

* **HIGH COURT OF DELHI : NEW DELHI**

+ **Crl. A. 254/2002 & Crl. M.A. 5282/2010**

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Decided on: May 24, 2011

Arun Kumar @ Tinku & Another Petitioners

Through: Mr. Uday Raj Singh, Adv.

versus

State

..... Respondent

Through: Mr. Manoj Ohri, APP for
the State.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | No. |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in the Digest? | Yes |

MUKTA GUPTA, J. (ORAL)

1. By the present appeal the Appellants lay a challenge to the judgment dated 8th March, 2002 convicting them for the offences punishable under Section 323/506 (II) IPC and order on sentence dated 11th March, 2002 directing them to undergo rigorous imprisonment for 1

year and fine of ₹ 1000/- for offence under Section 323 IPC and one year rigorous imprisonment with a fine of ₹ 1000/- for offence under Section 506 (II) IPC each and in default of payment of fine to further undergo R.I. for two months.

2. Briefly, the prosecution case is that four persons namely Sohan Pal @ Sonu, Rajesh Kumar, Arun Kumar @ Rinku & Amit Gill and two juveniles all residents of MMTC Colony, New Delhi, all aged about 18/20 years, attempted to murder one boy named Anil in furtherance of their common intention on 24th May, 1999 at around 6:25 PM. FIR No. 315/99 was registered at PS Malviya Nagar on the statement of PW3 Dalip, the brother of the deceased Anil. The complainant stated that the deceased Anil had an altercation with Arvind, Rinku @ Thakur, Rohit @ Haddi, Amit @ Sonu over an issue of a girl. On 23rd May, 1999 at around 10:30 PM Rajesh & Sohan Pal arrived at their house and called Anil and asked him to come along as the matter which had taken place in the day time was to be discussed with Arvind, Rinku, Rohit & Anil in the Nursery Park MMTC. He accompanied his brother to the park where Arvind, Rinku, Rohit & Amit were present. Arvind told his brother Anil that he was showing himself

to be a Badmash and all the four boys then started beating Anil by fist and kick blows and when he tried to save his brother Rohit @ Haddy pushed him and he fell down. Arvind then picked a stone and hit it on the head of his brother Anil, who fell down on the ground and became unconscious. Thereafter Arvind, Rinku, Rohit and Amit threatened him that if he disclosed about the incident to anybody they would kill him & they went away. PW3 Dalip along with Rajesh brought the deceased to the house of Rajesh and due to fear did not disclose about the incident to anyone and went back to his house. After some time Vishal i.e. elder brother of Rajesh informed the father of the deceased Anil that he had sustained injuries by falling from a staircase, whereupon the father of deceased rushed to the house of Rajesh and removed Anil to the Hospital. On the date of lodging of the report i.e. 24th May, 1999 the complainant in the afternoon came to know about the demise of his brother and then he narrated about the incident to his father. An inquiry was already in action regarding this incident as on 24th May 1999 at about 2.15 AM, DD No. 26A was received wherein Constable Sunil Kumar posted at Safdarjung Hospital had telephonically informed that one Ashok Kumar mistaken for Anil Kumar had been admitted in the hospital having fallen from stairs. This DD was marked to Sub-

Inspector Mahinder Singh for enquiry, but only after the death of the victim the Investigating Officer recorded the statement of PW3 Dalip and hence a case under Sections 302/201/506/34 IPC was registered against the accused persons. The Investigating Officer visited the place of occurrence and at the instance of Arvind, Rinku @ Thakur recovered a concrete accumulated stone from MMTC Park and seized the same vide Ex.PW3/A, clothes of the deceased vide seizure memo Ex. PW13/E. As per the opinion of the doctor, the death was due to sudden cardio respiratory arrest. Charge sheet was filed against all the accused except the juveniles, who were sent to the juvenile Court. After recording the statements of prosecution witnesses and examining the accused persons under Section 313 Cr.P.C., the learned trial Court acquitted Rajesh and Sohan Pal and convicted Amit and Arun and sentenced them as mentioned above.

