

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

% Reserved on: 22nd February, 2023
Decided on: 16th March, 2023

+ **CRL.A. 1107/2018**

ANIL @ BAHUWA @ HAKLA Appellant

Represented by: Mr. Adit S. Pujari, Ms. Aparajita Sinha & Mr. Zeeshan Thomas, Advocates.

versus

STATE Respondent

Represented by: Mr. Laksh Khanna, APP for the State with Insp. Ashutosh Kumar, P.S. Aman Vihar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By this appeal, the appellant challenges the judgment of the learned Trial Court dated 06th July, 2018 whereby the appellant was held guilty for murder of one Ghan Shyam Prasad ("deceased"); and also the order on sentence dated 09th July, 2018, whereby the appellant was directed to undergo rigorous imprisonment for life alongwith fine of ₹50,000/- in default whereof, simple imprisonment for 6 months, for offence punishable under Section 302 of the Indian Penal Code, 1860 ("IPC"), and also for rigorous imprisonment for 5 years alongwith fine of ₹20,000/- in default

whereof, simple imprisonment for 2 months for offence punishable under Section 27 of the Arms Act, 1959.

2. Briefly, the prosecution case is that on the intervening night of 11th-12th November, 2015, the deceased alongwith Vijay (PW-3), Mritunjay (PW-5), and Asha Ram (PW-6) was gambling in front of H.No. D-6, Chowk CC Road, Parvesh Nagar, Mubarakpur, Delhi. The appellant came there on a black Pulsar motorcycle and threatened to steal their money and further threatened that if anyone opposed him, he would shoot that person. The deceased objected to this behavior of the appellant on which, the appellant took out his pistol and shot the deceased on his left side temple region, after which the deceased collapsed. Other people present with the deceased fled away due to fear. Information was given to the police by one Sanjay Jamulkar (PW-1), on which ASI Naresh Kumar (PW-22) along with Ct. Niranjan reached the spot at about 1.50 AM and on reaching the spot, it was found that the injured had been taken to the hospital and blood was lying at the spot. ASI Naresh went to SGM Hospital, where the deceased was declared "brought dead". ASI Naresh prepared the *rukka* (Ex.PW-22/D) on which FIR No.1412/2015 dated 12th November, 2015 under Section 302 IPC and Sections 25/27 Arms Act (Ex.PW-11/A) was registered at PS Aman Vihar.

3. Dr.Anurag Thapar (PW-21) at the SGM Hospital conducted the post-mortem examination on the dead body of the deceased on 12th November, 2015 and tendered his report (Ex.PW-21/A). The report noted:

"External examination (injuries etc.):

1. *Firearm entry wound, oval shaped, 0.7 x 0.7 cm in diameter over left side of face, 4 cm in front of ear and 4 cm below the outer angle of left eye surrounded by*

abrasion collar and grease collar seen around the wound margin. On exploration, injury track passing through underlying skin, s/c tissues, muscles and fracturing left temporal bone, lacerating left and right temporoparietal lobes and bullet found embedded in right parieto temporal bone. Injury track is running upwards from left to right side with extensive blood extravasation along with track.

... ..

Head:

- *Scalp: Subscalp bruising in B/L temporoparietal region.*
- *Skull: Fracture of left temporal bone.*
- *Brain: Diffuse thin film of subdural hemorrhage over B/L temporoparietal region.*

Time since death: *apx 18 hours.*

Opinion: *Cause of death is shock as a result of head injury due to rifled fire-armed weapon. All injuries are ante-mortem in nature.”*

4. After registration of FIR, investigation was entrusted to SHO/Insp. Rajender Prasad (PW-23). On receipt of secret information, appellant was arrested on 13th November, 2015 from T-point, Mubarakpur Majri Road and Rama Vihar Road at about 5.30 PM (Ex.PW-23/B) and his disclosure statement (Mark PW-23/A) was also recorded. Thereafter, upon completion of investigation, charge-sheet was filed and the appellant was charged for offences punishable under Section 302 IPC for murder of the deceased, under Section 201 IPC for disappearance of firearm and also under Section 27 of the Arms Act. To prove its case, the prosecution examined 25 witnesses.

