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IN THE HIGH COURT OF DELHI

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Judgment reserved on : 04.03.2009

Judgment delivered on : 06.03.2009

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CRL.A.827/2008

MAHESH @ KALE

..... Appellant

Through: Mr.S.K.Sharma, Mr.Dhruv Kumar and
Mr.Mayank, Advocate

versus

STATE

..... Respondent

Through: Mr.Pawan Sharma, Advocate

CRL.A.5/2009

JITENDER @ JEETU

..... Appellant

Through: Mr.Anand Saini, Advocate

versus

STATE

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

: PRADEEP NANDRAJOG, J.

1. On 7.9.2002 at 2.10 PM, Const.Meenakshi PW-7, recorded DD No.25-B, Ex.PW-7/A on an information received

through the police control room that near house No.N-228 Maddi Wali Gali, near Khyala School, a quarrel had taken place. Soon thereafter, at 2.26 PM, on information given by one Chander, same information was re-recorded vide DD No.26-B, Ex.PW-7/B.

2. ASI Gyan Chand PW-22, accompanied by Head Const.Ram Narain PW-6, reached the given place as recorded in the two DD entries and found Hem Raj PW-3, at house No.N-228 Vishnu Garden, who made the statement Ex.PW-3/A recorded by ASI Gyan Chand PW-22, in which he informed that he resides with the other family members at house No.N-228 Vishnu Garden and that Mahesh and Jitender (the appellants) also reside in the same locality and some-time back had teased his sister-in-law because of which his brother Prakash, had a fight with them. That today, at around 1.30 PM, he and Prakash were walking towards Raghubir Nagar and had reached gali No.7, block NA Vishnu Garden, when the appellants who were armed with hockey sticks stopped them and started quarreling with his brother Prakash; they said that they would see as to who would save him today. Both started hitting Prakash on his head with hockey sticks. Prakash fell down and became unconscious. He raised a hue and cry. Both the appellants fled.

3. ASI Gyan Chand made an endorsement Ex.PW-22/A on the statement Ex.PW-3/A and sent HC Ram Narain for registration of an FIR. At 3.50 PM, ASI Kailash Chand PW-5, registered the FIR, Ex.PW-5/A.

4. Though not recorded in the statement Ex.PW-3/A, Hem Raj informed ASI Gyan Chand that his brother Prakash had been removed to Guru Gobind Singh Government Hospital by his brother Chandra Bhan PW-2 and his sister Sunita. ASI Gyan Chand went to the hospital and attempted to record the statement of the injured who was not certified fit for statement by the doctor. ASI Gyan Chand returned and accompanied by Hem Raj went to the spot pointed out by Hem Raj where his brother was assaulted i.e. at gali No.7. ASI Gyan Chand prepared the site plan Ex.PW-22/E. He called a photographer, Dheeraj Kumar PW-8, who took two photographs Ex.PW-8/A and PW-8/B; negatives whereof are Ex.PW-8/A1 and Ex.PW-8/B1 respectively. From the place of the occurrence ASI Gyan Chand lifted blood sample and blood stained earth vide seizure memo Ex.PW-6/A.

5. On 8.9.2002 appellant Mahesh was arrested from House No.N-148 Vishnu Garden, Delhi vide arrest memo Ex.PW-10/C by ASI Gyan Chand and Const.Pushpraj PW-10. Appellant Jitender was also arrested at the instance of Hemraj vide arrest

memo Ex.PW-10/D. On interrogation, appellants Mahesh and Jitender made disclosure statements Ex.PW-10/A and Ex.PW10/B respectively, to ASI Gyan Chand as per which they admitted assaulting the deceased with hockey sticks and volunteered to get the same recovered. Appellant Jitender got a hockey stick recovered from the roof of his house which was seized vide memo Ex.PW-10/G and appellant Mahesh also got a hockey recovered from the corner of his house NA-5 Vishnu Garden, which was seized vide Ex.PW-10/H.

6. On 9.9.2002, ASI Gyan Chand visited the trauma centre near Chandgi Ram Akhada, where the injured had been shifted on the advice of the doctor of Guru Gobind Singh Hospital, where the doctor declared the injured unfit for making a statement. ASI Gyan Chand met Chander Bhan PW-2 at the trauma centre and recorded his statement under Section 161 Cr.P.C.

