

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

Crl.A. 746/2015

Reserved on : 07.08.2019

Date of Decision : 14.10.2019

IN THE MATTER OF:

RAJU KUMAR GAUR alias RAJIV PRASAD Appellant
Through: Mr. Pramod Kumar Dubey, Advocate
(DHCLSC) with Mr. Kushank Sindhu, Md. Arham
Masood, Mr. Anurag Andley, Mr. Nirvikar Singh,
Mr. Prince Tiwari, Mr Syed Arham, Mr. Sreedh and
Ms. Kajal Thakur, Advocates.

versus

STATE Respondent
Through: Ms. Radhika Kolluru, APP for State

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. By way of the present appeal, the appellant has assailed the Judgment dated 27.11.2014 passed by ASJ/Special Judge, Rohini Courts, Delhi in SC No. 18/14 arising out of FIR No. 382/13 registered under Section 302 IPC at PS Ashok Vihar.

2. Vide aforesaid Judgement, the appellant was convicted for the offence punishable under Section 304 (Part II) of IPC and vide order on sentence dated 29.11.2014, the appellant was sentenced to RI for a period of 7 years along with payment of fine of Rs. 25,000/- and in default of payment of fine to undergo SI for 3 months.

3. The facts noted by the Trial Court reads as under:-

“Raju Kumar Gaur is accused of murdering Azam, his co-worker, on 18th November, 2013. It is the case of prosecution that the accused and deceased both used to work together in Factory no. C-59/2 Wazirpur Industrial Area, Delhi. On 18.11.2013, both of them came for the work in the factory and were present in the factory. At about 6 PM, deceased went out of the factory for some purpose. Accused also followed him out of the factory. Azam returned to the factory after few minutes, with an instrument stabbed and still inserted on his back near right shoulder. Other co-workers of the factory saw and spoke to Azam. At that time Azam told other workers that it was the accused who had stabbed him. Thereafter, other co-workers of deceased pulled out the instrument of stabbing, which was an awl (sua). Immediately thereafter Azam fell unconscious. He was taken to the hospital where he was declared brought dead. It is also the case of prosecution that the deceased sometimes used to tease the accused calling him 'hizda' and therefore accused stabbed the deceased on the fateful day. The accused did not return to the factory after he followed the deceased out of the factory. He did not return to the factory even thereafter. He was also found missing from his tenanted premises. Subsequently, he surrendered before Punjab Police on 23.11.2013. Thereafter, he was brought to Delhi and his police custody was obtained.

As per the case of prosecution, during police remand the accused got recovered his shirt from a place near Sabzi Mandi, Delhi, and got recovered his trouser from the roof of dhaba at Ludhiana where he had worked for few days after the incident but before surrender. It is also the case of prosecution that the area inside the factory, where the deceased and accused used to work, was covered under CCTV camera, and the recording of the time when the deceased and accused went out of the factory and when the deceased returned to the factory in injured condition was taken into possession, which also corroborates the version of the workers. The case was registered on the complaint of co-worker Ram Asrey. Other co-workers, namely, Akshaywar Shah, Mhd. Iqbal, Ansar Alam and Mhd. Mudassir also witnessed the factum of presence of

accused and deceased in the factory; the deceased going out of the factory; the accused following him out of the factory; then return of deceased in injured condition and; the fact that the deceased before his death orally stated that he was stabbed by the accused.

During investigation the weapon of offence i.e. awl (sua) was seized from the factory; the spot was got inspected by the crime team and; site plan was prepared. The clothes of deceased were handed over to investigating team by the doctors in sealed condition. Subsequently, the awl was sent to the autopsy surgeon seeking opinion about the weapon of offence. The concerned doctor opined that the injury present on the deceased was possible with the weapon and also that the clothes of deceased had cut/punctured marks corresponding to the injury on the deceased. This injury was opined to be sufficient in ordinary course of nature to cause death. The weapon of offence, clothes of deceased and blood sample of deceased in gauze, were sent to the FSL. The FSL result confirmed that there was blood present on the weapon of offence as well as the cotton gauze, but no blood was detected on the clothes of deceased. On the blood stained gauze, human blood of 'O' group was found, but the blood on the weapon was non-reactive as to the grouping. On completion of investigation, charge sheet was filed."

