

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

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Reserved on : 06.08.2020

Pronounced on : 15.09.2020

+ **CRL.A. 96/2019**

KAMAL

.....Appellant

Through: Mr. Atul Guleria, Advocate.

versus

STATE

..... Respondent

Through: Mr. Ashish Dutta, APP for the State

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

RAJNISH BHATNAGAR, J.

1. This is an Appeal against the Judgment dated 13.12.2018 and order on sentence dated 21.12.2018 passed by the Addl. Sessions Judge-02, South District, Saket Court, New Delhi vide which the appellant has been convicted for the commission of offence U/s 302 IPC and sentenced to undergo rigorous imprisonment for life and to pay a sum of Rs. 5,000/- as fine and in default of payment of fine to undergo 06 months of simple imprisonment.

2. Briefly stated the case of the prosecution is that an intimation vide DD No. 28A dated 05.09.2013 was received regarding gunshot injury to one CRL.A. 96/2019

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KUMAR GODAR
Signing Date: 17.09.2020 14:12:52
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to HMJ Rajnish Bhatnagar.

boy. On this, SI Rajinder Singh alongwith Ct. Manish reached in front of H.No. 5/4, Sector1, Pushp Vihar and found three empty khols (cartridges) and glass pieces lying there. No eye witness was found at the spot. Thereafter, SI Rajinder went to Batra hospital and obtained the MLC of injured Kapil Singh in which it was mentioned that he was brought by his friends Rohit and Balraj in unconscious state and the patient could not be revived and declared dead.

3. Thereafter, SI Rajinder recorded the statement of Balraj Singh @ Babli and pursuant to the statement of Balraj Singh @ Babli, FIR u/s 307/302/34 IPC and 27 Arms Act was registered and the investigation was handed over to Inspector Ajay Pratap Singh who during investigation called the crime team, took the photographs of the spot, lifted the exhibits i.e. glass pieces as well as empty khols (cartridges). Blood stains bullet pellets and glass pieces lying in the XUV car were also lifted. The blood stained clothes of Rohit Choudhary were also seized, post mortem of dead body was also go conducted.

4. Appellant Kamal was arrested on 07.09.2013, at the instance of a secret informer from service road near Tuglakabad Railway station. On the search of accused Kamal one pistol allegedly used in the crime was recovered from his left side dub. Thereafter, his disclosure statement was recorded.

5. During the investigation the mobile phone of the appellant could not be recovered but during the PC remand the appellant was got identified through Balraj @ Babli. As per the prosecution at the instance of the appellant motorcycle used in the offence was recovered from the street in

front of House No.B-36, JJ Camp, Tigri which was found to be registered in the name of Arjun.

6. On 13.09.2013, co-accused Neeraj Kumar surrendered in the Court, he was arrested and he made disclosure statement in which he disclosed that on the date of the incident he had taken Kamal (appellant) on motorcycle and they followed XUV car in which Kapil was sitting. When the car stopped at Pushp Vihar, appellant fired at Kapil and then he alongwith appellant fled on the motorcycle. On 14.09.2013, at the instance of co-accused Neeraj one Nokia phone alleged to have been used in the crime was recovered. The mobile Number 9899292973 which, according to the prosecution, was used by the appellant was found to be registered in the name of one Ranjit Middha who was not traceable. According to the prosecution, the statement of one Ahmed Parvej and Kanti Devi, mother of the appellant were recorded who stated that this number was used by the appellant.

7. The mobile number 9717499375 was found to be allotted to co-accused Neeraj by his company. Co-accused Arjun could not be arrested and was declared proclaimed offender. However, later on he was arrested. Co-accused Arjun was found to be using mobile number 9958669936 (in the name of his father) and 8527434510 in keeping touch with appellant and co-accused Neeraj.

8. FSL report of the recovered weapon was obtained in which it was opined that the recovered cartridges (Kholes) were not found to be fired from the weapon recovered from the appellant.

9. Vide order dated 25.02.2014 charges u/s 120B, 302/120B and 307/34 IPC were framed against appellant Kamal and his co-accused Neeraj. Appellant was further charged with the offence u/s 25 Arms Act. Lateron, after arrest of co-accused Arjun, supplementary charge sheet was filed and vide order dated 22.07.2014, charges u/s 120-B/302/307/34 IPC were framed against him and vide order dated 15.10.2018 charge u/s 174A IPC was also framed against co-accused Arjun as he was declared proclaimed offender.

10. We have heard the Ld. counsel for the appellant, Ld. APP for the state and have also gone through the records of the case.