7. At around 7.30 AM on 17.9.2002 information was received at the police station that Prakash had died. ASI Gyan Chand PW-22 went to the hospital and seized the dead body and sent the same for post-mortem to the mortuary.

8. Dr.Sarvesh Tandon PW-13, conducted the post-mortem and submitted his report Ex.PW-13/A, dated 18.9.02, which records nine injuries on the deceased, as under:-

- (i) Stitched wound – just above right eye on outer side, 2 black stitches, lacerated margins.
- (ii) Stitched wound – over tragus of right ear, black stitch, lacerated margin.
- (iii) Stitched wound – over pinna of right ear, black stitch, lacerated margins.
- (iv) Stitched wound – over right subclavicular region, black stitch, lacerated margins.
- (v) Healed abrasion – on right frontal prominence, 2 cms size.
- (vi) Lacerated wound on top of head, in back part, 2 cms long, present anteroposteriety.
- (vii) Lacerated wound on top of head, in back part, 2 cm to the left of injury No.(vi).
- (viii) Left side of face swollen, 11 x 7 cm size.
- (ix) Naematoma (boggy swelling) over left side of head 10 x 6 cm size.”

9. He opined the cause of death as cranio cerebral damage, consequent upon blunt force diverted upon the head, by a heavy, hard, blunt object by the other party and all the injuries were ante-mortem in nature and probably of the same duration as mentioned in MLC. Cranio cerebral injuries, as mentioned above, were opined to be fatal and sufficient to cause death in ordinary course of nature.

10. On 23.9.02, SI Neeraj Kumar PW-12, was handed over the investigations of the case. He summoned Tirath Raj PW-9 who prepared a site plan to scale Ex.PW-9/A.

11. Armed with the seizure memos, disclosure statements, post-mortem report of the deceased and citing the police officers associated with the investigation and two public witnesses namely, Hemraj and Chander Bhan, the brother of the deceased, a charge sheet was filed indicting the appellants for the offence of murdering Prakash i.e. the offence punishable under Section 302/34 IPC.

12. Needless to state the case of the prosecution hinged upon the testimonies of Hemraj PW-3, and Chander Bhan PW-2.

13. Hemraj PW-3, in his testimony deposed that on 7.9.02 he and his elder brother Prakash were going towards Raghubir Nagar at around 1.30 PM. On reaching gali No. 7, they found both the appellants standing there, holding hockey sticks in their hands. Appellant Jeetu held Prakash's collar from the back and started saying "*dekhte hain beta aaj tujhe kaun bachata hai*". Then both appellants started hitting Prakash on his head with hockey sticks; Prakash became unconscious and fell down. When he started shouting for help, the appellants ran away from the spot. That after 5/7 minutes, his elder brother

Chander PW-2 came there, and the two removed Prakash to Guru Govind Singh Hospital in a rickshaw. While Chander Bhan stayed in the hospital, he returned home with his sister. Police met him at his house and recorded his statement Ex.PW-3/A, and took him to the hospital, from where he led them to the place of occurrence. That on 8.9.2002, at his pointing out the investigating officer arrested both the appellants. On cross examination, he deposed that the clothes which he was wearing at the time of occurrence had received stains of Prakash's blood, but that he did not hand over the same to the police as he had thrown those clothes away.

14. Chander Bhan PW-2, the elder brother of the deceased Prakash deposed that on 7.9.02 at about 1.30 PM, some boys informed him at his house No.N-228 Vishnu Garden, Delhi, that Jitu and Kaley were beating Prakash in the Videogame wali gali, NA Block, Vishnu Garden. He reached there and found his brother lying in a pool of blood. He, along with his sister Sunita took Prakash in a three-wheeler scooter to Guru Teg Bahadur Hospital, from where Prakash was shifted to the Trauma Centre. He deposed that about 5/6 months prior to the date of incident, he had seen the appellants beat his brother Prakash and Suraj.

15. Holding that Hemraj PW-3 and Chander Bhan PW-2 are trustworthy witnesses and that Hemraj was a witness to the incident; with reference to the testimony of Hemraj and the recovery of the two hockey sticks pursuant to the disclosure statements of the appellants and at their instance; further recording a finding of motive for the crime, vide judgment and order dated 25.8.2008 the Learned Trial Judge has held that the prosecution has successfully established that acting with a common intention, the appellants assaulted deceased Prakash. With reference to the injuries suffered by Prakash as per post-mortem report Ex.PW-13/A; since they were on a vital part of the body i.e. the skull and were nine in number, it has been held that the acts of the appellants make them liable for having committed an offence punishable under Section 302 IPC. The appellants have been directed to undergo imprisonment for life and to pay a fine in sum of Rs.2,000/- each; in default of payment of fine to undergo rigorous imprisonment for one month.

