

IN THE HIGH COURT OF DELHI

Judgment reserved on : January 15, 2009

Judgment delivered on : February 05, 2009

CRL.A.303/2008

ANIL KUMAR GAUR @ TITU Appellant
Through: Mr. Jitender Kumar, Advocate with
Mr. Ajay Kumar Rai, Advocate

versus

THE STATE OF NCT OF DELHI Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A.405/2008

SANJAY SHARMA @ SANJU Appellant
Through: Mr. Anupan S.Sharma, Advocate

versus

THE STATE OF NCT OF DELHI Respondent
Through: Mr. Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J.

1. On 19.04.2001 at 10.02 P.M. a DD Entry No.29, Ex.PW-19/A, was recorded by Const.Dinesh to the effect that information has been received that a huge quantity of blood is

spilling in a house bearing municipal no.C-101, Dayanand Colony, 1st floor, Delhi. This swung the police into action. SI Anant Kumar PW-19, accompanied by Const.Deep Chand PW-8 proceeded to the spot and reached the place of the occurrence. Simultaneously, another police officer, Inspector V.P.Singh PW-23, the SHO of the local police station received a wireless message of the incident and he also reached the spot. At the spot, on learning that the injured had been removed to AIIMS Hospital, SI Anant Kumar accompanied by Const.Deep Chand proceeded to the hospital and on reaching there, learnt that Brij Naraian (hereinafter referred to as the "Deceased") had been declared brought dead.

2. Since the deceased was declared brought dead at the hospital, his body was sent to the mortuary, where Dr.Arun Kumar Agnihotri conducted the post-mortem on 20.04.2001 and gave his report Ex.PW-13/A which recorded that 5 ante-mortem injuries were found on the person of the deceased; that the cause of the death was haemorrhagic shock due to cut throat injury No.3 which was caused by a sharp edged weapon and was sufficient to cause death in the ordinary course of nature.

3. At late night and spilling on to the early morning of the next day, investigation at the site of the occurrence of the

offence was conducted. SI Bega Ram PW-4, from the crime team as also Brijbir Singh (Photographer) PW-7 and Vishram (Finger Print Expert) PW-10, reached the spot. 8 photographs, Ex.PW-7/A1 to Ex.PW-7/A8; negatives whereof are Ex.PW-7/B1 to Ex.PW-7/B8, were taken. A glass tumbler Ex.PW-19/1, cup Ex.PW-19/2 and spectacle Ex.PW-19/3 lying at the spot were seized vide memo Ex.PW-19/C. Chance prints from the said articles were lifted. Blood samples from the spot were lifted vide memo Ex.PW-19/D. A blood stained knife Ex.PW-13/1 lying at the spot was seized vide memo Ex.PW-19/E. SI V.P. Singh PW-23, prepared the rough site plan Ex.PW-23/F. SI Anant Kumar PW-19, recorded the statement Ex.PW-1/A, of Arvind Kumar PW-1, who is a neighbour of the deceased and made an endorsement Ex.PW-19/B thereon and at around 11.50 PM handed over the same to Const.Deep Chand PW-8, for registration of a FIR. Deep Chand took Ex.PW-1/A to the police station and handed over the same to HC Virender Singh PW-6, who recorded the FIR Ex.PW-6/A on 20.04.2001.

4. In his statement Ex.PW-1/A, Arvind Kumar stated that he resides on the ground floor of the property bearing Municipal No.C-101, Dayanand Colony, Lajpat Nagar – IV, New Delhi. That the deceased used to reside on the first floor of the said

property. That on 19.04.2001 at about 9.30 PM he was present in house when he heard the screams of the deceased. That he immediately came out and was about to climb the stairs to reach the house of the deceased when two boys whose clothes were stained with blood came down the stairs and told him that the deceased was vomiting blood. That when he reached the house of the deceased he saw that the clothes of the deceased were stained with blood; the deceased was staggering towards the balcony and blood was oozing from a wound on the neck. That he immediately came downstairs and saw that the said two boys were running towards the main road. That he screamed for help and followed them but the two boys who were aged 24-25 years succeeded in running away. That one boy was wearing a white coloured shirt while the other was thin boy and had a stubble. That on hearing noises people gathered and removed the deceased, who was in an unconscious condition, to AIIMS hospital where he was declared brought dead. That he is confident that the deceased was murdered by the said two boys.

