

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

% *Judgment Reserved on: 6th November, 2009*
Judgment Delivered on :13th November, 2009

+ **CRL.APPEAL No.106/2006**

VINEET @ GAPODI Appellant
Through: Mr.Rajesh Mahajan, Advocate.

versus

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

+ **CRL. APPEAL No. 163/2009**

SAJID @ SHAMBHU Appellant
Through: Ms. Anita Abraham, Advocate.

versus

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

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

PRADEEP NANDRAJOG, J.

1. Appellants Vineet @ Gapodi and Sajid @ Shambhu have been convicted for the offence of having murdered Gopal and for the offence of having attempted to murder Bhagat Singh

PW-1. Three other co-accused, namely, Sunil, Sachhe Ram and Vicky have been acquitted. The trial of the sixth co-accused was conducted before a Juvenile Court as he i.e. Deepender was a juvenile when the crime was committed. It may be noted that Deepender has been acquitted.

2. A perusal of the impugned judgment and order dated 26.10.2005 shows that Sunil, Sachhe Ram and Vicky have been acquitted because no witness, not even Bhagat Singh PW-1, stated anything against them. The appellants have been convicted on the sole testimony of Bhagat Singh PW-1. We note that Sumitra PW-5, who was also cited as an eye-witness turned hostile and denied having witnessed the incident. The other evidence held incriminating against the appellants is the recovery of a shirt each by the two appellants which they claimed, as per their disclosure statements, to be worn by them when the crime was committed, which shirts were found to be stained with human blood, group whereof could not be determined. Against appellant Vineet further incriminating evidence is the recovery of a knife, which was opined by the doctor who conducted the post-mortem of the deceased Gopal to be the possible weapon of offence.

3. It is apparent that everything would turn on the testimony of Bhagat Singh PW-1, who indisputably received stab

injuries on the day of the incident, i.e. 03.04.2003 as finds mentioned in the MLC Ex.PW-10/C which records that Bhagat Singh was admitted at Lok Nayak Hospital at 1.30 PM. He was having three stab injuries on the temporal region and the epigastric region. As noted above, the learned Trial Judge has held that the testimony of Bhagat Singh PW-1 is without blemish and inspires confidence.

4. We propose to note the contentions urged by learned counsel for the appellants and thereafter note the case of the prosecution and the evidence in support thereof.

5. With reference to the admission of Bhagat Singh PW-1 that he did not know the name of the appellants prior to 02.04.2003 and that he did not know their names when he deposed in court on 19.11.2003 as also the admission of SI Rajneesh Kumar PW-21 that on the day of the incident he brought the dossiers of appellants Gapodi and Shambhu and showed them to Bhagat Singh, it was urged that it was apparent that Bhagat Singh did not know the name of the appellants and that their names find a mention in the statement Ex.PW-1/A made by Bhagat Singh and recorded by SI Rajneesh Kumar PW-21 which has formed the basis of the First Information Report requires an inference to be drawn that Bhagat Singh named the appellants at the instance of SI Rajneesh Kumar after SI Rajneesh Kumar

showed the dossiers of the appellants to Bhagat Singh. Taking this argument a little further, with reference to the FIR Ex.PW-6/B which records that it was dispatched to the Area Magistrate on 04.04.2003 at 8.30 AM, it was urged that the FIR was ante-time and that the recording contained therein that it was registered at 3.10 PM on 03.04.2003 is manipulated. In a nutshell, it was urged that after the incident in which Gopal died and Bhagat Singh was injured, nobody knew the names of the assailants. The police was maintaining the dossiers of the appellants and SI Rajneesh Kumar manipulated the name of the appellants in the statement of Bhagat Singh which purportedly was recorded at 2.45 PM but as a matter of fact was recorded much after 7.00 PM resulting in an ante-timed FIR being registered. Since Bhagat Singh named the appellants at the instance of SI Rajneesh Kumar, his testimony stood discredited.

