

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

% *Judgment Reserved on: 15th February, 2010*
Judgment Pronounced on: 18th March, 2010

+ **CRL APPEAL NO.29/2010**

JITENDER KUMAR @ JITU Appellant
Through: Mr.Mukesh Kaushik, Advocate

versus

STATE Respondent
Through: Ms.Richa Kapoor, Advocate

CRL APPEAL NO.57/2010

MAHESH SHARMA Appellant
Through: Ms.Rebecca M.John, Advocate with
Mr.Vishal Gosain, Advocate

versus

STATE Respondent
Through: Ms.Richa Kapoor, Advocate

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 Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J.

1. Holding that the recovery of the alleged weapon of offence, a knife, at the instance of the appellants and in particular Mahesh, did not inspire confidence for various reasons and ignoring the incriminating evidence qua said

recovery, but believing the testimony of Mansoor Ahmad PW-3 and Dipti PW-10, both of whom claimed to be eye witnesses, the learned Trial Judge has convicted the appellants for the offence of having murdered Sachin Gupta @ Ashu in the evening of 8.5.2004 at Sauce N Spice restaurant near DDA Flats, Madangir. The refusal by the appellants to participate in the test identification proceedings has also been held to be an additional incriminating circumstance against the appellants.

2. Since arguments during appeal centered around the issue of credibility of the testimony of Mansoor Ahmad and Dipti, we shall be noting only such evidence as would be required to be looked into to determine whether Mansoor Ahmad and Dipti lack credibility or not.

3. But a brief background would be necessary to appreciate the arguments advanced in relation to the credibility of Mansoor Ahmed and Dipti.

4. As deposed to by Dr.Sajid PW-1 and with reference to Ex.PW-1/A, containing the record of the medical treatment given to a boy brought at Kharbanda Medical Centre at 5:00 PM on 8.5.2004, by a girl who did not disclose her name but disclosed that of the boy as Ashu, the boy had stab injuries on his chest and after giving him preliminary and rudimentary treatment and being of the opinion that the boy needed better medical aid, Dr.Sajid referred the patient to AIIMS. On Ex.PW-

1/A it has been recorded that Ashu has been brought by an adult female who did not disclose her name and that the shirt with few cheques inside the pocket have been handed over to the girl and later on a vest and chappals have been deposited with the chowki in-charge of the police post nearby.

5. As deposed to by Dipti PW-10, as also Smt.Rajbala PW-2 who is the mother of Ashu, information over the telephone was given to the family of Ashu to come to Kharbanda Clinic. As deposed to by Smt.Rajbala a girl rang her up on 8.5.2004 and informed that her son was involved in an accident but could speak no more and a gent took the phone from the girl and talked to her. Since there was no male member in the house she got in touch with her neighbour Akhilesh PW-5 and both of them went to Kharbanda Clinic. Her son was having bandages on the chest but could not speak. He was removed to AIIMS. Akhilesh PW-5 confirmed having accompanied Rajbala to Kharbanda Clinic and therefrom taking Ashu to AIIMS. As deposed by Dipti, she informed Ashu's mother over the telephone.

6. It may be noted that while deposing in Court Rajbala denied the suggestion given to her by the learned APP that the girl named Dipti had handed over to her a shirt of her son. She stated that somebody unknown to her had given the

shirt to her which she in turn handed over to the police as recorded in the memo Ex.PW-2/A.

7. Dr.Poonam Sehrawat PW-7 was working as a Junior Resident at AIIMS and was on duty in the casualty in the evening on 8.5.2004. She treated Ashu who was brought to the hospital. She prepared the MLC Ex.PW-7/A as deposed to by her, and immediately sent Ashu to the surgical department for further treatment because Ashu was bleeding and was drowsy. It was apparent that the wounds required surgical intervention. She recorded on the MLC that Sachin Gupta S/o Raj Narayan Gupta aged 21 years was brought at AIIMS at 18:00 hours on 8.5.2004. She noted that Sachin Gupta was having stab wounds on the chest.

8. Since it was a medico legal case, the duty constable at AIIMS informed PS Ambedkar Nagar i.e. the police station within jurisdiction whereof Sachin Gupta @ Ashu received the stab injuries about Sachin Gupta being admitted in an injured condition at AIIMS. Said information was noted at the police station vide DD No.18, Ex.PW-14/A by Const.Narender PW-14 at 6:45 PM.