11. It is submitted by the Ld. counsel for the appellant that the appellant has been falsely implicated in this case. It is further submitted by the Ld. counsel for the appellant that all the eye witnesses have turned hostile and not supported the case of the prosecution and they have failed to identify the appellant as the assailant. He further submitted that the alleged recovered pistol at the instance of the appellant is not found to be used in the commission of crime which is evident from the FSL report. He further submitted that the prosecution has miserably failed to prove that the alleged recovered motorcycle is the same on which, according to the prosecution, the appellant came with co-accused Neeraj to commit the crime. He further submitted that PW 12 Balraj had not named the appellant as an assailant at the first opportunity and lateron, after due deliberations, the appellant has been falsely implicated in this case. He further submitted that the Ld. Trial Court has failed to appreciate that the prosecution has not been able to prove that mobile number 9891292973 was used by the appellant in committing

the crime. He further urged that the Ld. Trial Court has wrongly relied upon the call details of mobile number 9891292973 to reach to the conclusion that the appellant was in the vicinity of the crime scene at the relevant time, whereas, on the same set of evidence, the Ld. Trial Court has acquitted co-accused Neeraj and co-accused Arjun. It is further urged by Ld. counsel for the appellant that the Ld. Trial Court has wrongly relied upon the testimony of PW 22 and document Ex. PW 22/A which is in total contradiction to Ex. PW 6/A. He further submitted that the prosecution has miserably failed to prove that the appellant has any motive to eliminate Kapil.

12. On the other hand, it is submitted by the Ld. APP for the state that the eye witnesses have supported the case of the prosecution in regard to the manner of commission of offence, and they have only turned hostile qua the identity of the assailants. The Ld. APP further submitted that the statement of the hostile witnesses over the factum of identity can be corroborated through their statement U/s 161 Cr.P.C., where they have categorically named the appellant and the Ld. APP has relied upon "***Paramjit Singh @ Pamma Vs. State of Uttarakhand***, CrI. Appeal No. 1699/2007 dated 27.09.2010". The Ld. APP has further submitted that the mobile location of the appellant was found within the vicinity of scene of crime. He further submitted that there is no infirmity in the impugned judgment.

13. In order to prove its case the prosecution has examined 43 witnesses. The Ld. Trial Court vide impugned judgment dated 13.12.18 came to the conclusion that the prosecution has been able to prove its case against the appellant beyond reasonable doubt, and convicted him for the commission

of offence U/s 302 IPC but observed that the prosecution has failed to prove the offence of conspiracy and other charges framed against the appellant.

14. In the impugned judgment, the Ld. Trial Court has observed that the material circumstances on which the prosecution relied are the testimonies of eye witnesses i.e. PW 8 Rohit Choudhary, PW 11 Praveen, PW 12 Balraj @ Babli, and the testimonies of PW 13 Swaroop Singh, PW 22 H.C. Montu, Ex. PW 22/A, recovery of pistol and the motorcycle used in the crime. The Trial Court has also relied upon the call details of the appellant alongwith his other co-accused persons showing their presence near vicinity of the crime scene.

15. However, the Ld. Trial Court in the impugned judgment observed that the prosecution has failed to prove its case against co-accused Neeraj and co-accused Arjun @ Pussy and acquitted both of them. The trial Court has also not believed the case of the prosecution with regard to the arrest of the appellant alongwith pistol, and observed in the impugned judgment that the recovery of the pistol in the manner as suggested by the prosecution was doubtful. The Trial Court has also not believed the recovery of motorcycle alleged to have been used in the commission of crime. At this stage, we may notice the material and relevant testimonies recorded by the Trial Court.

Testimony of the eye witnesses

16. **Testimony of PW 8 Rohit Choudhary** : His examination-in-chief was recorded on 16.08.2014. He deposed that on 05.09.2013, he alongwith Balraj @ Babli, Shiv Shakti, Ram Singh and Kapil had appeared in the Court of Sh. Rajeev Bansal, Ld. ASJ as their criminal case U/s 307/34 IPC CRL.A. 96/2019

was pending. He further deposed that he and Balraj @ Babli were charged for the offence U/s 307/34 IPC, and remaining three associates were discharged by the Court on that day. He further deposed that on 5.09.2013 at about 3:30 p.m. he alongwith Balraj @ Babli and Kapil left Saket Court by Mahendra XUV bearing No. DL-12CA-2055 and proceeded towards Pushp Vihar as he had to collect money from his friend, namely, Praveen @ Teetu, so he had made a call to Praveen from his phone bearing No. 9873479378 on his mobile phone bearing No. 9711119900. When he reached near the house of Praveen at Pushp Vihar, Sector 1, he stationed his car near a park at some distance from the house of Praveen, as he had seen him coming from his house. He further deposed that he got down from his car leaving Kapil and Balraj inside the car and went 5/6 meter towards his friend Praveen and collected Rs. 20,000/- from him. While he was talking with him, he heard 4-5 rounds of firing. He further deposed that he turned towards his vehicle and picked up one piece of stone and threw the same towards the assailant who were two in numbers. He further deposed that they fled on the motorcycle and while running, pistol used in the crime fell down from the hand of assailant.

