MOHD. ANWAR

v.

STATE OF DELHI

DECEMBER 17, 1999

[G.B. PATTANAIK AND M.B. SHAH, JJ.]

Penal Code, 1860:

Sections 302, 307 and 34—Accused persons chased by police party—Death in exchange of fire—Revolver seized from accused at the spot—Expert opinion that bullet recovered from body of deceased was fired from the said revolver—Eye witnesses—Members of police party testifying against accused—Held, under the facts accused was rightly convicted—TADA Act, 1987—Section 5.

Sections 302 and 34—Co-accused—Only allegation was that he exhorted the main accused—Some prosecution witnesses not specifically stating the specific words used by him in exhorting—Four out of six charge-sheeted persons discharged—Common intention to kill not established—Held, under the facts conviction of co-accused set-aside.

Appellants-accused, A and T, were tried and convicted for offences punishable under Sections 302, 307 read with Section 34 IPC and Section 5 of TADA Act, 1987 by the Designated Court. Prosecution alleged that deceased-informer was murdered by appellant, A, who fired a shot from his revolver at the exhortation of accused T, when they were chased and cornered by police. The accused were arrested and a 0.32 bore revolver, a country made .315 pistol with empty and live cartridges were recovered from them. After completion of inquiry, charge-sheet was submitted against appellants and four other persons who were discharged for lack of evidence. Against the judgment of the Designated Court, accused persons have filed the present appeals.

Appellant A, contended that no independent witness was examined by prosecution though number of persons had collected at the scene of crime; that the investigating officer was not examined and he should not have used the vehicle wherein deceased was asked to sit after receiving bullet injury; and that the bullet recovered from the body of the deceased was not compared

A by ballistic expert and it could have been fired by the police.

Appellant T, contended that when four other persons involved by police were discharged, there was no reason for convicting him under Section 302 read with Section 34 IPC solely on the alleged round that he had exhorted appellant A, at the time of incident; and that the appellants were not having
B any common intention to kill/commit the crime.

The respondent contended that prosecution witnesses were corroborated by seizure of weapons from the hands of appellants; and that bullet recovered from the body of the deceased was fired from the revolver of appellant, A.

C Partly allowing the appeal of 'A' and dismissing the appeal of T, the Court

HELD : 1. Apart from the ocular version of the witnesses which proved that accused A, fired from his revolver which caused the death, from the possession of appellant A, 0.32 bore English made revolver was seized
D alongwith four cartridges cases and two live cartridges and six more cartridges were recovered from his possession. These were examined by Dy. Sr. Scientific Officer cum-Assistant Chemical Examiner CFSL, CBI, New Delhi who gave his opinion that bullet found from the body of the deceased was fired from the said 0.32 bore revolver. As per the post mortem report, deceased was having one rounded punctured wound on the left side from the
E front of the chest. [490-G-H; 491-A-B]

1.2. There is no reason to disbelieve the evidence of PW1 that sub-inspector tried to record the statement of some persons who collected at the spot but none agreed to be a witness. For such situation, prosecution cannot be blamed. [491-C]

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1.3. For the non-examination of investigating officer, it was pointed out that he was out of the country when the evidence was recorded and therefore, this would be hardly a ground for disbelieving the other witnesses who were present at the spot. [491-C-D]

G 1.4. For giving immediate treatment deceased was required to be removed to the hospital and therefore, at that point of time the act of the investigating officer of using the vehicle, occupied by the deceased after receiving bullet injury, for removing him to the hospital, would not in any way affect the prosecution version. The said vehicle was not used for the commission of offence. [491-D-E]

H 2.1. Some of the prosecution witnesses had not specifically stated that

appellant, T, exhorted appellant A by using the words "Maro Salon ko". [492-D]

2.2. At the initial stage, six persons were chargesheeted for the alleged offences. The Designated Judge discharged four of them. In this set of circumstances, it would be unsafe to rely upon the evidence of prosecution witnesses that appellant T exhorted or uttered the words "Maro Salon Ko" as alleged and therefore appellant A fired his revolver which caused injury to the deceased. [489-A-B; 492-E-F]

3. The prosecution version is that both the appellants alongwith other person had gone near the house for allegedly committing dacoity. However, that would not mean that after being chased by the police party accused were having any common intention to kill the chasing party. There is nothing on record to establish that by alleged firing by appellant T any injury was caused to anyone. From the facts and circumstances it would be difficult to infer that appellant T was having any common intention to commit the crime for which appellant A is convicted. Hence, conviction of appellant T for the offence punishable under Section 302 read with Section 34 IPC requires to be set-aside. [492-G-H; 493-A-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1045 of 1999.

WITH

Criminal Appeal No. 1175 of 1999.