9. Since it was informed that Ashu has been admitted at AIIMS in an injured condition, not knowing whether the injuries were homicidal or accidental, HC Anand Pal PW-17 accompanied by Const.Kishan left for AIIMS, armed with a copy

of DD No.18, and on reaching AIIMS was informed that Ashu was admitted in an injured condition and thus he moved an application Ex.PW-17/A seeking permission to record the statement of Ashu, but could not do so because the doctors were giving urgent medical surgical intervention to Ashu who unfortunately died at around 8:00 PM, information whereof was conveyed to PS Ambedkar Nagar where Const.Narender PW-14 recorded the second entry vide DD No.20, Ex.PW-14/B at 8:40 PM.

10. SI Jaipal PW-13 accompanied by Const.Mahavir Singh PW-18, as deposed to by the two police officers, proceeded to AIIMS and met HC Anand Pal at AIIMS who handed him over a copy of the MLC of Ashu as also copy of DD No.18. Therefrom, as deposed to by SI Jaipal and Const.Mahavir, they went to Madangir and learnt that the incident had occurred at Sauce N Spice restaurant which was found closed and no eye witnesses being available SI Jaipal made the endorsement Ex.PW-8/A beneath DD No.18 and sent the same through Const.Mahavir for FIR to be registered. At the police station ASI Raj Singh PW-8, as deposed to by him, on receipt of Ex.PW-8/A got registered the FIR Ex.PW-8/B for the offence of murder, noting that the FIR had been registered at 11:00 PM.

11. It stands recorded on the endorsement Ex.PW-8/A that the same has been dispatched from Sauce N Spice restaurant DDA Flats, Madangir at 10:45 PM on 8.5.2004.

12. Since it was a case of murder, the investigation of the FIR was entrusted to Insp.Jagdish Yadav PW-21 who accompanied by Const.Mahavir PW-18, as deposed by the two police officers they first went to House No.95 RPS Colony, Madangir where the deceased resided with his parents and met Rajbala PW-2 who handed over to them a blood stained shirt which was seized vide memo Ex.PW-2/A. Insp.Jagdish Yadav recorded the statement of Rajbala under Section 161 Cr.P.C. as also the statement of Akhilesh PW-5 under Section 161 Cr.P.C. and went, as deposed to by him and SI Jaipal PW-13, to Sauce N Spice restaurant and summoned Mansoor Ahmad the Collection cum Delivery Man of the Restaurant. His statement under Section 161 Cr.P.C. was recorded and with his help Insp.Jagdish Yadav prepared the site plan Ex.PW-21/A.

13. In his statement under Section 161 Cr.P.C. Mansoor Ahmad disclosed:

“I reside at the aforesaid address and am working as a Delivery cum Collection Man at the restaurant Sauce and Spice at 6/97, DDA Flats. For the last one year a boy named Ashu used to come daily at the restaurant between 4:00 PM and 5:00 PM with his girl friend for snacks. Yesterday i.e. on 8.5.2004 at around 4:00 PM a thin boy, having fair complexion and of medium height, aged 22/23 years who was wearing a blue coloured shirt came with a girl and

sat in the restaurant and ordered cold drinks which were served. At 4:15 PM Ashu came with his girl friend Dipti and sat on seat No.5 in the restaurant which is next to the entrance. At around 4:30 PM the boy and the girl who came first left after making payment. After 20 minutes the same boy returned with a short statured boy having wheatish complexion and pointed towards Ashu and said this is the boy. The second boy caught Ashu by his hair and pulled him out. The first boy took out a knife. Both pulled out Ashu while slapping him. The fair complexion boy was calling the other boy Jitu who was exhorting the fair boy 'Chindu Mar'. The said boys threatened me to stay inside. After dragging Ashu outside the short boy caught Ashu by his hands and gripped him in a bear hug from behind. The other boy stabbed Ashu who yelled. The girl with Ashu was crying and yelling. On seeing people gathered both boys fled. The girl and some people took Ashu to Kharbanda Nursing Home. I can recognize the two boys if brought before me."

14. Relevant would it be to note that the FIR in question was registered past 11:00 PM in the night and by the time it was handed over to Insp.Jagdish Yadav for further investigation it was nearing 12:00 midnight and by the time Insp.Jagdish Yadav could manage to summon Mansoor Ahmad and record his statement under Section 161 Cr.P.C. the next day i.e. 9.5.2004 had come into being and hence under Mansoor Ahmad's statement the date recorded is 9.5.2004.

