

R-100, 101 & 102

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

% Date of Decision: 8th March, 2010

+ **CRL. APPEAL NO.604/2007**

SUBHASH Appellant
Through: Mr.R.P.Sharma, Advocate with
Ms.Lakshna Oberoi and Mr.Brijesh
Oberoi, Advocates

Versus

STATE Respondent
Through: Mr.M.N.Dudeja, Advocate

CRL. APPEAL NO.421/2007

MAUSAM Appellant
Through: Mr.Satish Tamta, Advocate with
Ms.Nisha Narayan and Ms.Ruchi
Kapoor, Advocates

Versus

STATE Respondent
Through: Mr.M.N.Dudeja, Advocate

CRL. APPEAL NO.450/2007

RAM GOPAL @ GOPAL Appellant
Through: Mr.Satish Tamta, Advocate with
Ms.Nisha Narayan and Ms.Ruchi
Kapoor, Advocates

Versus

STATE Respondent
Through: Mr.M.N.Dudeja, 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 the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Mr.Satish Tamta learned counsel who has filed the appeal on behalf of co-accused Mausam has filed a vakalatnama in Court on behalf of co-accused Ram Gopal which is taken on record.
2. Arguments have been heard.
3. We proceed to judgment.
4. Vide impugned judgment and order dated 22.5.2007, appellant Subhash has been convicted for the offence punishable under Section 302/34 IPC pertaining to the death of Vinod. The finding returned is that Subhash along with juvenile co-accused Khalid are the offenders and were the ones who used a knife each to inflict injuries on the person of the deceased. Appellants Subhash and Mausam have been held guilty of sharing the intention with the other two accused to cause injuries on the deceased and not death and thus the two have been convicted for the offence punishable under Section 326/34 IPC.
5. Vide order on sentence dated 1.6.2007, Subhash

has been sentenced to undergo imprisonment for life. Mausam and Ram Gopal have been sentenced to undergo imprisonment for a period of 10 years and have been directed to pay a fine in sum of Rs.50,000/-; in default of payment of fine have been directed to undergo SI for 1 year. It has been further directed that if the amount of fine is realized, Rs.40,000/- each shall be given to the legal heirs of deceased Vinod.

6. We note that Mausam and Ram Gopal are present in Court and they inform that they have deposited the fine.

7. In convicting the appellants, the learned Trial Judge has accepted the testimony of PW-1, PW-2, PW-3 and PW-13. We note that PW-1 is the father of the deceased. PW-2 is the brother of the deceased. PW-3 is the wife of the deceased and PW-13 is a relative of the deceased.

8. As per the aforementioned witnesses it all began when Pushpender PW-13 who is a nephew of Kunwar Pal PW-1, and had been staying in the house Kunwar Pal for about a week prior to 5.12.2003, left Kunwar Pal's house bearing No.A-257, Gali No.6, Mandoli Extension, Delhi to meet his uncle Jagdish who resided in Gali No.6. The date was 5.12.2003 and as deposed to by Kunwar Pal and Pushpender, the time was 4:00 PM.

9. As Pushpender was on his way to meet Jagdish he reached Veeru ki Bhatti where 4 persons including Subhash and Mausam accosted him and asked him to give them Rs.1,000/-. He hesitated. They persisted. He gave Rs.1,000/- and returned to complain to Kunwar Pal who along with Vinod went to Veeru ki Bhatti and met juvenile co-accused Khalid, appellants Mausam, Subhash and Gopal. He asked them why they extracted Rs.1,000/- from Pushpender. A verbal altercation ensued. Local people gathered. Peace was brokered. Kunwar Pal and Vinod returned to their house.

10. This is stage one of the incident and forms the backdrop of what happened at 9:30 PM.

11. It is urged by learned counsel for the appellants that so trivial is the incident which took place at 4:00 PM that it is difficult to believe that actuated out of malice or motivated by the same, the appellants and Khalid would go to the house of Kunwar Pal to commit the crime. It is alternatively urged that assuming the appellants and Khalid had some grievances pertaining to what may have been said to them by Kunwar Pal, the target would not be Vinod.

12. We do not agree with the said submission for the reason the accused may have gone back with a feeling of revenge and whosoever could be laid hands upon would

become the target of the assault.

