

Ram Dass Vs. State

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Court : Delhi

Decided On : Apr-08-2013

Judge : Sanjiv Khanna

Appellant : Ram Dass

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRIMINAL APPEAL No. 75/2011 Reserved on:

9. h January, 2013 Date of Decision:

8. h April, 2013 % RAM DASSAppellant Through Mr. Rajiv Dutta, Sr. Advocate with Mr. Narendra Kumar Choudhary, Mr. Kumar Dushyant Singh and Mr. Ajeet Singh, Advocates. Versus STATE Respondent Through Mr. Sanjay Lao, APP for the State. CORAM: HONBLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE SIDDHARTH MRIDUL SANJIV KHANNA, J.:

1. The impugned judgment dated 18th November, 2010 convicts Ram Dass under Section 302 of the Indian Penal Code, 1860 (IPC, for short) for murder of Sunil and Somnath, sons of Om Prakash, by causing injuries on them with firearm on 22 nd April, 2006. The appellant has been convicted under Section 323 IPC, for injuries on Om Prakash, by giving him a push, when he tried to intervene. By order of sentence dated 20th November, 2010 he has been sentenced to life

imprisonment under Section 302 IPC with fine of Rs.25,000/- and in default of payment of fine undergo Simple Imprisonment for one year. He has been sentenced to Simple Imprisonment for a period of six months under Section 323 IPC. He has been acquitted under Section 25/27 of the Arms Act, 1957 for having used and for having been found in possession of country made pistol.

2. The State or victims have not preferred any appeal against acquittal of the appellant under Section 25/27 of the Arms Act.

3. At the outset, we notice that the homicidal death of Sunil and Somnath was not disputed or challenged before us. Even otherwise, their homicidal death as a result of fire arm injuries stands established and proved from the post-mortem reports of Sunil and Somnath marked Exhibits PW-13/A and PW-13/B respectively. The said reports were proved by Dr. Manoj Dhingra (PW-13), who has deposed that he, along with Dr. Ashish Jain, had conducted the said postmortems on 23rd April, 2006. Bodies of Sunil and Somnath were sent by Inspector Ishwar Singh of Police Station Nangloi with the alleged history of gun shot wounds and the two of them were declared brought dead on 23rd April, 2006 at SGM Hospital at 11.55 P.M. The following external and internal injuries were noticed on the dead body of Sunil:

2.

1. Abrasion 2 cm x 1 cm over inside back with clotted blood. Entry wound of fire arm 1.5 cm x 1 cm, lacerated punctured wound present over front of chest on left side 2 cm from left nipple above and 8 cm from mid line with abrasion collar and tattooing in 3. an area of 8 cm x 7 cm around wound margins inserted. Exit wound of fire arm 0.7 x 0.6 cm, punctured wound present over back of chest just left of mid line 14 cm from right and 12 cm from left scapuler lower and with margin everted. Track:Bullet entered through anterior chest wall through 5th intercostal space pears upper and lower lobe of the lungs. Infroposterial chest wall near vertebra into 6th intercostal space and came out through posterior wall. Internal injury:Chest: Chest cavity filled with partially clotted blood about 1.5 meter.

4. The cause of death of Sunil, as opined by PW-13, was asphyxia and shock as a result of fire arm injury due to short gun firearm.

5. The following external and internal injuries were noticed on the dead body of Somnath:

1. Entry wound of fire arm 0.9 x 0.6 cm over front of chest at xiphisternum 12 cm from right and 16 cm from left nipple and 23 cm from umbilicus just right to the mid line with abrasion collar present with tatooing all over the chest. Upper abdomen and biletral arm in an area of 15 cm x 14 cm above. After exploring the wound it enters into the stomach through left lobe of liver and then pierces into oesophagus and after piercing oesophagus to pharyngs and after it pierces the tongue and roof of mouth cavity and enters into the skull through middle cranial fossa and lodged at posterior cranial fossa.

2. Entry wound of fire arm:0.8 x 0.5 cm, lacerated punctured wound present over back 10 cm from mid line towards left and 11 cm from lower part of scapula at 8th intercostal space with abrasion collar all around. On further exploration it enters into the chest wall fractured 9th rib in 8th intercostal space and then pierces the upper part of spleen and diaphram near stomach. Internal Injury:Head: Subdural heamatoma and subarrachnoid heamorrhage over inferior surface of occipital region and bullet was recovered from posterial cranial fossa. Hole in middle cranial fossa. Abdomen cavity filled with blood and food material. Chest: Left side of chest cavity contained blood.

