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

+ **CRL.A. 358/2017**

AJENDER @ MONU

..... Appellant

Through: Mr.L.S.Saini, Advocate with
Mr.Akash Kundra, Mr.Arjun Singh, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms.Kusum Dhalla, APP with
Insp.Satish (original I.O.), P.S. Seelam Pur and
S.I. Karamvir, P.S. Narela.

+ **CRL.A. 617/2017**

SUMIT @ SAM

..... Appellant

Through: Mr.N.Hariharan, Sr.Advocate with
Mr.Riyaz Abhat, Mr.Jacob Joseph, Mr.Nayyar
Kadar, Mr.Vaibhav Sharma, Mr.Varun Deswal,
Mr.Aditya Vaibhav Singh, Ms.Mallika Chadha,
Mr.Prateek Bhalla, Mr.Siddharth S. Yadav,
Advocates

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms.Kusum Dhalla, APP with
Insp.Satish (original I.O.), P.S. Seelam Pur and
S.I. Karamvir, P.S. Narela.

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

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been compared and the digital data is as per
the physical file and no page is missing.

ORDER**31.01.2018**

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1. These appeals are directed against a judgment dated 20th March 2017 passed by the learned Additional Sessions Judge, North East District in Sessions Case No.57447/2016 arising out of FIR No.510/2010 registered at P.S. Narela under Sections 302/34 IPC and the order on sentence dated 25th March 2017 whereby both appellants were sentenced to imprisonment for life with fine of Rs.5,000/- each and in default of payment of fine, to undergo six months simple imprisonment.

2. At the outset, it requires to be noticed that the charge sheet in the present case was originally against four accused, i.e. Naveen Kumar (A-1, since deceased), Manoj, Ajender @ Monu (A-2), and Sumit @ Sam (A-3), with the latter two being accused subsequently upon supplementary charge sheet being filed.

3. However, during the pendency of the trial, on 20th February 2013, Naveen was murdered in the Rohini Courts premises. In respect of that crime, FIR No.83/2013 was registered at P.S. Prashant Vihar under Section 302/307 IPC and Sections 25/27 of the Arms Act. The trial in that case is in progress.

4. As far as Manoj was concerned, by an order dated 25th July 2014, he was discharged of the offences under Section 302/120B IPC and Section 25/27 of the Arms Act. However, charge was framed against him for the offence under Section 174A IPC for evading the process as a result of which he had been declared as proclaimed offender.

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5. Therefore, as far as the present case is concerned, by the time the trial ended, only the two Appellants herein, i.e. Ajender (A-2) and Sumit (A-3), remained in the fray.

6. The charge against both the accused is that on 28th December 2010, at 1.30 pm, at Shop No.21, Main Bazar, Jhanda Chowk, Narela, Delhi both of them, along with Naveen (A-1), in furtherance of their common intention, committed the murder of Sushil by firing upon him, thereby committing an offence punishable under Section 302/34 IPC.

7. The prosecution case began with information being received at P.S. Narela at around 1.48 pm on 28th December 2010 that at the Main Bazar, Narela two persons had fired bullets and had fled thereafter. On receipt of the said information, S.I. Mohender Singh (PW-20) accompanied by Constable Gunwant (PW-18) reached the spot.

8. The said Shop No.21 was being run by one Yusuf Khan (PW-6) who had taken it on rent. Since it was winter, he was having a sale of winter clothes. When PW-20 reached the shop, he found a large amount of blood on the floor of the shop. There were empty shells, one magazine, and one live cartridge inside the shop and one live cartridge on the road outside the shop.

9. On the road outside the shop, PW-20 found a motorcycle with the number DL-8S-NC-2561. PW-20 was informed that the injured Sushil had already been removed to the SRHC Hospital by some public persons.

10. PW-20 met PW-6 and recorded his statement under Section 161 Cr PC.

In his statement to PW-20, PW-6 stated that he was present at the shop along with his employee Kallu Khan (PW-23). A young man with another lady came into the shop for purchasing winter clothes. While they were doing so, two men aged 20-25 years came there, pushed Sushil inside the shop. Both men were armed with pistols. They opened fire on Sushil and hit him on his head and his back. Sushil fell down bleeding. Both men immediately ran away and tried to start the parked motorcycle. However, when it failed to start, both ran towards the direction of the *subzi mandi*.

