

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

% Reserved on: 9th January, 2023.
Decided on: 19th April, 2023

+ **CRL.A. 145/2019**

RAHUL Appellant
 Represented by: Mr. Varun Tyagi, Mr. Bharat Gupta
 & Mr. Vishesh Chauhan, Advocates.

versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent
 Represented by: Ms. Shubhi Gupta, APP for State
 with Insp. Tej Bhan, SHO, PS
 Kalyanpuri.

+ **CRL.A. 154/2019**

AMIT KUMAR Appellant
 Represented by: Mr. Ajay Verma with Mr. Gaurav
 Bhattacharya, Advocates.

versus

STATE Respondent
 Represented by: Ms. Shubhi Gupta, APP for State
 with Insp. Tej Bhan, SHO, PS
 Kalyanpuri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By these appeals, the appellants challenge the common judgment of the learned Trial Court dated 30th November, 2018 whereby both the appellants Rahul and Amit Kumar @ Sher Khan were held guilty for murder of Ajay son of Ved Prakash (“deceased”); and also the order on sentence

dated 30th November, 2018 whereby the appellants were directed to undergo imprisonment for life alongwith fine of ₹5,000/- each in default whereof, rigorous imprisonment for six months for offence punishable under Sections 302/34 of the Indian Penal Code (“IPC”). The appellants were acquitted for charge under Section 201/34 IPC.

2. In nutshell, brief facts of the case are that on 10th October, 2013, at about 2:30 PM, the deceased alongwith his friend Ajay son of Bihari Lal (PW-12) reached in front of H. No. 17/230, Kalyanpuri when suddenly appellant Rahul stopped them and started abusing them. When the deceased tried to resist, appellant Rahul took out a knife from his pant and stabbed the deceased on his right thigh. Ajay (PW-12) made a call to the police at number 100 and on reaching the spot, the police lifted deceased Ajay and took him to LBS Hospital. Statement of deceased injured at that time, Ajay was recorded by ASI Shiv Murti Yadav (PW-7) and *rukka* (Ex. PW-7/A) was prepared which was handed over to Ct. Jitender for getting the FIR registered, and accordingly, FIR No.592/2013 dated 10th October, 2013 under Section 307 IPC at P.S. Kalyanpuri (Ex. PW-1/A) was registered.

3. Dr. Kashi prepared the MLC No.17505/13 (Ex. PW-8/A) and as per the MLC, Ajay was *conscious and oriented (alcohol +ve) and an incised wound on right thigh 1.5 x 0.5 cm over anterior lateral region and an abrasion on right thigh of size 5 x 1 cm* was found in examination and the deceased was referred to SR surgery.

4. On the same day at about 11:20 PM, the deceased died at the hospital. Dr. Md. Sarfraz who was working as SR Surgery at the LBS prepared the death summary (Ex. PW-13/A) dated 10th October, 2013 of Ajay son of Ved Prakash. It was noted in the death summary that “*case of 29 years old male*

came to casualty at 3 PM with h/o stabbed injury on Rt. thigh. On presentation patient was vitally stable and fully conscious with h/o smell of alcohol at about 5:10 PM patient suddenly collapsed then CPR given and patient shift to ICU when patient could not revive and expired at."

5. The post mortem examination was conducted on 11th October, 2013 by Dr. Vinay Kumar Singh (PW-9), who tendered his report (Ex. PW-9/A) and opined:

"EXTERNAL EXAMINATION:

- i. *Incised wound single edged sharp, sutured 2.5 x 0.6 x 7 cm present on front at rt. Thigh, 53cm above heel, 6.8cm above right knee, obliquely placed, lower end acute directed inwards, upwards, medial to lateral on dissection femoral vein incised anteriorly .3 cm, haemorrhage in surrounding tissues.*
- ii. *Abrasion 1.8 x 1.5cm on lt. side of chest 5cm below medial end of clavicle.*
- iii. *Abrasion 3 x 1cm on rt. artery shoulder tip*

