

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

% *Judgment Reserved on: 27th November, 2009*
Judgment Delivered on: 1st December, 2009

+ **CRL. A. 431/2003**

MOHD. RAHIM ...Appellant
Through: Ms.Sharddha Bhargava, Advocate

Versus

STATE Respondent
Through: Ms.Richa Kapoor, Advocate

CRL. A. 448/2003

MAZIBUL REHMAN ...Appellant
Through: Ms.Sharddha Bhargava, Advocate

Versus

STATE Respondent
Through: Ms.Richa Kapoor, 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? No
3. Whether the judgment should be reported in the Digest? No

PRADEEP NANDRAJOG, J.

1. The fate of the appellant hinges upon the testimony of Shatrughan PW-3 for the reason Shatrughan claims to be an eye witness to the incident in which Shatrughan's friend Shyam

Kumar suffered an untimely death. Apart from the testimony of Shatrughan which has been accepted by the learned Trial Judge the two other incriminating pieces of evidence used by the learned Trial Judge are the recovery of a knife Ex.P-1 pursuant to the disclosure statement made by appellant Mohd.Rahim which was opined to be the possible weapon of offence by Dr.B.N.Accharya PW-2 as also the recovery of blood stained shirts pursuant to the disclosure statements made by appellant Mohd.Rahim and appellant Mazibul Rehman which were opined to be stained with human blood of group 'B' i.e. the same blood group as that of the deceased vide reports Ex.PA and Ex.PB.

2. Pertaining to the recoveries, as held in the decisions reported as JT 2008 (1) SC 191 Mani Vs. State of Tamilnadu, 1999 Cri LJ 265 Deva Singh Vs. State of Rajasthan, AIR 1994 SC 110 Surjeet Singh Vs. State of Punjab, AIR 1977 SC 1753 Narsin Bhai Haribhai Prajapati Vs. Chhatrasinh & Ors. and AIR 1963 SC 1113 Prabhoo Vs. State of UP, recovery of ordinary articles and blood stained clothes, though relevant, are weak evidence. This is our reason for observing in para 1 above that the fate of the appellants turns upon the testimony of Shatrughan PW-3.

3. Vide impugned judgment and order dated 24.2.2003, the appellants have been convicted for the offence punishable

under Section 302/34 IPC. Both have been sentenced to undergo imprisonment for life.

4. We may note at the outset that appellant Mohd.Rahim was admitted to bail vide order dated 18.10.2006 and as per the nominal roll pertaining to him, as on 12.10.2006 he had undergone an actual sentence of 5 years 3 month and 2 days and had earned a remission of 1 year 3 months and 20 days. Appellant Mazibul Rehman continues to be languishing in jail and as per nominal roll pertaining to him, as on 10.8.2009 he has undergone an actual sentence of 8 years and 29 days. He has earned remissions of 2 years 5 months and 10 days as on 10.8.2009.

5. Shatrughan deposed about the incident in which his friend Shyam Kumar was injured, in the following words:-

“Earlier I used to reside in D-2/6 J.J.Colony, Shakurpur, Delhi. Deceased Shyam Kumar was my friend. About 6/7 months earlier I, Shambhu who was my friend and deceased Shyam Kumar were present near Red Light, Britannia Chowk. I know the accused persons they are the rickshaw puller. Accused persons used to reside in Masjid in Shakurpur. Shambhu Kumar and Shyam Kumar were rickshaw puller. It was about 6/7 p.m. Accused persons were quarrelling with the deceased. This was because there was dispute over who would had first number in plying the rickshaw in line. Number of rickshaws stand there and each rickshaw puller is require to take passenger on his number. Accused Mazibul Rehman caught hold the deceased and accused Mohd. Rahim gave knife blow on the chest of Shyam Kumar. When we raised alarm both

the accused persons ran away towards the Punjabi Bagh side. We chased them but they could not be apprehended. I and my friend Shambhu Kumar returned at the spot and accused could not be apprehended. Police also reached there. Both the accused persons present in Court had committed the murder of deceased Shyam Kumar in my presence. Earlier also accused had used to quarrel with Shyam Kumar over the same issue.”

6. As per the post-mortem report Ex.PW-2/A, Shyam Kumar had only one stab injury, being an incised wound on the right side chest placed 2 cm lateral to right nipple. The wound was 15 cm below the mid clavicle and 11 cm on middle of chest laterally. The wound had traversed following the path of the weapon of offence, a knife, piercing the right middle lobe of the right lung. The result was the collapse of the right lung triggering death due to haemorrhagic shock.