5. Statements of Sanjay Gupta PW-2, who resides on the second floor of the building; Sharda PW-3, the wife of the deceased; and Jai Prakash Pandey PW-14, a neighbour of the deceased were recorded under Section 161 Cr.P.C.

6. Since Sharda Devi PW-3 had told the police that the appellant Anil Gaur used to visit the house of the deceased along with the nephew of the deceased and used to demand money from them i.e. herself and her husband, the needle of suspicion pointed towards the appellant Anil Gaur. The police went about searching for him and apprehended him on 2.8.2001 as per arrest memo Ex.PW-9/C.

7. On being arrested appellant Anil Gaur purportedly made a statement admitting his guilt and disclosed that appellant Sanjay, resident of House No.14, Chatta Mohalla, Delhi Gate, Ghaziabad, U.P. had assisted him in the commission of the crime. This led the police on the trail to apprehend Sanjay who got information that the police was on his look out. He voluntarily surrendered before the police on 29.8.2001 as per arrest memo Ex.PW-9/F.

8. No recoveries were made from either appellant. There is no evidence that the finger prints of the appellants were found from the spot i.e. there is no evidence as to what happened to the chance prints lifted from the spot.

9. It is apparent that while filing the charge sheet against the appellants and naming them as accused persons,

the prosecution was heavily relying upon the eye witness account and in particular upon Arvind Kumar PW-1 and Sanjay Gupta PW-2. The charges were framed against the appellants for having committed offences punishable under Sections 302/201/393/397/460/34 IPC.

10. At the trial, apart from examining the police officers associated with the registration of the FIR and the investigation as also the doctor who recorded the MLC of the deceased and the doctor who conducted the post-mortem; Arvind Kumar was examined as PW-1. Sanjay Gupta was examined as PW-2. Sharda Devi was examined as PW-3. Jai Prakash Pandey was examined as PW-14.

11. Being relevant for our discussion and for a complete appreciation of the deposition of Arvind Kumar and Sanjay Gupta we shall be noting their depositions in full. We shall be noting the relevant depositions of Sharda Devi and Jai Prakash Pandey as also the relevant deposition of SI Anant Kumar PW-19 who had reached the spot on receipt of the information and had conducted the initial investigation.

12. The testimony of Arvind Kumar PW-1 is as follows:-

"On 19.04.2001 at around 9.30 PM I was present on my said address. Brij Narain (deceased) used to live on first floor of same house in which I am living and at said time I heard voice of vomiting from the first floor. I was in my toilet and came out of my house to reach 1st floor to enquire about that matter, but then I saw two young boys in the age group of 20 to 25 years came from the 1st floor side and ran out of that house premises. Their clothes were stained with blood as I could see. Those two boys while running away were saying that Brij Narain had vomited blood and that they were going to call doctor. By that time Brij Narain had also reached outside balcony of his first floor and by that time, I could observe foul play seeing Brij Narain having suffered bleeding injuries, the two culprits who had come downstairs had already run away. I ran about 15-20 paces to chase them, but they had already disappeared. Locality people arrived on the scene and police also reached. Brij Narain was taken to hospital by police. I lodged a report with police which bears my signatures and that is Ex.PW1/A.

XXXX by Sh.M.A.Khan Adv. for accused Anil Kumar Gaur

I do not know Anil Kumar Gaur even till today nor I can identify him. I do not recall if I had stated before the police that at time the of incident I was in toilet. I do not know Bablu who is maternal nephew of deceased Brij Naraian. Due to night darkness I could not identify the assailants. I had stated before the police that I heard a voice of "vomiting type" but it is not recorded in the complaint Ex.PW1/A. I had gone to the spot after coming of the neighbours and the police. My statement before police u/s 161 CrPC that "as soon as reached house of victim Brij Narain I saw" can be taken a meaning that as soon I came out of my house on the ground floor I saw victim Brij coming towards the open balcony of his first floor and I saw him in that condition. It is true before arrival of the police I had not entered inside the house of Brij Narain in this incident. I also saw Sanjiv Gupta who used to live on the second floor on the same premises and thereafter he went away. I had not given in my statement to the