From the Judgment and Order dated 13.8.1999 of the Designated Court-II, Delhi in Sessions Case No. 7/99.

For Appellant (s) in Crl. A. 1045/99 Jaspal Singh and Shakeel Ahmed.

In Crl. A.1175/99 Sushil Kumar, Sanjay M. Tripati, Parvez A. Siddiqui and Varinder Kumar.

For Respondent (s) K.N. Shukla, Tufail A. Khan and Ms. Sushma Suri.

The Judgment of the Court was delivered by

SHAH, J. Appellants were convicted for the offence punishable under Sections 302, 307 read with Section 34 IPC and Section 5 TADA Act, 1987

A by the Designated Court, Delhi vide its judgment and order dated 6.8.1999/ 13.8.1999 in Sessions Case No.7/97 and FIR No.279/92. It is alleged that in the broad day light, in the presence of police party, Khalil Ahmad-informer of the police, was murdered by Mohd. Anwar by firing of shot from the revolver. It is the prosecution version that there was information about activities of dacoits in Delhi, which was conveyed to SI Pankaj Singh. On 19.9.1992, SI Pankaj Singh along with the deceased-informer Khalil, SI Shiv Lal (PW3), ASI Raghbir Singh (PW1), Constable Devender (PW16), Constable Ramesh, Constable Satbir Singh (PW13) and Constable Jagpal (PW10) went for patrolling near Naulakha Niwas, Model Basti, Delhi. At about 1.50 p.m., three boys were seen coming to Model Basti from Rani Jhansi Road. On seeing the police party, they turned back and started running. At that time, informer Khalil pointed out towards them. The police party chased those three boys in their vehicles by taking the same to the wrong side of the road. When the police party reached quite near those boys near police quarters at Ahata Kedara, the third boy succeeded in running away while the present appellants took out their weapons i.e. Anwar took out his revolver and Tasleem took out his pistol. As soon as, SI Pankaj alighted from the vehicle in order to apprehend the accused, Tasleem asked his companion "Maro Salon Ko". At this, accused Anwar who was holding revolver in his hand fired therefrom. The bullet hit at the left aside chest of Khalil, who was just alighting from the police vehicle. SI Shiv Lal immediately made Khalil to sit in the vehicle. At that stage, SI Pankaj Singh and ASI Raghbir Singh fired two rounds each in reply. Both the accused also continued to fire and retreat. They were apprehended at the main gate of police colony, Ahata Kedara. ASI Raghbir Singh apprehended accused Tasleem and SI Pankaj Singh apprehended accused Anwar with help of constable Satbir and other staff. At that time, because of commotion, crowd collected and some persons out of the crowd also started beating the accused persons due to anger but the police rescued them. Injured Khalil was sent to the hospital alongwith SI Shiv Lal. From accused Anwar, English made revolver of .32 bore, which was in his hands, was seized and on checking its chamber four cartridges cases and two live cartridges were found. On further search, six more live cartridges were recovered from the right side pocket of his pants. It is also contended that from accused Tasleem a country made. 315 pistol, which was in his hands, was seized. On checking the said pistol, one cartridge case was found in chamber and on further search five more live cartridges were recovered from the right side pocket of pants of the accused. On interrogation, the accused disclosed the name of their third accomplice as Salim alias Pinny, who was also arrested.

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It has been contended that at the initial stage, police registered a case under Section 307 read with Section 34 IPC and Section 5 TADA Act. However, after receipt of information from SI Shiv Lal, who had gone to the hospital alongwith the injured Khalil, that Khalil was declared brought dead to the hospital, offence under Section 302 IPC was added. After completion of the inquiry, charged sheet was submitted against the appellants, Salim and other three persons. As there was no evidence against Salim and other three persons, they were discharged. It is the defence of the accused that the entire police version is false and that they were lifted from their houses and were roped in this case. After considering the evidence, which was led by the prosecution, the appellants have been convicted by the designated court.

Against the said judgment and order both the accused have filed separate appeals. Mohd. Anwar has filed Criminal Appeal No.1045 of 1999 and Tasleem has filed Criminal Appeal No.1175 of 1999 against their conviction and sentence.

The learned senior counsel. Mr. Jaspal Singh appearing on behalf of appellant, Mohd Anwar submitted that the impugned judgment and order passed by the learned Judge is illegal and erroneous and that the entire prosecution version is false and accused are roped in fabricated case. He submitted that admittedly number of persons had collected at the scene of offence yet no independent witness was examined by the prosecution. He further pointed out that SI Pankaj Singh was not examined by the prosecution and, therefore, also benefit of doubt should be given to the appellant. It is his contention that the investigating officer ought not have used the vehicle wherein the deceased Khalil was asked to sit after receipt of injury for carrying him to hospital. The bullet recovered from the body of the deceased was not compared by the ballistic expert. Blood was also not collected from the scene of offence and, therefore, prosecution version becomes doubtful that the incident occurred at the alleged place. He further submitted that there is no positive evidence to establish that the deceased has not expired because of the firing by SI Pankaj Singh and ASI Raghbir Singh, who, as per the prosecution story, fired in retaliation.

