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IN THE HIGH COURT OF DELHI

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Judgment reserved on : 13.03.2009

Judgment delivered on: 06.04.2009

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CRL.A. No.165/2001

BISHAN @ BINNY @ BAGGA & ANR. ...Appellants
Through : Mr. Raman Sawhney, Advocate

versus

STATE ...Respondent
Through :Ms. Richa Kapoor, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

: PRADEEP NANDRAJOG, J.

1. Three persons were sent for trial. They are appellant No.1 Bishan @ Binny @ Bagga (hereinafter referred to as appellant No.1), Balbir @ Billu @ Mukesh (hereinafter referred to as appellant No.2) and Babli. They were charged with the offence of having murdered Satish Kumar. Bishan @ Binny @ Bagga was additionally charged for the offence of unlawful possession of a dagger; an offence punishable under Section 27 of the Arms Act.

2. Vide impugned judgment and order dated 27.1.2001 Babli has been acquitted of the charge framed against him. Appellant No.1 has been convicted for the offence of murdering Satish Kumar as also for the offence punishable under Section 27 of the Arms Act. Appellant No.2 has been convicted for the offence of murdering Satish Kumar.

3. Case of the prosecution was that the accused had enmity with the deceased Satish Kumar and they hatched a conspiracy to kill him. The deceased had to attend a court hearing at Tis Hazari Courts on 27.7.1991. Accused Babli enticed him to have liquor and the other two accused joined and after intoxicating Satish Kumar, the appellants stabbed him with knives and all the accused ran away. That Devender Kumar PW-7 had witnessed his brother being stabbed. On being apprehended, the appellants made confessional statements admitting their guilt and disclosed to the police that they had hidden the knives used by them to murder the deceased and thereafter led the police to the place where they had hidden the knives which were recovered. They also told the police that when they were attacking the deceased their shirts got stained with his blood and that they had hidden the shirts, which were got recovered by them. That the two knives were stained with blood. The shirts, one each belonging to the

appellants which were got recovered, were also stained with blood. The serologist reported that the blood on the knives and the shirts was of human origin and of group 'B' i.e. the same group as that of the deceased. Further, it was the case of the prosecution that the deceased was removed from the place of occurrence to Hindu Rao Hospital in a TSR by Const.Shahji John PW-22 and on the way to the hospital, the deceased was muttering that Binny and Biloo i.e. the appellants had caused the injuries to him.

4. To put it in a nut shell, the incriminating evidence which required to be proved, to sustain the case of the prosecution, would be:-

- A. Enmity of the accused with the deceased.
- B. Eye witness account of Devender which directly would have implicated the accused.
- C. That the deceased was muttering the names of Binny and Biloo as the ones who had attacked him on the way to the hospital, which was heard by Const.Shahji John PW-22.
- D. Recovery of knives stained with blood and recovery of the shirts worn by the appellants at the time of commission of the crime which were stained with blood; the blood group on all being the same as that of the deceased.

5. Vide impugned judgment and order dated 27.1.2001, acquitting Babli, the learned Trial Judge has held that there was no admissible evidence against Babli and that the statement of the co-accused disclosing to the police that Babli had enticed the deceased with the lure of alcohol and had thus facilitated the commission of the crime, was inadmissible evidence.

6. Against the appellants, learned Trial Judge has held that the testimony of Devender PW-7 was credible and that certain inconsistencies pointed out by the defence were immaterial and the eye witness account by Devender established that the appellants had stabbed the deceased; that the deposition of Const.Shahji John PW-22 that on the way to the hospital the deceased was muttering that Binny and Biloo had stabbed him was trustworthy and that Binny and Biloo are the appellants; that the blood stained shirts recovered pursuant to the disclosure statements of the appellants as also blood stained knives recovered pursuant to their disclosure statements, all of which were found stained with human blood of same group as that of the deceased, were incriminating evidence against them. Thus, the appellants have been convicted as aforesaid.