6. PW-13 similarly opined that Somnath had died due to Hemorrhagic shock as a result of fire arm injury to the chest and abdomen. The fire arm used was a shot gun. PW-13 had recovered one bullet from the dead body of Somnath. The said bullet was shown to him after opening a sealed packet having seal of SGM mortuary. He identified the bullet as one recovered from the body of deceased Somnath and the same was marked Exhibit P-9.

7. The MLCs of Sunil and Somnath have been marked Exhibits PW-4/A and PW-4/B respectively. These were proved by Dr. Binay Kumar (PW-4), Medical Officer, SGM Hospital, Mangol Puri, Delhi, who had examined Sunil and Somnath and prepared the said MLCs. He has deposed that the two of them were brought to the hospital at 11.50/11.55 P.M. with the alleged history of fire arm injury. On examination their pulse was not palpable, BP was not recordable and their ECG

showed straight line. They were declared brought dead and shifted to mortuary. Both Dr. Binay Kumar (PW-4) and Dr. Manoj Dhingra (PW-13) were not cross-examined in spite of opportunity provided. Their testimonies went un rebutted.

8. The core issue raised by the appellant pertains to his involvement as a perpetrator of the said crime. As per the prosecution version, there are three eye witnesses; Om Prakash, Babli and Poonam, i.e., father, mother and cousin sister of the deceased. The prosecution relies upon their examination-in-chief which was recorded on 29th May, 2008. The appellant, on the other hand, relies upon their cross-examination which was conducted on 16th November, 2009 and it is submitted that the three eye witnesses have exonerated and denied that the appellant was the perpetrator of the crime.

9. Om Prakash (PW-1) in his deposition on 29th May, 2008 has in categorical terms stated that he along with Babli (PW-2) and Poonam (PW-3) were sitting outside their house on 22nd April, 2006 while his son Sunil was sleeping on the cot outside the house when, at 11 P.M., the appellant, who was identified by PW-1, came and fired a shot at Sunil. They raised an alarm and chased the appellant who ran towards Rohtak Road. The appellant gave a push to PW-3 and PW-1. As a result of the push, he fell down and sustained injuries on both knees. On hearing the commotion, his second son Somnath, who was upstairs, came down and chased the appellant. When Somnath was about to apprehend him, near the corner of the street, close to Narang Hospital, the appellant fired at Somnath. After receiving the bullet injury, Somnath fell down. The appellant again fired second shot at Somnath. Thereafter, the appellant boarded a car, which was parked at Rohtak Road. One or two persons were already present in the car. Somebody informed the police and his sons were taken to the SGM Hospital but were declared brought dead. He had sustained injuries on his knee and was medically examined. At this stage, we may note that the MLC of Om Prakash (Exhibit PW-13/C) was proved by Dr. Manoj Dhingra (PW-13). The medical examination of PW-1 was conducted by Dr. Ritesh who had worked under PW-13 but had since left the hospital and his whereabouts were not known. PW-1 proved his statement (Exhibit PW-1/A), which formed basis of the rukka. He has further deposed that on his pointing out the site plan (Ex. PW22/A) was prepared. He had identified the

dead bodies of Sunil and Somnath vide identification statement Exhibits PW-1/C and PW-1/D, which were signed by him. He identified the pant (Exhibit PW-1/B), which was worn by him when he had taken his two sons to the hospital.

10. Babli (PW-2)s statement is identical. In her testimony recorded on 29th May, 2008 she has implicated the appellant as the culprit who had fired the gun shot at Sunil at about 11 P.M. on 22nd April, 2006 when she was sitting with PW-1 and PW-3 outside their house. At that time, Sunil was sleeping on the cot outside the house. She has deposed that on hearing the commotion, her son Somnath came down and chased the appellant. When he was about to apprehend the appellant in the street opposite Narang Hospital, the appellant fired a gun shot. Somnath fell down and was again fired upon. The appellant escaped in a car parked on Rohtak Road. One-two persons were present in the car but she could not state who they were. Sunil and Somnath were taken to SGM Hospital where they were declared brought dead. She had not sustained any injury in person and was not medically examined.

