

R-112

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

% Date of Decision: 10th March, 2010

+ **CRL. APPEAL NO.821/2007**

MUKESH Appellant
Through: Ms. Shraddha Bhargava, 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 the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (Oral)

1. The appeal has reached for hearing and we find that the Amicus Curiae appointed on behalf of the appellant namely Ms. Poornima Sethi has not appeared at the hearing.

2. Ms. Shraddha Bhargava Advocate on the panel of the Delhi High Court Legal Services Committee who is present in Court is accordingly appointed as the Amicus Curiae and with assistance of the learned Amicus Curiae and counsel for the State records have been perused.

3. Before noting submissions we place on record our

appreciation for learned Amicus Curiae who has read the testimony of PW-11 in Court and has very ably assisted us in pointing out facets of the evidence which have been ignored by the learned Trial Judge.

4. We fix the fee of learned counsel in sum of Rs.7,500/- to be paid by the Delhi High Court Legal Services Committee.

5. With reference to the testimony of Kailash PW-11 and holding that the same is credible; finding further incriminating evidence in the form of the knife Ex.P-1 which was stated to have been got recovered after the appellant was apprehended, which has been opined to be the possible weapon of offence, further evidence being blood being detected on the knife of the same group as that of the deceased, the learned Trial Judge has held that the prosecution has successfully established that the appellant murdered Mukesh and injured Kailash, hence committed an offence punishable under Section 302 IPC and 324 IPC.

6. The MLC Ex.PW-14/A shows that the deceased Mukesh was got admitted at Sanjay Gandhi Memorial Hospital by Kailash at 8:45 PM on 8.1.2004.

7. The statement Ex.PW-11/A of Mukesh has been recorded by SI Ravi Shankar PW-19 at the hospital and the

endorsement Ex.PW-19/A beneath the statement of Kailash shows that the statement and the endorsement was dispatched from the hospital at 11:10 PM.

8. The stated time of the crime is 7:15 PM. There is thus proximity of time and place evidencing that Kailash was present when Mukesh received a single stab wound and Kailash was also injured.

9. But, the question arises as to who committed the crime and whether Mukesh is a witness who has to be believed?

10. It may be noted at the outset that during cross-examination Kailash has admitted being an accused in a large number of FIRs. The number of FIRs in which Kailash was an accused has been brought on record through the testimony of HC Ashok Kumar DW-1 who filed a tabular chart Ex.DW-1/H which shows that Kailash is an accused in as many as 19 FIRs. The chart is an interesting reading for the reason it shows that Kailash at whose instance the FIR was registered is an accused in as many as 19 cases with the offences ranging from robbery, attempt to murder, drug peddling, Arms Act and the Goonda Act. Interestingly the instant crime relates to something which happened on 8.1.2004 and only 8 days prior thereto Kailash was released from prison on bail and within 8

days thereafter i.e. on 16.1.2004 became an accused for an offence of attempt to murder.

11. It is apparent that Kailash has his roots in the world of crime and hence his testimony has to be viewed with care and caution and only if it is found to be of such high level of credibility, can it be the foundation of a conviction without any corroboration.

12. As deposed to by Kailash on 8.1.2004 at around 7:15 PM he was present at Paschimpuri Chowk and his friend Rohtash contacted him over his mobile phone No.9810499072 and informed him that Mukesh (the accused) brother of Vijay, was harassing Rohtash and was man handling Rohtash. Accordingly, he i.e. Kailash reached House No.RZB-195, Nihar Vihar where Rohtash was staying. He took along with him one Mukesh son of Mam Chand.

13. Before further noting the testimony of Kailash we wish to make the reader of this decision aware that there is a reference to two persons by the name of Mukesh. The first is Mukesh the accused and the appellant. The other is the reference to Mukesh the stated friend of Kailash who went with Kailash when Kailash responded to the telephone call of Rohtash and was killed.

14. As per Kailash, when he reached house No.RZB-195

Nihar Vihar he found accused Mukesh in presence of Rohtash and he tried to persuade accused Mukesh not to quarrel with Rohtash. Accused Mukesh told him that Rohtash had borrowed Rs.200/- from brother of Mukesh and was not repaying the same. Accused Mukesh picked up a fight with Kailash and tried to hit Mukesh, the friend of Kailash. Kailash intervened to save his friend Mukesh and in the process received an injury on his right hand and the left cheek. Accused Mukesh inflicted a knife blow on the lower portion of the abdomen of Kailash's friend Mukesh who started bleeding profusely. Kailash and Rohtash took Mahesh to Sanjay Gandhi Memorial Hospital where police recorded his statement Ex.PW-11/A. Kailash further deposed that he joined in further investigation and when accused Mukesh was apprehended he made a disclosure statement Ex.PW-9/D and volunteered to get recovered the weapon of offence. He led the police to his house at Laxmi Chowk and from an almirah got recovered the knife Ex.P-1 which was seized vide memo Ex.PW-9/G. He also got recovered a pant Ex.P-2 which was seized vide memo Ex.PW-9/H.