6. Further, in an attempt to discredit PW-1, the counsel pointed out two more variations in the statements given by PW-1. First being that in his examination-in-chief, PW-1 deposed that appellant Sajid gave the fatal knife blows to the deceased, but on being cross-examined by the counsel for State in this regard, he stated that appellant Vineet inflicted the knife blows on Gopal. Second discrepancy pointed out is that in statement Ex.PW-1/A made to the police, PW-1 stated that he was the driver of the RTV in which the incident took place, but in his deposition before the

court, he stated that he was a Government servant working in Delhi Jal Board. With reference to these inconsistencies, the counsel urged that from the fact that PW-1 has fumbled at places in his statements, an inference of his being an untruthful witness and deposing at the tutoring of the prosecution can reasonably be drawn.

7. Next, it was submitted by the counsel, that the evidence of recovery of a blood stained T-shirt worn by appellant Sajid @ Shabhu and a blood stained shirt worn by appellant Vineet @ Gapori, at the time of the incident as recorded in seizure memos Ex.PW-21/P and Ex.PW-17/A, at their behest, pursuant to their disclosure statements Ex.PW-21/O and Ex.PW-21/R was doubtful and appeared to be planted. Further, it was urged that the recovery of knife claimed to be used in the offence as recorded in seizure memo Ex.PW-17/C, at the instance of appellant Vineet @ Gapori pursuant to his disclosure statement was also planted against the appellant.

8. Pertaining to appellant Sajid @ Shambhu, apart from the afore-said submissions, learned counsel additionally submitted that PW-1 does not attribute any specific role to appellant Sajid @ Shambhu with respect to the stabbing of Gopal; the only role alleged by PW-1 against appellant Sajid @ Shambhu is that he caught hold of PW-1 to facilitate appellant

Vineet to inflict knife blows on him. As a result, it cannot be said that a common intention to cause death of Gopal, existed or was formed at the spur of the moment, between appellant Sajid @ Shambhu and appellant Vineet. Therefore, at best, he can be convicted for an attempt to murder Bhagat Singh PW-1 and no more.

9. Lastly, for both appellants, learned counsel urged that if at all the appellants are found guilty, then, at best they can be convicted for the offence punishable under Section 304 Part II IPC. The reason being, the appellants had no motive to kill Gopal as they had no prior enmity with him. Learned counsel urged that it is not in dispute that the actual target of the assault was PW-1 and that Gopal was assaulted only when he attempted to save PW-1, and as such, there being no intention on part of appellants to murder the deceased, and the death having been caused in the heat of passion, at best a case under Section 304 Part II IPC is made out.

10. Before dealing with the arguments set forth by the counsel for the appellants in paras 5 to 9 above, we broadly note the case of the prosecution.

11. The case of the prosecution is that at about 6.00 PM on 02.04.2003 i.e. a day prior to the day when deceased Gopal was put to death and Bhagat Singh was critically injured, the

appellants and their associates Sunil @Rinku, Vicky Gupta, Sachhe Ram and Deepender were extorting money from the drivers of TSRs parked at Karawal Nagar Chowk. Bhagat Singh PW-1, who was present there at that time, being a social worker, intervened in the matter and as a result the appellants and their associates went away. But on the next day i.e. on 03.04.2003, at about 1.00 PM, when Bhagat Singh was in the RTV bearing No.DL-1V-A-0947, both the appellants and their associates attacked him. While appellant Sajid caught hold of him, appellant Vineet inflicted knife blows on him. Gopal, a helper in the bus was also present there and when he tried to save Bhagat Singh, appellant Vineet stabbed him. Thereafter the appellants and their associates fled away.

12. The process of criminal law was set in motion when at 1.17 PM on 03.04.2003 HC Nirmala PW-6 the duty officer at PS Timarpur received information from the PCR about the stabbing of a person near Balak Ram Bus Stand, Timarpur and recorded DD No.15/A Ex.PW-6/A. A copy of said DD was entrusted to SI Rajnish Kumar PW-21 for investigation. He along with a constable reached the spot and on learning that the two injured had gone to Sushruta Trauma Centre, he went there. He found the two injured; namely, Bhagat Singh and Gopal admitted in the hospital; both were fit for making statements. He recorded statement Ex.PW-1/A of Bhagat Singh wherein Bhagat Singh

stated that he was the driver of RTV bearing No.DL-1V-A-0947 and at around 1.00 PM on that day i.e. 03.04.2003, when he was present in said RTV with Gopal, appellants Shambhu and Gaponi attacked him. When Gopal tried to save him, Gaponi stabbed Gopal.

