

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

Date of Hearing and Decision: 7th July, 2011

+ **CRL. A. 202/2011**

LALIT @ PRADEEP ... APPELLANT
Through: Ms. Anu Narula, Advocate.

Versus

STATE ... RESPONDENT
Through: MR. Lovkesh Sawhney, APP for the State.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Order? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported in the Digest? | Yes |

J U D G M E N T

G.P. MITTAL, J.

1. The Appellant impugns the judgment dated 26.10.2010 and order on sentence dated 27.10.2010 (passed in Sessions Case No.77/2007, FIR No.473/2006, Police Station Desh Bandhu Gupta Road) whereby he was convicted under Section 302 Indian Penal Code (IPC) and was sentenced to undergo imprisonment for life and to pay a fine of ₹ 5,000/-. In default of payment of fine, the Appellant was sentenced to undergo RI for six months.
2. PW-1 Santosh Kumar Pandey is the sole eye witness in the case. The FIR was recorded on the basis of his statement Ex.PW-1/A. According to the prosecution version, the incident took place on 13.11.2006 at about 11:30 P.M. when PW-1 Santosh Kumar Pandey was closing the *dhaba*. The facts of the case can be extracted from the impugned judgment as under:-

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3..... when he was closing down the Dhaba at about 11.30 PM
on 13.11.2006, along with his colleagues, he saw two young

persons noisily fighting with each other in front of the Dhaba, out of whom one person was wearing a red coloured shirt and was of medium build and physique with clear complexion which person was telling the other not to annoy him and while saying so stabbed the other person with a knife. According to the said statement (Ex.PW 1/A) of PW-1, the person suffered the stab injury came and fell down in front of the Dhaba and started bleeding. PW-1 stated that he had first tried to inform the police on phone at no.100 but since he could not contact, he had rushed to the police station to give the information on which the police had come and taken the injured person to the hospital where he had been declared brought dead. The SHO, PW-17 made endorsement Ex.PW 17/A and got FIR (Ex.PW 11/B) registered thereupon.....

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12. *It appears that the deceased was involved in petty crimes, mostly thefts. It is alleged that accused also had a criminal record and as a consequence of which he has remained in jail on several occasions. The prosecution case alleges that Padam Thapa (PW-3), cousin of the deceased informed the investigating officer (I.O) that the deceased had been released on jail on 1.11.2006, two days after which he had met him and requested for a rented accommodation to be arranged for him and had further disclosed that he and the accused would live together in the said rented accommodation. According to information given by PW-3 Padam Thapa, the deceased had told him that he had met the accused in jail and further that he (PW-3) had arranged accommodation in Sidhipura as requested by the deceased.*

13. *The prosecution case is that on the basis of information given by PW-3 Padam Thapa and on some secret information, search was launched for the accused. He was eventually arrested on 25.11.2006 at 9 PM from in front of Kothi No.64, Arihant Nagar, Punjabi Bagh, Delhi vide arrest memo (Ex. PW 6/E) after personal search vide memo (Ex.PW 6/F).*

14. *The prosecution claims that after the arrest, the accused during interrogation made a disclosure statement (Ex.PW 6/G) and thus pointed out the place of occurrence vide memo (Ex.PW 6/I). It is alleged that pursuant to disclosure and at the instance of accused, a knife was recovered from an open space in the grass near tree which knife was allegedly described by accused, as the weapon of offence used in the crime. The knife, on recovery, was found to be not having any chance print. The place of recovery of knife was subjected to photography through Ct. Ramesh (PW-10). Sketch (Ex.PW6/J) of the knife was prepared and, thereafter, it was kept in a parcel and sealed with seal of SHO and then seized vide formal seizure memo (Ex.PW 6/K).*

15. During investigation, IO applied for test identification parade (TIP) of the accused. These proceedings (Ex.PW14/A) are stated to have been held under the supervision of Sh. Sanjeev Kumar Malhotra, Metropolitan Magistrate (PW-14) on 20.12.2006, in the course of which PW-1 Santosh Kumar Pandey, identified the accused as the assailant in the crime in question.