police that I could identify those two accused if shown to me. As I had seen Brij after the police had arrived victim was suffering a bleeding injury on the neck and as there was consideration blood on his person I could not observe any other injury. I did not see any weapon whereby this offence could be said committed. It is not to my knowledge that if police had recovered any weapon from the house of Brij Naraian. Police had arrived within 10/15 minutes of this incident but I cannot say by what transport police had arrived. I myself had also telephoned police and police had also been informed by neighbours. My next house occupant Mr. VK Sharma told me that he had also informed the police perhaps who is a special police officer. I had informed the police on phone No.100. Two police officials had arrived. They had not carried out writing work there. They had interrogated several persons who had collected there but not writing was taken by them as far as I remember. (Witness has been shown site plan to point out in which direction he saw culprits running away from the spot). I have seen the site plan. These two accused had run towards houses 103, 104, 105 and thereafter there is main Kalka Devi Marg and I had seen them only up to the point of that Kalka Devi Marg. It is wrong that I had not seen culprits running away from the scene or occurrence or that I am deposing falsely. I had seen those culprits from their back side. I did not go to the hospital. My report Ex.PW1/A was taken down by the police on the spot either in my house or when I was outside my house. This report was recorded after Brij Naraian had been moved to hospital. In my presence statement of no other person was recorded. In my presence police did not record any of the statement of any witness. No further statement of mine was taken down by the police though police had come to me for further enquiry once or twice thereafter. May be such second statement was recorded. My statement was recorded once i.e. on 19.4.01. I had signed only one paper i.e. my complaint. It is wrong that my evidence is a hearsay.

XXX by Sh.Rajiv for accused Sanjay

It is true I had not been able to see any of the two assailants by their faces involved in this incident and I am unable to identify them”

13. The testimony of Sanjay Gupta PW-2 recorded on 11.4.2002 is as follows:-

“On 19.04.01 at about 9/10 pm I was coming down from my second floor residence through the staircase. When I reached the first floor I heard shrieks of uncle Brij Naraian (deceased). I saw that one boy who was wearing the white shirt which was blood stained. I had asked him that why he had come to the house of Brij Naraian on which he told me that Brij Naraian was vomiting blood and he was going to take doctor and when I reached inside the main gate and one another boy met me I had also asked the second boy that what was the matter who told me that Brij Naraian as vomiting blood and the other boy had gone to take some doctor. The another boy had caught hold of Brij Naraian he got freed Brij Naraian and came out from the gate to release the “pick” as he was chewing some gutkha. I thought he had come out of the room only to chew out gutkha but then that boy also ran downstairs and both the culprits ran away. As I observed that Brij Naraian had been assaulted in this crime I came downstairs to chase those culprits but then the two culprits escaped and could not be captured. I then saw Brij Naraian was having serious bleeding injury on his neck.

After about 15/20 days of this incident I went to PS Lajpat Nagar and there I identify one of the two accused culprits. Witness points out accused Anil as the accused he had identified in the PS saying that he does not know his name but he had identify this accused. This accused was the one who was chewing guktka and ran away from the spot after the first culprit had ran away.

Xxxx by Sh.M.A. Khan adv for accused Anil

I was inside the court room when PW1 was in the process of cross examination. As I was coming down from my second floor residence Arvind was there in the stairs of the first floor. Arvind was alone at that time. Arvind was on third or fourth stairs from the ground. One floor contains prob. 15 stairs and the first floor was quite visible from the place where Arvind was present. I heard Arvind shouting "Pakro Pakro". Arvind also had chased accused culprits to apprehend them and I also followed him. We ran only about 20 paces in that chase but as accused had disappeared we returned. In my statement to the police I had told that accused was chewing gutkha. (Conf. with statement Ex.PW2/D1 wherein it is not so recorded). I had also stated to the police that one culprit had already come down and ran away and the second followed him. (Conf. with statement Ex.PW2/D1 where it is not so recorded). I also stated to the police that second accused had been holding Brij Naraian as I saw him. (Conf. With statement Ex.PW2/D1 wherein it is not so recorded). Both accused had ran away in one direction and we had chased them both. The first accused had ran away with a intervening period of about a minute when second accused ran away. It might have been in all a few seconds to say half a minute when I had seen gutkha chewing accused holding victim Brij and then he uttered words to me (ulti ho gai) and Brij Naraian was holding his neck by his hands and this accused came out of the room which I took he was to chew out gutkha and then he ran away. The distance was about 5/6 steps when I had first saw accused Anil holding Brij Naraian on that occasion. I had stated to the police in my statement ex.PW-2/D1 that this accused was inside the room holding Brij when I first saw him.(Conf. With statement Ex.PW2/D1 wherein it is not so recorded). It is true ground floor occupant Arvind had come out of the house only after the two accused had already come downstairs and were not in the stairs. Arvind had first ran to chase accused and I had followed him. It is wrong to suggest that I did not see any such incident taking place or that I am making false statement. I had not stated to the police that out of the two culprits one was familiar to me. (Conf. With portion mark A to A to the statement Ex.PW2/D1 wherein it is recorded that one boy used to visit house of Brij Naraian and