The final opinion was kept pending by Dr. Vinay for want of chemical analysis report and on receipt of which, he tendered his final opinion regarding cause of death (Ex. PW-9/B) as per which, the cause of death was opined to be *"hemorrhagic shock consequent upon incised wound to thigh caused by single edged sharp cutting weapon/knife, all injuries are antemortem in nature, recent in duration. Injury No.1 is sufficient to cause death in ordinary course of nature and deceased has consumed ethyl alcohol 367 mg/ 100 ml at blood prior to his death."*

6. Pursuant to death of the deceased, the offence under Section 307 IPC was converted to Section 302 IPC and the investigation of the case was handed over to CM Meena (PW-28). Dead body of the deceased was identified by Suresh Pal (Ex. PW-28/A) and Rohit (Ex. PW-28/B) and after the postmortem examination, the dead body was handed over to Rohit (Ex. PW-28/F). On 11th October, 2013, SI Sandeep Kumar (PW-23) alongwith his team went to Bulandshahar, U.P. and reached P.S. Gulawati, where appellant Rahul was arrested from his house at village Archana vide arrest memo Ex. PW-17/A and his disclosure statement (Ex. PW-17/A2) was recorded, after which, they all returned to P.S. Kalyanpuri at about 6:50 PM. Appellant Rahul was first produced before the SHO and thereafter, before the I.O./ Insp. CM Meena. Appellant Rahul led the police to 17/96, Kalyanpuri from where appellant Amit @ Sher Khan was apprehended and arrested vide arrest memo Ex. PW-17/B and the disclosure statement (Ex. PW-17/B2) of appellant Amit was also recorded. After completion of investigation, charge-sheet was filed and the appellants were charged for offence punishable under Sections 302/34 IPC and Sections 201/34 IPC. To prove its case, the prosecution examined 28 witnesses.

7. The appellant Rahul assails the impugned judgment on the ground that the dying declaration made by the deceased to ASI Shiv Murti (PW-7) (“first dying declaration”) is not reliable as the same was recorded by the police officer without the permission/ report by the doctor, despite being recorded at the LBS Hospital, and therefore, such dying declaration made to the investigating officer, who is interested in the success of the case cannot be relied upon and in this regard reliance was placed on the decision reported as (1976) 3 SCC 104 Munnu Raja & Ors. v. State of Madhya

Pradesh and MANU/DE/1005/2009 Usha Rani vs State (Delhi Administration). Further, as per the MLC (Ex.PW-8/A) and the post mortem report (Ex.PW-9/A), the deceased was heavily under the influence of alcohol. Dr. Vinay Kumar (PW-9) stated that the accused would not be oriented and rather would be considered to be heavily intoxicated. Thus, it cannot be assumed that the deceased was in a fit state of mind when he made the statement to ASI Shiv Murti. It was further contended that the second dying declaration made by the deceased to Rohit (PW-3) is also not reliable as Rohit is not a reliable witness as his testimony suffers from various anomalies and contradictions. Allegedly, the first dying declaration was recorded by ASI Shiv Murti at 4.15 PM after which, the condition of the deceased started deteriorating and even as per the version of Rohit, the deceased was shifted to ICU around 4-5 PM, and therefore, it is doubtful as to how the deceased despite being in a critical condition made another dying declaration to Rohit. Furthermore, as per the second dying declaration, it was disclosed that the appellant had inflicted knife blow on the deceased on the issue of denial of ₹20/- by the deceased and the name of second appellant was also disclosed, however, these facts were not disclosed in the first dying declaration is doubtful even on this count. It was contended that even if the deceased was in an oriented condition, he did not disclose about the appellant to HC Dushyant (PW-20) who was the first police man to arrive, or to the doctor who prepared the MLC.

8. It was further contended on behalf of appellant Rahul that despite Ajay (PW-12) accompanying the deceased at the time of incident, he was not made a part of the investigation. Ajay (PW-12) neither in his call made at no. 100, nor in his deposition before the court named the appellant to be