The learned senior counsel, Mr. Sushil Kumar appearing on behalf of Tasleem, in addition, submitted that the role assigned to the accused Tasleem is that he exhorted "Maro Salon Ko" at the time of incident and for that he is convicted for the offence under Section 302/34 IPC. The prosecution version cannot be relied upon in view of the fact that in the present case apart from

A two accused, the police had roped in four more other persons, who were discharged by the learned Judge by order dated 09.1.1996. He submitted that both the accused were seriously beaten up by the police after picking them from their residence. The prosecution has intentionally not produced on record the medical reports indicating the injuries caused to the accused as well as SI Pankaj Singh. He submitted that there is no reliable evidence on B record to establish that pistol was seized from the possession of Tasleem.

As against this, learned senior counsel for the State Mr. Shukla submitted that the judgment and order passed by the learned Judge is based on evidence on record. There is no reason to disbelieve the evidence of prosecution C witnesses. He submitted that the said evidence is corroborated by seizure of revolver from the hands of Anwar and seizure of pistol from the hands of Tasleem and also recovery of bullets from the body of the deceased, Khalil, which was fired from the revolver of Anwar.

We would first deal with Criminal Appeal No. 1045 of 1999 filed by D Anwar. It is to be stated at the outset that prosecution has proved that accused Anwar fired from his revolver which caused the death of informer-Khalil. For the purpose, the prosecution has relied upon the evidence of PW1 Raghbir Singh, who has stated that police party took the vehicle and chased the accused near the gate of police quarters, Ahata Kedara. At that time, one E of the boys escaped from the spot and out of remaining two, Anwar took out a revolver and Tasleem took out a country made pistol on seeing the police party. Anwar tired from his revolver which caused injury to the informer. He has also stated that SI Pankaj Singh overpowered the accused Anwar and took into possession a .32 bore revolver with six rolls, out of which four rolls were found empty as having been tired and remaining two rolls were found F lying in the chamber. He has also stated that SI Pankaj Singh requested many persons who were on the spot to join the investigation but none agreed. He has identified the revolver seized from the accused Anwar. The evidence of this witness with regard to the role played by Anwar is fully corroborated by PW 3 SI Shiv Lal. PW10 HC Jagpal. PW13 HC Satbir Singh and PW16 G Constable Devender. Apart from this ocular version of this witness, from the possession of Anwar. 32 bore English made revolver was seized alongwith four cartridges cases and two live cartridges and six more cartridges were recovered from his possession. These were examined by PW6 Dy. Sr. Scientific Officer-cum-Assistant Chemical Examiner CFSL. CBI. New Delhi and according to his report English revolver was in working order. Further, he has given an H opinion with regard to. 32'' lead deformed bullet which was found from the

body of deceased and has stated that it was fired from .32 bore revolver, Ex. P1. That lead bullet was taken out from the dead body of deceased by Dr. L.K. Barua (PW18) during postmortem. As per the postmortem report, deceased was having one rounded punctured wound on the left side from the front of chest.

Aforesaid evidence, in our view, conclusively connects the accused Anwar with the crime. However, learned counsel Mr. Jaspal submitted that prosecution has failed to examine any independent witness. In our view, there is no reason to disbelieve the say of PW1 that SI Pankaj Singh tried to record the statement of the some persons who collected at the spot but none agreed to be a witness. For such situation, prosecution cannot be blamed. For the non-examination of investigation officer, SI Pankaj Singh, it was pointed out that he was out of the country when the evidence was recorded and therefore this also would be hardly a ground for disbelieving the other witnesses who were present on the spot. Learned counsel has further pointed out that investigating officer ought not to have used the vehicle wherein deceased Khalil was asked to sit after receiving bullet injury. In our view, this submission is without any substance because for giving immediate treatment deceased was required to be removed to the hospital and, therefore at that point of time the act of the investigating officer of using that vehicle for removing him to the hospital, would not in any way affect the prosecution version. It is to be stated that the said vehicle was not used for the commission of offence. Similarly, the contention of the learned counsel for the appellant that bullet recovered from the body of the deceased was not compared by the ballistic expert to find out whether it was bullet fired from the revolver of SI Pankaj Singh or PW1 ASI Raghbir Singh requires to be rejected, in view of the definite evidence on record which establishes that .32'' lead deformed bullet, which was found from the body of the deceased, was fired from English revolver which was seized from Anwar.