15. When investigation was being conducted at the spot, Vivek Gupta brother of the deceased, as deposed to by Insp.Jagdish Yadav, came to the restaurant and introduced himself and with his help Insp.Jagdish Yadav reached Dipti's house and recorded her statement under Section 161 Cr.P.C.

Obviously, this was around 5:00 AM of 9.5.2004. In her statement Dipti disclosed as follows:-

"I reside at the above address with my parents and I am student of class XII in the Open School. For the last 6/7 months I am learning typing at Prakash Institute which is near Sauce N Spice restaurant DDA Flats. Sometimes I used to eat snacks with my friend Sachin Gupta @ Ashu. Yesterday i.e. on 8.5.2004 I and Ashu went to Sauce N Spice restaurant where a boy and a girl were already seated in a corner. The boy was thin built, fair complexioned and of medium height and was aged 22-23 years. After 15-20 minutes the said boy and girl left after making payment. After 20 minutes around 4:45 PM the same boy returned with a short statured stout boy around 5 feet tall who was wheatish in complexion and pointed towards Ashu and said he was the fellow. Both pounced upon Ashu. The dark coloured boy caught Ashu by his hair and the fair complexion boy took out a knife and slapped Ashu. The fair complexion was calling the darker boy by the name Jitu and was exhorting him to pull Ashu out of the restaurant. Both pulled out Ashu who kept on asking why were they beating him. The said boys threatened me and the restaurant staff to remain inside. Ashu tried to free himself and at that the darker boy caught Ashu from behind and the other stabbed Ashu who shrieked and then both fled. With the help of people who had gathered I took Ashu to a doctor. I was nervous. I rang up Ashu's mother and told her that an incident had occurred. A boy took me on a motorcycle to give the clothes and personal effects of Ashu handed to me by the doctor at the house of Ashu. I can recognize the two boys if they are brought before me."

16. After Ashu died at AIIMS in the early part of the night of 8.5.2004, his body was sent to the mortuary of the hospital and the next day i.e. on 9.5.2004 Dr.Arvind Kumar PW-6 conducted the post-mortem and prepared the report Ex.PW-6/A recording therein that two stab wounds as also a

surgical wound were noted by him on the chest and a linear cut mark was noted over the index and middle fingers of the right hand. He recorded that the two stab wounds on the chest had penetrated through the muscles piercing the lung. He recorded that injury No.1 was sufficient to cause death in the ordinary course of nature.

17. Appellant Mahesh was apprehended on 15.5.2004 with respect to investigations being conducted in FIR No.239/2004 under the Arms Act, a fact deposed to by SI Aishvir Singh PW-19. Appellant Jitender was apprehended, as deposed to by HC Anand Pal PW-17 with respect to investigation pertaining to FIR No.238/2004 on the same day i.e. on 15.5.2004. As deposed to by SI Aishvir Singh and HC Anand Pal they recorded the respective disclosure statements of the two accused who admitted to have assaulted Ashu.

18. We eschew reference to the evidence of recoveries at the instance of appellant, for the reason, as noted above, the learned Trial Judge has found that the same lacks credibility.

19. Suffice would it be to note that the various police officers whose names have been noted by us hereinabove and while penning the narratives of how the investigation progressed have noted the relevant part of their testimony, deposed and stated facts as noted hereinabove.

20. Relevant would it be to note that SI Aishvir Singh PW-19, claimed participation in the investigation only after 15.5.2004 when Mahesh was apprehended and he recorded his disclosure statement Ex.PW-19/A. Further relevant would it be to note that SI Jaipal PW-13 and Const.Mahavir PW-18 deposed that they were the first two police officers to reach Sauce N Spice restaurant and that they met no witness there and accordingly SI Jaipal PW-13 made the endorsement Ex.PW-8/A beneath copy of DD No.18 and sent the same for FIR to be registered. As deposed to by ASI Raj Singh PW-8 he registered the FIR Ex.PW-8/B and entrusted investigation to Insp.Jagdish Yadav PW-21, who deposed having left for the place of the crime. The endorsement Ex.PW-8/A records that it was dispatched at 10:45 PM on 8.5.2004. The FIR Ex.PW-8/B notes that it was registered at the police station by 11:00 PM. Thus, Insp.Jagdish Yadav PW-21 would presumably have left the police station sometime soon thereafter and since he first went to the residence of the deceased and there from to Sauce N Spice restaurant, as deposed to by him and SI Jaipal Singh, and after summoning Mansoor Ahmad recorded his statement under Section 161 Cr.P.C., it is apparent that by the time the next day had commenced when the clock struck 12:00 midnight. Indeed, as noted above, the date beneath Mansoor Ahmad's statement is 9.5.2004.