11. Poonam (PW-3) in her deposition on 29th May, 2008 identified the appellant as a perpetrator. She has stated that at 11 P.M. on 22nd April, 2006 her cousin Sunil was sleeping on the cot when he was shot at by the appellant. She became emotional and starting weeping in the court. She was consoled and her statement was recorded after some time. She went on to further narrate that she, her uncle and aunt chased the appellant. On hearing the commotion, Somnath, who was upstairs, came down and tried to apprehend the appellant. Near Narang Hospital, the appellant grappled with her when she was trying to apprehend him. The appellant pushed her and shot at Somnath and then fired another shot at Somnath when he fell down. She deposed that father of the appellant was standing there and she rushed and pleaded with him. He caught hold of her hair and thrashed her. She started weeping again, during her deposition in the court and was consoled. She has testified that the appellant boarded a car parked on the Rohtak Road behind tractors and fled away. There was another boy in the car but she did not know/identify him. She has affirmed that she had certainly seen the appellant who had shot at her brothers and had grappled with her. The two brothers were taken to SGM Hospital by Om Prakash (PW-1). She did not accompany them to

the hospital. Later on she was informed that her brothers had died. She had sustained minor abrasions but was not medically examined.

12. Learned counsel for the appellant has submitted that the testimony of PW-3 on 29th May, 2008 is doubtful and debatable. She has referred to the father of the appellant, who was purportedly present at the spot and has stated that she had grappled with the appellant while trying to apprehend him. Reference is made to the testimony of PW-1 and PW-2 and the difference is pointed out. PW-1 and PW-2, in their depositions on 29th May, 2008, have not referred to the father of the appellant being present at the spot. We note that the father of the appellant was not prosecuted or charged. To this extent, PW-3 may have exaggerated and tried to implicate the father, i.e., an elder family member of the appellant but this by itself cannot be a ground to disbelieve her entire testimony. PW-1 and PW-2 have clearly affirmed presence of PW-3 at the spot. PW-1 has stated that he fell down after being pushed by the appellant and sustained injuries on his knees. He has deposed that Poonam (PW-3) was ahead of them. PW-2 the mother due to her age could not have chased the appellant. PW-2 has admitted that her husband and Poonam were chasing the appellant faster than her. The presence of one or two persons in the car, as deposed by PW-1 and PW-2, and one person, as stated by PW-3, is not really a contradiction. PW-3 had a better view and look at the car as she ran faster and had tried to grapple with the appellant. The site plan placed on record marked Exhibit PW-22/A and PW-9/A show the two spots where Sunil and Somnath were shot. Sunil was shot in front of the house whereas Somnath was shot in front of Narang Clinic which was at some distance and at the T-point where the street meets the Rohtak Road. The car was apparently parked on the Rohtak Road.

13. As noticed above, the examination-in-chief of PW-1, PW-2 and PW-3 the three eye witnesses, who belong to the same family, was recorded on 29th May, 2008. On the said date, the counsel for the appellant was stated to be unwell and the counsel appearing made a prayer and was granted adjournment. In other words, the cross- examination of PW-1, PW-2 and PW-3 was deferred till 20th August, 2008.

14. On 20th August, 2008, the appellant engaged another counsel Mr. Mahipal Singh. However, the previous counsel Ms. Bindia Malhotra, Advocate was present and stated before the court that she was ready for cross-examination. Mr. Mahipal Singh, Advocate, claimed that he was engaged only on the said date and was not in a position to carry out cross-examination. The trial court passed the following order: The counsel submits that he has been engaged only today and wont be able to carry on the cross examination. The examination of this witness was already recorded on 29.05.08. Thereafter, the accused sought adjournment for today as his counsel was not available on 29.05.08. Today, the accused has brought new counsel. The previous counsel Ms. Bindiya Malhotra is also present who is ready for cross examination but adjournment. the new counsel seeks It appears from overall circumstances that accused is deliberately avoiding the recording the cross examination of this witness. He even failed to inform his previous counsel who is ready with brief to cross examine the witness regarding the engagement of a new counsel by him. The witness is to be treated like a guest as per the judgment of Honble Supreme Court of India he should not suffer any harassment or humiliation. In these circumstances, the witness is again put to the accused and his new counsel for cross examination but he has expressed his inability. XXX by accused Nil (opportunity given). RO&AC.

15. Order sheet of the trial court reveals that on 20 th August, 2008 the appellant had filed an application for interim bail on the ground that his wife was unwell. This application was dismissed on 20 th August, 2008 recording that counsel for the appellant was not inclined to cross-examine witnesses and his conduct was not appropriate as he was avoiding cross-examination. It was recorded that there appeared to be something amiss and fishy. The appellant was subsequently granted interim bail vide order dated 30th September, 2008 by the High Court in Bail Application No. 1820/2008 for a period of six weeks on the ground that his wife was undergoing treatment. Om Prakash (PW-1) and Babli (PW-2) thereupon filed an application for cancellation of bail wherein it was alleged that after the release the appellant had started threatening them. The said application was disposed of vide order dated 8th October, 2008 requiring PW-1 and PW-2 to move to the High Court, and through legal aid, if required. The appellant surrendered thereafter on 15th November, 2008. There was another change in counsel and on

or about 7th March, 2009 an application under Section 311 Cr.P.C. was moved for recalling of PW1, PW-2 and PW-3 for their cross-examination. This was allowed vide order dated 20th July, 2009 recording that only one opportunity would be granted and in case the said witnesses were present, no further date would be given.

