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

+ CRL.A. 1244/2018

NIKHIL SAXENA

..... Appellant

Through

Mr. Jai Khanduja, Advocate.

versus

STATE (N.C.T OF DELHI)

..... Respondent

Through

Ms. Aashaa Tiwari, APP for the State
with Insp. Anil Kumar and ASI Ajit
Kumar, PS Adarsh Nagar.

WITH

+ CRL.A. 1249/2018

VISHAL SONKAR

..... Appellant

Through

Mr. M.L. Yadav, Advocate.

versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through

Ms. Aashaa Tiwari, APP for the State
with Insp. Anil Kumar and ASI Ajit
Kumar, PS Adarsh Nagar.

AND

+ CRL.A. 95/2019

PUNIT @ RAJU

..... Appellant

Through

Mr. Sahil Talwar, Advocate with
Mr. Chander Kant and Mr. Nikhil
Garg, Advocates.

versus

THE STATE GOVT. OF N.C.T OF DELHI Respondent
Through Ms. Aashaa Tiwari, APP for the State
with Insp. Anil Kumar and ASI Ajit
Kumar, PS Adarsh Nagar.

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Reserved On : 02nd November, 2019
Date of Decision: 09th December, 2019

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. Criminal Appeal Nos.1244/2018, 1249/2018 and 95/2019 have been filed by appellants-convicts Nikhil Saxena, Vishal Sonkar as well as Punit @ Raju respectively challenging the judgment dated 16th November, 2018 and the order dated 19th November, 2018 passed by the Additional Sessions Judge/Pilot Court, North District, Rohini Courts, Delhi in Sessions Case No. 482/2018 arising out of FIR No.101/2018 under Sections 302/393/397/34 of the Indian Penal Code (hereinafter referred to as 'IPC') and Sections 25/27 Arms Act registered with Police Station Adarsh Nagar. The appellants-convicts have been convicted under Sections 302/393/34 IPC and sentenced to undergo rigorous imprisonment for life with fine of Rs. 10,000/- for offence punishable under Section 302 read with Section 34 IPC as well as rigorous imprisonment for five years with fine of Rs. 5,000/- for offence punishable under Section 393 read with Section 34 IPC. The appellant-convict Punit @ Raju had also been convicted under Section 25 Arms Act and sentenced to rigorous imprisonment for one year with fine of Rs. 5,000/-

CASE OF THE PROSECUTION

2. The case of prosecution in brief is that Naresh (deceased) was working at Bharat Petroleum Petrol Pump and on 13th April, 2018, at about 1.00 A.M, he had gone to bring tea from a nearby stall for his co-workers. When he did not return for about twenty-twenty five minutes, two of his co-workers - Devender Pratap Mishra (PW-1) and Yashpal (PW-2) went to look for him. After walking some distance, they saw Naresh lying on the ground and three people standing near him. After seeing Devender Pratap Mishra (PW-1) and Yashpal (PW-2), those three people fled on their bike, which was of red colour and having green colour on its engine while shouting 'bhago-bhago'. Devender Pratap Mishra (PW-1) and Yashpal (PW-2) immediately rushed towards Naresh, and they saw that he was conscious and had an injury on his chest. He told them that the three boys had tried to snatch his mobile phone and when he resisted, two boys held him while the third stabbed him using a knife. Thereafter, Naresh was brought to the petrol pump, the police was informed and he was shifted to a hospital in a PCR Van. Mr.Naresh succumbed to his injuries at AIIMS Trauma Centre on the same day at about 8 a.m.

FINDING OF THE TRIAL COURT

3. The Trial Court convicted all the appellants-convicts under Sections 302/393/34 IPC and appellant-convict Punit@Raju additionally under Section 25 Arms Act. However, in the absence of evidence to establish who had used the weapon of offence, appellant-convict Punit @ Raju was acquitted of the charge under Section 397 IPC. The conclusion of the Trial Court is reproduced hereinbelow:-

“128. It has not been proved on record as to who out of these three accused persons stabbed Naresh and used the knife in commission of offence. However, the dying declaration and other circumstances shows that all three were having common intention to rob Naresh and when Naresh resisted they stabbed him resulting into his death. The post mortem report Ex.PW23/P40 clearly shows that injury No.1 was sufficient to cause death in ordinary course of nature. Keeping in view the above discussion as the prosecution has failed to prove and establish as to who used the weapon hence Punit is acquitted u/s 397 IPC. But keeping in view the dying declaration and other circumstances all the accused are convicted u/s 393 r/w 34 and 302 r/w 34 IPC. Accused Punit is also held guilty u/s 25 Arms Act for being found in possession of button actuated knife.”

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT NIKHIL SAXENA

4. Mr. Jai Khanduja, learned counsel for the appellant-convict Nikhil Saxena stated that the FIR in the present case had been registered on the basis of DD No. 6A and not as per the statements made by any of the eyewitnesses. He pointed out that SI Tej Singh (PW-24), who had gone to the scene of crime i.e. Bharat petroleum outlet had deposed that he had not found any eyewitness to the incident. Therefore, according to him, Devender Pratap Mishra (PW-1) and Yashpal (PW-2) had been introduced at a subsequent stage to solve a blind murder case.

5. Learned counsel for the appellant-convict Nikhil Saxena contended that the petrol pump, where the deceased used to work, was covered by CCTV cameras. He stated that though the scaled site plan (Ex.PW-6/P-11) showed the presence of a CCTV pole, but the police had not seized the CCTV digital video recorder. In support of his contention, he relied upon the

testimonies of Devender Pratap Mishra (PW-1) and Yashpal (PW-2), wherein they both had stated that CCTV cameras were installed at the petrol pump. He submitted that the said CCTV footage was the 'best evidence' which the prosecution had failed to produce. In support of his submission he relied upon the judgment in ***Tomaso Bruno and Anr. Vs. State of U.P. (2015) 7 SCC 178***, wherein the Supreme Court has held as under:-

“21. To invoke Section 106 of the Evidence Act, the main point to be established by the prosecution is that the accused persons were present in the hotel room at the relevant time. PW 1 Ram Singh, Hotel Manager stated that CCTV cameras are installed in the boundaries, near the reception, in the kitchen, in the restaurant and all three floors. Since CCTV cameras were installed in the prominent places, CCTV footage would have been the best evidence to prove whether the accused remained inside the room and whether or not they have gone out. CCTV footage is a strong piece of evidence which would have indicated whether the accused remained inside the hotel and whether they were responsible for the commission of the crime. It would have also shown whether or not the accused had gone out of the hotel. CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage, in our view, which is the best evidence, raises serious doubts about the prosecution case.”

