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

+ CRL.A. 358/2005

% *Judgment dated 30.10.2013*

PANKAJ

..... Appellant

Through : Mr.Inderjeet Singh Kapur, Ms.Kamini
Arora and Mr.Jaspreet Singh Kapur,
Advs.

versus

STATE

..... Respondent

Through : Mr.Firoz Khan Ghazi, Adv.

+ ***CRL.A.No.357/2005***

DHARMENDER

..... Appellant

Through : Mr.Inderjeet Singh Kapur,
Ms.Kamini Arora and Mr.Jaspreet
Singh Kapur, Advs.

versus

STATE

..... Respondent

Through : Mr.Firoz Khan Ghazi, Adv.

+ ***CRL.A.NO.361/2005***

PAWAN

..... Appellant

Through : Mr.Inderjeet Singh Kapur, Ms.Kamini
Arora and Mr.Jaspreet Singh Kapur,
Advs.

versus

STATE

..... Respondent

Through : Mr.Firoz Khan Ghazi, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Present appeals are directed against the judgment dated 23.3.2005 and order on conviction dated 28.3.2005 passed by learned Additional Sessions Judge, Delhi, whereby the appellants have been directed to undergo four years' Rigorous Imprisonment (RI) with fine of Rs.1000/- for the offence punishable under Sections 307/34 IPC and in default of payment of fine, to undergo RI for three months. It was also directed that the period for which the appellants remained in jail would be set off in view of the provision contained under Section 428 Cr.P.C. and benefit of the same would be given to the persons if required.
2. The case of the prosecution, as noticed by learned trial court, are as under:
“1. on 12.2.2004 on receipt of DD No.27A about a quarrel, SI Jai Singh along with Ct.Pawan Kumar reached at Sagarpur Bus Stand where many person were gathered in front of gali no.8 Vashisht Park and it was revealed that injured had been removed to DDU Hospital. They reached in the said hospital and collected the MLC of injured and recorded the statement of injured Anil who has stated that he used to sell grapes on rehri and by his side Kunwarpal also used to put his rehri. On 12.2.04 at about 12 noon or 12.30 p.m he was selling grapes @ Rs.20/- per kg to which Kunwarpal objected that when he is selling @ Rs.30/- per kg then why he is selling @ Rs.20/- per kg. Kunwarpal threatened him that when in the evening his sons will come then he will teach him a lesson. At about 7.30 p.m when he was selling grapes at that time Kunwarpal alongwith his three sons Dharmender, Pawan and Pankaj came and started quarrelling with him. When he tried to escape himself, then Kunwarpal caught hold him and Pawan gave

knife blow on his stomach and Pankaj gave knife blow on his head. They have caused injuries on his person with the intention to murder him. He was saved by Gulshan Kumar, Sunil along with other persons. On this statement IO prepared the ruqa on the basis of which the present case was registered u/s 307/34 IPC.

2. The accused persons were arrested in this case and after completing the investigations they were challaned to the court for trial.

3. This case being triable by the court of session, after committal proceedings, it was committed by the ld.MM and received by this Court on 17.5.04.

4. The charge against the accused persons were framed u/s 307/34 IPC on 14.7.04 & accused Dharmender was also charged under the same section on 15.9.04 after filing of his supplementary challan to which they pleaded not guilty and claimed trial.

5. The prosecution in all has examined as many as 13 witnesses.”

3. Learned counsel for the appellants submits that the testimony of the prosecution witnesses is not reliable nor trustworthy. It is further submitted that PW-1, complainant, Anil Kumar, has completely resiled from the version of the prosecution in his statement recorded on 29.7.2001. According to PW-1, appellants did not cause any injury to him. He has deposed that 4-5 persons were quarrelling with each other and when they came near his rehri, one of the 4-5 persons had pushed him due to which he fell on the rehri and some sharp article caused injuries to him. He further testified that due to darkness he could not identify those 4-5 boys, who had pushed him. This witness was declared hostile. In his

cross-examination by the learned Public Prosecutor PW-1 denied having made any statement to the Police. Counsel further submits that the appellant, Dharmender, was declared a Proclaimed Offender and in his absence challan against the other appellants, namely, Kanwar Pal, Pawan and Pankaj, was filed in Court. After recording testimonies of some of the witnesses, Dharmender was arrested and a supplementary challan was filed against him. In view thereof the witnesses whose evidence had already been recorded, were again called and thereafter statement of PW-1, Anil Kumar, was again recorded on 28.9.2004. Similarly statement of PW-2 was also recorded again.