11. PW-20 then went to the hospital leaving PW-18 at the spot. There, he collected the MLC which had been prepared by Dr. Mazhar Hussain (PW-11). The MLC showed that Sushil had been brought dead at around 2 pm (there is some over-writing in the MLC in respect of this time) by his brother Sunil (PW-1). The endorsement on the MLC is that Sushil was brought dead. The MLC indicates that there were two bullet wounds found on the chest and head of Sushil. It also shows that the clothes of Sushil were separately handed over in a packed condition to PW-20.

12. The Investigating Officer ('IO') of the case, Inspector Satish Kumar (PW-30), also reached the spot at around 2.20 pm where he found PW-20 recording the statement of PW-6. PW-30 remained at the spot till PW-20 returned from the hospital after obtaining the MLC of the deceased. PW-20 then prepared the *rukka* and handed it over to Constable Gunwant (PW-18) to be taken to the P.S. for the purpose of registration of FIR.

13. At this stage, it is necessary to refer to the *rukka* on the basis of which the FIR was registered. The *rukka* was the statement of PW-6 where no

mention is made of any eye-witness to the incident. This is significant because the present case of the prosecution primarily rests on four eye-witnesses. Two of them are related to the deceased, being his mother, Rameshwari (PW-15), and his sister, Jyoti (PW-10). The other two are the police witnesses who gave chase to the two assailants, i.e. Head Constable Arif Khan (PW-8) and Constable Mohd. Hasim (PW-24).

14. The trial Court has, in the impugned judgment, found the evidence of the two eye-witnesses to be truthful and trustworthy and corroborated by scientific and medical evidence including evidence concerning recoveries made at the instance of the two Appellants herein. On that basis the trial Court has returned a finding of guilt of the two accused persons.

15. With PWs 10 and 15 being interested witnesses, their evidence has to be carefully examined for improvements and inconsistencies. Therefore, it becomes important to carefully examine the deposition of the two eye witnesses.

16. With the assistance of Mr. N. Hariharan, learned Senior Counsel, and Mr. L.S. Saini, the learned counsel appearing for the Appellants and Ms. Kusum Dhalla, the learned APP, this Court has carefully perused the entire evidence of the case and in particular the testimonies of the so-called eye witnesses.

17. First, the Court takes up for examination, the deposition of Jyoti (PW-10), the sister of the deceased. Her version of events as spoken in her

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examination-in-chief is more or less along the same lines as that of her mother, Rameshwari (PW-15). It is significant that the statements under Section 161 Cr PC were recorded by PW-13 only around 8 pm on 28th December 2010, i.e. several hours after the killing of the deceased.

18. In her deposition in Court, PW-10 stated that while her brother and sister-in-law alighted from the car which was parked in front of the said shop, she and her mother remained sitting in the car as her mother was not feeling well. While the deceased and her sister-in-law were purchasing the winter clothes, PW-10 noticed that their neighbour, A-2, was standing at the distance of 10-15 steps from the car. In the meantime, A-1 (since deceased) who also resided in the same locality (Pana Paposna) as the deceased and who was also a friend of the deceased and A-3 arrived on a black-coloured motorcycle bearing registration DL-8S-NC-2561. The motor cycle was parked near the electricity pole. She states that they alighted with their respective pistols and proceeded towards the shop while her brother and sister-in-law were exiting. According to PW-10, when they saw the pistols in the hands of A-1 and A-3, they opened the glass window of the car and heard the voice of A-2 say "*maar sale ke bachne na paye*".

19. PW-10 then stated that after giving the above exhortation, A-2 ran away from there. A-1 and A-3 pushed her brother to the ground and then both of them fired on him continuously. PW-10 then stated that due to the commotion, they were unable to open the door of the car. Both A-1 and A-3 came out of the shop and tried to start the motorcycle but were unable to do so. They then ran way towards the *subzi mandi* on foot while waving the

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pistol in the air and threatening to shoot whoever came after them. PW-10 then came out of the car and helped PW-15 out as well. She claimed that she went to the shop and saw her brother lying in the pool of blood while her sister-in-law was weeping. One person, with the help of other public persons, helped to put her brother on the back seat of the Santro car and the boy who helped him do that drove the car to the SRHC Hospital. PW-10 stated that her sister-in-law also accompanied her brother in the car. PW-10 stated that the police came to her house in the evening and recorded her statement. They collected the blood stained clothes of her sister-in-law and PW-15. PW-10 also accompanied the police on 4th February 2011, when A-1 and A-2 were arrested in her presence near the Sonapat bus-stand.

