

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

% Date of Decision :17th March, 2010

+ **Crl. A. No. 80/2008**

ANIL GULIA Appellant
Through: Mr.Bhupesh Narula, Advocate

versus

THE STATE Respondent
Through: Ms.Richa Kapoor, APP

Crl. A. No. 693/2007

VINOD KUMAR Appellant
Through: Mr.N.Prabhakar, Advocate

versus

STATE Respondent
Through: Ms.Richa Kapoor, APP

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. (Oral)

1. Vide impugned judgment and order dated 20.08.2007 the appellants Anil Gulia and Vinod have been convicted for the offence punishable under Section 120-B IPC

as also the offence punishable under Section 302 IPC read with Section 120-B IPC. Anil Gulia has been additionally convicted for the offence punishable under Section 27 of the Arms Act.

2. Vide order on sentence dated 20.08.2007, for the offence of conspiracy and for the offence of murder, the appellants have been sentenced to undergo imprisonment for life. For the offence punishable under Section 27 of the Arms Act, Anil Gulia has been sentenced to undergo imprisonment for 2 years.

3. The third co-accused Anil @ Bhagat, remained a Proclaimed Offender throughout the trial.

4. At the outset, learned counsel for the State concedes that there is no evidence of conspiracy and thus the charge for the offence punishable under Section 120-B IPC must fail. But, learned counsel for the State draws attention to the evidence on record and urges that the same establishes an action in concert by Anil Gulia and Vinod. Thus, counsel urges that the two are liable to be convicted for the offence punishable under Section 302/34 IPC.

5. Information was noted at P.S. Adarsh Nagar, vide DD No.8, Ex.PW-7/A, on 02.04.2002 that at 11:40 A.M. Devinder Dahiya has been shot at his phad and that the public at the spot had caught the assailant and had beaten him. The

assailant was disclosing his name as Anil Gulia. Ct.Rajpal PW-7, the scribe of DD No.8 has proved its recording. Ct. Rajpal has not been cross-examined.

6. SI Satinder Rana PW-18 accompanied by Ct.Sanjay proceeded to the place where the crime was committed and took along with them a copy of the DD No.8A. As deposed to by SI Satinder Rana PW-18, when he and Ct.Sanjay reached Shop No.16 they saw blood at the spot. Accused Anil Gulia had been apprehended. He summoned HC Madhwanand (Madhwa Singh) PW-14, and leaving him at the spot proceeded to BJRM Hospital in the company of Ct.Sanjay, where he learnt that the deceased Devender Dahiya had been declared brought dead at the hospital. He met Narender Singh Dahiya at the hospital whose statement Ex.PW-18/A was recorded by him. The statement of Narender Singh Dahiya reads as under:-

"Statement of Sh.Narender Singh Dahiya S/o Sh.Ram Singh Dahiya R/o Gaon Badkhalasa Thana Rai Distt.Sonipat, Haryana, aged 36 years.

I live at the aforesaid place and in partnership with Devender Dahiya the son of my paternal uncle, carry on business as a commission agent at Azadpur Subzi Mandi. Today during day time at about 11:00 AM my brother Devender Dahiya and Ranjeet Singh S/o Balwant Singh R/o Village Badkhalasa, Distt. Sonipat as also Rajesh S/o Ramkumar R/o Village Lakhna Mazra Thana Meham Distt. Rohtak and many other persons were sitting at Phad No.16. People were moving about in the Mandi. Vinod Bhakte, who is the brother of Anil Bhagat, a known bad character, and is known to me

came along with a young boy from the side of the dump and reached the Phad where we were sitting. In a threatening voice they said as to why the money due to Anil Bhagat was not sent and further threatened that a lesson would be taught. Immediately, thereafter the boy who had come with Vinod Bhakte took out a pistol from his pant pocket and putting the same at the head of my brother Devender Dahiya fired when he was sitting on the Takht at the Phad. Devender started bleeding from his head and fell down on the Takht. People in the vicinity caught the boy who fired the shot and gave him beating out of anger. Vinod Bhakte took advantage of the crowd and managed to flee. I removed my brother to the trauma hospital where the doctor declared him brought dead. The boy who fired the shot told his name and particular as Anil Gulia S/o Birbal R/o Village Purkhas Thana Gannaur Distt. Sonipat Haryana. He is at the spot in the custody of Ranjit, Rajesh and a few other persons. My statement has been recorded at the hospital and I affirm it to be correct."

