

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

% *Judgment Reserved On: 31st August, 2009*
Judgment Delivered On: 02nd September, 2009

+ **CRL.A. 773/2003**

MUKESH @ GIRDI Appellant
Through: Mr. M.K.Sharma, Advocate

versus

THE STATE (GNCT) OF DELHI Respondent
Through: Mr. M.N.Dudeja, Advocate

CRL.A. 16/2004

SURENDER @ BABLI Appellant
Through: Mr. M.K.Sharma, Advocate

versus

THE STATE (GNCT) OF DELHI Respondent
Through: Mr. M.N.Dudeja, Advocate

CRL.A. 392/2004

MANJEET @ KULDEEP Appellant
Through: Mr. S.D.Singh, Advocate with
Mr. Rahul Kumar Singh, Advocate

versus

THE STATE (GNCT) OF DELHI Respondent
Through: Mr. M.N.Dudeja, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICEINDERMEET 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.

1. Vide judgment and order dated 19.9.2003, the appellants have been convicted for the offences punishable under Section 302/393/398/34 IPC. Two of the appellants have been convicted for the offence punishable under Sections 25 and 27 of the Arms Act. Vide order on sentence dated 22.9.2003 the appellants have been sentenced as under:-

“All the convicts are ordered to be sentenced u/s 302/34 IPC to undergo RI for life each and to pay a fine of Rs.20,000/- each and in default of payment of fine to further undergo RI for ten months. All the convicts are further sentenced u/s 393/34 IPC to undergo RI for five years each and to pay a fine of Rs.5,000/- each and in default of payment of fine to further undergo RI for three months. All the convicts are further sentenced u/s 398/34 IPC to undergo RI for seven years each and to pay a fine of Rs.10,000/- each and in default of payment of fine to further undergo RI for 5 months. Convict Mukesh is further sentenced u/s 27 of Arms Act to undergo RI for two years and to pay a fine of Rs.1,000/- and in default of payment of fine to further undergo RI for one month. Convict Surrender is further sentenced u/s 25 of the Arms Act to undergo RI for two years and to pay a fine of Rs.1,000/- and in default of payment of fine to further undergo RI for one month. Convict Manjeet is further sentenced u/s 25/27 of Arms Act to undergo RI for three years and to pay a fine of Rs.2,000/- and in default of payment of fine to further undergo RI for two months. All the

sentences shall run concurrently. All the accused shall get benefit of Section 428 Cr.P.C. for the period already undergone by each of the accused.”

2. In returning the finding of guilt, the learned Trial Judge has held that the testimony of Anil Sharma PW-6 establishes that when he i.e. Anil Sharma and the deceased were travelling on a scooter after withdrawing Rs.4,00,000/- from State Bank of Indore, Narela three persons on a motorcycle attempted to snatch the bag containing the money from the hands of the deceased and when the deceased resisted the attempt to rob him, one out of the said three boys fired a shot at his chest and the three boys on the motorcycle fled. That the testimony of Sanjay Sharma PW-10 establish that he was an eye witness to the murder which was preceded by an attempt to commit robbery and that appellant Mukesh fired the shot at the deceased and that the other two appellants were also armed with a country made pistol, and that the pistol in the hand of appellant Manjeet @ Kuldeep fell down at the spot. The learned Trial Judge has further held that pursuant to his arrest, appellant Surender made a disclosure statement Ex.PW-22/F and pursuant thereto got recovered a pistol Ex.P-1 and a fire cartridge Ex.P-2 as recorded in the memo Ex.PW-9/H. That the bullet recovered from the body of the deceased was opined, vide CFSL Report Ex.PW-25/A to be

fired from the pistol Ex.P-1. Lastly, the learned Trial Judge has held that the fact that the appellants, after they were arrested, pointed out the spot where the crime was committed was evidence of their conduct showing their knowledge of the place where the crime was committed. Since appellant Mukesh was pointed out as the person who had fired the fatal shot, though the recovery of the weapon of offence was at the instance of appellant Surrender, Mukesh has been convicted for the offence punishable under Section 27 of the Arms Act. Since the pistol which was recovered from the spot was stated to have been attempted to be used by appellant Manjeet @ Kuldeep, he has been convicted for the offence punishable under Section 25 read with Section 27 of the Arms Act.