4. The Trial Court framed charge against the appellant for the murder of Azam (the deceased) under Section 302 IPC to which the appellant pleaded not guilty. During the course of trial, the prosecution examined total of 28 witnesses.

POST MORTEM REPORT

5. Dr. Sanjay, who conducted the post mortem, was examined as PW-16. He proved the post mortem (Ex. PW-16/A), where the following external injuries were noted:-

- “(i) *There was a stab wound, circular in shape and of about 3 mm in diameter having regular contused margins situated on right scapular region of chest, 7 cm away from posterior midline and 144 cm above the right heel. On further exploration, after cutting, cutaneous and sub-cutaneous tissues it goes forward, downward and medially to enter ICS between third and fourth ribs, goes forward to further inter middle mediastinum to make a cavity deep cut of about 2 mm diameter in postero medial wall of right ventricle of heart (track was about 15 cm long). Pericardiac sac contained about 1.5 liter of clotted and liquid blood;*
- (ii) *Scratch abrasion brownish in colour of size 2.5 X 0.3 cm obliquely lying on upper portion posterior aspect of left.... arm.”*

6. The doctor further deposed that the cause of death was due to cardiac tamponade and cardiac injury consequent upon injury No. 1 caused by a pointed, cutting cylindrical weapon. He deposed that the first injury was sufficient in the ordinary course of nature to cause death. He found that the left lung of the deceased was collapsed. He proved his ‘subsequent opinion’ on the weapon of offence as well as the clothes of the deceased, which is exhibited as Ex. PW-16/B. As per the ‘subsequent opinion’, the cut mark on the T-shirt of the deceased corresponded to the injury present on his body. It was further opined that the cut-mark on the T-shirt as well as injury on the body were possible from the weapon of offence shown to him. He further opined that it could not be ruled out that the ‘Sua’ was used for inflicting the injury. The witness identified the ‘Sua’ in Court as the weapon shown to him for the opinion.

7. I have heard Mr. Pramod Kumar Dubey, the learned counsel for the appellant and Ms. Radhika Kolluru, learned APP for the State and have also gone through the entire case record. Learned counsel for the

appellant contended that the CCTV cameras installed at the ground floor was not seized; that although the Hard Disk/DVR was seized but the same was not played in the court; that the footage from the CCTV cameras was tampered with in light of the testimony of PW22 Praveen Sharma; that a defective certificate under Section 65B of the Indian Evidence Act was given by Sunil Jain; that the second certificate under S.65B ought not to have been accepted. He further contended that no dying declaration was made by the deceased and even if it is presumed that any such dying declaration was made, the same was inaudible on account of high decibel noise in the factory; that 'Sua' could not be connected with the injury of the deceased as no grouping could be obtained on it in the FSL examination; that the injury could have been possible by falling on an industrial electrical cable; that no blood stain was found on the body of the deceased; that the FIR was registered after about six hours of the incident, i.e., at 01:15 AM on 19.11.2013 whereas, the incident happened on 18.11.2013 at about 17:55 to 18:00 hours; that there was no enmity between the appellant and the deceased.

8. Per contra, learned APP for the State has supported the impugned judgment. She submitted that the presence of the appellant at the spot has been proved by the oral as well as documentary evidence; that the subsequent conduct of the appellant in absconding from the spot and going to Ludhiana without furnishing any explanation also proved his guilt; that dying declaration was proved by the material witnesses who also deposed about the motive. She has placed reliance on the 25th Edition of Modi, a Textbook of Medical Jurisprudence and Toxicology as well as on the decision in Bhargavan & Ors. v. State of Kerala reported as (2004) 12 SCC 414.

