

R-12 to 15

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

% *Date of Decision : 6th March, 2010*

+ **CRL.APPEAL NO.348/2008**

PRADEEP Appellant

Through: None.

versus

STATE Respondent

Through: Mr.M.N.Dudeja, A.P.P.

+ **CRL.APPEAL NO.616/2008**

PRADEEP Appellant

Through: None.

versus

STATE Respondent

Through: Mr.M.N.Dudeja, A.P.P.

+ **CRL.APPEAL NO.651/2008**

ROSHAN Appellant

Through: Ms.Anu Narula, Advocate.

versus

STATE Respondent

Through: Mr.M.N.Dudeja, A.P.P.

+ **CRL.APPEAL NO.678/2007**

KAPIL Appellant

Through: Mr.S.C.Buttan, Mr.Purvesh Buttan and
Mr.Himanshu Buttan, Advocates.

versus

STATE Respondent

Through: Ms.Richa Kapoor, A.P.P.

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

PRADEEP NANDRAJOG, J. (Oral)

1. All the above captioned appeals lay a challenge to the judgment and order dated 11.9.2007 convicting the appellants for the offence punishable under Section 302 IPC.
2. The finding returned by the learned Trial Judge is that the prosecution has successfully proved that acting in concert the appellants murdered deceased Kalo Singh at around 3:00 PM on 4.3.2007.
3. In sustaining the conviction of the appellants the learned Trial Judge has held that the eye-witness account given by Ajab Lal PW-6 and Shambhu Singh PW-7 needs to be accepted as the witnesses were found to be credible.
4. Shambhu Singh PW-7 is the younger brother of the deceased and Ajab Lal is friend of Shambhu Singh.
5. As per the prosecution, appellant Pradeep S/o

Sukhbir stabbed the deceased with a knife which we note was not recovered. Appellant Pradeep S/o Swaran Singh, Kapil S/o Lachhu and Roshan S/o Birbal Singh have been alleged to have caught hold of the deceased when Pradeep S/o Sukhbir inflicted the fatal stab wounds.

6. It is the testimony of the two witnesses that the deceased was caught and stabbed twice on two different places on the street. It is the case of the prosecution that blood was lifted at two different places on two public streets.

7. Our attention has been drawn to the examination of the four accused under Section 313 Cr.P.C. 11 identically worded questioned followed by 4 other identically worded questions, but without any number, have been put to the four accused.

8. The 11 numbered questions and the 4 non-numbered questions put to the accused are as under:-

“Q1: It is in evidence against you that on 4.3.2007 at about 3 pm at Goel Wali gali, Shardhanand Park, Opposite House No.E-4 and E-131/25 Bhalaswa Dairy you along with your co-accused Pradeep S/o Sukhbir Singh, Kapil S/o Lachhu and Roshan S/o Birbal Singh in furtherance of your common intention stabbed one Kalo Singh S/o Sudin Singh R/o E-72, Swami Shardhanand Park, Delhi thereby killing him and committed an offence of culpable homicide amounting to murder. What have you to say?

Q2: It is in evidence against you that the PCR call regarding murder was made which is Ex.PW-2/1 and DD No.27-A Ex.PW-11/1 was recorded and the

statement of the complainant Shambhu Singh which is Ex.PW-7/1 was recorded on which the endorsements Ex.PW-11/2 and Ex.PW-12/1 were made on the basis of which the FIR Ex.PW-12/2 was registered regarding the DD No.30A Ex.PW-12/3 was recorded and the copies of the FIR were sent to the learned M.M. and senior police officers vide DD No.31A which is Ex.PW-12/4 and the DD No.9A Ex.PW-12/5 and DD No.25A Ex.PW-12/6 were recorded. What have you to say?

Q3: It is in evidence against you that the MLC of the deceased Kalo Singh which is Ex.PW-4/1 was obtained; statement of the witness Ajab Singh which is Ex.PW-6/3 was recorded; the scene of occurrence was got photographed vide negatives Ex.PW-10/1 to Ex.PW-10/9 and photographs Ex.PW-10/10 – PW-10/18 and two rough site plans were prepared at the instance of the complainant which are Ex.PW-11/3 and PW-11/4. What have you to say?

Q4: It is in evidence against you that the exhibits were also lifted from the spot including the chappals of deceased, blood soaked earth samples and earth samples vide memos Ex.PW-3/1 and Ex.PW-3/2 and the report Ex.PW-9/1 was prepared by the Crime Team. What have you to say?

Q5: It is in evidence against you that the inquest proceedings of the deceased Kalo Singh were completed and the dead body was handed over to the brother of the deceased namely Shambhu Singh vide receipt Ex.PW-6/1; the identifications are Ex.PW-6/2 and Ex.PW-7/2. What have you to say?

Q6: It is in evidence against you that you were arrested on 5.3.2007 at the instance of the complainant vide arrest memo Ex.PW3/3; your personal search was conducted vide memo Ex.PW-3/12; your disclosure statement Ex.PW-3/8 was recorded and you pointed out the place of occurrence vide pointing out memo Ex.PW-3/10 and your clothes were changed which were taken into possession vide memo Ex.PW-3/5. What have you to say?

Q7: It is in evidence against you that the postmortem on the body of Kalo Singh was got conducted and

report Ex.PW-1/1 was prepared and the clothes of the deceased, blood samples along with one sample seal were seized vide memo Ex.PW-11/5. What have you to say?

Q8: It is in evidence against you that the scaled site plan Ex.PW-5/1 was prepared and the application for extract of the PCR call was made which is Ex.PW-11/6. What have you to say?

Q9: It is in evidence against you that the case property has been produced in the court in 12 sealed pulandas and the same is Ex.P-1 to Ex.P-12/A. What have you to say?