7. Making an endorsement Ex.PW-9/B beneath the Statement Ex.PW-18/A, SI Satinder Rana sent the same for FIR to be registered; the Tehrir was dispatched at 1:55 in the afternoon from the hospital as recorded on the Tehrir. At the Police Station the FIR Ex.PW-1/A No.124/2002 was recorded at 2:30 P.M. by ASI Bhagwan Devi PW-1 as deposed to by her.

8. Seizing the body and depositing the same at the mortuary of the hospital and leaving Ct.Sanjay at the mortuary, as deposed to by SI Satinder Rana, he returned to the spot and by which time the crime team has also reached. Insp. Hira Lal also reached the spot and conducted the investigation at spot assisted by SI Satinder Rana. As deposed by SI Satinder Rana the IO lifted control-earth, blood stained

earth and a fired cartridge from the spot as recorded in the memo Ex.PW-18/C; recording therein that the cartridge was of 9 mm with engraving 'KF 99' thereon. The IO took into possession the pistol having live cartridges which were seized vide memo Ex.PW-18/F. Sketch Ex.PW-18/D of the pistol and Ex.PW-18/E of the cartridges was drawn by the IO. He deposed that he was a witness to the seizure memo which were drawn and the exhibits which were seized at the spot. He further deposed that he took into custody Anil Gulia and on the IO interrogating him, recorded his statement Ex.PW-18/H. Anil Gulia was taken to BJRM Hospital as he had sustained injuries as a result of public persons beating him.

9. As is to be noted from the statement Ex.PW-18/A of Narender Singh Dahiya, he had named Vinod Bhakte as the person who had accompanied Anil Gulia and has exhorted him. He had also disclosed that Vinod Bhakte was the brother of Anil Bhagat a known bad character and that Vinod Bhakte and Anil Gulia had come to demand money from the deceased. Thus, it was but natural for the police to apprehend Vinod Bhakte and Anil Bhagat.

10. The post-mortem on the body of the deceased was conducted by Dr.R.K.Punia PW-8 on 02.04.2002 itself. He recorded therein the injury caused by a fire arm with the bullet

piercing the back side occipital region, blackening, burning and tattooing the scalp hair at the point of entry. The bullet perforated the right occipital lobe of the brain. It was recovered from the middle caranial fossa. Internal examination revealed the right side occipital bone was having fractures. Subdural hemorrhage and sub arachanoid hemorrhage was noted. It was opined that the injuries was anti mortem and were caused by a fire arm from close range contact. The death was due to craino-cerebral damage and that the injury was sufficient in the ordinary course of nature to cause death. The report Ex.PW-8/A prepared by Dr.R.K.Punia was proved at the trial by Dr.R.K.Punia.

11. Rajesh PW-4, a nephew of the deceased, who claims to be working as an accounts writer (munshi) with the deceased claimed to be present at the spot and his statement under Section 161 Cr.P.C. was recorded by the Investigation Officer.

12. The bullet recovered from the head of the deceased as also the fired cartridge lifted from the scene of the crime and the pistol stated to have been recovered from Anil Gulia were sent for ballistic examination and as per the report Ex.PW-11/A of the Ballistic Expert, it was opined that the cartridge recovered from the spot was fired from the pistol in-

question with reference to the individual characteristic of firing pin marks. With respect to the bullet recovered from the head of the deceased, no opinion was given for the reason there was insufficient data. It is apparent that as the bullet pierced the skull, it got deformed and hence striation marks were not detected with prominence thereon.

