

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

% *Judgment Reserved on : October 28, 2009*
Judgment Delivered on: November 05, 2009

+ **CRL.APPEAL NO.151/2000**

VIJAY Appellant
Through: Mr.L.D.Mual & Mr.S.S.Mual, Advocates.

Versus

STATE Respondent
Through: Mr.M.N.Dudeja, A.P.P.

CRL.APPEAL NO.771/2006

HANS RAJ Appellant
Through: Mr.L.D.Mual & Mr.S.S.Mual, Advocates.

Versus

STATE Respondent
Through: Mr.M.N.Dudeja, A.P.P.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 5.6.1999, appellants Vijay and Hans Raj have been convicted for the

offences punishable under Section 302/394/34 IPC and have been sentenced to undergo imprisonment for life for said offences. Appellant Hans Raj has additionally been convicted for the offence punishable under Section 397 IPC, for which offence he has been sentenced to undergo imprisonment for seven years.

2. Briefly stated, the case of the prosecution is that at about 5.30 AM on 17.4.1996, appellants Vijay Kumar and Hans Raj committed robbery and in the process murdered Ashok Kumar at City Service Center Petrol Pump, Mangolpuri, Delhi.

3. Process of law was set into motion, when at 5.30 AM on 17.04.1996, Const.Nirmal Singh PW-23, the duty officer at PS Mangolpuri received information that a person had been shot at new petrol pump by persons in a Tata 407 vehicle. He made an entry being DD No.7-B, Ex.PW-23/B wherein he entered said information. Copy of said DD No.7-B was entrusted to SI C.M.Meena PW-18 for investigation, who along with Const.Ramkesh PW-17 reached the spot. They found the dead body of Ashok Kumar, an employee of the said petrol pump, lying there with a bullet injury on the forehead and blood oozing therefrom. SI C.M.Meena met Dharampal PW-8,

another employee of the petrol pump and recorded his statement Ex.PW-2/A. In the said statement Dharampal stated that at about 4.45 AM on 17.04.1996 a blue coloured tempo came to the petrol pump and the driver of the vehicle asked for 10 liters of diesel. After getting the diesel filled, the driver paid Rs.100/- to him i.e. Dharampal and when he took out a pack of notes from his pocket to pay back the balance sum of Rs.30/-, the driver attempted to snatch the money from him. He managed to escape from there and raised an alarm. As a result, his co-employees Jitender, Ashok and Surender got alert and rushed towards the tempo. Surender carried a stick (danda) with him from the cabin. On this, the tempo driver rushed back and started reversing the tempo. When they all i.e. Jitender, Surender, Ashok Kumar and Dharampal tried to stop the tempo, the person sitting on the conductor's seat fired with a pistol from the window of the tempo, which hit Ashok Kumar. Ashok Kumar died at the spot. SI C.M.Meena sent this statement of Dharampal for registration of an FIR through Const.Ramkesh. At 7.45 AM HC Rajbir Singh PW-2 registered FIR Ex. PW-2/B at PS Mangolpuri.

4. After the registration of FIR, the investigation was handed over to Insp.Rajender Singh PW-25 who also reached the spot. He summoned a photographer Shri Bharat Kumar PW-26 who took photographs Exs.PW-26/A-1 to A-9 of the dead body; negatives whereof are Ex.PW-26/P-1 to P-9. He prepared a site plan Ex.PW-8/8 of the spot. He lifted blood stained earth and earth control from the spot and seized them as recorded in memo Ex.PW-8/B. He filled in the requisite inquest papers and sent the dead body to the mortuary of Civil Hospital, Sabji Mandi. He recorded the statements under Section 161 Cr.P.C. of the eye-witnesses.

5. On the same day, Dr.L.T.Ramani conducted the post-mortem examination of the dead body of Ashok Kumar and prepared his report Ex.PW-1/A. He noted three injuries on the person of the deceased; two being abrasion injuries on the forehead and cheek area, one being a laceration wound. He opined that injury No.3 was an entry wound of a fire arm projectile, which injury was sufficient in the ordinary course of nature to cause death. The doctor handed over the clothes of the deceased, the sample of his blood and the bullet Ex.P-3

recovered from his body to the police which were seized as recorded in memo Ex.PW-17/A.

6. On 21.04.1996 the investigation of the case was transferred to special staff North-West and after about a week the investigation was again transferred to SI C.M. Meena PW-18.

