

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Crl. A. Nos. 737/2000 & 9/2001**

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Reserved on: 13th December, 2010
Decided on : 28th February, 2011

Crl. A. 9/2001

ASHOK KUMAR Appellant
Through: Mr. N.S. Dalal, Advocate
Versus
STATE Respondents
Through: Mr. Pawan K. Bahl, APP

Crl. A. 737/2000

RAMESH KUMAR Appellant
Through: Mr. N.S. Dalal, Advocate
versus
STATE Respondent
Through: Mr. Pawan K. Bahl, APP

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Not necessary
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MUKTA GUPTA, J.

1. By the present Appeals a challenge is laid to the judgment of conviction passed by the Addl. Sessions Judge convicting the Appellants for offences

punishable under Sections 304/34 IPC and sentence of Rigorous Imprisonment for a period of five years.

2. The case of the prosecution in nutshell is that on 16th August, 1990 two persons namely Ramesh and Ashok who were drivers of two different trucks bearing no. DIG 6572 and HR-13-0376 respectively, reached near check-post at Badarpur and parked their respective trucks near the check post. At about 8 a.m. they ordered tea to one Malkhan Singh who used to run a kiosk near the check post. Malkhan Singh prepared the tea and supplied to them. However, both of them did not like the tea and subsequently there was exchange of heated arguments between the Appellants and Malkhan Singh. On this, Ramesh caught hold of both his hands and Ashok pressed his throat with his hands and he died on the spot. Malkhan Singh was taken to Holy Family Hospital, where he was declared brought dead. Both the accused persons were apprehended on the spot by Constable Jasbir Singh PW2 and other persons. On the statement of one Kaptan Singh Ex.PW16/1, FIR No. 240/90 Ex.PW13/1 under Section 304/34 IPC was registered at P.S. Badarpur. On completion of investigation, charge-sheet was filed. After recording of prosecution evidence and statement of the Appellants under Section 313 Cr. P.C., both the accused were convicted as above.

3. Learned counsel for the Appellants contends that out of 16 prosecution witnesses examined PW1 Asha Devi, PW2 Constable Jasbir Singh, PW3 Kalyan Singh and PW10 Mahesh claim to be eye-witnesses of the incident. Out of the four alleged eye-witnesses, the presence of PW1 Asha Devi and PW10 Mahesh who claim to be present on the spot at the time occurrence, has been held to be doubtful by the Ld. Trial Court and their testimonies have been excluded as there are material contradictions and inconsistencies in the same. Presence of PW1 Asha Devi is doubtful as PW2 Const. Jasbir Singh has deposed that when he along with Kaptan Singh reached at the spot where Malkhan Singh was lying unconscious, Asha Devi came later on i.e. after about 5-10 minutes and public persons separated Malkhan Singh from accused persons. However, PW1 Asha Devi deposed that no one else was present at the time of occurrence except PW2 Constable Jasbir and PW10 Mahesh. As per the testimony of PW3 Kalyan Singh who was working in the Melrose Bread Company (factory) near the tea stall of Malkhan Singh, when he reached at the spot PW1 Asha Devi was present there. PW1 Asha Devi in her testimony had stated that when Malkhan Singh was in the clutches of accused persons, she got Malkhan Singh released from them and she took him to the Holy Family Hospital. Learned counsel contends that it seems highly improbable that PW1 took the truck to the hospital. On being recalled for

cross-examination PW1 Asha Devi contradicted her own statement by deposing that she along with PW10 Mahesh took the deceased to the hospital and that it was incorrect to suggest that accused Ashok had throttled the deceased. On the contrary, PW10 Mahesh, brother of the deceased in his statement states that many persons got Malkhan Singh released and he along with PW3 Kaptan Singh and PW1 Asha Devi took Malkhan Singh to the Holy Family Hospital. PW10 Mahesh, brother of deceased in his cross-examination has deposed that when he reached at the place of occurrence Asha Devi was not present there and he called Asha Devi from her hotel. Mahesh PW10, who is the brother of the deceased in his statement, has nowhere stated that he got Malkhan Singh released from the clutches of the accused and this conduct of PW10 is highly unnatural being brother of the deceased, and thus it shows that he was not present at the time of incident. Further Kaptan Singh, uncle of the deceased, on whose statement FIR was registered, died during the course of trial, hence his statement could not be recorded. Thus, the prosecution has failed to prove the fact as to who got released Malkhan Singh from the clutches of accused persons and thus presence of the PW1 and PW10 is highly doubtful as there are material improvements and inconsistencies in their statements.

