

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

RESERVED ON : May 06, 2013

DECIDED ON : July 08, 2013

+ CRL.A. 134/2011

NARENDER SINGH @ FADDU Appellant

Through : Mr. Biswajit and Mr. Praveen Misra, Advs.

versus

STATE Respondent

Through : Mr M.N. Dudeja, APP for the State.

AND

+ CRL.A. 278/2011

BRAHAM PRAKASH & ANR. Appellants

Through : Mr. Dushyant Sisodiya, Adv.

versus

STATE NCT OF DELHI Respondent

Through : Mr. M.N. Dudeja, APP for the State.

**CORAM:
MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. The appellants-Narender Singh @ Faddu (A-1), Brahm Prakash (A-2) and Mahesh (A-3) impugn a judgment dated 18.12.2010 of learned Additional Sessions Judge in Sessions Case No.110/2008 arising out of FIR No.945/2007 registered at police station Dabri by which they were convicted under Section 304 (1)/308/323/34 IPC. By an order dated 24.12.2010, they were sentenced to undergo RI for ten years with total fine of ₹7,000/- each.

2. The police machinery came into motion when Daily Diary (DD) No.80B was recorded on 27.11.2007 at 10.40 p.m. at police station Dabri on getting information about a quarrel at Khasra No. 443, near Ice Cream factory at Nasirpur, Delhi. The investigation was assigned to ASI Sohanveer Singh. He with Constable Ashok went to the spot and came to know that PCR officials had already taken injured persons to DDU Hospital. No eye witness was available at the place of incident. ASI Sohanveer Singh went to DDU hospital and came to know that Madan Lal was declared 'brought dead'. Vikas and Mithlesh who had sustained injuries were present there. The Investigating Officer recorded Vikas's statement and lodged First Information Report without delay. FIR in a criminal case is an extremely vital and valuable piece of evidence for the

purpose of corroborating the oral evidence led during Trial. It gives information about the circumstances in which the crime was committed, the names of the actual culprits and the part played by them in the incident. Vikas informed in his statement (Ex.PW-4/A) that on that day i.e.27.11.2007 at about 09.15 p.m. he had gone to Rewati Prasad's factory in Nasirpur to get a dye checked. The factory had closed and Mithlesh chowkidar was present there. When he was having conversation with Mithlesh, three individuals from the nearby factory came out and inquired from him as to why he was standing there. A quarrel took place and one of them pushed him and exhorted A-3 to bring a danda to teach him lesson. A-3 brought a danda and hit him on his head. He (the victim/informant) fled the spot and made telephone call to his father to apprise him about the quarrel. After some time, his father Madan Lal and brother Pawan arrived there. A-1 to A-3, Pankaj and Shyam started giving beatings to them with lathi, danda and rods. He, his brother Pawan and chowkidar Mithlesh fled the spot to save themselves. However, his father Madan Lal fell on the ground. The assailants again started giving beatings to him. He made telephone call to PCR at 100.

3. During investigation, the police arrested A-1 to A-3, Shaym and Pankaj. Statements of witnesses conversant with facts were recorded.

Post-mortem on the deceased's body was conducted. The exhibits recovered at the instance of the assailants were sent for examination to Forensic Science Laboratory. On completion of the investigation, a charge-sheet was submitted against all of them for committing offences punishable under Sections 302/307/323/34 IPC. They were duly charged and brought to trial. The prosecution examined 25 witnesses to substantiate the charges. In their 313 statements, the assailants pleaded false implication. DW-1 (Sh.Bhagwan), DW-2 (Smt.Rajbala), DW-3 (Dr.B.N.Misra) stepped up in their defence. After appreciating the evidence on record and considering the rival contentions of the parties, the Trial Court, by the impugned judgment convicted A-1 to A-3 under Section 304 (1)/308/323/34 IPC. Shyam and Pankaj were acquitted of all the charges. It is relevant to note that the State did not challenge their acquittal and the appellants' conviction under Section 304 Part-I though they were charged under Section 302/34 IPC.

