

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 7th February, 2018
Decided on: 20th February, 2018

+

CRL.A. 1542/2014

MANOJ KUMAR

...Appellant

Through: Mr. Sacchin Puri, Sr. Advocate with
Mr. Varun Tyagi, Mr. Bharat Gupta, Mr. Kamil
Khan, Mr. Anuj Kapoor, Mr. Vishesh Chauhan,
Advocates.

versus

STATE (GOVT OF NCT OF DELHI)

...Respondent

Through: Ms. Radhika Kolluru, APP for the State
along with Insp. Meena Yadav, S.I. Yogender, P.S.
Aman Vihar.

Mr. Lovkesh Swahney, Advocate with Mr.
Durgesh Kumar Pandey, Mr. Harikishan Arora,
Advocates for the complainant.

+

CRL.A. 1650/2014

VINOD @ VICKY @ ANR.

..Appellants

Through: Mr. Manoj Ohri, Sr. Advocate with
Mr. Varun Tyagi, Mr. Bharat Gupta, Mr. Anuj
Kapoor, Mr. Vishesh Chauhan, Advocate for
Appellant Nos.1 and 2

versus

STATE (GOVT OF NCT OF DELHI)

...Respondent

Through: Ms. Radhika Kolluru, APP for the State.
Mr. Lovkesh Sawhney with Mr. Durgesh Kumar
Pandey and Mr. Harikishan Arora, Advocates for
the complainant.

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

J U D G M E N T

%

Dr. S. Muralidhar, J.:

1. These appeals are directed against the impugned judgment dated 18th July 2014 passed by the learned Additional Sessions Judge, Dwarka Courts, New Delhi in Sessions Case No.20/2012 arising out of FIR No.240/2011 registered at Police Station ('PS') Palam Village convicting the three accused, i.e. Vinod @ Vicky ('A1'), Pramod Vats @ Sanshyi ('A2') and Manoj Kumar ('A3'), for the offence under Section 302 read with Section 34 Indian Penal Code ('IPC') and convicting A1 under Section 482 IPC.

2. The appeals are also directed against the impugned order on sentence dated 19th August 2014 sentencing the Appellants for the offence under Section 302 read with Section 34 IPC to undergo rigorous imprisonment ('RI') for life with fine of Rs.60,000/- each and, in default of payment of fine, to undergo simple imprisonment ('SI') for one year; and A1 to imprisonment for one year and fine of Rs.1,000/- and, in default of payment of fine, to undergo SI for one month for the offence under Section 482 IPC. The sentences were directed to run concurrently.

Case of the prosecution

3. At 10.01 pm on 6th September 2011, Rekha (PW7), wife of the deceased,

Balwan Solanki, made a call to the Police Control Room ('PCR') from her mobile number stating that at House No.WZ-608, near Shiv Mandir, Palam Chopal, her husband had been shot by a firearm. In the said PCR form (Ex.PW25/A), a noting was made on the right side that the call was true. At 10.26 pm, it was noted in the PCR form that Balwan, a resident of the said place, had been shot at by Vicky (A1); that at the spot two cartridges had been found; that the injured had already been taken to the Mata Chanan Devi Hospital and that the Station House Officer ('SHO') with his staff was present at the spot. A further noting at 10.52 pm was that the SHO with the staff as well as the crime team was at the spot.

4. At 11.29 pm, it was noted that the injured had been brought dead to the Mata Chanan Devi Hospital. He had bullet wounds on his chest as well as on the right side and there was a bullet wound in his knees. It was further noticed, *"Inki property ka mamla tha, paise ki len den thi"*. Inspector Ramesh Khanka (PW35) was on patrolling duty with the staff. He was Inspector at PS Palam Village. At around 10 pm, he received the above information from the PCR. He then reached the spot, i.e. WZ-608, Badiyal Mohalla, near Shiv Mandir, Palam Village. On the corner of the Shiv Temple, he noticed blood and two empty cartridges. While he was still there, some other police staff also arrived.

5. Then PW35 along with Head Constable ('HC') Rakesh (PW36); Sub Inspector Virender (PW28) and driver went to Mata Chanan Devi Hospital. The deceased had been brought dead. PW35 then collected the Medico Legal Certificate ('MLC'). Baljit Solanki (PW2) (the younger brother of the

deceased) met him in the hospital and informed PW35 that he along with his relatives had brought the deceased to the hospital. PW35 then recorded the statement of PW2 (Ex.PW2/A) and on that basis prepared the *rukka* (Ex.PW35/A).

6. In his initial statement (Ex.PW2/A), PW2 informed PW35 that at around 9.30 pm, after dinner, he was standing with his elder brother (the deceased) in the corner of the Shiv Mandir and chatting when a white colour Maruti car proceeding towards Harijan Basti, came there and stopped in front of them. From the driver side, A1 and from the rear seats, his brother Manoj (A3) and Vinod (A2) got down. They all belong to the same village and were known to PW2 from before. They then entered into a scuffle with the deceased and before PW2 could intervene, A1 took out a pistol and fired twice or thrice on the deceased. The three accused then ran away from the spot in the same car in the direction of Lodhi Chowk. The other brother of the deceased, Sandeep (PW8), came there; they then picked up the injured and took him to Mata Chanan Devi Hospital where he was declared 'brought dead' by the doctors. PW35 then prepared the *rukka* and sent it with PW36 to the PS for the registration of the FIR.