7. An FIR No.422/1996 for an offence punishable under Section 307 IPC and Section 25 and 27 of the Arms Act was registered at PS Mangolpuri. With reference to investigation of the said offence, on 29.04.1996 SI Narender Singh (not examined), SI Jaibir Singh PW-10 and HC Ranbir Singh PW-11 of PS Mangolpuri who were investigating the said case, arrested appellant Hans Raj, appellant Vijay and two other persons being Jai Kishan and Yashpal who were accused in the said case i.e. the case pertaining to FIR No.422/1996. On being arrested, while carrying out the personal search of the appellants, they were found in possession of a country made pistol each. Said pistols were seized as recorded in memos Ex.PW-10/E and Ex.PW-10/F. SI Narender Singh interrogated the four accused and recorded their disclosure statements. The statement of Hans Raj is Ex.PW-10/A and the statement of

Vijay Kumar is Ex.PW-10/B. In the said two statements, the appellants disclosed their participation in the offence pertaining to the instant FIR.

8. The aforesaid information pertaining to the arrest of the appellants as also Jai Kishan and Yashpal was given to SI C.M.Meena who obtained the police custody of the appellants Hans Raj and Vijay Kumar on 14.05.1996. On 15.05.1996 the appellants led a police team to some bushes near the petrol pump and got an empty cover of cartridge Ex.P-2 recovered which was seized as recorded in the memo Ex.PW-8/B. SI C.M. Meena prepared sketch Ex.PW-8/F of the same.

9. Pertaining to the bullet Ex.P-3 recovered from the dead body of the deceased at the time of the post-mortem and the cartridge Ex.P-2 got recovered by the appellants, a report Ex.X-1 was obtained as per which the bullet and the cartridge were opined to be fired from the country made pistol sent for ballistic examination.

10. Appellants Vijay and Hans Raj were put to trial, being charged for the offence of having murdered Ashok Kumar and used firearms in the commission of the offence of robbery.

11. Needless to state, the prosecution hinged its case on the testimony of Dharampal PW-8, the informant on whose statement the FIR was registered as also the co-worker at the petrol pump i.e. Surender Kumar PW-9 as also the recovery of a firearm from appellant Hans Raj and the FSL report as per which the bullet Ex.P-3 recovered from the body of the deceased as also the cartridge Ex.P-2 were fired from the firearm sent along with the bullet and the cartridge for opinion.

12. Dharam Pal PW-8 deposed that at about 5.30 AM on 17.4.1996 he was working at City Service Centre Petrol Pump, Mangolpuri when a tempo driven by appellant Vijay entered the petrol pump. Appellant Hans Raj was sitting on the seat next to the driver's seat. Appellant Vijay got down and asked him to fill 10 litres of diesel. After the same was filled, they paid and left the petrol pump. After sometime they returned to the petrol pump, demanding the receipt of payment. When he i.e. Dharam Pal went inside the cabin to make a receipt, Vijay followed him. Vijay placed a pistol on him i.e. Dharam Pal and told him to hand over all the cash. He i.e. Dharam Pal somehow managed to push away Vijay and raise an alarm, whereupon his co-employees got alert and protested. On

seeing them, Vijay rushed back to his tempo; the employees including Dharam Pal chased him. Hans Raj who was sitting on the seat next to the driver's seat fired with a pistol, which hit Ashok Kumar, a helper at the Petrol Pump.

13. Surender Kumar PW-9 deposed that at about 5.15 AM on the day of the incident when he was working at City Service Centre Petrol Pump, Mangolpuri, Delhi, a blue coloured tempo of TATA 407 make came at the petrol pump. At that time he was sleeping in the cabin, Dharampal woke him up and told him that the persons in the tempo were robbing them. He immediately rushed outside the cabin and saw his colleagues Jitender, Dharampal and Ashok Kumar chasing the tempo. Ashok Kumar was ahead of the others. When they attempted to stop the tempo, appellant Hans Raj who was sitting on the seat next to the driver's seat fired a shot with a pistol which hit Ashok Kumar on his forehead. After firing the shot, appellant Hans Raj and his accomplice managed to escape in the tempo. He could not see the driver of the tempo.

14. Vide impugned judgment and order dated 05.06.1999, the learned Trial Judge gave a finding of guilt qua

both the appellants. The reasoning noted by the Trial Judge for said finding is produced herein under:-

“40. The next point for determination is with regard to the involvement of the accused persons in this case. The involvement can be traced out against the accused persons from three cases registered against them. The case FIR No.199/96 police station Jahangirpuri under Section 379 IPC is with regard to the theft of a tempo belonging to PW-5 Sh.Kharati Lal with the help of which the crime in this case was stated to be committed. The accused persons were apprehended in case bearing FIR No.422/96 police station Mangolpuri under Section 307 IPC while they were attempted to commit murder and made disclosure of this case also. Leaving apart the acquittal or conviction of the aforesaid cases, there are certain convincing evidence of the prosecution witnesses which leads to the conclusion tha the accused persons have actively participated in the commission of the crime. Statement of PW-5, Sh.Kharati Lal, the superdar of vehicle No.HR-12-7089 has clearly stated that accused Vijay was employed as Driver of the aforesaid tempo. He worked for three months with him and thereafter he found that his aforesaid tempo was stolen for which the above theft case was registered. Accused Vijay happens to be one of the accused persons of this case and he was identified by PW-5 Sh.Kharati Lal. There is no denial to this effect from the defence counsel.