13. SI Rajnish Kumar made an endorsement Ex.PW-21/A under said statement of Bhagat Singh and sent it for registration of an FIR. An FIR Ex.PW-6/B was registered under Sections 307/34 IPC at 3.10 PM. SI Rajnish got the spot and the RTV in question photographed and made the relevant seizures. Since at 2.25 PM, Gopal succumbed to his injuries and was declared dead, FIR was amended and Section 302/34 IPC was added thereto. SI Rajnish Kumar filled in the requisite inquest papers and sent the body to the mortuary of Civil Hospital, Sabji Mandi, Delhi for the conduct of post-mortem. Dr.Ashok Jaiswal PW-18 conducted the post-mortem and noted four incised wounds on the body of the deceased, one linear scratch on his right forearm and one abrasion injury below his left eye. He opined that the cause of death of Gopal was haemorrhagic shock and that injury No.2 was sufficient to cause death in the ordinary course of nature. It may be noted that injury No.2 had pierced the upper lobe of the left lung cutting the aorta resulting in excessive bleeding.

14. The appellants were arrested. On interrogation they made disclosure statements and pursuant thereto got recovered the blood stained clothes worn by them at the time of the incident. Pursuant to his disclosure statement, appellant Vineet also got recovered a knife used in the offence. The said knife was sent to Dr. Ashok Jaiswal PW-18, who opined the same to be the possible weapon of offence.

15. After the completion of the investigation, the appellants and the co-accused were put to trial. Prosecution examined 25 witnesses. Since the issue in appeal needs to be adjudicated with reference to the afore-noted submissions made by learned counsel as noted in paras 5 to 9 above, we note the relatable evidence thereto.

16. Bhagat Singh PW-1 is the star witness of the prosecution since Sumitra PW-5 another stated eye-witness has turned hostile. In his examination-in-chief, Bhagat Singh deposed as under:-

"I am a Govt. Servant and is working in Delhi Jal Board. On 2.4.2003 at about 6 PM I saw two accused persons whose names I do not know but this witness pointed out towards accused Sajid and accused Vineet and states that they standing at Karawal Ngr. Chowk and were snatching money from TSR drivers. People had gathered there. The said people and Sajid Ali were quarreling with each other. I intervened and separated Sajid Ali from the said person being a social worker also. Next day i.e. on 3.4.2003 at about 1 PM the RTV bearing No. DL-IV-A-0947 belonging to my friend namely Inder Singh Negi was stationed/parked at Timar Pur Balak Ram Hospital bus stand to fetch the school children. I was sleeping in the said RTV vehicle.

The helper namely Gopal was also in the said RTV. Accused Sajid Ali caught hold of me and accused Vineet gave me a blow of knife saying that my name is Gapori having a big knife ad measuring approximately 1 ft. Accused Sachhe Ram was holding a desi katta, accused Vickey Gupta was also standing with them. I do not know whether accused Rinku @ Sunil was with the accused persons or not. One other boy namely Jitender @ Bittoo was also with accused persons and his case is being tried in Juvenile Court. Thereafter accused Sajid gave two knife blows to Gopal. Thereafter accused persons ran away from the said place. Public had gathered there and someone had rang PCR. I waited for fifteen minutes and PCR Van failed to come there I drove said RTV to Roma Centre, Chandagi Ram Akhara. I was in an injured condition and one of my intestines has oozed out. Gopal was also lying in the said RTV. In my presence, injured Gopal was got down from the RTV and was taken inside the hospital by the doctor and other persons. Thereafter I lost my consciousness.....”.

17. On being cross-examined by the learned APP, Bhagat Singh PW-1 stated as under:-

“ I had told the police that I was driver of said RTV on the day of the incident alone as the school children were to be picked up. I was asked by owner of RTV to take RTV from B.R.Hospital to Karawal Nagar. (Vol.) It is correct to suggest that the associates of accused Gapori @ Vinees and Sajid Ali caught hold of Gopal and accused Vineet @ Gapori gave knife blow to deceased Gopal....”