7. At the hospital, the MLC was prepared by Dr. Rakesh Prasad Sahi (PW4). He handed over to PW35 the shirt of the deceased in a sealed parcel along with the sample seal. PW35 then returned to the spot and prepared a rough sketch of the empty cartridges. The empty cartridge was also picked up and preserved. One bullet was found near the electric pole which was also seized in a similar manner. According to PW35, they then tried to trace those

involved but could not find anyone.

8. The post-mortem of the deceased was conducted by Dr. Yogesh Tyagi (PW19). The post-mortem report (Ex.PW19/A) described the external injuries thus:

- (i) Firearm entry wound over the left knee-front. The track of the wound was going backward, upwards and outwards after the lower end of femur. A crater was present at the lower end of the femur due to impact of bullet.
- (ii) A firearm exit wound over the back of the left thigh, upper-third, 24cm above the knee joint of size 1.4 x 0.8 cm.
- (iii) Firearm entry wound over the right chest, front with absent singing and tattooing. The track was going through the lower lobes of both lungs which were collapsed. About one litre blood was present in both the chest cavities.
- (iv) A firearm exit wound was present over the back of the left chest 11cm outer to mid-line and 28cm from the top of left shoulder of size 1.4 x 1.0 cm.
- (v) The cause of death was shock of firearm injury over chest. All injuries were ante-mortem in nature. The time of death was 12-18 hours prior to the post-mortem examination. The post-mortem took place at 11 am on 7th September, 2011.

Arrest and recoveries

9. According to PW35, on 27th September, 2011 he received information from the Inter-State Crime Branch that A1 had been apprehended with some

illegal arms near Mundka Metro Line. He had admitted his involvement in the present case. PW35 along with the staff reached the Court of the learned ACMM at Tis Hazari and with the permission of the learned ACMM interrogated A1 and arrested him (Ex.PW29/A). The disclosure statement of the A1 was recorded. According to PW35, despite sincere efforts, the mobile phone could not be recovered.

10. On 28th September, 2011, PW35 went to Bulandshahar, U.P and reported to the local PS. A1 is supposed to have disclosed that after the incident, he and his cousin Monu were fleeing in his car and after reaching Bulandshahar, he fired a shot on the thigh of Monu. He learnt that Monu had been referred to a better hospital on 8th September, 2011 itself. On the next day, A1 is supposed to have taken PW35 to Village Nangali Tigga and got recovered the Maruti car having a fake number plate of DL-9CE-6934 whereas its actual registration number was DL-9CM-0457. Witnesses to the seizure were constable Subhash (PW43), Pokhpal Singh (PW17) and constable Rakesh (PW29). PW35 stated that he took photographs of the car from his mobile phone.

11. Thereafter, A1 took the police to Hotel Sahil in Aligarh where he supposedly stayed. The manager of the hotel, Shravan Kumar Sharma (PW18), identified A1. Thereafter, A1 led the police to Rishikesh and Neelkanth and to a lodge at Sidhibali. The manager of the hotel, Rajender Singh Chauhan (PW32), identified the accused.

12. On 1st October, 2011, A1 led the police to Bahadurgarh and pointed out

the shop from where he purchased the fake number plate which was affixed on the Maruti car. The owner of that shop Navin (PW12) also identified A1.

13. At the end of the investigation, a charge-sheet was filed. Initially, by an order dated 14th February, 2012, only A1 was charged with the offence under Section 302 IPC and Section 482 IPC (for using the fake number plate on the car used by him). Subsequently, after the arrest of A2 and A3, by an order dated 17th December, 2012, they too were charged for the offence under Section 302/34 IPC and 482/34 IPC.

Statements of the accused

14. Forty nine witnesses were examined by the prosecution. In his statement under Section 313 of the Code of Criminal Procedure ('Cr PC'), while denying the circumstances put to him, A1 stated that he had been falsely implicated; that he was on his way from Gola Dairy/ Shyam Vihar to his residence when he was arrested. He maintained as under:

"I am innocent and I have been falsely implicated in this case. Criminal case was pending against the deceased on the complaint made by me as well as another case registered on the complaint of my father. There was also a dispute between me and opposite party (complainant party) on a plot in a Harijan Basti. I used to be pressurized by the deceased to withdraw my case in the court and for which I was not ready I and my brothers have been falsely implicated after due deliberation discussion by the complainant party. At the alleged time of incident I was present in the jurisdiction of Shyam Vihar near Gola Dairy which may be about 15 KM from the place of occurrence. The complainant rang me on my mobile no. on 6.9.2011 at 9.45 PM and talked for about three minutes without telling the purpose however, I rang up from my mobile

telephone to the complainant at 9.53 PM Complainant after verifying my presence on telephone in Delhi has falsely implicated me in this case.”

15. A supplementary statement was recorded on 31st May, 2014 in which A-1 denied that he was in the area of Pochanpur. He claimed that he was but near the Gola Dairy/Shyam Vihar which was near Pochanpur tower.

