

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

Judgment reserved on : October 12, 2009
Judgment delivered on : October 15, 2009

+ **CRIMINAL APPEAL NO.518/2009**

NARENDER @ SONU & ORS. Appellants
Through: Mr.I.A.Alvi and Mr.Altaf Alvi,
Advocates

versus

STATE (NCT OF DELHI) Respondent
Through: Mr. Sunil Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. The appellants, having been convicted under Section 302 IPC in Sessions Case No. 166/2002 arising out of FIR No.320/2002 under Sections 148, 149, 323/302 IPC, Police Station S.P. Badli for having committed murder of the deceased Sandeep @ Lala vide impugned judgment dated 26.05.2009 and sentenced in terms of order on sentenced dated 28.05.2009 to undergo imprisonment for life and to pay fine of Rs.5,000/- respectively and in default of

payment of fine, to undergo RI for the period of six months respectively, have preferred the instant appeal.

2. Briefly stated, case of the prosecution as projected was that on 25.05.2002 at about 6.48 PM, information about a firing incident at the Harijan Basti, Khera Kalan, Delhi was received at Police Station S.P. Badli and it was recorded in the daily diary register as DD No.23A. Copy of the DD report was entrusted to SI Harkesh Gaba (PW15) for verification, who proceeded to the spot along with Constable Parkash.

3. That seven minutes later at 6.55 PM, another information about stabbing of a boy in front of Oriental Bank of Commerce, Khera Kalan was received at the Police Station, which was recorded in the daily diary register as DD No.24A. Copy of the said DD report was also forwarded to SI Harkesh Gaba (PW15) through Constable Vijay Kumar for verification. The SHO and the Additional SHO were also informed about the information on telephone and Inspector Rajbir Singh (PW25) was also instructed to the place of incident.

4. That SI Harkesh Gaba (PW15) along with Constable reached at the spot of occurrence near the Oriental Bank of Commerce, Khera Kalan. He was informed that two injured persons had already been removed from the spot to Babu Jagjivan Ram

Hospital, Jahangir Puri. One injured Shashi (PW1), however, was found present at the spot. He was removed to Babu Jagjivan Ram Hospital by SI Harkesh Gaba. On reaching the Hospital, SI Harkesh Gaba collected the MLC of injured Ram Niwas who had sustained bullet injury and also that of deceased Sandeep @ Lala. On the MLC, the deceased Sandeep @ Lala was declared "brought dead" by the Doctor. SI Harkesh Gaba, (PW15) collected the MLC of injured Shashi (PW1). In the meanwhile, Inspector Rajbir Singh (PW25) also reached the Hospital and SI Harkesh Gaba (PW15) handed over the MLC of Shashi Kumar Parcha (PW1) and the MLC of the deceased Sandeep @ Lala to Inspector Rajbir Singh (PW25).

5. That Inspector Rajbir Singh (PW25) recorded the statement of PW1 Shashi Kumar Parcha wherein he stated that about one and half months prior to the occurrence, the deceased Sandeep @ Lala had stabbed Sonu (appellant No.1) who was the nephew of Ram Niwas (appellant No.4) in a quarrel and a case in respect of the said incident was registered against the deceased. Due to the said incident, there was ill-will between them. He further stated in his statement that on 25.05.2002 at about 6.00 pm, he and Sandeep @ Lala (deceased) were sitting at the '*chopal*' near Valmiki Mandir, Khera Kalan. Sanjeev @ Harpal, a resident of Khera Kalan and friend of the deceased came there and told them that he was slapped by Ram Niwas(appellant No.4) while he was coming via his