6. He also pointed out that since there were multiple contradictions in the testimonies of Ravi Kumar Jha (PW-14), SI Tej Singh (PW-24) and Insp. Anil Kumar (PW-30) regarding the presence of CCTV cameras, the same indicated that the police had intentionally not seized the CCTV footage.

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT VISHAL SONKAR

7. Mr. M.L. Yadav, learned counsel for the appellant-convict Vishal Sonkar stated that no specific role had been attributed to Vishal Sonkar in the alleged incident and nothing incriminating had been recovered from him which could connect him to the crime.

8. He contended that the prosecution's case was that the appellants-convicts had tried to snatch the mobile phone of the deceased but admittedly, the said mobile phone had not been seized or produced in Court. He emphasised that in absence of the said mobile phone, the prosecution had failed to prove the motive of the crime.

9. Learned counsel for the appellant-convict Vishal Sonkar stated that as per the prosecution's story, Devender Pratap Mishra (PW-1) and Yashpal (PW-2) had taken the deceased to the petrol pump and from there they had accompanied him to the hospital in the PCR van. He pointed out that despite the aforesaid fact, the said witnesses had deposed that their clothes were not bloodstained.

10. He emphasised that the deceased had not made any dying declaration to any police officer who had accompanied him to the hospital in the PCR van. He contended that neither Devender Pratap Mishra (PW-1) nor Yashpal (PW-2) had told any other police official about the alleged dying declaration made by the deceased. According to him, in view of the abovementioned facts, the testimonies of Devender Pratap Mishra (PW-1) and Yashpal (PW-2) were not trustworthy and consequently, the presence of the appellants-convicts had not been proved and the alleged dying declaration was also unreliable. In support of his contention, he relied upon the following

judgments:-

A. ***Heikrujam Chaoba Singh vs. State of Manipur, (1999) 8 SCC 458,***

wherein it has been held as under:-

“3. An oral dying declaration no doubt can form the basis of conviction, though the courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability. We are, therefore, called upon to examine the evidence of PWs 2 and 5 to find out whether the courts below were justified in relying upon their testimony and in believing the statements alleged to have been made by the deceased while being carried to the hospital in ambulance and thereafter while he was an indoor patient in the hospital itself. So far as the statement in the ambulance is concerned, it was made to PW 2 who is the brother of the deceased. PW 2 while he was coming in a jeep towards the scene of occurrence saw the ambulance van and, therefore, thought that his younger brother Hera Singh was possibly being taken in the same ambulance van and coming to know that his guess was correct boarded the ambulance van. He stated in his evidence that on enquiry about the injuries sustained by his brother, Hera Singh, the injured told him that he had been given blows by Heikrujam Chaoba Singh with a dao, Yamlemba Paka Singh with a hockey stick and another person with a lathi. In his cross-examination, he candidly admitted that there were three or four persons inside the ambulance when his brother told him the names of his assailants but none of those disinterested persons have been examined by the prosecution to corroborate the said PW 2. He also admitted in his cross-examination that those persons who were in the ambulance were present near him when his brother stated the words and yet the prosecution had not offered any explanation as to why none of those persons were examined who could have been disinterested persons deposing about the dying declaration said to have been

made by the deceased inside the ambulance while he was being carried to the hospital. While according to the evidence of PW 2 the deceased told him that the appellant Chaoba Singh gave him a dao-blow but according to PW 5 to whom the deceased made a declaration in the hospital, the deceased told him that Chaoba Singh, the appellant held a thang and Paka Singh had a hockey stick. Intrinsically, therefore the so-called dying declaration made by the deceased to PW 2 is different from the declaration made by the deceased to PW 5. PW 2 happens to be the elder brother of the deceased. In the aforesaid premise, we do not think it safe to hold the evidence of PW 2 to be reliable and, therefore, the oral dying declaration as deposed to him by him cannot be pressed into service for bringing home the charges levelled against the accused appellant.”

B. *State of Gujarat v Bharatbhai Balubhai Lad and Ors, 2005 SCC OnLine Guj 231*, wherein it has been held as under:-

“27. It was also the case of the prosecution that dying declaration made by deceased before PW-3, Nileshbhai Patel, was sufficient to connect the accused with the alleged crime. Before the oral dying declaration of the deceased is accepted by the Court, the decision of the Supreme Court in the matter of Haikrujam Chaoba Singh v. State of Manipur, reported in 1999 AIR SCW p. 4181 is required to be considered. Para 3 of the said judgment reads as under:—

“para 3 : Any oral dying declaration, no doubt, can form the basis of conviction, though Court seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the Court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability.”

28. Oral dying declaration has been rightly disbelieved by the Trial Court on the following circumstances:—

(a) PW-3, Nileshbhai Umedbhai Patel, Ex. 25 is the person, who, with the help of Halpati, broke open the door and poured water on the body of the deceased and at that relevant point of time, on inquiry, the deceased is said to have made a statement before Nileshbhai that she cannot bear any more and that is why she has taken this extreme step. Nileshbhai, accompanied PW-1, Vinodbhai Mistry, to the Police Station. When PW-1, Vinodbhai Mistry, gave the first information report, Nileshbhai was very much present with him in the Police Station but Nileshbhai did not state anything about deceased making such a statement before him and that is the reason why there is no mention of any such oral dying declaration or statement in the FIR.