4. Learned counsel for the appellants contends that in the statement recorded on 28.9.2004 PW-1 categorically deposed that he supported his previous statement recorded in Court on 29.7.2004 and, thus, the same would show that he did not support the case of the prosecution. Counsel further contends that the evidence of PW-1 is also unreliable for the reason that as per his statement he had received injuries on the head as also on the abdomen but the medical evidence placed on record would show that there was no injury on the head of the complainant, PW-1. Reliance is placed by learned counsel for the appellants on the testimony of PW-3, Dr.Ramesh Bhatia, CMO, DDU Hospital, who prepared the MLC, Exhibit PW-3/A. It is submitted by the counsel that Dr.Bhatia had deposed in his testimony that there was only a single injury i.e. injury on the abdomen which was dangerous but he could not show whether the weapon from which the injury had been caused was a double edged weapon or not and therefore the injury on the person of the complainant could have been caused by any sharp object.
5. It is also the case of the appellants that the alleged knife which was used for commission of the offence was not produced at the time of

examination of PW-1 in the Court. Thus, the knife was not linked to the commission of the offence as PW-1 did not depose that the injuries caused to him were caused by the knife recovered by the Police. Moreover as per CFSL report no blood stains could be found on the knife. It is also contended by the counsel for the appellants that from the testimony of PW-1, PW-3 and PW-4 the prosecution has failed to establish that the dangerous injury caused in the abdomen of the complainant was due to the knife blow inflicted by Pawan, rather it is established that it was caused due to sharp article lying on the rehri. Thus, it cannot be said that either Pawan or Pankaj caused injury to the complainant, instead the injuries on his abdomen were only caused on account of sharp article lying on the rehri.

6. Learned counsel for the appellants submits that PW-2, Sunil, is also not a reliable witness. His statement was recorded twice, firstly, on 29.7.2004 and thereafter on 28.09.2004. In his first statement on 29.7.2004, he deposed that he does not know anything about the case. He was declared hostile and was cross-examined by learned APP. He denied having told the names of accused persons to the Police. He also denied having given any statement to the Police. In his subsequent statement dated 28.09.2004, he supported his earlier statement dated 29.07.2004. The cumulative effect of both the statements given by PW-2 Sunil is that he did not know anything about the case and the subsequent statement where he deposed that Pawan gave a knife blow in the abdomen of his brother on 12.02.2005 at 7.30 p.m. and Pankaj gave blow on the head of his brother was the result of improvement and knowledge derived by him later on. Counsel contends that it is a well settled principle of criminal jurisprudence that in such a situation the benefit of doubt should be given to the accused and not to the prosecution.

7. It is further submitted by counsel for the appellants that PW-2 is a planted witness and he was not present at the spot, which is evident from the fact that he did not inform the Police about the incident. A clear reading of DD No.28A would show that Anil was brought to the hospital in an injured condition by his father and ASI Mohan Chand. There is no mention of Sunil accompanying the injured to the hospital. Thus, his presence at the spot of incident is doubtful.
8. Reliance is placed by counsel for the appellants on the evidence of ASI Mohan Chand, official attached to the PCR wing of Delhi Police, who was examined as PW-7. During his cross-examination, PW-7 deposed that he took the injured to the hospital along with the father of the injured and other persons from the public. PW-2 was not mentioned in the statement of PW-7. Similarly in the Ruka prepared, presence of PW-2 was not mentioned. In fact even the complainant himself has not deposed with regard to the presence of PW-2.
9. Elaborating his arguments further, learned counsel for the appellants submits that his presence at the spot is further doubtful as there is nothing on record to suggest that he intervened to save his brother. Although, even in the FIR it is stated that Sunil and Gulshan had intervened to save the complainant. The signature of PW-2 is also not found in any of the documents. Counsel contends that another eye-witness, PW-8, Gulshan Kumar, in fact has stated in his statement that the injured, Anil, was removed to the hospital by the PCR van. Sunil and father of the injured came at the spot 30 minutes after the incident. In view of the evidence of PW-8 it would show that PW-2 is a planted witness.
10. Strong arguments have been made with regard to the evidence of PW-8, who is otherwise stated to be an eye-witness. Counsel contends that the evidence of Gulshan Kumar is unreliable and not trustworthy. PW-8,