4. The appellants' counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The impugned judgment of conviction is unsustainable, because it is based on shaky and tenuous evidence. Five individuals were charge-sheeted for inflicting injuries. However, the material prosecution witnesses turned hostile and

completely exonerated Shyam and Pankaj. The witnesses have given inconsistent version regarding the weapon of offence used in the crime. The complainant-Vikas did not reveal the purpose to visit Rewati Prasad's factory at Nasirpur, Delhi at 09.15 p.m. He never worked as a moulder in the said factory. His brother PW-5 gave contradictory version that he had gone there to get a dye checked. The Trial Court did not appreciate that the complainant was not aware of the names of the assailants till 2009. However, the FIR mentions their names. No Test Identification Proceedings were ever conducted. The prosecution witnesses have given divergent version about recovery of the weapons. Iron-rods with which the assailants were armed were not used to cause injuries. No independent public witness was associated at any stage of recovery of the weapons. No specific role was attributed to any of the accused in the inflicting of the injuries. PW-22 (Mithlesh) is not a reliable witness as he disappeared soon after the incident. The investigating officer tutored him and he remained in his company after coming from his native place to give evidence. The place of incident has not been established. The appellants were falsely implicated as Rewati Prasad, owner of the factory, nurtured grudge against them on account of a previous quarrel. Learned Additional Public Prosecutor argued that the impugned judgment is based

on sound reasoning and does not call for any interference. The appellants cannot take advantage of minor discrepancies. PW-22 (Mithlesh) is not a chance witness. All the accused shared common intention to inflict injuries upon the deceased- Madan Lal, PW-4 (Vikas), PW-5 (Pawan) and PW-22 (Mithlesh).

5. Madan Lal's homicidal death is not under challenge. PW-13 (Dr.B.N.Mishra) conducted autopsy and proved post-mortem examination report (Ex.PW-13/A). Madan Lal was brought to the hospital with alleged history of 'assault' on the evening of 27.11.2007 at about 11.20 p.m. As per autopsy finding, cause of death was injury caused by blunt and forceful impact upon the head. Time since death was 15 to 16 hours prior to post-mortem examination. In the cross-examination, PW-13 disclosed that it was a rare possibility that injury at serial No.3 could be caused by fall. He was also examined as defence witness as DW-3 and admitted that piece of heart along with tumor was taken while conducting post-mortem and it was preserved, sealed and handed over to IO for histo-pathological study of the tumor. He, however, asserted that presence of tumor in the heart was not an independent cause of death. It could be a contributory factor for cause of death under certain circumstances like mental excitement, anxious, anger and any other factor, which caused elevation

of mental stress. In the cross examination, he admitted that the tumor was not the direct cause of death. The cause of death was what he had opined in the post-mortem examination report. Madan Lal was hale and hearty when he arrived at the spot. He succumbed to the injuries inflicted upon his vital organs soon after the occurrence and was declared dead on arrival at the hospital. The post-mortem report, the inquest report, the statements of PWs-4, 5 and 22 are in line with each other and there is no noticeable conflict between them. Apparently, there was direct nexus between the injuries inflicted on his body and the death. It was a case of culpable homicide.

6. Madan Lal's presence at the spot is not in dispute. Suggestions have been put by the appellants to the prosecution witnesses that Madan Lal had gone to the spot with his associates numbering 15-20. A large crowd had gathered at the spot. A quarrel was initiated by the persons present in the crowd. It was also suggested that Madan Lal sustained injuries due to fall in the gutter. PW-22 (Mithlesh), an independent public witness, was chowkidar in Revti Prasad's factory in Nasirpur. He deposed that on 27.11.2007, when he was on duty in the said factory, at about 09.15 p.m. Vikas came and inquired about Revti Prasad. When he was trying to contact Revti Prasad on telephone, A-1,