15. On being cross-examined, Kailash admitted being an accused in a large number of FIRs and that he was released on bail a week prior. He admitted that the range of cases

against him pertained to offences under Arms Act, the Goonda Act, for gambling, for theft and robberies etc. and NDPS. On being cross-examined he had following to depose about the incident: *'I reached the room of incident at about 6:45 PM in the evening. Jamna Dass was not there in the room when I reached there. The room in incident is surrounded by the dwelling houses. No public person was there in the room. I saw outside the room Mukesh was holding the collar of Rohtash. There is an open ground immediately outside the room. I saw Mukesh holding collar of Rohtash in the gali and Mukesh was carrying Rohtash with him. I saw Rohtash was being dragged forcibly. At that time they were at a distance of about 20 to 25 ft. from the room.'* On being further cross examined he stated: *'When Mukesh i.e. accused left Rohtash the public person also left the spot and I was caught hold by him thereafter. There was a minor scuffle between me and the accused for about one and a half minute and thereafter I was set free by the accused. After my reaching the spot the quarrel continue for about half an hour at the spot but with me the dispute lasted for 10-15 minutes only.'* On being further cross-examined as to what steps he took to render comfort to his friend, Kailash deposed: *'I took off my shirt and try to stop the blood by wrapping the same around the injury. Mukesh*

i.e. deceased at that time was wearing shirt and with sleeves sweater'.

16. We find it strange and indeed something which is not to be missed, that Rohtash the person at whose instance Kailash responded and reached the house of Rohtash, the place where the crime took place, has not even been examined by the prosecution as a witness. We find it worthy of being noted that the shirt which Kailash claims to have wrapped around the waist of the deceased has not even been seized. The mobile phone on which Kailash claims having received a summons to rescue from Rohtash has not been brought before the Court as real evidence.

17. The manner in which Kailash has gone about describing the incident during cross-examination makes it highly suspect whether what is being spoken about by Kailash is worthy of any belief for the reason save and except a single stab wound on the person of the deceased we find no signs of any injury which show a scuffle. It became important to have examined Rohtash for as per Kailash the quarrel continued at the spot for about half an hour. As stated in his cross-examination accused Mukesh was not only holding Rohtash by the collar in the gali but was forcibly dragging Rohtash and if that be so, bruise and contusion wounds would have been on

the person of Rohtash.

18. Highlighting the fact that the place of the crime is the house of Rohtash whose involvement in the incident has surfaced with considerable degree of substantial measure, it indeed is a serious issue of Rohtash not being examined as a witness.

19. Considering the character of the person of Kailash, who is an accused in as many as 19 crimes, further noting the aforementioned features in the testimony of Kailash, we are of the opinion that it would be unsafe in the instant case, as the facts have emerged, to sustain the conviction of the appellant on the uncorroborated testimony of Kailash.

20. As regards the recovery of the knife at the instance of the appellant as also that the pant got recovered by him was stained with human blood, group whereof could not be determined, suffice would it be to state that as held in the decisions reported as JT 2008 (1) SC 191 Mani Vs. State of Tamilnadu, 1999 CrL LJ 265 Deva Singh Vs. State of Rajasthan, AIR 1994 SC 110 Surjit Singh & Anr. Vs. State of Punjab, 1977 (9) UJ 226 (SC) Narsinhbhai Haribhai Prajapati Etc. Vs. Chhatrasinh & Ors. and AIR 1963 SC 1113 Prabhu Vs. State of UP, recovery of ordinary object is always treated as a very weak piece of evidence. Unlike firearms, knives etc. are only

capable of being opined as the possible weapon of offence and not the only weapon of offence.

21. We give the benefit of doubt to the appellant. The appeal is allowed. Impugned judgment and order dated 5.10.2007 is set aside.

22. The appellant is acquitted of the charges framed against him.

23. Since the appellant is in jail we direct that a copy of this decision be sent to the Superintendent Central Jail Tihar with a direction that if not required in any other case, the appellant be set free forthwith.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

March 10, 2010
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