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

% Date of Decision: 20th November, 2009

+ **CRL.A. 369/2002**

MAHESH @ DESU Appellant
Through: Mr. Rajesh Mahajan, Advocate

versus

STATE Respondent
Through: Mr. M.N. Dudeja, Advocate

CRL.A. 648/2002

PARMOD KUMAR Appellant
Through: Mr. Rajesh Mahajan, Advocate

versus

STATE Respondent
Through: Mr. M.N. Dudeja, Advocate

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? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Appellants Pramod Kumar and Mahesh have been convicted for the offence of having murdered Ranjit Choudhary. Needless to state the conviction is with the aid of

Section 34 IPC.

2. The impugned judgment and order is dated 14.3.2002. Vide separate order on sentence dated 15.3.2002 both of them have been sentenced to undergo imprisonment for life.

3. A perusal of the impugned decision shows that the appellants have been convicted on the testimony of Sanjay Kumar PW-5, the brother of the deceased. In para 18 of the decision it has been observed as under:-

“18. A scrutiny of the evidence of Sanjay Kumar PW-5 would show that he had witnessed the stabbing of his brother at the hands of both the accused of this case due to which he received injuries which ultimately proved fatal and he died on 14.12.99. The suggestion of the accused to this witness that he has made a false statement due to enmity with them is absolutely without any substance. There is nothing on record to show that PW-5 Sanjay Kumar or even the deceased had any enmity with the accused of this case. Sanjay has fully stood the test of searching cross examination and his evidence could not be demolished by the defence at all. There is nothing on record to even doubt the truthfulness of the statement made by the brother of the deceased PW-5 Sanjay Kumar. The way Sanjay Kumar has replied the questions of the defence clearly show that his evidence could not be demolished and no doubt about his presence at the spot could be created by the defence.”

4. The testimony of Sanjay Kumar PW-5 has been discussed by the learned Trial Judge in the preceding paragraphs; being, paras 14 to 17 of the impugned decision.

The same read as under:-

"14. As PW-5 Sanjay Kumar has testified that deceased Ranjit was his brother. He along with his brother Ranjit used to work as labour in the Rakhi market, Jakhira. On 13.12.99 he along with his brother Ranjit was coming from Nehru Nagar market. At about 9.30 M when they were crossing the railway lines and were coming towards their jhuggi he (PW-5) stopped near the railway lines for answering the call of nature and his brother Ranjit who was with him went ahead and in the meantime he heard the noise of his brother who was saying "bachao-bachao" (save – save). He immediately ran towards his brother and saw that he was being caught hold of by two persons from his right and left side. It is further in the evidence of Sanjay Kumar PW-5 that those two persons who had caught hold of his brother are not present in the court but he can identify them if shown to him and later on he came to know of their names as Manchu and Tiger (these two persons could not be arrested by the police despite efforts as is mentioned in the report filed u/s 173 Cr.P.C. (in this case) and accd. Pramod and Desu present in the Court were stabbing his brother with knives.

15. It is also in the evidence of Sanjay Kumar PW-5 that seeing him coming towards them Manchu (not arrested) and accd.Pramod ran after him and so in order to save himself from them he ran towards the Nehru Nagar raising an alarm and after taking a different route and hiding himself from these two persons reached his jhuggi. In the meantime, his brother had also reached there and he found his clothes completely soaked in blood which was coming out of his wounds. Many people had collected there since a kirtan was going on and with the help of Phoolo Chaudhary he brought a scooter for taking Ranjit to the hospital but before they could reach that jhuggi they found that Ranjit had already been taken by the police to the DDU Hospital. He and Phoolo Chaudhary then reached the DDU hospital and from there Ranjit was referred to the Safdarjung Hospital and then they had gone to Safdarjung Hospital. PW-5 Sanjay Kumar has asserted that he had told the police the place of occurrence and the police had prepared the site plan on his pointing out. According to his police could not find the blood stains on the way as it was a thorough fare and wind was also blowing fastly. He had also identified the

dead body of his brother in the mortuary of the Safdarjung Hospital.