16. PW-1, PW-2 and PW-3 were thereafter cross-examined on 16th November, 2009. PW-1 and PW-2 in their cross-examination took a somersault and deposed that it was dark and they had covered themselves with the sheet to avoid mosquitoes. They uncovered their face after hearing the noise of the gun shot. Assailant had already left the spot and was at a distance. Due to darkness and distance they could not identify/see the assailant. They deposed that the appellant was never shown to them by the police after the occurrence at the time of investigation. PW-1 went to the extent of stating that he had seen the appellant for the first time in the court when his statement was recorded on 29th May, 2008. PW-1 and PW-2 deposed that their earlier statements made on 29th May, 2008 was at the behest of the police officers present outside the court who had tutored them and had asked them to identify the appellant as the person who had committed murder of their son. PW-1 went to the extent of stating that he had not signed papers of arrest of the appellant and police had never made any inquiry from him. Appellant was innocent and had been falsely implicated. PW-3 had stated that it was night time, there was no electricity at the spot and the deceased was sleeping at a distance from their house. At the time of occurrence she was sleeping and woke up after hearing the gun shot noise. She had not seen the person who had fired the gun shot at her cousins, as the assailant had absconded. The appellant, who was present in the court was never shown to her by the police at any point of time before her deposition in the court and in fact she had seen the appellant for the first time in the court when her statement was recorded on 29th May, 2008. She has claimed that her earlier statement was tutored and she had identified the appellant at the behest of the police. She claimed that the appellant had never grappled with her and never pushed her and she had not received any injuries. She had not seen the appellant at the spot and he had not uttered any word to her after the occurrence. She has claimed that the appellant was innocent and had been falsely implicated by the police.

17. There are number of reasons why we feel that the statements made by PW-1, PW-2 and PW-3 in the cross-examination are not the true and correct version and the earlier depositions made on 29th May, 2008 should be relied upon as truthful and correct. We have narrated the court proceedings and how and in what manner the appellant failed to and did not cross-examine the three witnesses. After he was released on interim bail for six weeks, PW-1, PW-2 and PW-3 were specifically recalled for cross-examination. PW-1 and PW-2, during this time, had moved an application alleging that the appellant had threatened them. This is clearly a case in which the appellant had succeeded in threatening the eye witnesses PW-1, PW-2 and PW-3. The change in stand cannot be explained for any other reason. PW-1 and PW-2 are the parents and it is difficult to perceive that they would have made a false statement for monetary consideration. Similarly, PW-3 is the cousin sister and obviously was close to the two brothers who have died. She was emotionally attached and had broken down twice when her examination-in-chief was recorded on 29th May, 2008.

18. PW-1, PW-2 and PW-3 were re-examined by the Public Prosecutor on 16th November, 2009 in view of the testimonies in their cross-examination. PW-1 and PW-2 admitted in the re-examination by the Additional Public Prosecutor that they knew the appellant from before as he was residing in premises No. E-39, Camp No. 2, Nangloi. PW-1 further accepted that the appellant was granted interim bail by the High Court vide order dated 30th September, 2008 and he had filed an application for cancellation of the interim bail (Exhibit PW-1/PX), which was signed by him at point A. On the question, who had pressurized or tutored him to make a false statement, PW-1 has stated that he did not remember whether the police officer was Head Constable, ASI, SI or IO. He has further deposed that he had not made any complaint to the senior police officers that he had been pressurized to make a statement against the appellant or that the appellant had not killed his two sons. PW-2, in her re-examination by the Public Prosecutor, denied having moved any application for cancellation for interim bail which is factually untrue and false. She, however, accepted that she had not complained to any police officer about pressure being put on her to implicate the appellant as the murderer of her two sons. PW-3 who had resided from her earlier 17, Camp No. 2 Nangloi which is adjacent to the residence of PW-1 and PW-2, E-18, Camp No. 2, Nangloi. She has

accepted that the appellant was residing in the same street but claimed that his house was at a distance. She has accepted that on 29th May, 2008 she had not stated that a police officer had pressurized her and she did not remember whether the said police officer was a Head Constable, ASI, SI, Inspector or IO of the case. She did not make any complaint to a senior police officer.