appeared familiar). I had given description of these accused by their approx. age in my statement. I had observed injury on Brin Naraian on his neck which was bleeding injury. I had not seen any weapon of offence in the room of Brij Naraian. I heard Brij Naraian only saying that culprits had cause him injury. Police was informed by VK Sharma. VK Sharma who is our neighbor is a special police officer (not by Delhi police of our area). It is correct that VK Sharma accompanied Brij Naraian in a PCR to the hospital. Initially 2-4 police personnels came and the remaining police officials had come later on. Probably these 2-4 police officials came by a two wheeler scooter. VK Sharma did not rang up at No.100 in my presence but I came to know this fact as VK Sharma was also telling at that time that he was going to inform the police. Other police personnel came in a police Gypsy and two wheeler scooters. I saw the PCR vehicle. Police officials made enquiry from many persons from the locality and majority of them told police officials that two assailants were seen running away by them. Police did not record any statement of those persons in my presence. Police officials were doing the writing work but they did not record the statement in my presence. I cannot say whether police officials were recording the statements. I can say only that they were doing some writing work.

Q: Whether any statement was recorded in your presence?

A: Police was busy interrogating several persons and they were taking down writing. I cannot say if statement of any person was taken into writing in those writings.

I do not recollect if the persons who were being interrogated by police were asked their name or they told their name to police. Police had interrogated me also and took it down in writing what I told the police and that was about one or one and a half hour after this incident. In my presence signatures of no such person who were interrogated by the police were taken down by the police nor did I also sign any paper prepared by the police. Police obtained my signatures

probably on one place. Paper which was signed by me did not contain any other signatures. Date I do not remember on which I signed the paper. I was called by police afterwards 19.4.2001 which was within a day or two of this occurrence and on that occasion also questions were repeated on if I had seen the culprits. Thereafter it was only after 15-20 days of incident I went to PS and identified accused Anil. It may be correct that I had not identified Anil after 15-20 days of this incident. Vol. may be I had identified him after 2 to 3 months of this occurrence. It is wrong that I am deposing falsely or that I had wrongly identified accused Anil."

14. The witness was recalled for further examination and was further examined on 29.4.2003. His testimony as recorded on 29.4.2003 reads as under:-

"Today I have seen accd. Sanjay Sharma present in custody in this case and he is the 2nd boy whom I have seen inside room of the deceased as I entered after the first boy other accused Anil Gaur had met me in the stairs. I had identified accused Sanjay Sharma when police had brought him to place of incident and that was around 15-20 days after the incident. It is not possible that intervening period which I have stated 15-20 days could be one and a half or two months but certainly nor 3 or 4 months.

Ld. APP requests to put a leading question only on the point of identification of accused Sanjay. Request is permitted.

Q. Since date of incident is 19.4.01, could it be possible that it was 31.8.01 that you happened to see Sanjay Sharma and identified him when he had been brought to the spot by police during investigation.