Gulshan Kumar, supported the prosecution version in his examination-in-chief and has given complete go by in his statement in the cross-examination to what he stated in examination-in-chief. In his cross-examination, he deposed that when we heard the noise of quarrel, he was present at his shop. He saw the knife in the hands of Pankaj when he came out of his shop. Pankaj gave two or three blows with the knife on the head and lot of blood oozed out and the clothes of Anil were smeared with blood. Due to injury on head, Anil fell down on his Rehri with abdomen hitting the Rehri and when rehri was pushed by public persons, it hit the abdomen of Anil. He picked up Anil and in that process his clothes got blood stained. From the testimony of PW-8, it is clear that he is not a reliable witness. Firstly, there was no injury on the head of Anil. Even the prosecution version is not that two or three blows were given on the head of Anil and secondly, no blood came out from the head of Anil. Therefore, the question of oozing out of the blood from the head and clothes of Anil being smeared with blood does not arise. According to his deposition, he has seen something which has not even happened and therefore, he is not a truthful witness and is totally unreliable. Further his testimony shows that the injury on the abdomen of Anil was not caused by Pawan but was a result of his falling on the rehri with his abdomen hitting the rehri when it was pushed by a public person. The statement of Gulshan supports the earlier statement of PW-1 that Anil received injuries on his abdomen by falling on the rehri and not on account of injuries inflicted on him by Pawan. The said statement is contrary to the prosecution version and therefore cannot be used by the prosecution against the appellants. Counsel contends that PW-8, Gulshan, has further deposed that he picked up Anil and his clothes got blood stained. His blood stained shirt was taken by the Police on the next date. According to

the prosecution, his clothes were not blood stained and were not taken into possession by the Police. PW-8, Gulshan, further states that the IO came over there after 30-45 minutes. Only Kanwar Pal was present at that time. He was arrested by the Police. At that time, knife was lying on the ground and the said knife was also taken into Police possession after picking the same from the ground. All the above allegations are contrary to the version of the prosecution and the witness is therefore not reliable. PW-8, Gulshan Kumar, also stated that from the spot, the Police went to the hospital and he also went there later on with the IO of the case in his gypsy. This statement is also not supported by the prosecution version. PW-8, Gulshan Kumar, further stated that the recovered knife belonged to Anil. This shows that the witness is not reliable. PW-8, Gulshan Kumar, has also deposed that he used to open his shop at about 9.00 a.m. and close the same at 9.00 p.m. but he remained at the spot upto 10.45 p.m. There is no explanation given by him as to why he kept his shop open upto 10.45 p.m that night. Moreover, he stated that he was called by the IO through one Constable so he went to the Police Station and his statement was recorded there. But according to the IO, his statement was recorded in his shop. It leads to one conclusion that PW-8, Gulshan Kumar, is a planted witness by the Police and is not a reliable witness. It is also stated that the signature of PW-8, Gulshan, is not found on any of the documents prepared by the IO at the spot, which shows that he was not an eye witness and not present at the spot.