MATERIAL WITNESSES

9. To prove its case, the prosecution examined co-workers of the deceased namely, Ram Asrey (PW-3), Md. Iqbal (PW-7) and Akshaywar Shah (PW-21). Ram Asrey was the complainant at whose instance, the present FIR was registered. He deposed that on 18.11.2013, at about 6:00 P.M., he along with Md. Iqbal, Akshaywar Shah, the appellant as well as the deceased was present in the factory. The deceased went out of the factory. The appellant followed him. After some time, the deceased returned with a stab injury on his back with a '*Sua*' which was still inserted in his back. Its black colour handle was visible from the outside. When the witness enquired from him, the deceased told him, in presence of other witnesses, that the appellant had inflicted the injury with a '*Sua*' on his back. The co-workers pulled out the '*Sua*' from the body of the deceased. Thereafter, the deceased fell unconscious. The factory owner was called and the deceased was rushed to D.R. Hospital in Ashok Vihar. The deceased was referred to ESI Hospital, Rohini, Delhi, where on arrival he was declared brought dead. The statement of Ram Asrey was recorded in the hospital. The witness further deposed that soon after the incident, the appellant had gone missing and did not return to the factory. After his arrest, the appellant was brought to the factory by the police on 28.11.2013 and the pointing out memo was prepared at his instance. During his deposition, the witness identified the '*Sua*' as well as the clothes of the deceased. He also identified the appellant in the Court. He further deposed that the deceased used to tease the appellant in the factory by calling him *hizda* (eunuch) in presence of others but the same was said in a lighter vain.

10. During his cross-examination, the witness stated that the working hours in the factory were from 9.30 A.M. to 8.30 P.M. It was suggested that duty hours in the factory were from 09:30 AM up to 05.30 P.M. and for working beyond the duty hours, over time used to be paid. The witness admitted that CCTV cameras were installed at the main gate of the factory.

11. The witness also stated that his statement (Ex. PW-3/A) was recorded on 18.11.2013 at 10.00-10.30 P.M. The witness clarified that when the deceased was taken to D.R. Hospital, no paper work was done. The witness was confronted with the site plan with reference to the “sitting plan” of various witnesses. The witness stated that no blood was oozing from the injury of the deceased. The witness denied the suggestion that the appellant had left prior to the departure of the deceased from the factory.

12. The testimonies of the other two co-workers namely, Md. Iqbal (PW-7) and Akshaywar Shah (PW-21) were cumulative to the testimony of Ram Asrey on all the accounts.

SUBSEQUENT CONDUCT AND ARREST

13. Sunil Jain, the factory owner, was examined as PW8. He deposed that the working hours in the factory were from 09.30 A.M. to 5.30 P.M. and in case of over time, the employees used to work till 08.30 P.M. In the factory, the work related to cutting of steel plates. He deposed that on 18.11.2013, the workers including Akshaywar Shah, Ram Asrey and Mohd. Iqbal, the appellant and the deceased were present in the factory amongst others. At about 06.00 P.M., he was called by Mohd. Iqbal and Muddassar. When he reached there, he saw the deceased lying on the

floor and other workers were present. He deposed that he was told by the workers that the deceased had been stabbed by the appellant. The deceased was initially taken to D.R. Hospital and thereafter to ESI Hospital. He also deposed that during this entire time, the appellant had not returned to the factory and his phone was switched off. The CDR of the appellant's phone show that it was switched off after 18:24 hrs on 18.11.2013 and remained switched off even after his arrest. The CAF form (Ex.PW5/A) was in the appellant's name. The CDRs were exhibited as Ex.PW5/B.

14. The witness also deposed that on 20.11.2013 he had handed over one register recording the attendance of the workers to the I.O. It was seized vide seizure memo Ex.PW-8/A. In the attendance register, while the entry regarding presence of the appellant in the factory on 18.11.2013 was at Sl. No. 8, the entry regarding presence of the deceased was at Sl. No. 10. The entries regarding presence of material witnesses namely, Ram Asrey Lal, Akshaywar Shah, Md. Iqbal and Ansar Alam were at Sl. Nos. 5, 3, 6 and 4 respectively. During his testimony, he identified the entries in the register as Ex.PW-8/D.

15. Raj Kumar Pal, the landlord of the appellant, was examined as PW-2. He deposed that on 18.11.2013, the appellant went to the factory in the morning but did not return. He deposed that on 19.11.2013, the police came searching for the appellant, when he handed over the "Tenant Verification Form" (Ex. PW-2/B) to the police. It contained a photograph of the appellant.