16. Arguing the appeal, the learned counsel for the appellants urged the following submissions:-

- (a) Questioning the conduct of Hemraj PW-3 in not attempting to rescue his brother Prakash, when he was

being beaten up by the appellants, learned counsel urged that Hemraj was about 16 years old at the time of the incident which was not too young an age to have prevented him from at least making an attempt to rescue Prakash.

(b) The learned counsel urged that the presence of Hemraj at the place of occurrence and hospital itself becomes doubtful, considering that Chander Bhan PW-2, nowhere mentioned in his testimony about Hemraj being present either at the place of incident or at the hospital. Learned counsel urged that Chander Bhan PW-2 had only mentioned about his sister Sunita who accompanied him in taking Prakash to the hospital. Thus counsel urged that testimonies of Hemraj PW-3 and Chander Bhan PW-2 cast a doubt on the presence of Hemraj. Learned counsel further urged that whereas Hemraj deposed that Prakash was removed to the hospital in a rickshaw, Chander Bhan deposed that Prakash was removed in a three-wheeler scooter. Further, Chander Bhan deposed that Sunita was present but Hemraj did not speak about Sunita's presence at the spot where Prakash was injured.

(c) Learned counsel for the appellants urged that as per the testimony of Hemraj PW-3, his clothes got stained with blood but surprisingly were not handed over to the police; learned counsel urges that Hemraj told a lie because he was not present at the spot and the question of his clothes being stained with blood does not arise. Learned counsel urged that Hemraj told a further lie when being cross-examined that he threw the clothes away.

(d) Learned counsel urged that each witness of the prosecution has spoken about his presence or seeing Prakash injured at a different place. Thus, learned counsel urged that the same casts a doubt about the presence of the witnesses as claimed by them. The testimonies of Chander Bhan PW-2 and Hemraj PW-3 and DD No.25-B were referred to. It was pointed out that Chander Bhan PW-2 disclosed the place of occurrence as Videogame Wali Gali, NA Block, Vishnu Garden; Hemraj PW-3 disclosed the place of occurrence as Gali No.7. It was pointed out that the seizure memo Ex.PW-6/A prepared by ASI Gyan Chand while seizing blood sample and blood stained earth from the place of occurrence records the place as Gali No. 5 NA Block, H.No.NA-94 Vishnu Garden. DD entry No.25-B,

Ex.PW-7/A records N-228 Maddi Wali Gali, near Khyala School, as the place of incident.

(e) Learned Counsel questioned as to why Sunita the sister of deceased has not been made a witness, when Chander Bhan in his testimony had categorically deposed that he with the help of his sister Sunita shifted Prakash to Guru Gobind Singh Hospital. Learned counsel also questioned as to why the boys who had allegedly informed Chander Bhan PW-2 about Prakash being beaten up by Kaley and Jitu have not been made witnesses.

17. From a perusal of the decision of the learned Trial Judge, it is apparent that of the five submissions made before us in appeal, only two appear to have been urged before the learned Trial Judge and hence have been dealt with. We note that certain submissions which were urged before the learned Trial Judge and have been dealt with by him have not been urged in appeal. The two submissions which were urged before the learned Trial Judge pertain to non seizure of the clothes worn by Hemraj, which according to him were stained with the blood of his brother. The other is pertaining to the place of the occurrence.

18. In para 60 and 61 of the decision, the learned Trial Judge has dealt with the issue of the police not seizing the blood stained clothes of Hemraj. The learned Judge has opined as under:-

“60. Another submission made by Ld.counsel for the accused persons is that according to PW-3 Hemraj, he lifted his injured brother in his arms and his clothes were blood stained but his clothes were not seized by the investigating officer. The blood stained clothes of Hemraj have not been produced in Court. In support of his submission he has relied upon Judgment in case titled as Khima Mikamshi & Ors. vs. State of Gujarat reported as 2003 (2) RCR (Criminal) 793.

