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

\+ **CRL.A.286/2009**

Date of decision: 25th June, 2021

IN THE MATTER OF:

PRAMOD GIRI ..... Appellant

Through Mr. Mohammad Shamikh, Advocate

versus

STATE OF DELHI ...Respondent

Through Ms. Kusum Dhalla, APP for State

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This appeal is directed against the judgment dated 08.04.2009 convicting the appellant of offence under Section 308 read with Section 34 IPC and order dated 13.04.2009 sentencing the appellant to undergo rigorous imprisonment for three years and six months and to pay a fine of Rs.3,000/- and in default in the payment of fine the appellant was to undergo a further period of three months simple imprisonment for the offence punishable under Section 308 and 34 IPC.

2. The facts in brief leading to the present case are as follows:-

a) The story of the prosecution is that on 21.09.2003, DD No.19A was recorded at Police Station Mansarovar Park, Delhi that there was a

firing in House No.131, Gali No.8 Jagatpuri.

b) SI Bhushan Azad (PW-12) along with Ct. Joginder (PW-10) and HC Amar Singh (PW-4) reached the spot. On reaching the spot, they were informed that one person has been injured who has been shifted to GTB hospital.

c) PW-12, the I.O. along with Ct. Joginder (PW-10) went to the hospital. The MLC of the injured Manoj (PW-1) S/o Chander Kiran(PW-13) was collected. As per the MLC, Manoj (PW-1) received a gunshot injury. After being found fit for giving a statement, the statement of Manoj (PW-1) was recorded. PW-1 stated that on 21.09.2003 at 8:15 p.m. he was going with his uncle Surender (PW-11) on the 100 ft. road. His brother Rahul came there. He asked his brother Rahul to get some eatables and gave him Rs.5/-. Rahul got them the eatables and left. PW-1 stated that when he and his uncle Surender were having the eatables, at that time one motorcycle stopped near them. There were three persons in the motorcycle namely, Pramod Giri, the appellant herein, Dinesh Giri (brother of the appellant) and one person who according to the complainant could be identified. The complainant said that Pramod Giri, the appellant herein exhorted his brother Dinesh Giri to shoot him because he had taken away the motorcycle of the accused which had been financed by some agency. On being exhorted Dinesh Giri took out a gun and fired a shot which missed Manoj (PW-1). The complainant stated that when he started running, Dinesh Giri fired for a second shot which hit PW-1 on his back. When PW-1 shouted, people started gathering and the assailants ran away towards Pari Chowk. It is stated that Rajinder (PW-3) brother

of PW-1 brought him to the hospital. On the statement of PW-1, FIR No.300/2003 was registered for offence under Section 307 read with Section 34 IPC. Investigation was conducted. During the investigation, it was stated by PW-13, Chander Kiran, father of PW-1 that accused Dinesh Giri (who passed away during the pendency of the trial) was threatening his son and had asked him to withdraw the case. On the basis of that statement offence under Section 506 IPC was added to the present case.

d) The appellant was arrested on 26.09.2003. Dinesh Giri (since deceased) was arrested on 15.10.2003. Jitender who was identified as the third person on the motorcycle was absconding during the course of investigation. He was declared as proclaimed offender and later on arrested on 16.09.2006.

e) Since Dinesh Giri passed away during the course of the trial the proceedings against Dinesh Giri were abated by order dated 21.07.2006. The case was committed to the Court of learned Sessions Judge. Charge under Section 307 and 34 IPC was framed against all the accused. The appellant pleaded that they are not guilty and claimed trial.

f) To prove their case, prosecution examined 16 witnesses. Two witnesses were examined by the defence.

i. PW-1, Manoj is the victim. He deposed that on 21.09.2003 he along with his maternal uncle Surender Kumar were present at 100 ft. road near Nathu Colony Fatak. PW-1 states that the accused persons came on a motorcycle, stopped the motocycle near them and started to abusing him. Accused