18. On being cross-examined by the counsel for the accused Vineet, he stated as under:-

“...I had no enmity with accused and neither I knew their names earlier to 2.4.2003. I had not seen accused persons prior to 2.4.2003...”

19. HC Nirmala PW-6, deposed that on 03.04.2003 she was the duty officer at PS Timarpur from 9.00 AM to 5.00 PM. At around 1.17 PM she received a call regarding the stabbing of a

person near Balak Ram Hospital, Timarpur by 3-4 persons, she recorded DD No.14-A to this effect and sent a copy of the same to SI Rajneesh Kumar. At about 3.10 PM she received a ruqqa sent by SI Rajneesh Kumar and on basis thereof she registered FIR No.143/2003 Ex.PW-6/B under Section 307/34 IPC. The said witness was not cross-examined on the issue of the time when she received the ruqqa and recorded the FIR. The only question put to her was, to which she replied that it was correct that in DD No.14-A the name of the assailant was not mentioned.

20. It may be noted here that in the FIR it stands recorded that it was dispatched to the Court of the learned Magistrate on 4.4.2003 at 08:30 hours.

21. SI Rajnish Kumar PW-21, deposed that on 03.04.2003 DD No.14-A was assigned to him for investigation. Accompanied by other staff he reached the spot near Balak Ram Bus Stand Timarpur. On learning that one of the injured had taken the other to Sushruta Trauma Centre, he also went to said hospital. He noticed an RTV bearing No.DL-IV-A-0947 parked outside the hospital with blood lying on its floor board. On enquiring from the hospital authorities, he learnt that the injured namely Gopal and Bhagat Singh were admitted in the hospital and were fit to make statements. He recorded statement of Bhagat Singh, made an endorsement thereunder and sent it for registration of

an FIR. He got the RTV and the spot photographed. After some time injured Gopal succumbed to his injuries. He made the relevant seizures and recorded statements of witnesses. He then went to PS Gokulpuri and brought dossiers of appellants Gapori and Shambhu, showed them to Bhagat Singh who identified the persons in the photographs on the dossiers as the assailants.

22. In his cross-examination, he clarified that it was around 7.00 PM when Bhagat Singh PW-1 was shown the photograph of appellant Vineet @ Gapori from which he identified Gapori. He denied the suggestion that Bhagat Singh first saw the photograph and then named the appellant in his statement Ex.PW-1/A which formed the basis of the FIR.

23. It is no doubt true that in the FIR Ex.PW-6/B it stands recorded that the same was sent to the Area Magistrate at 8:30 hours on 4.4.2003. It is apparent that there is a delay in forwarding the FIR to the Area Magistrate. But we note that reason for the delay has not surfaced for the reason PW-6 nor the investigating officer has been cross-examined as to why the FIR was sent so belatedly to the Area Magistrate.

24. HC Nirmala PW-6 has categorically deposed that she received the ruqqa sent by SI Rajnish Kumar at 3:10 PM on 3.4.2003. Said testimony of hers has not been challenged. She

has not been cross-examined with reference to said testimony. Thus, from the mere fact that the FIR was forwarded to the Area Magistrate after more than 17:00 hours of it being registered, it cannot be said that a presumption needs to be drawn of something being hanky panky. A somewhat similar situation existed in the decision reported as (2005) 9 SCC 298 Sunil Kumar vs. State of Rajasthan. It was held that in the absence of giving an opportunity to the investigating officer to explain the delay in forwarding the FIR to the Area Magistrate, no adverse inference could be drawn pertaining to the time when the FIR was registered.

25. If the FIR was registered at 3:10 PM, that SI Rajnish showed the dossiers of the appellants to Bhagat Singh at 7:00 PM makes no difference. It is apparent that SI Rajnish did so to seek confirmation that the person who was boasting his name as Gapodi when he stabbed Bhagat Singh and the other person named Shambhu were the ones whose photographs existed on the dossiers. It is apparent that the appellants were listed bad characters of the area.

