

HIGH COURT OF DELHI AT NEW DELHI

(1) Crl.A. No. 581/2010

Date of Decision: 11.3.2011

VAKEEL

... Appellant

Through: Mr. K.B. Andely, Sr. Adv. with
Mr. M.L. Yadav, Advocate.

Versus

STATE OF DELHI.

...Respondent

Through: Mr. Lovkesh Sawhney, APP
for the State.

(2) Crl.A. No. 709/2010

MOHD. ALAM

... Appellant

Through: Mr. Vikram Panwar with Mr.
Shivam Batra, Advocates.

Versus

STATE (N.C.T OF DELHI)

...Respondent

Through: Mr. Lovkesh Sawhney, APP
for the State.

(3) Crl.A. No. 715/2010

MOHD. IRFAN

... Appellant

Through: Mr. S. Azad, Advocate.

Versus

STATE OF DELHI

...Respondent

Through: Mr. Lovkesh Sawhney, APP
for the State.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE S.L. BHAYANA

1. Whether reporters of local paper may be allowed
to see the judgment? **Yes**
2. To be referred to the reporter or not? **Yes**
3. Whether the judgment should be referred in the
Digest? **Yes**

S.L. Bhayana, J.

By this common judgment, we dispose of the appeals of all the three appellants/accused persons, which arise out of the judgment and order of the trial Court dated 12.4.2010 and 15.4.2010.

2. The appellants/accused persons by the impugned judgment dated 12.4.2010 stand convicted under section 302/34 of Indian Penal Code, 1860. By the order on sentence, dated 15.4.2010, all the three appellants have been sentenced to undergo Rigorous Imprisonment for life and also to pay a fine of Rs.5000/- each and in default of payment of fine to further undergo RI for another six months each for the offence punishable under section 302/34 of Indian Penal Code.

3. Process of criminal law was set into motion when on 2.5.2003 on receiving DD No.21A, SI Amul Tyagi along with Constable Satpal rushed to the place of occurrence, which was near Nala Road opposite shop of Akhtar, near Gali No.10, Mustafabad, where he found blood was lying on Kachcha Road and some blood was also scattered at some distance in the side of the Gali towards West direction. SI Amul Tyagi came to know that the injured had been removed to GTB Hospital with the help of his friends and neighbors. SI Amul Tyagi left one constable at the spot and he went to GTB Hospital, where he obtained MLC of injured Mohd. Irfan who was declared brought dead.

4. In the hospital, Mohd. Arshad was found present there, who got recorded his statement. In his statement, he stated that he was living at the address given by him with his maternal grandfather and was studying in 8th standard. He came to Delhi about three days ago. He was roaming along with Mohd. Irfan who lived in their street

for the last 2/3 days. On 02.05.2003 at about 7-7.30 PM, he was present at the corner of the Gali No. 10 at the shop of Akhtar where he was playing video games and after completing the game he as well as deceased Mohd. Irfan sat on the boundary wall of the drain in front of the shop. Meanwhile accused Vakeel came there along with two other accused persons and accused Vakeel asked them not to sit there and not stare in the opposite direction towards left side where houses are situated and further told them that his girl friend was living in one of the house. Accused Vakeel further threatened them that if they looked towards those houses, he would kill them. He further stated that accused Vakeel started abusing them and when they asked the accused Vakeel and his associates for not doing so, accused Vakeel and his associates went away by saying that “agar asal ke ho to yahi baithe rahna, abhi aakar tumhe maja chakhate hai”. Mohd. Arshad and the deceased Mohd. Irfan kept sitting on the wall of the drain. After about 10 minutes, Vakeel returned along with both of his associates and said “Tum bahut ban rahe ho” and now he will kill both of them. Mohd. Vakeel and his associates dragged Mohd. Irfan towards the corner of the gali. Accused Vakeel took out a knife from his pant and both the other accused persons caught hold his hands and when he tried to save him, they threatened him to get aside otherwise they would also kill him. Accused Vakeel gave several knife blows on the chest, face and other parts of the body of Mohd. Irfan. After receiving injuries, Mohd. Irfan fell down, when he raised noise all the three accused persons ran away from there. He picked up Mohd. Irfan but he fell down after taking few steps. In the meanwhile, Mohd. Shafik who is the neighbor of Irfan also reached there and they took him to GTB Hospital where he was declared brought dead. Further he stated