17. He further deposed that he could not see both the assailants at the spot properly. He further deposed that because of this reason he cannot identify them. He further deposed that on the date of the incident he had taken injured Kapil to Batra hospital in his vehicle, alongwith Balraj and Praveen. He further deposed that he had got Kapil admitted in the hospital at about 3:45 p.m. He further deposed that he had made a call at 100 number to the

police from the spot about the incident. He further deposed that two police officials reached at Batra hospital after about 5 minutes of their reaching.

18. He further deposed that special staff police officials had also reached Batra Hospital and they took Balraj @ Babli somewhere else. He was also taken to police station by local police official of P.S. Saket and he was kept in the police station for about 5 days and finally released on 10.09.2013. He further deposed that during those 5 days police had shown him one person saying that *"Iska nam Kamal hai. Isne goli mari hai"*. Again said *"Police ne kaha tha ki iska nam Kamal hai"*. During the course of his examination-in-chief, the appellant was shown to him and on seeing the appellant he stated that *"Mai inhe nahi pechan sakta kyoki ye vaha nahi thye."*

19. This witness was declared hostile and was cross examined by the Ld. APP for the State. In his cross examination by the Ld. APP, he denied the suggestion that PW Balraj had made call at number 100 about the incident through his phone. However, he stated that he had made a call at 100 number about the incident from the spot through his mobile phone. He further stated in his cross examination conducted by the Ld. APP, that Balraj had also talked to the police while they were on their way to hospital and police officials were making detailed inquiry from them.

20. This witness was also cross examined by the Ld. counsel for the appellant and, during his cross examination, he categorically stated that he is not identifying the appellant and the co-accused persons in the Court as he had not seen them firing on Kapil. He further stated in the cross examination that there was no enmity between appellant and deceased Kapil

and also stated that Balraj @ Babli had not disclosed to the police about the involvement of the appellant and Neeraj in his presence.

21. **PW 11 Praveen @ Teetu** : His examination in chief was recorded on 27.11.2014, wherein he deposed that PW 8 Rohit Choudhary is his friend and he had borrowed some money from him about one year prior to September 2013. He deposed that one day at about 3:00/4:00 p.m Rohit had come to his house to take his money back, but he does not remember the exact date. He further deposed that Rohit had come by XUV Mahendra alongwith some persons who remained inside the car.

22. He further deposed that his friend Rohit had got down from the car and he returned a sum of Rs. 20,000/- to him and while Rohit was counting the said amount, he heard gun shots from the place where the vehicle of Rohit was parked. He further deposed that Rohit immediately turned towards his car and saw one boy on the motorcycle near the said car and he also noticed that one person had opened fire towards the car and thereafter the said person fled with his associate on the motorcycle.

23. He further deposed that he and his friend Rohit Choudhary chased them but they succeeded in escaping on the motorcycle by firing in the air. He further deposed that when they reached near the car of Rohit, they noticed that one Kapil was lying in injured condition in the car and one person Balraj who was inside the car of Rohit had not sustained any injury in the incident. He further deposed that he with the help of Rohit and Balraj removed injured to Batra Hospital, where Kapil was declared dead by the doctor. He further deposed that he can identify the assailant whom he had

seen escaping on the motorcycle after committing the crime. He failed to identify appellant and Neeraj as the persons who had committed the crime.

24. He was declared hostile and cross examined by the Ld. APP. In his cross examination he denied the suggestion that he had identified accused Kamal (appellant) and Neeraj as assailant before the police during the course of investigation. He further denied that Balraj had made a call on 100 number about the incident after taking phone from Rohit.

25. This witness was not cross examined by the Ld. counsel for the appellant.

26. **PW 12 Balraj @ Babli** : The examination-in-chief of this witness was recorded on 27.11.2014 wherein he deposed that on 05/09/2013 at about 10:00 a.m. he alongwith his friend Kapil and Rohit had appeared before the Court of Sh. Rajeev Bansal, ADJ Saket as their case U/s 307/34 IPC was pending trial. He further deposed that on that day, at about 2:30 p.m/3:00 p.m. they went to Pushp Vihar from the Court to meet one Praveen as his friend Rohit had to collect some money from him. He further deposed that Rohit had parked his car near the residence of Praveen in Pushp Vihar and he got down from his car and went towards the house of Praveen. He deposed that he and Kapil were inside the car when someone fired towards them from behind and when he took turn, he noticed that one person was firing on his friend Kapil. On hearing the sound of bullet, he tried to save himself.

