

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

Judgment reserved on: April 29, 2010
Judgment delivered on: July 02, 2010

+ **CRIMINAL APPEAL NO.31/2010**

SANJAY MISHRA

....APPELLANT

Through: Mr. Sheikh Israr Ahmad, Advocate

Versus

STATE (N.C.T. OF DELHI)

....RESPONDENT

Through: Mr. Lovkesh Sawhney, APP

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

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. Appellant Sanjay Mishra, having been tried in Sessions Case No.62/09, FIR No.160/01, P.S. Dabri and convicted for the murder of Ranbir @ Kari (hereinafter referred to as the “deceased”) under Section 302 IPC read with Section 34 IPC in terms of impugned judgment dated 26.10.2009 and sentenced to undergo imprisonment for life and also to pay fine of Rs.10,000/-, in default whereof to undergo SI for further period of three months in terms of the order on sentence dated 30.10.2009, has preferred this appeal.

2. Briefly stated, case of the prosecution is that on 01.03.2001 at about 4:00 pm, Constable Neelam of police control room informed P.S. Dabri about stabbing of one Pankaj near Solanki Public School, Durga Park. This information was recorded as DD No.30A (Ex.PW18/A) and copy thereof was entrusted to SI Manjeet Tomar (PW18) for further action. SI Manjeet Tomar, on receipt of copy of the DD report, proceeded to the spot of occurrence along with Constable Subodh.

3. On reaching the spot, SI Manjeet Tomar (PW18) found that the injured had been removed to DDU Hospital. He, therefore, went to the Hospital and collected the MLC of the deceased Ranbir Ex.PW13/A, who had been declared brought dead.

4. At the Hospital, SI Manjeet Tomar met Rajender Kumar (PW17) and Azimullah (PW10), who had brought the deceased to the Hospital. He recorded the statement of PW Rajender Ex.PW17/A and obtained his signatures thereupon. Thereafter, SI Manjeet Tomar along with PWs Rajender Kumar and Azimullah and the Constable came back to the spot of occurrence. He inspected the spot and got it photographed by a private photographer. A knife was found lying at the spot of occurrence. SI prepared the sketch of the knife Ex.PW18/B, converted the knife into a sealed packet and seized it vide seizure memo Ex.PW18/C. A blood stained cloth was also lying on the spot. It was also converted into a sealed packet and taken into possession vide memo Ex.PW18/D. The Investigating Officer also seized the samples of blood-stained earth and control earth, vide respective memos Exhibits

PW18/E and PW18/F. He appended his endorsement on the statement Ex.PW17/A of PW Rajender and sent that '*rukka*' Ex.PW18/G to the Police Station for the registration of the case. He also prepared the site plan Ex.PW18/H.

5. Constable Subodh came back to the spot after the registration of the case and handed over copy of the FIR to SI Manjeet Tomar. Thereafter, he proceeded in search of the accused persons along with the above witnesses and Constable Subodh as well as PW Deepak. Appellant Sanjay Mishra was arrested near Durga Park at 11:00 pm on the identification of PWs Rajender, Azimullah and Deepak.

6. On interrogation, appellant Sanjay Mishra made a disclosure statement Ex.PW17/B on 02.03.2001 and pursuant to the disclosure statement, on 03.03.2001, he got recovered a knife with a cover from a heap of cow dung lying in the open ground in Durga Park. The recovered knife and its cover were taken into possession after preparing their sketches and converting them into a sealed packet vide memo Ex.PW5/C.

7. PW17 Rajender Kumar in his statement Ex.PW17/A disclosed that on 01.03.2001 at about 3:15 pm, he and his friends Ranbir @ Kari, Deepak, Punit and Alok were present near a Pan Shop at Durga Park, main Nasir Pur Road. PW Azimullah also came and joined them. In the meanwhile Manoj @ Chintu and his friend Sanjay Mishra (appellant) were seen coming from the side of Solanki Public School. On seeing them, PW Azimullah and one PW Deepak informed them that Manoj @

Chintu and Sanjay were the boys who had quarrelled with them on the preceding day on the issue of their friendship with the self proclaimed sister of Chintu. When deceased Ranbir @ Kari asked the appellant and Chintu about that incident, the appellant Sanjay Mishra exhorted Chintu by saying *"Ye Kari Hi Jyada Badmash Banta Hai, Isi Ko Pahley Thikane Lagao"*. On this, PW Deepak and the deceased Kari started arguing with them. Accused Chintu pushed Deepak and he suddenly took out a knife from his *pant* and gave a knife blow on the chest of Ranbir @ Kari. As result, deceased Ranbir @ Kari fell down behind the Pan Kiosk and his friends, because of fear, ran away. However, he and Azimullah took the injured deceased to Deen Dayal Hospital, where they were told that he has expired. Rajender Kumar also stated that the incident took place in the open ground behind the Kiosk of Pan vendor at around 3:30 pm.