26. Appellants can draw no sustenance from the fact that Bhagat Singh stated during cross-examination that prior to 2.4.2003 he did not know the names of the appellants nor had he seen them prior to 2.4.2003. Nor can the appellants gain any

benefit from the fact that Bhagat Singh stated in Court that he did not know the names of the appellants. Our reason for so holding is that while deposing in Court, Bhagat Singh clearly stated that on 2.4.2003 he saw the appellants, whose name he did not know, when they were snatching money from TSR drivers. He clearly deposed that on 3.4.2003 Sajid caught him and Vineet gave him a blow with a knife saying that his name was Gapori. No supplementary question has been put to Bhagat Singh as to how did he disclose the names of the appellants in his statement Ex.PW-1/A. Had such a question been put to him, he would have answered the same and depending upon the answer, the issue could have been debated.

27. From the testimony of Bhagat Singh it is apparent that appellant Vineet @Gapodi was bragging, as street hoodlums normally do; telling his name while stabbing Bhagat Singh. Gangsters do so to instill fear in the mind of the victim. We note that Bhagat Singh has merely stated that on 2.4.2003 he did not know the names of the appellants. He did not state that on 3.4.2003 he did not know the name of the appellants. We reiterate that no cross-examination has been done with respect to the knowledge of Bhagat Singh as on 3.4.2003 of the names of the appellants. That after seven months of the incident, Bhagat Singh did not know the names of the appellants is also explainable for the reason he had heard of their names

only once on 3.4.2003 and immediately after the incident he disclosed their names to the investigating officer. In connection with this, it is relevant to note that the incident took place at around 1.00 PM. DD No. 15-A pertaining to the incident was recorded at PS Timarpur at 1.17 PM. A copy of the DD was entrusted to SI Rajneesh Kumar PW-21 for investigation; who first went to the spot i.e. near Balak Ram Bus Stand, Timarpur, and from there went to Sushruta Trauma Centre, where the injured were admitted. At the hospital, he recorded statement Ex. PW-1/A of Bhagat Singh and as recorded in endorsement Ex.PW-21/A, sent it for registration of an FIR at 2.45 PM. So short is the gap between the time of occurrence and the time when the statement of the complainant was recorded and sent for registration of a case, that the possibility of any manipulation in the recording of the statement is ruled out.

28. With the passage of time memory fades. The mind remembers the core of an incident and at fringes the picture becomes hazy.

29. It may be re-assured that Bhagat Singh clearly identified the appellants as the ones who participated directly while assaulting him. No motive on the part of Bhagat Singh to falsely implicate the appellants has been brought out.

30. It is fairly well settled that the testimony of an injured eye-witness has to be accepted if it is by and large credible. The reason being, a victim of an assault would seldom let go the real culprits who injured him and inculcate innocent persons in their place. See the decisions reported as AIR 2008 SC 3259 Dinesh Kumar vs. State of Rajasthan, 2007 (8) SCALE 649 Sukhdev vs. State of Punjab, AIR 1994 SC 1624 Brijpal Singh & Ors. vs. State of U.P. & Ors. and AIR 1985 SC 386 Mer Dhana Sida vs. State of Gujarat.

31. That Bhagat Singh had to correct himself with respect to the role of Sajid Ali in the death of Gopal; correction being made when a leading question was put to him by the learned APP does not discredit Bhagat Singh. When the number of persons who participate in the commission of a crime are many and the narrative of the incident is being made after a few months there is a possibility of the narrator incorrectly assigning the role of one to the other. If the narrator corrects himself on being asked a leading question with reference to his contemporaneous statement soon after the incident, it can hardly be a ground to label him as an untruthful witness.

32. That in his examination-in-chief Bhagat Singh stated that he was an employee of the Delhi Jal Board and in his statement Ex.PW-1/A he stated that he was the driver of the RTV

also does not make him an untruthful witness. That Bhagat Singh was an employee of the Delhi Jal Board was so stated by him when he deposed in Court on 19.11.2003. It is apparent that Bhagat Singh disclosed his occupation as on the date of his statement. He never stated that he was employed with the Delhi Jal Board when the incident took place. That apart, in his examination-in-chief he clearly stated that the RTV belonged to his friend Inder Singh Negi who had employed Gopal as a helper. In his cross-examination he stated that his friend asked him to drive the RTV on the day of the incident as school children had to be picked up.