7. Before analyzing the evidence on record, it becomes relevant to note the same.

8. That Satish Kumar was murdered is not in dispute. It has to be so for the reason the post-mortem report Ex.PW-12/A pertaining to him record the following injuries:-

- "1) One lacerated wound size 3c.m X 2c.m. on the occipital region of the scalp.
- 2) One lacerated wound size 2c.m.X 1c.m. muscle deep were seen on the upper border of scapula.
- 3) One stitched wound size 1.2cm was seen just below the outer two third of the left collar bone.
- 4) One stitched wound size 2c.m. was seen 3c.m.below the middle part of the left collar bone.
- 5) One rubber tube was seen fixed below the injury no.2.
- 6) One incised wound size 3c.m.X1c.m.X? was seen placed obliquely over the left posterior auxiliary fold.
- 7) One rubber tube was found fixed on the left lower ankle of the chest.
- 8) One incised wound size 2.5c.m.X1c.m.X? was seen on the left lumbar region 4c.m. above the left iliac crest.
- 9) One incised wound size 2c.mX0.5c.m muscle deep on the left on it's lower outer aspect.
- 10)Stitched wound size 10'' in length in the middle line of abdomen was seen which was an operational wound."

9. It was opined by the doctor conducting the post-mortem that injury Nos. 6 and 8 were sufficient to cause death

in the ordinary course of nature. The cause of death was shock and haemorrhage resulting from the injuries.

10. It is also not in dispute that the place of occurrence is near the canteen in Tis Hazari Courts adjoining the Lawyers' Chamber Block and the time of the occurrence is around 8:30 PM.

11. Information was received by the police when DD Entry No.32, Ex.PW-4/A was recorded at 8:30 PM by Const. Joginder Singh PW-4 at police post Tis Hazari that an advocate had informed on the phone that a person has been stabbed near the canteen. ASI Gopal Ram PW-19, Const.Shahji John PW-22 and Const. Suresh Kumar PW-5 who were at the police post immediately left for the spot and saw a man lying injured with blood all over. At the asking of ASI Gopal Ram, Const.Shahji John brought a TSR in which he removed the injured to Hindu Rao Hospital where he was admitted, as recorded in the MLC PW-9/A at 8:50 PM.

12. Dr. M.M.Gupta PW-9 prepared the MLC Ex.PW-9/A after examining the injured and on the MLC, apart from noting the injuries which could be seen by the eye, noted as under:-

"Name- Unknown, Son of- Unknown, Aged approximately 30 years, brought by Const. Shahji John

on 27.7.1991 at 8.50 P.M. with the alleged history of being stabbed by someone.”

13. He further recorded on the MLC that the patient was in a semi-conscious condition and his general condition was poor and smell of alcohol was present in the mouth of the injured.

14. After the injured had been removed to the hospital and whilst ASI Gopal Ram was still at the spot where the injured was found, Devender Kumar PW-7, reached the spot and told ASI Gopal Ram that he was the brother of the deceased but refused to make any statement and insisted that he would first like to meet his brother. Thereupon ASI Gopal Ram and Devender Kumar went to Hindu Rao Hospital. Devender saw his brother and thereafter made a statement Ex.PW-7/A which was recorded by ASI Gopal Ram who made an endorsement Ex.PW-19/A thereon and forwarded the same through Const.Shahji John at 10:10 PM, as recorded in the endorsement, for an FIR to be registered. At the police station the FIR Ex.PW-14/A was registered at 10:25 PM.

15. The statement Ex.PW-7/A of Devender Kumar PW-7, which has formed the basis of the FIR is in vernacular. Translated in English, it reads as follows:-

“Statement of Shri Devender Kumar S/o Shri Laxmi Narayan R/o 196/7 CD-9 Thansingh Nagar, Anand Parbat Delhi, Age 21 years:-

