

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

% *Date of Decision : October 31, 2014*

+ **CRL.A. 299/2012**

RIYAZ KHAN @ GAINDA Appellant
Represented by: Mr. Manoj Singh with
Mr. Abhay Singh, Advocates.

versus

STATE (NCT OF DELHI) Respondent
Represented by: Ms. Aashaa Tiwari, APP
Insp. Naresh Kumar, Insp.
Spl. Staff (North).

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. Believing the testimony of Suresh Kumar PW-1 and accepting that the knife Ex.P-2 was got recovered pursuant to the disclosure statement made by appellant Riyaz Khan, which knife when sent for the opinion of Dr.Vijay Dhankar PW-22 was opined as capable of inflicting the three injuries on deceased Sunil and additionally capable of causing the cut marks on a vest and a shirt worn by the deceased when he was assaulted, the learned trial Judge has opined vide impugned judgment dated December 14, 2010 that the prosecution has successfully established that Riyaz Khan along with juvenile co-accused Mohd. Mukkaddar (who was sent for trial to the Juvenile Justice Board) had committed the offence of having murdered Sunil and had attempted to murder Suresh Kumar and additionally had voluntarily caused hurt while committing robbery and

while doing so had used deadly weapons. Riyaz Khan has thus been convicted for the offences punishable under Section 302/307/394/397/34 IPC. Vide order on sentence dated December 22, 2010, Riyaz Khan has been sentenced to undergo imprisonment for life and pay fine in sum of ₹5000/-, in default to undergo simple imprisonment for two months for the offence punishable under Section 302 IPC; to undergo rigorous imprisonment for seven years and pay fine in sum of ₹5000/-, in default to undergo simple imprisonment for two months for the offence punishable under Section 307 IPC; to undergo rigorous imprisonment for seven years and pay fine in sum of ₹5000/-, in default to undergo simple imprisonment for two months for the offence punishable under Section 394/397 IPC. The sentences have been directed to run concurrently.

2. Challenging the conviction, learned counsel for the appellant has attacked the testimony of Suresh Kumar PW-1 regarding his identifying Riyaz Khan as one of the two co-assailants during trial; conceding to the fact that the prosecution has successfully established that on September 25, 2008 at around 00:30 hours i.e. just after midnight, Suresh Kumar and his friend Sunil were fatally assaulted at the platform No.2 of Badli Railway Station by two persons. To put it pithily, learned counsel for the appellant states that the prosecution has proved the incident but has not been able to prove Riyaz Khan's involvement in the incident. As regards the offence of robbery for which Riyaz Khan has been convicted, learned counsel urges that no stolen property being recovered, the learned trial Judge has erred in convicting the appellant for offences punishable under Section 394/397 IPC.

3. Thus, while capturing the evidence led at the trial, we shall be noting the relevant evidence pertaining to the incident very briefly to the extent it is necessary for the textual setting but would be laying emphasis

on such evidence as would relate to the identification of Riyaz Khan as one of the two assailants, the other being juvenile co-accused Mukkaddar whose name has surfaced in the evidence, while describing the participating role of Riyaz Khan and whose trial was conducted before the Juvenile Justice Board.

4. Process of criminal law was set into motion when, as deposed to by Swaroop Singh PW-17, on duty at Samaipur Badli Railway Station as an Assistant Station Master, he was informed past midnight on the intervening night of September 24, 2008 and September 25, 2008 by some passengers that a person was lying at platform No.2 in a stabbed condition and he rang up the Police Control Room where, as deposed to by lady Ct.Parveena PW-6, she being on duty noted said information in the PCR form Ex.PW-6/A and simultaneously transmitted the same over wireless so that the nearest PCR vans could rush to the spot and additionally to be recorded in the Daily Diary at the police station within jurisdiction whereof the crime was committed. As deposed to by Ct.Vikas Kumar PW-7, he was on duty at the Police Post Sabzi Mandi within the jurisdiction of P.S. Old Delhi Railway Station and on receiving said information conveyed by Ct.Parveena noted the same vide DD No.2, Ex.PW-7/A. He handed over a copy of the DD entry to ASI Rameshwar Dass PW-29 who, as deposed to by him, left the police post along with Ct.Ramnath (not examined) and reached platform No.2 of Badli Railway Station and saw blood lying on several places on the platform. As deposed to by him he learnt that the injured had been removed by the PCR officials in a PCR van to Babu Jagjivan Ram Hospital and thus leaving Ct. Ramnath at the spot he proceeded to Babu Jagjivan Ram Hospital and therefrom to Hindu Rao Hospital because he learnt that the injured had been removed to the said hospital.