27. He further deposed that he got down from the car and raised alarm and noticed that blood was oozing from the bullet injury of his friend Kapil. He further deposed that he had seen the shooter while running and had also

seen one person who was sitting on the bike on which the assailant escaped. He further deposed that his friend Rohit alongwith Praveen had come there and they all raised alarm "*Pakdo-Pakdo Goli Mar Di*". He further deposed that he made a call at 100 number about the incident from the phone of Rohit Choudhary and with the help of Rolhit Choudhary and Praveen he removed Kapil to Batra hospital where he was declared dead. Police recoded his statement Ex. PW 12/A at the police station bearing his signature at point A. He further deposed that he does not know Kamal and that he had not disclosed the name of Kamal as an assailant in his statement given to the police. He further deposed that he was kept in the police station for about 3-4 days and his signatures were obtained on blank papers. He failed to identify the appellant in the Court as the assailant.

28. This witness was also declared hostile and cross examined by the Ld. APP. He denied the suggestion that he had identified accused Kamal and Neeraj as assailants before the police during the course of investigation. He denied recording of his supplementary statement on 08.09.2013 and also denied that he had identified the appellant as the shooter before the police by saying that he had committed the murder of Kapil.

29. This witness was cross examined by the Ld. counsel for the appellant and, in his cross examination, he stated that he had not disclosed the name and description of the shooter as well as his associate when he made a call to the police on 100 number. He admitted his signatures on Ex. PW 12/A but categorically stated that it was blank when his signatures were obtained.

30. According to the prosecution all the above mentioned three persons are the eye witnesses of the incident. These three witnesses have supported

the case of the prosecution in regard to the manner in which the occurrence took place, previous and subsequent facts, investigation conducted in their presence, but they have not supported the case of the prosecution on the point of identification of the appellant as the person who opened fire on Kapil

31. The Ld. Trial Court has observed in the impugned judgment that on over all appreciation of the testimonies of PW 8, PW 11 and PW 12, it cannot be explicitly inferred that accused Kamal was not among the assailants who fired at the deceased, and further observed that the case of the prosecution cannot be thrown away because of the non identification of the assailants by these three material witnesses. The Ld. Trial Court further observed that corroboration is required for inferring the identity. So from the observations of the Ld. Trial Court, even the Ld. Trial Court was not convinced on the basis of the testimonies of these 3 eye witnesses that it was the appellant who had fired upon Kapil and that is why the Ld. trial court chose to look for corroboration.

32. We have also analyzed the testimonies of the 3 eye witnesses namely Rohit, Balraj and Praveen. All the 3 witnesses have not supported the case of the prosecution on the point of identification of the assailant. It is also pertinent to mention here that PW 8 and PW 11 have not even stated in their statements U/s 161 Cr.P.C that they can identify the assailants if shown to them. What these two witnesses have stated is that they had seen the assailant, meaning thereby, they had seen the assailants i.e. one person committing the crime but what is evident from their statement is that they had never stated that they can identify the said assailant. In our opinion,

seeing the incident happening is one thing and saying that one can identify the person committing the crime is another thing and the first does not necessarily lead to the second.

33. PW 8 and PW 11, alongwith PW 12 Balraj, had removed the injured Kapil to the hospital and it is in the car that Balraj disclosed the name of the appellant as the person who had fired at Kapil. According to the prosecution it was Balraj who had called the police after taking the phone of PW 8 Rohit Choudhary. PW 8 Rohit Choudhary has also deposed that he had talked with the police from his mobile phone and Balraj had also talked to the police from his number, and police made detailed enquiry from them while they were on their way to hospital. Here it is pertinent to mention that according to PW 8 and PW 11, while they were in the process of removing the injured to the hospital Balraj had disclosed the name of the appellant as the assailant to them. If it was so, then it is not understood why the name of the appellant was not given to the police at the very first instance i.e. when PW 8 and PW 12 Balraj were in conversation with the police. Pertinently, on the basis of their information Ex. PW 6/A was recorded in which nowhere it has been stated that it was the appellant who had fired upon Kapil. For better appreciation of this fact we have examined Ex. PW 6/A in detail and the same is reproduced herein below:

“KITE NET INFO FOR IMPV IN BATRA HOSP. FOR
DETAILS OF PATIENT KITE-58 05.09.2013 15:52:49
CALL IS TRUE MOUKA PAR 3 KHALI KHOL MILE HAI
JO 9 MM KE LAG RAHE HAI PHONE PAR CALLER
BALRAM NE BATAYA KI MERE FRIEND KAPIL KO