I reside at the abovementioned address with my parents and siblings. I make lamp shades at home for a living. My brother Satish also makes *dibba* at home. That today in the morning my brother Staish left the house after informing us that he was going to attend his hearing before the court. That when Satish did not return home by 7:00 PM we got worried, I left for Tis Hazari to look for him after informing my wife. While looking for my brother I reached the advocates' chambers near Pull Mithai at Tis Hazari. That at around 8:25 PM I saw my brother Satish quarrelling near the lawyer's canteen with Binny@ Bagga and Balvir@ Billu who are known to me and reside near our house at Gali no.2 and Gali no.3 Anand Parbat respectively. That while I was heading towards them both Binny@ Bagga and Balvir@ Billu stabbed Satish several times with knives on his chest and stomach in front of my eyes they said that they were going to finish him off today. That when I tried to raise an alarm both of them started chasing me but I managed to escape. That thereafter both of them ran away towards Pull Mithai. That I returned to the spot where my brother had fallen down on the ground owing to the stab injuries and blood had started to ooze out of his wounds. I immediately ran towards the road outside the court premises to fetch a scooter to remove my brother to the hospital. That by the time I returned with the scooter you had already reached the spot with the police and my brother had already been removed to the hospital. That after searching for the accused persons for a short while I came to the Hindu Rao Hospital with you where my brother is being treated. That my brother is not fit for making a statement. Let appropriate legal action be taken against Binny and Balbir. The statement has been read over to me and it is correct.”

16. Bir Singh PW-21, SHO of PS Subzi Mandi within jurisdiction of which police station Tis Hazari Court Complex

was situated was given the information of the crime and hence he proceeded to the place of occurrence and therefrom to Hindu Rao hospital. At the hospital, the blood stained shirt, vest, pant and the underwear of the injured were handed over by the doctor to Const.Rohtash Kumar PW-6, the duty constable at Hindu Rao Hospital, who in turn handed over the same to Inspector Bir Singh PW-21 who seized the same vide seizure memo Ex.PW-6/A.

17. From the place of the occurrence, ASI Gopal Ram lifted blood stained earth and control earth vide memo Ex.PW-5/B and prepared the rough site plan Ex.PW-19/B at the instance of Devender PW-7.

18. Satish Kumar expired at Hindu Rao Hospital on 28.7.1991 at about 4:20 A.M. The body was seized and sent for autopsy and on 28.7.1991 at 10:40 A.M. Dr. L.K. Barua PW-12 conducted the post-mortem and noted the injuries on the person of the deceased as noted in para 8 above and gave his opinion about the cause of death of the deceased as noted in para 9 above.

19. The police searched for the accused. As claimed by Inspector Bir Singh PW-21, he received information that appellant Bishan was seen at Old Delhi Railway Station. On

reaching the station he claims to have seen both the appellants who were arrested on 2.8.1991 at Old Delhi Railway Station. They were interrogated. Bishan made a disclosure statement Ex.PW-16/A, inter alia, admitting his involvement in the crime, and further disclosed that he had stabbed the deceased with a knife which he had thrown in bushes in the precincts of Tis Hazari Court Complex and he volunteered to point out the spot where he had thrown it. He further disclosed that he had concealed a full sleeve shirt which he was wearing when the crime was committed and that he had also concealed a half sleeve shirt of Mukesh, which Mukesh was wearing when the crime was committed. He disclosed that both the shirts were stained with blood and that he could get both the shirts recovered. On being interrogated, Mukesh made a disclosure statement Ex.PW-16/B admitting his involvement in the crime and that he had used a knife to stab the deceased which he had thrown in bushes in the precincts of Tis Hazari Court Complex which place he volunteered to be pointed out. Thereupon, both the appellants, led the police to the respective place where they claimed to have thrown the the knives. Bishan pointed out a bush at the rear of shop No.15, Khanna Market, adjoining Tis Hazari Court Complex and from within the bush, got recovered a knife which was seized

vide seizure memo Ex.PW-1/E. Mukesh led the police to a bush a little distance away and from within the bush, got recovered a knife which was seized vide seizure memo Ex.PW-1/B. The sketch Ex.PW-1/C of the knife got recovered by Mukesh was drawn by Inspector Bir Singh PW-21 who also prepared the sketch Ex.PW-1/A of the knife got recovered by Bishan.