19. It has come on record that the investigating officer of the present case Inspector Ishwar Singh expired on 10th March, 2008 and this has been recorded in the order of the trial court dated 20th July, 2009. Consequently, he was directed to be deleted from the list of witnesses. Thus, there was no possibility of the investigating officer, Inspector Ishwar Singh trying to tutor and pressurize PW-1, PW-2 and PW-3 to make false allegations against the appellant for having committed murder of Sunil and Somnath, sons of PW-1 and PW-2 and brother of PW-3. Even otherwise, there is enough corroborative evidence and material to support the statement of PW-1, PW-2 and PW-3 recorded on 29th May, 2008. PW-1 is the complainant and on his statement (Exhibit PW-1/A) rukka was recorded and the FIR was registered. PW-1 has admitted his signatures on PW-1/A at point A. The said complaint PW-1/A specifically refers and mentions the name of the appellant as the perpetrator who had fired the shots. It states that PW2 and PW-3 were present at that time. First Sunil was shot while he was sleeping on the cot, at 11.00 P.M. at night and then Somnath came running from upstairs and was shot at, when he tried to catch him. The appellant had fired another shot at Somnath when he fell down after he was given a push.

20. The appellant was arrested vide arrest memo (Exhibit PW- 12/D) on 23rd April, 2006 at 5 A.M. The place of arrest as shown is Kirari Phatk. Thereafter, the accused was searched and one fire arm and an empty cartridge was recovered from him vide seizure memo Exhibit PW-12/E. The seal of IS was put (Exhibit PW-12/F). The aforesaid seizure memos (Exhibits PW-12/E and PW-12/F) were proved by Constable Bijender Kumar (PW-12) who was examined on 11th September, 2009. The defence counsel did not examine the said witness on the ground that first he would like to cross-examine the public witnesses. Thereafter, the counsel for the appellant did not ask for re-examination of PW-12 till the trial was over. However, before us, contention raised is that PW-12 was not produced

and permitted to be cross-examined. The said contention was raised on 8th January, 2013 and was never raised before the trial court, i.e., during the final arguments. It appears to be an argument of convenience. However, even if we ignore the statement of PW-12, we have on record statement of Inspector Rajeev Gunwant (PW-22). He was posted, at the time of occurrence, as SI in Police Station Nangloi and has deposed that he had visited the crime spot soon after he had received call vide DD No. 72B (Exhibit PW-14/A) which was recorded at 11.20 P.M. in the Police Station, on the basis of information given by Police Control Room. PW-22 has further deposed that when he reached the spot he came to know that the victims had been removed to SGM Hospital. At that time he had seen pool of blood and two used cartridges. Constable Bijender and Constable Raj Kumar also reached the spot in the meanwhile. He left for the hospital with Constable Bijender. Constable Vijay and Constable Raj Kumar were left at the spot. At the hospital, he met Additional SHO Inspector Ishwar Singh and came to know that Sunil and Somnath were declared as brought dead vide their MLCs. Om Prakash (PW-1) was present in the hospital and PW-22 recorded his statement as Exhibit PW-1/A. He made endorsement on the said statement (Exhibit PW-5/B) which was signed by him at point A and sent it to the Police Station with Constable Bijender. Thereafter, along with Inspector Ishwar Singh he came to the spot, crime team was present and photographs were taken. He referred to the site plan (Exhibit PW-22/A) which was prepared. He specifically deposed that Inspector Ishwar Singh had expired on 10th March, 2008. He identified his signatures. He identified the two used cartridges which were marked Exhibits P-6 and P-7. Those two used cartridges were produced in a parcel with the seal of FSL Rohini and were opened. He has deposed that sketches of the empty cartridges P-6 and P-7, were taken (marked Exhibit PW-22/B) which was signed by him at point A. The IO seized led of the bullet (Exhibit P-5) from near the staircase (seized vide memo Exhibit PW-12/C) which was signed by him at point B. He has deposed that they had secret information that the appellant was present near Kirari Fatak and they apprehended him and a pistol (Exhibit P-2) along with one used cartridge (Exhibit P-3) was recovered from him. The sketch (Exhibit PW-12/E) was prepared and was signed by him at point B. He proved the arrest memo of the appellant (Exhibit PW-12/D). The investigating officer thereafter collected the FSL results Exhibits

PW15/A and PW-15/B and PW-16/A. A green colour Maruti car without any number plate was seized vide Exhibit PW-18/A and he identified the photographs of scene of occurrence Exhibit PW-4/A-1 to A-6. There is nothing in the cross-examination to dent his testimony. The FSL ballistic report (Exhibit PW-16/A) and the expert opinion as discussed below supports the prosecution case that the pistol (Exhibit P-2) was used for firing used cartridges Exhibits P-6 and P-7 recovered from the spot.

