

HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL No. 1305/2011

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Judgment reserved on 11th September, 2012
Judgement delivered on 27th September, 2012

PANKAJ KUMAR

.....Appellant

Through: Mr. Sudhir Nandrajog, Sr. Adv.
with Mohd. Faraz, Adv.

Versus

STATE (N.C.T.) OF DELHI

....Respondent

Through: Mr. Mukesh Gupta, APP with SI Ved
Parkash, P.S. Jahangirpuri.

AND

CRL. APPEAL No. 1306/2011

NARESH SHARMA

.....Appellant

Through: Mr. Sudhir Nandrajog, Sr. Adv.
with Mohd. Faraz, Adv.

Versus

STATE (N.C.T.) OF DELHI

....Respondent

Through: Mr. Mukesh Gupta, APP with SI Ved
Parkash, P.S. Jahangirpuri.

AND

CRL. APPEAL No. 1432/2011

DILSHAD KHAN

.....Appellant

Through: Mr. Sudhir Nandrajog, Sr. Adv.
with Mohd. Faraz, Adv.

Versus

STATE (N.C.T.) OF DELHI

....Respondent

Through: Mr. Mukesh Gupta, APP with SI Ved
Parkash, P.S. Jahangirpuri.

A.K. PATHAK, J.

1. All the above noted appeals arise out of the same incident, FIR and judgment of Trial Court, thus, are disposed of together.
2. Appellants have been convicted under Section 307/34 IPC and sentenced to undergo rigorous imprisonment for four years with fine of Rs.20,000/- each and in default of payment of fine to undergo rigorous imprisonment for six months. Benefit of Section 428 Cr.P.C. has been extended to the appellants. Aggrieved by their conviction as also the sentence, appellants have preferred above referred appeals.
3. Briefly stated, facts of the case are that Vicky (injured) was returning home on 22nd April, 2009 at 11 pm and when he reached at an open place known as 'khandar' behind the Senior Secondary School, K-Block, Jahangir Puri, Delhi appellants came there and started beating him. They also stabbed

him by knives, resulting in grievous injuries on his person. While the incident was going on one boy went to the house of Vicky and informed his mother Kiran about it. Kiran arrived at the spot and found appellants assaulting his son. Vicky was removed to Babu Jagjivan Ram Hospital (BJRH) by Kiran in a rickshaw. Vicky was unfit for making a statement. Later, Vicky was referred to Lok Nayak Jai Prakash Hospital (LNJPH) on 23rd April, 2009 and remained hospitalized there till 6th May, 2009.

4. Information regarding the incident was received by a Woman Ct. Promila of Police Control Room at about 11:43 pm from mobile no. 9212498029 that one boy was stabbed by a knife at J-631, Jahangirpuri. This information was passed on to the local police station pursuant whereof, DD No. 64-A was recorded and handed over to SI Ramesh Kumar who along with Ct. Parbhu reached at J-631, Jahangir Puri, Delhi but did not find any eye witness there. Thereafter, they went to BJRH and collected MLC of Vicky. No eye witness was present in the hospital and Vicky was declared 'unfit for making a statement'. Thus, on the basis of MLC, FIR No.225/2009 under Section 307/34 IPC was registered at Police Station Jahangir Puri.

5. Investigating Officer SI Ramesh Kumar continued to search for the eye witness but remained unsuccessful. On 28th April, 2009 injured-Vicky was declared 'fit for statement' and only thereafter his statement under Section 161 Cr.P.C. was recorded wherein he disclosed the names of assailants as Pankaj Kumar, Dilshad Khan and Naresh Sharma. After Vicky was discharged from the LNJP site plan was prepared on 7th May, 2009, on his pointing. Appellants were arrested. However, weapons of offence, that is, knives, could not be recovered. Statement of eye witness Kiran was recorded on 29th April, 2009.

6. After completion of investigations, charge-sheet was filed in the Court of Metropolitan Magistrate who committed the case to Sessions Court since the offence under Section 307 IPC is exclusively triable by the Sessions Court.

7. Vicky has been examined as PW8. Eye witness Kiran has been examined as PW9. Other witnesses are police officials, who had participated in the investigations at one or the other stage, and the doctor of BJRH, who has proved MLC of Vicky as Ex. PW1/A by identifying the handwriting and signature of Dr. Parvez, who had prepared the MLC.

8. Trial Judge has found the testimonies of PW8 and PW9 trustworthy, reliable and sufficient enough to conclude that it is the appellants who had assaulted Vicky by knives resulting grievous injuries to him. Opinion given on the MLC by the doctor of BJRH has been accepted by the Trial Court as a corroborative piece of evidence so as to form an opinion that the offence under Section 307 IPC was made out, in view of the circumstances in which grievous injuries were caused on the vital part of the body. One of the injuries was caused on the abdomen of injured.