13. Crime in Delhi is not showing any determinative pattern. Reasons and reasons, some of them must trivial, are being noticed by us in the commission of the crime. May be, the desire to show one's muscle or may be out of youth, unable to control one's feelings, people are resorting to crime. It assumes importance to note that the appellants were between 19 to 23 years when the offence was committed. Khalid was a juvenile i.e. less than 18 years. Want of adequate employment and want of adequate education and the city of Delhi being over-staffed is resulting in serious crime being committed over trivial issues.

14. Reverting back to the stage two of what happened on 5.12.2003, as consistently deposed to by PW-1, PW-2, PW-3 and PW-13, they were all present in the house along with Vinod when a knock on the door was heard at 9:30 PM. Vinod opened the door. Khalid, probably assisted by Subhash pounced upon Vinod and dragged him from the door of the house to the street where Mausam and Gopal joined and caught Vinod. Only Subhash and Khalid pulled out knives and inflicted stab injuries on the deceased. All ran away thereafter. 4 injuries proved fatal.

15. As deposed to by the 4 witnesses, they brought

Vinod inside the house and put him on a cot. A rescue vehicle i.e. a TSR was arranged for. Vinod was put in the TSR and was taken to GTB Hospital and as recorded on the MLC Ex.PW-17/A he was admitted at said hospital at 10:00 PM. It stands recorded that Vinod was brought to the hospital by his brother Kishan Kumar (PW-2) and one Nathu, who we note has not been examined as a witness by the prosecution.

16. As recorded on the MLC Ex.PW-17/A, Vinod was declared brought dead.

17. Information of the crime was received through two different sources at the police control room. The same was transmitted to PS Nand Nagri for the reason the place of the crime is House No.257, Gali No.6, Mandoli Extension i.e. the house where the deceased resided with his father, brother and wife. Entry at the police station pertaining to two relayed informations being received from the police control room, one after the other, stands entered in DD No.28, Ex.PW-8/A. It stands recorded that at 9:45 PM the police control room has informed that somebody has been stabbed at House No.257, Gali No.6, Mandoli Extension.

18. ASI Chet Ram PW-16 accompanied by Const.Jaiveer were entrusted with a copy of DD No.28 and the two proceeded to the spot i.e. House No.257, Gali No.6, Mandoli

Extension. But, before the two could reach the said place, SI Kailash PW-17 who was on patrol duty got information of the crime and he reached the spot a little earlier and thus ASI Chet Ram and Const.Jaiveer joined his company at the spot. Information was passed on to Insp.Gajender Singh PW-19, the SHO of the police station and even he proceeded to the spot. Thus, 4 police officers, ASI Chet Ram, Const.Jaiveer, SI Kailsah and Insp.Gajender reached the spot and learnt that Vinod had been removed to GTB Hospital.

19. Whereas Insp.Gajender and Const.Jaiveer remained at the spot, ASI Chet Ram and SI Kailash proceeded to GTB Hospital where they learnt that Vinod was declared brought dead. They obtained a copy of his MLC and met Kunwar Pal PW-1 at the hospital. As deposed to by SI Kailash and Kunwar Pal, Kunwar Pal's statement Ex.PW-1/A was recorded by SI Kailash who made an endorsement Ex.PW-17/B beneath the said statement and dispatched the same for FIR to be registered through ASI Chet Ram. As recorded on the endorsement Ex.PW-17/B the tehrir was dispatched from the hospital at 10:40 PM and by 11:00 PM vide DD No.21 A, the FIR was registered.

20. Unfortunately, as admitted by Insp.Gajender PW-19, nobody bothered to lift blood from the scene of the crime.

But, a photographer Const.Padam Singh PW-11 was summoned who took 4 photographs Ex.PW-11/1 to Ex.PW-11/4; negatives whereof are Ex.PW-11/5 to Ex.PW-11/8. The photographs show blood on the street as also on a cot inside the house as also on the floor beneath the cot.

21. As deposed to by PW-11 he was summoned to House No.257, Gali No.7, Mandoli Extension and took the photographs at the said spot. Thus, we have on record evidence that on the street outside the house and within the house, on the cot and on the floor of the house just under the cot, blood was to be seen.

22. Two knives have been claimed by the prosecution to have been recovered pursuant to the disclosure statements of Subhash and Khalid, both of which have been opined to be the possible weapon of offence.