20. In her cross-examination, PW-10 claimed that the Santro car had been parked "just in front of the door of the shop" of PW-6. She and PW-15 got down only after A-1 and A-3 had fled from the spot. She stated, "neither myself nor my mother had made any call to the police from spot. We had not asked the shopkeeper to inform the police." She further stated, "I and my mother remained at the spot for about 15-20 minutes after the incident. During this period, neither me nor my mother had given any information to anybody with regard to the incident." According to her, the "police officials met me at the spot when I was present there after the incident. At that time police did not record the statement of my mother and mine. The police officials only inquired from me and my mother about the incident at the time."

21. Then began a series of confrontations of PW-10 with her previous

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statement to the police under Section 161 CrPC, which this Court has also perused. The improvements made by her in her deposition before the Court were as follows:

- i. That PW-15 remained in the car because she was not well.
- ii. That A-2 was standing at a distance of 10-15 feet from the car.
- iii. That A-2 exhorted A-1 and A-3 to kill the deceased.
- iv. She saw A-1 and A-3 were carrying the pistols in their hands.
- v. That they fired upon the deceased continuously.
- vi. Due to commotion, she could not open the door of the car.
- vii. That her sister-in-law accompanied her brother in the car.
- viii. That her brother and the accused were friends earlier.

22. PW10 admitted that another brother, Anil, was in the house when she reached there and yet, "I did not make telephone call to the police after reaching my house. My mother had also not made telephone call to the police in my presence". The police met her only at 8 pm.

23. It is strange that PW10 did not go to the hospital where her brother was taken and she has no explanation for it. The spot where the deceased was shot at was at a walking distance of about 15 minutes from her house.

24. If indeed PW10 was present at the spot for 15-20 minutes and in fact met the police there as claimed by her, it is strange that neither PW-6 mentions her presence and more importantly PW-20, who reached the spot immediately after the incident, did not notice her. In her statement under Section 161 Cr PC, she has left out many details which she had added in her deposition in Court. Her behaviour seems so unnatural that it is difficult to

believe that she is speaking the truth. Why she would not go to the hospital when her own brother has been shot and carried there is beyond this Court's comprehension. Likewise, why she did not think of calling the police or informing anyone about the incident till 8 pm, when the police came to her house, is also unexplained. If indeed she recognized A-1 and A-3 from before, why she did not provide this information immediately to the police beats one's comprehension. It is, therefore, difficult for the Court to believe that PW-10 is speaking the truth.

25. Likewise, as far as PW-15 is concerned, her evidence is also not trustworthy. She too claims that she knew A-1, A-2, and A-3 from before the incident yet did not think of speaking to the police immediately after the incident. In her cross-examination, she claimed that she was taken to the hospital by one Bharat who is her grandson on his motorcycle. This Bharat has not been examined. Strangely, even at the hospital, the MLC only shows that the deceased was brought there by his brother Sunil. There is no evidence of the presence of PW-15 anywhere in the hospital.

26. PW15 too states that they remained in the spot after the incident and continued there till the police arrived but PW-20 does not mention having seen PW-15 at the spot. Both PW-10 and PW-15 have added in the deposition the exhortation supposedly given by A-2 to kill the deceased. This is a significant improvement which creates reasonable doubt about the credibility of these witnesses. Why they did not tell the police that they are the mother and sister of the deceased when the police reached there and why they did not inform the police that they have seen the assailants is not

understandable. These two witnesses being the sister and mother of the deceased, have not conducted themselves in the manner natural to such close relatives of the deceased. The sister PW10, did not even bothered to go to the hospital. The mother, who claims to have gone to the hospital, has not been seen by anyone there. The blood stained clothes of PW-15, when examined by the FSL, showed the presence of human blood but the blood group did not match with that of the deceased.