Pramod Giri then exhorted his elder brother Dinesh Giri to shoot at him. Dinesh Giri then fired at PW-1 which missed PW-1. PW-1 started running but Dinesh fired a second shot which hit him on his lower back. PW-1 in his chief-examination stated that someone informed his family and his brother reached the spot and took him to GTB hospital from where he received treatment for 10-11 days. However, in the cross-examination PW-1 stated that he ran home where his sister, sister-in-law and younger brother were present. He stayed there for 4 to 5 minutes and then went to hospital. He identified the appellant in court. PW-1 could not identify Jitender in court and was declared hostile.

ii. PW-2, Ct. Vinod Kumar deposed regarding the arrest of the appellant on 26.09.2003.

iii. PW-3, Rajinder Kumar is the brother of the injured victim stated that he received information about his brother Manoj (PW-1)getting shot and rushed him to GTB hospital along with maternal uncle Surender (PW-11). He further states that his brother received bullet injuries on his back and the victim told him that the appellant and two other persons who were on the motorcycle had fired upon him. In his cross-examination, PW-3 stated that they left from the house of Manoj (PW-1).

iv. PW-4, HC Amar Singh deposed that on 21.09.2003 pursuant to a call with regard to incident of firing, he along with SI Bhushan Azad (PW-12) and Ct. Yogender reached the

spot. They came to know that the incident had occurred at a 100 ft. road and that the injured had been shifted to GTB hospital. PW-4 further stated that he joined the investigation of the case alongside SI Bhushan Azad (PW-12), SI Kailash Chand, Ct. Iqbal, Ct. Sunil and SI Ravinder. He went to Meerut for the arrest of Dinesh Giri. PW-4 was not cross-examined.

v. PW-5, Sh. Rajneesh Kumar Gupta was the Metropolitan Magistrate who conducted TIP proceedings of Jitender on 25.08.2004. He has stated that the accused refused to join the TIP proceedings, despite being given a warning that in case of his refusal, adverse inference will be drawn. His testimony has not been challenged.

vi. PW-6, Ct. Mukesh Kumar deposed that Jitender was taken on police remand on 25.08.2004. He testified that Jitender had thrown the country made pistol in Seemapuri drain. PW-6 stated that the accused refused to join TIP proceedings. PW-6 has not been cross-examined.

vii. PW-7 was dropped.

viii. PW-8, Dr. Prashant was working in GTB Hospital when (PW-1) Manoj was brought after suffering the injury on 21.09.2003. He testified that (PW-1) Manoj had one entry wound 1 cm back in the left lumber region. Tattooing of skin was found around the entry wound which was red in colour. There was also tattooing of skin on back of right shoulder. PW-8 was not cross-examined.

ix. PW-9, HC Shankar Lal was working as duty officer. He received rukka from Ct. Joginder (PW-10) for registration of the case. A case was registered as FIR No.300/2003 for offences under Section 307 and 34 IPC.

x. PW-10, Ct. Joginder accompanied (PW-12) SI Bhushan Azad and (PW-4), HC Amar Singh after the registration of DD No.19A. He went with the rukka to the Police Station and got the case registered.

xi. PW-11, Surender is the uncle of (PW-1) Manoj who was with PW-1 when he was shot. He corroborated the statement of injured PW-1. He gave the torn, blood stained vest of the injured to the Police and correctly identified the appellant, Pramod Giri but was unable to identify the person who fired at PW-1 and the person driving the motorcycle. PW-11 has been cross examined in detail.

xii. PW-12, SI Bhushan Kumar is the IO. He went to the place of the incident with (PW-4) HC Amar Singh and (PW-10) Ct Joginder. He left (PW-4) HC Amar Singh at the site of the incident and went to GTB hospital with (PW-10) Ct. Joginder. He collected MLC and recorded the statement of the injured. He provided the Rukka and got the case registered through Ct. Joginder. Surender(PW-11) was present and he recorded his statement. He prepared the site plan and confirmed that (PW-11) Surender provided him with the blood stained vest. He states that father of injured Chander Kiran (PW-13) received a threatening call from Dinesh Giri and

Section 506 IPC was added in the case. He testifies that after the appellant was arrested and his disclosure statement was recorded, which confirms the motorcycle bearing no. DL 4SL-3580 was used at the time of incident. Accused Jitender was arrested by way of production warrant on 16.09.2006. It has come on record that elder brother of PW-1 was a Bad Character of the area and that he had previously lodged a report against Dinesh Giri in another incident which had taken place prior to the incident. PW-12 has been cross-examined at length by the defence counsel.

xiii. PW-13, Chander Kumar, the father of PW-1 stated that the accused Dinesh Giri telephonically threatened him to withdraw the case. PW-13 has also been cross-examined by the defence counsel.

xiv. PW-16, Avon Kumar brought the original file of case FIR No. 591/2003 under Section 25 of the Arms Act.

