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

Date of Decision: April 21, 2018

+ **CRL.A. 830/2015**

VISHAL Appellant
Through: Ms. Saahila Lamba, DHCLSC Advocate.

Versus

STATE Respondent
Through: Mr. Hirein Sharma, Addl. Public
Prosecutor for State with SI Sumit of
Police Station Aman Vihar.

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR
HON'BLE MS. JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present Appeal arises from the impugned judgement dated 27th March 2015, passed by the Ld. Additional Sessions Judge, Fast Track Court, North-West District, Rohini Delhi, holding the Appellant guilty of culpable homicide amounting to murder and convicting him under Section 302 of the Indian Penal Code, 1860 (*hereinafter 'IPC'*)
2. The Appellant was tried in FIR No. 128/2013, registered at police station Aman Vihar, Delhi, on the charge of murdering *Madan Lal Soni* on 26th March, 2013 at about 10:15 p.m. at D-18, Inder Enclave-II, Mubarakpur, Delhi. The Trial Court, convicted the Appellant under Section 302 IPC, with the following observations:-

“12.0 In view of my forgoing discussion, I have no hesitation in holding that prosecution has been able to

prove its case beyond shadow of doubt. It stands proved that accused had murdered Madan Lal Soni on 26/03/2013. He gave knife blows on vital parts of his body which is clearly indicative of his intention to eliminate Madan Lal Soni. There is no material suggesting that his act was on the basis of any grave and sudden provocation. His act reflects pre-meditation. He left the house and returned with some planning while armed with knife. Thus he had intention to commit culpable homicide amounting to murder.

12.1 Resultantly, I hold accused guilty and convict him under Section 302 IPC."

3. Vide the impugned order dated 31st March, 2015, Appellant has been sentenced to imprisonment for life with fine of Rs.20,000/- and in default of payment of fine, appellant has been sentenced to simple imprisonment for six months. The facts, as per the version of the prosecution, are as under:-

i) Madan Lal Soni (victim) used to reside at D-18, Inder Enclave-II, Mubarakpur, Delhi with his family. Name of his wife was Leelawati. Leelawati had a sister, namely, Sulekha who was married to one Vijay Malhotra.

ii) Accused Vishal @ Raju was elder brother of Vijay Malhotra. Madan Lal Soni used to work as a driver on TATA 407 and Vishal used to work with him as helper and as per PW-3, also used to reside with Madan Lal at his said house.

iii) Accused Vishal was claimed to be a drug addict and was alleged to be keeping an evil eye on Leelawati. Therefore, there used to be frequent altercations between Madan Lal and accused.

iv) On the occasion of festival of Holi, Vijay Malhotra along with his family had come to the house of Madan Lal Soni. On 26th March, 2013, Madan Lal and Vijay Malhotra were taking drinks at the said house of Inder Enclave-II and during conversation, Madan Lal revealed about the said habits of accused i.e. taking drugs and keeping an evil eye on Leelawati. In the meanwhile, accused Vishal also happened to overhear there the same. He was in an inebriated state. He became furious. He started abusing and left the house while threatening Madan Lal. These events transpired at about 9.00 p.m. Thereafter, Vijay Malhotra also left from there.

v) At about 10/10:15 p.m. accused Vishal returned with a knife. He threatened Madan Lal claiming that he would teach him a lesson for complaining against him and then attacked him with the knife and gave a knife blow on his abdominal region. Madan Lal shouted for help and on hearing this, his wife and children came there. Leelawati saw the accused armed with a blood stained knife and she also claimed to have seen the accused stabbing her husband with the said knife. The accused, after causing the said injuries, is said to have fled away. However, when he was fleeing away, Vijay Malhotra saw him running with a knife in his hand. Raj Kumar (brother of Madan Lal) was then called. Madan Lal was rushed to SGM hospital where he revealed all the aforesaid facts before SI Ravinder Solanki. On the basis of the said statement, FIR was initially registered u/s 307 IPC. However, Madan Lal succumbed to his injuries and, therefore, the case was converted from Section 307 IPC to Section 302 IPC.

vi) Investigation was thereafter carried out. The spot was got inspected through the crime team. Statements of various witnesses including Leelawati Soni, Vijay Malhotra and Raj Kumar were recorded. Accused was arrested on 28th March, 2013 and from his house he the knife in question as well as the clothes which he had worn at the time of occurrence were recovered.

vii) The accused was then sent-up to face trial for commission of offence u/s. 302 IPC.