5. Learned counsel for the appellant assailing the impugned judgment contends that the eye-witnesses in the present case i.e. PW-3, PW-5 and PW-6, are unreliable as their statements are inconsistent and contradictory

to the case of the prosecution. It is contended that these eye-witnesses, despite being closely associated with the deceased, neither informed the family nor the police about the incident until their statement was recorded after about 14 hours of the incident. Further, despite being present at the mortuary after the incident, the eye-witnesses did not disclose about the incident to the police, and this unnatural behavior of the eye-witnesses dents the prosecution story at its roots, for which reliance was placed on the decisions reported as (2008) 16 SCC 319 State of Tamil Nadu vs. Zubair @ Mohamed Zubair and (2003) 11 SCC 223 Joseph @ Jose vs. State of Kerala. It was further submitted that even otherwise, testimonies of the eye-witnesses PW-3 and PW-6 do not inspire confidence as they were detained in police custody for about two to three days after the incident. It was further contended that the police did not bring on record the CDR of the appellant to ascertain if the appellant was in fact present in the town at the time of incident. As per the case of the prosecution, the appellant came to the place of incident on a black Pulsar motorcycle which he had borrowed from his friend Manjoor (PW-10), however, PW-10 deposed that he had not given his motorcycle to the appellant on the day of incident. It was also the case of prosecution that the appellant was in possession of the said motorcycle on the day of arrest i.e. 13th November, 2015 however, as per the testimony of PW-10, the police came to his residence and seized the said motorcycle from him. It was further pointed out by learned counsel for the appellant that soon after receiving the information at about 1.30 AM on 12th November, 2015, the IO (PW-23) reached the spot and after inspection of the crime scene went to the mortuary, and despite being in close contact with the eye-witnesses at the crime scene as well as at the mortuary, the IO

continued to be unaware about the existence of any eye-witnesses to the incident till about 3.00 PM on 12th November, 2015. PW-3 and PW-6 were apprehended later in the day and were kept in police station, which shows that the police coerced these two witnesses to concoct a story against the appellant.

6. Learned counsel for the appellant also contended that as per the prosecution story as mentioned in the charge-sheet, the incident was first disclosed by one Raju, who according to PW-3 was also an eye-witness, and who talked about the incident with one Satish. Thereafter, the said Satish told Sanjay (PW-1) about the incident, who in turn, called the police. Despite the crucial role played by Raju and Satish, their statement was neither recorded during investigation nor during trial. It was further pointed out that as per the case of the prosecution, the appellant had borrowed the alleged weapon of offence from one Sher Khan, from whom later the weapon of offence was recovered. However, no document pertaining to the recovery of said firearm was brought on record despite which the Investigating Officer sent the said firearm to ballistics. It was submitted that due to such procedural illegality, the FSL reports (Ex.PW-25/B, C and D) cannot be read against the appellant. It was also contended that the wife of the deceased Chinta Devi (PW-18) constantly requested the police to investigate the role of Sonu Dabas and his brother Chintu Dabas as the mastermind of the murder of her husband for which an application under Section 319 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") was also filed, however, no action on the said version of the wife of the deceased was taken, which shows a prejudicial and motivated act of the police against the appellant. It was, therefore, contended that in light of the discrepancies in

the version of material witnesses including the eye-witnesses, and the facts as aforesaid, the present appeal be allowed and the impugned judgment be set aside.

7. On the other hand, learned APP for the State submitted that the prosecution has been able to successfully establish its case against the appellant and after proper appreciation of the evidences, the learned Trial Court has rightly convicted and sentenced the appellant and, therefore, the present appeal be dismissed. To buttress his contention, learned APP relied upon the following facts proved by the prosecution:

