

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

% CRL.A. 125/2004

+ Date of Decision: 15th October, 2012

PRAKASH Appellant
! Through: Mr. S.S. Haider, Advocate

Versus

\$ STATE OF DELHI ...Respondent
Through: Mr. M.N. Dudeja, APP for the State

AND

% CRL.A. 131/2004

KAMAL @ KASHMIRI Appellant
! Through: Mr. Z.S. Lohat & Mr. Manoj Lohat,
Advocates

Versus

\$ STATE OF DELHI ...Respondent
Through: Mr. M.N. Dudeja, APP for the State

AND

% CRL.A. 133/2004

SANJAY GOEL Appellant
! Through: Mr. K.B. Andley, Sr. Advocate
with Mr. M.L. Yadav, Adv.

Versus

\$ THE STATE **...Respondent**
Through: Mr. M.N. Dudeja, APP for the State

CORAM:
*** HON'BLE MR. JUSTICE P.K.BHASIN**

JUDGMENT

P.K.BHASIN, J:

The appellants have been convicted for the commission of the offence punishable under Section 307 of Indian Penal Code ('IPC' for short) by the learned Additional Sessions Judge vide judgment dated 21st January, 2004 and vide order dated 24th January, 2004 they have been sentenced to undergo rigorous imprisonment for three years and also to pay fine of RS.3,000/- each and in default to undergo further imprisonment of one month.

2. The relevant facts leading to the conviction of the three appellants are that on 29th September, 1998 a message was received from DDU Hospital at Dabri police station that a person named Rajesh(PW-4) had been stabbed. That information was recorded at the police station as DD No. 3-A (Ex.PW-2/A) and Head Constable Chand Ram and Constable Hari Kumar were deputed to look into the matter. On reaching the hospital they found PW-4 Rajesh admitted there. After he was declared fit to give a statement HC Chand Ram recorded his statement (Ex.PW-4/A) in which he stated that on the intervening night of 28/29th September, 1998 at about 12.30 a.m. he was returning home

from West Sagarpur after watching Ramlila and when he reached near DDA Flats of Nasirpur accused Sanjay met him and at that Sanjay was accompanied by accused Kamal @ Kashmiri, Prakash and one Bobby(who could not be apprehended during investigation). Sanjay had thrown a wrapper of groundnut on him 3-4 days back and Sanjay told him to have a bout of fight with him alone and then Sanjay stabbed him on his chest with a *churri*. On the basis of the said statement of Rajesh FIR(Ex. PW-2/C) was registered under Section 324/34 IPC. Thereafter, during the investigation the nature of injury sustained by PW-4 on being opined by the doctor to be dangerous the case was converted into one under Section 307/34 IPC. On the completion of investigation the police filed a charge-sheet in the Court of concerned Metropolitan Magistrate against the three appellants herein as their fourth associate could not be apprehended. After completing necessary formalities of supplying the case papers to the accused person the Metropolitan Magistrate committed the case to the Court of Sessions where charge u/s 307/34 IPC was framed against all the accused-appellants to which they had pleaded not guilty and claimed to be tried.

4. In order to bring home the guilt of the accused the prosecution had examined six witnesses including the injured Rajesh. In their statements under Section 313 of the Code of Criminal Procedure all the accused while denying their involvement in the incident of stabbing of PW-4 Rajesh and claimed that Rajesh had inimical relations with them and that is why they had been falsely implicated.

5. The trial Court after examining the oral as well as the medical evidence adduced by the prosecution passed the judgment dated 21st January, 2004 convicting all the three accused-appellants under Section 307/34 IPC and that judgment led to the filing of three separate appeals at the instance of the three convicted accused persons.