4. The next contention of the learned counsel for the Appellant is that as per the statements of the alleged eyewitnesses, a crowd of about 50-60 persons gathered at the spot when the quarrel took place, however, no one from the crowd has been examined as witness. As per the testimonies of PW1 Asha Devi, PW2 Constable Jasbir Singh, PW3 Shri Kalyan Singh, PW10 Mahesh, accused Ramesh caught hold of both the hands of the deceased and accused Ashok pressed his throat. Thus he died due to strangulation. However, as per the post-mortem report Ex.PW8/A, PW8 Dr. G.K. Chaubey who conducted the post mortem of the deceased opined that there was no external or internal injuries found on the person of the deceased and the cause of death was opined to be “vaso-vagal shock”. PW8 in his cross-examination has deposed that vaso-vagal shock can result because of extremes of emotion, fear and due to pressure over sensitive areas. He has further deposed that vaso-vagal shock is due to stimulation of vagal nerves which causes cardiac arrest. Thus, in view of the post-mortem report, the case of the prosecution is without any merit as there is inconsistency between the medical evidence and the alleged eye witness account. The learned Trial Court has failed to appreciate that there was no external or internal injury on the person of the deceased proving that the accused persons had not throttled the neck of the

deceased. No marks of manual strangulation were noticed on the neck of the deceased by the doctor while conducting the post mortem.

5. Learned counsel further contended that as per the testimony of PW1 Asha Devi and PW3 Kalyan Singh, employed at Melrose Bread Company there were three drivers for whom the deceased had prepared and supplied tea. However, identity of third person is not known and no investigation has been conducted by the police in this regard. Even as per the version of PW4 Raj Pal, the owner of the truck bearing number DIG 6572, on the day of incident there were two drivers on the said truck i.e. one being the accused Ramesh and other was Ajit Kumar. But the prosecution has not recorded any statement of the said Ajit Kumar which was essential for a fair investigation as it could have thrown light on the facts of the case. For the non-examination of such a material witness, an adverse inference should be drawn against the prosecution.

6. Learned counsel for the Appellants states that immediately after the incident crime team was summoned at the spot for lifting chance prints. However, as per the report Ex.PW6/A no chance prints were found or developed at the spot. It is urged that as per testimony of PW16 Inspector O.P. Swami, the Investigation Officer on the date of incident the then SHO, PS Badarpur, at about 9.00 a.m. on receipt of the information about the incident

vide DD No. 4A when he was leaving for the place of incident with his team, PW2, PW3, along with ASI Jagdish Chander and Kaptan Singh brought both the accused persons to the police station. Thereafter, he recorded the statement of Kaptan Singh and along with accused persons went to the spot, and seized both the trucks present at the spot at 10:45 a.m. However, as per testimony of other PWs both the trucks were seized at 8:00 a.m. Hence, the version of PW 16 cannot be relied upon. It is also contended that it is not natural and cannot be accepted that out a crowd of 50-60 persons, nobody rescued or reacted when the deceased Malkhan Singh was being throttled by the accused persons. Thus the prosecution has failed to prove its case beyond reasonable doubt and hence the Appellants be acquitted.

7. Learned APP on the other hand contends that, late Kaptan Singh was the Complainant on whose statement FIR at the Police Station Badarpur vide Ex.PW16/1 was recorded. He was the eyewitness of this case and his presence at the place of occurrence has not been denied by any of the prosecution witnesses. Though, there are minor contradictions in the testimony of PW1, PW2, PW3 and PW10 however, their evidence cannot be discarded on the basis of such minor contradictions. As per the statement of PW3 Kalyan Singh an eyewitness and employed at Melrose Bread Company, on hearing about a quarrel, when he reached at the spot he saw accused Ramesh holding hands of

Malkhan Singh and accused Ashok was pressing his throat. In the cross-examination by counsel for Appellants no suggestion was given to this witness that the Appellants were not present at the spot. The presence of this witness at the spot and witnessing the incident cannot be doubted and the same is reliable.