Q10: It is in evidence against you that the sealed pulandas were taken to the FSL vide RC No.90/21/07 and the receipt along with the RC is Ex.PW-14/A and on 24.7.2007 the pulandas had been received back along with the FSL result and the entries in this regard is Ex.PW-13/1. What have you to say?

Q11: It is in evidence against you that the expert opinion from the FSL was obtained which is Ex.PW-16/3. What have you to say?

Q: Why this case against you?

Q: Why PWs have deposed against you?

Q: Do you wish to say anything else?

Q: Do you wish to lead defence evidence?"

9. Interestingly it may be noted that the first question put to accused Kapil also notes that he along with his co-accused Kapil as also co-accused Pradeep and Roshan in furtherance of their common intention stabbed Kalo Singh. Similarly, same mistake has been committed vis-à-vis the other accused. Interestingly in question No.1 no reference has been

made to anything done by co-accused Pradeep S/o Swaran Singh.

10. That apart, we find that save and except question No.1, commencing from question No.2 and ending till question No.11, the learned Trial Judge has simply put to the accused the record of investigation and not the evidence which was led against the accused and was inculpatory of the accused.

11. Reference has been made in the question to various statements recorded by the investigating officer during investigation of various persons who were associated in the investigation.

12. Needless to state, statements of persons recording during investigation by police officers are not substantive evidence and cannot be made the basis for putting questions to the accused when they are examined under Section 313 Cr.P.C.

13. As held in the decision reported as AIR 1972 SC 535 Parichhat vs. State of Maharashtra, Trial Judges must realize the importance of examination of accused under Section 313 Cr.P.C. It is the duty of the Trial Judge to question the accused properly and fairly, bringing home to the mind of the accused, in simple and clear language, the exact case he has to meet and each material point that is sought to be made against him

and of affording him a chance to explain it if he can and so desires.

14. As held in the decision reported as AIR 2004 SC 5068 Parsuram Panday vs. State of Bihar, it is imperative on the Trial Court to give opportunity to an accused to explain every incriminating circumstance proved by the prosecution.

15. The lynchpin of Section 313 Cr.P.C. are the words '*explain any circumstances appearing in evidence against him*'. This means that every fact from which the Court would draw the inference of guilt against the accused has to be put to the accused. For example, as held in the decision reported as AIR 1953 SC 468 Hate Singh vs. State of Madhya Bharat, if the Court attaches importance to the fact that the accused absconded, the accused should have been questioned on this point and given a chance to explain.

16. In the instant case, different roles at different points of time have been assigned against Pradeep S/o Swaran Singh, Kapil S/o Lachhu and Roshan S/o Birbal Singh. The witnesses of prosecution have alleged that Pradeep S/o Sukhbir stabbed the deceased.

17. With reference to the questions put to the accused, it is apparent that the incriminating circumstance of the eye-witness account allegedly claimed as having been seen by Ajab

Lal PW-6 and Shambhu Singh PW-7 has just not been put to the accused.

18. It has not been put to the accused as to what is the claim of the two eye-witnesses of what they saw. It has not been put to the accused the claim of the two eye-witness of having seen the incident spanning two different spots while standing from a spot on the street.

19. Under the circumstances, we hold that there has been a denial of the right of all the accused in terms of Section 313 Cr.P.C.

20. This requires the impugned judgment and order convicting the appellants as also the order on sentence to be set aside with the matter remanded before the learned Trial Judge to re-examine the accused by properly framing questions under Section 313 Cr.P.C.

21. Ordered accordingly.

22. The appeals stand disposed of setting aside the impugned judgment and order dated 6.9.2007 convicting the appellants of the offence punishable under Section 302 IPC. The order on sentence dated 11.9.2007 is also set aside.

23. The matter is remanded to the learned Trial Judge with a direction that taking note of the law relatable to Section 313 Cr.P.C. and as explained herein above, all the accused

would be properly examined under Section 313 Cr.P.C. and thereafter, should the accused desire to lead defence evidence, an opportunity to lead defence evidence would be granted followed by arguments being heard and matter being decided afresh.

24. We note that Kapil S/o Lachhu is on bail. The order admitting him to bail directed that till disposal of the appeal he would be set free on bail. Appellants Pradeep S/o Sukhbir Singh, Pradeep S/o Swaran Singh and Roshan S/o Birbal Singh are in custody.

25. Since the matter is being remanded before the learned Trial Judge, exercising our power under Section 482 Cr.P.C. we direct that on the appellants Pradeep S/o Sukhbir Singh, Pradeep S/o Swaran Singh and Roshan S/o Birbal Singh furnishing a personal bond in sum of Rs.10,000/- with one surety in the like amount to the satisfaction of the learned Trial Judge, they would be released on bail till the matter is re-decided by the learned Trial Judge.

26. We further direct that Kapil S/o Lachhu who is already on bail shall continue to remain on bail till the matter is decided afresh by the learned Trial Judge and we accordingly direct the learned Trial Judge to accept fresh bail bond and surety bond from Kapil S/o Lachhu, the personal bond being in

sum of Rs.10,000/- and the surety bond would be in the like amount till the matter is re-decided.

27. 3 copies of this order be sent to the Superintendent, Central Jail, Tihar to be made available to appellants Pradeep S/o Sukhbir, Pradeep S/o Swaran Singh and Roshan S/o Lachhu.

28. Copy of this order be handed over dasti to learned counsel for appellant Kapil who is already on bail.

29. TCR be returned forthwith.

30. As a word of caution to the learned Trial Judge, we direct that the Registry would sent a copy of this decision to the District & Sessions Judge, Delhi who would ensure that it is supplied to the learned Judge who has penned the impugned decision, whom we note was the Judge when the accused were examined under Section 313 Cr.P.C.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**APRIL 06, 2010
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