20. The blood sample of the deceased as also his clothes stained with blood, which were handed over by the doctor at Hindu Rao Hospital to the police, as also the two blood stained shirts, one with full sleeves and the other with half sleeves, got recovered by Bishan as also the two knives, were sent for serological examination and as per report Ex.PW-21/F, it was opined that all the items had presence of human blood and the group thereof was 'B'. On 7.8.1991, the two knives were sent for opinion to Dr.L.K.Barua who vide report Ex.PW-12/B gave the opinion that the injuries on the deceased could possibly be caused by either or by both the knives.

21. At the trial, Const. Joginder Singh PW-4, proved the DD Entry No.32, Ex.PW-4/A recorded by him. Const. Rohtash Kumar PW-6 proved having handed over the blood stained clothes of the deceased to the IO vide memo Ex.PW-6/A. Dr.M.M.Gupta PW-9 proved the MLC Ex.PW-9/A and deposed that the patient was brought to the hospital at 8:50 PM on

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27.7.1991 by Const.Shahji John. Inspector Devender Singh PW-10, a draftsman proved the site plan to scale Ex.PW-10/A and deposed that he prepared the same on 8.10.1991 with the assistance of Devender Kumar. Dr. L.K.Barua PW-12 proved the post-mortem report Ex.PW-12/A and his opinion Ex.PW-12/B pertaining to the two knives which were sent to him for opinion. Const. Amrit Lal PW-13, a photographer, deposed and proved that the photographs Ex.PW-1/A/1 to 3; negatives whereof were Ex.PW-1/A/4-6 were taken and developed by him.

22. Ignoring the testimony of a few formal police witnesses who deposed to the receipt of various seized articles in the Malkhana and further movement thereof to the doctor who conducted the post-mortem and the FSL Laboratory, we note the testimony of such witnesses, in respect whereof, submissions were made during argument of the appeal on the issue, whether Devender PW-7 was at all an eye witness and whether Const.Shahji John truthfully deposed that on the way to the hospital, in an inebriated condition the deceased was muttering the names of Binny and Biloo and was saying that he would see them; if yes, the evidentiary value thereof.

23. Devender Kumar PW-7, deposed that on the day of the incident i.e 27.7.1991, his brother Satish Kumar (the

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deceased) had left the house in the morning to attend a court hearing at Tis Hazari Complex. When Satish Kumar did not return home till about 7:00 PM, he went to Tis Hazari Courts, looking for him and at about 8:00 or 8:15 PM, near the canteen at Lawyer's Chamber Block Criminal Wing at Tis Hazari, he saw his brother Satish being beaten by Binny @ Bishan @ Bagga and Mukesh @ Billu @ Balbir. That the first blow with a knife was inflicted by Mukesh at the back of the neck of his brother and thereafter both Binny and Mukesh indiscriminately stabbed his brother saying that they would finish him. He raised an alarm at which the said accused, with knives in hands, ran after him and he had to flee. That when he looked back to see whether the accused were after him, he saw them running in the opposite direction. To remove his brother to the hospital he took a TSR and when he returned to the spot with the TSR he found that the police had removed his brother to the hospital, so he went to Hindu Rao Hospital where his brother Satish was unable to make any statement and that the police recorded his statement Ex.PW-7/A which was signed by him at point A. That at the hospital, the clothes of Satish were seized vide memo Ex.PW-7/B which bore his signature at point A. Thereafter, he came back to the spot with the police and the blood stained earth was seized vide seizure memo Ex.PW-

5/A which was signed by him at point B. That the police lifted blood from the spot vide seizure memo Ex.PW-5/B which was signed by him at point B. That he along with the police had gone in search of the accused persons to their house but they were not to be found. That the pointing out memo Ex.PW-7/B signed by him at point A was drawn after he took the police to the house of Billoo and that the pointing out memo Ex.PW-7/D signed by him at point A was drawn after he took the police to the house of Binny. That the pant Ex.P-1, the underwear Ex.P-2, the bushirt Ex.P-3 and the vest Ex.P-5 belongs to his brother. On a clarificatory question being put, he clarified that the shirt Ex.P-4 was the one which was being worn by his brother at the time of the occurrence.