16. The appellant was arrested from Jalandhar, Punjab on 23.11.2013. ASI Raj Kumar (PW-14) and SI Ved Prakash (PW-18) proved the arrest

of the appellant from Jalandhar. Balkar Chand, the *dhaba* owner, was examined as PW-9. He deposed that the appellant had approached him for a job on 19.11.2013 at about 7.00-7.30 P.M. The appellant worked in his *dhaba* till 22.11.2013, where after he went missing from 23.11.2013.

17. Raj Kumar Pal, the landlord of the appellant, also deposed that on 28.11.2013, the appellant was brought by police to the tenanted premises and at appellant's instance, his Voter I-card, Aadhar Card, identity card of Gram Panchayat and one cover of SIM Card of Idea service provider bearing mobile No. 9891380497 were recovered. The recovery was done after breaking open the lock of the appellant's room. During cross-examination, no suggestion was given to the witness challenging the recovery of the aforementioned documents.

18. Ram Bharose Dixit, in whose presence, the shirt of the appellant was recovered, was examined as PW-25. He deposed that on 26.11.2013, he joined the investigation at the request of the police, where after the appellant got recovered his shirt. He identified the shirt (Ex. P-12), the photographs (Ex. PW-15/D1 to D5) as well as his signature on the seizure memo (Ex. PW-15/C). Balkar Chand, the *dhaba* owner (PW-9) also deposed that the appellant was brought to his *dhaba* on 27.11.2013 and from the roof of the *dhaba*, the appellant got recovered his pant. The witness identified his signature on the seizure memo of the pant (Ex. PW-9/A).

CCTV CAMERA

19. The trial court after seeing the footage from the CCTV camera noted that Azam (the deceased) had gone out of the factory at about 05:55P.M on 18.11.2013. The appellant had followed the deceased out

of the factory at 05:57 P.M. While the deceased returned to the factory at 06.00 P.M., the appellant did not. The deceased had a *Sua* stabbed on the back side of his right shoulder. The deceased sat on the floor and was surrounded by his co-workers, who also took out the *Sua* from his body. The deceased fainted after about 45 seconds and was taken out of the factory by the co-workers.

20. Sunil Jain, the factory owner, deposed that on 20.11.2013, he handed over two pen drives and two DVDs containing the footage from CCTV cameras installed in his factory to the I.O. He further deposed that the two pen drives, the two DVDs and the attendance register of the workers were seized by the IO on the above date vide seizure memo Ex.PW-8/A. He further deposed that on 15.02.2014, the IO came to his factory and watched the footage from DVR with the help of a technician. The DVR was seized by the IO vide seizure memo Ex.PW-8/B. The witness identified the two pen drives as Ex.P-9A & B and the two DVDs as Ex.P-10A & B. The DVR of black & grey colour and make "Juan" was identified as Ex.P-11. During cross-examination, the witness stated that he had given the annual maintenance contract (hereinafter referred to as AMC) for the maintenance of the system of CCTV cameras installed in his factory. He stated that the maintenance staff of the firm used to maintain and upkeep the system at regular intervals. He denied the suggestion that the recorded portion in the CCTV was manipulated on or after 18.11.2013. He volunteered that after the incident, the recording in the CCTV system was stopped, the hard disk of DVDR (DVR) was kept in intact condition. He denied the suggestion that any manipulation was done after the hard disk of the DVDR (DVR) was taken out by the technical staff at the instance of the police officials.

21. Praveen Sharma (PW-22) deposed that he had installed the CCTV cameras in the factory of Sunil Jain. He stated that on 18.11.2013, upon being called by Sunil Jain, he went to his factory in the evening and at his request, prepared copies of CCTV footage for the date 18.11.2013 in two DVDs and two pen drives. He handed over the two DVDs and two pen drives to Sunil Jain on 20.11.2013. He further deposed that on 15.02.2014, he again went to the factory, where on asking of Sunil Jain and the police personnel, he played the CCTV footage before them. In his presence, Sunil Jain had handed over the DVR and hard disk to the police. He identified the DVDs, pen drives and the DVR, which were already exhibited.