7. With reference to the testimony of Shatrughan and opining that the same evidences a past enmity, the learned Trial Judge has concluded that it was obviously a case where the appellants acted in concert and notwithstanding a quarrel preceding the act of stabbing, it was a case where intention to cause the death of the victim could be attributed to both appellants.

8. Two submissions were urged at the hearing of the appeal by Ms.Sharddha Bhargava, learned Amicus Curiae

appointed on behalf of the appellants. It was firstly urged that the presence of Shatrughan at the spot when Shyam Kumar was injured is doubtful and that Shatrughan is a planted witness. Alternatively, by way of the second submission it was urged that at best, the acts of the appellant attracted the offence punishable under Section 304 Part I IPC and accordingly counsel urged that the conviction and the sentence should be suitably modified.

9. Whether Shatrughan was an eye witness or not requires this Court to consider the evidence on record as to when Shatrughan first met the investigating officer. The reason is obvious. If Shatrughan was nowhere to be seen when the investigating officer reached the spot soon after the police received information of the crime, it would cast a doubt on Shatrughan's presence at the spot when the crime took place. We note that Shatrughan claims to be a friend of the deceased and his contemporaneous conduct needs to be appreciated with reference to how a friend would ordinarily react on seeing his friend being stabbed. While considering the conduct of Shatrughan we have to keep in mind that he is a rickshaw puller. He comes from a rural background. He comes from a humble background and his cognitive faculties may not be as sharp and reactive as that of a city bred i.e. an educated

person. Needless to state education brings along with it self-confidence and the power of rational thinking as also the ability to take quick decisions at the spur of the moment even during adverse conditions.

10. Information of two persons stabbing somebody near Britannia Chowk was received at the local police station at 8:10 PM on 3.7.2001 when the duty officer recorded DD No.42 B Ex.PW-4/A. Taking along with him a copy of the DD Entry SI Surjeet Singh left the police station in the company of HC Sahib Singh and proceeded to the spot, where, as deposed to by SI Surjeet Singh he found no eye witness and learnt that the injured had been removed to Babu Jagjeevan Ram Hospital. Leaving behind HC Sahib Singh he proceeded to the hospital where he learnt that the injured had been declared brought dead. As deposed to by SI Surjeet Singh he found no eye witness at the hospital and thus he obtained the MLC Ex.PW-1/A of the deceased and made an endorsement Ex.PW-17/B beneath the copy of the DD Entry and forwarded the same to the police station for the FIR to be registered. Further investigation was taken over by Insp.Sanjeev Tyagi PW-15 on the same date. It stands recorded in the endorsement Ex.PW-17/B that it has been dispatched from the spot at 11:00 PM. It may be noted that as deposed to by SI Surjeet Singh he penned

the endorsement Ex.PW-17/B on returning from the hospital to the spot where the crime took place.

11. HC Sahib Singh PW-11 has deposed that after DD No.42 B was registered he left for the spot in the company of SI Surjeet Singh and remained at the spot till SI Surjeet Singh came back from the hospital and prepared the rukka. He left the spot with the rukka so that he could get the FIR registered.

12. It is apparent that Shatrughan was nowhere to be seen at the spot till 11:00 PM.

13. It may be noted that as deposed to by HC Krishan Lal PW-7 he was in a PCR van which was stationed near TV Tower Pitam Pura and on receipt of wireless information reached Britannia Chowk within 3-4 minutes and removed the injured to the hospital. He deposed that people standing at the spot were saying that 2-3 persons had stabbed the injured.

14. It may be noted that a personal diary of the deceased containing his name was recovered from his pocket and for said reason the name of the injured has been recorded in the MLC.

15. We have noted hereinabove the relevant extract of the testimony of Shatrughan as per which he and his friend Shambhu Kumar chased the appellants when they fled after

stabbing the deceased but since they could not apprehend the appellants, he and Shambhu returned to the spot, by which time the police had arrived.

16. If this be true, we wonder how come SI Surjeet Singh and HC Sahib Singh did not meet Ram Kumar.

17. Shatrughan is positive in his statement that when he and his friend Shambhu gave up the chase and returned to the spot, the police had arrived at the spot. Reference to the police by Shatrughan has obviously to be a reference to the presence of the police from the police station for the reason the PCR van reached the spot within 3 or 4 minutes and removed the injured to the hospital as deposed to by HC Krishan Lal and during this period, if at all, Shatrughan and his friend were chasing the appellants.