16. It is the case of prosecution that knife recovered at the instance of the accused was shown to autopsy doctor who gave opinion (Ex.PW 19/B) to the effect that the four external injuries with corresponding internal injuries mentioned in post-mortem report were possible with the said weapon.”

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3. In order to prove its case, the prosecution examined 20 witnesses. When examined under Section 313 Cr.P.C. the Appellant claimed that he was falsely implicated in the case. He stated that he had already been shown to the witnesses prior to holding the Test Identification Parade (TIP). He stated that he was released from jail only on 09.11.2006 and was falsely implicated as he was a BC (bad character) of Madipur area.
4. The Trial Court believed Santosh Kumar Pandey to be an eye witness to the incident. Relying upon his testimony coupled with the identification of the Appellant in TIP and recovery of a blood stained knife Ex.P-3 in pursuance of the disclosure statement Ex.PW-6/G, the Trial Court came to the conclusion that the Appellant was responsible for causing the four stab injuries on the person of deceased Kallu Singh @ Raju. Injury No.(c) i.e. “*Stab wound elliptical margins clean cut both angles acutely pointed, lower margin undermined 3 x 1 cm x chest cavity deep transversely placed present on the left side of chest 5 cm below the roof of left auxiliary in the left posterior, extra vassation of blood seen in and around the margins and also inside the wound. Fluid blood kept oozing out of the margins of the main wound*” was sufficient to cause death in the ordinary course of nature. The Appellant was thus held guilty of the offence punishable under Section 302 IPC and was convicted and sentenced as stated earlier.

5. It is argued by Ms. Anu Narula, learned counsel for the Appellant that the Trial Court has not appreciated the evidence in correct perspective. It was admitted by PW-1 (the sole eye witness) in his cross-examination that he had not seen the incident taking place. The Trial Court fell into a grave error in holding that the suggestion must have been denied by PW-1. It is urged that the conclusion of the Trial Court that the word “correct” was typed in place of “incorrect” is too far fetched and without any basis.
6. It is submitted that the Appellant’s identification in TIP is valueless as PW-1 had admitted in his cross-examination that he was called to the Police Station 15/ 20 days after the incident and the Appellant was shown to him. It is urged that in the circumstances it is apparent that the Appellant was involved to work out a blind murder case and PW-1 Santosh Kumar Pandey, a lowly paid employee (a waiter) working in a *Dhaba* was pressurized to identify the Appellant.
7. It is strenuously canvassed that the alleged recovery of a knife stained with human blood from an open place i.e. Ajmal Khan Park is suspect and even if the same is believed, it is not sufficient to warrant Appellant’s conviction. The Appellant, it is pleaded is therefore, entitled to be acquitted.
8. In his chief-examination PW-1 deposed “*that on 13.11.2006 I was working in the abovesaid Dhaba and was present in that Dhaba. At about 11:30 p.m., I was closing the Dhaba, I saw two boys were fighting each other. Accused present in the court was one of them. I saw that accused gave some blows with knife to the deceased as a result the deceased fell down and accused ran away*”. Thus, PW-1 called the Police at No.100, since he was unable to contact the Police, he went to PS Deshbandhu Gupta Road to report the matter.
9. PW-1’s cross-examination is very significant to understand the sequence of events. In the cross-examination PW-1 stated; “*I was working at abovesaid Dhaba for last seven years. About eight workers were working in the Dhaba. They were also present there. It is correct that there are other Dhabas in the area and the road is a running road. Those two boys were quarreling across the road. It is correct that several rickshaw pullers used to park the rickshaw at that place.*”

The road side Dhabas are also situated there to serve food to the rickshaw pullers. There is no street light across the road. We went to the roof after closing the Dhaba. I came down the stairs after hearing the noise of rickshaw pullers. The injured was lying on the ground. It is correct that no incident took place in my presence. The police came to spot within 20 minutes. I along with one boy name not known had gone to PS to inform that some person was lying in injured condition Police interrogated me at Lady Harding Hospital. I heard noise of two boys and looked through window that two boys were quarreling and were abusing each other. On which I opened shutter of the shop came down stairs and saw one person lying on the road. When I came downstairs there was light. No crowd gathered at the spot. I have not seen the accused or his photograph in the PS.”