the assailant. It was pointed out that ASI Shiv Murti (PW-7) did not show the place of occurrence in the rough site plan (Ex.PW-7/C) prepared by him, however, despite the fact that Shiv Murti was neither an eye witness nor witnessed the scene of crime, described the 'place of occurrence' to Insp. Mahesh (PW-22) and the same accordingly, found mention in the scaled site plan (Ex.PW-22/A), which points to the fact that the Police implicated the appellant by fabricating false evidence in order to solve a blind murder mystery. It was pointed out that the appellant Rahul was arrested from his village Archana at PS Gulawati, however no explanation was provided by any of the witnesses if any efforts were made by the Police to arrest the appellant from his local residence at Delhi. It was pointed out that as per the death summary (Ex.PW-13/A) the column of time of death and place have been left blank and also that none of the doctors who had examined/treated the deceased in the hospital were examined. MLC of the deceased was prepared by Dr. Kashi, however Dr. Sachin Gupta (PW-8) appeared on his behalf who could merely identify signatures of Dr. Kashi and no explanation for non-examination of Dr. Kashi was tendered. Similarly, Dr. Mohd. Sarfraz who had prepared the death summary and the death certificate (Ex.PW-13/A and B respectively) was not examined and in his place Dr. Ranveer Singh (PW-13) was examined who could merely identify the handwriting and signatures of Dr. Sarfraz, and the non-examination of these doctors caused serious prejudice to the case of the appellant and in this regard reliance was placed on the decision reported as MANU/DE/9994/2006 State Vs. Hori Lal & Ors. It was further contended by learned counsel for the appellant Rahul that the alleged weapon of offence i.e. knife was recovered from the house of co-appellant Amit from

Amit's house underneath the bed in an open condition without any cover. No efforts to trace the finger-prints on the knife were made and despite the knife being recovered from appellant Amit on 11th October, 2013, the same was sent for FSL examination after a delay of 7 days i.e. 17th October, 2013 which raises doubts on the role of the Police and thus, the possibility of manipulation cannot be ruled out. The Police even failed to comply with the provisions under Section 154 and 157 of the Code of Criminal Procedure, 1973 (Cr.P.C.) which is another serious lapse on the part of the prosecution and raises questions on the investigation of the case. Reliance was placed on the decision cited as MANU/SC/0787/1994 Meharaj Singh & Ors. Vs. State of U.P. & Ors.

9. It was the case of the appellant that the first PCR call about the incident was made by a person at about 2.39 PM, however, the said person was never examined, as also Ct. Rohit and Const. Ravinder who shifted the deceased to the hospital along with HC Dushyant (PW-20) were not examined as witnesses. Further, that the deceased had expired at about 5.00 PM on 10th October, 2013 due to negligence of the Doctors. The Doctors did not assume one single blow caused to the deceased to be dangerous and therefore, after giving bandage the deceased was asked to go home and this fact was also stated by Ajay (PW-12), and thus, the appellant is not liable for the murder in the absence of motive or previous animosity between the appellant and deceased. In alternative, it was submitted that even if the case of the prosecution is accepted as it is, at best an offence punishable under Section 304 Part II of the IPC is made out as the appellant allegedly inflicted only a single knife blow upon the thigh of the deceased which is not a vital part of the body without any previous animosity or prior planning

and also that the weapon allegedly used was not a dangerous weapon but could be available with anyone easily and to buttress this argument, reliance was placed on the decision reported as MANU/SC/1542/2009 Gurumukh Singh v. State of Haryana and (2013) 12 SCC 110 Chenda v. State of Chattisgarh.

10. On behalf of appellant Amit it was contended that the entire case of prosecution is based on an unproved dying declaration made by the deceased to PW-7 relying upon which the learned Trial Court had convicted the appellant Amit. The dying declaration made by the deceased cannot be relied upon as the deceased was heavily intoxicated at the time of making such statement. Further, before recording the statement of the deceased, ASI Shiv Murti (PW-7) failed to take the certificate of fitness from the doctor at the LBS Hospital which is another reason as to why the alleged dying declaration cannot be relied upon. Even otherwise, there is nothing in the statement of the deceased so as to inculcate the appellant Amit. It was contended that the sole eye-witness to the entire incident was Ajay (PW-12) who did not support the case of the prosecution and stated facts contrary to the testimony of the other prosecution witnesses. It was further contended that the recovery of knife from the residence of appellant Amit cannot be relied upon as no public witness was associated to the said recovery and thus, false implication of the appellant cannot be ruled out. It was submitted by the counsel for the appellant Amit that the prosecution failed to establish that the appellant Amit shared any common intention with the appellant Rahul at time of the incident for which reliance was placed on the decisions (2001) 3 SCC 673 Suresh v. State of U.P., (2020) 4 SCC 126 Chhota Ahirwar v. State of M.P. and AIR 1945 PC 148 Mehbub Shah v. Emperor. It

was thus contended that in the light of the above said facts and circumstances of the present case, the prosecution failed to bring on record any material evidence to establish that the offence was committed by Amit, therefore the impugned judgment be set aside and Amit be acquitted.