13. The statement of Ranjit Singh, driver of Rajender Dahiya was also recorded under Section 161 Cr.P.C.

14. Unfortunately, when the trial commenced Narender Singh Dahiya also Narender Singh died and could not be examined as witnesses by the prosecution. Only Rajesh Kumar PW-4 was examined as witness of the prosecution.

15. Rajesh Kumar PW-4 deposed in examination-in-chief as under:-

"Deceased Devinder Dahiya was my maternal uncle. Davinder Dahiya was running a shop of commission agent at Azad Pur Subji Mandi and he was also pardhan of D Block Azad Pur Subzi Mandi. I was also working with my maternal uncle Devinder Dahiya as his Munshi at his Commission Agent shop at Azad Pur Subzi Mandi. On 02.04.02 I along with my maternal uncle Davinder Dahiya and one person by the name of Narinder Dahiya and Ranjit Singh driver of Devinder Dahiya were present at the shop of Mr.Devinder Dahiya i.e. shop No.16 Azad Pur Subzi Mandi. Narinder Dahiya was the partner of my maternal uncle Devinder Dahiya. At about 11 a.m. on 2.04.02 we were sitting on a takhat at shop No.16.

One person by the name of Vinod along with one other person came at our shop witness has identified accused Vinod as the same person who came at our shop along with one other person. Mr.Vinod asked my

maternal uncle Devinder Dahiya why he had not paid the amount to Anil Bhagte and we will teach you a lesson. Second person who was with Vinod took out a revolver and fired on the head of my maternal uncle Devinder Dahiya. Witness has identified accused Anil Gulia today present in court as accused as the same person who came at our shop along with accused Vinod and accused Anil Gulia fired on head of my maternal uncle Devinder Dahiya. Accused Vinod ran away from the spot. Accused Anil Gulia tried to ran away from spot but he was apprehended by public persons at a very short distance. Public persons gave beatings to accused Anil Gulia. Ranjit driver of my maternal uncle took out a revolver from the right hand of accused Anil Gulia. In the meantime police persons also arrived at spot and accused Anil Gulia was confirmed in the basement of the shop. Narinder and Ranjit removed my maternal uncle Devinder Dahiya to Trauma Centre. After sometime Ranjit came back at the shop and I along with Ranjit went to Trauma Centre. My maternal uncle had already expired. We again reached at our shop at Azad Pur Subzi Mandi. Accused Vinod asked my maternal uncle why he had not sent the amount of Anil Bhagte and "we will teach a lesson."

16. Believing Rajesh and linking the pistol recovered from Anil Gulia with the cartridge lifted from the spot and holding that the same was the weapon of offence, the appellants have been convicted by the learned trial Judge for having entered into a conspiracy with Anil @ Bhagat and for having murdered the deceased.

17. As noted hereinabove, we find no evidence of a conspiracy and thus we proceed to look at the evidence whether it stands established that Anil Gulia and Vinod have acted in concert to kill the deceased.

18. From the testimony of Rajesh PW-4 it stands established that he was at the place where the crime was committed and Narender Dahiya and Rajesh Singh, the driver of the deceased were also present. Appellant Vinod came with appellant Anil Gulia and not only demanded money from Devinder Dahiya questioning him why was the amount was not paid to Anil Bhagat but even threatened to teach Devender Dahiya a lesson. At that, Anil Gulia took out a revolver and fired at the head of the deceased.

19. It is apparent that Anil Gulia fired at the exhortation of Vinod and that the purpose of the visit was to teach Devender Dahiya a lesson for not paying money to Anil Bhagat. Vicarious liability of Vinod qua the act of Anil Gulia is writ large.