8. On completion of the formalities of the investigation, both the appellant and his co-accused Manoj @ Chintu were challaned and sent for trial for the murder of the deceased Ranbir @ Kari in furtherance of their common intention.

9. At the outset, we may mention that both the appellant as well as his co-accused Manoj @ Chintu raised the plea of juvenility and they claimed to be tried in accordance with the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000. An inquiry into their respective pleas of juvenility was conducted by the Principal Magistrate, Juvenile Justice Board, Delhi and the concerned Magistrate,

on the basis of inquiry, found that the co-accused Manoj was a juvenile on the date of commission of offence, as such, his case was separated and sent to Juvenile Justice Board for trial in accordance with the provisions of the Juvenile Justice (Care and Protection of children) Act, 2000. However, the concerned Magistrate, on the basis of inquiry, found that the appellant Sanjay Mishra was not a child or juvenile on the date of commission of offence, as such, his case was tried separately in accordance with the provisions of Code of Criminal Procedure. Above referred order dated 19th July, 2005 of the Principal Magistrate, Juvenile Justice Board was not challenged by the appellant.

10. The appellant was charged for committing murder of the deceased Ranbir @ Kari in furtherance of his common intention with his co-accused Chintu under Section 302 IPC read with Section 34 IPC. The appellant pleaded not guilty to the charge and claimed to be tried.

11. In order to bring home the guilt of the appellant, prosecution has examined 25 witnesses in all. Out of the said witnesses, PW1 Deepak, PW2 Punit, PW3 Alok Kumar, PW10 Azimullah Khan and PW17 Rajender Kumar are claimed to be the eye-witnesses. Besides the eye-witness account of the occurrence given by the prosecution witnesses, the prosecution is also relying upon the evidence of recovery of the weapon offence i.e. Knife Ex.PW8/P1 and its cover Ex.PW8/P2 at the instance of the appellant. PW8 Ram Chander, PW9 Om Prakash, PW18 SI Manjeet Tomar, PW5 Head Constable Subodh Kumar, PW20 Head

Constable Baljeet Singh and PW21 Head Constable Ashok besides subsequent Investigating Officer Inspector Lakhwinder Singh are claimed to be the eye-witnesses of recovery of knife. We may, however, note at this juncture that nothing much turns on the purported claim of recovery of knife Ex.PW8/P1 because the prosecution has not been able to connect said knife with the crime from CFSL report Ex.PW22/A, according to which, no blood could be detected on the said knife. Thus, it is apparent that the case of the prosecution hinges mainly on the eye-witness account of the incident given by the witnesses. Before adverting to the submissions made on behalf of the appellant, we feel that it would be useful to have a look upon the gist of the testimony of the eye-witnesses.

12. PW1 Deepak is a friend of the deceased. He testified that on a day before 01.03.2001, accused Chintu (juvenile) had slapped Hazimullah (should have been Azimullah). On 01.03.2001, he along with the deceased, Punit, Alok and Azimullah was going to the house of Mahawal Mishra, near Dugra Park when they saw the appellant and his co-accused Chintu. On seeing them, he and Azimullah told the deceased, Punit, Alok and Rajender that the appellant and Chintu were the boys who had given them beating on the previous day. He further stated that the accused persons stopped them and the deceased Ranbir asked Sanjay Mishra (appellant) as well as Chintu as to why they had beaten Azimullah and Deepak. On this, accused Chintu retorted that they (Deepak and Azimullah) have called bad elements

and took him (Deepak) aside by catching hold of him from the neck. He also took out a knife. The deceased Ranbir tried to intervene and on this, the appellant Sanjay Mishra exhorted Chintu by saying that Ranbir was projecting himself as a '*badmaash*'. Thereafter, the deceased had an altercation with the appellant and Chintu @ Manoj inflicted a knife blow on the person of the deceased. As a consequence of the knife injury, Ranbir (deceased) fell down. He further stated that PW2 Punit ran away from the spot. They fetched an auto and PWs Rajender and Azimullah took the deceased to the hospital and they went to the house of deceased to inform his parents. This witness turned hostile as regards the arrest of the appellant. Therefore, he was cross-examined by learned APP with the permission of the court and in the cross-examination, he admitted that the appellant Sanjay Mishra was arrested on the same day by the police in his presence.