61. Again the argument is without any merit. In Khima Mikamshi's case (supra), there was no blood stains on the person of witnesses in spite of their holding body of deceased, absence of any blood stained earth at the place of incident, non-filing of complaint at the police outpost in the village. In the instant case Shri Hemraj (PW-3) has testified that his clothes were having blood stains of his brother Prakash. He threw the said blood stained clothes and did not hand over the same to the police. At the most, non seizure of blood stained clothes of Shri Hemraj, is a lapse on the part of investigating officer. But it is settled principle of law that defective investigation or lapses on the part of the investigating agency are not sufficient to acquit the culprits and cannot be made base of acquittal. The prosecution case cannot be made to die at the hands of the police officials. In this regard reliance can be placed on a Judgment in case titled as State of West Bengal vs. Mir Mohd. Omar & Ors. Reported as JT 2000 (9) SC 467 and another case titled as State of U.P. vs. Hari Mohan & Ors. Reported as 2001 Criminal Law Journal 170 (SC). In Mir Mohd. Omar's case (supra) it has been held that flaws in investigation, if made basis of acquittal, criminal justice would be a victim. In the instant case the blood had come on the clothes of Shri Hemraj. Mr.Hemraj while appearing as PW-3 has testified that there was blood

on his clothes, he threw his clothes and the same were not handed over to the police. Moreover, the blood stained earth was seized from the spot.”

19. We note that the Trial Court has extensively noted the above contention and the evidence has been correctly appreciated. We only wish to add that the MLC of Prakash shows that he was bleeding from the nostrils. We further note that the injuries received by Prakash were internal and the blood loss was internal. Not much blood would spill out. It appears to be a case where Hemraj has over-stated himself by exaggerating the facts. It is not uncommon in India for witnesses to mix fiction with facts and try and go for an over kill. There are large numbers of decisions which require, due to said reason, the Court to separate the grain from the chaff. It has to be noted that the statement of Hemraj under Section 161 Cr.P.C. was recorded by the police on the day of the incident itself at around 3.30 PM as recorded in the rukka. The incident in question had taken place at around 1.30 PM, meaning thereby there was hardly any time available with Hemraj to fabricate a false story.

20. The dispute of the place of occurrence as emanating with reference to the testimonies of Chander Bhan and Hemraj; the recovery memo and the place of incident recorded in DD

No.25-B has been dealt with by the learned Trial Judge in paras 51, 52 and 53 of the impugned decision which read as under:

“51. Ld. Counsel for the accused persons also contended that the place of incident has not been proved by the prosecution. According to him PW-2 Chander has stated that incident took place in Video game wali gali, NA Block and PW-3 Shri Hemraj has deposed that incident took place in gali No.7, NA Block. He pointed out that there is distance of about 200/250 feet between gali No.5 and gali No.7, NA Block, Vishnu Garden, Delhi. In support of his submission he has relied upon Judgment in case titled as Syed Ibrahim vs. State of Andhra Pradesh reported as 2006 (3) RCR (Criminal) 864.

52. Again the argument is without any substance. PW-2 Chander Bhan has deposed that he was informed that the accused persons were beating his brother Prakash in Video game wali gali, NA Block, Vishnu Garden. He has not been cross examined on this aspect. No question was put on behalf of the accused persons that Video game wali gali is gali No.7. Shri Hem Raj (PW-2) is an eye witness and he has testified that when he and his brother reached in gali No.7 both the accused persons met them and the accused persons gave beating with Hockeys to injured Prakash. Moreover, PW-3 Hemraj in his cross examination has explained that gali No.5 is situated at a distance of about 15 – 20 feet from the place of incident. The prosecution has proved the site plan prepared by IO as Ex.PW-22/E and the place of incident has been shown at point A in the site plan. The prosecution has also proved the scaled site plan which is Ex.PW-3/A and the place of incident has been shown at No.1. The site plan has not been disputed by the accused persons. In any case it has come on record that the accused persons gave beating with Hockeys to deceased Prakash, who received multiple injuries and later on succumbed to his injuries on 11.09.2002.

53. The Apex Court in case titled as State of HP vs. Lekh Raj & Anr. reported as JT 1999 (9) SC 43 has observed that the traditional dogmatic hyper technical approach has to be repealed by rational, realistic and

genuine approach for administering justice in a criminal trial.”

21. The learned Trial Judge has correctly appreciated the facts. The learned Trial Judge has noted the clarification given by Hemraj PW-3 when he was cross-examined with reference to the place of occurrence. We note that the learned Trial Judge has not referred to DD Entry 25-B Ex.PW-7/A, which records the place of incident as N-228 Maddi Wali Gali, near Khyala School.