11. Per contra, learned APP for the State contended that the impugned judgment of the learned Trial Court was based on proper appreciation of facts, circumstances and evidences of the case and therefore, be upheld and the present appeals be dismissed. To substantiate its contention, learned APP relied upon the following circumstances:

(i) That the first dying declaration was made by the deceased at LBS Hospital soon after the incident at about 3.00 PM to ASI Shiv Murti (PW-7) who in his examination-in-chief clearly stated that at the time of recording the statement of the deceased, the deceased was conscious and oriented. Even as per the MLC of the deceased (Ex.PW-8/A) the deceased was conscious and oriented and the vitals of the deceased were recorded to be stable despite being found positive for alcohol and similarly as per the death summary Ex.PW-13/A it was recorded that “*on presentation patient was vitally stable and fully conscious with history of smell of alcohol*”. Thus, it can be safely concluded that the deceased was fully conscious and oriented at the time of making of the dying declaration (Ex.PW-7/B) and in this regard reliance was placed on the decision of the Hon’ble Supreme Court in CrI.A. 608/2001 dated 27th February, 2002 Laxman v. State of Maharashtra.

(ii) Qua the second dying declaration made to Rohit (PW-3) who was the brother of the deceased, it was submitted that the presence of

Rohit (PW-3) at the hospital on 10th October, 2013 at the relevant time was clearly established by the testimonies of PW-3 himself, PW-7 and PW-12. Further, Rohit (PW-3) clearly deposed in his examination-in-chief that the deceased told him that he was stabbed by Rahul son of Jagdish and that the deceased alongwith his friend Ajay son of Bihari Lal was returning from their work at about 2:30-3:00 PM when the appellants Rahul and Amit were drinking liquor and demanded ₹20/- from the deceased, and upon refusal by the deceased, the appellant Rahul stabbed the deceased with a knife on his thigh. Thus, the said dying declaration clearly names both the appellants as also describes the incident in detail.

(iii) Arrest of both the appellants was duly proved by the testimonies of PW-17, PW-18, PW-23 and PW-28, who made consistent statements in this regard as also with respect to the recovery effected from the appellant Amit. The appellant Rahul was apprehended from his house at Village Archana, Bulandshahar, U.P. on 11th October, 2013, and at his instance appellant Amit @ Sher Khan was apprehended from his own house and Amit got recovered one knife from under the bed at his house.

(iv) As per the postmortem report (Ex. PW-9/A) as also the subsequent opinion (Ex. PW-9/B) of Dr. Vinay Kumar (PW-9), cause of death was opined to be the incised wound caused on the thigh of the deceased by a single edged sharp cutting weapon/knife, which was “*sufficient to cause death in the ordinary course of nature.*” Vide Ex. PW-9/C, it was also opined that injury on the body of the deceased was possible by the weapon produced before the doctor.

Further, blood found on the recovered knife tallied with the DNA of the deceased (FSL report Ex. 16/A). Furthermore, Parshuram Singh (PW-15) vide a FSL report (Ex. PW-15/A) opined that the cut mark on the pant of the deceased was also possible by the knife recovered.

12. Learned APP for the State contended that the injury caused by the appellant Rahul was inflicted with an intention to cause death. Dr. Vinay Kumar (PW-9) in his deposition clearly stated that the arteries running through the thigh are connected to the heart and if cut can prove to be dangerous and that the depth required to cause a dangerous injury to the artery in the thigh would not be as much as the arteries at the superficial level. Thus, when the injury caused by the deceased was inflicted on a vital part of the body by a knife with an intention to inflict the said injury knowing the seriousness of the consequence of the said injury, it can clearly be established that the appellant Rahul had clear intention to cause injury which would ultimately result in the death of the deceased. Reliance in this regard was placed on the decision in CrI. A. 645/2004 dated 18th August, 2006 Pulicherala Nagaraju @ Nagaraja Reddy v. State of A.P. and (1995) 1 SCC 326 State of Karnataka v. Vedanayagam.