A. It can be possible since proceedings in this case continued for a long period.

XXXX by Sh.Rajiv Sharma for accused Sanjay Sharma

As I had entered inside the room I had seen accd Sanjay holding victim decease Brij Narain from his head near wash basin. As I had seen accd. Sanjay inside the room on the date of incident, that is how I have been able to identify him when he was in police custody. In my examination period date before court I had identified both accd and it is not that I had not been able to identify Sanjay. I cannot say if my earlier evidence did not mention name of Sanjay or his identification. After the incident, I had been called in the police station on about 3 or 4 dates. My statement was however recorded once and that statement was after recorded 5 or 7 days of this incidence. During my 3 or 4 visits to the police station after the incidence I did not see Sanjay present in P.S. I had seen accused Sanjay after the incident in the Police Station and that was after around 3 or 4 months of the occurrence. I had identified him by his face but his name and other particulars were known to me only after I identified him. On that occasion when I identified Sanjay in PS I had called by police for the purposes of identifying accused and on that occasion only accused was present and police officials were there including Incharge police post SI Mr. Gunjan. My statement was recorded with my signatures when I identified accused. I had remained in P.S. for an about half an hour when I identified Sanjay. On the date of incident Arvind had arrived on my shout but he was downstairs and had not come upstairs. Since Arvind was staying inside his house which was the house adjoining the house of Brij Naraian he did not make efforts to capture Sanjay as he might not have suspected any serious foul play. It is wrong to suggest that I have not seen accused Sanjay inside the room on the date of Incident or that I saw him only when he was in police custody. It is wrong to suggest that accused Sanjay was not present on the spot on the date of incident. I was not told any fact by the police to be deposed before I gave my statement in the court in this case by the police."

15. The relevant portion of the testimony of Sharda Devi PW-3 the wife of the deceased reads as under:-

“.....My husband nephew's Yogesh @ Bablu used to visit our house and accused Anil Gaur today present in court in custody used to accompany Yogesh @ Bablu during those visits. (witness correctly identified and pointed out accused Anil)..... About 10-15 days prior to that 11.4.01 that accused Anil alongwith other accused Sanjay today present in court in custody had come to our house and both accused demanded money from me when I was alone in the house as my husband was away from the house. About a month prior, both accused had come to our house and had demanded money from me on a plea that they had to hire a contract for a cycle stand and I gave them Rs.10,000/-. About 15 days prior to 11.4, when accused had come to our house and had demanded Rs.5,000/-, I had refused to pay them money telling that the daughter of my sister had been got married sometime before and I had spent money on that occasion. Accused had left our house using a threatening language “dekh lenge”.....

XXXXX by Sh.Raju Sharma for accused Sanjay

.....I had mentioned name of Sanjay also who used to accompany Anil whenever they visited our house and demanded money. (confronted with statement Ex.P=CW3/DA where name of Sanjay is not there.) Whatever I stated to police about visits of accused to my house and their demand of money I had stated what were the facts and that statement to police was without any pressure or coercion.”

16. Jai Prakash Pandey PW-14 deposed that on 19.4.2001 he was sitting in the temple at about 9:30 PM and came out of the temple on hearing a noise and saw two persons running on the road. He went to House No.101 and saw that many people

had collected there. He along with 3/4 persons took the injured to the hospital. On being cross examined he stated that it was correct that in his statement recorded under Section 161 Cr.P.C. it was not recorded that he had seen two persons running away on the road. On further cross examination he told that the person in whose car the deceased was taken to the hospital was Vinod Kumar Sharma who was not a resident of the colony.

17. Pertaining to who met SI Anant Kumar when he first reached the spot and the time when Arvind Kumar and Sanjay Gupta met him, the relevant portion of the testimony of SI Anant Kumar reads as under:-

“On 19.04.2001 I was posted as SI at PP Amar Colony, PS Lajpat Nagar. On that day on receipt of DD No.29 Ex.PW19/A I alongwith SI Krishan Kumar and Ct.Deep Chand reached First Floor H. No.C-101, Daya Nand Colony, Lajpat Nagar, IV. Blood was lying in the verandah and kitchen of the said house. One blood stained 'churri' was also lying on the slab of the kitchen. We came to know that injured had already been removed to AIIMS hospital.

Xxxx by Sh.Sehdev Singh, counsel for Sanjay Kumar

I reached the spot after receiving information. I did not found PW1 Arvind Kumar and Sanjay Gupta at their residence.....Sanjay Gupta and Arvind Kumar met me at AIIMS hospital. Again said I am not sure if they met me there.....When I came back to the spot I came to know that Arvind Kumar and Sanjay Kumar were residing in the same building. I had recorded the statement of Arvind Kumar at that time.....”