3. Learned counsel for the Appellants states that Appellant Arun Kumar i.e. Appellant No.1 has expired in a road accident on the 8th April, 2006, hence the present appeal stands abated qua him and thus argued only for Appellant Amit. It is stated that the testimony of Shri Dalip PW3 is not reliable as he is an interested witness, being the real brother of the deceased. His testimony is also full of contradictions.

There is an unexplained delay in lodging of FIR and the same has been ignored by the learned trial Judge. The incident took place on 23rd May, 1999 at about 10:30 P.M. and the matter was reported on the next day. Also the conduct of the brother i.e. Dalip whose brother was injured is highly suspicious as he did not narrate the incident to his family and only after the death of his brother he disclosed about the incident. As regards the place of incident PW3 in his testimony stated that the incident took place at MMTC Park whereas in his cross-examination in reply to the specific question put to this witness that the incident took place at either Sarvodya Park or MMTC Park, he answered that the incident took place at Sarvodya Park. Hence, his presence at the spot is highly doubtful as he has contradicted himself about the place of incident. The prosecution has also not proved on record the post-mortem report, hence, any specific opinion about the death of the deceased could not be formed by the Court. It is submitted that appellant Amit was a juvenile at the time of commission of offence and thus he is entitled to the benefit under Juvenile Justice (Care & Protection of Children) Act, 2000. Thus, the Appellant be acquitted of the charges framed against him as prosecution has not been able to prove its case beyond reasonable doubt.

4. Per contra, learned APP states that there is no error in the impugned judgment in convicting the Appellants as there is sufficient evidence placed on record to show that the Appellants have committed the crime in furtherance of their common intention. The statement of the brother PW3 is reliable and cogent as he accompanied the deceased to the place of incident and has clearly disclosed about the events. He has specifically stated that the accused threatened him not to disclose about the incident to anyone and so he did not disclose the incident. Hence, the testimony of this witness cannot be thrown out on the ground that he is an interested witness and hence not reliable. It is stated that the death summary Ex.PW2/A has been proved by PW2 Dr. R Chaudhary wherein it has been recorded that the deceased suffered from left temporo-parietal compound fracture with large fronto parieto-temporal EDH and that the patient suddenly went into cardio-respiratory arrest. The testimony of PW6 Ram Kishan father of deceased clearly shows that the accused persons were the one who had called his son Anil on 23rd May 1999 and PW3 also went along with him. Hence, the brother PW3 was present at the spot of occurrence and his testimony should be relied. There is no merit in the present appeal and the same is liable to be dismissed.

5. I have heard learned counsels for the parties and perused the record. It is submitted that Arun Kumar i.e. Appellant No.1 has died in a road accident on 8th April, 2006 and a death report in this regard has been placed on record. Thus, the appeal qua the Appellant No.1 stands abated.

6. As against Appellant No.2, Amit Gill PW3, the brother of deceased Anil has deposed in his testimony that the Appellant along with Arvind, Rohit & Arun was present at the MMTC Nursing Park and when the quarrel took place between the deceased and the accused persons they all started beating Anil with fists and blows. Thereafter accused Arvind picked up a stone and hit his brother as a result of which he fell down and became unconscious. This witness has specifically identified the Appellant. It may be noted that this witness at the time of incident was threatened by the assailants that if he deposed about the incident to anyone he would also be killed. Being a child it was but natural that he was so overtaken by the incident that he got scared and due to fear he did not disclose about the incident to anybody. Further from the testimony of PW6 Ram Krishan, the father of deceased it is clear that PW3 followed Rajesh & Sohan who had come to their house to call Anil which corroborates the version of PW3 that he accompanied

his brother to the MMTC park. As regards the place of occurrence PW3 in his testimony stated that in his presence the accused persons told his brother that he would go to MMTC Nursery Park to talk about the quarrel which had taken place during the day. It is only in his cross-examination that he has deposed that MMTC park is surrounded by Sarvodaya Colony, MMTC Colony, Archi Colony & Shivalik Colony and further that the incident took place at Sarvodaya Park which fact has been highlighted by the learned Counsel for Appellant contending that this witness is not reliable and was not present at the spot of occurrence. This part of the testimony of PW3 gets clarified by the testimony of PW13 S.I. Mahender Singh who has specified that MMTC Park is situated in Sarvodaya Enclave. Thus it shows that the place of incident was clearly mentioned by PW3 in his statement. It appears that the young witness got confused during cross-examination about the surrounding area, whereas in his statement before the Court and that given to the Police he has clearly mentioned about the place.