8. Learned APP next contended that as per the post-mortem report prepared by PW8 Dr. G.K. Chaubey, the deceased died due to vaso-vagal shock. PW8 in his cross-examination has further stated that vaso-vagal shock can be a result of extremes of emotion, fear and due to a pressure over sensitive areas. Throat is very sensitive part of the body and the deceased was strangled by pressing the throat by the Appellants. Thus, the contention of the learned counsel for the Appellants that there were no external or internal injury on the person of the deceased has no merit and is liable to be ignored. The Appellants have not disputed their presence at the spot and no suggestion has been given to PW10 Mahesh who has also deposed about the role of the each of the two accused. A scuffle took place at the tea stall is not disputed. PW2, PW3 and PW10 are natural witnesses who have proved the sequence of events. Minor variations or discrepancies in their statements will not be fatal to the prosecution case. The prosecution has thus proved its case beyond reasonable doubt against the Appellants.

9. I have heard learned counsel for the parties and perused the record. As far as the statement of PW1 Smt. Asha Devi is concerned, I am of the opinion that her statement is not trustworthy. All that has been deposed by her in her examination-in-chief, is an improvement and she has been duly confronted with her earlier statement recorded under Section 161 Cr. P.C. Ex. PW1/DA. The improvement is to the extent that as per the statement to the police, she is not an eye-witness and had reached the spot only after the deceased Malkhan Singh lay unconscious. Thus, the alleged offence had already been committed by the Appellants when PW1 reached at the scene of occurrence. However, the testimony of PW10 Mahesh, the brother of the deceased, PW2 Constable Jasbir Singh, an independent witness, who was posted at the check post, Badarpur at the relevant time and PW3 Kalyan Singh employed at Melrose Bread Company factory near the tea stall of Malkhan Singh clearly proves the case of the prosecution. As per PW10, deceased Malkhan Singh had taken the tea for accused Ashok and Ramesh both the Appellants who were standing near their respective trucks. After consuming the tea, when the deceased demanded money from them they said "*Teri Chai Me Na Patti Hai Na Mitha Hai Tujhe Maja Chakhate Hai: Paise Nahin Denge*". In the meantime, accused Ramesh caught hold of the hands of his brother and accused Ashok strangled his throat. On Malkhan Singh making a noise, several persons

collected there which included PW2 Constable Jasbir Singh, PW3 Kalyan Singh etc. Since, PW10 was at the spot, PW2 and PW3 were present at a distance, he has given the details which naturally could not have been given by PW2 and PW3 who watched the incident from a distance and rushed to the spot.

10. I do not find any merit in the contention of learned counsel for the Appellants that though the crowd of 50-60 persons had collected, however, none of them was cited as a witness. The prosecution has cited two natural and public witnesses who have witnessed the occurrence i.e. PW2 and PW3. It is common knowledge that people gather to watch a scuffle or fight but most of those who witness the incident in the crowd immediately leave the place after the incident or they may have actually not witnessed the incident and would have come after the incident, thus cannot depose about the incident. Thus, the prosecution rightly did not examine or cite them as eye-witnesses. As per the testimony of PW8 Dr. G.K. Chaubey who conducted the post-mortem it is opined that the cause of death was “Vaso-Vagal Shock” and vaso-vagal shock can result because of extremes of emotion, fear and due to a pressure over sensitive areas. It is further deposed that vaso-vagal shock is due to stimulation of vagal nerves which causes cardiac arrest. In the present case, the throat is an area which encompasses the air passage and any constriction

thereon can result in a fatal injury. Medical jurisprudence guides us that vagal nerves are present and pass through the neck and in the present case the neck of the deceased was pressed, which resulted in the pressing of vagal nerves and proved to be the cause of death of the deceased Malkhan Singh. In *The Essentials of Forensic Medicine and Toxicology* by Dr. K.S. Narayan Reddy and *Medy's Medical Jurisprudence and Toxicology* it is noted that “a blow on the front of the neck may cause unconsciousness or even death due to vagal inhibition.” Thus the stimulation of the vagal nerve is directly relatable to the act of the Appellants in pressing the neck in furtherance of their common intention. In *Taylor's Principles and Practice of Medical Jurisprudence*, it is noted:

“The larynx is a cartilaginous structure which becomes progressively calcified with age. It is generously supplied with sensitive nerve endings, and excessive stimulation of some of the vagal nerve endings may result in sudden cardiac arrest from ‘vagal inhibition’.