- i. From the testimony of the eye-witnesses Vijay Singh (PW-3), Mritunjay Pandit (PW-5) and Asha Ram (PW-6), it is evident that on the intervening night of 11th and 12th November, 2015, all these three witnesses along with the deceased were gambling, when the appellant came at the spot, threatened to snatch the gambled money and on objection by the deceased, the appellant took out a pistol and shot the deceased on his temple region from a point-blank range. This version of the eye-witnesses is corroborated by the post-mortem report (Ex.PW-21/A).
- ii. Sanjay Jamulkar (PW-1) deposed that his neighbor Satish informed him about the incident on which he informed the wife of the deceased and the police. This fact was also corroborated from the testimony of Chinta Devi (PW-18).
- iii. The scene of crime and the recoveries thereto were duly proved by the crime team report, as per which, one empty cartridge, two live cartridges with “KF 7.65” written on it, one green slippers and

Ritz 555 playing cards were recovered from the spot (Ex.PW-22/B).

- iv. As per the MLC of the deceased (Ex.PW-7/A), the deceased was declared “brought dead” with an alleged history of gunshot injury, and as per the post-mortem report (PW-21/A), cause of death was opined to be shock, as a result of head injury due to rifled firearm which was sufficient to cause death.
- v. The appellant was arrested on 13th November, 2015 at about 5.30 PM (Ex.PW-23/B) from T-point, Mubarakpur Majri Road and Rama Vihar Road on the basis of a secret information. As per the disclosure statement of the appellant (Ex.PW-23/A), the appellant took the weapon of offence from his friend Sher Khan and after using the same, the pistol was returned back to Sher Khan. This pistol was later recovered and seized from Sher Khan vide Register Entry-Pistol (Ex.PW-8/E), which records the seizure of the pistol from Sher Khan.
- vi. As per the forensic evidence, the pistol recovered (Ex.F1) was found in a working order. The characteristics of the fire pin marks and the breech face marks present on the recovered empty cartridge (Ex.EC1) was found identical with the test fired cartridges (Ex.TC1 and Ex.TC2). The recovered empty cartridge case was also found to have been fired from the recovered pistol. The striation marks on the bullet recovered from the skull of the deceased (Ex.EB1) and on the test fired bullets (Ex.TB1 & TB2) were found identical.

- vii. In his statement under Section 313 Cr.P.C., the appellant took a false defence of alibi by stating that on 11th November, 2015 at about 4.00 PM he had gone to Rohtak with a friend of Manjoor, Monti. However, PW-10 was silent on this aspect and did not support the defence of the appellant. The appellant did not also examine any witness to substantiate his alibi. Therefore, on this false plea of alibi, an adverse inference must be drawn against the appellant for which reliance was placed on the decision in (2012) 13 SCC 213 Sahabuddin vs. State of Assam.
- viii. When the Investigating Officer (PW-23) reached the house of the appellant, the appellant was found to be absconding and mother of the appellant told the IO that the appellant had not come back to the house for the last two days. Even otherwise, the appellant failed to disclose his whereabouts for the relevant time, till his arrest on 13th November, 2015, for which an adverse inference must be drawn against the appellant and in this regard, reliance was placed on the decision in (2013) 9 SCC 778 Sahib Hussain vs. State of Rajasthan.
8. Qua the contention put forth by the learned counsel for the appellant that the eye-witnesses to the incident neither informed the family members nor the police, learned APP for the State submitted that the same is not a ground to doubt the testimony of the witnesses as every person acts differently in such situation. In this regard reliance was placed on the decision in (2009) 17 SCC 208 Abuthagir & Ors. vs. State Rep. by Inspector of Police, Madurai. Qua the contention of non-examination of Satish and Raju, it was contended by learned APP that at best the same can be seen as a

lapse on the part of the police, but cannot be held to be fatal to the case of the prosecution and for this reliance was placed on the decision in (2010) 10 SCC 374 Sambu Dass vs. State of Assam. It was further submitted by learned APP that the register entry of the Pistol (Ex.PW-8/E) was a document which clearly proves the seizure of the pistol from Sher Khan and is contrary to the contention on behalf of the appellant that there is no document to prove the recovery/seizure of the pistol.

