

* **HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 21.04.2009

+ **Crl. Appeal No.106/2007**

SANTOSH KUMAR Appellant
Through : Ms.Poornima Sethi, Advocate.

VERSUS

STATE Respondent
Through : Ms.Richa Kapoor, Advocate.

+ **Crl. Appeal No.230/2007**

BRIJESH KUMAR @GUDDU Appellant
Through : Ms.Poornima Sethi, 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 paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

PRADEEP NANDRAJOG, J. (Oral)

1. Vide impugned judgment and order dated 31st May 2006, the appellants have been convicted for the offence of having murdered Ram Naresh Yadav on 30.8.2004.

2. In a lengthy judgment spanning 43 pages, learned counsel for the parties concede, the learned Trial Judge has not critically discussed the evidence and has penned the decision in a most unsatisfactory manner by simply noting the testimony of various witnesses, without analyzing the same as required by law.

3. Shorn of unnecessary details, inasmuch as the case of the prosecution was sought to be proved through the testimony of two eye-witnesses, one of whom has turned hostile, the issue had to be decided with reference to the testimony of the other eye-witness. Needless to state, pertaining to the witness who had turned hostile, it needed to be considered whether any part of his testimony is relevant and corroborates the testimony of the other eye-witness.

4. Case of the prosecution is that on 30.8.2004, at around 8:45 PM, accused Santosh Pandey and Brijesh were quarreling with one Santosh Pandit who was known to the deceased Ram Naresh Yadav and Panna Lal PW-3. In the room in which the accused were quarreling with Santosh Pandit, Durgesh Yadav PW-1 was also present. The quarrel between the accused and Santosh Pandit attracted the attention of the deceased and Panna Lal as they were residents of the adjoining room in the same building. The two i.e. Ram Naresh Yadav and Panna Lal went up to the roof and through the grill saw the accused fighting with Santosh Pandit. The deceased Ram

Naresh Yadav came down to separate the three. Panna Lal continued to remain on the roof top. When Ram Naresh Yadav intervened to separate Santosh Pandit and the accused, Brijesh exhorted: 'Aaj tujhe main jaan se maar deta hoon' upon which accused Santosh caught Ram Naresh Yadav from behind who cried for help and Panna Lal came down, by which time accused Brijesh had picked up a country made pistol and fired a shot at Ram Naresh Yadav who was removed to the hospital by Durgesh PW-1 and Pannal Lal PW-3. At the hospital the deceased was declared brought dead.

5. On receipt of information of the offence, Inspector Ashok Tyagi PW-12 accompanied by Const. Balwant Singh PW-4 left for the place of occurrence and met Durgesh Yadav PW-1 who informed them about the incident. His statement Ex.PW-1/A was recorded and Inspector Ashok Tyagi made an endorsement Ex.PW-12/A thereon and forwarded the same through Const. Balwant Singh for registration of an FIR. At the police station, HC Matta Prashad PW-6 registered the FIR Ex.PW-6/B.

6. The appellants were apprehended and a country made pistol Ex.P-1 was recovered from Brijesh. An empty cartridge Ex.P-2 was recovered from his shirt. As per FSL report Ex.PW-12/D, the used cartridge was found to be fired from the country made pistol recovered from Brijesh.

7. The dead body of Ram Naresh Yadav was seized and

sent to the mortuary of Lal Bahadur Shashtri Hospital where Dr.Jayant Das PW-10 conducted the post-mortem on 1.9.2004 and on the post-mortem report Ex.PW-10/A recorded the following injuries on the deceased:-

“Right foot dorsal aspect lacerated.
Left knee 2 x 3 cm laceration present.
1.57 cm x 0.57 cm lacerated wound present 5 cm lateral at T-12/L-1 level on right side wound present 5 cm lateral at T-12/L-1 level on right side wound has inverted margin with synging of surrounding skin.
3 x 1 cm lacerated wound in right hypocondrium present 5 cm supero lateral direction and 3 cm in infro medial direction with ragged margin. Omentum coming out through wound.
Track of wound going supro medially containing clotted blood with tissue haematoma.
Peritoneal cavity contained around 2 ltrs. of blood with clots.
Right kidney lacerated with pererenal haematoma present.”

8. We may note at this stage that in the MLC Ex.PW-11/A of Ram Naresh Yadav, it has been recorded that he was brought to the hospital at 9:30 PM on 30.8.2004 by Durgesh Yadav PW-1 and Panna Lal PW-3. It records an external entry wound on the stomach and an exit wound at the back.