18. Vide judgment and order dated 04.03.2008, the learned Trial Judge has held that the circumstantial evidence led by the prosecution establishes that the appellants had murdered the deceased and convicted the appellants for offences punishable under Sections 302/406/34 IPC. Regarding the defence of the appellants that the evidence of the material witnesses of the prosecution was full of contradictions, the learned Trial Judge held as under:-

“29. Though Ld. Defence Counsel tried to strengthen their case on behalf of the some contradictions but I do feel that such contradictions are not so material to demolish the case of prosecution. It is well settled that if the witness appear in court for deposition then, obviously some contradictions or improvements are bound to occur. This may be due to lapse of time and fades of memory. In criminal trial Court, the duty of the court is not to let off the criminal on petty discrepancies and minor contradictions. Ground realities must be appreciated. Accused be not allowed the benefit of defective investigation. Prosecution lapses can not be allowed to escape route of criminals and the prosecution has to prove its case by broader probabilities as so observed in case Ms. Vishveswaran VS. State, 2003, RLR, 350 (Supreme Court)

In Amrita @ Amrit Lal Vs. State of M.P. Reported in 2004 (III) AD (SC) 497, their Lordship were pleased to make following observations:-

“In India Maxim “Falsus is Uno and Falsus in omni bus” has no application. It is the duty of the court to separate the grain from the chaff and convict the accused if called for on the basis of evidence, even if, the same witness has falsely implicated others.

Further it was held in this case that minor variations with regard to the place of occurrence would not render the evidence untrustworthy, if otherwise on perusal of evidence in its entirety it appears to be trustworthy.”

30. Objections raised by the Id. Defence counsel are not material enough to destroy the sub-stratum of the prosecution case and contradictions highlighted are minor in nature.”

19. The learned Trial Judge has concluded the decision by recording in para 32 of the impugned decision as under:-

“From the evidence and the circumstances of this case motive, recovery of weapon of offence from the place of occurrence, disclosure statements and identification of the accused persons beyond any shadow by PWs coupled with the medical evidence pointing to their involvement in the killing of the deceased Brij Naraian have definitely been established. The circumstances taken cumulatively point to the only hypothesis guilt of the accused persons as there is no material on record pointing towards their innocence. So, I have no hesitation to hold that the prosecution had successfully brought home the guilt of both the accused persons. In the result, accused Anil Kumar Gaur and Sanjay Sharma both are held guilty and convicted for the offence punishable U/s 302/460/34 of INDIAN PENAL CODE. They be heard separately on the point of sentence on 12.03.08.”

20. Unfortunately for us, the contradictions and improvements which were pointed out by learned counsel for the appellants pertaining to the deposition of PW-1 and PW-2 have not been noted by the learned Trial Judge; it has just been stated that some contradictions were pointed out during

arguments. The learned Judge has held that the same are nothing but a result of memory fading due to lapse of time.

21. We had an occasion to pen our opinion as to how a judgment has to be written in a criminal case. We had recorded that it is incumbent upon the trial Judge to faithfully note the stated improvements and contradictions in the depositions of the witnesses and as urged by counsel for the accused and thereafter deal with the same as required by law. It is only then can the appellate court appreciate the process of reasoning by which the Trial Court has opined the same to be trivial or inconsequential or material and of a serious nature.

22. A perusal of the judgment of the Trial Court reveals that the contradictions pointed out by the defence have not been noted, much less considered. It is a trifle surprising as to how, without examining the contradictions pointed out by the defence, the Trial Court had come to the conclusion that the said contradictions are minor in nature.

23. In such circumstances, we have ourselves read the deposition of Arvind Kumar PW-1 and Sanjay Gupta PW-2. We have noted the testimony of the two witnesses hereinabove.

From the deposition of Arvind Kumar following 18 statements of fact can be lifted:-

I On 19.04.2001 at around 9.30 PM I was present on my said address.

II Brij Narain (deceased) used to live on first floor of the same house in which I am living.

III At said time I heard voice of vomiting from the first floor.

IV I was in my toilet and came out of my house to reach 1st floor.

V By then I saw two young boys in the age group of 20 to 25 years coming from the 1st floor side and running out of that house premises.