9. Having heard learned counsel for both the parties at length and perusing the record, the following evidence emerges.

10. Vijay Singh (PW-3) stated that on the night of Diwali in 2015, on the 11th day of the month, 4-5 persons including himself were playing cards at Parvesh Nagar, near Chowk and at about 12.45 AM, the appellant came on a motorcycle and threatened that he would snatch the gambling money from them on which the deceased, who was also playing cards with them, objected, at which the appellant took out a pistol and shot the deceased on his temple region. All of them got scared and ran away. He further stated that he told these facts to the police on the evening of 12th November, 2015. He also stated that the appellant was dead drunk at that time. In his cross-examination, he stated that he did not inform the police about the incident and that Raju had informed one Satish and Satish then informed others about the incident. He also stated that he did not go to the house of the deceased to inform his family members about the incident. He further stated that on next morning, he went to the house of deceased after receiving information about his death from Raju and had thereafter also gone to SGM Hospital mortuary. He stated that he remained in the police station for about 2-3 days and nights.

11. Mritunjay Pandit @ Sonu (PW-5) deposed that on the intervening night of 11th and 12th November, 2015, he along with Vijay, Asha Ram and deceased was playing cards at Chowk at Parvesh Nagar, when the appellant came there on a black colour Pulsar motorcycle and threatened that he would snatch the gambling money and also that if anyone opposes him, he would shoot that person. On this, deceased asked the appellant how would he shoot, after which, the appellant took out a pistol and shot the deceased on the left side temple region. Deceased collapsed on the spot and he along with other persons fled away due to fear. In his cross-examination, he stated that he did not inform about the incident to anyone except his wife. He stated that he had gone to the mortuary but did not give the details about the incident to the police.

12. Asha Ram (PW-6) deposed that on the Diwali night last year, he along with Vijay, deceased and Sunil @ Sonu was playing cards at the Chowk. At about 11.00 PM, the appellant, who was drunk, came at the spot and started abusing them. Appellant asked them not to play “jua” or he would kill them. The deceased told the appellant not to abuse on which the appellant took out a pistol and shot the deceased on his left temple region and thereafter, the appellant stated that if anyone dared to speak anything, he would kill that person also. In his cross-examination, he stated that after the incident, he fled towards the house. On the next day he went to the house of Ghan Shyam, when his body was brought to the house after post-mortem examination. He stated to have not gone to the mortuary at the time of post-mortem. He also stated that his statement was recorded by the police after 2-3 days of the incident.

13. Sanjay Jamulkar (PW-1) deposed that on the intervening night of 11th and 12th November, 2015 at about 1.00 AM when he was sleeping, his neighbor Satish came to his house and informed that someone had shot the deceased. He made a call on the mobile number of the deceased which was answered by the deceased's wife and he informed her about the incident. Thereafter, he made a call to the police at number 100.

14. Manjoor (PW-10) deposed that he used to drive his Gramin Seva Vehicle i.e. Tata ACE No.DL 2W 3933 on Nangloi Mubarakpur route and he stopped plying on this route approximately 6-7 days prior to Diwali in 2015. He was the owner of motorcycle No.DL 4S ND 3262 and that the police came to his house and took the same away. Thereafter, he was declared hostile as not disclosing the complete facts. In his cross-examination, he stated that whenever there was any requirement, the accused would borrow his motorcycle, however, he never took the same for overnight. He further stated that the appellant did not take the motorcycle on the night of Diwali.

15. Chinta Devi (PW-18) who was the wife of the deceased deposed that on 11th November, 2015 at about 1.15 AM she received a call from Sanjay on the mobile of her husband which her husband had left at the house that her husband had been shot. Thereafter, she went to the Chowk with her children and on her way, she met one Sunil Dabas @ Sonu who told her that he had taken his revenge. On reaching the Chowk, she saw her husband lying in a seriously injured condition and on asking she found that Anil Hakla had shot the deceased. Thereafter, her son brought the car from the house and took the deceased to the hospital, where he was declared "brought dead."