7. By the testimony of PW15 Dr. Alexander Khaka, the cause of death has been proved wherein he has deposed that after going through the MLC of deceased Anil Ex.PW7/A and death summary Ex.PW2/A it is opined that the cause of death was due to cardio-cerebral injuries

caused by blunt force impact on the head and the injuries are sufficient to cause death in ordinary course of nature. It is also opined that such injuries can be caused by a piece of stone. On being cross-examined this witness has clarified that it is unlikely that a person could receive the said injuries by falling from stairs. Hence, the testimony of PW3 that his brother was hit by a stone is duly corroborated by the medical evidence. The prosecution has established its case beyond reasonable doubt against the Appellant as his presence at the place of incident and involvement in the commission of crime is clearly established by the cogent and reliable testimony of PW3, the brother of deceased. I find no illegality in the impugned judgment convicting the Appellant No.2 passed by Learned Trial Court.

8. Learned counsel for the Appellant Amit had filed an application under Section 7(a) of Juvenile Justice Act before this Court on 7th December, 2010 praying for the release of the Appellant on probation being a juvenile on the date of incident. A report in this regard has been received from the learned Trial Court returning a finding that the Appellant No.2 Amit Gill @ Sonu was 17 years, 10 months and 22 days on the date of incident. Hon'ble Supreme Court in *Hari Ram Vs. State of Rajasthan (2009) 13 SCC 211* has held that a

juvenile, who had not completed 18 years on the date of commission of the offence is entitled to benefit of the Juvenile Justice (Care & Protection of Children) Act, 2000.

9. The issue thus arises as to how the benefit of juvenility can be extended to the Appellant in a case where the offences charged have been proved beyond reasonable doubt by the Prosecution. The Hon'ble Supreme Court in *Bhoop Ram vs. State of U.P.*, AIR 1986 SC 1329 held:

“7. On a consideration of the matter, we are of the opinion that the appellant could not have completed 16 years of age on 3-10-1975 when the occurrence took place and as such he ought to have been treated as a "child" within the meaning of Section 2(4) of the U.P. Children Act 1951 and dealt with under Section 29 of the Act. We are persuaded to take this view because of three factors. The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column 'date of birth'. There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars. The Sessions Judge has failed to notice this aspect of the matter and appears to have been carried away by the opinion of the Chief Medical Officer that the appellant appeared to be about 30 years of age as on 30-4-1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that it is not unusual for parents to understate the age of their children by one or two years at the time of their admission in schools for benefits to the children in their future years. The second factor is that the Sessions Judge has failed to bear in mind that even the Trial Judge had thought it fit to

award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12-9-1977 on the ground the appellant was a boy of 17 years of age. The observation of the Trial would lend credence to the appellant's case that he was less than 10 years of age on 3-10-1975 when the offences were committed. The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30-4-1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date of the offences were committed. It therefore follows that the appellant should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various counts.

8. Since the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for being detained there. In a somewhat similar situation, this Court held in *Jayendra v. State of U.P.* 1982 CriLJ 1000 that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed in so far as the sentence imposed upon the appellant are quashed.

10. In view of the fact that the Appellant No.2 was a juvenile at the time of the commission of offence and the said benefit has to be extended to him, while maintaining the conviction of the Appellant No.2, the order on sentence is set aside. The appeal and the application are disposed of accordingly. The Appellant No.2 is in custody. The Superintendent, Tihar Jail is directed to release the Appellant No.2 forthwith, if not required in another case.

MUKTA GUPTA, J

May 24, 2011

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