41. When the accused persons were arrested in case bearing FIR No.422/98, police station Mangolpuri, they made a disclosure statement Ex.PW10/A in respect of accused Hans Raj and Ex.PW10/B in respect of accused Vijay. From their disclosure some facts and some incriminating articles were recovered in consequence of this disclosure. It is pertinent to mention here that both the accused persons in their disclosure statement stated about the theft of the aforesaid tempo, they changed the number of that tempo, planning for commission of the petrol pump

robbery etc. These facts have been discovered during the trial of this case from the statement of PW-5 Sh.Kharati Lal, PW-8 Sh.Dharampal, PW-9 Sh. Surinde Kumar, PW-10 S.I. Jairbir Singh and PW-18 S.I.C.M. Meena. It is pertinent to mention here that the facts narrated in the disclosure are corroborating in all material particulars from the statement of independent witnesses like PW-8 Sh. Dharampal, PW-9 Sh. Surinder Kumar and other police witnesses. Significant incident relates to the theft of the tempo, changing of its number, leaving the said tempo in abundant condition, recovery of one cover of the cartridge. Thus the disclosure statements have led the discovery of theft as well as the recovery of incriminating articles and these facts are relevant under Section 27 of Indian Evidence Act. All these corroborated facts lead to irresistible conclusion that the accused persons namely Hans Raj and Vijay have actively participated in the commission of crime of robbery coupled with murder of one Ashok Kumar, Salesman of City Service Centre, Petrol pump Mangolpuri, Delhi.

42. Besides, the aforesaid evidence against the accused persons. PW-8 Sh.Dharampal. PW-9, Sh. Surinder Kumar have established that they were present at the aforesaid Petrol Pump at the time of incident. When the accused persons namely Vijay and Hans Raj came on tempo for diesel filling were duly identified by those two witnesses at the spot. The presence of these witnesses have not at all been challenged by the Id.defence counsel. Besides this, from the statements of PW-13 Sh.Jitender Kumar Sharma, PW-21 Sh. Jitender Kumar son of Sh. Laxmi Chand and PW-24 Sh. Ish Puniani, it has been established that they were employees at the aforesaid petrol pump and were working at the relevant time with the said petrol pump. Both the aforesaid witnesses namely PW-8 Sh. Dharampal and PW-9 Sh.Surinder Pal and other co-employees have witnessed the scene of occurrence and shooting of Ashok Kumar by Hans Raj, who was sitting by the side seat of driver in the said tempo. At that time, the

accused Vijay was driving the said tempo. The statement of the aforesaid witnesses are so meticulous and explicit which relates to the incident that took place at the petrol pump. There is no denial of this fact from any of the prosecution witnesses. In other words, the defence could not make any dent in the prosecution case.

43. After the aforesaid incident, victim Ashok Kumar was got admitted in the hospital. The post mortem conducted by completing all the formalities as required, under the law, such as death report Ex.PW18/B, the brief facts of the case Ex.PW18/C and identification of the dead body Ex.PW18/D to Ex.PW18/F. The post mortem was conducted by PW-1, Dr. L.T. Ramani and he opined that the injuries were anti mortem. He further opined that the injury No.3 was due to the fire arm and was sufficient in the ordinary course of nature to cause the death. He proved his report Ex.PW1/A. There is no cross-examination on the opinion of the doctor. Thus, it has been duly established that the cause of death of the victim is on account of the injury caused due to the fire arm injury on the forehead of the victim Ashok Kumar. It has also been established that from the statement ofg PW-9 Sh. Prakash Chand, PW-20, Sh. Bhule Ram that the dead body belongs to Ashok Kumar, their nephew and father of the deceased.

44. The accused persons in their statement under Section 313 Cr.P.C. have merely denied the evidence put forth. Mere denial of a fact is no sufficient. There is no plausible explanation given by these accused persons in their statements. They have also not preferred to lead any evidence in defence.”

15. The learned Trial Judge has apparently not relied upon the report of the ballistic expert i.e. Ex.X-1 probably for the reason the report is most unhappily worded. It gives an opinion with respect to a firearm sent to the expert. Which is

the parcel and containing what seal (though it has been mentioned that the seals were intact) has not been noted by the expert. The report records that the various exhibits were sent to the expert through Const. Ram Mehar, who has not been examined as a witness and thus we have no clue as to with reference to which country made pistol, the opinion has been given.