(b) The evidence of PW-2, Dr. Ajaykumar Jankiprasad Sharma, Exh. 22, is to the effect that the whole body of the deceased was congested and stiff. Eyes were closed. Tongue was protruding. All over the body right from top to bottom there were 3rd degree 100% burns. According to him, the death must be instantaneous and considering the nature of burn injuries all over the body deceased could not have uttered a single word.

(c) There is contradiction in the evidence of PW-2, Nileshbhai Patel, Ex. 25 and PW-2, 4, Geetaben Mistry, Ex. 26, so far as the so called oral dying declaration is concerned.

(d) PW-4, Geetaben, the mother of deceased, has admitted that when she tried to inquire with her daughter as to why did she take such a step, she was unconscious and was not able to talk.

(e) There is contradiction between the evidence of PW-3, Nileshbhai Patel, Ex. 25 and the evidence of PW-5, Jigishaben Mistry, Ex. 27 so far as the exact words uttered by the deceased at the relevant point of time is concerned.”

11. He lastly stated that the appellant-convict Vishal Sonkar was entitled to the benefit of doubt as the prosecution had failed to complete the chain of events in the present case.

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT PUNIT @ RAJU

12. Mr. Sahil Talwar, learned counsel for the appellant-convict Punit @ Raju contended that the investigating officer had deliberately not recorded the statement of the deceased despite the fact that the deceased had been declared fit for statement by the doctor as per the MLC (Ex.PW-15/P-20).

13. He stated that the place of occurrence had been shifted as it was based upon the oral evidence of Devender Pratap Mishra (PW-1) and Yashpal (PW-2) only and had not been corroborated by any scientific evidence. He emphasised that the place of occurrence had neither been photographed nor inspected by the Crime Team and no bloodstained earth had been lifted.

ARGUMENTS ON BEHALF OF THE STATE.

14. *Per contra*, Ms. Aashaa Tiwari, learned APP for the State stated that the presence of appellants-convicts had been proved by the testimonies of Devender Pratap Mishra (PW-1) and Yashpal (PW-2). She further stated that the tea stall owner Sunil (PW-13) had corroborated the version of Devender Pratap (PW-1) and Yashpal (PW-2).

15. She contended that as the appellants-convicts had been unsuccessful in taking the mobile phone of the deceased, they had stabbed him. She stated that no question regarding the said mobile phone was put to the father of the deceased – Ram Kumar (PW-5) and consequently, the issue of non-production of the phone cannot be raised at this stage.

16. Learned APP for the State contended that the manager of the Bharat Petroleum – Ravi Kumar Jha (PW-14) had testified that CCTV camera had not been installed at the time of the incident and even the investigating

officer had deposed that the CCTV camera was not working. She further contended that there was no evidence on record to show that there was any camera on the CCTV pole shown in the scaled site plan (Ex.PW-6/P-11) or if that camera was covering the place of occurrence. Consequently, she stated that in absence of such evidence, it cannot be said that the police had withheld the best evidence from the Court.

17. She stated that appellants-convicts Vishal Sonkar and Nikhil Saxena had been apprehended on 15th April, 2018 while they were travelling on the motorcycle bearing registration No. DL3S BB 4456 on the front number plate and DL3S BB 445 on the rear number plate. She pointed out that the said motorcycle was of red colour but the engine was of green colour. She further stated that the said motorcycle had been seized vide seizure memo (Ex. PW-27/P-51) in the presence of Constable Ankit (PW-27), Constable Jang Bahadur (PW-29) and Insp. Anil (PW-30) and duly identified by Devender Pratap Mishra (PW-1) and Yashpal (PW-2).

18. Learned APP for the State contended that the aforesaid motorcycle had been registered in the name of the original owner i.e. Mohd. Kalwa (PW-9) and the same had been proved by the transport authority officer– Om Prakash (PW-3) who had exhibited the registration record (Ex.PW-3/P-1) of the motorcycle. She further contended that Mohd. Kalwa (PW-9) had sold the motorcycle to Sher Singh (PW-10), who in turn sold it to Gulshan (PW-11), who finally sold it to appellant-convict Nikhil Saxena. She stated that the original owner and all the subsequent purchasers had testified before the Court and identified the motorcycle. The relevant portions of the testimonies of Om Prakash (PW-3), Mohd. Kalwa (PW-9), Sher Singh (PW-10) and Gulshan (PW-11) are reproduced hereinbelow:-

A. Testimony of Om Prakash (PW-3)

“.....I brought the particulars of registration of this motorcycle in the name of Mohd. Kalwa and the computer generated record is Ex.PW3/P-1 bearing the signature of Sh. Naveen Kochar at point A. Naveen Kochar is working as a Inspector in the authority.....”

B. Testimony of Mohd. Kalwa (PW-9)

“I was owner of motorcycle no.DL3S BB 4456 Bajaj Pulsar which was sold to Sher Singh for sum of Rs.17,000/- and I signed the documents and I also handed over the RC of this motorcycle to Sher Singh. I was the registered owner of the aforesaid motorcycle.”

C. Testimony of Sher Singh (PW-10)

“In the year 2010, in the last months may be 10-11 month I purchased motorcycle no.DL3S BB 4456 Bajaj Pulsar from Mohd. Kalwa R/o Jamia Nagar, Okhla Delhi who signed the documents in this regard and handed over the RC of this motorcycle.....

In the year 2014, I sold the said vehicle to Gulshan who is my neighbourer for a sum of Rs.13,000/- and I also handed over the original RC.....

I can identify the motorcycle if shown to me.

xxx

xxx

xxx

Witness has correctly identified the motorcycle already Ex.M O-1.”

D. Testimony of Gulshan (PW-11)

“In the year 2014, I purchased motorcycle no. DL3S BB 4456 Bajaj Pulsar from my neighbourer Sher Singh. At the time of purchasing, Sher Singh handed over the RC of this motorcycle to me.....