22. Learned counsel for the appellant contended that the footage from the CCTV cameras cannot be relied upon, as only DVD was played in the court. The DVR or the hard disk was not played in the Court. In this regard, it has come on record that Sunil Jain had asked Praveen Sharma to prepare the DVDs on 18.11.2013 as he was assigned the AMC for the maintenance of CCTV camera installed in the factory of Sunil Jain. The DVDs and the pen drives were seized on 20.11.2013 itself from Sunil Jain by the I.O. vide Ex.PW-8/A. The DVR and the hard disk were subsequently seized from Sunil Jain by the I.O. vide Ex.PW-8/B. As such, both, the primary as well as the secondary evidence was seized and brought on the record. No objection was taken on behalf of the appellant at the time when DVD was played in the court. Both Sunil Jain and Praveen Sharma denied the suggestion that any manipulation was made in the DVDs or pen drives or the hard disk during the time when it were in their possession. Learned counsel for the appellant also urged that it has come in testimony of Sunil Jain that some recorded portion in the

CCTV got deleted. A careful reading of the testimony would show that the said deletion was stated to have occurred during maintenance. In the very next sentence, the witness denied the suggestion that recorded portion in the CCTV was manipulated on or after 18.11.2013. It was also stated that after the incident, recording in the CCTV was stopped and hard disk of the DVDR (DVR) was kept in intact condition. As such, I do not find any merit in the contention raised by the learned counsel for the appellant. Learned counsel for the appellant has relied on the decision in Tomaso Bruno & Anr. v. State of Uttar Pradesh reported as **(2015) 7 SCC 178** to contend that the footage from the CCTV camera is inadmissible. In the captioned case, accused were charged with murder of their companion in the hotel. The accused took the defence that while they had gone out, the deceased had stayed back in the hotel. On their return, they found him dead. While acquitting the accused, the Supreme Court held that being a case of circumstantial evidence, the prosecution ought to have seized the footage from the CCTV cameras. It was further held that omission to produce the best evidence had rendered the case unreliable. In the present case, the prosecution has produced and proved the footage from the CCTV cameras, hence the decision in Tomaso Bruno has no applicability to the facts of the present case.

23. Learned counsel for the appellant contended that the trial court committed illegality while permitting the prosecution to file a second certificate under Section 65-B of the Indian Evidence Act with respect to the footage from the CCTV camera. In the present case, Sunil Jain who was the owner of the factory and having control over the DVR & the CCTV cameras, had initially exhibited a certificate under Section 65-B of the Indian Evidence Act as Ex.PW-8/C. It stated that the DVDs and

the pen drives were copied from the DVR and contained the CCTV footage of the incident dated 18.11.2013 and that no tampering was done in the same. Subsequently, on an application moved by the prosecution, the witness was recalled when he produced and exhibited a fresh certificate under Section 65-B of the Indian Evidence Act. It was stated that the two DVDs and the pen drives contain the CCTV footage dated 18.11.2013 recorded by the DVR during the period of which the DVR was used regularly to record and store the information and that he had the lawful control over this use of CCTV/DVR. The said certificate was exhibited as Ex.PW-8/E. Learned counsel for the appellant next contended that even if the said objection was not taken during the trial, the same is available to him at the time of the appeal. In support of his submission, he has relied on the decision rendered in Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Others reported as **(2009) 9 SCC 221**. A perusal of the decision shows that the documents in question, in the said case, were medical opinions.

24. It is noted that not only the deficiency with respect to filing of the certificate under Section 65B IE Act is a curable defect but also the appellant took no objection at the time when the fresh certificate under Section 65B IE Act was exhibited. In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple reported as **(2003) 8 SCC 752**, it was held as under :-

“20. ...Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility

of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.” (emphasis added)

25. In Sonu @ Amar vs. State of Haryana reported as **(2017) 8 SCC 570**, which was reaffirmed in Union of India and Others Vs. CDR. Ravindra V. Desai reported as **(2018) 16 SCC 273**, it was held as under:

“32. It is nobody’s case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B (4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 of the Cr. P.C. 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.” (emphasis added)

26. Lastly, it was contended that the I.O. did not seize the third camera installed at the main gate of the factory as the same would have shown the true picture of the incident. The argument is fallacious. The prosecution has placed reliance on the site plans as well as the photographs to negate the presence of any camera at the main gate. The

appellant ought to have asked such a suggestion to either Sunil Jain or Praveen Sharma.