22. DD entries are recorded in the police station in Delhi mostly as a relayed information for the reason the informant rings up the number 100 and the call is received at the police control room which is centralized. The duty officer at the police control room there upon conveys the information either over the telephone or wireless to the concerned police station where the duty officer at the police station notes down the same. In the process there is likelihood of the place where from the informant has rung up the police with the address of the injured or the place of occurrence getting mixed up. It is not out of place to note that N-228 Maddi Wali Gali is the house of the deceased and there is every probability that while recording the DD entry the duty constable incorrectly recorded the same as the place of occurrence. Be that as it may, a DD entry is not a substantive

piece of evidence inasmuch as it only sets into motion the involvement of the police in the investigation. By its very nature, it is a record of a cryptic information received at the police station. Pertaining to the fact that in the seizure memo the place of occurrence is referred to as Gali No.5, whereas the actual place of occurrence as shown in the site plan Ex.PW-9/A is in between Gali No.5 and Gali No.7 and this accounts for Hemraj deposing that the place of occurrence was Gali No.7 and the recovery memo recording it as Gali No.5. Had Hemraj deposed that the place of incident was near Gali No.7 and had the investigating officer recorded in the recovery memo that the place of incident was near Gali No.5, it would have ruled out any controversy on said point. It is obvious that each one has been a little lazy in not expressing himself correctly.

23. The submission pertaining to the so called unnatural conduct of Hemraj PW-3, in not attempting to rescue his brother and on said account should an inference be drawn that he was not present at the spot as urged by learned counsel for the appellant presupposes that the conduct of every brother would be to rush and save his brother who is being assaulted. How a man or a woman would react when faced with a hostile environment cannot ever be uniform for all. Each individual has

a different nerve and thus reacts differently. Hemraj was aged 16 years. The assailants were much older and were armed with hockey sticks. His brother was being assaulted. As per Hemraj he started weeping. It is not unnatural for a brother to get frozen with fear on witnessing his brother being beaten. We find nothing unnatural or abnormal in the conduct of Hemraj and merely because he did not go to rescue his brother does not mean that he was not present at the spot.

24. Pertaining to the plea that Chander Bhan PW-2 did not depose about the presence of Hem Raj and deposed that his sister Sunita had accompanied him to the hospital; that Hemraj deposed that Prakash was removed to the hospital in a rickshaw and Chander Bhan deposed that Prakash was removed to the hospital in a three-wheeler scooter; that Chander Bhan deposed that Sunita was present but Hemraj did not depose about Sunita's presence and hence an inference should be drawn that Hemraj was not present, is nothing but an attempt to clutch to straws. The incident took place on 7.9.2002. PW-2 and PW-3 deposed on 7.11.2003 and 8.1.2004 respectively. With the passage of time, trivial aspects of an incident fade in the memory. Merely because Chander Bhan did not depose that he met Hemraj at the spot does not mean that Hemraj was not

present. We note that Hemraj has categorically deposed that he also went to the hospital along with Chander Bhan and returned home leaving Chander Bhan with his brother Prakash at the hospital. We give credence to the fact that the statement of Hemraj was recorded by the police at around 3.30 PM i.e. soon after the incident and there was hardly any time for Hemraj to spin a false story. That a witness spoke about the victim being carried in a rickshaw and another witness spoke about the victim being carried in a three-wheeler scooter is neither here nor there because in common parlance, in the city of Delhi, a three-wheeler scooter is also referred to a rickshaw.

25. That Sunita the sister of the deceased and the persons who informed Chander Bhan about Prakash being beaten, not being cited as witnesses of the prosecution leads the defence nowhere. It is not the number of witnesses and the volume of evidence which is relevant at a criminal trial. It is the quality of the evidence which matters.

26. The only question which now remains to be considered is whether the acts attract Section 304 IPC or Section 302 IPC.

27. The appellants were armed with hockey sticks. Blows which have caused injuries No.1, 2, 3, 4, 5, 6 and 7 have

been directed towards the head of the deceased; a vital part of the body. The remaining blows are directed towards the lower part of the body. If not intention, knowledge has to be attributed to persons who inflict seven blows with hockey sticks directed towards the head that the acts are so imminently dangerous that they must, in all probability, cause death or such bodily injury as is likely to cause death.

28. We find no merit in the appeals. The appeals are dismissed.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

March 06, 2009
Dharmender