GOLI LAGI HAI PUBLIC KA KOI ADMI KUCH BHI NAHI BATA HAI BUS INTNA BATA RAHE HAI KI HAMNE TO AVAJ SUNI THI QRT MAUKA PAR C/ROOM INFORM 05.09.2013 15:56:53 SHO SAHIB MAUKA PAR 05.09.2013 16:11:24 FROM ____ KITE 58 ____ FROM BATRA HOSPITAL. CALL IS TRUE CALLER BALRAJ NE BATAYA MERE DOST KAPIL S/O SWAROOP SINGH AGE 35 R/O A-BLOCK, SANGAM VIHAR KO UNKNOWN BLACK MCYCLE PER 2 LADKE EK NE HELMET PEHNA THA DUSRE NE MOUTH PER KAPDA LAGA RAKHA THA KAPIL KO GOLI MAR KE PUSHP VIHAR KI SIDE BHAG GYE RTO WITH STAFF MAUKA PAR HAJ LADKA BEHOSH HAI JISSE SINE ME GOLI LAGI HAI. 05.09.2013 16:26:54 CALLER BALRAJ NE AB BATAYA HUM TEEN DOST ROHIT AND KAPIL KE SATH CAR MAHINDRA XUV DL 12 C 2055 MAI AJ COURT NO. 303 MAI 307 IPC ME BARI HO GAYE THEY HAMRE 2 SATHI RAM SINGH AND SHAKTI BHI COURT MAI THEY JO BAAD MAI APNE GHAR CHALE GAYE. HUM 3 SANATAM DHARAM MANDIR SEC. 1 PUSHP VIHAR PAAS THEY 2 LADKE HULIYA NA MALUM BALCK M/CY PER AYE PEECHEY SEAT PER BAITHE KAPIL KO GOLI MAR KE BHAG GYE. LADKO KO HUM SAMNE AANE PER PEHCHAN SAKTE HAI.

CALL 2/3 MIN PEHLE KI GHATNA HAI HUM INI KO BATRA HOSPITAL LE AYE HAI JO ABHI OPERATION THEATRE ME HAI EK KHALI KHOL CAR ME MILA HAI (C/ROOM INFO) 5/9/13 16:28:34 B/C ON EAGLE ALPHA NET AND RAX AND C/ROOM INFO FOR ONE HOUR CHECKING 05/9/13 16:30:26 K-58.....BALRAJ KA ADDRESS HAI BALRAJ S/O SH. RAMPAL AGE 36 R/O A-157 SANGAM VIHAR AND KAPIL KA ADD HAI A-319 SANGAM VIHAR RTO SAKET HOS. MAI (C/ROOOM INFO) 5/9/13 16:46:27 E-19....05/09/13 16:47:40 E-19....MAUKA PER 9 MM K 3 KHALI KHOL MILE HAI AUR EK KHALI KHOL CAR ME MILA HAI SHO ACP WITH STAFF MAUKA PER THEY C/ROO INFO.”

34. This document Ex. PW 6/A which is the PCR form was filled in by PW 6 W/Ct. Sunita. In her testimony she has deposed that at about 3:26 p.m. through phone No. 9711119900 belonging to one Rohit an information was received that one boy was shot at his chest and he was taken to Batra Hospital, meaning thereby, when the information was given to the police at 3:26 p.m., the identity of the appellant though already known to PW 8, PW 11 and PW 12, was not disclosed by them.

35. After the PCR call was made, PCR officials PW 21 H.C. Ramesh and PW 22 H.C. Montu Ram also reached at the spot. PW 21 H.C. Ramesh has deposed that on 05.09.2013, he was working as in-charge PCR Van Eagle-19. On that day of the incident i.e. 05.09.2013, at about 3:28 p.m. he

received a call from control room that someone was shot near Pushp Vihar Sector-1, so he alongwith his staff reached the spot at 3:30 p.m. but the injured was not found there. He further deposed that later on he made a call to the caller Balraj telephonically who told that his friend Kapil had sustained bullet injuries and he was taking him to hospital and thereafter he switched off his mobile phone. He has further deposed that after sometime another PCR van Eagle-20 also reached there whose in-charge was Ct. Montu Ram (PW 22).

36. The Ld. Trial Court has placed much reliance on the testimony of PW 22 who has deposed that he reached the spot at about 3:28 p.m. after receiving a call from PCR control room that one person has been shot near park Pushp Vihar. When he reached there, he came to know that injured has been removed to Batra hospital. He has further deposed that PCR van eagle 19 was also present there. According to PW 22, caller Balraj had told that brother of Monti has fired upon Kapil and thereafter Balraj had switched off his mobile phone. This witness has proved the 3 attested pages of log book as Ex. PW 22/A. The Ld. Trial Court has also relied upon the log book entry recorded at 3:37 p.m., wherein it has been recorded that Balraj had told that brother of Monti fired upon Kapil.

37. First of all, the prosecution has not proved on record as to who made this entry in the log book. PW 22 has not stated in his examination-in-chief that the entry was made by him. Though this log book has been got exhibited by the prosecution through PW 22, yet he is totally silent on this aspect in his deposition. Now as far as his talking to Balraj on phone is concerned, the same raises doubts because, firstly, no such call record of

talks between PW 22 and Balraj has been placed and proved on record. It is worth mentioning here that police never had the phone number of Balraj. In this regard Ex. PW 6/A assumes importance because the phone number recorded in this document is 9711119900, which is of Rohit. Therefore, by no stretch of imagination PW 22 could have talked to Balraj and it is nobody's case that Balraj was carrying the mobile phone of Rohit.