16. ASI Ram Kumar (PW-14), in-charge of the mobile crime team reached the spot i.e. opposite H. No.D-6, at about 2.30 AM on receipt of DD No.6PP dated 12th November, 2015. At the spot, he saw blood spilled near the intersection, one empty cartridge case lying at a distance of about 4 feet from the electricity pole No.513-28/1/2, one green colour slipper lying at a distance of 10 ft., one live cartridge lying along with the slipper and another live cartridge was found lying in the street over the cover of the drain. One empty box of playing cards was also lying at a short distance, besides two cards. Photographs of the spot were taken and inspection was concluded by 3.30 AM after which he prepared and submitted his report (Ex.PW-14/A).

17. IO/Insp. Rajender Prasad (PW-23) deposed that on the intervening night of 11th and 12th November, 2015 an information was received that a person had been shot in Parvesh Nagar area, upon which he reached the spot where he met ASI Naresh Kumar and Ct. Niranjana. At the spot it was found that the deceased had been taken to the SGM Hospital and the crime team was summoned at the spot. No eye-witness was available at the spot or at the hospital. From the hospital it came to know that the deceased was declared brought dead after which ASI Naresh Kumar prepared the *rukka* (Ex./PW-22/D) on which FIR was got registered. He prepared the site plan (Ex.PW-22/E). On the same day, body was sent for post-mortem examination and was identified by Sandeep Kumar and Mahesh Kumar, the son and brother of the deceased respectively vide memos Ex.PW-4/A and Ex.PW-2/A. After the post-mortem examination, the dead body was handed over to the son of the deceased. After thorough interrogation and investigation, the three eye-witnesses were found out and their statements were recorded, who revealed the name of the appellant as the assailant.

Thereafter, IO went to the house of the appellant from where he was found absconding. Thereafter, on 13th November, 2015, on a secret information, the appellant was arrested from T-point, Mubarakpur Majri Road and Rama Vihar Road at about 5.30 PM. He was arrested vide arrest memo (Ex.PW-23/B) and his disclosure statement (Mark 23/A) was recorded. From the said disclosure statement it was found that the appellant had taken the country made pistol from his friend Sher Khan and despite repeated attempts, Sher Khan could not be found. Thereafter, charge-sheet was prepared and submitted in the Court. In his cross-examination he stated that he met Asha Ram for the first time after the post-mortem and at that time Asha Ram did not tell him that he was a spot witness and it was only when he was brought to the police station for investigation that this fact was revealed by Asha Ram. He further stated that the three eye-witnesses did not come to the police station on their own, rather the police reached them. He further stated that he was not able to contact any eye-witness till 3.00 PM on 12th November, 2015.

18. In his statement under Section 313 Cr.P.C., the appellant denied his presence at the spot at the time of incident. He stated that on 11th November, 2015 at about 4.00 PM, he along with wife of Manjoor, namely Monti (later said that Monti was not the wife but a friend of Manjoor) went to Rohtak in a Santro car to deliver some goods. He further stated that he used to take the motorcycle of Manjoor whenever he needed. He further stated that he neither made any disclosure statement to the police nor obtained any country made pistol from Sher Khan and stated that he was innocent and was falsely implicated in the present case. He stated that he was lifted by the police from his house.

19. The thrust of the prosecution case is the testimonies of three eye-witnesses i.e. PW-3, PW-5 and PW-6, which if found cogent and credible, would be sufficient to establish the guilt of the appellant beyond reasonable doubt. From the testimony of these three witnesses as also of the IO/Insp. Rajender Prasad (PW-23), it is evident that two out of the three eye witnesses i.e. PW-3 & PW-5 were present at the hospital at the time when the IO was in the hospital, when the body was sent for post-mortem examination. Although as per the record, the statement of the three eye witnesses under Section 161 CrPC is dated 13th November 2013, however, PW-3 and PW-6 had categorically stated during their examination in chief that they were in police custody for about 2 - 3 days before their statements was recorded and therefore, it cannot be safely said that the statements of the eye witnesses were recorded by IO soon after the incident.

20. It is settled law that conviction of an accused can be based on the sole testimony of an eye-witness, however, if such testimony is not cogent or credible, corroboration on material particulars should be insisted upon by the Court. In the present case, as noted above, the statements of the eye witnesses appeared to have been recorded belatedly and after detaining two of them in police station, therefore, in view of this belated disclosure of being eye-witnesses, version of these two witnesses cannot be accepted as it is and conviction cannot be based on the sole testimonies of these witnesses in the absence of corroboration.