gali, for the reason that his friend had stabbed Sonu. On this, he (the complainant), Sandeep (deceased) and Sanjeev decided to take revenge for the slapping. Sanjeev brought a 'desi katta' from his house and they all reached at Balmiki Mohalla, Khera Kalan, near the house of Ram Niwas where Ram Niwas (appellant No.4), Sonu (appellant No.1), Vedu (died during trial) and Mogli (appellant No.3) were found standing. Sandeep @ Lala asked Ram Niwas as to why he had slapped Sanjeev. On this, Ram Niwas abused him. Vedu and Mogli caught hold of Sandeep @ Lala and Ram Niwas grappled with Sanjeev. The Complainant further stated in his statement to the Police that he tried to pacify them. In the meanwhile Sonu @ Narender (appellant No.1) inflicted knife blow on the person of deceased Sandeep @ Lala and when Sandeep @ Lala raised alarm, Sanjeev fired a shot from the 'desi katta' on the accused Ram Niwas and when he (complainant) tried to run away from the spot, he was hit by Ved Prakash @ Vedu with a lathi on his hand and due to the blow, he fell down. Sonu @ Narender, Vedu @ Ved Prakash, Mogli @ Rajesh ran away from the spot while Ram Niwas fell down because of the bullet injury. After some time, a PCR van came at the spot and removed Ram Niwas and Sandeep to the hospital. Sandeep @ Lala died due to his injuries and Ram Niwas was referred to the Trauma Centre. Inspector Rajbir Singh (PW25) sent the aforesaid complaint statement of complainant

Shashi Kumar Parcha with his endorsement thereupon to the Police Station, on basis of which the instant case was registered.

6. That Ram Niwas (appellant No.4) was declared unfit for making a statement by the doctors. SI Harkesh Gaba (PW15) appended his endorsement on DD No.23A and sent it to the Police Station for registration of case under Section 307 IPC on the basis of the DD No.23A and the MLC of Ram Niwas.

7. That during the investigation, supplementary statement of Shashi Kumar Parcha (PW1) was recorded on 26.05.2002 wherein he clarified that the stab wound to the deceased Sandeep @ Lala was inflicted by appellant Bhupinder @ Gora and not by appellant Narender @ Sonu as stated by him in the FIR earlier. He also clarified in the supplementary statement that Deepu @ Deepak and Mogli @ Rajesh and Sonu @ Narender had caught hold of the deceased Sandeep @ Lala and Ram Niwas had beaten Sanjeev. On the basis of the supplementary statement of the complainant, Sections 147, 148, 149 IPC were added to the charge sheet.

8. It is also the case of the prosecution that PW4, Bimla Devi, mother of the deceased also reached the spot after the stabbing and she accompanied the deceased to the hospital in the PCR van and on the way, the deceased told her that Gora S/o Man Singh had stabbed him with a knife and in the quarrel Ram Niwas S/o

Mayee Ram, Mogli S/o Kanwar Singh, Deepu S/o Jile Singh , Vedu, brother of Ram Niwas and Sonu, nephew of Ram Niwas were involved. She also stated that after disclosing said facts, her son became unconscious.

9. After completing necessary formalities of the investigation, charges under Section 302/323/147/148/149 were filed against the appellants as well as Ved Prakash @ Vedu (who died during the trial) and against Deepak @ Deepu, who was acquitted by the Trial Court vide the impugned judgment.

10. The Appellants were charged for the offences punishable under 148 IPC, 302 IPC read with 149 IPC and 323 IPC read with 149 IPC, to which charges they pleaded not guilty and claimed to be tried.

11. Statements of the appellants and their co-accused were recorded under Section 313 Cr.P.C. They denied the prosecution story and claimed to be innocent.

12. On conclusion of trial, the learned trial Judge found the appellants guilty of having committed murder of Sandeep @ Lala and convicted them under Section 302 IPC vide the impugned judgment. He, however, did not find sufficient evidence against

the co-accused Deepak @ Deepu and acquitted him of all the charges.

13. On perusal of the impugned judgment, it transpires that PW1, Shashi Kumar Parcha, the complainant, and PW5 Sanajeev Kumar, purported eye witnesses examined by the prosecution turned hostile during their testimony and did not support the case of the prosecution. Thus, the impugned judgment of conviction rests solely on the dying declaration of the deceased purported to have been made by him in presence of his mother, PW4 Bimla Devi while the deceased was being transported to the hospital by Head Constable Desh Raj (PW13) and Head Constable Ved Parkash (PW26) in a PCR van.