In the year 2016, in the month of October and November I sold the said vehicle to Nikhil S/o Narayan Singh who is my

neighbor for a sum of Rs.7,000/- and I also handed over the original RC to him.....

xxx

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I can identify the motorcycle if shown to me.

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xxx

xxx

Witness has correctly identified the motorcycle already Ex.M O-1.”

19. Learned APP for the State further stated that on 20th February, 2017 appellant-convict Nikhil Saxena had filed a complaint regarding some lost documents pertaining to the motorcycle bearing registration No. DL3S BB 4456 and he had given a copy of the said complaint (Ex. PW-11/P-13) to Gulshan (PW-11). She further stated that Gulshan (PW-11) had produced the same in Court and it had been proved by ASI Bajrang Lal (PW-12). According to her, the said complaint and the testimony of Gulshan (PW-11) proved that appellant-convict was in possession of the motorcycle bearing registration No. DL3S BB 4456 on the day of the incident. The relevant portions of the testimonies of Gulshan (PW-11) and ASI Bajrang Lal (PW-12) are reproduced hereinbelow:-

A. Testimony of Gulshan (PW-11)

“On 20.02.2017, Nikhil filed a complaint with regard to missing of some documents. I gave the copy of complaint by which the complainant Nikhil S/o Narayan lodged the report. The report to the police with respect to article/document lost in Delhi is Ex.PW11/P-13 bearing my signature at point A. The said report was taken in possession by the police vide seizure memo Ex.PW11/P-14 bearing my signature at point A. These documents were given to me by Nikhil and I gave the same to the police.”

B. Testimony of ASI Bajrang Lal (PW-12)

“I have brought the summoned record pertaining to LR No.167610/2017 dated 20.02.2017. As per record this report was lodged by Nikhil S/o Narayan regarding lose of RC, DL and pollution of vehicle no.DL3S BB 4456. I have brought the certified copy of the report which is already Ex.PW11/P-13 and now Ex.PW12/P-15 bearing the signature of Inspector Shivaji Chauhan at point A.”

20. Learned APP for the State stated that as per the post mortem report (Ex.PW-23/P-40) the cause of death was opined to be *“haemorrhagic shock consequent upon injury no.1. Injury no.1 is ante mortem in nature, caused by sharp or pointed object or weapon”* and the pleural/chest cavities of the deceased had about 2.5 litres of blood. Consequently, she stated that despite heavy blood loss, not a lot of blood of the deceased had spilled out on the roads.

21. She further stated that the weapon of offence i.e. knife (seized vide seizure memo-Ex.PW-27/P-58) had been recovered pursuant to the disclosure of the appellant-convict Punit @ Raju. She pointed out that as per the CFSL report (Ex.PW-30/P-70) the DNA of the blood found on the recovered knife had matched with the DNA of the deceased.

22. She emphasised that even Dr. Suraj Ohal (PW-23) in his subsequent opinion (PW-23/P-42) regarding the weapon of offence had opined that injury No. 1 mentioned in post mortem report was possible by the recovered knife.

23. Learned APP for the State stated that Devender Pratap Mishra (PW-1) and Yashpal (PW-2) had consistently deposed that the deceased had told them that one of the appellants-convicts had stabbed him while the other two

had held him. She submitted that it was settled law that a person can be convicted on the basis of a dying declaration if the same was reliable and voluntary.

24. Thus, according to her, the prosecution had established all the material circumstances and the chain of events was complete.

COURT'S REASONING

AS THE PRESENT CASE IS BASED ON CIRCUMSTANTIAL EVIDENCE, IT IS ESSENTIAL TO OUTLINE THE CONDITIONS THAT HAVE TO BE FULFILLED BEFORE SUCH A CASE CAN BE SAID TO BE FULLY ESTABLISHED.

25. Having heard the learned counsel for the parties and after going through the record, this Court is of the view that the present case is based on circumstantial evidence as there is no eye witness to the incident of murder. Consequently, it is essential to outline the conditions that have to be fulfilled before such a case can be said to be fully established. The Supreme Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116*** after referring to its earlier decision in ***Hanuman, Son of Govind Nargundkar vs. State of Madhya Pradesh, 1952 SCR 1091*** stated the five golden principles, constituting the Panchsheel, of proof of a case based on circumstantial evidence as follows:-

“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao

Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

(emphasis supplied)

THIS COURT IS OF THE VIEW THAT DEVENDER PRATAP MISHRA (PW-1) AND YASHPAL (PW-2) WERE NATURAL WITNESSES AND THEIR TESTIMONIES ARE CLEAR, COGENT, CONSISTENT, CREDIBLE, TRUSTWORTHY AND HAVE BEEN CORROBORATED BY OTHER EVIDENCE AND MATERIAL ON RECORD. ACCORDINGLY, THE PRESENCE OF ALL THE APPELLANTS-CONVICTS AT THE PLACE OF OCCURRENCE ON THE DATE OF THE INCIDENT IS PROVED.

26. This Court is further of the opinion that it is essential to analyse the testimonies of Devender Pratap Mishra (PW-1) and Yashpal (PW-2) as they were the last persons who had seen the deceased with the appellants-