24. On being cross examined, Devender stated: *'My statement was recorded by police first at the place of occurrence and then in the hospital. In the hospital, my statement was recorded at around 9-9:15 PM.'* On being cross examined as to after how much time he returned to the spot after he fled, when as deposed to by him he was chased by the assailants, he replied: *'I took about 5-7 minutes in coming back to the spot with the scooter.'* On being questioned, whether his brother was alive when he reached the hospital, he replied: *'My brother Satish was still alive when I reached*

the hospital. He was crying mildly and saying that Biloo and Bagga had stabbed him.' On being further cross examined on what happened thereafter and did he interact with the police when he returned to the spot, he replied *'I had given the names of culprits to the police at the spot. However, my statement was recorded in the hospital.'* On being cross examined as to how he reached Hindu Rao Hospital, he replied: *'I was taken to Hindu Rao Hospital by the police in their van and not in TSR. I was not allowed to see my brother in the hospital nor I met the doctor who had attended my brother.'* On being cross examined whether he went to the hospital with the police when he met the police immediately on returning to the spot or after some time, he said: *'Before I went to hospital with the police, police had searched around place of occurrence for the search of accused persons.'* On being cross examined whether he had told the police when his statement was recorded in the hospital, that in the hospital he heard his brother crying mildly saying Biloo and Bagga had stabbed him, a statement which he made in his examination in chief, he admitted that he did not tell police the said fact.

25. Surender Kumar PW-8, brother of the deceased, deposed that he identified the dead body of his brother at the hospital. On being cross examined he stated that he came to

know about the incident at 9/9:25 PM and reached the hospital at around 10:30 PM and that Devender was not present at the hospital when he reached and that Devender came to the hospital after about 20-25 minutes of his arrival in the hospital and that Devender told him the names of the assailants.

26. Const.Suresh Kumar PW-5, deposed that on 27.7.1991 on receipt of information that a person had been stabbed near Chamber No.279, Criminal Side, Lawyers' Chambers, he along with ASI Gopal Ram and Const.Shahji John went to the place of occurrence and saw a man lying in an injured condition, who was removed to the hospital by Const.Shahji John. That thereafter Devender arrived at the spot and was interrogated at the spot. They searched for accused Binny and Balbir. He was left to guard the spot and the IO went to the hospital and returned to the spot at around 10:30 PM and collected blood earth sample and blood. On being cross examined, with reference to his statement that Devender was interrogated at the spot and they had searched for accused Binny and Balbir, he stated: *'Devender did not tell the IO in my presence, the names of persons, who had stabbed Satish Kumar..... IO did not record the statement of Devender in my presence at the spot.'* On being cross examined, as to in which vehicle the IO and Devender went to the hospital, he

replied: *'IO and Devender had gone in TSR to the hospital, which TSR was brought by Devender.'*

27. Const.Rohtash Kumar PW-6 deposed that on 27.7.1991 he was posted as the Duty Constable in Hindu Rao Hospital and at around 8:50 PM, a constable whose name he did not remember, brought an unknown injured in the hospital. A baniyan (vest) and a shirt was handed over by the doctor to him, which in turn, he handed over to the IO, vide memo Ex.PW-6/A.

28. ASI Gopal Ram PW-19 deposed that on 27.7.1991 he was on emergency duty at police post Tis Hazari Courts and at 8:30 PM received DD No.32 regarding the incident in question and along with Const.Shahji John and Const.Suresh Kumar he reached the place of the incident near Chamber No.279 and saw a person lying near the chamber with blood all over. He asked Const.Shahji John to bring a TSR. He immediately brought a TSR in which the injured was removed to Hindu Ram Hospital with Const.Shahji John. He deposed further: *'After sending injured to hospital one person Devender Kumar contacted me at spot and told me that he was younger brother of deceased and he made statement in hospital as witness insisted to make statement after seeing his brother.'*

(NB: We have verbatim copied the aforementioned deposition).

29. He deposed that he recorded the statement Ex.PW-7/A and made his endorsement Ex.PW-9/A and sent the same through Const.Shahji John for FIR to be registered and took the parcel containing the clothes of the deceased and returned to the spot from where he seized blood and blood control earth. That he prepared the rough site plan Ex.PW-19/B with the assistance of the complainant. That the accused were searched as per information given by the complainant but could not be traced.