13. PW2 Punit has testified that on 01.03.2001, he along with his friend Kari (deceased), Deepak and Alok were standing near the Pan Shop where they were joined by their friend Hazimullah (should be Azimullah) and were talking with each other. In the meanwhile, appellant Sanjay Mishra came there along with Chintu. Appellant told Chintu that the deceased Kari used to pose as "*chaudhary*" and first of all, he should be dealt with. On this, the appellant Chintu took out a knife and stabbed the deceased Kari. Thereafter, both the appellant and Chintu ran after him. He, however, managed to escape.

14. PW3 Alok Kumar is a hostile witness. He has not fully supported the case of the prosecution. He, however, has testified that on 01.03.2001, while he was returning from the house of his father's sister (*bua*), he met his friend Rajender at about 03:15 pm. PWs Deepak and Punit were also along with him. They started talking about their quarrel with somebody. In the meanwhile, he heard a big noise "*mar diya mar diya*". He has stated that he could only see that two boys had stopped his friend Ranbir @ Kari. He identified one of those two boys as Sanjay Mishra. In the cross-examination by the learned APP, he stated that he could not say if Chintu @ Manoj was present along with appellant Sanjay Mishra at the relevant time. In his cross-examination by the learned defence counsel, he stated that he was not able to see the incident which took place behind '*khokha*'.

15. PW10 Azimullah Khan and PW17 Rajender Kumar, who had taken the deceased to the hospital, are totally hostile to the case of prosecution. According to them, they reached at the spot after the occurrence and they took the deceased to the hospital. Though PW17, in his cross-examination by learned APP has admitted his signatures on his purported statement Ex.PW17/A, he denied having given that statement to the Investigating Officer.

16. On conclusion of prosecution evidence, appellant was examined under Section 313 Cr.P.C. to afford him an opportunity to explain the incriminating circumstances appearing against him. The appellant, in

his statement pleaded innocence and claimed to have been falsely implicated. He, however, did not lead any evidence in defence.

17. The learned Additional Sessions Judge, on consideration of the evidence, found the appellant guilty of committing murder of the deceased Ranbir @ Kari in furtherance of his common intention with his co-accused Manoj @ Chintu and convicted him under Section 302 IPC read with Section 34 IPC.

18. Sh. Sheikh Israr Ahmad, learned Advocate appearing for the appellant took us through the evidence as well as the impugned judgment and submitted that the case of prosecution is mainly based upon the testimony of PW1 Deepak, PW2 Punit and PW3 Alok Kumar. He has submitted that the Trial Court has committed a grave error in relying upon their testimony as they are not worthy of credence and their presence at the spot of occurrence is highly doubtful. Expanding on this argument, learned counsel for the appellant submitted that PW1 to PW3 claim themselves to be the friends of the deceased. They also claim that they had seen the occurrence yet admittedly, they neither accompanied the deceased to the hospital nor they informed the parents of the deceased about the incident nor they reported the matter to the police, which conduct of the witnesses, according to the learned counsel for the appellant, is highly unnatural and raise a doubt against their presence at the time of occurrence. Learned counsel submitted that the aforesaid doubt is further compounded from the

fact that PW18 SI Manjeet Tomar, who conducted initial investigation of this case and who prepared the site plan Ex.PW18/H, has not shown the position of these witnesses at the time of occurrence in the Site Plan, which circumstance also rules out a possibility of these witnesses being present at the time of occurrence.