3. Information pertaining to a person being shot at X-Ray Wali Gali, Narela was received at PS Narela Industrial Area as recorded vide DD No.12-A, Ex.PW-1/A by ASI Jagir Singh PW-1. SI Praveen Vats PW-22 accompanied by Const.Ram Prakash PW-8 reached the spot where the shooting had taken place and found a scooter bearing registration No.DL 8SJ 0780 on the road and a country made pistol lying nearby. He was told that the injured was removed to Jaipur Golden Hospital in a rickshaw. Leaving Const.Ram Prakash at the spot, SI Praveen Vats reached the hospital and learnt that the injured named

Sanjeev was declared brought dead. He obtained the MLC of the deceased and met Anil Sharma PW-6 at the hospital. He returned to the spot with Anil Sharma, by which time the Addl.SHO of the police station Shri S.K.Meena PW-24 had also reached the spot in the company of Const.Vijender PW-16. At the spot SI Praveen Vats recorded the statement Ex.PW-1/B of Anil Sharma and made an endorsement Ex.PW-22/A thereunder and dispatched the statement containing his endorsement through Const.Vijender PW-16 for FIR to be registered.

4. Investigation at the spot was conducted by Addl.SHO S.K.Meena who lifted the blood sample of the deceased from the road as also a country made pistol Ex.P-4 and a live cartridge Ex.P-5 within the chamber of the pistol. He recorded said seizures in the memo Ex.PW-6/A. The sketch of the pistol and the live cartridge being Ex.PW-6/C recovered from the spot was drawn.

5. The dead body of the deceased was taken possession of by S.K.Meena, and through Const.Ram Prakash PW-8, was sent to the mortuary of Babu Jagjivan Ram Hospital. SI Praveen PW-22 prepared the inquest papers Ex.PW-22/B. At the hospital Dr.B.N.Acharya PW-11 conducted the post-mortem the same day i.e. on 8.2.2001 and prepared the post-mortem

report Ex.PW-11/A recording therein a solitary ante mortem firearm injury on the chest of the deceased and death being caused as a result of haemorrhagic shock. A bullet Ex.PW-25/1 was recovered from the chest of the deceased by the doctor who handed over the same to Const.Ram Prakash along with the blood sample of the deceased. The same were seized by SI Praveen Vats as per memo Ex.PW-8/A prepared by him.

6. On 9.2.2001 Sanjay Sharma PW-10 went to the police station and informed the investigating officer that he had witnessed the crime. He stated that three boys waylaid two persons on a scooter. They attempted to snatch a bag which was clutched on to by the pillion rider on the scooter. The scooter fell down. The two boys on the pillion seat on the motorcycle were armed with pistols and the pistol in the hand of one of the boy on the pillion seat fell down. The other boy on the pillion seat shot the pillion rider on the scooter and thereafter the three boys on the motorcycle fled. He stated that he left for his house in the village Pooth Khurd and the next day i.e.9.2.2001, he dutifully reported to the police station.

7. Appellant Mukesh was apprehended, as per secret information claimed by the prosecution, on 23.2.2001 at 8:30 PM as recorded in the arrest memo Ex.PW-9/A. When he was

arrested, as per the prosecution a country made pistol was recovered from the dub of his pant pertaining whereto, for unexplainable reason FIR No.70/2001 under Section 25 of the Arms Act was registered. We are using the expression 'surprisingly' for the reason the arrest memo of Mukesh shows his apprehension in FIR No.48/2001 for offences punishable under Section 393/398/302/34 IPC i.e. the FIR pertaining to the instant case.

8. Mukesh made a disclosure statement Ex.PW-9/B admitting his involvement in the crime and disclosed that the two other boys with him were appellant Manjeet @Kuldeep and appellant Surender. He disclosed that Surender was driving the motorcycle and that he and Manjeet were armed with a pistol each. That the pistol of Manjeet fell down at the spot. He i.e. Mukesh fired the shot on the deceased and handed over the pistol to Surender, after they fled.