9. While deposing as PW-1, Durgesh Yadav deposed that he knew the accused as they resided in his neighbourhood and that he knew the deceased Ram Naresh Yadav as they belonged to the same village. That on 30.8.2004 he came to his house at about 8:45 PM and saw some people, whose faces he cannot recollect, fighting with the deceased Ram Naresh Yadav. He stated that the appellants were not present when the quarrel was going on.

10. Durgesh Yadav was declared hostile and was cross-examined by the learned APP. On being cross-examined he admitted; to quote from his testimony:- *"I gave my statement to the police, the same is Ex.PW-1/A bearing my signature at point 'X'..... it is correct that the quarrel was being taken place outside the room of Guddu. It is correct that deceased Ram Naresh Yadav came there to stop the quarrel."* It may be noted that Guddu is none other than accused Brijesh Kumar.

11. On being confronted with the contents of the statement Ex.PW-1/A wherein it is recorded that Durgesh Yadav saw the deceased being shot at by Brijesh, he responded that the police obtained his signatures on a blank paper.

12. Panna Lal PW-3 deposed as under:-

"Last year i.e. 2004 I was working as a tailor in a factory situated at Noida. I know accused Guddu present in court. I also know accused Santosh present in court. While working in Noida factory I used to reside in a house situated at Kondli. Both the accused persons also used to reside at Kondli near to me. Hence both of them are known to me. On 30.8.2004 at about 8.45 PM I along with Ram Naresh the deceased were in our room. I along with Ram Naresh heard a noise from adjacent house and I along with Ram Naresh the deceased went there immediately while running and came on the roof of the house. There was jali on the roof and from the jali I along with Ram Naresh deceased were seeing inside the house and we saw a quarrel was going on. We saw Santosh and Guddu both the accused present in court were giving beatings to Santosh Pandit. There was one Durgesh also inside and on account of Durgesh's presence there Naresh deceased came inside and I remained on the roof and continued seeing the incident through the jaali and Naresh deceased started separating Santosh Pandit from the accused persons, on this Guddu Pandey present in court asked Naresh as to who was he to save Santosh Pandit from

them and Guddu also told that "ABHI TUJE MAIN JAAN SE MAAR DETA HOON". Accused Santosh Kumar then caught hold of Ram Naresh called me to come immediately come inside and I immediately came inside and saw that accused Guddu struck a country made pistol on his abdomen and fired from the same upon Ram Naresh in my presence. Thereafter accused Guddu started away and accused Santosh Pandey went in his room. On receipt of gunshot injury Ram Naresh fell down. I and Durgesh took him to ESI Hospital in Sector 24 Noida and on examining him doctor declared him dead. Police was informed."

13. As noted above, the impugned decision, though lengthy, has not analyzed the evidence as required to be done, but the underlining signature tune of the decision is that there was no reason to doubt the testimony of Panna Lal. Further, the country made pistol and a used cartridge being recovered from the person of accused Brijesh when he was arrested has also influenced the learned Trial Judge to convict the appellants.

14. Since we are dictating the decision in Court, we are not following the conventional path of first noting the submissions urged and then dealing with the same. We are dealing with the submissions urged after noting the same, one by one.

15. It is firstly urged that the recovery of the pistol and the used cartridge does not link Brijesh to the crime for the reason the live cartridge could have been used anywhere by Brijesh. It is pointed out that the used cartridge was not recovered from the spot. It is pointed out that no bullet was recovered from the spot nor from the body of the deceased.

16. We agree with learned counsel for the appellant that

under the circumstances it cannot be concluded that the country made pistol Ex.P-1 was used for the commission of the crime. Unfortunately for the prosecution, the learned public prosecutor had not been vigilant enough to show the pistol Ex.P-1 to PW-3 and elicit a response whether Ex.P-1 was the pistol seen by him in the hand of Brijesh when he shot the deceased. Thus, the recovery of the country made pistol and the used cartridge from Brijesh loses any incriminatory value.

17. It is next urged by learned counsel for the appellants that by not examining Santosh Pandit, the alleged person with whom the accused were fighting when the deceased allegedly intervened, the prosecution has withheld vital evidence and therefore the appellants are entitled to be given a benefit of doubt.

18. It is settled law that a lapse by the prosecution cannot be used to acquit the accused, if otherwise the prosecution successfully establishes its case. Thus, the lapse by the prosecution not to examine Santosh Pandit is held not to be fatal to the prosecution of the accused.