13. Having heard learned counsel for the appellants as also the learned APP for the State and perusing the record, the following evidence emerges.

14. Ajay son of Bihari Lal (PW-12) stated that the deceased was known to him for about 1½ year prior to the incident as both of them used to work on daily wages. In the year 2013 before Dussehra, after working in the morning hours, he and deceased were going for lunch and on reaching the crossing of Block No.17, Kalyanpuri, he stopped at a grocery store to purchase *bidi* and deceased moved ahead. After purchasing *bidi*, he started

moving towards his house when on reaching near the Gurudwara, he heard someone saying “*kisi ko chaku lag gaya*”. Crowd had gathered near that place and he saw the deceased lying on the road with a stab injury on his thigh. He took out his shirt and tied it around the wound and made a call to the police at number 100. Police reached at the spot, lifted the deceased and took him to the LBS Hospital. He accompanied the deceased in the PCR van. The deceased was treated in the hospital after which the doctor told him to take the deceased home, however, he kept sitting in the hospital alongwith the deceased and after sometime brother of deceased reached the hospital. During the noon hours, the deceased expired in the hospital. Thereafter, he was declared hostile as he was resiling from his previous statement under Section 161 of the Code of Criminal Procedure, 1973 (“Cr.P.C.”). In his cross-examination, he failed to identify appellants Rahul and Amit in the court. He further stated that he reached the hospital at about 2:30-3:00 PM where the deceased was initially given first aid and thereafter, the deceased was made to lie on the bed outside the building of the hospital but inside the hospital premises. He stated that the deceased was not in a position to speak at that time, he remained in the hospital till 8:00-9:00 PM, however, till that time, no one from the family of the deceased reached the LBS hospital. He stated that at about 8:30-9:00 PM, family member of the deceased reached the hospital, however, the deceased did not talk to any of his family members in his presence and the deceased had already expired before the arrival of the family members.

15. Rohit (PW-3) deposed that the deceased was his brother and that on receiving the information that the deceased was admitted in the hospital by the police, he alongwith his mother and other associates reached the hospital

where he found that Ajay was bleeding from his right thigh. He was in a pool of blood and his clothes were stained in blood. He stated that the deceased informed him that he was stabbed by Rahul son of Jagdish. It was further informed that the deceased alongwith his friend Ajay son of Bihari Lal were returning from their work and at about 2:30-3:00 PM, appellant Rahul alongwith his friend Sher Khan were drinking liquor near Kali Ka Mandir and both Rahul and Sher Khan demanded ₹20/- from the deceased and on the deceased's refusal, appellant Rahul under the influence of liquor stabbed the deceased on his thigh with a knife. He stated that he changed the clothes of the deceased and the bloodstained clothes remained with the doctor. He stated that Ajay died on the same day at about 5:00 PM and he identified his body which was handed over to him. In his cross-examination, he stated that he came to know about the incident from his neighbours. One Sonu who was his cousin sister who lived in the same area came to his house at about 2.30 PM, when he was washing clothes, and informed about the incident, on which she and his mother left for the hospital in the police gypsy and he followed them on foot and reached the hospital at about 3:00 PM. He stated that he had seen the police putting his brother/deceased in a vehicle as he was on the street at about 40-50 meters from the spot. He further stated that his brother was shifted to the ICU at about 4.00-5.00 PM and his statement was recorded by the police at about 3:30-4.00 PM and that he remained at the hospital till about 11-11:30 PM. He stated that he was informed by the doctor about the death of his brother/deceased at about 11 PM. He stated that before the incident he last spoke with his brother at around 12 noon when both of them were at the home and after the incident he last spoke with his brother at about 4:45 PM

for about 2-4 minutes outside the ward of the hospital. He also stated that earlier, his brother was facing trial in 2-3 cases but those had ended in acquittal, and that his brother used to consume alcohol after which he used to blurt out wrongly and because of which, he did not have good relations with other people.