21. It is apparent from the aforesaid statement and the statement of PW-1 (Exhibit PW-1/A) that the appellant was named as the assailant, immediately after the occurrence.

22. It was submitted and argued before us that there was delay between the occurrence and when the rukka was sent to the police station at 1.15 A.M. and thereafter the FIR was recorded at 1.35/2.05 AM. We do not agree. The occurrence had taken place at about 11 P.M. Thereafter, DD entry 72B was recorded in the Police Control Room at 11.20 P.M. Police officials, including PW-22, then reached the crime spot but found that the injured had been taken to the hospital. PW-22 then reached the hospital where he found that the IO Ishwar Singh was already present there. The two injured were declared brought dead. The mental condition and status of PW-1 at that time can be understood as within a span of 50 minutes he lost his two young sons. PW-1 has deposed that he had earlier lost his third son Jai Prakash. It would have taken time for PW1 to compose himself and make statement to the police. PW-22 has stated that he reached the hospital only at 11.45 P.M. at night. We do not think the time gap between when the police officer/PW-1 reached the hospital and when the rukka was sent to the police station, i.e., at 1.15 A.M. is belated or delayed to create suspicion that the appellant would have been falsely implicated. In the present case, only one person was named in the FIR, i.e., the appellant and no one else. The contention of the appellant, therefore, that there was a time gap between the occurrence and when the FIR was registered has to be rejected.

23. Another contention raised, on behalf of the appellant, was with regard to the recovery of the empty cartridges and the led. During the course of arguments

before us, our attention was specifically drawn to the findings recorded by the trial court in paragraph 28 of the impugned judgment to the effect that arrest of the accused and recovery of the country made pistol etc. have been disbelieved. It is highlighted that the trial court has not relied upon the ballistic report (Exhibit PW-16/A). We have considered the said contentions but find that we cannot agree with the findings recorded by the trial court in paragraph 28 of the impugned judgment. As per PW-22, the appellant was arrested immediate in the morning at about 5.00 A.M. after the occurrence had taken place at 11.00 P.M. at night. The FIR was registered at 2.05 A.M. in the intervening night between 22nd and 23rd of April, 2006. The fact that the public witnesses did not participate when the appellant was arrested vide memo (Exhibit PW-12/D) does not create any doubt. The arrest had taken place early in the morning. It would be difficult to find a public witness who would have agreed to join the proceedings at that hour. Regarding the recovery of the cartridges, there is enough evidence to show that two cartridges were and one led of a fired bullet were recovered from the spot in question. As per the police version and as deposed by PW-22 and PW-12, one used cartridge was found in the fire arm. However, we may note that the police had not sent the bullet/led recovered from the body of Somnath for FSL examination. However, this does not mean that the FSL report (Exhibit PW-16/A) and the findings recorded therein should be disbelieved. Exhibit PW-16/A was proved by V.R. Anand, Senior Scientific Officer, Ballistics, FSL, Delhi (PW-21) and Inspector Prakash Chand (PW-16) who had collected the said report. PW-21 has submitted that he had given the report after conducting test of the fire arm and ammunition. He was not cross-examined and his report, as well as, the testimony remained completely unchallenged. Exhibit PW-16/A records that the individual characteristics of striation marks present on fired bullets (Exhibits EB1 and EB2) were insufficient for comparison on whether they have been fired through the country made pistol (Exhibit F1) which was seized from the accused. Exhibit EB1 is a deformed bullet or the led which had been found at the spot and was identified and given Exhibit No. P-5 in the statement of PW-22. Eb2 was the intact bullet which was fired from the said pistol for the purpose of comparison. To this extent, therefore, the fired led EB1 or Exhibit P-5 could not be collated with the weapon/fire arm Exhibit P-2 which was recovered from the appellant. However, paragraphs 2, 4 and 5 of

Exhibit PW-16/A read as under:

2. The 8 mm/.315 cartridge cases marked exhibit EC1 to EC3 are fired empty cartridge.

4. The three 8 mm/.315 cartridges from laboratory stock were test fired through the .315 bore country made pistol marked exhibit F1 above and test fired cartridges Marked as TC1 to TC3 and the recovered test fired bullets marked as TB1 to TB3.