that he can identify all the three appellants/accused persons on seeing them. On the statement of Mohd. Arshad, SI Amul Tyagi made his endorsement and sent *tehrir* to the P.S. for registration of the case through Ct. Satpal and got registered a case under section 302/34 of Indian Penal Code. Crime team also reached at the spot. Further investigation was handed over to Inspector Sumer Singh. During the investigation, Inspector Sumer Singh prepared the site plan and inspected the spot. Crime team also inspected the spot and took photographs of the scene of crime. Earth control and blood stained earth were taken into possession by keeping the same in two separate vials which were sealed with the seal of SS and were taken into possession by preparing seizure memo. Statements of the witnesses were recorded by Inspector Sumer Singh. Post mortem on the body of the deceased was got conducted. After the post mortem, the dead body was handed over to his relatives for cremation. Doctor handed over clothes of the deceased and one gouge piece to IO which was taken into possession by the I.O.

5. From the information received and on the basis of investigation, appellants (Vakeel and Alam) were apprehended and they were interrogated. Appellants/accused persons made disclosure statements regarding the commission of the offence. During the investigation, accused Vakeel got recovered his blood stained clothes from inside the room of his house and also got recovered one blood stained knife. The sketch of knife was prepared by the IO. The blood stained clothes were kept in a cloth pullanda. The knife and the clothes were kept into separate pullandas which were sealed with the seal of SS and the same were taken into possession by the police.

6. Thereafter, both the appellants/accused persons pointed out

the place of occurrence for which separate pointing out memos were prepared. Later on at the pointing out of secret informer, third accused namely Irfan was arrested by the IO. He too made a disclosure statement, regarding the commission of offence. He was medically examined in GTB Hospital and thereafter he was produced before the court in muffled face where an application for TIP was moved but appellant/accused Irfan refused to participate in TIP proceedings. On the transfer of SHO Sumer Singh, further investigation was carried out by Sub-Inspector Satpal Singh. SI Satpal got prepared the scaled site plan from the draftsman SI Mukesh Jain. The exhibits were sent to FSL Malviya Nagar, Delhi. After Completion of investigation the challan was filed in the court of learned MM. concerned. Since the offence under section 302/34 of Indian Penal Code was exclusively triable by the Court of Sessions, the case was committed to the court of learned District & Sessions Judge. Charge under section 302/34 of Indian Penal Code was framed against the appellants to which the appellants pleaded not guilty and claimed trial.

7. During the trial, the prosecution examined 20 witnesses. The statements of appellants were recorded under section 313 of Criminal Procedure Code in which they denied their involvement and stated that they have been falsely implicated.

8. The Sessions Court after considering the pleas and contentions of both the parties and the evidence on record of the case convicted and sentenced all the accused with imprisonment for life and also to pay a fine of Rs. 5,000/- each for the offence punishable under section 302/34 of Indian Penal Code. In default of payment of fine, the convicts shall further undergo for six months rigorous imprisonment by the judgment dated 12.4.2010 and order

dated 15.4.2010 which are challenged by the appellants/accused persons in the present appeal.

9. Learned counsel for the appellants/accused persons relied on depositions of various witnesses on record and have contended that the prosecution has failed to establish its case against the appellants/accused persons. They have further submitted that there are contradictions in the statements of PW-4 Mohd. Arshad, PW-7 Mohd. Abid and PW-9 Mohd. Shafik and their statements are liable to be rejected on account of contradictions. He has further submitted that the statement given by PW-7 Mohd. Abid has not been put to the appellant/accused Mohd. Alam, while recording his statement under Section 313 of Criminal Procedure Code and thus the appellant/accused Mohd. Alam is liable to be acquitted. Learned counsel for the appellant further contends that PW-4 Mohd. Arshad in his statement had not mentioned about the presence of PW-7 Mohd. Abid at the place of incident and PW-7 Mohd. Abid had also not deposed about the presence of PW-4 Mohd. Arshad at the place of occurrence. Thus, from the statements of both the witnesses, it is clear that both of them were not present at the time of incident and they are falsely implicating the appellants in this case.

10. Learned counsel for the appellants/accused persons have strenuously argued that there is delay in lodging the FIR which clearly suggests that FIR was registered after manipulation and consultation which cast serious doubt in the prosecution case. They have further submitted that according to the prosecution case, the alleged occurrence took place at about 7.30 p.m. whereas FIR was registered at 11.00 p.m. which clearly shows fabrication of documents and falsity of the prosecution case. It has been further argued that PW-4 Mohd. Arshad has not witnessed the occurrence

which is clear from the cross examination of PW-7 Mohd. Abid wherein he has clearly stated that Mohd. Arshad and Mohd Shafiq came at the spot after 5-10 minutes. It has been further argued that PW-4 Arshad has been introduced as an eye-witness of the occurrence later on, whereas, he has not witnessed the occurrence. PW-4 Mohd. Arshad being the friend of deceased is an interested witness hence his testimony should not be relied upon.