Blow to the front of the neck may cause instant death when directed against the larynx. Special units during hostilities are trained to strike enemy personnel across the larynx with the side of their hand, causing instant and silent death.”

Thus, the testimony of eyewitnesses who have deposed about the said act of manual strangulation stands corroborated by the evidence of the doctor who conducted the post-mortem.

11. I also do not find any merit in the contention of the learned counsel for the Appellant that the third person for whom the third cup of tea was taken has not been examined and thus in the absence of examination of that unknown person, the prosecution case becomes doubtful. Taking of three cups of tea would normally be meant for three person but the witnesses, that is, PW3 and PW10 have stated that three cups were taken for the drivers. PW3 in his examination-in-chief has deposed that when he came to the stall and told Malkhan to prepare tea for him, he told him that he was going to deliver three glasses of tea to the drivers. PW10 also deposed on similar lines that on the date of incident Malkhan Singh had taken three glasses of tea for accused Ramesh Kumar and Ashok Kumar. Nothing has been stated by the witnesses about the presence of any other person with the two accused person at the spot. Thus the contention of learned counsel that there were three cups recovered from the spot which shows the presence of some other person at the sport is liable to be dismissed. Assuming, in view of the statement of PW4 Rajpal that he had employed two drivers on his truck on the date of incident and the other driver i.e. Ajit Singh has not been examined, the same would not be fatal to the prosecution case. From the testimony of the witnesses and the complaint Ex.PW16/1 it is clear that there was no other person present with accused persons and if there was something contrary the Appellants could

have proved by bringing the said witness in defence. As stated above, the prosecution has already examined two independent witnesses besides the brother of the deceased who have given the entire sequence of the incident and which clearly proves the case of the prosecution. In this case the complainant Kaptan Singh uncle of the deceased had expired before he could be examined in the Court.

12. The contention of the learned counsel for the Appellant that the time of seizure of the two trucks casts a doubt on the prosecution version does not demerit the prosecution case as the witnesses have consistently deposed about the presence of the two trucks and Appellants have also not disputed the seizure of the trucks on that date. In their statements under Section 313 CrPC they have admitted the seizure of the trucks but have stated that the trucks were falsely taken into possession. Moreover, PW2, Constable Jasbir Singh has deposed that both the trucks were seized vide seizure memo Ex.PW2/B and Ex.PW2/C. PW16 Inspector O.P. Swami, SHO PS Badarpur who had seized the two trucks has also deposed only about the factum of seizure of trucks and they being parked near the place of occurrence. Nothing on the timing of the seizure has been deposed or put as a suggestion to the witnesses.

13. I also do not find any merit in the contention of the learned counsel that there is contradiction as to who took the deceased to the hospital and thus the

prosecution case should be discarded on that count. Though the testimony of PW1 Asha Devi is not believable on the factum of her being an eye-witness to the incident but in her testimony before the Court she had deposed that she and Mahesh PW10 had removed deceased Malkhan Singh to Holy Family Hospital in Truck No. DBL 6638, where the Doctor who examined Malkhan Singh declared him brought dead. PW10 Mahesh, the brother of deceased has also deposed that he along with Kaptan Singh and PW1 Asha Devi removed the deceased Malkhan Singh to Holy Family Hospital, PW2 Constable Jasbir Singh had deposed that he does not recollect as to who took deceased to hospital. This deposition of PW2 has been pointed out as a material discrepancy by the learned counsel for the Appellant. Such minor discrepancies and variations in the testimony of the witnesses which do not go to the root of the matter, the entire prosecution case which is otherwise trustworthy cannot be discredited.

14. Ordinarily it so happens that a witness is overtaken by the events. The witness could not have anticipated the occurrence of the event which most often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb all the details. The power of observation differs from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it

might go unnoticed by another. By and large people cannot accurately recall a conversation and reproduce the exact and the same specific words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

15. From the acts of the Appellants i.e. Ramesh Kumar holding the hands of the deceased thus making him defenceless and Ashok Kumar throttling the neck, the intention to commit the injury that is likely to cause death is clearly attributable.

16. For the reasons aforesaid, I find no merit in the present appeals and the same are accordingly dismissed. The Appellants are on bail. Their bail bonds and surety bonds are cancelled. The Appellants be taken into custody to undergo the remaining sentence.

(MUKTA GUPTA)
JUDGE

FEBRUARY 28, 2011
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