

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

% *Date of Decision : July 23, 2009*

+ **CRL. APPEAL NO.341/2001**

ANISH @MONU ...Appellant.
Through : Mr.R.P.Khatana, Advocate.

VERSUS

STATE ...Respondent
Through : Mr.Pawan Sharma, APP.

CRL. APPEAL NO. 342/2001

SATENDER @SEETU ...Appellant.
Through : Mr.R.P.Khatana, Advocate.

VERSUS

STATE ...Respondent
Through : Mr.Pawan Sharma, APP.

CRL. APPEAL NO. 343/2001

KRISHAN KUMAR ...Appellant.
Through : Mr.R.P.Khatana, Advocate.

VERSUS

STATE ...Respondent
Through : Mr.Pawan Sharma, APP.

CRL. APPEAL NO. 381/2001

SURESH KUMAR @LUCHRA ...Appellant.
Through : Mr.R.P.Khatana, Advocate.

VERSUS

STATE ...Respondent
Through : Mr.Pawan Sharma, APP.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

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. Vide impugned judgment and order dated 10.5.2001, appellant Suresh Kumar @ Luchra has been convicted for the offence of having murdered Vijender son of Khyali Ram. All the appellants have been convicted for the offence of causing simple hurt to Harish as also for wrongfully confining Harish i.e. for the offence punishable under Section 323 IPC and the offence punishable under Section 341 IPC. A co-accused Sunil died during trial. We may clarify that since there were five accused and the allegation against them was of having formed an unlawful assembly, the conviction for the offence of simple hurt and wrongful confinement is with the aid of Section 149 IPC. As per the impugned decision, since the object of the unlawful assembly was to cause hurt to Harish, the act of accused Suresh Kumar of stabbing the deceased, who had intervened later on when Harish was being beaten, has been held to be the individual act of Suresh Kumar and not the object of the unlawful assembly or within the contemplation of the other members of the unlawful assembly.

2. At 1959 hours on 16.4.1997 DD No.44-B, Ex.PW-16/A, was recorded at PS Najafgarh that a person has been stabbed and was lying in an injured condition at the bus stand of village Chhawla. SI Shyam Pal Singh PW-17 accompanied by

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Const. Ashok reached the spot and on learning that the injured had been removed to DDU Hospital proceeded to the hospital.

3. At the hospital the injured named Vijender was brought in a Maruti van by Subhash Chand PW-5, Khyali Ram PW-1 and Samai Singh PW-4. Khyali Ram is the father of Vijender and Samai Singh is his brother. Dr.Sanjiv Vashisht was on duty in the emergency of DDU Hospital and he prepared the MLC Ex.PW-13/A of Vijender, noting therein that the patient was dead. Being relevant, it may be noted that in the MLC it has been recorded that the patient Vijender has been got admitted by his father.

4. Narender Kumar PW-2, a resident of village Chhawla was also present at the hospital and his statement Ex.PW-2/A was recorded by SI Shyam Pal Singh PW-17. The said statement has formed the basis of the First Information Report and as recorded in the endorsement Ex.PW-17/B beneath the statement, the same was dispatched from the hospital at 11:30 PM. The FIR in question has been registered at 0:30 hours on 17.4.1997. In the statement Ex.PW-2/A, Narender stated that he and his friend Harish were standing at the bus stop of village Chhawla when at 7:30 PM the five accused came there and on seeing Harish, started slapping and kicking him. He intervened to save Harish. Even he was beaten, being given blows. His brother Vijender happened to come to the bus stop and intervened to save him and Harish. All of a sudden, Suresh

caught Vijender by the neck and said that he would teach him a lesson and in a flash took out a knife from his pant pocket and stabbed Vijender in the chest and all ran away. They took Vijender to the clinic of Dr.Lakra who told them to remove the injured to a government hospital. Subhash Chand, a resident of the village removed Vijender to the hospital in his van and was accompanied by their father.

5. Needless to state, evidenced by the statement Ex.PW-2/A, Narender and Harish are vital eye-witnesses of the prosecution. They have been examined as PW-2 and PW-3. It is obvious that if the evidence establishes that PW-2 and PW-3 were present at the bus stop and Vijender was stabbed in their presence and their testimony stands the judicial scrutiny, the impugned decision would have to be upheld. This is the position conceded at the Bar by learned counsel for the appellants and the State.

6. We may note that the alleged weapon of offence Ex.P-2 has been ostensibly got recovered after accused Suresh Kumar was apprehended but we note that the knife recovered is from an area accessible to the public and when the knife was sent to Dr.Komal Singh PW-9, the autopsy surgeon, he gave an opinion that the injury on the person of the deceased could not be caused by the knife. The reason was the apparent mismatch between the blade of the knife and the solitary wound inflicted in the chest of the deceased, one end whereof

was obtuse and the other was elliptical. The post-mortem report Ex.PW-9/A shows that the blow was inflicted at a spot 5.5 cm from the left nipple and 5 cm from midline. Unfortunately, the heart got pierced resulting in cardiac arrest.