14. Before advertng to the submissions made on behalf of the appellants, it would be useful to reproduce the relevant testimony of PW4 Smt. Bimla Devi regarding the purported dying declaration made by the deceased in her presence. In that regard, she has, inter alia, testified thus:

“.....I was present at my house when in the evening time, one child had come to me that my son Sandeep and Ram Niwas were quarreling near Balmiki chopal. At that time, I was alone at my house. I immediately left my house and when I was going towards Balmiki Chopal and when I reached near the Bank, I saw that my son Sandeep @ Lala was lying in a pool of blood. In the meantime, PCR van reached there and he was taken to hospital in Jahangir Puri. I had also accompanied with him in the van. He had sustained injuries on his thigh and when I was

accompanying in the PCR van, I had enquired from him as to how he had sustained the injuries. He told me that he was beaten by Gora, Ram Niwas, Vedu, Sonu and Mogli and he expired in the van in my lap.....”

15. In the cross-examination, she stated that she had reached near the spot where her son was in conscious state. He was put immediately in the PCR van for transporting him to the hospital and on the way her son was bleeding but was conscious, and he expired in the van after they travelled a distance of about 1 km. In further cross-examination, she also stated that she had stated to the Police that deceased told her that he was stabbed with a knife. In her cross-examination by the learned counsel for the appellants Ram Niwas, Narender and Ved Prakash, she stated that she had talked with her son in the van for about 10-15 minutes.

16. PW13, Head Constable Desh Raj, who was on duty on the PCR van in which the deceased was removed to Babu Jagjivan Ram Hospital, stated that the mother of the deceased accompanied them in the van and the deceased Sandeep had disclosed the names of the assailants to his mother on the way to the hospital. He, however, did not mention the names so disclosed. PW26, Head Constable Ved Prakash was also on the same PCR van. According to him, the mother of the deceased Sandeep accompanied them in the PCR van to the hospital and she was

talking to him. He also stated that Sandeep was telling something to his mother, but he could not hear the conversation.

17. Learned counsel for the appellants has challenged the impugned judgment on the following grounds:

- (a) Testimony of PW4 Bimla Devi pertaining to the dying declaration is not reliable.
- (b) Even if the dying declaration is taken to be proved for the sake of argument, then also it is not clear and concise enough to implicate either of the appellants because the dying declaration does not disclose the name of the person who actually stabbed the deceased.
- (c) From the prosecution case, as projected in the FIR, actually the complainant party, which also included the deceased, was the aggressor and they had gone to the place of occurrence to take revenge from the appellant Ram Niwas. Since as per the FIR, the appellants were attacked by the complainant party, by no stretch of imagination could it be said that the appellants had formed an unlawful assembly or that they nurtured a common intention to cause knife injury to the deceased. It is submitted, therefore, that in absence of any evidence about common intention or common object on the part of the appellants, neither of them could be convicted under

Section 302 IPC for want of direct evidence implicating either one or more of the appellants for stabbing the deceased.

18. Learned counsel for the State, on the other hand, has supported the impugned judgment. According to him, the learned Trial Judge has rightly accepted the testimony of PW4 Smt. Bimla, mother of the deceased in respect of the dying declaration made in her presence as she is a natural witness and her presence in the PCR van is established by the testimony of PW13 Head Constable Desh Raj and PW26, Head Constable Ved Prakash. He has further submitted that the dying declaration is clear and concise and holds all the four appellants responsible for the murder of the deceased. He has submitted that though the learned trial Judge has not given any finding on the charge under Section 148/149 IPC, yet from the charge sheet and offence on record, it is apparent that more than five persons were involved in the occurrence, as such it can be safely inferred that when the appellants and their associates indulged in quarrel with the complainant party, they formed an unlawful assembly with the illegal object to commit an offence of stabbing the deceased. Thus, according to learned counsel for the State, learned trial Judge has rightly convicted the appellants.

19. Dying declaration is a statement made by a person as to the cause of his death or as to any of the circumstances of the

transaction which resulted in his death. Such statement would be relevant in every case or proceeding in which the cause of death of that person comes into question. It is immaterial whether or not that person at the time of making dying declaration was under expectation of death.

20. In the matter of **Kaushal Rao Vs State of Bombay**, *AIR 1958 SC 22*, the Supreme Court laid down following proposition of law relating to the test of reliability of the dying declaration:

- “1. That is cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;
2. That each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;
3. That it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of evidence;
4. That a dying declaration stands on the same footing as another piece of evidence and a has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;
5. That a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character; and
6. That in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation; for example whether there was sufficient light if the crime was committed at night; Whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been mad at the earliest opportunity and was not the result of tutoring by interested parties.”