18. Insp.Sanjeev Tyagi PW-15 took over the investigation on 3.7.2001 itself and as deposed to by him he prepared the site plan Ex.PW-15/A and lifted blood sample, earth control and blood stained earth from the spot as per memo Ex.PW-11/A. He stated that he recorded the statement of Shatrughan when he revisited the spot for the second time.

19. From the testimony of Insp.Sanjeev Tyagi and the testimony of SI Surjeet Singh it can safely be gathered that

Insp.Sanjeev Tyagi had reached the spot somewhere around 11:00 PM. We say so for the reason SI Surjeet Singh has prepared the rukka and dispatched the same at around 11:00 PM and as per him around said time, Insp.Sanjeev Tyagi reached the spot.

20. We find it difficult to accept that Shatrughan's presence would go unnoticed till 11:00 PM. From the testimony of HC Sahib Singh PW-11 it is apparent that he continued to stay at the spot after reaching the same till SI Surjeet Singh returned and handed over the rukka to him after preparing the same for FIR to be registered. If Shatrughan and his friend Shambhu returned to the spot after giving up the chase they would have certainly met HC Sahib Singh.

21. Thus, there is sufficient material on record wherefrom it becomes doubtful whether Shatrughan was present at the spot as claimed by him. We may note that as per Insp.Sanjeev Tyagi even he claims to have recorded Shatrughan's statement when he returned to the spot *for a second time*. Unfortunately for us, what was the time when Insp.Sanjeev Tyagi went back to the spot for a second time has not come on record. Be that as it may, it is apparent that when Insp.Sanjeev Tyagi reached the spot at around 11:00 PM, Shatrughan was not to be found.

22. In that view of the matter, we must give the benefit of doubt to the appellants with respect to the claim of Shatrughan being an eye witness.

23. If we ignore the testimony of Shatrughan, the only other evidence left would be the recovery of blood stained shirts, one each attributable to the two appellants and the recovery of an ordinary knife attributable to appellant Mohd.Rahim. Said recoveries are weak evidence in view of the law declared in the decisions noted in para 2 above.

24. In returning the finding aforementioned we are conscious of the fact that Shatrughan comes from a humble background and may have had some initial hesitations in volunteering information to the police. But as deposed to by HC Sahib Singh 10 to 15 persons were present at the spot. The place where the incident took place was a rickshaw stand. Shatrughan is also a rickshaw puller, a fact admitted by him during cross examination, some of those 10 to 15 persons would be rickshaw pullers and in the presence of his fellow rickshaw pullers Shatrughan would be expected to muster courage and inform the first police officer who came to the spot that he had witnessed the crime.

25. What appears to have happened is that Shatrughan reached the spot much later when Insp.Sanjeev Tyagi visited the spot for the second time and on learning that his friend was murdered, went back in time to think as to who could have stabbed his friend. It happens with every human being. If a near and dear one is killed the mind searches to find the answer to the question: who did it? All those with whom the deceased friend had an enmity are the ones whose names crop up in the mind and hence the tongue.

26. Though we find considerable merit even in the second plea that the act of the appellants attract the offence punishable under Section 304 Part I IPC and even on said account the appeals can be disposed of directing that the appellants should be sentenced for the period of incarceration already undergone since the main offender i.e. Mohd.Rahim has suffered an actual sentence of 8 years and 5 months as of today and with the remission of 2 years and 5 months would be deemed to have undergone a sentence of 11 years; the one with a lesser role i.e. Mazibul Rehman has likewise served an actual sentence of 5 years and 3 months and a deemed sentence of 6 years and 6 months, we express no opinion on the same in view of our finding pertaining to the first submission made by learned counsel for the appellants.

27. The appeals are allowed. The appellants are given the benefit of doubt. The impugned judgment and order dated 24.2.2003 convicting the appellants is set aside. The appellants are acquitted of the charge of having murdered Shyam Kumar.

28. Since appellant Mazibul Rehman is in jail, he is directed to be set free forthwith if not required to be kept in jail in some other matter. The bail bond and surety bonds furnished by appellant Mohd.Rahim are discharged.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

December 1, 2009
mm