A-2 and Shyam came there and started quarreling with Vikas. In the meantime, A-3 also arrived there and hit him and Vikas with a bat/thapi. They ran outside. Vikas called his father on telephone. Madan Lal and Pawan, Vikas's father and brother, came there. All the accused stated that no one could escape from there. He further deposed that Pankaj hit Pawan with a cricket bat on his head. When Madan Lal tried to run away, all the five accused assaulted him with bat, hockey, danda and iron rods. Pawan and Vikas also sustained injuries in the incident. Considering that Madan Lal was dead, all the assailants fled the spot. They took Madan Lal to DDU hospital. In the cross-examination, he revealed that he was working in the said factory for the last two years. He had informed the police from outside the factory at a distance of 50 meters. He admitted that there were pits on the road. The place where Madan Lal fell down was 70 meter away from the main road. He fairly admitted that after coming from his village, he stayed with the Investigating Officer. He explained that there was threat to him by one of the accused persons and he stayed with Investigating Officer after reaching Delhi due to fear for protection. He further admitted that after discharge from the hospital, he left for his village next day. He emphatically denied that false statement was given by him at Revti Prasad's instance. Testimony of this independent public

witness, whose presence at the spot being chowkidar was quite natural and probable, inspires confidence. Despite lengthy cross-examination, no material discrepancies emerged to disbelieve him. He had no prior animosity with the accused persons to falsely implicate them and travel from Bihar to give evidence. He offered plausible explanation that he had to stay with the Investigating Officer due to fear and threat. He specifically named Narender, Brahm Prakash and Mahesh (A-1 to A-3) for inflicting injuries to the victim. He was also specific that Shyam and Pankaj who were given clean chit by the victim's son were also authors of injuries to him. No ulterior motive was assigned to infer that PW-22 had a soft corner for the victim. Injuries sustained by him confirm his presence at the spot. His evidence is consistent with surrounding circumstances and the probabilities of the case.

7. Initial confrontation had taken place with PW-4 (Vikas) at about 09.15 p.m. when PW-22 Mithlesh was making telephone call to Revti Prasad. This fact finds mention in PCR form (marked PW-16/A). He deposed that after he was beaten, he rescued himself after escaping from the spot and made telephone call to his father. His father Madan Lal and brother Pawan who reached the spot were assaulted and injured. PW-4 (Vikas) identified A-1 to A-3 who caused injuries to them by beatings.

He proved statement (Ex.PW-4/A) recorded by the police. He further deposed that he and his brother Pawan received injuries on the head. The accused caused injuries with dandas. His statement under Section 164 Cr.P.C. was also recorded before the Magistrate. He, however, exonerated Pankaj and Shyam and did not assign any role to them. PW-5 (Pawan), other injured, corroborated PW-4 and PW-22. He also identified A-1 to A-3 as assailants. He deposed that he and his brother received injuries on head. Due to injuries given by the accused persons his father fell down. The accused persons were armed with dandas. He also did not attribute any role to Shyam and Pankaj. He admitted the suggestion that at the time of occurrence, there were three assailants. They did not counter the attack and ran away from the spot. His father could not run. He denied the suggestion that they had gone there to assault with the weapons produced by the prosecution.

8. Testimony of PW-4 and Pw-5, injured witnesses, inspire confidence to the extent that A-1 to A-3 were the assailants who inflicted injuries to them and Madan Lal. They were specifically identified in the court by faces. PWs-4 and 5 who had lost their father in the occurrence, were no expected to let the real culprit go scot free and to falsely implicate the appellants, perpetrators of the crime in the absence of prior animosity.

9. In *State of UP vs. Kishan Chand*, (2004) 7 Scale 75, a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon.

10. The testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

11. PWs 4 and 5 were not even acquainted with the appellants and were not aware of their names. Specific role was attributed to them. Initial confrontation took place with Vikas and when he informed about the quarrel, his father and brother Pawan arrived at the spot. They were not spared by the appellants and were inflicted injuries. PWs 4 and 5