19. We do not find merit in the above argument of the appellant. PW1 Deepak in his examination-in-chief has explained that after the deceased suffered injury, they brought an Auto-rickshaw in which PW10 Azimullah and PW17 Rajender Kumar took him to the hospital. This version of PW1 finds corroboration in testimony of PW10 Azimullah as well as PW17 Rajender Kumar, who otherwise have not supported the case of prosecution. Auto-rickshaw is a small vehicle meant to carry three passengers. Since Azimullah (PW10) and Rajender Kumar (PW17) had accompanied the deceased to the hospital, we find nothing unnatural in the conduct of PW1 to PW3 in not going to the hospital as all the five friends could not have been accommodated in the Auto-rickshaw. PW2 Punit has deposed that after stabbing the deceased, the appellant and co-accused Chintu started running towards him. Therefore, he escaped from the spot. His version finds corroboration from the testimony of PW1 Deepak, who has also stated that after the stabbing of Ranbir (deceased), Punit started to run away. We do not find anything surprising or unnatural in Punit running away from the spot. It is important to note that PW1 to PW3 were young boys of around 17 to 18 years at the time of occurrence. Therefore, it is not

surprising that because of shock and fear of the occurrence, they did not go to report the matter to the police or to inform the parents of the deceased. Failure of the Investigating Officer to show the location of these witnesses in the Site Plan of scene of crime is also of not much significance because SI Manjeet Tomar has nowhere stated that he had met and examined these witnesses before the preparation of Site Plan. Otherwise also, the lapse on the part of Investigating Officer cannot be taken as a reason to suspect the version of PW1 and PW2, who are otherwise reliable.

20. Another criticism against the reliability of the version of PW1 and PW2 is that they claim to have been examined by the police on the same night but when they were confronted with the judicial record, their statements dated 1st of March, 2001 under Section 161 Cr.P.C. could not be located by them. We do not find any merit in this contention. For the purpose of proper decision of this appeal, what is important is the testimony of the witnesses in the court and not their statements under Section 161 Cr.P.C., which are otherwise inadmissible in evidence. On careful reading of the testimony of PW1 Deepak as well as PW2 Punit, we find that their testimony is consistent with the case of the prosecution. Both of them are categorical that on the exhortation of the appellant Sanjay Mishra, his co-accused Manoj @ Chintu stabbed the deceased with a knife, as a result of which the deceased fell down and he was taken to the hospital by PW10 Azimullah and PW17 Rajender Kumar. PW3 Alok Kumar, who turned

hostile to the case of prosecution however has admitted his presence near the spot of occurrence and he has stated that his attention was drawn to the spot of occurrence on hearing noise “*maar diya maar diya*” and he could see the boys, who had stabbed the deceased and one of them was Sanjay Mishra. From this version, at least the presence of Sanjay Mishra at the spot of occurrence immediately after the stabbing of Ranbir @ Kari (deceased) is established. This also gives an assurance that PW1 Deepak and PW2 Punit are telling the truth. Even PW10 Azimullah and PW17 Rajender Kumar who are totally hostile to the case of prosecution have admitted their presence at the spot immediately after the occurrence and that they took the deceased to the hospital in a TSR. Thus, we find no reason to disbelieve the testimony of PW1 and PW2 implicating the appellant as the person who exhorted the co-accused Manoj @ Chintu, who actually stabbed the deceased.

21. Learned counsel for the appellant further submitted that as per the testimony of PW10 Azimullah, the police had apprehended Deepak (PW1), Punit (PW2), Alok (PW3) and other boys in connection with investigation of this case and they were beaten. From this, he has urged us to infer that PW1 to PW3 were not the eye-witnesses and they have been falsely introduced as witnesses against the appellant by the police under pressure. We do not find merit in this contention. PW10 Azimullah is a hostile witness, who resiled from his earlier statement made to the police during investigation of the case. Thus, in our view,

he is an unreliable witness and his version regarding apprehending of PW1 to PW3 and beating given to them by the police cannot be relied upon. Otherwise also, PW1 to PW3 in their cross-examination were not given any suggestion to this effect, which circumstance also shows that PW10 was won over and the version of beating given to PW1 to PW3 was introduced by him at the instance of the accused to create a doubt against fairness of investigation.