4. The Prosecution produced 24 witnesses. Our attention is, however, being drawn to the testimony of –

- Leelawati (PW-3) - the wife of the deceased and eye witness to the incident,
- Vijay Malhotra (PW-7) - brother of the appellant,
- Constable Anoop (PW-14),
- Sub-Inspector Ravinder Solanki (PW-19),
- Raj Kumar Soni (PW-22), the brother of the deceased
- Inspector Vijay Kumar Kataria (PW-23).

5. The deceased Madan Lal, in this case, had given a statement before his demise which was recorded by SI Ravinder Solanki (PW-19) and was also endorsed by ASI Satveer Singh (PW-1). The deceased narrated the following chronology of events in his *Rukka (statement given)* -

- i) That he lives on rent at D-18, Inder Enclave-II, Mubarakpur, Delhi;
- ii) That he works as a driver with a TATA 407 tempo;

- iii) That his sadu's brother Vishal @ Raju lives with him and he works as a helper in the tempo;
- iv) That Vishal @ Raju had a habit of taking drugs;
- v) That he has evil intentions towards his wife and because of this they had arguments in past;
- vi) That on the day of Holi, his sadu, Vijay Malhotra and his wife had visited his house and while they were consuming the drinks, he was telling Vijay Malhotra about his brother's bad habit of taking drugs and keeping an eye on his wife;
- vii) That at the time when he was speaking to Vijay Malhotra, Vishal @ Raju reached there. He was in an inebriated state and it was around 9:00 pm;
- viii) That Vishal @ Raju lost his cool and after hearing the conversation between him and Vijay Malhotra, he started abusing the deceased and threatened him with dire consequences;
- ix) That after this, Vijay Malhotra left the house of the deceased;
- x) That about 10/10:15 pm, Vishal @ Raju returned with a knife in his hand and threatened him that since he had complained to his brother, he would teach him a lesson;
- xi) That with an intention to deprive him of his life, he stabbed him in the stomach with a knife;
- xii) That he screamed loudly after he was stabbed, hearing which, his wife and his children came to the spot and upon seeing them Vishal @ Raju ran away;
- xiii) That his family brought him to Sanjay Gandhi hospital;

xiv) That Vishal @ Raju stabbed him with an intention to take away his life;

xv) That legal action be taken against Vishal @ Raju.

At the end of his statement, the deceased confirmed that he was read over the statement and that he confirmed the correctness of the same. The entire statement was recorded in Hindi and the deceased signed in Hindi. The declaration is attested by SI Ravinder Solanki (*PW-19*). Below this declaration, *PW-19* has also given the entire background of how he reached the hospital along with Ct. Anoop (*PW-14*) where HC Sukhbir (*PW-16*) and Ct. Sandeep were already there. Latter two persons had informed *PW-19* that the victim was in the minor OT. He confirmed that he recorded the entire statement given by the victim. It is the case of prosecution that Madan Lal had given the version of this incident to SI Ravinder Solanki (*PW-19*), on the basis of which the law was set into motion.

6. The stand of the Appellant before the trial court, in his statement under Section 313 Cr.P.C., was of false implication and regarding his brother Vijay Malhotra, the Appellant stated that he is not in good terms with him. However, no evidence in defense was led by the Appellant before the trial court. The plea put forth by the Appellant is that he was working as a Helper with Madan Lal Soni, who owed him some money, which was not being returned and therefore, Appellant has been falsely implicated in this case.

7. The Trial Court relied upon the statement of the deceased (*Ex.PW-3/A*) and the evidence of Leelawati (*PW-3*), wife of deceased, as well as

evidence of *Vijay Malhotra (PW-7)* and the medical evidence to hold Appellant guilty of the offence of murder.

8. The challenge to the impugned conviction and sentence by learned counsel for the Appellant is on the ground that there is apparent contradiction *inter se* in the evidence of the initial Investigating Officer (*PW-19*) and Ct. Anoop (*PW-14*), regarding the time of preparation of *rukka*. Our attention was drawn by learned counsel for Appellant to the evidence of Ct. Anoop (*PW-14*) to point out that as per this witness, the *rukka*, which was prepared on the basis of the statement of *Madan Lal Soni*, was taken by him from the hospital to the police station at midnight. It is pointed out that according to SI Ravinder Solanki (*PW-19*), he had prepared the *rukka* at about 03:00 a.m. It is the submission of appellant's counsel that the variation of timings in respect of preparation of *rukka* creates a serious doubt as to the veracity of the contents thereof and adversely affects the prosecution case.