16. A2, Pramod, too denied his involvement. According to him, there was a dispute between the accused party and the complainant party over a plot in Harijan Basti. The accused party used to pressurize the complainant party to withdraw the case in the Court which they declined. As a result, the complainant party had falsely implicated the accused. A2 maintained that at the alleged time of the incident, he was present at home. According to him, “The complainant rang up my brother Vinod @ Vicky on 6th September 2011 at 9.45 PM on his mobile telephone and talked for about three minutes without telling the purpose however, my brother Vinod rang up from his mobile telephone to the complainant at 9.53 PM. Complainant after verifying my presence on telephone in Delhi has falsely implicated his in this case.”

17. As far as Manoj (A3) is concerned, he too maintained likewise. A supplementary statement was recorded of A3 on 31st May, 2014 regarding location of the mobile phone. No defence evidence was led.

Impugned judgment of the trial Court

18. In the impugned judgment dated 18th July, 2014, the trial Court came to

the following conclusions:

- (i) The present case was based on the eye witness account of Baljit (PW2), the younger brother of the deceased; Seema (PW6) the wife of PW-2; and the other brother, Sandeep (PW8). It also hinged on the evidence of Rekha (PW7), the wife of the deceased. From an analysis of the evidence of PWs 2, 6 and 8, it could safely be concluded that
“the deceased was fired upon by accused Vinod @ Vicky after sharing common intention with other accused persons before 10:00 pm. There is connectivity between the mobile phone of deceased and accused Vinod @ Vicky first at 9:45 pm and thereafter at 9:53 pm on 09.06.2011. In this regard, Pawan Singh (PW14), Nodal Officer, Idea Cellular Ltd., has proved on record that mobile no. 9911074656 is owned by Balwan Singh (deceased) in terms of Ex.PW14/A and mobile number 9891787703 is owned by accused Vinod @ Vicky in terms of Ex. PW14/C.”
- (ii) From the CDRs, it would be concluded that there was telephonic contact between A1 and the deceased at 9.45 pm on 6th September, 2011. Thereafter, at around 9.53 pm, on the same day i.e. 6th September, 2011, A1 had made a call from his mobile number on the mobile number of the deceased. The location of both mobile phones was near the spot. The defence taken by A1 to the contrary was not substantiated by the cell ID location of his phone which shown it to be near Pochanpur, a short distance from the spot. Thus, the plea of A1 that he was at Gola Dairy in Shyam Vihar was false which further incriminated him.
- (iii) The testimony of eye witnesses who spoke consistently about the deceased having been shot at by A1 with the participation of A2 and

A3 was truthful and believable. The fact that PW2 did not intervene to save the deceased who was scuffling with A1 to A3 does not throw doubts on his testimony or his presence at the spot. The minor contradictions did not affect the veracity of his deposition. Even the depositions of PWs 2, 6, 7 and 8 were consistent. There were no material contradictions or improvements.

- (iv) The non-seizure of the bloodstained clothes of PWs 2, 7 and 8 by the police does not create a doubt regarding their presence at the spot and removing the deceased to the hospital.
- (v) The testimony of PW8 was duly corroborated by Constable Shyam Lal (PW25) who deposed that on 6th September, 2011 at about 10.01 pm he received information from the said mobile number regarding bullet injury to the husband of PW8. This was received by Shyam Lal (PW25) and later passed on to SI Shanti Prakash (PW30) vide DD No.85B(Ex.PW16/A), the mere non-mention of the other two accused in the very first information given by Rekha again does not throw any serious doubt about the veracity of her deposition.
- (vi) The car which was used in the commission of the offence was recovered at the instance of A1 with a fake number plate. The motive for commission of the crime was proved and in any event, with criminal cases pending between the parties and the deceased facing criminal charges in FIR No.17/2009 registered at PS Palam Village in which A1 was the complainant, showed that there was motive for commission of the crime. The eye witness account was corroborated by both medical as well as forensic evidence.

19. As already noticed, by a separate order on sentence, the trial Court sentenced the Appellants in the manner indicated hereinbefore.

Submissions on behalf of the Appellants

20. Mr. Manoj Ohri, learned Senior Counsel appearing for A1 and Mr. Sacchin Puri, learned Senior Counsel appearing for A2 and A3 submitted as under:

- (i) Despite PW2 stating that the accused persons were known to the victim's family since childhood, none of the names of the accused persons were mentioned by PW8 in the first instance as indicated in the left side of the PCR form recorded. Reliance is placed on the decisions in ***State v. Lallu Ram III (2016) CCR 59 (Del)*** and ***Rajender v. State 2011 (2) JCC 1134***.
- (ii) What was proved through Kartar Singh (PW13) was only Part-I of the PCR form and not Part-II. Relying on the decisions in ***Purshottam Chopra v. State*** (Crl.A. 121/1999, decision dated 23rd May 2011) and ***Pradeep Khatri v State 2014 (4) JCC 3003***, it is submitted that what was only proved was Part-I of the PCR form.
- (iii) There was discrepancy in the time of recording of the statement of PW2. According to him, his statement was recorded by PW35 at 10.45pm whereas the IO (PW35) stated that it was recorded at 1.15-1.30 am. The FIR was registered only at 2.30 am. Despite the presence of PWs 6 and 7 at the spot, their statements have not been recorded. The *rukka* was not prepared on that basis even though the PCR call had been made by PW7. It is submitted that the delay in lodging the FIR was fatal to the prosecution case.