11. Counsel for the appellant further contends that the knife seized is not an incriminating article as it has no connection with the crime and it has been planted by the IO. Counsel contends that as per the testimony of PW12, the knife was found at the instance of the appellant, Pankaj, from the rehri, which was available in the galli and the same was taken into

possession vide memo Exhibit PW-11/J. This document does not bear the signatures of Anil Kumar and thus it cannot be said that the knife was recovered from the spot in question. No public witness was joined at the time of recovery of knife. The knife was stated to have been recovered through a public thorough fare and thus it cannot be said that it was recovered from the spot which was only in the knowledge of the appellant, Pankaj. None of the witnesses identified the knife, neither was it produced before the Doctor nor before the complainant.

12. It is also contended that the incriminating evidence was not put to the appellants in their examination under Section 313 Cr.P.C. that Kanwal Pal and Dharmender had caught hold of Anil and Pawan gave knife blow on the left side of the abdomen of Anil and Pankaj gave knife blow on the head of Anil. All the above incriminating evidence is not put to the appellants in their examination under Section 313 Cr.P.C. It is thus contended that on this ground alone the appellants are liable to be acquitted and even otherwise the appellants have not been able to establish their case beyond any shadow of doubt.
13. Per contra learned counsel for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt. It is further submitted that the evidence placed on record shows that on 22.2.2004 at Noon there was an altercation between Kanwar Pal and the victim, Anil Kumar, and Kanwar Pal had threatened to teach him a lesson. Thus, the motive stands duly established. Counsel further submits that the testimony of the injured, Anil, is reliable and any contradiction, which is pointed out does not go to the root of the matter. Counsel also submits that much cannot be read into the evidence of PW-1 and PW-2, which was recorded on 29.7.2004, as at that stage one of the co-accused, Dharmender, was still at large and it was under his threat that the statements were made,

however, after Dharmender was arrested, PW-1, PW-2 and PW-8 have given a clear description of the incident and it leaves no room for doubt that the injured was stabbed by the appellant, Pawan, while Dharmender and Kanwar Pal (since deceased), had caught hold of the victim. It is further submitted that the weapon of offence has been recovered and the mere fact that the weapon of the offence was not shown either to the injured or to the Doctor would not affect the case of the prosecution as any procedural lapse cannot go to the benefit of the appellants herein.

14. Learned counsel for the State submits that PW-2, Sunil, was also present at the spot of the incident and his testimony is reliable. Counsel further submits that merely because the medical evidence does not support the fact that there are no head injuries on Anil, it would not *ipso facto* result in the evidence of PW-8, Gulshan Kumar, to become unreliable. Counsel also submits that the appellant failed to show that the version of the prosecution that Kanwar Pal and Dharmender had caught hold of Anil and Pawan gave knife blow on the left side of the abdomen of Anil was not put to any of the appellants and it has not caused any prejudice, as no submission has been made as to what prejudice has been caused to them, especially, all three of them had caused injury on the person of Anil. Thus, merely because a complete description was not given the appellants cannot derive any benefit of the same.
15. I have heard learned counsel for the parties, considered their rival submissions and carefully examined the evidence placed on record. As per the evidence, statement of PW-1, Anil Kumar, and PW-2, Sunil, were recorded on 29.7.2004 in part. Both, Anil and Sunil, had turned hostile. According to the victim, Anil, he had fallen on the rehri and sharp articles had caused injury to him. It may, however, be noticed that on 29.7.2004 i.e. the date when the statements of PW-1 and PW-2 were recorded one of

the co-accused, Dharmender, was still at large, however, subsequently he was arrested, a supplementary charge sheet was filed and thereafter evidence of PW-1 and PW-2 was recorded on 28.9.2004.