20. The only thing which we now require to see is whether Rajesh PW-4 is a witness worthy of credit.

21. It is urged by learned counsel for the appellants that Rajesh Kumar is not a creditworthy witness for the reason he claims to be a nephew of the deceased but did not go to the hospital along with the deceased when the deceased was in an injured condition.

22. With reference to the statement Ex.PW-18/A of Narender Dahiya, who unfortunately could not be examined as

a witness as he died during trial, we have a fact on record proved through the testimony of SI Satinder Rana PW-18, the scribe of the statement, that Narender Dahiya had removed Devender Dahiya to the hospital. Thus, comforted with the fact that his injured uncle was in the safe hand of his other uncle and had been rushed to the hospital, we see nothing abnormal in the conduct of Rajesh Kumar to stay back.

23. It is next urged that in the seizure memo of the bullet it stands recorded that the bullet had an engraving 'KF-99' but on the sketch of the bullet the engraving shown is 'KF 65'. It is thus urged that there is a taint in the recovery of the fired cartridge.

24. It is true that a hiatus does exist as afore-noted, but we give not much importance to the same for the reason the author of the witness to the two documents i.e. SI Satender Rana has not been subjected to any cross-examination on the issue. Had he been cross-examined, we do not know what answer would be given by him.

25. It is to be noted that as deposed to by SI Satender Rana he took possession of the pistol at the spot.

26. It is next urged that presence of Rajesh Kumar PW-4 at the spot is doubtful for the reason SI Satender Rana PW-18 claims that he first saw PW-4 at the spot when he returned

to the spot from the hospital. Additionally, counsel points out that ASI Madhav Singh PW-14 who was summoned to the spot by SI Satender Rana has also stated that he did not see Rajesh at the spot.

27. Now, the crime has been committed in Azadpur Mandi. As deposed to by Rajesh and as find mentioned in the statement Ex.PW-14/A, lot of people were at the spot. Thus, if ASI Madhav Singh and SI Satender Rana did not notice the presence of Rajesh at the spot, does not mean that Rajesh was not present at the spot. It assumes importance to note that in the statement Ex.PW-18/A i.e. the compliant on which the FIR has been registered there is a mention of Rajesh being at the spot and having custody of Anil Gulia.

28. It is then urged that during cross-examination Rajesh stated that there was another person by the name of Rajesh whose pant got stained with the blood of the deceased when deceased was removed to the hospital and thus the prosecution should suffer the consequences of not examining said Rajesh.

29. The argument has to be rejected for the reason Rajesh PW-4 talked about another person Rajesh only when he was cross-examined and prior thereto never talk about said person to the investigating officer and thus where was the

occasion for the investigating officer to hold back a material witness.

30. From the fact that Anil Gulia was apprehended at the spot; from the fact that in the complaint Ex.PW-18/A reference has been made to him; from the fact that in the complaint reference has been made to Vinod Bhakte; for the fact that Rajesh Kumar PW-4 has deposed facts substantially in conformity with what has been disclosed in the complaint; additionally noting the report of the ballistic expert we conclude by holding that the prosecution has successfully established that the appellants acted in concert to shoot Davinder Dahiya for not having paid money to Anil Bhagat.

31. We note that a defence witness has been examined, but with reference to his testimony no submission has been urged at the hearing of the appeal.

32. The appeals stand disposed of modifying the impugned order, in that, we convict the appellants for the offence punishable under Section 302/34 IPC and for the same sentenced them to undergo imprisonment for life. We acquit them of the charge punishable under Section 120-B IPC. We maintain the conviction of Anil Gulia and the sentence relatable thereto for the offence punishable under Section 27 of the Arms Act.

33. Appellant Anil Gulia is in jail, we direct that a copy of this decision be sent to the Superintendent, Central Jail, Tihar to be made available to him.

34. Appellant Vinod is on bail. The bail bond and surety bonds furnished by him are cancelled and he is directed to surrender and suffer the remaining sentence.

PRADEEP NANDRAJOG, J

SURESH KAIT, J

MARCH 17, 2010
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