VI Those two boys while running away were saying that Brij Narain had vomited blood.

VII By that time Brij Narain had also reached outside balcony of his first floor.

VIII The two culprits who had come downstairs had already ran away.

IX I ran about 15-20 paces to chase them but they had already disappeared.

X Locality people arrived on the scene and police also reached. Brij Narain was taken to hospital by police.

XI Due to night darkness I could not identify the assailants.

XII I had gone to the spot after coming of the neighbours and the police.

XIII It is true before arrival of the police I had not entered inside the house of Brij Narain in this incident.

XIV I also saw Sanjiv Gupta who used to live on the second floor of the same premises and thereafter he went away.

XV As I had seen Brij after the police had arrived victim was suffering a bleeding injury on the neck.

XVI I had seen those culprits from their back side.

XVII I did not go to the hospital.

XVIII It is true I had not been able to see any of the two assailants by their faces involved in this incident and I am unable to identify them.

24. Similarly from the deposition of Sanjay Gupta recorded on 11.4.2002 following 11 statements of facts can be lifted:-

I On 19.04.2001 at about 9/10 pm I was coming down from my second floor residence through the staircase.

II When I reached the first floor I heard shrieks of uncle Brij Naraian (deceased).

III I saw that one boy who was wearing the white shirt which was blood stained.

IV When I reached inside the main gate one another boy met me.

V The another boy had caught hold of Brij Naraian he got freed and came out from the gate to release the "pick".

VI I thought he had come out of the room only to chew out gutkha but then that boy also ran downstairs and both the culprits ran away.

VII As I observed that Brij Naraian had been assaulted in this crime I came downstairs to chase those culprits but then the two culprits escaped and could not be captured.

VIII After about 15 – 20 days of this incident I went to PS Lajpat Nagar and there I identified one of the two accused culprits. (Witness points out accused Anil as the accused he had identified in the PS saying that he does not know his name but he had identify this accused.) This accused was the one who was chewing gutkha and ran away from the spot after the culprit had ran away.

IX The first accused had ran away with a intervening period of about a minute when second accused ran away.

X It is true ground floor occupant Arvind had come out of the house only after the two accused had already come downstairs and were not in the stairs.

XI It is correct that VK Sharma accompanied Brij Naraian in a PCR to the hospital.

25. From the deposition of PW-2 recorded on 29.4.2003 following two statements of fact can be noted:-

I. Today I have seen accused Sanjay Sharma present in the custody in this case and he is the 2nd boy whom I have seen inside the room of the deceased as I had entered after the first boy other accused had met me in the stairs.

II. As I had entered inside the room I had seen accused Sanjay holding victim deceased Brij Narain from his head near wash basin.

26. An analysis of the depositions of Arvind Kumar PW-1, and Sanjay Gupta PW-2, reveals that the said witnesses have contradicted themselves on material particulars as also each other.

27. Pertaining to PW-1 Arvind Gupta, it is apparent that he allegedly heard voice of vomiting from the first floor when he was in the toilet of his house and this led him to go upstairs and that by then the two boys had come out from the first floor and had run away, and being dark he could not identify them and saw them from their back and that thereafter he saw Brij Naraian on the balcony of the first floor. Pertaining to PW-2

Sanjay, it is apparent that he categorically deposed that he was descending the staircase from the second floor and when he reached the first floor he heard shrieks of the deceased and saw one boy wearing a white shirt which was stained with blood who ran away. As he reached inside the main gate another boy met him who had caught hold of Brij Naraian and that said boy freed himself from Brij Naraian and also ran away. He categorically stated that the intervening period was about a minute of the first and the second accused running away.

28. It is apparent that the first contradiction by the two witnesses is of the manner in which each saw the two young boys running away from the first floor. PW-1 has categorically stated that when he came out of his house i.e. on the ground floor because he had heard voice of vomit coming from the first floor he saw two boys running away and that when he saw them, both had already reached downstairs and for said reason he could have a glimpse of the two from their back. PW-1 categorically deposes that PW-2 came out of his house on the second floor after the two accused had already come downstairs and were not on the stairs. PW-2 has deposed a completely different version by stating that first one boy ran away and after an interval of a minute, the other boy ran away.