- (iv) The presence of the eye witness at the spot was doubtful particularly since PWs 2, 6, 7 and 8 had not mentioned about the presence of each other. In the *rukka*, PW2 had not mentioned the presence of PW7. In her entire examination-in-chief as well as cross-examination, PW7 had not mentioned about the presence of PW2 and Sandeep (PW8) and had also not mentioned about the presence of Seema (PW6). Further, despite being in the same van, which took the deceased to the hospital, PW2 did not mention about any dying declaration made by the deceased to PW7. Even the dead body of the deceased was not identified by the said eye witnesses. Throughout, the time of the incident was recorded as 9.30 pm on 6th September, 2011, i.e. both in the charge as well as questions under Section 313 Cr PC, whereas the PCR call was made only at around 10.10 pm.
- (v) The call details were not specifically put to the accused persons in their statements under Section 313 Cr PC but in a vague manner. This too was fatal to the case of the prosecution. Reliance is placed on the decision in *Asraf Ali v. State of Assam (2008) 16 SCC 328*.
- (vi) The non-recovery of bloodstained clothes of PWs 2, 7 and 8 was fatal to the case of the prosecution. Reliance is placed on the decision in *D. Thamodaran v. Kandasamy (2015) 16 SCC 758*.
- (vii) There was no matching of the weapon of the offence with the gunshots as per the medical evidence of Dr. Yogesh Tyagi (PW19). There was no charring, tattooing and scorching on the body of the deceased. Further, the FSL report clearly showed that the recovered bullets were not fired from the weapon recovered from A1 (Ex.PW47/A and PW47/X). Reliance in this regard was placed on the

decisions in *Suchand Pal v. Phani Pal* (2003) 11 SCC 527; *Joginder Singh v. State of Haryana* 2014 (2) SCJ 537; *Mahavir Singh v. State of Madhya Pradesh* (2016) 10 SCC 220; *Vinod v. State* (decision dated 26th March 2009 of the this Court in CrI.A. No.670/2008); and *Mohinder Singh v. State* AIR 1953 SC 415.

- (viii) PW2, despite being the brother of the deceased, did nothing to save the deceased and his conduct was, therefore, unnatural. Further, despite the spot being surrounded by various shops that were admittedly open at that time no public person was made a witness to this. While PWs 16, 21, 22 and 28 talked about the presence of Satyabir (PW49) at the spot, he himself stated that on the date of the incident he was on leave.
- (ix) Despite recovery of empty cartridges on 6th September, 2011 and arrest of the accused on 27th September, 2011, the cartridges were sent to the forensic lab only on 13th October, 2011. This weakens the case of the prosecution. Reliance is placed on the decision in *Vinod v State* (supra).
- (x) The trial Court failed to discuss any particular role of A2 and A3 in the entire judgment. Even as per the prosecution, except holding the deceased, no other role was played by A2 and A3. The prosecution has even failed to prove that they shared any common intention with A1 to eliminate the deceased. Reliance is placed on the decisions in *Rahisuddin v. State* 204 (2013) DLT 35; *Shambhu Kuer v. State of Bihar* AIR 1982 SC 1228; *Ajay Sharma v. State of Rajasthan* AIR 1998 SC 2798; and *Ramashish Yadav v. State of Bihar* AIR 1999 SC 3830.

- (xi) Lastly, it was submitted that there was no intention to cause the death of the deceased as talks were taking place between the accused and the deceased. One shot was fired on the knee of the deceased and that too only following a scuffle. Therefore, there was no intention to cause death of the deceased. Therefore, the offence under Section 302 IPC is not made out.

Submissions on behalf of the State and the complainant

21. Ms. Radhika Kolluru, learned APP for the State, and Mr. Lovkesh Sawhney, learned counsel for the complainant however, supported the judgment of the trial Court and submitted that:

- (i) Where the eye witness testimony is truthful and reliable, even though they may be interested witnesses, it was sufficient to bring home the guilt of the accused. The three eye witnesses were natural witnesses and have spoken consistently. They have stood the test of cross-examination.
- (ii) Where the eye witness testimony is clear and cogent, any lapses in the recoveries or delay in the registration of the FIR, or even absence of proof of motive, becomes insignificant.
- (iii) There is no real inconsistency in the medical evidence and the ocular evidence. Reliance is placed on Modi's Jurisprudence (24th Edition) to show that the distance from which the gunshot was fired need not result in singeing and tattooing. Reliance is also placed on the decision in ***Pattipati Venkaiah v. State of Andhra Pradesh AIR 1985 SC 1715*** to submit that this is not a case where any interference is called for with the impugned judgment of the trial Court. The nature

of the injury, i.e. gunshot wound to the chest, ruled out any other offence except the one under Section 302 IPC.