5. As deposed to by HC Surinder Singh PW-32 he was posted in PCR Libra 89 and on receiving the information of the incident reached platform No.2 of the railway station and took injured Suresh Kumar PW-1 to Babu Jagjivan Ram Hospital from where the injured was referred to Bara Hindu Rao Hospital.

6. There was another injured person: the deceased named Sunil. He ran for his life hoping to be taken to a hospital. He managed, in an injured condition, to run up to the gate of the railway station where he was seen by Aashish Gupta PW-24 who, as deposed to by him was driving a TSR. He agreed to take the injured to the nearby Ambedkar Hospital and wanted to know from the injured whether he should inform his family members through his mobile phone to which, as deposed to by Aashish Gupta, the injured told him that this was not possible because the robbers had robbed him of his mobile phone. He took the injured to Ambedkar Hospital.

7. In the interregnum, Inspector Naresh Kumar PW-36, posted as Inspector Investigation at P.S. Old Delhi Railway Station received information of the incident. Accompanied by Ct.Jagdish PW-3 and SI Ashok Kumar PW-23 he left for Samaipur Badli Railway Station and met Ct.Ramnath who told the three that the injured had been removed to the hospital in a PCR van. The three went to Babu Jagjivan Ram Hospital and learnt that the injured had been removed to Hindu Rao Hospital. Thus, four police officers: Inspector Naresh Kumar, SI Ashok Kumar, Ct.Jagdish and ASI Rameshwar Dass reached Hindu Rao Hospital where they met Suresh Kumar whose statement Ex.PW-1/A was recorded by SI Ashok Kumar. Making the endorsement Ex.PW-23/A beneath the statement of Suresh Kumar, the Tehrir was dispatched from the hospital at 06:30 hours on September 25, 2008 for FIR to be registered, and as

deposed to by HC Sunder Lal PW-4 he registered the FIR Ex.PW-4/A making a corresponding DD entry No.7A Ex.PW-4/B of the FIR being registered.

8. Returning to the spot the police officers summoned the crime team which simply took photographs of the scene of the crime, perusal whereof would show a trail of blood on the platform. Rough site plan to scale Ex.PW-36/A was prepared, the scale plan whereof corresponds to Ex.PW-11/A. Blood samples were lifted.

9. As deposed to by the aforementioned four police officers, the clothes of Suresh Kumar PW-1 which he was wearing at the time of the incident and which were stained with blood were handed over to them, as entered in the memo Ex.PW-3/A. The same were duly deposited the same day in the malkhana.

10. As regards Sunil Kumar, as deposed to by Dr.Raj Mohan PW-10, he was brought to the casualty of Ambedkar Hospital and on being examined by Dr.Raj Mohan was found to be in a critical condition. Blood pressure was falling. It was 80/60 MM Hg. Smell of alcohol was present in his breath. One stab injury on the abdomen just above umbilicus (with omentum peeping out) and two clean incised wounds, one on the left face lateral to chin 4 cm long and the other 1.5 cm long on right thoracic region was seen. Aforesaid was written by Dr.Raj Mohan as deposed to by him in the MLC Ex.PW-10/A. Sunil being in a critical condition was immediately sent to the Intensive Care unit where Dr.Azaz (not examined) declared him brought dead as per death certificate Ex.PW-16/A proved at the trial by Dr.Vandana PW-16 who had worked with Dr.Azaz and could thus identify his writing and the signatures.