29. In this context it would not be out of place to mention that when he deposed on 11.4.2002, PW-2 did not state that appellant Sanjay was the boy he saw inside the house, near the sink. His deposition on said date as per statement No.VIII noted in para 24 above categorically shows that he had identified Anil as the one who was seen by him chewing the gutkha and running away. The statements of PW-2 being statement No.III shows that the first boy had gone and thereafter he had seen the second boy chewing gutkha who was allegedly Anil as per statement No.VIII. When PW-2 was re-summoned he deposed to the contrary, in that, he said that Sanjay was the boy whom he had seen inside the room next to the deceased near the wash basin.

30. It is important to note that the prosecution had in the meanwhile examined Sharda Devi as a witness on 13.1.2003 and she had stated that Anil had been visiting the house. PW-1 had not identified either of the appellants as the persons whom he saw because he stated that it was dark and he could see both the boys from their back. Obviously, to identify Sanjay as the second boy, the prosecution had to introduce facts consistent with PW-2 being able to identify Sanjay, and hence made PW-2 to improve upon his earlier statement by stating that Sanjay was

the boy inside the house; meaning thereby, the witness created grounds to justify his being able to identify Sanjay whom he had never met earlier. But, the prosecution lost track of the deposition of PW-2 recorded at the first instance on 11.4.2002 wherein he had categorically stated that Anil was the second boy.

31. There is yet another material contradiction in the versions of the two witnesses as to where they saw Brij Naraian. Whereas PW-1 categorically states that Brij Naraian was seen by him on the balcony of the first floor after both the boys had run away; to quote: *those two boys while running away were saying that Brij Naraian had vomited blood and they were going to call doctor. By that time Brij Naraian had also reached outside balcony of his first floor and by that time I could observe foul play*; PW-2 has stated that he saw the second boy and Brij Naraian near the sink. The photographs show the sink installed in the kitchen within the house. Thus, the two versions are at material variance.

32. Jai Prakash Pandey PW-14, has not deposed about the presence of PW-1 and PW-2. Jai Prakash Pandey had arranged a vehicle in which the deceased was removed to the hospital and one Vinod Kumar Sharma had helped him. Even SI Anant Kumar

did not see or meet PW-1 and PW-2 at the spot when he reached soon after receiving the information of the deceased being injured. He met them on returning from the hospital. Jai Prakash Pandey has categorically stated that he was in the temple when he heard a commotion from the house and ran towards the house and saw two boys running away. The presence of PW-1 and PW-2 at the spot is doubtful. Had they been present, being residents of the ground floor and the second floor of the building in which the deceased resided on the first floor, their presence could not have gone unnoticed by others.

33. Aforenoted facts and circumstances have created a doubt whether at all PW-1 and PW-2 were eye witnesses. The benefit of doubt has to accrue to the benefit of the accused.

34. We may note the inherent improbability in the testimony of Sharda PW-3. She deposed that both appellants used to demand money from her. The appellants are not related to her. Indeed, if they had so done, it was expected of Sharda Devi to have complained to the police. More so for the reason that she has categorically deposed that when she did not give money to the appellants, which was demanded about 15 days prior to the date of the incident, they threatened her. To quote

the words used by her, she has deposed that the accused said “dekh lenge”; which means that the accused threatened to teach her a lesson. Her conduct is strange, in that, she never informed the police of being threatened. It is not out of place to note here that in her statement recorded by the police under Section 161 Cr.P.C. she had only named appellant Anil as the one who had been demanding money from her and visiting her house. She improved upon her said statement by inculcating appellant Sanjay as accompanying Anil Gaur when the demands were raised.

35. We fail to understand the reasoning of the learned Trial Judge in para 32 pertaining to the recovery of the weapon of offence from the place of occurrence as being an incriminating evidence against the appellants as also the disclosure statements of the appellant as being incriminating evidence. The weapon of offence was found at the spot and not at the instance of the appellants and hence cannot be incriminating evidence against them. No fact was discovered by the police based upon the disclosure statements of the appellants; which we note are nothing but confessions recorded by the police. The said statements are totally inadmissible in evidence.

36. The appeals are allowed. The appellants are directed to be set free unless required in judicial custody in some other case.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

**February 05, 2009
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