19. Drawing our attention to the fact that the complainant, Durgesh Yadav PW-1 has turned hostile and with reference to the testimony of Panna Lal PW-3, Ms.Poornima Sethi, learned counsel for the appellants urges that Panna Lal could not have seen the incident as it was not possible to see inside the room through the jaali by a person who was standing

on the roof opposite the room.

20. Before discussing whether anything can be salvaged from the testimony of Durgesh Yadav, pertaining to the submission that Panna Lal could not have seen the incident from the jaali, we have questioned learned counsel for the appellants whether Panna Lal was cross-examined on the issue whether it was possible to see the place where the incident took place through the jaali while standing on the roof. Learned counsel concedes that the witness has not been cross-examined on said issue. Thus, we cannot entertain an argument which is predicated on surmises and conjectures. Further, Panna Lal has not deposed of having seen the entire incident while standing on the roof. He has categorically deposed that when appellant Santosh Kumar caught the deceased from behind, the deceased called for him and he immediately came inside the room and at that point of time saw that Brijesh had struck a country made pistol on the abdomen of Ram Naresh and he fired a shot. Thus, the act of shooting has been seen by Panna Lal when he had come inside the room where the firing took place.

21. Is the deposition of Durgesh Yadav, the hostile eye-witness, completely worthless? We think, no. He has firstly admitted that he and Panna Lal PW-3 took the deceased to the hospital. His testimony corroborates the presence of Panna Lal at the spot. As noted above, though at the first instance PW-1 deposed that when he came to the house he saw people

fighting with the deceased, but on cross-examination by the learned APP stated that it was correct that a quarrel was taking place outside the room of Brijesh and the deceased came there to stop the quarrel. Thus, he has corroborated Panna Lal PW-3 to the extent that the deceased suffered a death when he intervened in an ongoing quarrel. Durgesh Yadav admitted on being cross-examined by the learned APP that he gave a statement to the police and that the same was Ex.PW-1/1 and that it bore his signatures at point 'X'. Having admitted that Ex.PW-1/1 was the statement which he had made to the police, Durgesh Yadav was obviously lying when he deposed facts to the contrary in the Court. It is important to note that he did not say that his statement was incorrectly recorded. We may hasten to add that he has denied having told the police what was recorded in Ex.PW-1/1. We have noted herein above that during cross-examination by the learned APP he volunteered that the police obtained his signatures on a blank paper.

22. A perusal of the statement Ex.PW-1/1 shows that it spans 1 ½ sheets with the signatures of Durgesh Yadav at the middle of the second page. The said circumstance i.e. signatures of Durgesh Yadav at the middle of the page belies the fact that somebody obtained his signatures on a blank paper and thereafter scribed the statement for the reason the normal conduct of he who obtains signatures of a person on a blank paper is to require the signatory to append his signatures

at the bottom of the page.

23. It is apparent that Durgesh Yadav has violated the sanctity of the oath which he took before deposing as a witness; it is obvious that Durgesh Yadav has been won over by the accused. Be that as it may, his testimony corroborates the presence of Panna Lal at the spot as also the fact that nobody was quarreling with the deceased and that the deceased suffered the death when he intervened in an ongoing quarrel. To this extent, Durgesh Yadav can be said to have corroborated Panna Lal.

24. With reference to the testimony of Panna Lal PW-3, learned counsel for the appellants urges that a closer look at his testimony would show that he and the deceased saw a quarrel between the appellants and Santosh Pandit when the deceased and PW-3 were on the roof. Whereas PW-3 continued to remain on the roof, the deceased came down and intervened to separate the accused and Santosh Pandit. At that point of time appellant Santosh Kumar caught the deceased from behind and thereupon PW-3 left the roof to reach the place where the fight was going on as the deceased had called out for him. Learned counsel draws our attention to the further testimony of Panna Lal wherein he has not stated that when he came down he saw that the deceased was continued to be caught by Santosh Kumar. Learned counsel draws our attention to the further testimony of Panna Lal to the effect that he saw Brijesh stick a

pistol in the stomach of the deceased and fire a shot. Counsel urges that under the circumstances accused Santosh cannot be convicted for the offence of murder with the aid of Section 34 IPC.

25. We find considerable merit in the said contention urged by learned counsel for the appellants. It is not the case of the prosecution that the accused had wanted to kill the deceased. The testimony of PW-3 shows that the accused were fighting with Santosh Pandit and when PW-3 and the deceased heard the quarrel, they went up to the roof and through the jaali saw the accused fighting with Santosh Pandit. The deceased came down and intervened to separate the accused and Santosh Pandit. PW-3 continued to remain on the roof. It is obvious that till that point of time, neither accused was having any animus against the deceased. The testimony of PW-3 shows that whatever happened thereafter was the result of the anger generated against the deceased on account of his intervening in the fight. Thus, the intention which was formed was at the spur of the moment and by no stretch of imagination the consequential acts can be classified as premeditated.