38. Now coming to the testimony of PW 21, who was the first to reach the spot. According to him, he had made call to caller Balraj telephonically. But from his testimony, it is evident that the name of the assailant was not disclosed to him by Balraj who-according to this witness, switched of his mobile phone after some time.

39. PW 22 had reached the spot at around 3:32 p.m i.e. within 2 minutes of PW 21 reaching the spot, so they both i.e. PW 21 and PW 22 claimed to have talked with Balraj and, according to both of them, Balraj used to switch of his mobile phone. It does not appeal to logic that Balraj-in such a situation, when he was removing his injured friend to hospital would keep on switching his mobile phone on and off. Moreover, from the records it is noted that the number from which the call was made to the police did not belong to Balraj. So, it is highly improbable that PW 12 Balraj talked with PW 22 and PW 21, and it also does not appeal to logic as to why he would not disclose the name of the assailant to PW 21 who called him first from the spot and within a span of 4-5 minutes he would reveal to PW 22 that brother of Monti had shot Kapil.

40. Now if PW 22 was to be believed that Balraj had told him about the assailant, then why he remained silent and did not share this information

with PW 21 H.C. Ramesh is also not explained. According to PW 22, after some time many senior police officials reached the spot and according to PW 22 he had informed about the identity of the assailant to ATO. ATO has been examined as PW 43 (Inspector Hira Lal), and he has not stated in his testimony that PW 22 had informed him about the name of the assailant. So, this conduct of PW 22 in not informing about the name of the assailant to PW 21 and other Sr. police officials makes him an unreliable witness. Therefore, we have no hesitation in discarding the testimony of PW 22 and document Ex. PW 22/A proved by him, which is in total contradiction to Ex. PW 6/A which has been reproduced hereinabove, wherein there is no mention that brother of Monti had shot Kapil.

41. In order to seek corroboration in regard to the identity of the assailant, the Ld. Trial Court has heavily relied upon the statements of PW 13 Swaroop Singh, who is the father of deceased Kapil, and PW 22 H.C. Montu Ram. PW 13 has deposed that on 05/09/2013 at about 3:45 p.m his daughter-in-law Seema told him that she had received a telephonic call from Balraj @ Babli that Kapil was admitted in Batra Hospital after sustaining bullet injury. Thereafter, he alongwith Sanjay and other family members reached Batra Hospital where Balraj met him and told him that one Kamal had fired at Kapil. He further deposed that after some time doctor told them that Kapil had died.

42. This witness was cross examined by the Ld. counsel for the appellant and in his cross examination he has stated that neither the police asked him about the factum of involvement of Kamal as disclosed by Balraj to him, nor he told this fact to the police. Now this conduct of this witness is highly

improbable. According to this witness, immediately on coming to the hospital he came to know the name of the assailant as Kamal, but he made no efforts to inform the police-who was present in the hospital, about the identity of the assailant and even after coming to know about the death of his son, he kept quiet and did not make any hue and cry, and even then he did not disclose the identity of the assailant to the police. This witness has further stated that he came to know about the incident from his daughter-in-law Seema-who was informed by PW 12 Balraj, but again the conduct of Seema is also very questionable because she never asked from Balraj as to who shot her husband. It is pertinent to mention here that PW 12 Balraj never stated before the police in his statement Ex. PW 12/A and during the course of his examination-in-chief that he had informed Seema through telephone that her husband Kapil was shot by appellant Kamal. Now this witness has not supported the case of the prosecution. During the course of his cross examination by the Ld. APP, it was not even suggested to him that he had made a call to Seema informing about the firing incident and that the name of the assailant was Kamal. The only logical inference which can be drawn is that even as per the prosecution PW 12 had never made any telephonic call to Seema informing about the incident or the assailant. The prosecution has not placed on record call records to show that any call was made by Balraj to Seema. Pertinently, in the instant case, the police has collected the call records at each and every stage but have curiously failed to do so here. The prosecution has not even examined Seema and testimony of PW 13 Swaroop Singh is hearsay and not admissible. Also, looking into his

conduct discussed hereinabove, no reliance can be placed upon the testimony of this witness PW 13.

43. In the instant case, the ruqqa was sent at about 6:00 p.m. and in the ruqqa the name of the appellant as assailant has been mentioned. In our opinion, if the details of the assailant were known to the police through Balraj-as claimed by them, then there was no occasion to keep the ruqqa pending till 6:00 p.m. Therefore, it appears that much deliberation has gone into before preparing the ruqqa. It is well said that “*a man may lie but circumstances don't*” and the circumstances of this case belie the theory of the prosecution that immediately after the incident Balraj told to the police about the involvement of appellant.