were successful to flee the spot to save themselves. Victim Madan Lal, however, could not run and succumbed to the injuries at the spot. The appellants fled the spot after the occurrence. None of them sustained any injury on their body at the hands of the victim or his sons. It is true that the incident took place on a trivial issue and the appellants had no prior intention and planning to cause injuries to the victim. His presence at the spot was not anticipated. For these valid reasons, the Trial Court in its wisdom did not convict them under Section 302 IPC. The minor discrepancies and contradictions highlighted by the counsel, do not go to the root of the case to discard the prosecution version in its entirety. Each and every infirmity in prosecution case will not necessarily vitiate the trial. Non-recovery of the weapon of offence is not fatal to the prosecution case. The ocular testimony is in consonance with medical evidence and post-mortem examination report. PW-6 (Dr.Ajay Sharma) proved MLCs (Ex.PW-6/A, Ex.PW-6/B and Ex.PW-6/C) of Vikas, Pawan and Mithlesh.

12. It is true that for the reasons known to them, PWs 4 and 5 did not opt to depose against Pankaj and Shyam. However, that does not dilute the prosecution version against the appellants. It is to be observed even though complainant and PW-5 refused to identify Pankaj and Shyam

involved in the offence but they ascribed particular role to the appellants and throughout their statements, they remained constant as to the role of the appellants which was duly corroborated by the medical evidence. It is well settled principle that it is not necessary that once the role of the other accused are not established the benefit of doubt can be given to all if there is clinching evidence against the accused persons.

13. In ‘*Surajit Sarkar vs. State of West Bengal*’, AIR 2013 SC 807, the Supreme Court held :

“63. The final contention of learned Counsel for Surajit Sarkar was that since five of the accused persons were given the benefit of doubt there is no reason why he should not be given the benefit of doubt.

*64. In **Gurcharan Singh v. State of Punjab**, this Court held, in a case where some accused persons were acquitted and some others were convicted, as follows:*

The highest that can be or has been said on behalf of the Appellants in this case is that two of the four accused have been acquitted, though the evidence against them, so far as the direct testimony went, was the same as against the Appellants also; but it does not follow as a necessary corollary that because the other two accused have been acquitted by the High Court the Appellants also must be similarly acquitted.

*65. Learned Counsel for the State drew our attention to **Komal** in which it was held that merely because some of the accused persons have been acquitted by being given the benefit of doubt does not necessarily mean that all the accused persons must be given the benefit of doubt. It was observed that:*

... the complicity of two accused persons who were armed with guns having been doubted by the High Court itself, they have already been acquitted which cannot in any manner affect the prosecution case so far as the Appellants are concerned against whom the witnesses have consistently deposed and their evidence has been found to be credible.

66. Similarly, in **Gangadhar Behera** reliance was placed on **Gurcharan Singh** and it was held:

Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted.

67. **Gangadhar Behera** was cited with approval somewhat recently in **Prathap v. State of Kerala** : (2010) 12 SCC 79.

68. We agree that Surajit Sarkar cannot be absolved of his involvement in the death of Gour Chandra Sarkar merely because the other accused persons were either not identified by the eyewitnesses or had no role to play in the attack on Gour Chandra Sarkar. There is the cogent and reliable evidence of PW-8 Achintya Sarkar to hold that Surajit Sarkar attacked Gour Chandra Sarkar which ultimately resulted in his death. The contention of learned Counsel for Surajit Sarkar is rejected.”

14. The incident occurred on a trivial issue. Initially Pankaj and Shaym were also named to be the perpetrators of the crime with the appellants. However, during their examination before the Court they were exonerated by the victim’s son. The injuries sustained by Mithlesh, Vikas and Pawan were simple caused by blunt object. The appellants are not

previous convicts and not involved in any criminal case. They were not nurturing any grudge or animosity with the victim. Taking into consideration these mitigating circumstances, while confirming the findings on conviction which are based upon fair appraisal of evidence, order on sentence requires modification and substantive sentence of the appellants is reduced to Rigorous Imprisonment for eight years each. Other terms and conditions of the sentence order are left undisturbed.

15. The appeals stand disposed of in the above terms.

16. Trial Court record be sent back forthwith along with a copy of this judgment.

(S.P.GARG)
JUDGE

JULY 08, 2013

sa/tr