9. Learned counsel for the appellant has vehemently contended that Trial Court has grossly erred in accepting the statements of PW8 and PW9, who had named the appellants only after about 6/7 days of the incident. PW8 Vicky was assaulted by some unknown persons but on account of the fact that on the complaint of Naresh Sharma and Dilshad Khan, Vicky's father was languishing in jail in a case arising out of FIR 194/09 under Section 406 IPC, PW8 and PW9 have implicated the appellants. PW9 had not witnessed the incident as she was in her house and could not have reached the spot within such a short span of 5to10 minutes since as per PW8 incident continued only for this much of time. She has been planted as a witness. As per the prosecution first an unknown boy saw the incident, thereafter went to

house of Vicky, informed Kiran and only thereafter she went to the spot. In these circumstances, it was not possible for Kiran to have witnessed the incident. It is contended that PW8 has admitted in his cross-examination that he regained consciousness after 14 hours of the incident. No reasonable explanation has been furnished as to why his statement was not recorded immediately thereafter. The doctor, who had opined Vicky as “fit for statement”, had not stepped in the witness box. As per the endorsement made on the MLC, Vicky was declared “fit for statement” on 28th April, 2009 and as on that date he was in LNJPH; whereas endorsement has been taken on the MLC of BJRH. No doctor from LNJPH has stepped in the witness box, thus, this endorsement has remained unproved. He has further contended that a perusal of MLC makes it clear that Vicky was conscious and well oriented at the time when he was hospitalized. If, that is so, then no reasonable explanation has been furnished as to why he did not disclose name of assailants to the doctor. No plausible explanation could also be given by the prosecution as to why statement of Vicky was not recorded by Investigating Officer at BJRH, more so, when endorsement ‘unfit for statement’ has not been initiated by any doctor, inasmuch as, as per the MLC, Vicky was conscious. It is further contended that PW9 Kiran was

very much available in the BJRH and subsequently in LNJPH, as per her own admission, inasmuch as, she had met duty Constable Murari Lal (PW3) in BJRH. She did not disclose names of assailants to him either. Investigating Officer PW13 has admitted that PW3 HC Murari Lal had informed him that Vicky was got admitted by a lady. If that is so, Investigating Officer has failed to give satisfactory explanation as to why he did not meet Kiran and record her statement. This clearly shows that she was not a witness to the incident nor was she aware about the names of assailants. She knew the appellants as she has admitted that they had earlier come to her house and extended threats in respect whereof, a complaint was made to the police, thus, her conduct of keeping quiet for seven days is unnatural. It is also contended that PW3 Murari Lal has deposed in his cross-examination that the lady who had brought Vicky in the hospital did not tell him the names of appellants, inasmuch as, she stated that somebody had stabbed her child. PW9 had not even disclosed the names of appellants to the doctor either. Had she given the names of assailants to the doctor, the same would have been found mentioned in the MLC. All these facts indicate that Vicky was stabbed by unknown assailants and as an

afterthought appellants, against whom Vicky's family was nourishing a grudge, have been implicated.

10. There is no law that mere delay in recording of FIR and/or statements of the witnesses by itself, will be sufficient to discard the prosecution story. Delay if explained will not be fatal. However, in case sufficient reasons are not furnished to explain the delay in recording the statements of material witnesses, it casts a cloud of suspicion on the credibility of the prosecution story. Admittedly, there is a delay of six days in recording of the statement of PW8 Vicky; delay of seven days in recording of the statement of eye witness PW9 Kiran. The explanation given by the Investigating Officer is that Vicky was unfit for making a statement and Kiran could not be traced despite efforts made by him. However, the explanation offered in the facts and circumstances of this case is doubtful and under the cloud of suspicion on the face of evidence available on record. PW8 has admitted in answer to a court question that he regained consciousness after 14 hours of the incident; meaning thereby, he regained consciousness on 23rd April, 2009. Then what was the hitch in recording his statement immediately thereafter. As per the Investigating Officer, Vicky remained unfit for making a statement till 28th April, 2009. Prosecution has relied on the endorsement

“fit for statement” made on the MLC by the doctor on 28th April, 2009. However, this endorsement has remained unproved and is suspicious more particularly when no doctor from LNJP has stepped in the witness box. Obviously, this endorsement could not have been made by any doctor of BJRM as Vicky was not hospitalized there on 28th April, 2009. Thus, prosecution has failed to prove that Vicky remained unfit for making a statement for six days more so when he has himself admitted that he became conscious after 14 hours. This delay creates a serious doubt about the veracity of version of PW8 about the identity of the appellants; more particularly when Vicky has admitted that the appellants were not known to him prior to the incident. If that is so, then how did he come to know their names remains a mystery.