11. Learned counsel for the appellants/accused persons has further submitted that the Test Identification Parade (TIP) of the accused persons has not been conducted by the prosecution and they have been identified by the witnesses for the first time in the Court and thus the appellants are liable to be acquitted on this ground alone.

12. In support of his case, learned counsel for the appellants/accused persons has relied on Sheikh Umar Ahmad and Anr Vs. State of Maharashtra, 1998 SCC (Cri) 1276, in which it was held as under:

“Once the accused was already shown to the witnesses, their identification in the court by the witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the court lost its value and could not be made the basis for recording conviction against the accused”.

13. Learned counsel for the appellants/accused persons have further placed reliance on Ganpat Singh and Ors. Vs. State of Rajasthan, 1998 SCC (Crl.) 201, wherein it has been held as under:

“The appellants shown to the sole eye-witness in the police station who later identified them in TIP and it was held that no reliance can be placed on such identification and consequently his evidence regarding identification in court after one year cannot be relied upon.”

14. Learned counsel for the appellants/accused persons has further submitted that as per the statement of PW-2, Dr. S Lal the incident must have taken place in the morning hours of 02.05.2003,

whereas, the witnesses have deposed that the incident took place at 7-7.30 PM on 02.05.2003 indicating a difference of almost 12 hours which hits at root of the prosecution story and thus the ocular evidence does not match with the medical evidence.

15. In support of his case learned counsel for the appellants/accused persons has relied on Ram Narain v/s State of Punjab, AIR 1975 SCC 1727, wherein it has been held as under:

“that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence ballistic expert this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case.

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It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. While appreciating the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye-witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the doctor's evidence with a view to support an incorrect case.”

16. Learned counsel for the appellants/accused persons further argued that the PW-4 Mohd. Arshad did not take injured Irfan to the hospital and the injured was taken to the hospital by Mohd. Shafik. Thus, the presence of both the witnesses, Mohd. Arshad and Mohd. Abid are doubtful at the time of incident. He further submits that the complainant/PW-4 Mohd. Arshad did not give the details of the appellants/accused persons to the doctors and also the story of the prosecution is not given in the MLC prepared by the doctor. The police have also not seized the blood stained clothes of PW-4 Mohd. Arshad. Thus, his presence at the spot of incident has become doubtful.

17. Learned counsel for the appellants/accused persons further

contended that Mohd. Iqbal and Alimuddin, who identified the dead body, were not produced in the Court. Further, it is submitted that the story of the prosecution becomes doubtful by not placing on record the statement of Sh. Akhtar, who was the owner of the shop near which the incident took place and whose shop was open at the relevant time and as per statement of Ct. Satpal, PW 11, statement of Akhtar was recorded in his presence by the IO after coming back from the hospital on the date of incident, therefore, it raises suspicion that his statement was deliberately withheld from the court, which could have put the correct picture before the trial court.

18. Learned counsel for the appellants/accused persons have relied on Hem Raj & Ors. Vs. State of Haryana, AIR 2005 SC 2110, wherein the Supreme Court has held as under:

“No independent witness though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case having regard to the indisputable facts of this case.

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It is a case of blind murder which might not have been witnessed by anybody and the version of P.Ws. 4 and 5 the alleged eye witnesses and close relations of the deceased is unnatural and unbelievable. No explanation was forthcoming for not examining the independent witnesses who would have been available at the place of occurrence which is in a busy locality.”

19. Learned counsel for the appellants/accused persons further asserted that as per PW-4, the injured Irfan was taken to the Mohan Nursing Home and from there the injured Mohd. Irfan was taken to the GTB Hospital in the RTV, whereas, PW-7 and PW-9 stated that the injured was taken to the GTB Hospital and there is no mention about Mohan Nursing Home. Thus, the presence of the witnesses becomes doubtful at the spot.

20. Learned counsel for the appellants/accused persons have further contended that according to prosecution story, it was appellants/accused persons Irfan and Alam, who allegedly caught hold of the deceased and appellant/accused Vakeel allegedly stabbed the deceased. He has further stated that if the story of the prosecution is believed that appellants/accused persons Irfan and Alam had caught hold of deceased from his arms then it is not possible that deceased could have received the injuries on his arms. He has submitted that they have been falsely implicated in the present case.