44. Therefore, we are of the opinion, that no reliance can be placed upon the testimonies of PW 8, PW 11, PW 12, PW 13, PW 22 and also on Ex. PW 22/A on the basis of which the Ld. ASJ has arrived at the conclusion as to the identification of the appellant as the assailant.

45. Now let us see if there are any other circumstances, through which the appellant can be connected with the crime in question. The law as far as circumstantial evidence is concerned, is well settled. The principles of law governing the proof of a criminal charge by circumstantial evidence need hardly any reiteration. From the several decisions of the Supreme Court available on the issue, the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstances against the accused beyond all reasonable doubt, but the said circumstances should complete the chain and they must give rise to only one conclusion to the exclusion of all others, namely, that it is the accused and nobody else who had committed the crime. The above said principles are deducible from the 5 principles of law laid CRL.A. 96/2019

down by the Supreme Court in “*Sharad Birdhichand Sarda Vs. State of Maharashtra*”, (1984) 4 SCC 116.

46. The Trial Court has not believed the manner of arrest of the appellant with pistol and has observed that the recovery of pistol in the manner as projected by the prosecution is doubtful. The Trial Court has also observed that the prosecution has been unable to prove that the motorcycle bearing No. DL 3S BS 7176 was used in the commission of the crime. The Trial Court has placed heavy reliance on the phone locations of the accused persons namely Kamal (appellant), his co-accused Neeraj and Arjun. According to the prosecution, Arjun (acquitted) had told the appellant about the movements of deceased Kapil with Rohit Choudhary and Balraj from Saket Court. The trial Court has also acquitted accused Neeraj who was using phone No. 9717499375, and while acquitting Neeraj and Arjun, the Ld. Trial Court observed that the evidence against these two accused persons is only that as per their mobile call details, they were in contact with the appellant in the vicinity of Saket Court and Pushp Vihar at the time of commission of offence. It is further observed by the Ld. Trial Court that these circumstances are not sufficient to involve them in the present offence through the offence of conspiracy. The Ld. Trial Court has further observed in the impugned judgment that mere presence of Neeraj and Arjun on the basis of mobile record with accused Kamal (appellant) in the vicinity at the crime scene is not sufficient to make them culpable for the offence of conspiracy, and they have not been found to be involved in any overt act. However, the same benefit has not been given by the trial court to the appellant and the trial court has come to the conclusion that the appellant

was using mobile No. 9891292973 and, according to the cell ID chart of this number, he was found in the area of Saket and Pushp Vihar at the time of commission of the offence, and this circumstance was held against the appellant.

47. It has been vehemently argued by the Ld. counsel for the appellant that the prosecution has not been able to prove that the mobile number 9891292973 was used by appellant Kamal. In order to prove that the appellant was using mobile number 9891292973, the prosecution examined PW 14 Ahmed Parvej and PW 31 Kanti Devi, who is the mother of the appellant. Neither PW 14 nor PW 31 has supported the prosecution version over the fact that the said mobile number was used by Kamal (appellant). PW 41 is the IO of the case and he has categorically stated that mobile number 9891292973 is of one Ranjit Middha who was untraceable. PW 14 Ahmed Parvej in his testimony had denied the suggestion that he was using the connection number 9999620007, and stated that one Dharambir had given a phone number 9891292973 to call him in case his phone was not reachable. So from the testimony of PW 14, it can be inferred that mobile No. 9891292973 exists, but it was used by one Dharambir @ Sallu who has not been examined by the prosecution. PW 31, who is the mother of the appellant, also denied the suggestion that she is the registered customer of mobile No 990635813 and also denied the suggestion that the appellant was using the mobile No. 9891292973. The prosecution has examined PW 34 Pawan Singh, Nodal Officer, Vodafone who proved on record the customer application form (Ex. PW 34/D) of mobile No. 9891030955 which was in the name of Kanti Devi-mother of the appellant, and CDR

details Ex. PW 34/B of mobile No. 9891292973 which, according to the prosecution, was being used by the appellant showing that he was calling or receiving calls from mobile No. 9891030955 number of times on 05.09.2013 and even prior to the said date.

48. Mere calling and receiving calls from mobile No. 9891292973 does not prove the fact that the said mobile was used by the appellant, when PW 31 has categorically denied that the appellant was using the said mobile number. It is pertinent to mention here that PW 14 Ahmed Parvej had deposed that one Dharambir had given the questioned phone number i.e. 9891292973 to call him in case his phone is not reachable. So it was incumbent upon the prosecution to have examined Dharambir which has not been done by the prosecution for the reasons best known to it and had he been examined, it would have become clear as to how this number reached in the hands of the appellant. But the IO failed to examine Dharambir as a witness in this case and non examination of Dharambir leaves a missing link as far as the fact of the appellant using mobile number 9891292973 is concerned. It was upon the prosecution to prove by way of positive evidence that it was the appellant, and none else, who was using the mobile phone No. 9891292973. In this regard reliance can be placed upon **“Rohit Dhingra & Anr. Vs. State of NCT”**, (2012), Criminal Appeal No. 926/2011 in which it has been held that :