30. On being cross examined he stated: *'I was not aware about name of culprit till I reached hospital.... Injured was alive when I reached place of incident. I asked from him about incident but he could not speak, even he could not tell his name.'* On being questioned as to whether he interacted with the injured in the hospital, he replied: *'I tried to have talked with him there also but was unable to speak. I met doctor also. I requested doctor to allow me to have talked with injured but doctor did not permit me.'*

31. Const.Shahji John PW-22 deposed that on 27.7.1991 he was posted at PP Tis Hazari and after receiving information regarding stabbing, accompanied by Naresh Kumar and Suresh Kumar, went to chamber No.279, criminal side, Tis Hazari and saw a person lying in a pool of blood. That he took one TSR
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from nearby hospital and came to the place of the incident and took the injured to the hospital and got him admitted at Hindu Rao hospital. That the injured was intoxicated and was naming Binny and Billoo and was saying that he would see them. On being cross-examined, he stated that he had told the duty constable at the hospital that the injured was naming Binny and Billoo and was saying that he would see them. He admitted that he did not tell any other senior police officer about said fact but justified by volunteering that he did not do so as there was no occasion for him to tell anybody.

32. As noted above, the learned Trial Judge has believed that Devender was an eye witness. We have our doubts. The reason of our doubt is that admittedly Devender was not present when ASI Gopal Ram PW-19, Const.Shahji John PW-22 and Const.Suresh Kumar PW-5 reached the spot, soon after 8.30 PM when information of a person being stabbed was recorded at the Police Post of Tis Hazari, vide DD No.32. No doubt, Devender has deposed that he had left the spot where his brother was stabbed because he was forced to so do, when the appellants chased him as they saw him making a noise and that he returned to the spot with a TSR when he realized that the appellants had run away. But, neither ASI Gopal Ram PW-19 nor Const.Suresh Kumar PW-5 who remained at the

spot after Const.Shahji John PW-22 removed the injured to the hospital in a TSR, have deposed that they saw Devender coming to the spot with a TSR. As per Surender Kumar PW-8, the brother of the deceased, he i.e. Surender Kumar learnt about his brother being stabbed at around 9/9.25 PM and he reached the hospital at around 10.30 PM. Devender was not present in the hospital by that time, as deposed to by Surender Kumar. As per Surender Kumar, his brother Devender came to the hospital after about 20-25 minutes and told him the names of the assailants. To explain the delay in reaching the hospital, Devender has introduced the theory that before going to the hospital he and the police went to search for the accused persons. It is just not believable that ASI Gopal Ram PW-19 would go about searching for the accused without recording the statement of Devender and ensuring that an FIR is registered. It has to be noted that ASI Gopal Ram PW-19 has categorically deposed that when Devender came to the place of the incident after his brother had been removed in a TSR to the hospital, he refused to make any statements to him and insisted that he would first see his brother in the hospital and then make a statement. The said conduct of Devender is most unnatural for a brother who has witnessed a brutal assault on his brother, of not telling a police

officer at the first available opportunity as to what had happened. Devender has deposed that he gave the names of the culprits to the police at the spot. This is in direct variance with the deposition of ASI Gopal Ram PW-19 who has categorically deposed that Devender refused to tell him anything at the spot and insisted on first seeing his brother in the hospital. It is not in dispute that Devender's statement Ex.PW-7/A was recorded at the Hindu Rao hospital. It has further to be noted that at one stage Devender claims that his brother Satish was alive when he reached the hospital and was crying mildly and saying that Billoo and Binny had stabbed him, but later on contradicted himself when he deposed that he was not allowed to see his brother in the hospital nor he met the doctor who had attended to his brother. It is apparent that Devender was buying time to think of a plausible statement to be made. This is the reason why he refused to make any statement to ASI Gopal Ram when he first came to the spot and insisted that he would first like to meet his brother. Only after reaching the hospital, Devender made the statement to ASI Gopal Ram. Being conscious of the fact that in view of his belated statement and not telling anything to ASI Gopal Ram at the first available opportunity, his being an eye witness may be doubtful, while deposing in court, Devender

introduced the fact of the deceased having told him that Billoo and Binny had inflicted the injuries on him i.e. has tried to introduce a dying declaration of his brother. But, at the same time, Devender wanted to introduce the supremacy of his being an eye witness, and thereby to discount that his brother possibly told him something, he stated that at the hospital he was not allowed to see his brother nor he met the doctor who attended to his brother at the hospital.