3. After recording prosecution evidence, statements of appellant Pramod Giri and Jitender was recorded, who stated that they have been wrongly implicated. They produced two defence witnesses DW-1, Ram Pal and DW-2, Sadhu R Singh primarily to establish that the appellant was not present in Delhi on the day when the incident took place.

4. The learned Additional Sessions Judge found that the testimony of PW-1, PW-3 and PW-11 to be reliable.The learned Trial Court held that in the facts and circumstances of the case, knowledge and intention of the accused to commit murder cannot be attributed to and the accused cannot be convicted for offence under Section 307 IPC. The learned Trial Court held

that the prosecution has proved its case against the appellant herein for having intent and knowledge of attempting to commit culpable homicide not amounting to murder along with Dinesh Giri (since deceased) with the aid of Section 34 IPC.

5. The learned Trial Court held that though PW-13, the father of PW-1 had stated that he has received a phone call threatening him to withdraw the case for which Section 506 IPC was added by a supplementary charge sheet but no charge for offence under Section 506 IPC had been framed. The learned Trial Court by the judgment impugned herein convicted the appellant for offence under Section 308 read with Section 34 IPC.

6. The learned Trial Court by an order on sentence dated 13.04.2009 sentenced the appellant to undergo rigorous imprisonment for three years and six months and to pay a fine of Rs.3,000/- and in default in the payment of fine the appellant was to undergo a further period of three months simple imprisonment for the offence punishable under Section 308 and 34 IPC. It is this order which is under challenge in the instant appeal.

7. Mr. Mohammad Shamikh, learned counsel for the appellant contended that the complainant/PW-1 has a number of cases registered against him. He contends that the complainant also acts as an informer of the Police. It is stated that brother of the complainant has been declared as a bad character of the area with number of cases pending against him and is an associate of Dinesh Giri (who passed away during the pendency of the trial). He also contends that it has come in evidence that about 10-12 persons were present at the time of incident and no effort has been made by the Police to join any one of them as a witness. PW-1, PW-3, PW-11 and PW-13 are relatives of PW-1 are all interested parties. Learned counsel for the appellant

contends that the reading of the deposition of PW-8, Dr. Prashant and the MLC shows that there is a bullet injury and there is charring around the wound but no bullet has been found from the body of the victim or recovered even from the site. He states that there is no exit wound therefore the bullet should have been found inside the body. He states that the weapon has also not been recovered. He further states that no blood has been found from the site. It is argued that injury was self-inflicted only to implicate the appellant. Relying on the judgment of High Court of Allahabad, learned counsel for the appellant contends that merely because a witness is injured, intrinsic value of the evidence cannot be enhanced. It is further contended that there are major inconsistencies in the story of the prosecution. He states that the initial statement of PW-1 was that he was brought to the hospital by PW-3, but in his cross-examination he has stated that after he was hit, he went to his house where his sister, sister-in-law and his younger brother were present and from there he was taken to hospital. Similarly, PW-11 Surender, the uncle in his deposition stated that after PW1 Manoj was hit on his back, he went to the house of PW-1, took his motorcycle from his house and then took PW-1 to the hospital. PW-3, Rajinder had deposed that when he was present near his house he was informed that his brother has been shot, he rushed to the spot and his uncle Surender was present there. He and his uncle PW-13 removed PW-1 to the hospital. He states that in view of the inconsistencies as to how the incident occurred, the case of the prosecution cannot be believed.

8. Mr. Mohammad Shamikh, learned counsel for the appellant contends that the appellant is being implicated due to the enmity between PW-1 and the accused.