6. Mr. K.B. Andley, learned senior counsel for the appellant Sanjay contended that the testimony of injured Rajesh(PW-4) should not have been relied upon by the learned trial court since he himself was a dreaded criminal and was facing trial in many criminal cases and so he could easily implicate the accused persons on false allegations. He also pointed out that in his examination-in-chief the PW-4 Rajesh had stated that he had received 3-4 stab injuries while his MLC showed only one clean incised wound on the right side of his chest as stated by the doctor also examined by the prosecution as PW-3 and that circumstance also renders his testimony unreliable. It was also argued by Mr. Andley that since the prosecution had not produced the doctor who had opined the injury of PW-4 Rajesh to be dangerous to his life the injury should have been treated as simple one and so conviction of the accused for the attempted murder of Rajesh cannot be sustained. In support of this submission Mr.Andley cited one judgment of this Court in “ Ashok Kumar vs State”, 1994 JCC 522. Learned counsel appearing on behalf of appellants Prakash and Kamal @ Kashmiri had contended that the case as per the FIR was totally different from what had been projected by the injured Rajesh(PW-4) at the time of his evidence inasmuch as in his complaint to the police had not assigned any role to

any of these two convicted accused while in his examination before the Court he had claimed that they had caught hold of him and Sanjay had stabbed him and thus he had clearly made a material improvement while deposing in Court and that improvement made him totally unreliable witness despite the fact that he was an injured witness and consequently the conviction of these two accused-appellants deserved to be set aside. In support of the submission that there being a material deviation from the FIR version and the version before the Court regarding the involvement of these two accused their involvement becomes doubtful learned counsel placed reliance on a judgment of the Supreme Court in “ L.L.Kale vs State of Maharashtra”, 2000(1) Recent Criminal Reports(Crl.) 299. It was also contended that just because these two accused were in the company of Sanjay Goel it could not be said that they had shared with him common intention to stab PW-4 Rajesh. Reliance in support of this submission was placed on one judgment of the Supreme Court in “Suresh vs State of U.P.”, AIR 2001 Supreme Court 1344 in which it was held that merely because one of the accused was present at the scene of incident he could not be convicted with the aid of Section 34 IPC. Another judgment in the case of “Idrish Bhai Daudbhai vs State of Gujarat”, 2005 (1) JCC 447 was also cited in which case despite the fact that one of the accused was attributed the role of exhortation it was not accepted by the Apex Court that he shared common intention with the actual assailant to kill the victim of the assault.

7. Learned Additional Public Prosecutor, on the other hand, fully supported the decision of the trial Court and submitted that the testimony of the injured Rajesh(PW-4) could not be shaken by the defence counsel at the time of his cross examination and so all the three appellants had been rightly found guilty and considering the fact that the injury was caused to PW-4 on a vital part of his body and that injury was dangerous for his life the conviction of the appellants under Section 307/34 IPC was absolutely justified. It was also submitted that even though the concerned doctor could not be examined since he had left the services of hospital but the doctor who was examined as PW-3 had also claimed that the injury sustained by the injured which was clean incised wound on the right side of the chest could be dangerous and, therefore, non-examination of the doctor who had earlier opined the injury to be dangerous had no adverse effect on the prosecution case that it was a case of attempted murder of PW-4 Rajesh.

8. After having examined the evidence of the star prosecution witness PW-4 Rajesh and given due consideration to the submissions made at the Bar from the side of the appellants-accused and the State, I have come to the conclusion that as far as appellants Kashmiri and Parkash are concerned their appeals deserve to be allowed on the ground that when the injured PW-4 had made his first statement before the police regarding the incident in question he had simply claimed that accused-appellants Kamal @ Kashmiri and Parkash and one more person were accompanying accused-appellant Sanjay when he had met them in Nasirpur and after telling him to fight with him one to one

accused Sanjay had stabbed him with a chhuri. No role was assigned to accused-appellants Kamal @ Kashmiri and Parkash. However, during evidence before the trial Court PW-4 Rajesh made a vital improvement as far as accused-appellants Kamal @ Kashmiri and Parkash are concerned and deposed that both of them had caught hold of his hands while Sanjay had stabbed him. In his cross-examination he was duly confronted with his first information statement to the police since he had claimed that in that statement that these two accused had caught hold of his hands at the time of the incident but that was not so recorded therein. Thus, the statement of PW-4 Rajesh that these two accused had caught hold of his hands cannot be accepted and simply because of their being seen with accused Sanjay Goel at the time of the incident it cannot be said that they shared common intention with co-accused Sanjay Goel when he had stabbed PW-4 Rajesh. Consequently, they become entitled to be acquitted.