16. Sanjay Kumar PW-5 in his cross-examination by the Ld. defence counsel has stated that he knew both the accused present in the court prior to the date of incident and there was enough light near the railway lines when the incident had happened. According to him the distance between him and his brother Ranjit was about 10 steps and the two persons who had caught hold of his brother were the associate of these two accused. Sanjay Kumar PW-5 has further stated in cross examination that both the accused had a knife each in their hand with which they had stabbed his brother. According to him it took him about ½ hour to reach his jhuggi from there. Accused Pramod and Manchu (not arrested) ran after him till the railway line crossing and thereafter they did not follow him. Sanjay Kumar has further stated in cross-examination that his brother Ranjit Chaudhary had reached the jhuggi of his own. He was wounded and was soaked in blood and nobody had accompanied him to the jhuggi. Sanjay Kumar has then stated in cross-examination that he had reached the DDU hospital at 10.15 PM and at that time Phoolo Chaudhary also accompanied him and he had met 2 – 3 police officials including Const. Sanjay in the DDU hospital. According to him he was enquired about the incident by the police in the hospital and he had told them the same and his statement was recorded by the police.

17. Sanjay Kumar PW-5 has clearly further stated that in cross-examination that none other than him had witnessed the stabbing of his brother. Sanjay Kumar has denied the suggestion that the incident had not happened in his presence and his brother was not stabbed by the accused present in the court in his presence. Sanjay Kumar has clearly stated in cross-examination that he has no enmity with the accused. He had denied the suggestion of the accused that due to enmity he has made a false statement against the accused persons. Sanjay Kumar has further stated in cross examination that DDU hospital was not fully equipped with the life saving system and so his brother was referred to Safdarjung Hospital where he was admitted and his brother died there on 14.12.99. Sanjay Kumar has also stated in cross-examination that the

deceased could not make any statement to the police nor could he talk to him even at all due to the injuries.”

5. Indeed, learned counsel for the parties at the hearing of the appeal today concede that the issue turns on the testimony of Sanjay Kumar PW-5; with the focus being whether at all Sanjay Kumar was an eye witness as claimed by him or that there are serious doubts in his claim of being an eye witness and is there a possibility of Sanjay Kumar’s statements recorded under Section 161 Cr.P.C. being ante-timed.

6. From the record of the learned Trial Judge we note that two statements of Sanjay Kumar have been recorded under Section 161 Cr.P.C. Both statements purport to be recorded by ASI Azad Singh on 14.12.1999.

7. It is interesting to note that one out of the two statements refers to the statement being in FIR No.715/1999 dated 13/14-12-1999 under Section 307 IPC PS Moti Nagar. The second statement also recorded on 14.12.1999 refers to it being recorded in FIR No.715/1999 dated 13.12.1999 under Section 302/34 IPC PS Moti Nagar.

8. We have noted aforesaid facts because something turns on the same.

9. Police received information of somebody being

stabbed near a slum cluster at Zakhira when DD No.19A, Ex.PW-13/A was recorded by the Duty Constable at PS Moti Nagar at 10:40 PM on 13.12.1999.

10. Copy of the DD was entrusted to ASI Azad Singh PW-16 for investigation. He left for the place in the company of Const.Sanjay PW-2.

11. Ranjit Choudhary, the deceased, was found grievously injured and was removed, as claimed by Sanjay PW-2, in a TSR to the hospital i.e. DDU Hospital, where as per MLC Ex.PW-9/A, he was admitted at 10:55 PM on 13.12.1999 by Const.Sanjay Kumar.

12. Ranjit Choudhary was grievously injured and was unfit to make a statement. As per death summary reflected in the inquest papers Ex.PW-24/C, Ranjit Choudhary died at 9:50 AM on 14.12.1999.

13. It may be noted that in the post-mortem report Ex.PW-6/A the time of death recorded is 8:40 AM on 14.12.1999.

14. Reverting back to what transpired after ASI Ajad Singh and Const.Sanjay received a copy of the DD Entry and proceeded to the spot and thereafter to the hospital. As deposed to by ASI Azad Singh, since he and Const.Sanjay did not meet any eye witness at the spot when they removed

Ranjit Choudhary to the hospital nor did he meet any eye witness in the hospital, ASI Azad Singh made an endorsement Ex.PW-16/A beneath the copy of DD No.19A and through Const.Sanjay sent the same for FIR to be registered for the offence punishable under Section 307 IPC. At the police station FIR Ex.PW-10/A was recorded for an offence punishable under Section 307 IPC.

15. ASI Azad Singh returned from the hospital to the place of the occurrence, a fact deposed to by him, where he claims to have meet Sanjay Kumar PW-5 and with the help of whom he prepared the rough site plan Ex.PW-16/B. He claims to have recorded the statement of Sanjay Kumar under Section 161 Cr.P.C.