7. The author of the first information report namely Narender Kumar PW-2 has stood by his statement which has formed the basis of the FIR with the exception that whereas in the FIR he does not state that accused Sunil and Krishan caught the hands of his brother Vijender, he has so stated while deposing in Court. In Court, while deposing as PW-2, he has stated that Sunil and Krishan caught the hands of his brother and thereupon Suresh took out the knife from his right pant pocket and gave a knife blow on the chest of his brother.

8. We may note that Narender has been subjected to a lengthy cross-examination and has successfully withstood the same.

9. Harish Kumar PW-3 has also deposed on the same lines as PW-2 and even he has stated that accused Krishan and Sunil caught the hands of Vijender before Suresh could stab him. But, Harish has deposed something more. After deposing the facts till the stage Vijender was injured and the five accused fled, Harish went on to depose as under:-

“The villagers came there and helped me to get into a truck and I reached Police Post Kapashera. My report was not recorded by the police of P.P.Kapashera and they directed me to go to PS Najafgarh. At that time, I was feeling pain and I went to a private doctor for

medical help. The police recorded my statement on 18.4.1997.”

10. Pertaining to the incident disclosed by Harish till the stage of the accused stabbing Vijender and running away, Harish has spoken on the same lines as Narender including the improvement made by Harish vis-à-vis his statement Ex.PW-2/A of assigning a role of catching hold to Krishan and Sunil. We may note that pertaining to said testimony of his, Harish has also successfully withstood the cross-examination.

11. One would thus jump to the conclusion that nothing more needs to be looked into and the appeals should be dismissed. But this is not to be so and therefore our reasons for the same.

12. The testimony of Narender and Harish Kumar till the stage of the accused running away is identical and spans sixteen lines on a typed sheet of paper and consists of about 200 words. Where a person deposes in a very cryptic manner it indeed becomes difficult to demolish the testimony because the witness says that he just remembers the core of the incident. The law also requires the core to be considered because embellishments here or there or variations here or there are irrelevant, because of the time gap of the incident and the deposition of a witness, resulting in possible memory lapses.

13. In such situations it becomes critical to evaluate whether at all the witness was present at the spot and saw what he is telling about. Of course, one method is to contradict the witness himself while cross-examining him or to show contradictions in the testimony where there are more than one witness. There is yet another method to test the presence of a witness and the same is to look into the circumstances under which the offence was committed and therefrom see whether circumstances exist which deprobablize the very presence of the witness at the spot.

14. It would be of importance to note that in the statement Ex.PW-2/A, Narender has stated that after the accused fled, Vijender was taken to the clinic of Dr.Lakra who told them to take Vijender to a government hospital and Subhash Chand removed his brother Vijender in a Maruti van to the hospital and was accompanied by his father. Indeed, the MLC Ex.PW-13/A of Vijender shows that Khyali Ram, father of Vijender has brought him to the hospital.

15. Khyali Ram PW-1 has simply deposed as under:-

“On 17.4.1997 I identified the dead body of my son Vijender Kumar in Deen Dayal Upadhyay Hospital. I had received the dead body of my son Vijender Kumar vide memo Ex.PW-1/A which bears my thumb impressions at point ‘A’.”

16. We are surprised at the fact that the prosecution has not examined Khyali Ram to make him testify any further fact. Be that as it may, Khyali Ram has nowhere deposed of

Narender or Harish being present at the bus stop or near or at the clinic of Dr.Lakra.

17. As per Narender, Subhash Chand was the man in whose van his brother Vijender was removed to the hospital. Subhash Chand PW-5 has deposed that when he reached the bus stand of village Chhawla he saw Vijender on the ground in the company of Khyali Ram and Samai Singh and they all put Vijender in the Maruti van and took him to the hospital and thereafter he went home.

18. It is important to note that Subhash Chand has denied the presence of Narender or Harish at the bus stop when he was cross-examined by the learned APP after being declared a hostile witness.

19. Samai Singh PW-4, the brother of the deceased and Narender, who was present at the spot, but after the incident took place and before the injured was removed to the hospital, and has been referred to by Narender in his statement Ex.PW-2/A, deposed as under:-

“On 17.4.1997 I had identified the dead body of my brother Vijender Kumar @Vijay in the DDU Hospital. My statement in this regard is Ex.PW-4/A.”

20. As we were surprised with the testimony of Khyali Ram, we are equally surprised with the testimony of Samai Singh. The prosecution has not made him speak a word about the presence of anybody at the spot.

21. Before we draw the conclusions, which we feel are the only conclusions possible with reference to the testimony of PW-1, PW-4 and PW-5 qua the presence of PW-2 and PW-3 at the spot, certain other relevant facts and circumstances need to be noted.

22. The first and foremost fact which stares us is there being no MLC pertaining to Narender being proved at the trial. Now, as per Narender even he was beaten when he intervened. The assailants were five. Assuming that the assailants gave only slaps/fist blows or kicks to Narender, some injury, in the least being tenderness of the tissue where the blow was directed would have resulted. As per Narender and SI Shyam Pal Singh PW-17, Narender was present at DDU Hospital. We see no reason why Narender could not have got himself medically examined at the hospital, for after all he was also the victim of an offence and not only needed medical help but could have brought on record of the hospital proof of his being injured. If not more, a doubt arises in the judicial mind: Whether at all Narender was beaten as claimed by him.