10. So what can be gathered from PW-1’s testimony is that when he went to the roof after finishing his work, he saw the incident of the two boys “quarrelling noisily” across the road. There was no light across the road. He (PW-1) came down stairs, opened the shop’s shutter and came out on the road and saw that the deceased (who was alive at that time) was injured. So at the most PW-1 had a glimpse of the incident going on across the road in the darkness from the *Dhaba*’s roof. Obviously one cannot identify a stranger from a rooftop across the road especially when it is dark.
11. PW-1 was categorical that he went to the roof after closing the *Dhaba* and he came down on hearing the noise of the rickshaw pullers; when he opened the shutter, he found the injured (i.e. deceased) lying on the ground. Thus, it is evident that PW-1 had generally observed the incident going on between the two boys and did not see the complete incident. He had no occasion to see the Appellant so as to identify him later.
12. The purpose of holding a test identification parade is to test and strengthen the trustworthiness of the witness. PW-1 saw the assailant for the first time in this case when the TIP was held on 20.12.2006. Of course, the Appellant was identified in the test identification proceedings conducted during the investigation. In the cross-examination PW-1 stated that he was called by the SHO of the Police Station to identify the accused, who was present in the Police Station after 15

days of the incident. The Appellant was arrested in this case on 25.11.2006 i.e. after 12 days of the incident. Even if a margin of a few days is given to the prosecution (to the period of 15 days when PW-1 saw the Appellant in the PS) it would be evident that the Appellant was shown to PW-1 in the Police Station either at the time of his arrest or during the period of police custody remand. In the circumstances, the TIP held in the case has to be excluded.

13. As noticed by us earlier PW-1 had a glimpse of the quarrel going on across the road between two boys. He came down stairs, opened the shutter of the *Dhaba* and found the deceased lying injured on the road. Admittedly, the assailant was not present at that time thus the identification of the Appellant by PW-1 in the Court for the first time after more than a year of the incident was of no consequence. Even otherwise, we are of the view that since there was neither any electricity nor PW-1 had the opportunity to see the assailant from a close quarter, PW-1 could not have been in a position to identify the assailant either in the TIP or otherwise. The Appellant, therefore, could not have been held guilty of the murder of the deceased on the strength of PW-1's testimony.
14. It has come in the testimony of PW-1 that there were a number of rickshaw pullers on the road and in fact there were also some other *Dhabas* situated nearby, which served meals to rickshaw pullers. It is quite strange that none of them were joined as witnesses by the Police. PW-1 stated in his cross-examination that there were 8 workers working in Mishra *Dhaba*. The said 8 workers were also present at the time of incident and none of them were joined in the investigation of this case. In the circumstances, we are of the view that implicit reliance cannot be placed on PW-1's wavering testimony to hold the Appellant guilty.
15. The other piece of evidence relied upon by the prosecution is the recovery of the knife Ex. P-3, which was recovered by the Police by memo Ex. PW-6/K on 26.11.2006. Admittedly, the knife was recovered from the Ajmal Khan Park an open place accessible to all. According to the prosecution version, the knife had not been concealed by the Appellant. It was just thrown inside the Park while the Appellant was escaping after the incident. It is true that an article can be concealed in an open place, which is accessible to all; it could be either buried

under the earth or concealed beneath any article. Since, the knife was not concealed its recovery after 15 days of the incident from a place where it was merely thrown by the Appellant is very suspicious. Of course, some human blood was detected in the FSL report Ex. PY but since there was no reaction to any specific blood group, it would be unsafe to hold the Appellant guilty solely on the basis of recovery of the knife even if the recovery is deemed to be established against the Appellant.

16. In view of the foregoing discussion the judgment and order of the Trial Court cannot be sustained. The appeal has to succeed. The impugned order is set-aside; Appellant's Personal Bond and surety bond are cancelled and the Appellant is hereby ordered to be set at liberty.
17. The Appeal is allowed in above terms.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

JULY 07, 2011
vk/hs