9. Regarding the statement made by the deceased, it is further submitted by the Appellant's counsel that the Doctor, who had declared Madan Lal Soni fit for giving the statement was not examined and hence it would not be safe to presume that he was fit and rely upon the evidence of SI Ravinder Solanki (*PW-19*) regarding the recording of deceased's statement, as it was recorded much later than the incident. To assail the testimony of Leelawati (*PW-3*), wife of deceased, learned counsel has drawn our attention to the evidence of Vijay Malhotra (*PW-7*), who has denied that Madan Lal Soni had told him about the appellant having evil intentions towards Leelawati (*PW-3*). Our attention was drawn to the cross-examination of Vijay Malhotra (*PW-7*) to show that this witness has

not supported the prosecution's case as his statement in the examination-in-chief is starkly different from the statements in his cross examination. So, it is submitted that the ocular version is inconsistent and the statement made by Madan Lal Soni to the police is not reliable and so, it cannot be treated as a dying declaration.

10. Regarding the recovery of the blood-stained knife and clothes of appellant, it is submitted that no prudent person would keep the weapon of offence, which is blood stained and would preserve the incriminating evidence i.e. his own blood-stained clothes only to be handed over to the police. Ld. Counsel thus alludes to the fact that the evidence may have been planted. It is submitted by the Appellant's counsel that the prosecution case is rendered doubtful and so, benefit of doubt ought to accrue to Appellant. As an alternate submission, it was urged by Appellant's counsel that the instant case is not one of murder but is of culpable homicide not amounting to murder and so, the conviction and sentence awarded to the Appellant needs to be reconsidered.

11. On the other hand, learned Additional Public Prosecutor for the Respondent-State submits that the eye witness account of this incident is rendered by Leelawati (*PW-3*), whose evidence is consistent and it clearly incriminates the Appellant. It is submitted that the dying declaration (*EX.PW3/A*) is also supported by the testimony of the eye witness and is worthy of reliance. It is further submitted that on the basis of the dying declaration (*EX.PW3/A*), conviction and sentence awarded to the Appellant is well justified and no case for altering the sentence is made out. Thus, dismissal of appeal is sought.

12. We have considered the submissions on behalf of both sides and upon evaluation of the record we find that the contents of the statement of the deceased are fully corroborated by Leelawati (*PW-3*) and SI Ravinder Solanki (*PW-19*). The facts stated by the deceased in his declaration have all been confirmed by his wife (*PW-3*). Some doubts were sought to be raised by the Appellant's counsel about her background and her other relationships with a third party. Learned counsel for the Appellant also attempted to say that the neighbors were not examined and the daughter of the deceased was also not examined. *PW-3*'s evidence in chief was not shaken in cross examination and mere conjectural theories that she may have had illicit relationships with third parties, who were not even present at the spot, cannot give any benefit of doubt to the Appellant. The cross-examination of *PW-3* is merely based on a conjecture without any direct evidence. It does not even set up any alternative theory as to how the deceased was killed, especially in front of his own home. There were eye witnesses who saw the incident. The facts mentioned in the *Rukka* are established by eye witness *PW-3*. At this juncture, it is relevant to note is that while in his examination in chief, Vijay Malhotra (*PW-7*) confirmed all the facts as contained in the dying declaration and the testimony of *PW-3*, in his cross-examination, which was recorded almost 13 months later, he even denied the fact that he was present at the house of the deceased. It is clear that the long gap of time in the recording of the examination in chief of *PW-7* and the cross-examination may have led to him resiling from his statement and turning hostile. Recently the Supreme Court in ***Ramesh and Ors v. State of Haryana AIR 2016 SC 5554*** has observed that in criminal cases, witness turning hostile has become a

common phenomenon and that by itself should not be a reason to let the accused go scot free, if there are other evidences to support the charges against the accused. The Supreme Court observed:

“35. We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the Investigating Officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the Court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations.”

(emphasis supplied)

Thus, the contradictions in the evidence of Vijay Malhotra (PW7) could be due to family pressure as he is the brother of the Accused. Learned counsel for the Appellant has also raised doubts as to the veracity of the *rukka* on the ground that the time of the *rukka* is recorded to be 3:00 am but in the evidence by Ct. Anoop (PW-14) he stated that the *rukka* was recorded around midnight i.e. 12:45 am. We find that regarding the timing of the *rukka*, Ct. Anoop (PW-14) has clarified the timing of sending of *rukka* and has maintained that he had reached the police station with the *rukka* between 03:00 p.m. and 03:20 p.m. and that he had earlier stated about reaching the police station at mid-night by

approximation. The suggestion put to him regarding the *rukka* being ante-timed has been denied by him. Regarding the timing of the *rukka*, documentary evidence in the shape of *rukka* is on record. Pertinently, there is no overwriting regarding the time of sending *rukka*. There is no justification to doubt the prosecution case on the basis of so-called discrepancy regarding time of sending *rukka*. Such a view is taken because SI Ravinder Solanki (PW-19), who is the author of *rukka* has not been cross-examined or challenged on this aspect and so, benefit of alleged discrepancy does not accrue to Appellant.