5. The individual characteristic of firing pin and breech face marks present on evidence fired cartridge cases marked exhibits EC1 to EC3 and on the test fired cartridge cases marked as TC1 to TC3 were examined and compared under the comparison Microscope Model Leica DMC and were found identical. Hence exhibit EC1 to EC3 have been fired through the country made pistol .315 bore marked exhibit F1 above.

24. As noticed above, two fired or empty cartridges Exhibit P-6 and P-7 were recovered from the spot and the third empty cartridge Exhibit P-3 (one used cartridge) found in the country made pistol when seized. Exhibit PW-10/D records that three cartridges of .315 bore were made available to the FSL for test firing. These were test fired. The test fired cartridges were marked TC1 to TC3. The microscopic examination of the test fired cartridges TC1 to TC3 and EC1 to EC3 reveal that they were fired from the same country made pistol F1, i.e., Exhibit P-2, which was seized from the appellant. The FSL Report, therefore, clearly corroborates that the empty cartridges found at the spot (Exhibit P-5 and P-6) were fired from the arm which was recovered from the possession of the appellant Exhibit P-2. The cartridge (Exhibit P-3) found in the pistol was fired from the said pistol.

25. The malkhana moharar Head Constable Tarif Singh has appeared as PW-10. He has deposed with regard to the deposit of the seized material. 15 pullandas were sent to FSL for examination and thereafter the report was received. It was submitted that three cartridges of .315 bore were deposited belatedly on 30 th June, 2006 by Inspector Ishwar Singh. The appellant is trying to obfuscate the issue. PW-10 has clearly deposed that on 23rd April, 2006 ten pullandas with seal

of IS and five pullandas with seal of AJ were deposited vide entry in register No. 19 with serial No. 5138. Photocopy of the register was marked Exhibit PW-10/A. On 29th May, 2006, 15 sealed pullandas were sent to FSL and relevant entry was made in register No.

19. Subsequently, three cartridges of .315 bore were deposited at serial No. 5360, in register No. 19, and on 3rd July, 2006 these were sent to FSL. This is clear from the malkhana register (Exhibits PW-10/C and PW-10/D). The three cartridges referred to as Exhibit PW-10/C, which were deposited on 30th June, 2006 were the three cartridges which were required and subsequently used for test firing. This is clearly mentioned in document Exhibit PW-10/D.

26. During the course of hearing before us, the counsel for the appellant had relied upon two extracts. One extract is from Forensic Retrieval of Striations on Fired Bullets by using 3D Geometric Data sourced from www.firearms ID.com bullet identification. The second article is of no relevance as far as the contention of the appellant is concerned. It was important for the appellant to crossexamine PW-21 V.R. Anand, Senior Scientific Officer, Ballistics in case they wanted to question and challenge his report but he was not cross-examined. The first article relates to striation marks on the fired bullets. In the present case, as noticed, the striation marks on the one fired led, which was found at the spot Exhibit P-5, could not be compared with the test fired led/bullet. There can be number of reasons for the same. In case the report of PW-21 was incomplete or he had deliberately favoured the prosecution, the appellant it is reiterated should have cross-examined and questioned PW-21 in that regard. We have relied upon FSL report PW16/A in respect of markings, on the recovered cartridges Ex. P-6 and P-7 and the pistol Ex. P-2.

27. The clothes and belongings of the deceased and PW-1 were sent for FSL examination and as per the FSL report (Exhibit PW-15/A and PW-15/B) blood was detected on all exhibits except on the earth control. The blood ascertained was of group A or O. In the case of blood stained clothes there was no reaction. The blood group and the origin of the blood could not be ascertained.

28. We may now deal with some other contentions raised by the appellant and citations relied upon by them. It is submitted that the neighbours from the colony were not cited as witnesses. It is submitted that PW-1, PW-2 and PW-3 had pointed out that one-two persons were present in the car but no investigation was done by the police in that regard.