33. We note that Const.Suresh Kumar PW-5 has also introduced the fact that when Devender arrived at the spot he was interrogated at the spot and all searched for accused Binny and Balbir i.e. facts which were introduced in his testimony by Devender. But, even Const.Suresh has not deposed truthfully, for the reason he has stated that Devender and I.O. went to the hospital in a TSR, a fact neither deposed to by either Devender or the I.O. As noted above, Devender has deposed that he went to the hospital in a police van. This may appear to be a minor variation, but assumes significance because the intention behind the statement is to corroborate Devender that after he fled from the place of occurrence on being chased by the accused and on realizing that the accused were not following him, he returned with a TSR to remove his brother to the hospital and since in the meanwhile the police

had already removed his brother to the hospital, Devender and ASI Gopal Ram left for the hospital in the TSR. As noted above, Const.Suresh Kumar contradicted himself when, on being cross-examined, he stated that Devender did not tell I.O. the names of any person who had stabbed his brother in his presence nor did the I.O. record any statement of Devender. Juxtaposing the statements of Devender and Suresh Kumar with reference to claim of Devender Kumar that he told ASI Gopal Ram at the spot the names of the accused and before going to the hospital everybody searched for the accused and the statement of Suresh Kumar that in his presence no such names were disclosed, it is apparent that the two witnesses of the prosecution have deposed facts which are irreconcilable opposites. Whereas two police officers claim that Devender did not make any statement at the spot, only one i.e. Const.Suresh Kumar claims that Devender made a statement at the spot but even he, on being cross-examined went about contradicting himself inasmuch as he deposed that in his presence Devender did not tell the I.O. the names of the persons who had stabbed Satish Kumar. If Devender did not tell anything to the I.O. in the presence of the witness, wherefrom could Const.Suresh Kumar claim that Devender told something to the I.O? It remains a mystery.

34. These are our reasons to hold that it is doubtful that Devender was an eye witness to the incident. We note that the aforesaid features of the deposition of Devender, Suresh Kumar, Surender Kumar and ASI Gopal Ram have not been noted by the learned Trial Judge.

35. Did Shahji John hear the injured muttering that Billoo and Binny would be seen by him?

36. Shahji John PW-22, has so deposed. His testimony stands contradicted on three counts. Firstly, ASI Gopal Ram has responded, on being cross-examined, that though the injured was alive when he reached the place of incident, he i.e. the injured could not speak and hence did not respond when he asked him about the incident. In fact, ASI Gopal Ram has deposed that the injured could not even tell his name, a fact corroborated in the MLC of the deceased, where it is recorded that the victim brought is unknown i.e. neither the name is known nor the parentage is known. With reference to whether the injured was in a position to speak in the hospital, ASI Gopal Ram has categorically deposed that he tried to speak to the injured at the hospital but the injured was unable to speak. The second count on which Shahji John stands contradicted is the fact recorded in the MLC of the deceased that the patient was not only intoxicated but was semi-conscious and his

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general condition was poor. It is apparent that the semi-conscious condition of the injured was so poor that he could not even tell his name, for had he been even in a position to comprehend somebody asking him his name, he would have responded thereto. A visit to the emergency ward in a hospital would show to one and all that the most rudimentary form of testing the condition of a patient brought to the hospital, used since time immemorial by the doctors, is to nudge, pinch or give a mild shake to a patient, to not only see the natural response of the brain thereto, but also to elicit some information i.e. the history of how the injury was sustained, because the said information may be very crucial for the initial treatment to be given. Otherwise, till the diagnosis is complete, the doctor concerned cannot decide what treatment is to be given. Lastly, on being cross-examined, Shahji John has stated that he did not tell any police officer that the injured was muttering the names Binny and Billoo. He justified his not telling so, by stating that he had no occasion to do so because nobody asked him. Shahji John is a constable in the Delhi Police and is not a novice. Surely, he knows the importance of volunteering a useful information to the police and under the circumstances, if he had heard the deceased muttering the names of the appellants, he would have