9. Manjeet @Kuldeep was arrested on 26.2.2001 at 7:00 PM as recorded in the arrest memo Ex.PW-9/D. He made a disclosure statement Ex.PW-7/B in which he confessed to the crime and disclosed same facts as were told by Mukesh.

10. Surender was apprehended on 28.2.2001 at 5:15 PM as recorded in the arrest memo at page 479 of the Trial

Court Record, which we note has remained unproved. He made a disclosure statement Ex.PW-22/F and informed that he could get recovered the country made pistol with which the deceased was shot from a place at Village Chandpur where he had hid the same. He led the investigating officer to a forest in Village Chandpur and lying concealed in bushes got recovered a pistol Ex.P-1 and two live cartridges Ex.P-2 and Ex.P-3 which were seized vide memo Ex.PW-9/H. Sketch of the pistol and the cartridges was drawn as per Ex.PW-9/G.

11. We may note that as per the prosecution as recorded in the pointing out memos Ex.PW-9/F, Ex.PW-7/C and Ex.PW-9/C, the appellants pointed out the place where the crime was committed i.e. X-Ray Wali Gali on the very day they were arrested.

12. The three accused were sent for TIP proceedings which were fixed on 1.3.2001 and as recorded in the proceedings Ex.PW-21/2, Ex.PW-21/3 and Ex.PW-21/4 all the three accused refused to participate in the test identification proceedings on the ground that they were shown to the witness.

13. The country made pistol recovered from the spot and pursuant to the disclosure statement of Surrender as also

the bullet recovered from the body of the deceased were sent for ballistic examination and as per report Ex.PW-25/A, the bullet recovered from the body of the deceased was opined to be fired from the country made pistol recovered at the instance of Surrender.

14. At the trial, PW-6 Anil Sharma did not identify the appellants as the three boys who were on the motorcycle and had committed the crime. He simply deposed that three boys on a motorcycle waylaid him and the deceased and attempted to snatch the bag containing Rs.4 lakhs from the deceased and when they failed to do so, one of them shot the deceased and the pistol in the hand of the other fell down. The three boys fled on their motorcycle.

15. Sanjay Sharma PW-10 deposed that he was residing at village Pooth Kurd and on 8.2.2001 had gone to Narela to purchase household goods and at around 12:45 PM, when passing through X-Ray Wali Gali, he saw three boys on a motorcycle overtaking two boys on a scooter. Two boys sitting on the back of the motorcycle disembarked from the motorcycle and tried to snatch a bag from the pillion rider of the scooter who resisted and in the process the scooter fell down. One boy fired on the pillion rider of the scooter and hit him on the chest. A pistol in the hand of the other boy fell

down. The three boys fled on the motorcycle. That appellant Mukesh fired the shot. Appellant Surrender was riding the motorcycle and Manjeet was the third person from whose hand the pistol fell on the ground. That he returned home as he had some urgent work. Next day he went to the police station to inform of the incident. He went to the police station on 25.2.2001 after reading in the newspaper that one boy who had committed the crime was arrested and saw Manjeet in the police station. On being cross-examined PW-10 stated that he stayed at the spot for 10/15 minutes. He stated that a crowd gathered. He admitted that the deceased was also a resident of Village Pooth Khurd. He admitted that he did not tell any villager that he saw the incident. He further stated that he returned to his house at 2:00 PM and left for Sohna in Haryana and returned at about 11:00 PM in the night.

16. We need not note the testimony of the various police officers for the reason they have parroted the facts noted herein above by us pertaining to the seizures effected, the arrest of the appellants, the disclosure statements made by them and the recovery effected pursuant to the disclosure statement of Surrender.

17. We note that Mukesh has been acquitted in FIR No.70/2001 pertaining to the recovery of the firearm from his Crl.A.Nos.773/2003, 16/2004 & 392/2004

possession when he was apprehended on 23.2.2001. The judgment has been proved at the trial as Ex.DW-1/A.