16. Now, the FIR which was registered at 12:25 AM i.e. 25 minutes past midnight as noted vide DD No.23A, had to be registered and indeed has been registered for the offence punishable under Section 307 IPC.

17. As noted above, the deceased died in the morning of 14.12.1999, as per the post-mortem report at 8:40 AM and as per inquest papers at 9:50 AM. Thus, the offence of murder could have been added in the FIR only thereafter.

18. It is in this context that it assumes significance that one statement of Sanjay Kumar is recorded pertaining to the

FIR being for the offence under Section 307 IPC and apparently would be one which was recorded as claimed by ASI Azad Singh when he returned to the spot.

19. This statement does not name the persons who had assaulted the brother of Sanjay Kuamr.

20. We note that the second statement records the names of the appellant.

21. Whether at all the second statement was recorded contemporaneously would be further dealt with by us a little later with reference to the inquest papers and the application for post-mortem.

22. As deposed to by PW-24 Insp.Gurdeep Singh, he took over the investigation of the case immediately after the offence punishable under Section 302 IPC was added in the FIR on information being received that Ranjit Choudhary had died i.e. on 14.12.1999.

23. As deposed to by Insp.Gurdeep Singh, the application for post-mortem Ex.PW-24/A and the inquest papers Ex.PW-24/B and Ex.PW-24/C were prepared by him.

24. It is interesting to note that all papers bear the date 16.12.1999 as also the date 16.12.2000. Ex.PW-24/A reads as under:-

“PM No.2421/99
Date : 16.12.99 at 12:10 PM

Case FIR No.115/99 dated 13.12.99 under Section IPC,
PS Moti Nagar.

To,

The CMO
Safdarjung Hospital,
New Delhi.

Subject : Application for postmortem of deceased
persons.

Sir,

Ramjeet Chowdhary S/o Sh.Rajender Chowdhary R/o
Rakhi Market, Zakling, Delhi Age about 30 years
declared dead in the hospital due to stab injuries by
some unknown persons. It is requested that post
mortem of deceased person may kindly be
completed/done and its result may please be
intimated as early as possible please with the
following opinions:

- (1) Cause of death.
- (2) Blood sample be prepared.
- (3) Clothes of the deceased be prepared.
- (4) Edges of weapon with nature of weapon.
- (5) Sample seal may be prepared.
- (6) Type of weapon used."

25. Relevant would it be to note that in the caption, the
application refers to an FIR pertaining to an offence under
Section 302 IPC. Section 34 is conspicuously missing as being
referred to. Further, in the application it is clearly stated that
the deceased named Ranjit Choudhary aged 30 years had
been stabbed by some unknown persons.

26. The inquest papers Ex.pW-24/B and Ex.PW-24/C

clearly record '*No eye witness was present at the spot and no blood was found at the spot..... No eye witness was found present in the hospital also in this case*'.

27. The second statement of Sanjay Kumar under Section 161 Cr.P.C. purporting to bear the date 14.12.1999 and having the caption pertaining to the FIR relating to the offence punishable under Section 302/34 IPC names the appellants as the persons who had stabbed the deceased.

28. Now, if said statement was available and was indeed recorded on 14.12.1999, it remains unexplainable as to how come in the application seeking post-mortem i.e. Ex.PW-24/A, it was recorded that some unknown persons had inflicted the injuries on the deceased. It also remains unexplainable as to how in the statement of brief facts pertaining to the inquest papers i.e. Ex.PW-24/B and Ex.PW-24/C it came be recorded that neither was an eye witness present at the spot nor was any person at the hospital. It need hardly be emphasized that 16th December, 1999 is a day 2 days after 14th December, 1999.

29. A serious doubt is thus cast upon the contemporaneous recording of the statement of Sanjay Kumar PW-5.

30. Let us have a look at the testimony of PW-5.

31. He has deposed on the lines of his second statement recorded under Section 161 Cr.P.C.

32. He states that on 13.12.1999, in the company of his brother he was returning to their jhuggi from Nehru Nagar Market and were crossing the railway line at about 9:30 PM. He stopped near the railway line to answer the call of nature while his brother Ranjit Choudhary went forward. He heard cries of 'bachao-bachao' and he recognized the same to be that of his brother and saw two persons having caught his brother from the left and right arm and two persons were stabbing his brother. He stated that the appellants were stabbing his brother and one Munchoo and one Tiger were holding on to the arms of his brother. He further deposed that on seen him approach, Munchoo and Pramod ran after him. Raising an alarm he fled in the opposite direction and taking a different route he reached the jhuggi by which time his brother had also reached there. Many people had collected. With the help of Phoolo Choudhary, he brought a scooter for taking his brother to the hospital but when he and Phoolo Choudhary returned with the scooter they found that his brother had already been taken to the hospital by the police. That he and Phoolo reached DDU hospital where he learnt that his brother had been removed to Safdarjung Hospital and accordingly he

went to Safdarjung Hospital.