disclosed said fact most voluntarily to ASI Gopal Ram. His not having done so casts a very serious doubt that the deceased muttered the names Billoo and Binny which were heard by him. It is important to note that Const.Shahji John has deposed that he told the fact to Const.Rohtash Kumar PW-6, that the injured was naming Billoo and Binny and he was saying that he would see them. If this be so it becomes all the more surprising that Const.Shahji John did not disclose the said fact to ASI Gopal Ram. Const.Rohtash Kumar PW-6 has not deposed that Const.Shahji John told him that on the way to the hospital the injured was naming Billoo and Binny and was saying that he would see them. Thus, if not more, at least benefit of doubt has to be given to the appellants.

37. That apart, as observed in the decision reported as Nallapati Sivaiah Vs. Sub-Divisional Officer, Guntur, A.P. AIR 2008 SC 19 the Supreme Court has observed as under:

“The Dying Declaration must inspire confidence so as to make it safe to act upon. Whether it is safe to act upon a Dying Declaration depends upon not only the testimony of the person recording Dying Declaration – be it even a Magistrate but also all the material available on record and the circumstances including the medical evidence. The evidence and the material available on record must be properly weighed in each case to arrive at proper conclusion. The court must satisfy to itself that the person making the Dying Declaration was conscious and fit to make statement for which

purposes not only the evidence of persons recording dying declaration but also cumulative effect of the other evidence including the medical evidence and the circumstances must be taken into consideration.”

38. Therefore the only incriminating evidence that remains against the accused is the recovery of blood-stained knives and shirts of both the accused.

39. In the decision reported as Narsinbhai Haribhai Prajapati v Chhatrasinh & Ors AIR 1977 SC 1753 the Supreme Court had held that in the absence of any other evidence the circumstances of seizure of blood stained shirt and dhoti from the person of an accused and dharias from the houses of the accused are wholly insufficient to sustain the charge of murder against the accused.

40. In the decision reported as Surjit Singh v State of Punjab AIR 1994 SC 110 a watch belonging to the deceased and one dagger which was found to be stained with human blood were recovered at the instance of the accused. It was held by the Supreme Court that said recovery by itself, does not connect the accused person with the murder of the deceased. It was further held that said circumstance may create some suspicion but the same cannot take the place of proof.

41. In the decision reported as Deva Singh v State of Rajasthan 1999 Cri.L.J. 265 Supreme Court had held that merely because a knife is alleged to have been recovered at the instance of the accused would not lead to a conclusion that the accused was the perpetrator of the crime of the murder.

42. In the decision reported as Prabhoo v State of U.P. AIR 1963 SC 1113 a kulhari, a shirt and a dhoti which were found to be stained with human blood were recovered from the house of the accused, at his instance. Holding that it is well settled that circumstantial evidence must be such as to lead to a conclusion which on any reasonable hypothesis is consistent only with the guilt of the accused and not with his innocence and that from the mere production of the blood stained articles by the accused, one cannot come to the conclusion that the accused committed the murder inasmuch as the fact of production cannot be said to be consistent only with guilt of the accused and inconsistent with his innocence, for the reason it is quite possible that someone else committed the murder and kept the blood stained articles in the house of the accused and that the accused might have produced the said articles when interrogated by the police, the Supreme Court acquitted the accused.

43. Insofar as circumstance relating to motive of the appellant for causing the death of the deceased, suffice would it to be state that the motive, by itself, is not a circumstance, though it may be relevant in case of circumstantial evidence. (See the decision of Supreme Court reported as Surjit Singh v State of Punjab AIR 1994 SC 110).

44. The appeal is allowed. The impugned judgment and order dated 27.1.2001 is set aside. The appellants are acquitted of the charge of having murdered Satish Kumar. The appellants are on bail. Their bail bonds and surety bonds are discharged.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

April 06, 2009
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