21. In **Paniben Vs State of Gujarat**, *AIR 1992 SC 1817*, the Supreme Court considered various judgments pronounced on the

law relating to the dying declaration and summed up the principles governing the dying declaration as under:-

- i. There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (**Mannu Raja V State of U.P.**, AIR 1976 SC 2199).
- ii. If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration (**State of U.P. V Ram Sagar Yadav**, AIR 1985 SC 416; **Ramavati Devi V State of Bihar**, AIR 1983 SC 164).
- iii. This court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (**Rama Chandra Reddy V Public Prosector**, AIR 1976 SC 1994).
- iv. Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (**Rasheed Beg V State of Madhya Pradesh**, AIR 1974 SC 332).
- v. Where the deceased was unconscious and could never make any dying declaration the evidence with regard to its is to be rejected. (**Kake Singh V State of M.P.**, AIR 1982 SC 1021).
- vi. A dying declaration which suffers from infirmity cannot form the basis of conviction. (**Ram Manorath V State of U.P.**, 1981 SCC (CrI) 581).
- vii. Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of **Maharashtra V Krishnamurthi Laxmipati Naidu**, AIR 1981 SC 617).
- viii. Equally, merely because it is a brief statement it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (**Surajdeo Oza V State of Bihar**, AIR 1979 SC 1505).
- ix. Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (**Nanahau Ram V State**, AIR 1988 SC 912).
- x. Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (**State of U.P. V Madan Mohan**, AIR 1989 SC 1519)."

22. From the law enunciated above, it is obvious that before a Court could base conviction on the strength of a dying declaration, it must be convinced that the dying declaration is properly proved and it is true and voluntary. Thus, the first question which arises for determination in this appeal is whether or not the prosecution has been able to prove the purported dying declaration of the deceased. The sole witness of the dying declaration is PW4 Bimla Devi, mother of the deceased. According to her, she reached at the spot when she was informed at her residence by a child that her son and Ram Niwas were quarreling near Balmiki Chopal. She has stated that on reaching at the spot, she noticed her son Sandeep in the injured condition. PCR van had already reached there. The deceased was immediately put into the PCR van and taken to the hospital. She stated that she also accompanied the deceased in the PCR van and on the way when she asked the deceased as to how he had sustained injuries, he told her that he was beaten by Gora, Ram Niwas, Vedu, Sonu and Mogli. She further stated that the deceased expired in the van. Admittedly, PW13, Head Constable Desh Raj and PW26, Head Constable Ved Prakash had also travelled in the same PCR van along with the deceased and PW4, Bimla Devi. PW13, Head Constable Desh Raj, though he stated that Sandeep, injured, had disclosed the names of the assailants to his mother, did not name any one of the assailants in his testimony. If the version of PW13, Head Constable

Desh Raj is taken to be true and he actually over-heard the conversation between the appellant and the deceased, then under natural course of circumstances, he should have known the names of the assailants which were disclosed by Sandeep. PW26, Head Constable Ved Prakash, on the other hand, even stops short of that and stated that mother of Sandeep was talking to him in the van and Sandeep was telling her something, but he could not hear the conversation. The identity of the assailants remains uncorroborated. Further, perusal of the testimony of Head Constable Ved Prakash, who was on duty at PCR van Commander 97 shows that in the cross-examination he has stated that they reached at the spot at 6.15 PM and at that time Sandeep @ Lala (deceased) was lying in a pool of blood and was in a state of unconsciousness. PW4 Smt. Bimla Devi stated in her examination-in-chief that on being informed by a child she reached at the spot and saw Sandeep @ Lala lying in the blood and in the meantime PCR van reached there and took him to the hospital in the PCR van. This implies that there was no time gap between the arrival of the PCR van and Bimla Devi at the place of occurrence. If Head Constable Ved Prakash had seen the deceased lying unconscious in a pool of blood at the spot of occurrence, it becomes highly doubtful that he would have been conscious in the PCR van to make a dying declaration in presence of his mother. The doubt is further strengthened from the fact that PW4 Bimla Devi in her

examination-in-chief has stated that after making dying declaration, Sandeep expired in the van in her lap. In the cross-examination on behalf of the appellant Rajesh @ Mogli, she also stated that her son had expired in the van after a distance of about 1 km, which implies that son of the witness, PW4 died within few minutes of his being put into the van for transportation to the hospital. Therefore, also, we find it difficult to accept the version of PW4 Bimla Devi that her son Sandeep was conscious when he was put into the PCR van or that he actually made the dying declaration in presence of PW4 Bimla Devi.