convicts. The relevant portion of their testimonies is reproduced hereinbelow:-

A. Testimony of Devender Pratap Mishra (PW-1)

“On that night at about 1am, Naresh went to the tea stall for bringing tea for us.....When Naresh did not return for 15-20 minutes, I alongwith Yashpal went to the side of tea stall behind petrol pump near transport centre. When we went towards the back side of petrol pump, tea stall and we had walked upto 50 meters, we saw Naresh was lying on the ground. We also saw three boys were standing near him started raising noise “Bhago- Bhago” and those three boys ride on the motorcycle and ran away. Naresh informed us that those three boys were trying to snatch his mobile phone and when he resisted, two boys caught hold of him and third boy stabbed him with knife. I with the help of Yashpal brought the injured Naresh to our Petrol pump and the other employees gathered over there. I made a call to the police at 100 number. Rahul also made a call to police. After sometime PCR van reached there and injured Naresh was taken to BJRM Hospital in PCR van. I alongwith Yashpal accompanied with injured Naresh in PCR van to the hospital. On the way to the hospital, in the PCR, Naresh requested me to make a call to his father from his mobile phone. I find out the mobile number of father of Naresh from his mobile phone. I made a call to the father of Naresh from my mobile phone and informed him that Naresh had been stabbed and we are taking him to BJRM Hospital. In the BJRM Hospital, the Doctor examined Naresh and he was given first aid and Naresh was advised to be taken to Dr. BSA Hospital. In the same PCR, we again took injured Naresh to Dr. BSA Hospital where Naresh was admitted and medically examined. Later on we came to know that injured expired in AIIMS Hospital. I met the police at our petrol pump where I pointed out the place and police prepared site plan. We could not noted down the registration no. of the motorcycle on which those three assailants ran away. The motorcycle was of red coloured and having green colour on its engine. I can identify those

three boys, if shown to me as I had seen them running away on motorcycle.”

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xxx

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.....Witness has correctly identified all the three accused persons.

xxx

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xxx

.....Witness has correctly identified the motorcycle Ex.M
O-1.

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xxx

Q. Whether you found the tea also lying near Naresh?

A. We found polythene containing tea lying there in torn condition.

I did not notice any blood was lying on the spot.... Police prepared the site plan of the spot on my pointing out.....Neither my nor Yashpal's clothes were stained with blood while carrying Naresh to Petrol pump. Vol. I was catching hold of one hand of Naresh and Yashpal was catching hold of other hand of Naresh and Naresh walked upto petrol pump.....I left Ambedkar hospital at about 4.15 AM and reached the petrol pump at about 5 AM.....Police from PS Adarsh Nagar met me first time on 13.04.18 at 8 PM at petrol pump. Before 8 PM I had not gone to PS to tell that I had seen three boys standing near Naresh and fleeing on motorcycle.”

B. Testimony of Yashpal (PW-2)

“.....On that night, at about 1AM, Naresh one of our colleague went to take tea for other employees from the tea shop near transport centre. He did not return to the petrol pump for about 15-20 minutes. I alongwith Devender Pratap Mishra went to the tea stall behind our petrol pump. When we were approaching towards tea shop and left our petrol pump. We were about 50 meters away from the petrol pump. We saw Naresh was lying on the ground and three boys were standing

near him. After seeing us those three boys ran away towards the motorcycle having red colour and green colour on its engine. Those three boys were saying “Bhago-Bhago”. We reached near Naresh who informed us that these three boys who were running on the motorcycle had caught and stabbed him. Naresh informed us that two of the boys caught hold him and one of the boy stabbed him with knife. (objected to by defence). We were unable to noted down the registration number of motorcycle.

I with the help of Devender brought injured Naresh to our petrol pump where Rahul and Devender informed the police at 100 number. After few minutes PCR van reached there and injured Naresh was taken to BJRM Hospital. I along with Devender accompanied injured Naresh in the PCR Van. On the way to the hospital, injured Naresh requested us to inform his father about the incident and the mobile number of his father is in the mobile phone contact list of Naresh. Devender Pratap searched the mobile number of father of Naresh from his mobile phone. Devender made a call to the father of Naresh from his mobile and informed him about the incident. In the BJRM hospital, the injured Naresh was given medical first aid and he was taken to Dr. BSA Hospital in the same PCR van. We also accompanied injured Naresh in the same PCR and reached BSA hospital where Naresh was admitted and medically examined. Later on we came to know that Naresh expired in AIIMS hospital. I had seen those three boys who were standing near Naresh and ran away on the red colour motorcycle. Naresh informed that those three boys had tried to snatch his mobile and when he resisted, he was stabbed by one of the boy and two other caught hold him. I can identify those three boys.

xxx

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xxx

.....Witness has correctly identified the accused persons present in the court today.....Witness has correctly identified the motorcycle already Ex.M O-1.

xxx

xxx

xxx

.....First of all Rahul made a call to the police at 100 number. I don't know thereafter to whom Rahul made a call. In the BSA

hospital, Manager Ravi reached and we left to the petrol pump. I remained at the petrol pump upto 7 AM. I don't know at what time Devender left the petrol pump. Devender may have left about 15-20 minutes prior to me."

(emphasis supplied)

27. Perusal of the aforesaid testimonies reveals that the aforesaid witnesses have given similar, if not identical, description of events that they had seen when they had gone looking for the deceased.

28. The fact that the deceased had gone to buy tea also finds corroboration from the testimony of tea stall owner Sunil (PW-13) who had deposed that the deceased had come to his stall on the date of the incident. The relevant portion of the testimony of Sunil (PW-13) is reproduced hereinbelow:-

A. Testimony of Sunil (PW-13)

"In the intervening night of 12-13 April 2018, Naresh came to my tea stall and purchased five tea for employees of petrol pump. My shop is situated behind the petrol pump. I gave five tea to Naresh who left my shop and went towards petrol pump....."

(emphasis supplied)

29. Devender Pratap Mishra (PW-1) had also stated in his testimony that he had found a polythene containing tea lying in torn condition near the injured body of the deceased.

30. Further, Devender Pratap Mishra (PW-1) and Yashpal (PW-2) had deposed that the deceased had told them that the appellants-convicts had tried to snatch his mobile phone and when he resisted, one of them had stabbed him with a knife while the other two held him. The said part of the testimony is corroborated by the post mortem report (Ex.PW-23/P-40) of the

deceased wherein it is stated that the deceased had a stab wound over the left side of his chest. The relevant portion of the post mortem report is reproduced hereinbelow:-

***“Department of Forensic Medicine & Toxicology
JaiPrakash Narayan Apex Trauma Centre
All India Institute of Medical Sciences, Raj Nagar, New Delhi-110029***

xxx

xxx

xxx

7. Injures (briefly but accurately describe all)

(State whether injures are ante-mortem with reasons)

Ante-mortem injures:-

- 1) Vertically placed a stab wound of size 3cm X 0.5 cm X cavity deep was present over the left side of chest, situated 128 cm from right heel, 10.5 cm from sternal notch and 23 cm from right shoulder tip. The stabbing weapon passed through skin, subcutaneous tissue, muscles of thorax, left sided 4th rib, Pleura, Paricardium and upper part of right ventricle where a defect of 2 cm X 0.5 cm X cavity deep (after removing stitches), was present.