21. Mansoor Ahmad PW-3 deposed facts substantially the same as per his statement under Section 161 Cr.P.C. but with a minor variation of stating that both accused took out knives and stabbed Ashu outside the restaurant. He denied having told the police that the short statured boy had caught hold of Ashu, a fact so recorded in his statement by the investigating officer. He stated that he told the police that both accused had taken out knives. He stated that his statement was recorded by the police on the day of the incident as also on the next day. He stated that on 9.5.2004 his statement was recorded at the spot by SI Aishvir Singh and that another police officer Jagdish Yadav was also there. He stated that the police officers came to the restaurant at about 7:00/8:00 PM on 8.5.2004 and interrogated him.

22. Dipti PW-10 deposed facts in harmony with her statement under Section 161 Cr.P.C. with a slight variation that the accused pinned down Ashu on the ground and dragged him outside the restaurant by pulling his hair and that Ashu was stabbed by both of them. She also made a variation by stating that after she informed Ashu's mother, she came to the spot and took Ashu to the hospital in an auto.

23. On being cross-examined she stated that perhaps her statement was recorded by the police on the same day. She stated that after Ashu was sent to the hospital she went to

her house and after about ½ hour relatives of Ashu along with the police came to her house to record her statement.

24. It was urged that Dipti and Rajbala have deposed at variance, in that, Rajbala claimed not to have met Dipti, much less Dipti handing her over the shirt of her son. She claimed that some unknown person handed over her son's shirt to her. It was urged that as per Dipti, Rajbala took Ashu to Kharbanda hospital and not she. As per Rajbala, she reached Kharbanda hospital where her son was admitted.

25. Dr.Sajid PW-1 has not been cross-examined. His testimony that a girl brought Ashu to Kharbanda Nursing Home and that the document Ex.PW-1/A was prepared by him has gone unrebutted. As noted above, on the document Ex.PW-1/A, it is recorded that a girl who is not disclosing her name has brought Ashu to Kharbanda Nursing Home and the shirt of Ashu containing a few cheques inside the pocket has been handed over to the girl. Dipti PW-10 deposed at variance with what she told the investigating officer the next day morning i.e. that she took Ashu to Kharbanda Nursing Home in an auto; in Court she deposed that Rajbala came to the spot and took Ashu to Kharbanda Nursing Home. But we note that Rajbala and Akhilesh PW-5 have corroborated each other of not going to the spot and reaching Kharbanda Nursing Home.

26. It is apparent that Dipti was the girl who had brought Ashu to Kharbanda Nursing Home. Her variation afore-noted in the narration of facts is natural for the reason she was a young girl from a middle class background. She used to leave her house to learn typing and not to be sitting in a restaurant with a boy. As deposed to by Mansoor Ahmad she and Ashu were regular visitors to the restaurant. Events over came Dipti, who not only was a witness to the brutal assault on her boyfriend but was scared of what she would tell her parents about herself. She found herself in a messy situation and her moorings were lost. As deposed to by Rajbala, the girl who rang her up over the phone could not speak and a male informed her that her son was injured. That Dipti was trying to hide her identity is evidenced through the testimony of Dr.Sajid PW-1 and the record of medical treatment given by him to Ashu i.e. Ex.PW-1/A on which it stands recorded that the girl who brought Ashu to the Nursing Home was not disclosing her name.

27. We find nothing abnormal in the contemporaneous conduct of Dipti whose middle class background was compelling her to hide her identity. That she spoke at somewhat variance vis-à-vis what she told the police as also at variance with what Ashu's mother and Akhilesh deposed, is

also a natural variation. We note that Dipti deposed in Court on 30.5.2006 i.e. after a little over two years of the incident.

28. It is settled law that it is only material contradictions or material improvements which are fatal to the testimony of a witness.