23. Even if, for the sake of argument, the version of PW4 Bimla Devi is accepted as true, then also the dying declaration of the deceased does not name any one or more of the appellants as the person/persons who inflicted knife injuries to him. There is no evidence on record to fix the identity of the person who inflicted knife injuries to the deceased. Therefore, under law, neither of the appellants can be held liable for murder of the deceased even if they had beaten him, unless the case of the appellants falls within the purview of Sections 147/149 IPC or Section 34 IPC.

24. On perusal of the judgment, it transpires that though specific charges under Section 148 IPC and Section 302 IPC read with Section 149 IPC were framed against the appellants, the learned

trial Judge, for reasons best known to him, has failed to give any finding as to whether there was an unlawful assembly and if so, the appellants or any one of them was a member of such unlawful assembly. Unless it is established that there was an unlawful assembly and the appellants were members thereof, they cannot be convicted for an offence under Section 302 IPC because there is no evidence on the record to fix the identity of the person who actually inflicted the knife injuries to the deceased.

25. The complaint which formed basis of registration of the FIR is Ex.PW1/A. Perusal of the complaint shows that actually on 25.05.2002 at about 6.00 PM, the complainant party comprising of PW1 Shashi Kumar Parcha, PW5 Sanjeev and deceased Sandeep @ Lala had hatched a plan to take revenge from Ram Niwas and in pursuance to that plan, they proceeded to the gali of Ram Niwas after arming themselves with a 'Katta' (country made pistol) and challenged Ram Niwas. Which resulted in an altercation and scuffle in which the deceased Sandeep @ Lala sustained knife injuries and appellant Ram Niwas suffered a bullet injury. If the aforesaid story is to be taken as true, then it was the complainant party who were the aggressors and they had gone and accosted the appellants in their gali. That being so, obviously the appellants were taken by surprise and the deceased suffered injuries in sudden quarrel which erupted due to the act of the complainant party. Therefore, by no stretch of imagination, it can be said that

the appellants and others had formed an unlawful assembly with the object to commit an offence i.e. to assault and cause injuries to the deceased and others, as such the charge under Section 148 fails and the learned Trial Court could not have convicted the appellants for Section 302 IPC even with the aid of Section 149 IPC.

26. Learned counsel for the State has submitted that it can be inferred from the dying declaration, which clearly named the appellants as assailants who had inflicted injuries to the deceased, that all the appellants had acted in furtherance of their common intention. Therefore, they have been rightly convicted under Section 302 IPC with the aid of Section 34 IPC.

27. Submission of the learned counsel for the State is misconceived. It is apparent from the record that neither is there any evidence to establish common intention on the part of the appellants to commit murder of the deceased or to cause injury to him with a sharp object nor the learned trial Judge has given any finding to the effect that the deceased was inflicted knife injuries by one or more of the appellants in furtherance of the common intention of all the appellants. Thus, under law, no aid from Section 34 IPC can be taken to sustain the conviction of the appellants under Section 302 IPC for the murder of Sandeep @ Lala. Admittedly, there is no evidence on record to pin point the

person who has actually inflicted the knife blows to the deceased Sandeep @ Lala. Therefore, under the circumstances all the appellants are entitled to the benefit of doubt and their conviction under Section 302 IPC cannot be sustained under law.

28. In view of our discussion above, the appeal is allowed. Impugned judgment of conviction and consequent order on sentences are set aside. All the appellants are hereby acquitted, extending them benefit of doubt.

AJIT BHARIHOKE, J.

October 15, 2009
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SANJAY KISHAN KAUL, J.