33. Phoolo Choudhary PW-3 has deposed at variance.

34. As per Phoolo Choudhary, he was present in his jhuggi which was near a temple and the time was 9:00 PM. Activity going on was singing of hymns. At 9:45 PM Ranjit Choudhary who lived in a jhuggi nearby reached outside his jhuggi in an injured condition. His clothes were soaked in blood. He asked him who had stabbed him. Ranjit Choudhary tried but could not speak as he was grievously injured and could only say that there were 3/4 boys. Phoolo Choudhary further deposed that he along with one Kishore took Ranjit in a rickshaw to PS Moti Nagar from where they were sent to DDU Hospital.

35. Phoolo Choudhary has nowhere deposed that Sanjay Kumar ever met him. We find that no suggestion has been given by the public prosecutor to Phoolo Choudhary to the effect that he was not remembering that Sanjay Kumar had met him and he and Sanjay Kumar had gone to fetch a TSR.

36. Going by the version of Phoolo Choudhary it is apparent that there is a material different version, in that Sanjay Kumar was nowhere near the place where his brother stumbled upon after receiving injuries.

37. The testimony of Phoolo Choudhary is in harmony with the testimony of Const.Sanjay Kuamr PW-2 and ASI Azad Singh PW-16 as per whom they neither met any eye-witness at the spot nor at the hospital.

38. Further, if Sanjay Kumar, as deposed to by him, went to fetch a TSR and in the meanwhile the police removed his brother to the hospital and an argument being raised that this explains Sanjay Kumar not meeting ASI Azad Singh and Const.Sanjay Kumar at the spot, is still remained unexplained as to why Sanjay Kumar who claims to have reached the hospital in the TSR in question i.e. the one which he brought to take his brother to the hospital did not meet ASI Azad Singh at DDU Hospital.

39. It is no doubt true that the deceased was referred to Safdarjung Hospital, but the MLC Ex.PW-8/A shows that the deceased remained at DDU Hospital for a considerable period of time inasmuch as in view of the injuries on the neck and the head area, he was referred to the ENT Ward where Dr.Surender Sehgal PW-9, examined him and as per endorsement Ex.PW-9/A on the MLC admitted him at the ENT Ward. The MLC further reveals that Ranjit Choudhary was attended to by the Senior Resident on duty namely, Dr.Sanjay Jayant. On the MLC, Dr.Surender Sehgal Senior Resident ENT

Ward, has recorded at 11:30 PM that the patient is unfit for statement.

40. As noted above the MLC records that the patient was admitted at DDU Hospital at 10:55 PM. There is evidence that the patient remained at the hospital till 11:30 PM.

41. The fact that the police got the information as recorded in DD No.19A at 10:40 PM the fact that the patient was taken to the hospital by Const.Sanjay Kumar at 10:55 PM, shows that the jhuggi wherefrom the patient was lifted is not too far away from the hospital and therefore Sanjay PW-5, if indeed he was present at the spot and as claimed by him, would have reached the hospital well before 11:30 PM. In said eventuality he would have obviously met ASI Azad Singh at the hospital.

42. Cumulatively seen and especially with reference to Ex.PW-24/A and Ex.PW-24/C, serious doubt is cast upon the presence of Sanjay PW-5, as claimed by him when his brother received the injuries.

43. Benefit of doubt must go to the accused in the facts and circumstances of the instant case.

44. The appeals are allowed.

45. Impugned judgment and order dated 14.3.2002 is set aside. The appellants are acquitted of the offence charged

of.

46. Mahesh is on bail. The bail bond and surety bonds furnished by him are discharged. Appellant Pramod Kumar is in jail. He is directed to be set free unless required in some other case.

47. Copy of this judgment be sent to the Superintendent Central Jail Tihar for being made available to appellant Pramod and for necessary action.

PRADEEP NANDRAJOG, J.

SURESH KAIT, J.

NOVEMBER 20, 2009
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