23. Needless to state, the case of the prosecution hinges upon the testimony of PW-1, PW-2, PW-3 and PW-13, all of whom have deposed in sync and stated facts as noted in paras 14 and 15 above. PW-1 has in addition deposed to what happened at 4:00 PM the same day.

24. With reference to the testimony of the 4 witnesses learned counsel for the appellants had tried to urge that it is difficult to believe that all 4 were present when the crime took

place for the reason the natural conduct of the 4 would have been to save Vinod and rush him immediately to the hospital. As a limb of this argument it is urged that it is unnatural conduct that the 4 would bring Vinod inside the house and make him lie on the cot. It is urged that the normal conduct would be to rush the injured to a hospital.

25. Second contention urged is that the witnesses have not clearly deposed to in what sequence they walked behind Vinod when he was allegedly pulled out. With reference to the testimony of Kunwar Pal it is pointed out that as per him, after Vinod was pulled in the gali, Kunwar Pal followed. Thereafter Meena PW-3 followed and then Kishan PW-2. It is pointed out that Kishan PW-2 could not disclosed as to in what sequence the family members went out of their house when Vinod was pulled out. With reference to the testimony of Meena PW-3 it is pointed out that as per her, first her father-in-law, then she, followed by her brother-in-law Kishan went outside the house. As regards Pushpender it is urged that as per him first Kunwar Pal, thereafter he and then the others went out.

26. It is urged that Kunwar Pal has not taken the deceased to the hospital for the reason had it been so, in the MLC of Vinod his i.e. Kunwar Pal's name would have been recorded as the one who brought Vinod to the hospital.

27. None of the submissions have compelled us to take a view contrary to the one taken by the learned Trial Judge with reference to the testimony of PW-1, PW-2, PW-3 and PW-13.

28. The incident in question took place on 5.12.2003 and the witnesses of the prosecution deposed on various dates between 13.4.2005 to 25.10.2005. With the passage of time human memory gets blurred. A witness does not possess a video camera inside his brain which he switches on nor does he have with him a tape recorder in his mind, button whereof he presses to speak. Thus, narratives of past events by ordinary persons have to come along with the imperfect recollection which is the failing of every human being. Who followed whom, is most trivial and merely because the witnesses have given a different sequence in which the family members walked outside following Vinod, is an inconsequential fact vis-à-vis the alleged discrepant statements.

29. Qua their conduct, the witnesses have clearly stated that when Vinod was grievously injured, a rescue had to be arranged and pending that, Vinod was brought inside and made to lie on the cot. We have referred to the photographs of the spot which corroborate to the said version of the 4 witnesses of the prosecution. Thus, it is not that all stood as

by-standers. There is nothing unnatural to make an injured lie on the cot till a vehicle is arranged to remove him to the hospital.

30. Thus, notwithstanding the unfortunate serious lapse committed by the investigating officer in not picking blood samples or control earth from the scene of the crime we find that the credible version deposed to by the eye witnesses has more than offset the said lapse. We need not refer to the decisions where the exclusionary rule has been debated vis-à-vis the heavy price to be paid by society if criminals are allowed to be set free on account of a lapse in investigation. With reference to serious crimes, the view taken is that if there is credible evidence wherefrom conviction can be sustained, lapses by the prosecution during investigation have to be ignored. Only where the investigation has caused prejudice to the accused or has resulted in planting being done with impunity, the exclusionary rule has to be applied.

31. Now, the witnesses have deposed in unison that PW-2, the brother of the Vinod, as also Kunwar Pal his father, and some persons from the neighbourhood went to the hospital.

32. On the MLC of the deceased, it stands recorded that the persons who have brought the deceased to the hospital

are his brother Kishan Pal and a neighbour Nathu.

33. We have noted hereinabove that DD No.28, Ex.PW-8/A, has been recorded at 9:45 PM at the police station. The MLC records that the injured has been brought at the hospital at 10:00 PM.

34. So closed is the proximity of time of the crime and the victim being taken to the hospital that it lends assurance to Kishan Pal being with his brother.

35. PW-17 has stated that he recorded the statement Ex.PW-1/A of Kunwar Palk at the hospital. Kunwar Pal does not say so with clarity. But, the tehrir Ex.PW-17/B beneath the statement Ex.PW-1/A shows that the statement and the tehrir have been dispatched from GTB Hospital. Thus, in view of the documentary evidence it is apparent that Kunwar Pal was at the hospital. We note that Kunwar Pal has claimed to be present in the hospital.