Evidence of PW2

22. At the outset, it requires to be noticed that A1 is not at all disputing his presence at the site. In his statement under Section 313 Cr PC, he took the stand that it was PW2 who had called him on his mobile phone at 9.45 pm “and talked for about three minutes without telling the purpose.” He then claims that he called back PW2 at 9.53 pm. Therefore, he does not dispute the exchange of calls. If indeed, as was suggested by Mr. Ohri, the previous incident involving A1 and the deceased was in 2009 and PW2 was calling up at 9.45 pm, there is no way that in the three minutes time that they spoke, he would not have known the purpose of the call. Also, he need not have waited for eight minutes to call back PW2 in order to ascertain that purpose.

23. What appears to be a complete giveaway is the line of questioning of PW2 in his cross-examination. PW2 denied the suggestion in his cross-examination that he called A1 from the mobile of the deceased; that he had a conversation with A1 for three minutes; that thereafter A1 called him at 9.53 pm to ask him the reason as to why he had called him.

24. In this regard, the evidence of Pawan Singh (PW14), a nodal officer of Idea Cellular Limited is relevant. He has proved that the mobile number 9911074656 was owned by the deceased and mobile number 9891787703 was owned by A1. PW14 has proved the CDRs (Ex.PW14/B) and the call locations of both phones, i.e. Ex.PW14/B and Ex.PW14/D respectively,

showing that the location of the mobile phone of the deceased was at Tower-29223, i.e. Lodhi Chowk, Dwarka at 9.45 pm. The location of the phone of deceased at 9.53 pm was of Palam Village. Likewise, the location of mobile phone of A1 was at Tower-26101, i.e. Pochanpur, at about 9.55 pm and Tower-28392, i.e. Palam Extension, at 9.53 pm. This belied the contention of A1 that his location was at Gola Dairy, which is at a distance of 15 km from the spot. His location was at Pochanpur at 9.45 pm. The fact that A1 himself called the deceased and spoke to him at 9.53 pm equally stands proved by the CDRs. Clearly, therefore, the deceased was alive at 9.53 pm. The story of PW2 having taken the mobile phone of his brother to give a call to A1, after someone had shot the deceased, only to falsely implicate A1 is totally unbelievable. On the other hand, the evidence of PW2 appears to be natural. He appeared on the scene at 9.30 pm, after dinner.

25. It must be remembered that there was a second round of cross-examination of PW2 after the arrest of A2 and A3. There was no suggestion put to PW2 at this stage about his having called A1 from the mobile phone of the deceased. As rightly analyzed by the trial Court, the CDRs disproved the defence of A1 that he was at Shyam Vihar, Gola Dairy, a distance of 15 km from the spot at 9.45 pm when he received a call from the deceased. He was at Pochanpur at that time. Later, when he gave a call to the deceased at 9.53 pm on the mobile phone of the deceased, he was at Palam Extension, which was very close to the spot when the crime took place. He was, therefore, clearly proceeding towards the spot at that time. It is A1 who had reached the spot of the deceased along with A2 and A3 and he had no valid explanation as to why he had reached that spot. Clearly, therefore, as held by

the trial Court, the incident took place at around 9.55-10 pm. The mention of 9.30 pm in the charge and in the 313 Cr PC statement cannot therefore be relied upon by the accused to state that the incident took place at that time. This coupled with the fact that the PCR form records the call of the wife of the deceased i.e. Rekha (PW7) at 10.10 pm stands fully corroborated by the above evidence.

26. Undoubtedly, the eye witnesses to the incident are interested witnesses as they are closely related to the deceased. PW2 is the younger brother; PW6 is his sister-in-law; PW7 is the wife of the deceased. Their depositions, therefore, deserve very close scrutiny.

27. In *Hari Obula Reddy v. The State of Andhra Pradesh, (1981) 3 SCC 675*, the Supreme Court observed:

".. it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

28. PW2 is very clear and consistent about the roles of the three accused. He is clear that it was A1 who fired upon the deceased; that A2 and A3 caught hold of the deceased from his neck and hands while A1 had fired at him.

PW2 watched this from a distance of around two and a half feet. The entire incident took less than two minutes. Therefore, there was not enough time for PW2 to intervene. In the considered view of the Court, this conduct cannot be termed as unnatural. Neither the deceased nor PW2 were armed whereas A1 was. PW2 himself stated that while there was a scuffle between the accused and the deceased. Even PW2 did not expect that A1 would pull out the weapon and fire on the deceased. All this has happened in an extremely short span of time. What is certain, however, are the roles assigned to each of the accused and the manner in which the killing took place. Despite being subjected to extensive cross-examination, nothing was elicited from PW2 which could cast any doubt on his identifying the three accused whom he knew from before. Their house and the house of the deceased were just opposite each other. The site plan also shows that there was a street light and so the visibility of the incident itself was not in issue.

29. It was sought to be suggested that PW2 did not hear the dying declaration supposedly made by the deceased to his wife PW7 in the van. However, that dying declaration has not been relied upon by the trial Court, and rightly so. The eye-witness account of PW2 itself was sufficient. This account was fully corroborated by Seema (PW6) the wife of PW2 who viewed the whole incident from the terrace of her house. This will be discussed shortly.

30. In his cross-examination, PW2 stated: "I was sitting on the floor by the site of my injured brother and my Bhabhi (sister-in-law) was sitting on the seat which was on the back side of the driver's seat." Therefore, it is not

correct that PW2 did not mention the presence of PW7. He further stated, “My bhabhi informed the police about the incident over phone while she was sitting in the van.” Further, “My bhabhi informed the police from her mobile phone in my presence so I did not call the police.” This is true because indeed PW7 called the police from her mobile phone.