16. ASI Shiv Murti Yadav (PW-7) deposed that DD No. 30A was marked to him pursuant to which, he along with Ct. Jitender reached at H.No.17/230, Kalyan Puri and found blood lying on the road, and from the public, he found out that one person who was stabbed was taken by the PCR to LBS Hospital. Thereafter, he reached LBS Hospital and met the deceased Ajay there and recorded his statement on which *rukka* (Ex. PW-7/A) was prepared. He returned to the spot and handed over the *rukka* to Ct. Jitender for getting the FIR registered and crime team was called at the spot. He lifted blood, bloodstained concrete and earth controlled piece from the spot vide seizure memo Ex. PW-5/A & B. He then went back to the hospital where he met Rohit who was the brother of the deceased. On the same day at about 11:20 PM, he came to know that the deceased had died in the hospital and on instructions of the SHO, further investigation was handed over to Insp. CM Meena. In his cross-examination, he stated that he did not take written permission from CMO at LBS Hospital for recording the statement of the deceased. He further stated that the first time he went to the hospital, no family members of the deceased met him. He further stated that when he returned to the place of incident, no family members of the deceased met him there. He denied the suggestion that the deceased was heavily under the influence of liquor and was not in a position to make statement.

17. SI Sandeep Kumar (PW-23) stated that on 11th October, 2013, on the instructions of SHO, he alongwith Ct. Suresh, Ct. Manoj, Ct. Nemichand and Ct. Virender went to Bulandshahar, U.P. in a private Eeco car. They reached P.S. Gulawati and informed about the purpose of their visit i.e. effecting arrest of appellant Rahul. Thereafter, all the police officials reached the house of appellant Rahul at Village Archana where the appellant was arrested vide arrest memo Ex. PW-17/A and his disclosure statement Ex. PW-17/A2 was recorded. Thereafter, the appellant was first produced before the SHO after which the appellant was produced before I.O./Insp. CM Meena.

18. ACP CM Meena (PW-28) deposed that on 10th October, 2013 after 11:00 PM, upon receipt of information regarding death of the deceased from the hospital, the offence under Section 307 IPC was converted to Section 302 IPC and on the intervening night of 10th-11th October, 2013, the investigation was marked to him. He stated that the dead body was identified by Suresh Pal and Rohit (Ex. PW-28/A & B) and after the postmortem, the dead body was handed over to Rohit (Ex. PW-28F). On 11th October, 2013, SI Sandeep and Ct. Manoj and Ct. Suresh produced appellant Rahul before him and pursuant to appellant Rahul's disclosure statement, he alongwith his team was led to H.No.17/96, Kalyanpuri and on the first floor of the said house, appellant Amit @ Sher Khan was found present. Appellant Amit @ Sher Khan was apprehended and after interrogation, appellant Amit was arrested vide arrest memo Ex. PW-17/B and his disclosure statement Ex. PW-17/B2 was recorded and pursuant thereto, appellant Amit got recovered the weapon of offence i.e. knife from under the bed and the same was seized vide seizure memo Ex. PW-17/D.

The case property was thereafter deposited at the malkhana and on 17th October, 2013, the sealed exhibits were sent to FSL Rohini.

19. Dr. Vinay Kumar Singh (PW-9) conducted the post mortem examination and tendered his report (Ex.PW-9/A) as also his subsequent opinion (Ex.PW-9/B) and his opinion on the weapon of offence (Ex.PW-9/C). In his cross examination, he stated that the deceased was found to be suffering from a disease in his lungs which could have been tuberculosis or some other disease. He stated that multiple old healed scars were present all over his chest as also on his left arm. And as per the quantity of alcohol reflected in the post-mortem report would indicate that the deceased was heavily under the influence of alcohol immediately before his death. He further stated that such a person would not be oriented rather would be considered heavily intoxicated.

20. Parshuram Singh (PW-15) made a FSL report (Ex. PW-15/A) opining that the cut mark on the pant of the deceased was also possible by the knife recovered and in his cross examination he stated that the injury was possible by the recovered knife or any similar type of knife. Monika Chakravarty (PW-16) conducted DNA profiling (Ex.PW-16/A) and opined that the DNA generated from the knife was found to be similar to that of the deceased.