9. On the other hand, Ms. Kusum Dhalla, learned APP supported the judgment stating that there is no inconsistency in the version of the witnesses. She states that the phone call was received by the Police Station from the house of PW-1. She states that after he was shot PW-1/Manoj came home and from there he was taken to the hospital and this is clear from a reading of the deposition of the injured PW-1 and PW-11. She contends that there is a bullet injury on the back of the PW-1. She states that the MLC Ex. No. PW-8/A shows that an entrance wound of 1cm on the back in the lumber region and tattooing of the skin around the wound red coloured. She also states that there is also a small injury on the shoulder. She therefore states that this supports the theory that two shots were fired one shot would have scrapped the shoulder of PW-1 and second shot hit PW-1 on his back. She states that the fact that the weapon was not recovered and that no bullet has been recovered either from the spot or from the body of the accused cannot lead to a conclusion that the wound was self-inflicted.

10. Heard Mr. Mohammad Shamikh, learned counsel for the appellant and Ms. Kusum Dhalla, learned APP for the State and perused the material on record.

11. PW-1 in his chief-examination stated that after he was shot in his lower back, somebody informed his parents. His brother PW-3, Rajinder Kumar reached the spot who took him to the hospital for treatment. In his cross-examination, he has narrated the events more clearly by stating that he was running to his house towards Jagatpuri with his uncle PW-11, Surender following him. He reached his house where his sister, sister-in-law and younger brother were present and from there they went to the hospital. PW-3 also stated that he and PW-11 took PW-1 to the hospital. In his cross-

examination, PW-3 has stated that they left the house of PW-1 at about 8:30/9:00 p.m. PW-11 has also stated that he went to the house of victim and took the motorcycle and took PW-1 to the hospital along with PW-3. The minor inconsistencies among the three witnesses does not persuade this Court to come to a conclusion that the entire case of the prosecution is to be ignored.

12. The appellant has been identified by PW-1, PW-3 and PW-11. Accused Dinesh Giri has got cases against him. His motorcycle had been financed and since the instalments were not being paid, the possession of the motorcycle was being taken back by the financer and thus there was motive on the part of the appellant to harm PW-1. Nothing has been brought on record to show that PW-1 would go to the extent of inflicting an injury on himself only to implicate the accused. The appellant had the motive to cause harm to the victim and his family but it cannot be said that the injured PW-1 had any motive to somehow implicate the accused.

13. The fact that PW-1, PW-3 and PW-13 are related does not lead to an inference that their testimony should be discarded. The Supreme Court in Namdeo v. State of Maharashtra, **(2007) 14 SCC 150**, has observed as under:

> *"**16**. Having heard the learned counsel for the parties, in our opinion, no interference is called for in exercise of power under Article 136 of the Constitution.* ***It is no doubt true that there is only one eyewitness who is also a close relative of the deceased viz. his son. But it is well settled that it is quality of evidence and not quantity of evidence which is material. Quantity of evidence was never considered to be a test for deciding a criminal trial and the emphasis of courts is always on quality of evidence.***

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29. *It was then contended that the only eyewitness, PW 6 Sopan was none other than the son of the deceased. He was, therefore, "highly interested" witness and his deposition should, therefore, be discarded as it has not been corroborated in material particulars by other witnesses. We are unable to uphold the contention. In our judgment, a witness who is a relative of the deceased or victim of a crime cannot be characterised as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or the other convicted due to animus or for some other oblique motive.*

30. *Before more than half a century, in Dalip Singh v. State of Punjab [AIR 1953 SC 364 : 1954 SCR 145] a similar question came up for consideration before this Court. In that case, the High Court observed that testimony of two eyewitnesses required corroboration since they were closely related to the deceased. Commenting on the approach of the High Court, this Court held that it was "unable to concur" with the said view. Referring to an earlier decision in Rameshwar Kalyan Singh v. State of Rajasthan [AIR 1952 SC 54 : 1952 SCR 377] Their Lordships observed that it was a fallacy common to many criminal cases and in spite of endeavours to dispel, "it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel" (Dalip Singh case [AIR 1953 SC 364 : 1954 SCR 145] , AIR p. 366, para 25).*

31. *Speaking for the Court, Vivian Bose, J. stated: (AIR p. 366, para 26)*

> *"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as*

> *enmity against the accused, to wish to implicate him falsely.* ***Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth****.''*
>
> *(emphasis supplied)*

The Court, no doubt, uttered a word of caution: (AIR p. 366, para 26)

> *"However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."*
>
> *(emphasis supplied)*

32. In Darya Singh v. State of Punjab [AIR 1965 SC 328 : (1964) 3 SCR 397 : (1965) 1 Cri LJ 350] this Court held that evidence of an eyewitness who is a near relative of the victim, should be closely scrutinised but no corroboration is necessary for acceptance of his evidence.