21. Per contra, learned Additional Public Prosecutor has submitted that PW-7 Mohd. Abid has specifically named Mohd. Alam in his statement recorded by the police and before the Court as one of the assailants who caught hold of the hands of the deceased, so there is no question of conducting TIP of appellant Mohd. Alam. He has further deposed that PW-7 Mohd. Abid has identified Mohd. Irfan, when he was brought in the Court by the police. Accused Mohd. Irfan was known to PW-7 Mohd. Abid from before and he has therefore named him in his statement as one of the assailants.

22. Learned counsel for the prosecution has relied on Suresh Chandra Bahri Vs. State of Bihar, 1995 Supp (1) SCC 80, wherein it was held as under:

“substantive evidence of the witness is his evidence in the Court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines on addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for

punishing the real culprit. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TI parade.”

23. Refuting the plea of the counsel for the appellants/accused persons that as per the version of PW-2 the learned Additional Public Prosecutor, Mr. Lovkesh Sawhney, has contended that PW-2 Dr. S. Lal has stated before the Court, that time since death is 27-28 hours. He concedes that there is a variation of 7-8 hours between the time of incident and the time since death. This variation is a natural variation and the time since death by the doctor is only approximate and not exact. This variation of time is quite natural as this was only an approximate time given by the doctor and if there is a contradiction between ocular evidence and medical evidence, then the ocular evidence is to be believed by the Court.

24. Learned Additional Public Prosecutor, Mr. Lovkesh Sawhney has relied upon Mangu Khan and Ors Vs. State of Rajasthan, (2005) 10 SCC 374, wherein it was held as under:

“On forensic medicine to show the time within which rigor mortis develops all over the body also has no factual basis. It depends on various factors such as constitution of the deceased, season of the year, the temperature in the region and the condition under which the body has been preserved.”

25. Also the learned counsel for the prosecution has relied upon Solanki Chimanbhai Ukabhai Vs. State of Gujarat, (1983) 2 SCC 174, wherein it was held as under:

“Ordinarily, the value of the medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitness. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye-witnesses, the testimony of the eye-witnesses cannot be thrown out on

the ground of alleged inconsistency between it and the medical evidence.”

26. Learned Additional Public Prosecutor has vehemently argued that when stabbing of the deceased Irfan was going on, PW-4 Mohd. Arshad who was present there might have not seen PW-7 Mohd. Abid as this is quite natural that, at that time PW-4 Mohd. Arshad would be very much tense and he was more concerned for calling help to save the injured Irfan. When he tried to save the deceased Mohd. Irfan, Mohd. Vakeel threatened him to get aside otherwise he would also be killed. It is also possible that Mohd. Abid was present on one corner of the gali, while PW-4 was present on the other corner of the gali when the incident took place and they might not have seen each other. So it cannot be said that PW-7 Mohd. Abid was not present at the time of occurrence. Whereas, it was stated by PW-9 Mohd. Shafiq in his statement that when he reached at the place of occurrence he saw that deceased Irfan was lying on the ground in the pool of blood and PW-7 Mohd. Abid was also standing there.

27. Learned Additional Public Prosecutor has further contended that prosecution has successfully proved its case against the appellants/accused persons, hence they have been rightly convicted by the Trial Court. Learned counsel has further submitted that complainant i.e. PW-4 Mohd. Arshad and PW-7 Mohd. Abid who are eye witnesses of the occurrence have fully supported the case of prosecution and learned counsel for appellants/accused have failed to shatter their testimonies despite lengthy cross-examination. He has submitted that there is no delay in lodging FIR and that the FIR was registered promptly. He has further submitted that contradictions pointed out by learned counsel for the appellants/accused persons are minor in nature and are bound to

occur due to lapse of time and can be safely ignored. Therefore, the appellants/accused persons are liable to be convicted.