Evidence of PW6

31. Turning now to the evidence of PW6. She was on the roof checking the water tank and noticed A1 come down in the Maruti car with A2 and A3 sitting on the rear seat. They got down and started quarrelling with the deceased. She noticed A1 taking out a pistol firing two shots and thereafter all three accused sitting in a Maruti car and fleeing towards Jaat Dharamshala. PW6 noticed her husband PW2, her *jethani* Rekha (PW7); *dewar* Sandeep (PW8) shift the deceased to the hospital. She knew the accused persons as they were residents of the same village.

32. The cross-examination of PW6 by counsel for A1 did not yield anything for the accused. There was electricity in the area and there was street light. When again cross-examined after the arrest of A2 and A3, PW6 maintained her version. There is very little confrontation of PW6 with her previous statement under Section 161 Cr PC except to the extent that she said in that statement that the car came from the side of Ramphal Chowk whereas in her deposition in the Court she stated that it came from the side of Harijan Basti road. However, she clarified that the gali which comes from Harijan Basti side and the front half portion is outside the gali facing towards her house. She too confirmed that the PW2 was standing at a distance of 3ft from the

deceased. She cried from the roof of her house and ran downstairs while shouting. She was so nervous that she did not remember as to what happened thereafter. Her viewing the incident from the terrace could not have been noticed by PW2 as he was busy attending to the deceased.

33. PW6 did not dispute that the shops around the spot were opened at that time. However, the failure by anyone from those shops to come forward to speak about the incident is not surprising. There was no need for PW7 to falsely implicate any of the accused. Her account corroborates the eye witness account of PW2 in the material aspects following the firing. PW6 is a natural witness who is truthful and reliable.

Evidence of PW7 and PW8

34. Turning now to Rekha (PW7) the wife of the deceased, she reached the spot at the time when the deceased was already lying down in a pool of blood. She claimed that on the way to the hospital while carrying him in the van brought by PW8, the deceased had told her that A1 had shot him and that A2 and A3 were also present. Any doubt regarding the presence of PW2 in the van was explained by her in her further cross-examination after the arrest of A2 and A3. A suggestion was given to this witness to which she answers, "It is wrong to suggest that I was sitting on the seat along with my *dewar* Baljit." This was after she had stated that she was on the floor besides the body of her husband. This clearly showed, therefore, that not only the presence of PW8 is confirmed by this witness but even the presence of PW2. A further suggestion to PW7, which she of course denied, was that after the deceased was declared brought dead to the hospital all his family members

planned to take 'revenge' and falsely implicated the accused. This question in fact makes the version of PW7 both natural and truthful. She did not deny that she did not in the first instance mention the name of the assailant but that she found out about this only later on. The implication of 'revenge' and the suggestion of false implication were at cross purposes. It only reaffirmed the identity of the main assailant i.e. A1.

35. The evidence of PW8 who also witnessed the incident while standing on the first floor of their house fully corroborates the above versions. He noticed three accused coming in a white Maruti van, stopped near the Shiv Mandir; the three accused getting down from the car and then quarrelling with the deceased and in that process A1 taking out a pistol and firing two gunshots upon the deceased. He clearly states that PW7 reached the spot thereafter; that he took out his vehicle and along with PW7 and PW2 took the deceased to the hospital. He too was subjected to extensive cross-examination but nothing came of it. He confirmed that PW7 called the police even before they reached the hospital with the deceased.

36. With the eye witnesses speaking cogently and consistently, and with nothing being elicited in their cross-examination to doubt their versions on the actual incident, the Court sees no reason why their evidence cannot be relied upon to convict the three accused.

Fire arm injuries

37. Much has been made about the confusion of the fact that the firearm injuries on the dead body did not show any singeing or tattooing. In this

context, the following extract from Modi's Medical Jurisprudence and Toxicology (24th Edition) states that when a firearm is discharged from very close to the body or in actual contact the surrounding skin is usually scotched and blackened with smoke and tattooed with unburnt grains or powder. However, the distance from which it fired also determines whether there would be blackening, tattooing or singeing. It is stated that:

“At a distance of one to three feet, small shots make a single aperture with irregular and lacerated edges corresponding in size to the bore of the muzzle of the gun, as the shot enter as one mass, but are scattered after entering the wound and cause great damage to the internal tissues. The skin surrounding the wounds is blackened, scorched and tattooed, with unburnt grains of power. On the other hand, at a distance of six feet, the central aperture is surrounded by separate openings in an area of about two inches in diameter made by a few pellets of the shot, which spread out before reaching the mark. The skin surrounding the aperture may not be blackened or scorched, but is tattooed to some extent.”

38. It was further noted in conclusion that: “a definite opinion about the distance from which a firearm was discharged should be given with caution.”

39. The mere absence of singeing and tattooing will not by itself therefore throw doubts on the veracity of the version of the eye witnesses. In any event, nothing prevented the defence from examining a ballistic expert in this regard. Instead they chose to address all their questions to the doctor performing the post-mortem, i.e. PW19. The questions to him and his answers read as under:

“Q. What was the approximate distance from where the gun shot was fired at the deceased?