18. Learned counsel for the state could not satisfactorily explain as to why was FIR No.70/2001 registered when the arrest memo Ex.PW-9/A of Mukesh shows that he has been arrested in the instant FIR i.e. FIR No.48/2001 and the claim of the police officers is that Mukesh was arrested when a secret informer informed that a gangster involved in the instant crime would be coming to the place disclosed by the secret informer. It is obvious that something is amiss. It probablizes Mukesh being apprehended, not as claimed by the prosecution, but in a manner unknown to us and FIR No.70/2001 was registered by the police not knowing of Mukesh's involvement in the instant case and an ante dated arrest memo showing his apprehension in the instant case has been drawn up.

19. That Mukesh gave a good reason not to participate in the TIP proceedings i.e. being shown to PW-10 stands established by the testimony of PW-10 who claims that he saw accused Mukesh in police custody on 25.2.2001. As noted above, TIP proceedings for all the accused were got fixed for 1.3.2001.

20. The sole evidence against Mukesh and Manjeet is the testimony of PW-10. Their confessional statements have to be excluded while considering the evidence as the same are inadmissible in evidence. No incriminating object or article has been recovered pursuant to their disclosure statements.

21. The conduct of PW-10 is strange. He admits during cross-examination that the deceased was a resident of Village Pooth Khurd and so was he. Kinship bonds are strong in villages. It is just not possible that the death of the deceased, in the tragic circumstance in which it took place, did not spread like fire in the village. Thus, PW-10 surfacing the next day and claiming to be an eye-witness is a matter of intrigue.

22. Ignoring kinship bonds in villages, is the conduct of PW-10 that of a normal person? During cross-examination PW-10 admitted that he stayed at the spot for 10 – 15 minutes. He claims to have rushed back home due to some urgent work, but failed to disclose the nature of the urgent work and what it was. That, PW-10 himself went to the police station the next day, ostensibly shows that he was a public spirited person. If this is the theory to explain his visit at the police station the next day, it belies his conduct on the previous day for such a public spirited person would be expected to inform the police of his being an eye-witness on the same day, more

so when he claims to have remained at the spot for 10 to 15 minutes.

23. The circumstances, under which PW-10 has surfaced, render it prudent for this Court to look for some corroboration to the testimony of PW-10. Finding none against appellant Manjeet and Mukesh, we hold that it would be unsafe to convict said appellants on the sole testimony of PW-10.

24. The pointing out by the appellants of the place where the crime was committed is worthless evidence for the reason the place of crime was known to the police on 8.2.2001, much before the appellants were apprehended.

25. We have noted herein above good reasons for Mukesh not to participate in the TIP proceedings. Thus, there is no incriminating evidence against Mukesh. The only incriminating evidence against Manjeet would be his refusal to participate in the TIP proceedings. It is settled law that the sole incriminating evidence of refusal to participate in the TIP proceedings is insufficient to draw a conclusion of guilt.

26. Against Surrender, the incriminating evidence of recovery of the weapon of offence proved through his disclosure statement, the recovery effected pursuant thereto and the report of the ballistic expert connecting the bullet

recovered from the body of the deceased to the firearm in question is good evidence to establish the authorship of the weapon of offence with Surrender. Needless to state, the striation marks on a bullet are the result of distinctive characteristics of the bore of a firearm being imprinted as a negative image on the projectile i.e. the bullet when a cartridge is fired. These distinctive marks connect a bullet to a one and only firearm in the world. For this reason, recoveries of firearms connected with a crime have always been treated as highly incriminating evidence sufficient to prove the commission of the crime by the person from whom or at whose instance the firearm is recovered, unless the person concerned can render a satisfactory explanation.

27. Appellant Surrender has failed to render any satisfactory explanation.

28. Thus, the appeal filed by appellant Surrender has to be dismissed.

29. Crl.Appeal No.773/2003 and Crl.Appeal No.392/2004 filed by appellants Mukesh and Manjeet are allowed. They are acquitted of the charges framed against them. Crl.Appeal No.16/2004 filed by Surrender is dismissed.

30. Copy of this judgment be sent to the Superintendent, Central Jail, Tihar for necessary action qua appellants Mukesh and Manjeet who would be entitled to be set free unless required in some other case.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

September 02, 2009
mm / dk