The wound was wedge shaped, with regular margins and edges.

The stabbing weapon passed through and directed upwards, outwards, inwards, towards right. Signs of surgical interventions:-

- 1) *41 cm horizontal thoracotomy wound was present. It was stapled wound and situated 2 cm below the stabbed wound.*
2) *Stitched wound of size 2 cm was present over the right ventricle.*

xxx

xxx

xxx

C-CHEST (THORAX)

xxx

xxx

xxx

5. *Pleura cavities – contained about 2.5 litres of blood.*

xxx

xxx

xxx

***K. OPINION: The cause of death to the
Best of my knowledge and belief.***

Hemorrhagic shock consequent upon injury no.1. Injury no.1 is ante-mortem in nature caused by sharp and pointed object/weapon.”

(emphasis supplied)

31. As per the prosecution’s story, the deceased had been brought to the Bharat Petroleum outlet and thereafter the police had been informed. Perusal of the PCR form (Ex.PW-17/P-25) reveals that the call was made by phone No. 918700171952. Another co-worker of the deceased-Rahul (PW-8) had deposed that the said mobile number was his and he had made the PCR call. He also corroborated the version of Devender Pratap Mishra (PW-1) and Yashpal (PW-2).

32. The motorcycle, on which the appellants-convicts had fled, had been described in detail by Devender Pratap Mishra (PW-1) and Yashpal (PW-2). They both had stated that the motorcycle had a red body with green colour on its engine. The motorcycle (Ex. MO-1) that was seized (vide seizure memo Ex. PW-27/P-51) from the appellant-convict Nikhil Saxena had the same distinctive colour combination and it was identified by both Devender Pratap Mishra (PW-1) and Yashpal (PW-2) as the same bike that was used by appellants-convicts to flee after committing the crime.

33. This Court is in agreement with the contention of the learned APP for the State that in view of the testimonies of Om Prakash (PW-3), Mohd. Kalwa (PW-9), Sher Singh (PW-10), Gulshan (PW-11) and ASI Bajrang Lal (PW-12) which have been mentioned earlier as well as the complaint (Ex. PW-11/P-13) filed by appellant-convict Nikhil Saxena with respect to the lost documents of the motorcycle, the prosecution has been able to conclusively prove that appellant-convict Nikhil Saxena was in possession

of the said motorcycle bearing registration No. DL3S BB 4456 and it was used by the appellants-convicts in commission of the crime in the present case.

34. Devender Pratap Mishra (PW-1) and Yashpal (PW-2) had also identified all the appellants-convicts in Court.

35. In view of the abovementioned facts, this Court is of the view that Devender Pratap Mishra (PW-1) and Yashpal (PW-2) were natural witnesses. The testimonies of Devender Pratap Mishra (PW-1) and Yashpal (PW-2) are clear, cogent, consistent, credible, trustworthy and have been corroborated by other evidence and material on record. Accordingly, the presence of all the appellants-convicts at the place of occurrence i.e. behind the Bharat Petroleum outlet, Adarsh Nagar, on the date of the incident is proved.

AS TO WHY THE FIR HAD NOT BEEN REGISTERED ON THE BASIS OF STATEMENTS OF DEVENDER PRATAP MISHRA (PW-1) AND YASHPAL (PW-2) THE SAME HAS BEEN EXPLAINED BY THE PROSECUTION. THERE WAS NO INORDINATE DELAY IN RECORDING OF THE STATEMENTS BY THE POLICE.

36. Perusal of testimony of SI Tej Singh (PW-24) reveals that by the time he had reached the Bharat Petroleum outlet to look for eyewitnesses, Devender Pratap Mishra (PW-1) and Yashpal (PW-2) had left for the hospital with the deceased and thereafter when they came back to the petrol pump at about 5 a.m., SI Tej Singh (PW-24) had already left at about 4:40 a.m. after sending DD No. 6A for registration of FIR. Consequently, the FIR had not been registered on the basis of statements of Devender Pratap Mishra (PW-1) and Yashpal (PW-2). However, their statements had been

recorded by the second investigating officer Insp. Anil Kumar (PW-30) on the day of the incident itself. Consequently, there had been no inordinate delay in recording of their statements as contended by the counsel for the appellants-convicts.

THE PRESENCE OF FUNCTIONAL CCTV CAMERAS HAD NOT BEEN PROVED. CONSEQUENTLY, THE JUDGMENT OF THE SUPREME COURT IN TOMASO BRUNO (SUPRA) IS OF NO HELP

37. This Court is also in agreement with the contention of the learned APP for State that the presence of functional CCTV cameras had not been proved. The fact that a CCTV pole had been mentioned in the scaled site plan is not sufficient to prove that CCTV cameras were installed or that they were covering the place of incident or were functional. In fact, the manager of the Bharat Petroleum outlet Ravi Kumar Jha (PW-14) had categorically deposed that no CCTV camera was installed at the petrol pump. Consequently, the judgment of the Supreme Court in *Tomaso Bruno* (supra) is of no help to the appellants-convicts as the investigating officer had not withheld the best evidence in the present case.