“The inference drawn on the basis of mobile tower details in the documents (Ex. PW 16/C and Ex. PW 16/D) could not have been held against them. That someone could have been present in the vicinity of scene of crime is a matter of probability. However, for the Court to conclude that he was actually present, the prosecution had to establish- by

application of the only relevant rule of evidence in this case i.e. that only the accused and one else was present at the scene of crime. **In other words, in the absence of positive material proving beyond reasonable doubt that the accused was at the scene of occurrence, the Trial Court could not have concluded that the appellants were so present in this case and then shifted the burden (not merely the onus) of proving that they were not at that place at the time when offence was committed”.**

49. While acquitting Neeraj and Arjun who were projected as co-accused of the appellant, the Trial Court acquitted them holding that simply their presence in the vicinity of the crime scene on the basis of their mobile location cannot make them culpable in the crime. Similar analogy applies to the appellant as well-rather with more force, as compared to co-accused Neeraj and Arjun who have been acquitted by the Trial Court.

50. In the case of appellant Kamal, the prosecution has not been able to prove as to how the number 9891292973 came in the hands of the appellant which he was allegedly using. It is the cardinal principle of law that the prosecution has to stand on its own legs, and cannot draw benefit from the deficiency of the defence. Having said that, it was for the prosecution to prove by way of positive evidence that it was the appellant and no one else, who was using this mobile number i.e. 9891292973.

51. According to the prosecution, the appellant had motive to kill Kapil as he was involved in the murder of his brother Monti, and in order to take revenge the appellant fired on deceased Kapil. PW 41 IO of this case has stated that FIR U/s 365 IPC has been registered but except this nothing has been brought on record to suggest that deceased Kapil was named in the said

FIR or that any kind of role was assigned to deceased Kapil in the said FIR wherein, according to the prosecution, brother of the appellant was murdered. The Ld. Trial Court while coming to the conclusion that the appellant had the motive to kill Kapil has relied upon the testimony of PW 12 Balraj but, as already observed hereinabove, PW 12 has not supported the case of the prosecution. The prosecution has also failed to prove on record that it was the appellant who had fired upon Kapil, therefore, coupled with the facts that the prosecution has not brought on record sufficient material to prove on record that the appellant has a motive to eliminate Kapil, therefore, in our opinion, the prosecution has failed to prove that the appellant had any motive to kill Kapil.

52. We have discarded the testimonies of the eye witnesses and have reached to the conclusion that they are not reliable witnesses, therefore, we have looked into as to whether the prosecution has been able to bring on record other circumstances so as to reach to the conclusion that it was the accused, and none else, who has committed the crime and whether the circumstances so brought on record by the prosecution satisfy the test as laid down in the judgment *“Sharad Birdhichand Sarda Vs. State of Maharashtra”, (1984) 4 SCC 116.*

53. As far as the judgment *“Paramjit Singh @ Pamma Vs. State of Uttarakhand*, Crl. Appeal No. 1699/2007 relied upon by the Ld. APP for the state is concerned, there is no dispute with regard to the propositions of law laid down in the said judgment. We have perused the said judgment but the same is not applicable to the facts and circumstances of the present case, as each criminal case revolves around its own peculiar facts and circumstances.

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54. In our opinion, the prosecution has failed to prove even by way of circumstantial evidence that it was the appellant, and none else, who has committed the crime as the prosecution has failed to prove the following:

- (a) that it was the appellant and none else who has fired upon deceased Kapil;
- (b) recoveries at the instance of the appellant;
- (c) motive for the crime in question;
- (d) the prosecution has further failed to prove that it was the appellant who was using mobile No. 9891292973;
- (e) the prosecution has further failed to connect the gun allegedly recovered at the instance of the appellant with the crime;
- (f) the prosecution has also failed to prove that the alleged motorcycle bearing No. DL 3S BS 7176 was used by the appellant while escaping from the scene of crime.

Therefore, the prosecution has failed to bring this case within the purview of 5 golden principles as laid by the judgment *“Sharad Birdhichand Sarda Vs. State of Maharashtra”, (1984) 4 SCC 116.*

55. As a result of the above discussion, the appeal is allowed. The impugned judgment of conviction and order of sentence qua the appellant are quashed and set aside. The appellant is acquitted for the offence punishable under Section 302 IPC and is directed to be released forthwith, unless required to be detained in any other case. The appellant shall fulfill the requirements of Section 437-A of the Cr.P.C. at the earliest.

56. The appeal is disposed of. Trial court record be sent back forthwith alongwith a certified copy of this judgment.

RAJNISH BHATNAGAR, J

VIPIN SANGHI, J

SEPTEMBER 15, 2020

Sumant