27. The Court finds it strange that with PW-10 and PW-15 stating that the deceased was taken to the hospital in the Santro car, the IO did not think it necessary to examine that car. He did not check to see if there was any blood on the seat of the car. This is a significant omission by the IO which has not been able to be explained by the prosecution. This evidence was necessary in order to corroborate the eye-witness testimonies of PWs 10 and 15.

28. The Court is unable to, therefore, concur with the trial Court that PW-10 and PW-15 were in fact present at the spot and were eye-witnesses to the occurrence. They being interested witnesses, their testimonies are required to be examined very carefully for improvements and inconsistencies. Both testimonies are abounding in inconsistencies and improvements. They are also not corroborated by the other evidence that has been gathered. While it is true that the homicidal death of the deceased has occurred in tragic circumstances, unless the eye witnesses' testimonies inspire confidence, it would not be safe for the Court to return a finding of guilt on the basis of such eye witness testimonies.

29. Turning to the two policemen who chased the accused, PW-8 states that

there were as many as 2000 persons present at the market area at the relevant time. He claims to have a mobile phone with him and yet after not succeeding in apprehending the two accused whom he was chasing, he did not call the PCR to inform them of this. How he knew A-1 is also doubtful. He claims that since A-1 was resident of his beat, he recognised him. He initially stated he only identified A-1 but did not know who the other person was. In his cross-examination, PW-8 claimed that the other person was, in fact, A-3. How he suddenly recognized A-3 in the Court is a mystery. It is strange that PW-8 sought to explain that "my statement in cross that the other assailant is Sumit is correct and my statement in chief that the assailant is Ajender has been recorded inadvertently." This makes this witness unreliable.

30. The position regarding PW-24 is even more curious. He too, during his cross-examination, suddenly claimed to recognize A-3. How he knew him when in his examination-in-chief he claimed not to know the person is again a mystery.

31. With the above evidence of PW-8 and PW-24 not inspiring confidence as to the identity of the assailants, the prosecution ought to have conducted a test identification parade ('TIP') to enable these two witnesses to at least to identify the assailants. However, that was not done.

32. PW-6, who was the other person who could have seen those two assailants, was not made to identify the assailants in TIP. As it transpired, PW-6 turned hostile. So did his employee, PW-23.

33. This was a case based on direct evidence of the eye witnesses. Yet, the prosecution was unable to gather the necessary evidence to corroborate the eye witness testimonies. One important piece of corroborating evidence, which was totally missed, was the clothes of the deceased. Although the blood stained clothes were handed over by the doctors to the police and they were sent to FSL, they were not marked as exhibits during the trial. This was indeed a serious lapse. With the deceased having died of gunshot injuries, his clothes would have borne the bullet marks and would have provided important corroborative evidence for the eye witnesses' testimonies.

34. The Court is, therefore, not able to agree with the conclusion reached by the trial Court that the prosecution has proved the guilt of the two accused beyond reasonable doubt. The failure to examine the wife of the deceased, who was present next to him and who could have offered the most direct evidence, has weakened the case of the prosecution. A vital piece of evidence is, therefore, unavailable to the Court.

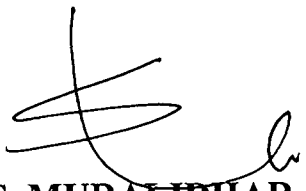
35. The Court, therefore, is constrained to conclude that the two interested eye witnesses, i.e. the mother and the sister of the deceased did not inspire confidence and cannot be said to be truthful and reliable. The two police witnesses, PW-8 and PW-24 who purportedly gave chase to the assailants also do not inspire any confidence. The shopkeeper, PW-6, and his assistant, PW-23, have both turned hostile thus dealing a fatal blow to the case of the prosecution.

36. In the circumstances, the Court sets aside the impugned judgment of the

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trial Court as well as the order on sentence and acquits the Appellants of the offences under Section 302/34 IPC. Unless wanted in some other case, the Appellants shall be released forthwith.

37. The Appellants shall satisfy the requirements of Section 437A Cr PC to the satisfaction of the trial Court. The trial Court record be returned forthwith along with a certified copy of this judgment.


S. MURALIDHAR, J.


I.S. MEHTA, J.

JANUARY 31, 2018
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