29. As regards the testimony of Mansoor Ahmad that his statement was recorded around 7:00 or 8:00 PM on 8.5.2004 by SI Aishvir Singh and at that time a police officer Jagdish Yadav was present and that thereafter his statement was again recorded by the investigating officer, it is apparent that Mansoor Ahmad, who is no more than a delivery-cum-collection man at the restaurant Sauce N Spice, has mixed up facts. We note that Mansoor Ahmad appeared as a witness on 9.3.2005 i.e. after about a year of the incident. The question of SI Aishvir Singh recording his statement at around 7:00 or 8:00 PM does not arise for the reason by said time nobody had reached the restaurant. At that time the police officers then associated with the investigation were at AIIMS. HC Anand Pal and Const.Kishan had left the police station at 6:45 PM when DD No.18 was recorded. Thereafter SI Jaipal and Const.Mahavir left for AIIMS when DD No.20 was recorded at 8:40 PM. After reaching AIIMS they reached Sauce N Spice restaurant and met nobody there. The endorsement Ex.PW-8/A beneath copy of DD No.18 in the hand of SI Jaipal shows

that the same was dispatched from the restaurant at 10:45 PM. As recorded on the FIR Ex.PW-8/B, the FIR was registered at 11:00 PM and only thereafter Insp.Jagdish Yadav PW-21 proceeded from the police station and first went to the residence of Ashu and there from to the restaurant. It is apparent that Insp.Jagdish Yadav reached the restaurant past midnight. This is the reason why Mansoor Ahmad's statement recorded by him notes the date 9.5.2004. The question of anybody other than Insp.Jagdish Yadav questioning Mansoor Ahmad does not arise under the circumstances. We note that Mansoor Ahmad has stated that when SI Aishvir Singh recorded his statement another officer Jagdish Yadav was present. Now, other than Insp.Jagdish Yadav, no police officer by such name has been associated in the investigation. It is writ large that the memory of Mansoor Ahmad failed him or he got over-awed in the Court. It is also important to note that SI Aishvir Singh got involved in the investigation, as deposed to by him, only on 15.5.2004. It is further relevant to note that no suggestion was given to SI Aishvir Singh that he recorded the statement of Mansoor Ahmad. It is further relevant to note that in his examination-in-chief, SI Aishvir Singh never claimed to have recorded the statement of Mansoor Ahmad.

30. While arguing the appeal, we put it to learned counsel for the appellants, whether it was not a fact that

appellant Mahesh matched the description of the first boy given by Dipti and Mansoor Ahmad to Insp.Jagdish Yadav soon after the crime and appellant Jitender matched the description of the second boy referred to by the two in their statements. Learned counsel for the appellants very frankly conceded that they did.

31. It lends assurance to the credibility of Dipti and Mansoor Ahmad that they gave a good description of the accused with reference to their height, built, age and complexion; all four of which matched the accused. It is also relevant to note that both of them said that one boy was referring to the other as Jitu and the other was referring to the first Chindu. Jitender would be Jitu in the short form.

32. As regards the submission that the appellants were apprehended on 15.5.2004 and test identification proceedings were fixed for 1.6.2004 and in the interregnum the accused i.e. the appellants were shown to the witnesses and hence the appellants were justified in refusing to participate in the test identification proceedings and that for the first time the dock identification of the appellants when the witnesses deposed in Court needs to be rejected, suffice would it be to state that evidence is of what witnesses depose and test identification proceedings relate to Section 162 Cr.P.C. i.e. investigation. It is desirable for it lends credibility to a witness who identifies

an accused in Court to be subjected to the test of being able to identify the accused from amongst many similar looking persons, but as held in the decision reported as AIR 1988 SC 345 *Hari Nath Vs. State of U.P.*, where there is evidence before the Court that the witnesses had sufficient time to gain an enduring impress of the identity of the accused on the mind and the memory of the witness, non conduct of test identification proceedings loses significance. From the testimony of PW-3 and PW-10 it is apparent that both of them had sufficient opportunity spanning at least 3 to 5 minutes to see the second accused and the first accused was under their gaze for at least 15 minutes. That in their statements recorded by the investigating officer they were able to give graphic description of the two accused with reference to the complexion, height, built and age of the accused, which incidentally is correct, we hold that PW-3 and PW-10 have deposed with credit to their account.

33. We hold that Mansoor Ahmad and Dipti have to be believed and the learned Trial Judge has correctly accepted their testimony.

34. From the acts of the appellants it is apparent that they acted in concert and had an intention more than to merely inflict grievous injuries on Ashu. From their acts the intention is clear, to launch a murderous assault on Ashu.

They succeeded in their endeavour. They came pre-armed with a knife. The nature of the injuries caused to the deceased compels us to further concur with the learned Trial Judge that the offence committed by the appellants is that of murder.

35. The appeals are dismissed.

36. The appellants are in jail. Copy of this decision is directed to be sent to the Superintendent, Central Jail, Tihar to be made available to the appellants.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

MARCH 18, 2010
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