 years.... ko ek goli lagi hai jo behosh admit hai.'

5. On receipt of the above mentioned information ASI Ram Kanwar (PW13) passed on the message to ASI Dharmender (PW-22) who then proceeded to the community center near the Water Tank, Nangloi. Meanwhile the SHO, PS Nangloi also deputed SI Mahesh Kumar (PW-24) to the spot. PW-22 was informed that the injured had already been taken to the hospital. At the spot there were six empty cartridges lying. At some distance blood was also lying.

6. While PW-22 remained at the spot, PW-24 proceeded to the Satyabhama Hospital. The injured Yusuf had been admitted and was unfit for the statement. At the hospital, enquires were made by PW-24 from Rahul Kumar (PW-1) who ran the Rajoria Tent House which provided tents, chairs, lights, vehicles for marriages and other functions. PW-24 returned to the spot with PW-1 and noticed the six empty cartridges and the blood spots. It appeared that somebody had thrown water on the blood spots tampering with the scene of the crime. The crime team was called and photographs taken. On the statement of PW1 (Ex.PW1/A) a rukka was drawn up (Ex.PW24/A) and sent to the Police Station for registration of the FIR. The bloodstained earth was collected along with the earth-control and these were sealed in plastic containers and sealed. PW-24 also

recorded the statements of Bheem Sen (PW-11) and Yashpal (PW-4), purported eye-witnesses.

7. On receipt of secret information, the Appellant was arrested while he was coming in a Santro Car on 7th December, 2016 at 6 pm. The Appellant purportedly made a disclosure statement and on his search a pistol was found from his left dub of his pant containing three live cartridges. On 8th December, 2016 the statements of three more purported eye witnesses viz., Avinash (PW-9), Jatin Yadav (PW-15) and Krishan Kumar (PW-8) were recorded.

8. PW-24 tried recording the statement of the injured Yusuf at the RML Hospital to which he had been moved. However, he was still unfit for statement. On 15th December, 2016 Yusuf died at the RML Hospital. Thereafter Section 302 IPC was added to the FIR.

9. The post mortem of Yusuf was conducted by Dr. Munish Wadhawan (PW-12) on 16th December, 2016. The post mortem report (Ex. PW-12/A) revealed one gunshot injury wound, 1.2 x 1 cm over the lateral aspect of right neck, situated 2 cm below the right ear with blackening and tattooing of margins. The opinion as to the cause of death was “shock due to spinal injury as a result of firearm injury.”

10. The charge sheet was filed against the Appellant and by order dated 17th April, 2017 the trial Court framed charges as noticed hereinbefore against the Appellant.

11. The case of the prosecution was based on direct evidence of as many as six eye-witnesses namely, PW1, PW4, PW-8, PW9, PW11 and PW15. Unfortunately for the prosecution all of these eye-witnesses turned hostile. As far as the Appellant is concerned, he denied all the circumstances put to him under Section 313 CrPC. He offered to lead defence evidence.

12. The Appellant in his defence examined Ashok Yadav (DW1) and Surender Yadav (DW2). This was in order to prove the Appellant's *alibi* that he was present at the engagement ceremony of the daughter of one Jaipal in Gurgaon at the relevant time.

13. By the impugned judgment, the trial Court proceeded to convict the Appellant despite noting that the prosecution had failed to prove his guilt through the evidence of the eye-witnesses. The trial Court based the conviction by holding that the prosecution had succeeded “in completing the chain of circumstances pointing towards the guilt of the Dharmender @ Kale.” According to the trial Court, both the oral and documentary evidence established that the Appellant and the deceased were present at the Community Centre, Nangloi on the intervening night of the 6th/7th December, 2016; that the deceased

suffered gunshot injury in his neck which proved fatal; that empty cartridge cases were found at the spot which were fired from the pistol which was recovered from the possession of the Appellant. Since no other person present in the community centre was involved in the firing and since the Appellant took a false plea of *alibi*, it was held that failure of the prosecution to prove motive was not fatal to its case. As already noticed, the trial court convicted the Appellant for the offence punishable under Section 302 IPC and for the offences punishable under Section 25(1B)(a) and Section 27 of the Arms Act while acquitting him of the offence punishable under 201 IPC.