33. Thus, we hold that the findings of fact returned by the learned Trial Judge against the appellants are correct.

34. Pertaining to the death of Gopal, evidenced by the post-mortem report Ex.PW-18/A and the testimony of Dr.Ashok Jaiswal PW-18 there is hardly any scope for a debate that the act by which Gopal suffered death would be murder if the necessary intention can be attributed to the doers of the act.

35. From the testimony of Bhagat Singh it is apparent that the knife blows were inflicted upon Gopal by Vineet @Gapori. Thus, Vineet @Gapori has to suffer the consequences of his acts. With reference to the testimony of Bhagat Singh it is apparent that Sajid @Shambhu caught him and Vineet @Gapori

stabbed him. Three stab injuries have been inflicted upon Bhagat Singh. Thus, it is apparent that Sajid kept holding Bhagat Singh to facilitate the blows being inflicted upon him by Vineet. The vicarious liability of Sajid is apparent.

36. The injuries on Bhagat Singh are life threatening and thus we hold that the appellants have been rightly convicted for the offence punishable under Section 307/34 IPC.

37. Pertaining to appellant Sajid qua the death of Gopal, it is true that no specific role has been assigned to Sajid in the death of Gopal. Bhagat Singh has stated that the associates of Gopori and Shambhu held on to Gopal when Gopori stabbed him. Which associate caught hold of Gopal, has not been stated.

38. But the circumstance under which Gopal was attacked has to be considered. From the testimony of Bhagat Singh it is apparent that both appellants and the other co-accused had come to take revenge for being prevented by Bhagat Singh on the previous day, from extorting money from the TSR drivers. From the testimony of Bhagat Singh it is apparent that he was directly targeted by the appellants with Sajid demobilizing him by catching him and Vineet inflicting the knife blows on Bhagat Singh. Gopal was targeted as he intervened to save Bhagat Singh. It is apparent that both

appellants shared a common intention to murder Bhagat Singh, as also a common intention that if anyone intervened to save Bhagat Singh, they would overcome the resistance. It is settled law that if in the doing of an offence, evidence establishes, that the accused had intended to overcome all resistance to achieve their common intention, the accused would be presumed to be having a common intention to do all acts to overcome the resistance.

39. Dealing with organized gangsterism and organized crime, the Courts have to be vigilant enough not to lose sight of the backdrop facts. In the instant case, the backdrop facts are that the appellants and their associates were extortionists and were moving around fully armed. A reasonable presumption can be drawn that each one of them shared a common intention. It can reasonably be presumed that the common intention was to overcome resistance and overpower anyone who resisted the act of extortion or prevented them from extorting money.

40. Though the State has not challenged the acquittal of the co-accused, we note that there is sufficient evidence against them in the commission of the crime.

41. The learned Trial Judge has let off the co-accused because Bhagat Singh apparently said nothing about them except for their presence. The learned Trial Judge has ignored

that Bhagat Singh has clearly said that the associates of the appellants, meaning thereby the three co-accused who have been acquitted, had caught hold of Gopal when Gopori stabbed him. Their roles have been clearly defined. Further, Bhagat Singh has categorically stated that Sachhe Ram was holding a *desi katta* in his hand and Vicky Gupta was standing there when he was stabbed.

42. The learned Trial Judge lost sight of the fact that organized gangsterism may not require active participatory role to be played by all. Six gangsters, as in this case, may surround a victim with only two assaulting him and the four hanging around. The fact that four are merely hanging around would not ipso facto mean that they had no role to play. The threatening presence of the four is intended to scare the persons in the vicinity who might otherwise intervene to save the victim. An act may be committed positively. It may be committed negatively. When organized crime takes place, the co-horts who stand around menacingly are obviously there to instill fear in the minds of the victims and the persons in the vicinity and by their very presence participate in the commission of the crime, if not more, by preventing rescue.

43. It is settled law that if the reasoning of the learned Trial Court in acquitting some of the accused is wrong, the

relatable evidence can still be looked into by the Appellate Court. See the decision reported as AIR 1962 SC 1211 Surender & Ors. vs State of Punjab.

44. We find no merits in the appeals which are dismissed.

45. Since the appellants are in jail, copy of this order be sent to the Superintendent, Central Jail, Tihar for being made available to the appellants.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

November 13, 2009

sb / dk