28. Regarding the plea of the appellants/accused that there are contradictions in the statements of PW-4, PW-7 and PW-9 therefore, their statements are liable to be rejected on account of contradictions. The learned APP has submitted that from the testimonies of said witnesses their presence is established at the spot and the contradictions which are minor can be ignored. PW-4 has deposed in his statement that he was present along with deceased Mohd. Irfan at the time of occurrence when appellant/accused Mohd. Vakeel came along with other two appellants/accused and dragged the deceased Mohd. Irfan towards the corner of the gali. Mohd. Vakeel took out knife from his pant and both the other accused persons caught hold of Mohd. Irfan. When he tried to save the deceased, Mohd. Vakeel threatened him to get aside otherwise he would also be killed. The appellant/accused Mohd. Vakeel gave several knife blows on the chest, face and other parts of the body of the deceased. Thereafter, he cried for help and Mohd. Shafiq came there and both of them took Mohd. Irfan to GTB Hospital. Whereas, PW-7 also stated injured Mohd. Irfan was taken by PW-4 and PW-9 to the hospital. Another witness i.e. PW-9 also deposed that he was informed by Mohd. Arshad that Mohd. Vakeel stabbed Mohd. Irfan. When he reached at the place of occurrence he saw Mohd. Irfan was lying on the ground in a pool of blood and Mohd. Abid was also standing there. Mohd. Shafiq with the help of Mohd. Arshad took the deceased Mohd. Irfan to the hospital in RTV. Mohd. Abid did not accompany them to hospital but he helped them in removing the deceased Mohd. Irfan.

29. Regarding the plea raised by learned counsels for the

appellants/accused that as per the statement of PW-2, Dr. S Lal the incident must have taken place in the morning hours of 02.05.2003, whereas, the eye witnesses have deposed that the incident took place at 7-7.30 PM on 02.05.2003 indicating a difference of almost 7-8 hours in the medical evidence and ocular evidence. Whereas, it is a well settled law laid down held by the Supreme Court in many cases and also in Solanki Chimanbhai Ukabhai(supra) that the value of the medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. In the present case the post-mortem conducted by PW-2 had also corroborated the statements given by the witnesses regarding injuries inflicted to the deceased by knife. So, the ocular evidence has been corroborated by medical evidence. Post-mortem report of PW 2, Dr. S.Lal, who conducted the post mortem, has clearly stated that the death of Mohd. Irfan was due to hemorrhage shock and due to ante- mortem stab injuries to lungs and abdomen. As per the FSL report, Ex. PW 15/B (re Ex. as PW 19/D) human blood was found on the knife which was got recovered at the instance of by the appellant/accused Mohd. Vakeel and there is no explanation on the part of the appellant/accused as to how human blood was detected on the knife. Further human blood of 'B' group which was group of deceased has been found on the pant of appellant/accused Vakeel which he was wearing at the time of occurrence. After going through the statements of both the eye-witnesses i.e. PW 4 Mohd. Arshad and PW 7 Mohd. Abid, we have come to the conclusion that it was the appellants/accused persons and none else who committed the murder of Mohd. Irfan. Therefore, these facts lead to a legitimate inference that it was the appellants/accused persons who in furtherance of their common intention caused the death of

the deceased Mohd. Irfan.

30. In our opinion, the prosecution has established its case beyond any doubt that the appellant/accused Mohd. Vakeel had given knife blows to Mohd. Irfan while accused Alam and Irfan caught hold of him and that he died as a result of the injuries received at the hands of accused/appellants. This occurrence was witnessed by Mohd. Arshad who has clearly stated in his statement that all the appellants/accused persons dragged the deceased Mohd. Irfan towards the corner of the gali. Mohd. Vakeel took out a knife from his pant while both the other appellants/accused persons caught hold the hands of Mohd. Irfan. When he tried to save the deceased Mohd. Vakeel threatened him to get aside otherwise he would also be killed by them. The stab injuries caused to lung and abdomen were sufficient in the ordinary course of nature to cause death, and the evidence also discloses that the appellant/accused Mohd. Vakeel had motive to kill the deceased Mohd. Irfan.

31. Learned counsel for the appellants/accused persons has not been able to show that the findings of the Trial Court are unsustainable, illegal or perverse. This court, on perusal of the evidence on record and the documents, is of the opinion that the prosecution has successfully proved that the appellants/accused persons Alam and Mohd. Irfan caught hold of deceased Irfan while accused Mohd. Vakeel stabbed the deceased on his face, chest and other parts of the body and therefore, the appellants/accused persons have been rightly convicted and sentenced by the Trial Court under Section 302/34 of Indian Penal Code. We, therefore, uphold the conviction and sentence of the appellants.

32. The appeals are without any merit and are, therefore, dismissed. Since the appellants are in jail, a copy of this judgment

be sent to them, through, the Superintendent, Central Jail, Tihar.

S.L. BHAYANA, J.

ANIL KUMAR, J.

March 11, 2011
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