DYING DECLARATION INSPIRES CONFIDENCE, IS WHOLLY RELIABLE, VOLUNTARY, TRUTHFUL AND MADE WITHOUT BEING INFLUENCED BY ANYONE

38. This Court finds no merit in the contention of the learned counsel for appellants-convicts that since no dying declaration was made to the police, the earlier dying declaration made to Devender Pratap Mishra (PW-1) and Yashpal (PW-2) cannot be believed. The perusal of the paper book reveals that the first investigating officer SI Tej Singh (PW-24) had deposed that the

deceased was unable to give his statement due to the injury on his chest. Therefore, the contention of the learned counsel for appellant-convict Punit @ Raju that the investigating officer had deliberately not recorded the statement of the deceased is not correct. The witnesses to whom the dying declaration was made are natural witnesses and they have withstood the test of cross-examination and their credibility remains intact.

39. It is settled law that an accused person can be convicted solely on the basis of dying declaration provided the same inspires confidence, is wholly reliable, voluntary, truthful and made without being influenced by anyone. The Supreme Court in ***Parbin Ali & Anr. vs. State of Assam (2013) 2 SCC 81*** has held as under:-

“16. In this context, it will be useful to refer to the decision in Puran Chand v. State of Haryana wherein it has been stated that a mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous and it is the duty of the court to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The Court further opined that: (Puran Chand case [(2010) 6 SCC 566 : (2010) 3 SCC (Cri) 197] , SCC p. 572, para 18)

“18. The law is now well settled that a dying declaration which has been found to be voluntary and truthful and which is free from any doubts can be the sole basis for convicting the accused.”

APPELLANTS-CONVICTS HAD COMMON INTENTION TO KILL

40. The dying declaration made by the deceased to these witnesses also proves that the appellants-convicts had common intention to kill the

deceased and in furtherance of that common intention, two of the appellants-convicts had caught hold of the deceased while the third stabbed him with a knife. Consequently, all the three accused are liable to be held guilty.

IN THE PRESENT CASE, THERE WAS SUFFICIENT MOTIVE ON PART OF THE APPELLANTS-CONVICTS TO COMMIT MURDER OF THE DECEASED

41. Though motive is not a *sine qua non* for the conviction of an accused person yet it is a relevant factor to establish a case based on circumstantial evidence. In the present case, the deceased had clearly told Devender Pratap Mishra (PW-1) and Yashpal (PW-2) that the appellants-convicts had tried to snatch his mobile phone and upon his resistance, they had stabbed him. Therefore, there was sufficient motive on part of the appellants-convicts to commit murder of the deceased.

THE CONTENTION THAT THE PLACE OF OCCURRENCE HAD BEEN SHIFTED, IS BEREFT OF MERIT

42. The place of occurrence has been consistently mentioned to be behind the Bharat Petroleum outlet. Accordingly, the contention of the learned counsel for the appellants-convicts that the place of occurrence had been shifted, as the Crime Team had not inspected it, is bereft of merit specially when SI Tej Singh (PW-24) had deposed that he had found no blood lying on the ground.

THERE IS EXPLANATION ON RECORD AS TO WHY THE CLOTHES OF DEVENDER PRATAP MISHRA (PW-1) AND YASHPAL (PW-2) WERE NOT BLOOD-STAINED

43. Further, the contention of the learned counsel for appellants-convicts that the clothes of Devender Pratap Mishra (PW-1) and Yashpal (PW-2)

were not bloodstained as they were not eyewitnesses is unsubstantiated in view of the testimony of Devender Pratap Mishra (PW-1) wherein he had explained that they had carried the deceased by holding his hands and consequently, their clothes were not bloodstained. It is also pertinent to mention that in the post mortem report (Ex.PW-23/P-40) it was observed that the chest cavities of the deceased had about 2.5 litres of blood. This proves why blood of the deceased had not spilled out in large quantity.

NON-PRODUCTION OF THE MOBILE PHONE IS NOT FATAL TO THE CASE OF THE PROSECUTION

44. As far as the non-production of the mobile phone of the deceased is concerned, it is the prosecution's case that the appellants-convicts had not been successful in snatching the mobile phone. In fact, Devender Pratap Mishra (PW-1) had deposed that he had handed over the phone to the father of the deceased Ram Kumar (PW-5). It is pertinent to mention that the father of the deceased Ram Kumar (PW-5) had not been questioned on this aspect and accordingly, the said issue cannot be raised at this stage [See: ***Mahavir Singh v State of Haryana (2014) 6 SCC 716***]. Consequently, this Court is of the view that non-production of the mobile phone is not fatal to the case of the prosecution.

BLOOD OF THE DECEASED WAS FOUND ON THE KNIFE RECOVERED AT THE INSTANCE OF APPELLANT-CONVICT PUNIT @ RAJU. DR. SURAJ OHAL HAD OPINED THAT INJURY NO.1 AS MENTIONED IN THE POST MORTEM REPORT COULD BE POSSIBLE WITH THE RECOVERED KNIFE.

45. The weapon of offence in the present case is a knife which had been recovered at the instance of appellant-convict Punit @ Raju vide seizure

memo Ex. PW-27/P-58. The said knife had been sent for forensic examination and the FSL Report (Ex. PW-30/P-71) reveals that the DNA profile generated from the blood found on the knife matched with the DNA profile generated from the samples of the deceased. In other words, blood of the deceased was found on the recovered knife.

46. Further, in the FSL Report (Ex. PW-30/P-72), Dr. Bharti Bharadwaj (PW-32) had opined that the cuts on the t-shirt of the deceased could have been caused by the recovered knife. The doctor who had conducted the post mortem i.e. Dr. Suraj Ohal had also given a subsequent opinion (Ex. PW-23/P-42) wherein he had stated that injury No. 1 as mentioned in the post mortem report could be possible with the recovered knife. The relevant portions of the FSL Reports (Ex. PW-30/P-71 and Ex. PW-30/P-71) are reproduced hereinbelow:-

A. FSL Report (Ex.PW-30/P-71)

*“Forensic Science Laboratory
Govt. of NCT of Delhi
Sector 14, Rohini, Delhi-110085
Tel: 011-27555811, Fax: 011-27555890*

*Accredited by the National Accreditation Board for Testing and
Calibration Laboratories (NABL) as per standards of ISO.IEC
17025:2005 and NABL 113:2008*

xxx

xxx

xxx

DESCRIPTION OF ARTICLES CONTAINED IN PARCEL

xxx

xxx

xxx

Exhibit ‘1a’ : One cut/torn foul smelling ‘T’-shirt having brown stains.