21. Jitendra Kumar (PW-24) conducted the chemical examination and tendered his report (Ex.PW-24/A) and opined that stomach and piece of small intestine (Ex.1A), pieces of liver, spleen and kidney (Ex.1B) and blood sample (Ex.1C) were found to contain ethyl alcohol, and the blood was found to contain 367 mg/ 100 ml ethyl alcohol.

22. In his statement under Section 313 Cr.P.C., appellant Rahul stated that he was falsely implicated in the present FIR. He stated that he was not

arrested from Bulandshahar, rather on 11th October, 2013 he was called at the Police Station kalyanpuri by Amit @ Sher Khan saying that his bike had been impounded and that he did not have money to pay for the same and on reaching the Police Station, he was falsely implicated in the present case. He stated that he was innocent.

23. Appellant Amit @ Sher Khan in his statement under Section 313 Cr.P.C. stated that on 11th October, 2013, he called appellant Rahul to P.S. Kalyanpuri on the directions of the police officials who directed him to ask Rahul to come to the Police Station saying that his bike was impounded and that he did not have money to pay. He stated that when Rahul came to the Police Station, both of them were arrested by the police and falsely implicated in the present case. He stated that he was innocent and that all the prosecution witnesses being interested witnesses, have deposed against him.

24. In the charge-sheet, case of the prosecution was based on both eyewitness account of Ajay son of Bihari Lal (PW-12) and the statements made by the deceased to ASI Shiv Murti (PW-7) and his brother Rohit (PW-3) which are required to be treated as dying declarations. As noted above, Ajay son of Bihari Lal (PW-12) though stated that on the fateful day, he was accompanying the deceased after the lunch, however, he stopped at the grocery store to purchase 'bidi' when the deceased moved ahead and then, he heard someone saying '*kisi ko chaku lag gaya*'. Thus, in his deposition, though PW-12 claimed to be present near the scene of occurrence but he stated having not witnessed as to who inflicted stab injuries on the deceased. Thus, the evidence of this witness can be relied upon only to prove the place and time of incident. Despite the ocular evidence not being proved, the prosecution as noted above, relies upon the two dying declarations. In the

dying declaration recorded by ASI Shiv Murti, based whereon, *rukka* (Ex.PW-7/A) was sent, which was duly thumb marked by deceased, it is clearly noted that when the deceased reached in front of house No. 17/230, Kalyanpuri, suddenly, Rahul stopped two of them i.e. both the Ajay, and started abusing them. When the deceased protested, Rahul took out a knife from the right side pocket and inflicted knife injury on his right thigh. This statement of the deceased on which *rukka* was sent is required to be treated as dying declaration under Section 32 of the Indian Evidence Act, for the reason, it explains the circumstance resulting in the death of the deceased. However, this statement of the deceased Ajay on which FIR was registered does not name the appellant Amit Kumar.

25. Challenge to statement of the deceased recorded by ASI Shiv Murti for being treated as dying declaration is laid primarily on the ground that the Doctor did not certify the deceased to be in a fit state to make the statement. It may be noted that as per the MLC, deceased received injury on the right thigh and thus, when this statement was recorded pursuant to which FIR was registered under Section 307 IPC, there was no imminent expectation of the death of the deceased. Be that as it may, the legal position is well settled that while recording dying declaration, though as a matter of prudence, an endorsement as to the fitness of the deceased to make the statement should be recorded by the concerned Doctor, however, what is essential is that the person recording the statement is required to ascertain whether the victim is in a fit state of mind to make the statement. As per the MLC of the deceased, the deceased was conscious and oriented and his vitals were stable. The deceased Ajay was admitted to the hospital on 10th October 2013 at around 8 p.m. and immediately thereafter, his statement was

recorded which is now required to be treated as a dying declaration as he died thereafter. It is well settled that conviction can be based only on one dying declaration if the same is cogent and convincing.