11. That apart, statement of PW8 appears to have been anti dated. PW13 had filed one Action Taken Report (Ex.PW13/D-1) before the Metropolitan Magistrate, Delhi on 14th May, 2009. In the said report, PW13 has categorically mentioned that on 28th April, 2009 injured-Vicky stated that he was attacked by 3-4 persons but he did not know them. On 29th April, 2009 mother of Vicky gave an application to Investigating Officer naming the appellants and only thereafter, her statement under Section 161 Cr.P.C. had

been recorded wherein she has named Dilshad Khan, Naresh Sharma and Pankaj Kumar (appellants herein) as the assailants; meaning thereby statement of PW8 might have been recorded after 29th April, 2009 after acquiring knowledge from the PW9.

12. Delay in recording the statement of eye-witness PW9 Kiran has also remained unexplained. She has admitted that the appellants were known to her. However, she did not make any efforts to disclose their names either to the doctor or to duty constable present in BJRH. PW3 HC Murari Lal had met her immediately after the incident but she failed to disclose the names of appellants to him. Rather she stated that Vicky was stabbed by some unknown persons. PW9 has admitted in her cross-examination that she had met PW3 HC Murari Lal and did not disclose the names of appellants to him. She states that she could not tell their names to HC Murari Lal as she was perplexed. Explanation given by her appears to be highly improbable and unnatural. Even if a person is in a disturbed state of mind he or she will not withhold the names of preparators of crime to a police officer, if they are known to such person. What to talk of not disclosing the names of appellants to duty constable, she did not approach any police official almost for seven days. For the first time she gave an application (Ex.PW13/D-2)

to the Investigating Officer disclosing the names of appellants. She kept mum for 7 days which creates a serious doubt of her having witnessed the incident.

13. In *Shaukat Ali vs. Bechan 2007 (4) JCC 2980*, eye witness surfaced after about four days of incident and claimed that he saw the accused running away with a knife in his hand. A Division Bench of this Court disbelieved the statement of said witness on account of delay even though he was an independent person and no motive was attributed to him. It was observed that merely because the defence could not attribute motive to PW2 does not technically mean that the witness is telling the truth. There is no explanation forthcoming as to why this witness did not inform the police for four days as to what he claimed to have seen. In the present case, PW8 and PW9 had motive to name the appellants since father of PW8 and husband of PW9 was languishing in jail in FIR No. 194/2009 under Section 406 IPC registered on the complaint of Dilshad Khan and Naresh Sharma, (appellants herein). In *Abdul Sattar & Anr. Vs. State 2009 (4) JCC 3179*, there was delay of about 28 hours in recording the statement of eye witnesses. Since delay of 28 hours had remained unexplained the eye-witnesses were disbelieved. It was observed that the conduct of both witnesses in not telling

anyone about their having witnessed the occurrence is highly abnormal and it raises a strong suspicion that they were not the witnesses to the occurrence and they have been introduced subsequently as eye witnesses to implicate the appellants, who were suspected by the family members of the deceased.

14. In this case, eye witness PW9 has named the appellants after 7 days of the incident for which no cogent and reasonable explanation has been put forth. She was all the time available in the hospital and it cannot be believed that Investigating Officer could not have located her, inasmuch as, she told PW3 HC Murari Lal, who was on duty in the BJRH, that her son was stabbed by unknown person. As regards PW8, he has admitted in his deposition that the appellants were not known to him prior to the incident. If that is so, then he could not have named them on 28th April, 2009 and it appears that he has named them at the instance of PW9. Investigating Officer in his Action Taken Report (PW13/D-1) has categorically mentioned that on 28th April, 2009, he recorded statement of Vicky after he was declared “fit for statement”. Vicky did not name the assailants. Accordingly, it would be highly unsafe to place reliance on the statements of PW8 and PW9 and in absence of their statements prosecution story that the appellants had assaulted Vicky by knives has remained unproved. In my

view, trial court has overlooked the above discussed material aspect of the matter.

15. For the foregoing reasons, Appeals are allowed; impugned judgment is set aside and appellants are acquitted. Appellants be released forthwith, if not wanted in any other case.

16. Copy of the order be sent to Jail Superintendent for serving it on the appellants as also for compliance.

A.K. PATHAK, J

September 27, 2012
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