33*. Speaking for the Court, Gajendragadkar, J. (as His Lordship then was) stated: (AIR p. 331, para 6)*

> *"6. There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been*

committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence. If the offence has taken place, as in the present case, in front of the house of the victim, the fact that on hearing his shouts, his relations rushed out of the house cannot be ruled out as being improbable, and so, the presence of the three eyewitnesses cannot be properly characterised as unlikely. If the criminal court is satisfied that the witness who is related to the victim was not a chance witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised. In doing so, it may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the

> *real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."*
>
> *(emphasis supplied)*
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> ***38**. From the above case law, it is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."* (emphasis supplied)

14. There is no reason to disbelieve PW-1, PW-3, PW-13 and more particularly PW-1 who is the injured witness and eyewitness. They withstood sustained cross-examination.

15. The defence put forward by the accused cannot be believed. There is no corroboration. The plea of alibi must generally be supported by some corroborative evidence. The MLC report of the victim Ex. PW-8/A shows a

bullet injury. There is a wound on the back and charring around the skin of the wound.

16. The fact that PW-15 Dr. Amit Kumar, has not given his opinion on the MLC is of no consequence. PW-8/A has been exhibited by PW-8, Dr. Prashant who had deposed that apart from the entrance wound in the back of PW-1, there was tattooing on the back of the right shoulder which supports the case of the prosecution that two shots were fired, one bruised to the shoulder of PW-1 and other hitting him on the back.

17. The fact that no independent witnesses joined or examined does not take away the credibility of the prosecution. It is well known that people shy away from becoming witnesses in court cases and the fact that nobody was prepared to come in the evidence would not lead to a conclusion that the prosecution has not proved his case. The Supreme Court in Ashok Kumar Chaudhary v. State of Bihar, **(2008) 12 SCC 173** has observed as under:-

> "***14****. Similarly, PW 5, who, in his cross-examination had divulged that appellant Kailash Chaudhary was his brother by gotra, was also injured, had been cross-examined at length, but nothing could be elicited to show that he had any animosity towards the appellants or to discredit his deposition in support of the prosecution. The trial court as well as the High Court have found the evidence of all these witnesses to be trustworthy and reliable, and it has been recorded that their evidence inspires confidence and stands corroborated by the medical evidence. The trial court has also taken note of some minor variation in the timing of the occurrence, which has also been highlighted before us by learned counsel for the appellants, and has held that negligible variation of half an hour between the testimony of PW 1 to PW 5, wherein all of them have given the time of occurrence either at about 5.30 p.m. or between 5-6 p.m.*

> *(PW 5) and the evidence of PW 8, wherein the time of occurrence has been given as 5.00 p.m. hardly affects the prosecution case.* ***In view of consistent evidence that has come on record, it cannot be said that non-examination of public witness makes the case of the prosecution untrustworthy or that the courts below have committed any legal infirmity in relying upon the testimony of the injured witnesses. It is the quality and not the quantity of evidence which matters."*** (emphasis supplied)

18. The prosecution has proved the guilt of the accused beyond reasonable doubt. As stated earlier, there is no reason to disbelieve PW-1, PW-3 and PW-11. There is no reason for the complainant to implicate the appellant rather the appellant had a reason to assault the complainant.

19. In view of the above, judgment dated 08.04.2009 and the order on sentence dated 13.04.2009 does not require interference. The appeal is dismissed. Bail bonds of the appellant are cancelled and the appellant is directed to surrender within four weeks from today.

SUBRAMONIUM PRASAD, J.

JUNE 25, 2021
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