26. Constitution Bench of the Hon'ble Supreme Court in the decision reported as (2002) 6 SCC 710 Laxman Vs. State of Maharashtra held as under:

“3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication

whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

[emphasis supplied]

27. Prosecution also relied on the statement made by deceased to his brother Rohit (PW-3) who as noted above, stated that when he reached the hospital, he saw his brother Ajay bleeding from the right thigh and was in a pool of blood. Ajay told that he had been stabbed by Rahul S/o Jagdish Singh. In the said statement, it was also noted that the deceased stated to Rohit that while he was returning along with his friend Ajay S/o Bihari Lal from their work at about 2.30 – 3 p.m., Rahul and his friend Sher Khan were drinking liquor near Kali ka Mandir and demanded ₹20/- from Ajay and on refusal to give the said amount, Rahul who was under the influence

of liquor, stabbed him with knife. The only role attributed to Amit Kumar @ Sher Khan was that he demanded money and there is no role whatsoever either of exhortation or catching hold qua Amit Kumar @ Sher Khan to convict him with the aid of Section 34 IPC.

28. Further, serious challenge is laid to the veracity of the alleged dying declaration made to Rohit. It may be noted that there are contradictions in the statements of the witnesses as to when Rohit reached the hospital. In view of the serious discrepancies as to when Rohit reached the hospital, it cannot be held from the evidence on record that at that stage Ajay was in a fit condition to make statement. Thus, it would be unsafe to place reliance on the statement made by the deceased to his brother Rohit and treat the same as a dying declaration.

29. Contention of the learned counsels for the appellants that the MLCs have not been proved as the concerned Doctor has not appeared in the witness box and only Doctor who could identify the handwriting and signature have been examined, deserves to be rejected. It is well settled that a document can be proved either by the author of the document or by an expert opinion proving the handwriting on the document to be of the said author or by a witness who has been the author of the document written in the ordinary course of business, for which witnesses, in this case have been examined. The MLC (Ex.PW-8/A) has been duly proved in accordance with law. Further, as per the MLC, the deceased arrived at the hospital at 3 p.m. when he was conscious and oriented though presence of alcohol has been noted and he was brought by the ASI Shiv Murti who recorded the statement. As per the case of the prosecution, the deceased was shifted to ICU around 4-5 p.m. when his condition deteriorated. Hence, even though

the dying declaration made to Rohit by the deceased Ajay may not be so convincing, however, the statement made by the deceased to ASI Shiv Murti on which FIR was registered has been proved beyond reasonable doubt and can be safely relied upon as a dying declaration.

30. From the evidence as noted above, it is clear that no role has been attributed to Amit Kumar in the statement of the deceased made to ASI Shiv Murti and the only allegation against him as per the case of the prosecution is the recovery of the weapon of offence i.e. the knife at the instance of the appellant Amit Kumar. Recovery of knife without there being any evidence with regard to his participation in the offence for which appellant Rahul has allegedly played the role of stabbing, is not sufficient to invoke Section 34 IPC against the appellant Amit Kumar. Consequently, the impugned judgment of conviction and order on sentence qua appellant Amit Kumar is set aside.

31. As regards the appellant Rahul is concerned, learned counsel for the appellant has also contended that in alternative, at best, an offence under Section 304 Part II IPC is made out. As noted above, from the dying declaration, it is clear that there was no pre-meditation. While the deceased was going back to his house, Rahul met him on the way and on a sudden quarrel, he inflicted one single blow of knife on the thigh of the deceased. Hon'ble Supreme Court in the decision reported as (2006) 5 SCC 425 Rajinder Vs. State of Haryana, dealing with a case where the appellant (therein) was charged for murder of deceased Subhash (therein) by inflicting a fire arm wound on the right thigh of the deceased leading to his death, the Court set aside the conviction of the appellant therein under Section 302

IPC and convicted him for offence punishable under Section 304 Part-II IPC for a period of seven years.

32. In view of the fact that the offence committed by the appellant Rahul was on the spur of moment without any premeditation and one single blow on the thigh was inflicted, this Court finds merit in the alternative contention raised on behalf of the appellant Rahul. Consequently, the conviction of appellant Rahul is modified to one under Section 304 Part-II IPC and he is directed to be released on the period already undergone which is approximately 10 years 7 months (including remissions).

33. Consequently, both the appeals are disposed of. Appellants be released forthwith, if not required in any other case.

34. Copy of this judgment be uploaded on the website of this Court and be sent to the Superintendent, Tihar jail for updation of records and necessary compliance.

(MUKTA GUPTA)
JUDGE

(POONAM A. BAMBA)
JUDGE

APRIL 19, 2023/akb