16. Learned counsel for the appellant has submitted that in the subsequent statement recorded on 28.9.2004 both PW-1 and PW-2 had stated that in support of their previous statement recorded on 29.7.2004 further statement was made. It is, thus, contended that in the light of two diametrically opposite statements, the testimony of PW-1 and PW-2 is unreliable. The arguments of counsel for the appellant cannot be accepted as there is force in the argument and explanation of counsel for the State that when the first statement was made one of the accused, Dharmender, was at large and out of fear PW-1 and PW-2 did not support the case of the prosecution.
17. The subsequent statement made by PW-1 on 28.9.2004 makes it abundantly clear that the appellant, Dharmender, who was identified in Court, caught hold of him; the appellant, Pawan, gave him knife blow on the abdomen; and appellant, Pankaj, gave knife blow on his head. PW-1 witness was cross-examined by the accused persons but there is nothing to shake the evidence of this witness.
18. The evidence of PW-1 is also corroborated by the evidence of PW-8, Gulshan Kumar, who was running an auto shop near the spot of the incident. In his examination-in-chief he has completely supported the case of the prosecution and deposed that Kanwar Pal and Dharmender had caught hold of Anil by his hands and Pawan, who was having a knife in his hand, gave a knife blow on the left side of the abdomen of Anil Kumar. There is nothing to show in his cross-examination that the evidence of this witness was shaken.
19. MLC, Exhibit PW-3/A, has been proved by Dr.Divesh Bhatia, CMO,

DDU Hospital, PW-3, which shows that the patient was referred to the surgery department. This witness was not cross-examined, however, he was called for re-cross-examination wherein he deposed that there was only one injury as mentioned in the MLC and there was no injury on any other part of the body of the victim.

20. As per the evidence of PW-4, Dr.V.M. Saini, SR (Surgery), DDU Hospital, who carried out the surgery on Anil, the nature of injury, which was caused to the victim, was dangerous.
21. As per the evidence of PW-6, Ct.Pawan Kumar on the fateful day he was posted at Police Station Hari Nagar as Constable and he was on emergency duty with SI Jai Singh. On receiving the DD he along with SI Jai Singh went to the spot where they learnt that the injured had been removed by the PCR Van to the hospital. SI Jai Singh collected the MLC and recorded the statement (Exhibit PW-1/A) of the injured.
22. As far as appellant, Pankaj, is concerned, as per the evidence of PW-1, Anil, he was hit on the head by a knife by the appellant Pankaj. Similar statement has been made by PW-2 and PW-8, however, the medical evidence placed on record and also PW-3 in his cross-examination clearly stated that there was only one injury as mentioned in the MLC and there was no injury on the head. In the absence of injury on the head of the victim as per the MLC and as per the evidence of Doctor and taking into consideration that no other role has been ascribed to the appellant, Pankaj and further there is no evidence to support the case of the prosecution that Pankaj inflicted any injury on the Anil, the judgment and order on sentence qua appellant, Pankaj, is set aside. Bail bond stands cancelled and surety stands discharged.
23. With respect to appellants, Dharmender and Pawan, counsel for the appellant submits that having regard to the date of the incident and the

fact that the above appellants have suffered trial for more than nine years, in the meanwhile they have got married, they have small children, there is nobody to support them, they belong to the lower strata of the society, they are the sole earning members of their family, they have clean antecedents and there is no previous conviction, it is prayed that the sentence awarded to the appellants be reduced. It is also submitted that as far as the appellant, Dharmender, is concerned, he has not inflicted any injury on Anil and even otherwise the incident had taken place in the heat of the moment as his father and Anil, both used to sell fruits from rehri adjacent to each other. It is also submitted that during trial appellant, Kanwar Pal, the father of the present appellants, has died and the present appellants are not selling fruits from the spot of the incident. It is also pointed out that the appellant, Pawan, has already undergone 01 year 09 months and 24 days, besides he has earned some remission as well.

24. Having regard to the facts of this case and taking into consideration that the appellants, Dharmender and Pawan, have suffered trial for more than nine years, they are married and have small children, they belong to the lower strata of the society, they are the sole earning members of their family, there is no previous conviction, they have clean antecedents, and further the appellant, Dharmender, has not inflicted any injury on the deceased, the incident had taken place in the heat of the moment and the present appellants are not selling fruits from the spot of the incident, the sentence awarded to appellant, Dharmender, is reduced to one year and the sentence awarded to appellant, Pawan, is reduced to two years. They shall surrender by 15.12.2013.

OCTOBER 30, 2013 msr

G.S.SISTANI, J