Ans. According to post mortem findings, the fire arm probably shot from a distance of more than six meters. However, exact distance is the expertise of forensic ballistics because it depends on the fire arm weapon used.”

40. Clearly therefore PW19 was telling the defence counsel that they had to address the question regarding exact distance to a ballistic expert. In the opinion of this witness, it was a distant range shot more than from a distance of six meters but clearly that could not have been concluded. PW19 was clear that only one bullet was recovered from the body of the deceased but there were two firearm injuries. There was a single entry wound in the body of the deceased in both the injuries – one of those firearm injuries was over the chest.

41. As regards one of the bullets recovered from behind the electric pole, this could have easily been as a result of the bullet ricocheting of the wall as is evident from the site plan. This again does not throw any serious doubt on the veracity of the version of the eye witnesses.

Delay in registering the FIR

42. Much has been made of the alleged delay in the registration of the FIR. While PW2 does state that his statement was recorded at 10.45 pm whereas PW35 states that it was recorded at 1.13 to 1.15 am, it seems more likely that the statement which was recorded at the hospital was definitely after 10.45 pm. The MLC itself records the time of bringing the deceased into the hospital as 10.20 pm. By the time the IO reached the hospital and recorded

the statement it could have been well beyond 10.45 pm. In fact, the noting on the PCR form on the right side to that effect is at 11.29 pm. The Court, therefore, inclined to agree with the trial Court that the conjoint reading of the testimonies of Sub Inspector Virender (PW28), HC Rakesh (PW29); HC Hanuman (PW34) leads to the conclusion that all of them including PW35 left the spot at about 11 pm and thereafter the statement of PW2 was recorded in the hospital by PW35. Therefore, even if PW2 had made a statement after 11 pm, the registration of the FIR at 3 am after the rukka was prepared cannot be said to be so delayed as to cause doubts on the case of the prosecution. It is only where the delay is not satisfactorily explained that doubts begin to arise. In this regard, the trial Court has rightly followed the ratio of the decisions in *Sahib Singh v. State of Haryana AIR 1997 SC 3247* and *Gorige Pentaiah v. State of A.P. (2008) 12 SCC 531*.

43. In *State v. Lallu Ram (supra)* the delay in registration of the FIR was not explained to the satisfaction of the Court. That was a case where the presence of the eye witnesses was not believed. Likewise, in *Rajender v. State of Delhi (supra)*, the delay was unexplained and it was in the context of other circumstances surrounding the case not being satisfactorily proved by the prosecution. The above two decisions are, therefore, distinguishable on facts. The Court is of the view that in the present case the eye witness evidence is clear, cogent and consistent. The delay in registration of the FIR has been satisfactorily explained and does not vitiate the case of the prosecution.

Other grounds

44. The Court is unable to agree with the contention that there was any failure to put to the accused the call details. To begin with, Section 215 Cr PC states that no omission to state particulars either in the offence or the charge shall be considered material "unless the accused was in fact misled by such error or omission, and it has occasioned in the failure of justice." The case of the prosecution here rests essentially on the consistent and uncontroverted testimony of three eye witnesses, PWs 2, 6 and 8. The call details were meant to only corroborate the eye witness testimonies. This was not a case based on circumstantial evidence. It is also not the case of the accused that they were misled by the omission or that there was any failure of justice on that score. Therefore, these factors will have to be borne in mind while examining whether the failure to put the CDRs to the accused would be fatal to the case of the prosecution.

45. Even the counsel for the accused do not dispute that the CDRs were generally put to the accused. In the considered view of the Court, in a case of the present nature, where the three eye witnesses namely PWs 2, 6 and 8 have clearly spoken consistently and truthfully, the failure to specifically put to each of the incriminating calls to the accused would not be fatal to the case of the prosecution. The decision in *Asraf Ali v State of Assam* (*supra*) was a case of circumstantial evidence and not of direct evidence and therefore distinguishable on facts.

46. Likewise, the failure to recover the bloodstained clothes of the eye witnesses could at best point to a lapse on the part of the prosecution. It does

not, however, make the eye witness accounts doubtful. In ***D. Thamodaran v. Kandaswamy*** (*supra*), there were serious discrepancies in the deposition of the prosecution witnesses. The place of incident and the sequence of events were not proved. Only one independent witness was examined and even that witness was not found to be consistent or truthful. However, in the present case the above infirmities are really missing. There is no ground made out at all to disbelieve any of the eye witnesses. Therefore, the decision is again clearly distinguishable on facts.

47. The failure on the part of the prosecution to match the recovered weapon with the bullets recovered from the deceased is again not fatal to the case of the prosecution. The fact that the death was homicidal has been clearly proved and the fact that A1 used his firearm to fire two shots at the deceased – one on the knee and the other on the chest has clearly been proved. Even without the recovery of weapon of offence, there would be no weakening of the case of the prosecution. The decisions cited by the learned counsel for the accused, therefore, clearly distinguishable on facts.