DYING DECLARATION

27. It has come in the testimony of the witnesses that the appellant had followed the deceased out of the factory and within five minutes, the deceased came back with an injury on his back. These witnesses stated that the deceased before losing consciousness clearly narrated the incident and told them that the appellant had assaulted him with a *Sua*. The weapon i.e., the *Sua* was found stuck in his back and the same was removed by the witnesses. The testimony of the material witnesses namely, Ram Asrey, Mohd. Iqbal and Akshaywar Shah stand duly corroborated by the Post Mortem Report.

28. In so far as the contention is raised that the co-workers i.e., the material witnesses could not have heard the dying declaration on account of high decibel noise level in the factory, it is relevant that no such suggestion was put either to Ram Asrey or Mohd. Iqbal. A suggestion was given to Akshaywar Shah that the witnesses could not hear each other from their respective work stations, however, no question was put that the dying declaration was inaudible as it was the prosecution case that the witnesses surrounded the deceased and did not keep sitting on their respective work stations. The law on dying declaration is well settled. In the case of Vikas & Ors. v State of Maharashtra reported as (2008) 2 SCC 516, while referring Paniben(Smt.) v State of Gujarat reported as (1992) 2 SCC 474, the Supreme Court held as under:

“45. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

18. (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of M.P, 1976 3 SCC 104)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of M. P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164)

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Ram Chandra Reddy v. Public Prosecutor, AIR 1976 SC 1994)

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, 1974 4 S.C.C. 264)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P., AIR 1982 SC 1021)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P., 1981 SCC (Crl.) 581)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State, AIR 1988 SC 912)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State U.P. v. Madan Mohan, AIR 1989 SC 1519)”

29. The oral dying declaration made by the deceased in the presence of independent material witnesses satisfies the above principles governing dying declaration. The deceased told the material witnesses that the fatal injury was caused by the appellant. All the 3 material witnesses i.e, Ram Asrey, Mohd. Iqbal & Akshaywar Shah deposed that Azam had told them that the appellant had caused the injury with a *Sua*. The appellant, being a co-worker, was well known to the deceased. All of them are independent witnesses. There is no inconsistency or variance in their depositions. The testimony of the material witnesses is creditworthy and reliable as there is no motive alleged against them. Further, the testimony of the material witnesses was duly corroborated by the medical evidence proved on the record. Even, the footage from the CCTV cameras is corroborative.

RECOVERY OF SUA

30. The crime scene report noted that the *Sua* was lying at the spot. SI Nand Kishore proved the mobile crime team report which was exhibited as Ex. PW-6/A. The *Sua* was recovered from the spot itself vide seizure memo (Ex. PW 7/A) on the date of the incident itself. The act of removal

of the *Sua* from the back of the deceased was also captured in the footage from the CCTV camera.

31. Learned counsel for the appellant next contended that the *Sua* could not be connected with the injuries as no blood was found on the T-shirt of the deceased and no grouping could be obtained on the *Sua* itself. It is relevant to note that the post-mortem report observed collection of 1.5 liters of liquid clotted blood in the *Pericardiac sac* in the body of the deceased. At this stage, it is profitable to reproduce the extract from the 25th Edition of Modi (Supra) (page 616-618), as under :-

“Punctured wounds are penetrating wounds produced by a long piercing or stabbing instrument, such as a pin, needle, knife, scissors, bayonet, spear, dagger, pickaxe and arrow and when passing through the tissues, they enter a cavity of the body, such as the thorax or abdomen.

A sharp, pointed and cylindrical or conical instrument produces a wound having a circular or slit-like opening. A blunt-pointed instrument requires considerable force to puncture the skin and penetrate the soft tissues. It causes a punctured wound with lacerated edges.

The aperture of a punctured wound in the skin is usually a little smaller in length than the breadth of the weapon used owing to the elasticity of the skin, although, it is sometimes large as the weapon enlarges the wound, if it is withdrawn by lateral movements.