29. The appellant was a neighbour and the occurrence had taken place at night at about 11 P.M. PW-1, PW-2 and PW-3 were not cross-examined on whether the neighbours had seen the occurrence. Further, the fact that no details or identity of one or two others who were in the car could be ascertained, is inconsequential in the present case. Decision of this Court in the case of Udhal Singh versus State (Criminal Appeal No. 394/2009 decided on 3rd December, 2009) is on the factual matrix in the said case. It cannot be said that any legal principle has been culled out or expounded. Similarly, reliance placed upon Rai Sandeep @ Deepu versus State of NCT of Delhi (Criminal Appeal No. 2486/2009 decided by the Supreme Court on 7th August, 2012) is misconceived. In the said case, it was noticed that the prosecutrix had taken u-turn in her cross-examination and had gone on to say that she did not know the accused prior to the incident and had also stated certain other exculpatory facts. Keeping in view the facts of the said case, observations were made in paragraph 15 of the said judgment wherein it has been observed that truthfulness of the statement made by witness is an important circumstance. Statement of the witness should be natural and consistent with the case of the prosecution, qua the accused, and the witness should be able to withstand the cross-examination and then only it can be relied upon. On the said aspect we would like to refer to Khujji @ Surendra Tiwari versus State of Madhya Pradesh, (1991) 3 SCC 627. In the said decision, it has been observed that evidence of witnesses declared hostile is not wholly effaced from the record. That part of evidence, which is otherwise acceptable, can be acted upon. This, of course, requires careful scrutiny and the court has to be satisfied about the credibility of the truth stated in the version, on the part they are accepting. To the extent their version is found to be dependable and acceptable, the statements can be read and used for conviction. Even in case of witnesses who are related to the deceased or victim, their evidence is not to be overlooked on this ground. Statements of such witnesses may require strict scrutiny but can be accepted

when the court is satisfied that they were present at the spot and had seen the occurrence. In such cases, care has to be taken that in addition to the accused, others related or close to the accused are not implicated. Regarding hostile witnesses, it was elucidated in *Rameshbhai Mohanbhai Koli v. State of Gujarat*, (2011) 11 SCC 111.16. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide *Bhagwan Singh v. State of Haryana* [(1976) 1 SCC 38.:

1976. SCC (Cri) 7 : AIR 197.SC 202., *Rabindra Kumar Dey v. State of Orissa* [(1976) 4 SCC 23.:

1976. SCC (Cri) 566 : AIR 197.SC 170., *Syad Akbar v. State of Karnataka* [(1980) 1 SCC 3.:

1980. SCC (Cri) 59 : AIR 197.SC 1848.and *Khujji v. State of M.P.* [(1991) 3 SCC 62.:

1991. SCC (Cri) 916 : AIR 199.SC 1853.) 18. In *C. Muniappan v. State of T.N.* [(2010) 9 SCC 56.: (2010) 3 SCC (Cri) 1402 : JT (2010) 9 SC 95.this Court, after considering all the earlier decisions on this point, summarised the law applicable to the case of hostile witnesses as under: (SCC pp. 596-97, paras 8385) 83. the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

84. In the instant case, some of the material witnesses i.e. B. Kamal (PW

86) and R. Maruthu (PW

51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the

appellants, but we find them to be very trivial in nature.

85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. (Vide *Sohrab v. State of M.P.* [(1972) 3 SCC 75.:

1972. SCC (Cri) 819 : AIR 197.SC 2020., *State of U.P. v. M.K. Anthony* [(1985) 1 SCC 50.:

1985. SCC (Cri) 105 : AIR 198.SC 48., *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* [(1983) 3 SCC 21.:

1983. SCC (Cri) 728 : AIR 198.SC 753., *State of Rajasthan v. Om Prakash* [(2007) 12 SCC 38.: (2008) 1 SCC (Cri) 411 : AIR 200.SC 2257., *Prithu v. State of H.P.*[(2009) 11 SCC 58.: (2009) 3 SCC (Cri) 1502] , *State of U.P. v. Santosh Kumar*[(2009) 9 SCC 62.: (2010) 1 SCC (Cri) 88] and *State v. Saravanan* [(2008) 17 SCC 58.: (2010) 4 SCC (Cri) 580 : AIR 200.SC 152..) 30. Before we part, it would be pertinent to reiterate the observation of the Supreme Court in *Zahira Habibulla H. Sheikh v. State of Gujarat* (2004) 4 SCC 158.41. Witnesses, as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats,

coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the TADA Act) have taken note of the reluctance shown by witnesses to depose against dangerous criminals/terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before courts mere mock trials as are usually seen in movies.

42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be

any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the individual accused. In this courts have a vital role to play.

31. In view of the aforesaid findings, we uphold the conviction and sentence awarded to the appellant under Sections 302 and 323 IPC. The appeal is dismissed. -sd(SANJIV KHANNA) JUDGE -sd(SIDDHARTH MRIDUL) JUDGE
APRIL 8 h, 2013 VKR

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