48. The PCR form is computer generated and gives very little scope for the tampering. There was no occasion for the PCR form to be fabricated as suggested. The decision in ***Purshottam Chopra v. State*** (*supra*) and ***Pradeep Khatri v. State*** (*supra*) appear to have turned on their own facts. In the present case, the PCR form mentioned clearly the name of A1. It was consistent with PW2 disclosing to the IO the name of the assailants and that being passed on for being recorded in the PCR form.

49. It was submitted that the PCR form records on the right side that the SHO and his team were present at the spot soon after the call was made by PW6 whereas the SHO who was examined (PW49) stated that he was on leave on the date of the incident. It transpires that the reference in the PCR form was not to the SHO on leave but to an Additional SHO who was deputing in his place.

50. The last contention that there was no intention on the part of the accused to cause death of the deceased has to be rejected for the simple reason that there were two bullet wounds on the deceased – one on the knee and the other on the chest. The firing on the chest could not have been without there being any intention to cause the death of the deceased. The three accused came to the spot where the deceased was in the car with one of them being armed with a dangerous weapon.

A2 and A3

51. The Court has considered the plea on behalf of A2 and A3 that they did not share a common intention with A1 to kill the deceased. It was contended that while PW-2 stated that the caught hold of the deceased from both sides by his arms, PW6 stated that it was dark and she could not state who caught hold of the deceased and PW-8 stated that all three accused had a scuffle with the deceased. The Court has also considered, in this context, the decisions in ***Rahisuddin v. State***; ***Shambhu Kuer v. State of Bihar***; ***Ajay Sharma v. State of Rajasthan***; and ***Ramashish Yadav v. State of Bihar*** (*supra*).

52. Each case turns on its facts. In ***Shambhu Kuer*** (*supra*) the eye witnesses did not clearly state “that the appellant continued to hold the deceased till the assault was completed by Mandip” who had stabbed the deceased. In ***Ajay Sharma*** (*supra*) also, the exhortation was ‘to strike’ and not to kill. Further, it was noticed that the main assailant who stabbed the deceased took out his *kirpan* from under his stockings. It was, therefore, held that the other two accused may not have known that he was carrying the weapon. In ***Ramashish Yadav*** (*supra*) the two co-accused merely came and caught hold of the deceased while two others hit him on his head with a *gandasa*. Therefore, the co-accused were held not to share a common intention. Again in ***Rahisuddin*** (*supra*), the co-accused who were acquitted had not done any overt act qua the deceased but caught others in the complainant party. Further there was no evidence to show that they knew that the accused who used the firearm was in fact carrying one. However, the present case turns on a different set of facts.

53. The three eye witnesses PWs 2, 6 and 8 are consistent about all three accused coming in the car to the spot where the deceased was. The three accused are brothers. Two of them i.e. A2 and A3 were sitting in the rear and A1 was driving. They came there for a specific purpose as is evident from the fact that they immediately started quarrelling with the deceased. It was not as if only A1 was quarrelling with him or that only A1 had a scuffle. All three eye witnesses state that all three accused quarrelled with the deceased. So this is not a case where A2 and A3 were mere spectators to what A1 did to the deceased. And importantly it is not as if they were merely holding the deceased as is sought to be projected by learned senior

counsel appearing for A2 and A3. This is evident from the following description given by PW8 in his cross-examination:

“Baljeet was standing at a distance of about 6/7 feet away from Balwan. All the three brothers (accused) were standing adjoining to Balwan at a distance of about 1-1.5 feet. All the three brothers (accused) were beating Balwan and they all had caught hold of him. All the three brothers were grappling with Balwan. The back side of Balwan was towards me. Again said, I could have seen Balwan from back side as well as from front side as the accused persons were grappling with the deceased. During the course of grappling they also took number of turns. I had seen when Balwan was shot at. The face of Balwan at the time of firing gunshot was on the side of accused persons and not towards me. At the time of firing gun shot by accused Vicky, both his brothers (accused Pramod and Manoj) were grappling (chipkete hue the to Balwan) with him.”

54. It cannot, therefore, be said that A2 and A3 were merely holding the deceased. They were all grappling with him. The fact that all three came there in the same car and proceeded to quarrel with and in that process grapple with the deceased speaks eloquently of their common intention. The three were brothers. There was no possibility of A2 and A3 not knowing where they were going with A1 or being unaware of A1 being armed. Clearly they knew what would happen if A1 used that firearm. The fact situation being this, the decisions discussed do not come to aid of A2 and A3. The only conclusion possible is that they shared a common intention with A1 to kill the deceased. In the circumstances, the judgment of the trial Court finding A1 to A3 guilty of the offence punishable under Section 302 read with Section 34 IPC cannot be faulted.

Conclusion

55. For the aforementioned reasons, the Court finds no grounds are made out for doubting the correctness of the impugned judgment of the trial Court, which is hereby affirmed. The order on sentence also calls for no interference.

56. As regards the offence under Section 482 IPC, it is only A1 who has been convicted and that too correctly. The corresponding sentence awarded to him also cannot be said to be disproportionate.

57. The appeals are accordingly dismissed, but in the circumstances, with no orders as to costs. The bail bonds and surety bonds furnished by A2 and A3 are hereby cancelled. They are directed to surrender forthwith to serve out the remainder sentence. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 20, 2018

rd