14. This Court has heard the submissions of Mr. R. P. S. Yadav, learned counsel for the Appellant and Mr. Hirein Sharma, learned APP for the State.

15. As already noticed earlier, the prosecution has projected the present case as one based on direct evidence. It has sought to prove the guilt of the Appellant on the basis of eye witness testimonies of PWs-1, 4, 8, 9 and 11, all of whom failed to support the prosecution. As noticed by the trial Court itself, Rahul Kumar (PW-1) resiled from his previous statement and simply stated that PW-11 came to him running and stated '*goli lag gai*'. He then stated that he immediately went running to the injured and he also called Kishan Kumar (PW-8) there. They took the injured to a van standing nearby and drove to the Satyabhama Hospital. PW-1 maintained that his statement was not

recorded by the police at the spot or the hospital. According to PW-1, he was called to the police station two days after the incident and made to sign documents. PW-1 claimed to know the Appellant since the latter's plot was situated at some distance from the office of PW-1. He further stated "It is correct that accused was also present in the tent at around 11.00 p.m. when the boys were taking food". However, PW-1 denied having told the police that the Appellant "was having weapon in his hand and he was firing in the air". He also denied that in his presence six empty cartridges were seized from the spot by PW-24. PW-1 again stated that he was made to sign documents which were already written and that "I had not read the documents prior to putting my signatures on them". At this stage, it must be noticed that the un-scaled site plan (Ex.PW-1/E) which was supposed to have been drawn up by PW-24 on the statement of PW-1 does not indicate where PW-1 himself was standing. This somehow appears as letter B in the scaled site plan (Ex.PW-14/A).

16. Learned APP sought to place reliance on the statement of PW-1 in his cross-examination by the Addl.PP that the Appellant was also present in the tent at about 11.00 p.m. This *per se* does not, in the considered view of this Court, assist the prosecution since there is no corroboration of this part of the statement of PW-1 by any of the other witnesses.

17. Yashpal (PW-4) was one of the waiters working under Bheem Sen (PW-11). He too was a witness who failed to support the prosecution. He categorically stated that he did not know the Appellant. He failed to confirm that the Appellant was also present in the *pandal* when the incident took place. PW-4 denied the suggestion that he had seen the Appellant become angry, take out a fire arm and start firing in the air and then he pointed the gun and fired a gunshot at the deceased. Therefore, the presence of the Appellant at the spot as spoken to by PW-1 was not corroborated by PW-4.

18. Turning now to Kishan Kumar (PW-8) who was also cited as an eye witness, he only stated that he noticed the injured lying bleeding. He denied that the Appellant was present, or that he took out a pistol and started firing or that any arguments took place between the Appellant and the victim. It should be recalled that it was the engagement ceremony of the brother of PW-8 that was being performed in which this incident took place.

19. Avinash (PW-9) was another eye witness who turned hostile. He also denied having seen the Appellant take out a fire arm and fire in the air. Likewise, Bheem Sen (PW-11) also turned hostile on the point of presence of the Appellant and his taking out the pistol and firing in the air. PW-11 in fact was the contractor who had engaged the waiters including the deceased.

20. The last eye witness was Jatin Yadav (PW-15) who also turned hostile. He claimed not to know the Appellant or that he was present at the venue or that he fired the gunshot at the deceased. With PW-1 not being corroborated by any of the other eye witnesses, it was unsafe for the trial Court to proceed with the conclusion that the presence of the Appellant at the scene of crime was established beyond reasonable doubt.

21. With all the above eye witnesses turning hostile, there was absolutely no evidence to prove the fact that the Appellant was present at the spot; that he came with an unlicensed fire arm which he fired in the air five times and the sixth one injured the deceased.

22. Unfortunately, the trial Court appears to have converted what essentially was a case based on direct evidence into a case based on circumstantial evidence. This was a fundamental flaw in the very approach of the trial Court. In *Bhagirath v. State of Madhya Pradesh (1976) 1 SCC 20*, the Supreme Court held that "the approach of the courts below in reconstructing a story different from the one responded by the prosecution and then convicting the appellant on that basis was clearly erroneous." It was further observed:

"15. It is well settled that the prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. Nor can the court, on its own

make out a new case for the prosecution and convict the accused on that basis."