36. At this stage we may notice that it has been brought to our notice, with reference to the cross-examination of Kishan Kumar PW-2, that he stated during cross examination: *'it is incorrect that I got admitted my brother in the hospital'*.

37. This is probably the 12th or 13th time where we have noticed evidence where the dispute vis-à-vis *'incorrect'* and

'correct' has been debated upon.

38. We have repeatedly highlighted and do so once again for the reason we find that the learned Trial Judges are obstinately continuing to record evidence using expressions like *'correct'* and *'incorrect'*. We have highlighted that where a witness denies a suggestion, it would be better to record that *'it is wrong..... (whatever may be the suggestion)'*.

39. If we peruse the testimony of Kishan Kumar, in his examination-in-chief, he has categorically stated that along with his father he removed his brother to GTB Hospital. Even during cross-examination, in the sentence prior to where the aforementioned sentence stands recorded, i.e. it is incorrect that I went to the hospital, he has said that police officers accompanied them to the hospital. Immediately after the aforementioned sentence being debated upon, he has said: *'it is incorrect that my father was not present in the hospital at the time of admission of Vinod'*. It is apparent that in the sentence in question there is either a typographic error or the witness did not correctly understand the negative import of the question put to him during cross-examination.

40. On sentence, the learned counsel for Subhash and Mausam draws our attention to the fact that the two were just beyond the age of minority and had turned the age of

majority. Mausam was around 19 years and Ram Gopal was 2 years older. Though major, the two lacked the maturity of an experienced man for the obvious reason the two had hardly any experience behind them. Learned counsel urges that Mausam and Ram Gopal have since got married. They have a wife each. They have been blessed with two children who are studying in school. Learned counsel draws our attention to the fact that nominal roll of Mausam and Ram Gopal does not show their prior involvement in any crime. Counsel urges that sending Mausam and Ram Gopal to jail would be not much punishment to them but to their wife and children. Their children would be on the street. Their wives would be likewise on the streets. It is pointed out that Mausam and Ram Gopal are petty hawkers who earn their daily bread and butter by hawking goods and with the fruits of their labour feeding their wives and children. In a nut shell, what is urged is that since Mausam and Ram Gopal have been held not to be sharing any common intention with Subhash and Khalid to murder the deceased and for said reason have been convicted for the offence punishable under Section 326 IPC, it would be appropriate to modify the sentence qua them by directing that the same stands reduced to the period already undergone.

41. We note that Mausam and Ram Gopal have

undergone an actual sentence of a little over 4 years and 8 months. They have earned some remissions.

42. Noting the arguments advanced by learned counsel for Mausam and Ram Gopal we are of the opinion that ends of justice would be met if their conviction is maintained but sentence reduced to the period already undergone. The imposition of fine is also to be maintained.

43. As regards Subhash we note that even Subhash was not of much matured age, but unfortunately for him, we cannot extend the benefit of directing his release on the sentence already undergone for the reason there is no scope for any argument that when two persons joined together in an assault and cause multiple stab injuries, 4 of which are serious, it can be said that their intention was something other than to murder the victim.

44. Thus, the conviction of Subhash for the offence of murder and the sentence for him to undergo imprisonment for life has to be maintained.

45. The three appeals stand disposed of by dismissing CrI.A.No.604/2007 filed by Subhash. CrI.A.No.421/2007 and CrI.A.No.450/2007 filed by Mausam and Ram Gopal are disposed of by maintaining their conviction but modifying the sentence imposed. The two are sentenced to undergo

imprisonment for the period they have already undergone.
The fine imposed on the two is maintained.

46. We modify the directions of the learned Trial Judge that only Rs.40,000/- would be paid to the kin of deceased Vinod. We direct that the entire fine realized to be paid over to the widow of Vinod i.e. Meena Devi PW-3.

47. In view of the sentence which stands imposed upon Mausam and Ram Gopal, noting that they are on bail and need not be taken into custody, we discharge the surety bond and bail bonds furnished by Mausam and Ram Gopal.

48. Taking further notice of the fact that Subhash is still in jail we direct that a copy of this order be sent to the Superintendent Central Jail Tihar to be made available to Subhash.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

March 08, 2010
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