23. Turning to the testimony of Harish, we find that he claims to have shown himself to a private doctor and gone home. Who is that doctor is not known. We find that Harish has got himself examined on 18.4.1997 i.e. two days after the incident at Safdarjung Hospital. His MLC Ex.PW-11/A shows that Harish was examined at Safdarjung Hospital on 18.4.1997

and himself gave the history of his wounds. The wounds noted in the MLC are bruises in the back and tenderness in the back. The history given by the patient himself i.e. Harish pertaining to the cause of the injuries is: *"Assault with wooden stick on back and face"*. Harish has not deposed in Court of being assaulted with sticks. His testimony in Court is that he was given leg and fist blows by all the accused. It is apparent that on 18.4.1997, to the doctor at Safdarjung Hospital Harish said something else and in the Court he said something else qua the assault on him. We further find it strange that Harish, who as claimed by him was injured, did not accompany his grievously injured friend i.e. Vijender in the van of PW-5 to the hospital. To explain his afore-noted unnatural conduct, Harish claims to have been helped to get into a truck by villagers and his going to police post Kapashera where the police officers present did not record his statement and directed him to go to PS Najafgarh. Harish has not gone to PS Najafgarh. There is no evidence of his having reached the police station. It is indeed doubtful whether Harish was present and saw what he told. It is indeed doubtful whether Harish received any injuries as claimed. The simple injuries on Harish noted in Ex.PW-11/A can well be self-inflicted or can be inflicted by a benevolent friend to create false evidence.

24. We link ourselves back to para 21 above. What are the conclusions which a logical mind would unhesitatingly

reach, keeping in view the facts noted in para 22 and 23 above and the testimony of PW-1 Khyali Ram, his son Samai Singh PW-4 and Subhash Chand PW-5.

25. There being no evidence that Narender received any injuries, it is doubtful whether the claim of Narender of being beaten at the spot is truthful. That Harish did not go to any doctor and avail medical aid on 16.4.1997 is also suggestive of the fact that even he did not receive any beating at the spot as claimed by him. The post incident conduct of Harish renders it highly suspect that he was at the spot where Vijender was assaulted. The attempt of Harish to get himself examined on 18.4.1997 and bring on record proof of his being injured has resulted in a messed up act committed by him inasmuch as, he told the doctor, as recorded in the MLC Ex.PW-11/A, that he received injuries when he was beaten by a wooden stick; his claim in the Court being of given fist blows and kicks. Khyali Ram is the person who has brought Vijender to the hospital, evidenced by Vijender's MLC Ex.PW-13/A. The prosecution has chosen not to make Khyali speak anything pertaining to how he received information of his son being injured; who met him at the spot and who helped him to remove his son to the hospital. A suspicion arises in our mind, being that, neither Narender nor Harish were present as claimed by them, for the reason had the prosecution made Khyali speak more than what he did, the prosecution feared that Khyali would spill the truth. In this

connection the testimony of Subhash Chand PW-5 assumes importance because he speaks of only Khyali Ram and Samai Singh being seen by him near the body of Vijender when he first saw Vijender lying near the bus stop and thereafter with the help of Khyali Ram and Samai Singh removed Vijender to the hospital.

26. The incident has taken place in a rural village in the Union Territory of Delhi. Vijender was grievously injured at 7:30 PM is not in doubt. It is common knowledge that news of a fellow villager being fatally stabbed travels very fast in villages, where unlike in metropolitan cities, kinship is deeply rooted. It appears that Narender got news of his brother being injured and removed to DDU Hospital. He reached the hospital and learnt that his brother had died. He did not witness his brother being injured.

27. When a near and/or a dear one is stabbed on a public street and as a result thereof he dies, every human mind would reflect upon the past and a question would arise in said mind as to who could possibly be the perpetrator of the crime. The names of all those with whom relations were inimical would surface in the mind. The fertile human mind starts thinking and very soon the thought turns into a belief and one starts believing that the belief is the truth. The accused are residents of the same village and the possibility of some previous misunderstanding, grievance or ill-will between the

accused and Narender or Harish cannot be ruled out and hence the version of Narender and Harish that the accused had stabbed Vijender.

28. It is unfortunate that a young life has been lost, but there are enough circumstances wherefrom it becomes doubtful whether Narender or Harish were present at the spot as claimed by them. The evidence on record has germinated a seed of suspicion and hence a doubt in the judicial mind regarding the guilt of the appellants and hence the appellants are entitled to the benefit of doubt.

29. The appeals are allowed. The impugned judgment and order dated 10.5.2001 convicting the appellants is set aside. The appellants are acquitted of the charges framed against them. The order of sentence dated 11.5.2001 is also set aside.

30. The appellants are on bail. Their bail bonds and surety bonds are discharged.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

July 23, 2009
Dharmender