16. At the hearing of the appeals, learned counsel for the appellants Mr.L.D.Mual, Advocate urged that Dharampal PW-8 has given a materially different version while deposing in Court vis-à-vis his statement Ex.PW-2/A. Learned counsel pointed out that in his statement Ex.PW-2/A Dharampal stated that after ten litres of diesel was filled in the tempo in which the accused were travelling, receiving Rs.100/-; price of the diesel being Rs.70/-, when he took out money from his pocket to return Rs.30/-, the driver attempted to snatch the money from him. While deposing in Court Dharampal stated that after purchasing ten litres of diesel, the appellants left but returned and demanded receipt for payment and at that point of time Vijay took out a pistol and demanded money from Dharampal. Thus, learned counsel urged, that Dharampal had

to be disbelieved. Counsel urged that even Surender Kumar had not to be believed because he had a motive to support his friend Dharampal. The other submission made by learned counsel was that if Surender Kumar had to be believed, he having named only appellant Hans Raj as the person who fired and having categorically stated that he could not see the face of the person driving the tempo, Vijay was entitled to the benefit of doubt.

17. The plea of learned counsel has to be rejected for the reason we find no serious improvement or a contradictory version spoken of by Dharampal PW-8. Embellishments of a minor nature or variations of a minor nature do not discredit a witness. The reason is obvious. When a person deposes two facts seen by him months before, certain events at the fringe do get blurred. The incident took place on 17.4.1996. Dharampal was examined in Court on 3.2.1999. The time lag of nearly two years and ten months is long enough for a person to imperfectly recollect the facts at the fringe of an incident. Save and except the embellishments that the accused, left and returned, everything else deposed to by Dharampal is in sync with his statement recorded by the police

soon after the incident. It has also to be noted that a co-worker had been murdered and Dharampal was face to face with the accused when the incident took place. It can reasonably be expected that by the time Dharampal made his statement to the police, his nerves were still frozen and therefore omitted to disclose the complete sequence of events or may be thought it unnecessary to state that the accused left but returned forthwith.

18. That apart, it is settled law that if there is some embellishment in the testimony of a witness, if there is corroboration to his testimony, the part of the testimony of such a witness which is independently corroborated can be accepted; rather has to be accepted.

19. No embellishment has been shown to us in the testimony of Surender Kumar who also witnessed the incident of firing and has corroborated Dharampal in the manner in which the offence was committed and Hans Raj shooting at Ashok Kumar.

20. That Surender Kumar could not see the driver as Hans Raj was obstructing his view, does not entitle Vijay to any

benefit, for the reason we find Dharampal to be a truthful witness.

21. That for the reason the ballistic expert has penned a shoddy report, the appellants have got the benefit of the report in question being not used as incriminating evidence does not dilute the fact that the appellants were found to be carrying unlicensed country made firearms, which shows the propensity of the appellants as unworthy citizens having criminal background. It is unfortunate that in the instant case no charge was framed against the appellants under the Arms Act for carrying with them unlicensed firearms.

22. It is true that no participative role in the actual shooting has been assigned to appellant Vijay, but the testimony of the two eye-witnesses establishes that both the appellants were on the prowl looking for victims and under the circumstances it has to be held that both the appellants shared a common intention to overcome resistance or use force in the commission of robbery. Thus, Vijay is liable for the act of Hans Raj by virtue of Section 34 IPC.

23. Pertaining to the conviction of appellant Vijay for the offence of murder the same has to be sustained. But for

the offence punishable under Section 394 IPC, the conviction of appellant Vijay is set aside for the reason it is not proved that Vijay caused hurt to anyone.

24. Pertaining to appellant Hans Raj, his conviction for the offence of murder and for the offence punishable under Section 394 IPC has to be sustained however his conviction for the offence punishable under Section 397 IPC has to be set aside for the reason no robbery was committed. It merely remained an attempt. But he is liable to be convicted for the offence punishable under Section 398 IPC.

25. The two appeals are accordingly disposed of maintaining the convictions and the sentences imposed upon the appellants save and except the conviction of appellant Vijay for the offence punishable under Section 394 IPC and the conviction and sentence imposed upon appellant Hans Raj for the offence punishable under Section 397 IPC. We acquit appellant Vijay of the charge under Section 394 IPC. We acquit appellant Hans Raj of the charge under Section 397 IPC but convict him for the offence punishable under Section 398 IPC for which offence we punish him to undergo rigorous imprisonment for seven years.

25. Since the appellants are in jail, the Registry is directed to transmit a copy of the present judgment and order to the Superintendent, Central Jail, Tihar for being supplied to the appellants.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

NOVEMBER 05, 2009
Dharmender