External hemorrhage is not necessarily a criterion for the danger to life. There may be very little external hemorrhage and yet profuse hemorrhage may take place internally owing to some vital organ having been penetrated, the signs of which may be delayed.

Sometimes, it is argued that a punctured wound may have been caused by a fall on a sharp pointed piece of an earthenware pot or broken glass. In that case, the edges of the wound are

irregular and more or less bruised, and fragments of such articles may be found embedded in the soft tissues.”

32. In view of the above, the absence of blood on the *Sua* does not weaken the prosecution case in any manner. The recovery of the *Sua* from the spot, the opinion of the post mortem doctor and the testimony of material witnesses lead to the irresistible conclusion that the prosecution has proved that the *Sua* was the weapon used to inflict the injury on the deceased. In view of the testimony of the material witnesses, the dying declaration and footage from the CCTV cameras, the contention of the learned counsel for the appellant that the injury could have resulted on account of fall on the industrial electrical cable also has no merit.

33. Learned counsel for the appellant also contended that at the time of recording of MLC, the name of the appellant was not mentioned. He, thus, urged that the appellant has been falsely implicated in the case as a result of an afterthought. The contention has been a subject matter of many decisions and has no merit. In this regard, it is profitable to refer the decision of the Supreme Court in Bhargavan (supra), wherein it has been held that the non-disclosure of the names to the doctor is of no consequence. It was held as under :-

“As rightly noted by the courts below, his primary duty is to treat the patient and not to find out by whom the injury was caused. The plea in this regard is clearly unacceptable. The question was examined by this Court in Pattipati Venkaiah vs. State of A.P. and similar view was taken”

DELAY IN REGISTRATION OF FIR

34. From the testimony of material witnesses, it is clear that at about 6/6.15 P.M., the deceased had left the factory premises. He was

immediately followed by the appellant. Within few minutes, the deceased came back to the factory in an injured condition and narrated the incident to the material witnesses. It has also come in the testimony of the witnesses that the deceased was initially taken to D.R. Hospital. On reference, he was taken to the ESI Hospital, Rohini, where he was declared brought dead. The MLC (Ex. PW4/A) of the deceased was recorded at about 07:30 PM. At about 07:55 PM, on the information received from the police personnel at ESI Hospital, DD No. 27/PP was recorded. Thereafter, the police officers namely, SI Azad Singh (PW19) and Ct. Aditya (PW24) reached ESI Hospital and obtained MLC of the deceased. In the meantime, Insp. Surender Singh (PW28) reached the spot. The statement of the Ram Asrey (PW3) was recorded from 10:00 PM to 10:30 PM. The crime team conducted the investigation firstly, at ESI Hospital and then at the spot from 10:05 PM to 12:20 PM. The crime team report (Ex. PW6/A) was proved by SI Nand Kishore (PW6) and Ct. Subhash (PW23). On the basis of the statement given by Ram Asrey and the crime team report, *Rukka* was prepared at 01:00 AM and accordingly, the FIR was registered at 1:15 a.m. From above sequence of events, it stands established that there was no delay in recoding of FIR. Even, the footage from the CCTC camera corroborates the version of the material witnesses.

35. During his examination under Section 313 Cr.P.C., the appellant admitted that he was working & present in the factory of Sunil Jain on 18.11.2013 alongwith Ram Asrey, Mohd. Iqbal, Akshaywar Shah and Azam (the deceased). He admitted that he went out of the factory after some time when the deceased went out of the factory at about 6/6.15 PM. When it was put to him that he did not return to the factory, he

replied that though he returned but after seeing the crowd, he went back. He admitted that he did not return to the factory or his tenanted premises after that day. He also admitted that he was using the mobile number 9891380497 at the relevant time. He admitted that Azam (the deceased) used to call him *Hizda* because of which he stopped talking to Azam but he did not nurture any grudge against Azam. He further admitted that he worked in the *dhaba* of Balkar Chand from 19.11.2013 to 22.11.2013.