9. However, as far appellant Sanjay is concerned, there is no merit in his appeal. PW-4 Rajesh's evidence is without any blemish or infirmity in respect of the involvement of accused Sanjay is concerned. This is what he deposed as PW-4:-

“On 28.9.98 at about 10.30 p.m. I was coming from West Sagar Pur after seeing the Ramlila towards my house. When I reached near DDA flats Nasir Pur in a vacant plot all the accused persons present in the Court along with one lovely were found present there. Accused Sanjay present in Court asked me to fight with him alone and at that time he was having a churri in his hands. Accused Kamal @ Kashmiri and accused Prakash @ Billi caught hold of my hand and Lovely caught hold me by me legs. Accused Sanjay stabbed me $\frac{3}{4}$ times on the right side of chest with churri. The accused persons already

known to me. I was thrown in a ditch by the accused persons. One person known to me was passing through and he took me to DDU Hospital. I was being taken to the hospital in the police van and I came to know this fact when I regained consciences at Dabri mod and I found in the police van. In the hospital the police recorded my statement which is Ex.PW4/A which bears my sig. at point A and B. I remained admitted in the hospital (DDU) for 9 days. I was discharged from DDU but on the next day the blood started oozing from my wound then I got admitted in AIIMS for one day from there I referred to S.J. Hospital and I remained admitted for about 4 and 4 ½ months.”

10. During his cross-examination it was suggested to him that in fact he had with him a knife and he had threatened to kill Sanjay at the time of the incident. The relevant part of his cross-examination is as under:-

“It is incorrect to suggest that only accused Sanjay met me near asir pur flat and I had threatened to kill because I had flung pea nut shell at me. It is incorrect to suggest that thereafter I had pushed accused Sanjay into a narrow lane. It is further incorrect to suggest that after punishing him into a narrow lane and I attacked him with a knife or that accused Sanjay had caught hold of my hands turned and pushed me away and fell down thereafter.”

That suggestion put to PW-4 shows that some incident took place in which accused Sanjay Goel and PW-4 Rajesh were involved. Accused Sanjay Goel had, however, not even attempted to establish his defence that PW-4 had in fact threatened him to kill him. This was not even the plea taken by accused Sanjay Goel in his statement under Section 313 Cr.P.C. Rajesh’s version of the incident, as far as accused Sanjay’s involvement is concerned, could not be shattered in his cross-examination.

11. Evidence of PW-4 Rajesh qua Sanjay Goel, though not requiring any corroboration as he is a victim of serious stab injury, finds full corroboration from the first information report.

12. As far as non-examination of the doctor who had opined the injury sustained by PW-4 Rajesh to be dangerous is concerned the same does not create any dent in the prosecution case nor it can be said that because of non-examination of that doctor offence under Section 307 IPC is not made out. The doctor who was examined by the prosecution, PW3, had identified the signatures of the concerned doctor and he himself had also claimed that the clean incised wound on the chest of Rajesh could be dangerous injury. That opinion of the doctor was not challenged in cross-examination. In the judgment of this Court in Ashok Kumar's case(supra) cited by Mr. Andley the prosecution had not examined the concerned radiologist who had given the report about the fracture of the injured nor had any radiologist been examined who could give his opinion on the basis of X-ray report. Here PW-3 has been examined and he had deposed that in his opinion also the injury on the person of the injured could be dangerous. The fact that Rajesh stated in his evidence before the trial Court that he had received 3-4 stab injuries on his person but the MLC indicates only one injury on right side of the chest will not make evidence of PW-4 doubtful as it is not a significant improvement and the factum of injured Rajesh having received stab injury has not been denied by the defence.

13. As a result of the above discussion and conclusions, Crl. Appeal No. 131 of 2004 of accused-appellant Kamal @ Kashmiri and Crl. Appeal No. 125 of 2004 of accused-appellant Parkash are allowed and their convictions under Section 307/34 IPC are set aside and they stand acquitted and their bail bonds stand discharged. Crl. Appeal No. 133 of 2004 of accused-appellant Sanjay Goel, however, is dismissed and his conviction under Section/34 IPC is converted into one under Section 307 IPC because he had stabbed PW-4 Rajesh. The sentence of imprisonment of three years awarded to him by the trial Court also cannot be said to be excessive and so the same is also maintained.

P.K. BHASIN, J

OCTOBER 15, 2012