21. Further, as regards the recovery of the weapon of offence i.e. the pistol, the case of the prosecution has been that the said weapon was recovered from one Sher Khan from whom the appellant had allegedly borrowed the pistol and after using the same, returned it back. It would be

pertinent to refer to the judgment of the Hon'ble Supreme Court in (1983) 2 SCC 305 State of Uttar Pradesh vs. Jageshwar & Ors., wherein it was held:

“6. The gun, Ex. 23, is alleged to have been recovered in pursuance of a statement made by accused Durga. The evidence of the Ballistic expert, Shariq Alvi, shows that the empty shells which were found at the spot of occurrence were fired from that gun. This would be very good evidence to connect an accused with a crime but, the police did not recover the gun from Durga. Nor, indeed, did he make any statement that he had concealed it at a place which he would point out. The discoveries under Section 27 of the Evidence Act are not of guns and daggers used in a crime. Guns and daggers have an ancient origin and one does not have to hunt for an accused to discover them. The discovery, mostly and really, is as regards the authorship of concealment. Conduct and concealment are incriminating circumstances and their discovery becomes relevant and admissible under Section 27 of the Evidence Act. Here, we are left with the position that a gun was recovered from a person called Sunder Ahir and the shells or cartridges found at the scene of offence were fired from that gun. Inexplicably, Sunder has not been examined in the case. His evidence could have shown, what is alleged by the prosecution, that Durga had borrowed his gun at about the material time. Sunder, not having been a witness in the case, there is no legal evidence on the record to connect Durga with the gun.”

22. In the present case, the only piece of evidence qua the recovery of the pistol is the statement of IO/Insp. Rajender Prasad who stated that one Sher Khan, who was earlier absconding, was arrested from whom a pistol was also recovered. However, the prosecution did not bring on record any document or any witness to prove the recovery of the said pistol even from Sher Khan. Further, the pistol was neither recovered from the appellant himself nor at his instance. Furthermore, Sher Khan was neither examined as a witness nor his statement as a co-accused was recorded in the present

case. Therefore, there is no evidence to connect the appellant with the alleged weapon and thus, it would be beyond the scope of Section 27 of the Indian Evidence Act, 1872 to read such evidence against the appellant.

23. As per the FSL report (Ex.PW-25/A) dated 28th June, 2016, the two live cartridges (marked as Ex.A-1 and Ex.A-2) recovered from the spot were test fired during examination through a pistol of 7.65mm caliber (marked as Ex.F-1). As per FSL report (Ex.PW-25/B) dated 28th September, 2016, another 7.65mm cartridge is marked as Ex.A-1 which is found to be live and is test fired through an improvised pistol of 7.65mm bore (Ex.F-1). It has been the case of prosecution that two live cartridges were found at the scene of crime, and it remains unclear as to from where did the third live cartridge (marked as Ex.A-1 in FSL report Ex.PW-25/B dated 28th September, 2016) come, and otherwise, when Ex.A-1 was already test fired on 28th June, 2016, how could it have been test fired again on 28th September, 2016. Thus, even the FSL reports adduced by the prosecution, fails to provide any corroboration and does not aid the prosecution.

24. In view of the fact that the presence of the eye-witnesses at the spot is not convincing, this Court finds it difficult to rely upon the sole testimony of these eye-witnesses. Further, as discussed above, there is no other evidence on record which corroborates the version of the eye-witnesses. Accordingly, in the absence of any other corroborative evidence proving the guilt of the appellant, the impugned judgment of conviction and order on sentence is set aside.

25. Appeal is accordingly disposed of. Appellant is directed to be released forthwith if not required in any other case.

26. Judgment be uploaded on the website of this Court and copy of the same be sent to the Superintendent, Tihar Jail for updation of record and intimation to the appellant.

(MUKTA GUPTA)
JUDGE

(POONAM A. BAMBA)
JUDGE

MARCH 16, 2023/‘vn’