CONCLUSION

36. As noted above, the post-mortem report observed that the fatal injury inflicted on the back of the deceased was a circular shaped wound. Dr. Sanjay in his subsequent opinion, stated that the cut mark on the T-shirt of the deceased corresponded to the above injury. After seeing the *Sua*, it was further opined that the injury on the deceased were possible with the said *Sua*. The *Sua* was recovered from the spot. The testimony of all three material witnesses is cumulative to each other. The prosecution has been able to prove that the *Sua* was used by the appellant to inflict the fatal injury to the deceased. The testimony of the material witnesses is also corroborated by the medical evidence on record. Even the electronic evidence in the form of footage from the CCTV cameras further corroborates the prosecution case.

37. The appellant has not denied his presence at the spot. He admitted that after some time of the deceased leaving the factory, he also went out. The testimony of the material witnesses as well as the footage from the CCTV camera show that the appellant left within 2 minutes of the deceased leaving. The deceased returned back within 3 minutes thereafter with the fatal injury caused to him. For the reasons already

stated in the previous paragraphs, I am of the opinion that the oral dying declaration stands proved by the testimony of the material witnesses.

38. The prosecution has successfully proved the motive for committing the offence i.e., the deceased being called *hizda* by the appellant, the oral dying declaration made by the deceased to the material witnesses, the *Sua* being used in inflicting the fatal injury. The Post Mortem doctor has opined that the injury no. 1 was sufficient to cause death in the ordinary course of nature. The present case squarely falls under Section 304 (Part II) IPC. It would be profitable to refer the decision rendered by Supreme Court in Gokul Parashram Patil v. State of Maharashtra, reported as (1981)3 SCC331, where it was held as under:

“3. The case, of the prosecution was that the appellant attacked the deceased with a knife giving the latter a single blow above the left clavicle where it caused a muscle-deep incised wound having the dimension 1-1/4" x 1/3". The autopsy surgeon, while certifying the existence of that wound, also found that the superior vena cava had been cut, the damage so caused being sufficient in the ordinary course of nature to cause death.

4. The learned Counsel for the appellant has contended that the case does not fall within the ambit of Section 302 of the Code and that the two courts below erred in relying on Virsa Singh v. State of Punjab 1958CriLJ818. The gist of the dictum of this Court in that case is that if an injury is held to have been intended by the assailant and is further found to be sufficient in the ordinary course of nature to cause death, it would attract clause thirdly of Section 300 of the Code and that, therefore, its author would be liable to punishment under Section 302 thereof. The question thus is whether the particular injury which was found to be sufficient in the ordinary course of nature to cause death, in the present case, was an injury intended by the appellant. Our answer to the question is an emphatic No. The solitary blow given by the

appellant to the deceased was on the left clavicle-a non-vital part-and it would be too much to say that the appellant knew that the superior vena cava would be cut as a result of that wound. Even a medical man perhaps may not have been able to judge the location of the superior vena cava with any precision of that type. The fact that the venacava was cut must, therefore, be ascribed to a non-intentional or accidental circumstance. This was precisely the view taken in Harjinder Singh v. Delhi Administration, 1968CriLJ1023 by Sikri, J., and in Laxman Kalu Nikalje v. The State of Maharashtra, 1968CriLJ1647 by Hidayatullah, C. J. In the former of these cases, the injury in question was a stab wound on the left thigh which had cut the femoral artery and vessels. In the latter, the damage caused consisted of a cut in the auxiliary artery and veins. In each of the two cases it was held that although the injury which was found to be sufficient in the ordinary course of nature to cause death had resulted from a blow with a sharp-edged weapon, the same could not be said to have been intended, that the only injury which could be regarded as intentional was the superficial wound resulting directly from the blow, that the assailant could not be held guilty of an offence under Section 302 of the Code and that he was, on the other hand, guilty of a lesser offence falling under part II of Section 304 thereof.”

39. Resultantly, the present appeal fails and the Judgment on conviction and order on sentence rendered by the trial court are upheld. The appellant's bail bonds are cancelled. The appellant shall surrender before the trial court within a period of two weeks from the day of passing of this judgment. The trial court record is returned. A copy of this judgment be sent to the trial court and be also provided to the appellant free of cost.

(MANOJ KUMAR OHRI)
JUDGE

OCTOBER 14th, 2019
yo/na