22. It was next contended on behalf of the appellant that the first information about the incident was received at the police station vide No. 30A (Ex.PW18/A), which recorded that one Pankaj had stabbed a boy near Solanki Public School, Durga Park. The information also mentioned a telephone number 5043052 from which the information was conveyed to Police Control room. Despite of that, the Investigating Officer did not bother to verify the correctness of said information either by trying to locate Pankaj or trying to locate the owner of the telephone number so as to find out as to who conveyed that information to the police. From this, learned counsel for the appellant has urged us to infer that this is a case of unfair investigation, indicating that Investigating Officer wanted to falsely implicate the appellant.

23. We do not find any substance in this submission. PW18 SI Manjeet Tomar, initial Investigating Officer, when cross-examined in this regard has clarified that he did make inquiry about said Pankaj

referred to in DD No. 30A at the spot on the same day. Thus, it cannot be said that no effort was done by the Investigating Officer to trace Pankaj with a view to falsely implicate the appellant. Further, from the testimony of SI Manjeet Tomar (PW18), it is apparent that at the spot of occurrence, he was told that the deceased has been removed to DDU Hospital, so he went there. At the hospital, he met PW17 Rajender Kumar and recorded his statement Ex.PW17/A about the occurrence in which Rajender Kumar had implicated the appellant and his co-accused Manoj @ Chintu. As per SI Manjeet Tomar, he pursued that lead, which was ultimately verified by the statement of other witnesses namely PW1 to PW3. Therefore, nothing suspicious can be read into the failure of the Investigating Officer to find out as to who made the call to the PCR or to fix the identity of Pankaj who may be fictitious person.

24. In view of the above, we find that the learned Trial Judge has rightly relied upon the evidence of PW1 and PW2, which also finds corroboration from the testimony of PW3 Alok, though he turned hostile, to find the appellant guilty of exhorting his co-accused Chintu, which prompted him to inflict a fatal knife blow on the person of the deceased.

25. Learned counsel for the appellant has contended that even if, for the sake of argument, it is assumed that the deceased was inflicted fatal stab injury with a knife by the co-accused Manoj @ Chintu on the exhortation of the appellant, from the facts on record, it cannot be

inferred that the appellant, at the time of exhortation shared common intention with his co-accused Manoj @ Chintu to commit murder of the deceased.

26. As per the case of prosecution, the fatal blow was inflicted on the person of the deceased by the co-accused Manoj @ Chintu. The role attributed to the appellant is that he exhorted his co-accused Manoj @ Chintu by saying that the deceased thought himself as a '*badmash*'. Therefore, first of all, he should be settled. The words used in the FIR are "*ye Kari hee zaada badmash banta hai, isiko pehle thikane lagao*". From these words, we find it difficult to infer that by using the word '*thikane lagao*', the appellant Sanjay Mishra meant that the deceased be killed. As per the case of prosecution, the incident took place in a chance encounter between the parties when the deceased and his friends were standing near the Pan Shop and the appellant and his co-accused, by chance, came there and they were asked by the deceased as to why they had beaten Azimullah (PW10) and Deepak (PW1) on the previous day. From the aforesaid facts also, it appears that the incident took place in the heat of moment because of sudden altercation between the parties. Thus, we find that the learned Trial Judge went wrong in inferring from the aforesaid words used by the appellant that he shared a common intention with his co-accused Manoj @ Chintu to commit murder of the deceased, particularly when apart from the aforesaid exhortation, the appellant did not physically participate in the incident in any manner whatsoever. Since co-

accused Manoj @ Chintu was carrying a knife, at best, it can be inferred that while exhorting his co-accused Chintu, the appellant intended Chintu to cause grievous hurt to the deceased. Thus, we find no justification for conviction of the appellant for the offence of murder punishable under Section 302 IPC with the aid of Section 34 IPC and convert his conviction to the offence of causing grievous hurt with a dangerous weapon under Section 326 IPC read with Section 34 IPC.

27. In view of the above, the sentence of the appellant awarded for the offence under Section 302/34 IPC cannot be sustained. Therefore, taking into account that the appellant was a young boy, just above 18 years at the time of occurrence, nature of the offence and the circumstances under which it was committed, we, while maintaining the sentence of fine, convert the sentence of imprisonment of the appellant Sanjay Mishra from life imprisonment to rigorous imprisonment for a period of 5 years. Needless to say, he shall get benefit of Section 428 Cr.P.C.

28. The appeal is disposed of accordingly.

AJIT BHARIHOKE, J.

JULY 02, 2010
pst/akb

A.K. SIKRI, J.