Exhibit '1b': One cut/tear foul smelling shirt having brown stains.

xxx

xxx

xxx

Exhibit '3': Cloth piece having reddish brown stains described as blood on gauze of deceased.

xxx

xxx

xxx

Exhibit '5': One all metallic knife.

xxx

xxx

xxx

CONCLUSION

DNA Profiling (STR analysis) performed on the exhibits provided is sufficient to conclude that the DNA profile generated from the source of exhibit '3' (Cloth piece) of deceased was found to be matching with the DNA profile generated from the source of exhibits '1a' ('T'-shirt), '1b' (Shirt) of deceased & '5' (knife)."

B. FSL Report (Ex.PW-30/P-72)

*“Forensic Science Laboratory
Govt. of NCT of Delhi
Sector 14, Rohini, Delhi-110085
Tel: 011-27555811, Fax: 011-27555890*

*Accredited by the National per standards of ISO/IEC 17025:2005
and NABL 11:2008
Accreditation Board for Testing and Calibration Laboratories
(NABL)*

xxx

xxx

xxx

2. DESCRIPTION OF ARTICLES CONTAINED IN PARCEL(S) EXHIBIT (S):

xxx

xxx

xxx

Exhibit-1a : One half sleeves T-Shirt with dark brown stains having one cut mark in front left middle portion marked as “Q1” in the laboratory.

Exhibit-1b: One half shirt with dark brown stains having one cut mark in front left middle portion marked as “Q2” in the laboratory.

xxx

xxx

xxx

Exhibit-5: One button knife measuring approximately 25 cm in length. It was having blade measuring approximately 11 cm in length and 2.7 cm maximum width with one sharp edge.

3. RESULTS OF EXAMINATION/OPINION:

Exhibit-1a and Exhibit-1b were examined physically and under magnification and also examined the knife Exhibit-5. The cut mark “Q1” and “Q2” on “Exhibit-1a” and “Exhibit-1b” respectively were having sharp cut edges and also found corresponding to each other. Test cut marks “T1” and “T2” were made on Exhibit-1b with Exhibit-5 and compared with the crime cut marks “Q1” and “Q2” and the following opinion is given.
OPINION:

The cut marks ‘Q1’ and ‘Q2’ on Exhibit-1a and Exhibit-1b could have been caused by Exhibit -5.”

(emphasis supplied)

IN THE PRESENT CASE THE CHAIN OF EVENTS IS COMPLETE AND ALL THE CIRCUMSTANCES CONCLUSIVELY POINT TOWARDS THE GUILT OF THE APPELLANTS-CONVICTS

47. In view of the aforesaid, the following circumstances have been proved and they form a complete chain of events:-

A. On 13th April, 2018 i.e. the date of the incident, Devender Pratap Mishra (PW-1) and Yashpal (PW-2) had seen the appellants-convicts near the injured body of the deceased and the appellants-convicts had run away after seeing both of them shouting “*bhago-bhago*” on a red coloured motorcycle having a green coloured engine from the place of occurrence that is behind the Bharat Petroleum outlet which is mentioned as Point ‘A’ in the scaled site plan.

B. Thereafter, the deceased had made a dying declaration to Devender Pratap Mishra (PW-1) and Yashpal (PW-2) wherein he had stated that the appellants-convicts had unsuccessfully tried to snatch his mobile phone and when he resisted, they had stabbed him.

C. The aforesaid circumstance also proves that appellants-convicts had motive to kill the deceased.

D. Appellants-convicts Nikhil Saxena and Vishal Sonkar were arrested on 15th April, 2018 and the motorcycle bearing registration No.DL3S BB 4456 was seized. The said motorcycle was in possession of appellant-convict Nikhil Saxena on the date of the incident as Gulshan (PW-11) had sold the said bike to him in 2016.

E. The appellants-convicts as well as the motorcycle bearing the registration No. DL3S BB 4456 had been duly identified by Devender Pratap Mishra (PW-1) and Yashpal (PW-2).

F. Appellant-convict Punit @ Raju was arrested on 15th April, 2018 and on the basis of his disclosure statement, a knife i.e. weapon

of offence was recovered.

G. As per the subsequent medical opinion (Ex.PW-23/P-42), injury No.1 as mentioned in the post-mortem report was possible by the recovered knife.

H. On 13th April, 2018, a post-mortem was conducted and the cause of death was opined to be hemorrhagic shock consequent upon injury No.1.

I. FSL report (Ex.PW-30/P-71) confirmed that DNA profile generated from the recovered knife was similar to the DNA profile generated from the clothes and blood sample of the deceased.

J. FSL report (Ex.PW-30/P-72) opined that the cuts on the t-shirt of the deceased could have been caused by the recovered knife.

48. Keeping in view the abovementioned circumstances, especially the dying declaration of the deceased, testimonies of Devender Pratap Mishra (PW-1) and Yashpal (PW-2) read with medical and scientific evidence, which is of conclusive nature, this Court is of the view that the chain of events is complete and all the circumstances conclusively point towards the guilt of the appellants-convicts. Consequently, it stands proved beyond reasonable doubt that the appellants-convicts, with common intention, committed murder of the deceased.

CONCLUSION

49. In view of the aforesaid circumstances and mandate of law, this Court does not find any reason to interfere with the impugned judgment. The

orders on conviction and sentence are upheld.

50. Accordingly, present appeals, being bereft of merit, are dismissed. Trial court record be sent back. Copy of the judgment be sent to appellants-convicts through the concerned Jail Superintendent(s).

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

DECEMBER 09, 2019

rn/js