26. Keeping in the backdrop the said circumstance, it assumes significance to note that what led PW-3 to come down from the roof was the unsuccessful intervention by the deceased and the act of accused Santosh Kumar catching the deceased from behind. But, PW-3 has not deposed that when

he came down he saw that appellant Santosh was still catching hold of the deceased from behind. PW-3 has simply deposed that when he came down he saw that Brijesh stuck a pistol on the stomach of the deceased and fired therefrom.

27. It assumes significance that the bullet which pierced the stomach of the deceased made an exit at the back as recorded in the MLC of the deceased, a fact corroborated by the post-mortem report. If this be so, and had appellant Santosh Kumar continued to catch the deceased from behind when the shot was fired, there is no way that the bullet would not have hit Santosh Kumar. It is not the case of the prosecution that Santosh Kumar was also injured.

28. What is the picture which the Court can draw with reference to the afore-noted facts. The appellants were quarreling with Santosh Pandit. The deceased heard the quarrel. PW-3 heard the quarrel. The deceased and PW-3 climbed up the roof to see what was going on and saw the quarrel. The deceased decided to intervene and separate the appellants and Santosh Pandit. PW-3 decided to remain a spectator. The deceased came down and intervened. He managed to separate Santosh Pandit and the appellants. Obviously, this was the result of some jostling and pushing by the deceased and at that time, appellant Santosh Kumar caught the deceased from behind. Seeing that the quarrel was not being quenched, and on being summoned by the deceased even PW-3 decided to

intervene but by the time he came down Brijesh had taken out a pistol and stuck the same at the stomach of the deceased and the shot was fired. Thus, the act of Santosh Kumar of catching the deceased from behind can possibly be an act committed when the jostling and pushing was going on and not to facilitate the commission of the crime by Brijesh. The circumstance of the fight, not involving the deceased at the origin of the fight has to be kept in mind. It is obvious that Brijesh lost his cool at the deceased as he thought that the deceased had no business to intervene in the fight between the appellants and Santosh Pandit.

29. The fact that PW-3 has not deposed that appellant Santosh Kumar continued to hold on to the deceased from behind and the fact that the deceased was shot at point blank range on the stomach and the bullet made an exit wound from the back did not hit Santosh Kumar, compels us to give the benefit of doubt to Santosh Kumar of not having continued to catch the deceased, in any case the deceased was not caught by him when Brijesh fired the shot i.e. it is doubtful whether Santosh Kumar disabled the deceased and facilitated Brijesh to shoot the deceased. Thus, appellant Santosh Kumar cannot be said to have shared any common intention with Brijesh.

30. Unfortunately, the learned Trial Judge has not critically appreciated the evidence. The effect of the bullet making an exit wound from the back of the deceased and not

hitting or injuring Santosh Kumar with reference to whether Santosh Kumar had continued to catch hold of the deceased from the behind, has not been considered by the learned Trial Judge. Further, the learned Trial Judge has not critically analyzed either the testimony of PW-1 or of PW-3. Even the testimony of PW-3 has not been critically analyzed as herein above done by us, keeping into account that the original fight was between the appellants and Santosh Pandit. The deceased had intervened in an ongoing fight.

31. The submission urged by learned counsel for the appellants that Brijesh had no intention to kill the deceased and he acted with anger which was generated at the spur of the moment when the deceased intervened to separate the appellants and Santosh Pandit who were fighting, and hence it is not a case of murder, has not impressed us for the reason, if nothing more, a person who sticks a pistol in the stomach of a person and shoots, whatever be his intention, does an act which is imminently dangerous and in all probability would cause death.

32. The acts of Brijesh fall within Section 300 Fourthly if not Thirdly thereof.

33. Crl.Appeal No.230/2007 filed by Brijesh Kumar is dismissed.

34. Crl.Appeal No.106/2007 filed by Santosh Kumar is allowed. The impugned judgment and order dated 27.5.2006 is

set aside qua him and he is acquitted of the charge of having murdered the deceased. The sentence imposed upon him is set aside.

35. Copy of this decision be sent to the Superintendent, Central Jail, Tihar for compliance.

(PRADEEP NANDRAJOG)
JUDGE

(ARUNA SURESH)
JUDGE

APRIL 21, 2009
Dharmender