23. The trial Court also drew a negative inference about the Appellant not having established his plea of alibi since the testimonies of DWs-1 and 2 were not believed. However, it is seen that DWs-1 and 2 were cross-examined at length and it could not be said that their testimonies were shaken in the cross-examination. What emerged in the cross-examination is that they were certainly related to the Appellant but also that the Appellant voluntarily went to the police station and was not arrested in the manner suggested by the prosecution. It also emerged in the cross-examination of the DWs that the Appellant was previously arrested by the police officials of PS Nangloi in FIR No.27/2009 under Section 307 IPC. However, it is pointed out by learned counsel for the Appellant that the Appellant was in fact acquitted in the said case.

24. Be that as it may, the trial Court was in error in drawing an adverse inference against the Appellant only because according to the trial Court the Appellant did not establish his plea of alibi. It is an event that by itself will not fulfill the legal requirement of the prosecution having established the proof of guilt of the Appellant for the offence punishable under Section 302 IPC beyond reasonable doubt. In *Datar Singh v. State of Punjab* (1975) 4 SCC 272, the Supreme Court reminded:

"It is often difficult for Courts of law to arrive at the real truth in criminal cases. The judicial process can only operate on the firm foundations of actual and credible evidence on record. Mere suspicion or suspicious circumstances cannot relieve, the prosecution of its primary duty of proving its case against an accused person beyond reasonable doubt. Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime, of patricide. They cannot even act on some conviction that an accused person has committed a crime unless his offence is proved by satisfactory evidence of it on record. If the pieces of evidence on which the prosecution closes to rest its case are so brittle that they crumble when subjected to close and critical examination so that the whole super-structure built on such insecure foundations collapses, proof of some incriminating circumstances, which might have given support to merely defective evidence cannot avert a failure of the prosecution case."

25. At the cost of repetition it must be noted that this is not a case of circumstantial evidence and the trial Court erred in proceeding on that basis. Even the trial Court noticed that although six empty cartridges were found at the spot only four of six empty cartridges were shown to have been fired from the pistol recovered from the Appellant. How this enabled the trial Court to proceed and infer that 'it was the accused and only the accused who had fired to the deceased' is unclear.

26. The manner of arrest of the Appellant and the recovery of the weapon from him cannot be stated to have been convincingly proved

in the light of the witnesses party to search, arrest and recovery, turning hostile. The trial Court did not also consider the failure on the part of the prosecution to prove the motive to be problematic. Here, the trial Court again fell in error. When all the eye witnesses turned hostile, the necessity for the prosecution proving the motive of the accused became significant. Particularly in the absence of other clinching evidence to connect the Appellant with the crime it was incumbent for the prosecution to show what motive the Appellant may have had to kill the deceased. It must be recalled at this stage, the deceased was a complete stranger to the Appellant and so there was no question of any previous enmity.

27. Consequently, this Court is of the view that the prosecution has miserably failed to prove the case set out against the Appellant much less beyond all reasonable doubt. It should be noticed here that even if the prosecution case was taken to be established, at the highest, the crime was not premeditated and clearly happened if at all at the spur of the moment. It was a single gunshot injury on the neck of the deceased to which he succumbed more than ten days after the incident. In any event, therefore, there was no question of charging the Appellant with the offence under Section 302 IPC. Therefore, the charge itself was defective.

28. Be that as it may, with the prosecution having been unable to prove that it was the Appellant who fired the gunshot on the deceased, the Appellant is entitled to the benefit of doubt.

29. Consequently, the impugned judgment and order on sentence passed by the trial Court is hereby set aside. The Appellant is acquitted of the offences under Section 302 IPC and Sections 25 (1B)(a) and 27 of the Arms Act. The corresponding order on sentence is also hereby set aside. Unless wanted in some other case, the Appellant shall be released forthwith. The appeal is allowed.

30. The Appellant will fulfill the requirements of Sections 437A Cr.P.C. to the satisfaction of the trial Court at the earliest. The trial Court record be returned forthwith together with the certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

AUGUST 20, 2018

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