Hence, in our view, there is no substance in this appeal and the learned designated court has rightly convicted the appellant, Anwar for the offence for which he was charged.

CRIMINAL APPEAL NO. 1175 OF 1999

Now we would deal with the Criminal Appeal No. 1175 of 1999 filed by Tasleem. He has been convicted for the offence punishable under Section 302 read with Section 34 IPC and sentenced to suffer imprisonment for life and

A to pay a fine of Rs. 500. He is also convicted for the offence under Section 307 read with Section 34 IPC and sentenced to suffer RI for 5 years and to pay a fine of Rs. 500 and under Section 5 TADA (P) Act, 1987 to undergo R.I. for 5 years and to pay a fine of Rs. 500. The learned counsel pointed out that the appellant is in jail since the day of offence i.e. 19.9.1992 and he has already undergone the sentence for the offence punishable under Section 307 B IPC and Section 5 of the TADA (P) Act. He, therefore submitted that assuming that the said conviction is valid yet there was no reason for convicting the accused for the offence punishable under Section 302 read with Section 34 IPC solely on the alleged ground that Tasleem has exhorted as alleged, particularly when the police had falsely involved four other persons, who C were required to be discharged. For this purpose, we are also taken through the evidence off all the witnesses. From the evidence on record, the role assigned to Tasleem is that he was accompanying Anwar and that he was having pistol in his pocket. When they were chased and cornered both took out their fire arms and it is alleged that Tasleem uttered the words "Maro Salon Ko". Question is, whether prosecution has established the said part of D its version beyond reasonable doubt. For this purpose it can be noted that PW1 ASI Raghbir Singh had not specifically stated that Tasleem exhorted Anwar by using the words "Maro Salon Ko". He has only stated that Mohd. Anwar took out a revolver and Mohd.Tasleem took out a country made pistol on seeing the police party and fired at them. Thereafter, he has improved and E stated that Anwar fired at the instance of Tasleem. The court while recording the evidence has noted that witness has identified Tasleem as Anwar and Anwar as Tasleem. It is true that PW10 HC Jagpal Singh, PW13 SI Shiv Lal, PW13 Constable Satbir Singh and PW16 Constable Devender have deposed to the effect that Tasleem has exhorted other boys by uttering "Maro Salon Ko". ASI Raghbir Singh has specifically not deposed that Tasleem has exhorted F and thereafter Anwar fired from his revolver, which caused injuries to the deceased. P.W.10 Jagpal Singh has in his examination-in-chief merely stated that after chasing the accused when they stopped the vehicle, Tasleem told his companions to shoot them. He has not specifically used the words 'Maro Salon Ko'. In his cross-examination, he has stated that when Khalil got down G from the vehicle, accused shouted 'Maro Salon Ko'. He was contradicted with his 161 statement but as the Investigating Officer is not examined, nothing can be stated about that part of the evidence. Further, the prosecution version is that both appellants alongwith other persons had gone near Naulakha house for allegedly committing dacoity. However, that would not mean that after being chased by the police party accused were having any common H intention to kill the chasing party. There is nothing on the record to establish

that by alleged firing by Tasleem injury was caused to anyone. Hence we do not discuss the other contention raised by learned counsel Mr. Sushil Kumar that from Tasleem temancha was not recovered or, in any case, the said recovery is not proved. Further, it is to be noted that at the initial stage, six persons were chargesheeted for the alleged offences. The learned Judge discharged four of them. In this set of circumstances, it would be unsafe to rely upon the evidence of prosecution witnesses that Tasleem exhorted or uttered the words 'Maro Salon Ko' as alleged and therefore, Anwar fired from his revolver which caused injury to the deceased Khalil. From the facts and circumstances it would be difficult to infer that Tasleem was having any common intention to commit the crime for which Anwar is convicted. Hence, conviction of Tasleem for the offence punishable under Section 302 read with Section 34 IPC requires to be set aside.

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As submitted by learned senior counsel Mr. Sushil Kumar for the other role played by Tasleem, for which he is convicted and has undergone the sentence, the evidence is not required to be re-appreciated.

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In the result, Criminal Appeal No. 1175 of 1999 filed by Tasleem is partly allowed. He is acquitted of the offence punishable under Section 302 read with Section 34 IPC. Rest of the order passed by the learned Judge is confirmed. If he has already undergone the sentence for those offences, he be set at liberty immediately if not required in any other case.

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Criminal Appeal No. 1045 of 1999 filed by Anwar is dismissed.

A.K.T. Criminal Appeal No. 1175/1999 allowed.
Criminal Appeal No. 1045/1999 dismissed.