13. It is the settled position that a conviction can be upheld solely on the basis of a dying declaration as held in ***Lakhan v. State of M.P.*** (2010) 8 SCC 514. The Supreme Court in ***Natha Shankar Mahajan v. State of Maharashtra*** (2011) 15 SCC 219, has held as under:

“ 4. Mr. Ranjan Mukherjee, learned counsel appearing for the accused argued that the sole basis of the conviction in this case is the aforesaid dying declaration and, therefore, if there is any suspicion about this dying declaration, the benefit must go to the accused. That is a correct proposition of law. However, it is also the settled position that where the dying declaration is believable, creditworthy and appeals to the court, the same can be made the sole basis of the conviction. That appears to be the case here.”

(emphasis supplied)

14. Thus, a dying declaration is not to be believed only if there are suspicious circumstances surrounding the same. In ***Lakhan*** (*supra*), the

Supreme Court had earlier elaborated the recognition to be given to the dying declaration as under:

“9. The doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means “a man will not meet his Maker with a lie in his mouth”. The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as “the Evidence Act”) as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the

assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon.”

15. Going by the settled law and on a reading of the statement of the deceased i.e., *the rukka*, it has all the attributes of a dying declaration and constitutes one. The contradictory versions of PW7, by itself cannot give any benefit to the Accused, if his guilt is established by other evidence viz., Dying Declaration and eye witness account. It is also supported by the testimonies of PW-3, PW-14 and PW-19, and there is no basis to doubt the same. Learned counsel for the Appellant has urged that there was no doctor or nurse present at the time of recording of the statement of the deceased. On this aspect, there is no cross-examination of the witness SI Ravinder Solanki (PW-19) and so, there is no basis to doubt the dying declaration (EX. PW3/A). Upon a bare perusal of the dying declaration (EX. PW3/A), we find that it has been duly signed by *Madan Lal Soni*, whose signatures have been attested by the witness SI Ravinder Solanki (PW-19). MLC of Madan Lal Soni does not in any way reveal his incapacity to give the statement. In our considered opinion, there is no basis to discard the dying declaration of the deceased which is quite natural, probable and consistent.

16. The MLC of the deceased which records that the deceased was fit to make the statement has also been proved by Dr. Ashish (*PW-10*). Thus, there is no reason to disbelieve the dying declaration and testimony of *PW-3*. From the evidence, the motive for the incident has been sufficiently proved. The presence of the Appellant at the spot also stands established not only from the evidence of Leelawati (*PW-3*) but also from the evidence of Vijay Malhotra (*PW-7*). Leelawati (*PW-3*) is the eye witness of the incident and her presence at her house, where the incident took place, is quite natural and probable. After having scrutinized the evidence on record, we find no justification to discard the version of these witnesses, which is reliable and consistent. Merely because the neighbours were not examined, would not cast any doubt about the veracity of the prosecution version. Although it was suggested to Leelawati (*PW-3*) that she was found in a compromising position with one Shauki and in connivance with him she had murdered her husband, the said suggestion given to this witness does not find any reflection in the statement under Section 313 Cr.P.C. Even otherwise the suggestion put to this witness of her being a party to the murder of her husband, is highly implausible.

17. Regarding recovery of the blood-stained knife and blood-stained clothes from the residence of the appellant, we find that such evidence is of corroborative nature and even in the absence of such evidence, the conviction of the Appellant for the offence in question is sustainable in view of the unimpeachable dying declaration and the eye witness account. Even if the recovery effected is discarded, still the prosecution case stands sufficiently proved from the eye witness account as well as

from the dying declaration. Hence, there is no justification whatsoever to doubt the prosecution case or to scale down the nature of offence committed, as the incident in question took place at 10:15 p.m. and is preceded by an altercation, which took place in the evening of 26th March, 2013. Since the Appellant had left the deceased's home and returned with a pre-meditative mind, armed with a knife to take revenge, it cannot be said that the incident in question had taken place on the spur of moment or in the heat of passion. The case set up against the Appellant does not come within the purview of 304 of IPC and in fact is within the sweep of Section 302 of IPC. No case for extending benefit of doubt to the Appellant or to alter the sentence awarded is made out.

18. In view of the foregoing narration, the conviction and sentence awarded to the Appellant is maintained and the appeal is accordingly dismissed.

(PRATHIBA M. SINGH)
JUDGE

(SUNIL GAUR)
JUDGE

APRIL 21, 2018

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