11. As deposed to by Ct.Naipal Singh PW-19, since he was on duty at Ambedkar Hospital, on learning that Sunil Kumar had been admitted to

the hospital by Aashish Gupta he conveyed the said information to the concerned police station i.e. P.S. Old Delhi Railway Station within jurisdiction whereof the police post at Old Delhi Sabzi Mandi was situated, where as deposed to by ASI Rama Saroha PW-25 it was entered vide DD No.9A Ex.PW-25/A.

12. Said information being conveyed to the police officers involved with the investigation, they proceeded to Ambedkar Hospital and seized the dead body of Sunil who died within a few hours of his being admitted at Ambedkar Hospital and sent it to Sabzi Mandi mortuary where Dr.Vijay Dhankar PW-22 conducted the post mortem finding the four wounds as recorded in Sunil's MLC. As per the post mortem report Ex.PW-22/A the injuries were collectively sufficient to cause death in the ordinary course of nature. He handed over the clothes of the deceased to the police officers. He later on opined when two knives were sent to him that the injuries could be caused by weapon No.1 on the clothes of the deceased as per report Ex.PW-22/C.

13. The only clue to the criminals which the investigating officers had was from Suresh Kumar's statement Ex.PW-1/A in which he disclosed that he along with Sunil had reached Badli railway station since he had to catch a train to Gannaur when two boys aged between 22-25 years, one of whom was wheatish in complexion and other was dark, came to them and demanded a *biri*. He told Sunil to go back home because the train to Gannaur was soon to arrive and so saying walked ahead. As he walked 10-15 paces he heard shrieks of Sunil and turned back. He saw both boys stabbing Sunil with knives who was begging for mercy saying that they could take his belongings but should spare him. He rushed to save Sunil. The wheatish complexion boy assaulted him with a knife and stabbed him. Yelling, he i.e. Suresh ran for his life and covering a distance of 10-

12 steps fell down. He was again assaulted when he had fallen down. He got up and ran 20-30 steps and fell onto a cemented seat on the platform. That he did not remember what happened thereafter. He could recognize the two boys brought before him.

14. From the nature of the crime the Investigating Officers had the clue that petty criminals were involved.

15. Since learned counsel for the appellant has not disputed the fact that the evidence establishes that deceased Sunil and PW-1 Suresh Kumar were stabbed at platform No.2 of Railway Station Samaipur Badli and that running for his life Sunil ran from the platform to the gate of the railway station where Aashish Kumar Gupta, the TSR driver took him to the hospital, and Suresh Kumar fell on the cement platform seat on the railway station and the trail of blood confirms said fact, we would not be wrong to record that part-I of proof at a criminal trial has successfully been achieved by the prosecution. It has been proved that Sunil and PW-1 were fatally stabbed when the two were at platform No.2 of Samaipur Badli Railway Station at 00:30 hours on September 25, 2008. Thus, Suresh Kumar, an injured at the platform, would be a competent eye witness.

16. Part II required to be proved by the prosecution would be involvement of appellant Riyaz Khan in the commission of the offence accompanied by one more person: the juvenile Mukkaddar.

17. As deposed to by HC Mukesh Kumar PW-30 and Ct.Rajender Kumar PW-35, the two were posted in the Special Staff of District North-West Delhi. On September 28, 2008 at about 7.40 PM a secret informer informed that a petty criminal who had stabbed somebody four-five days ago at railway station Samaipur Badli was standing at Sector-16 near petrol pump. They verified that pertaining to a stabbing incident at

Samaipur Badli Railway station FIR No.141/08 was registered. They reached the petrol pump in Sector-16 Rohini with the secret informer who pointed towards Mohd. Mukkaddar. They nabbed him and on a personal search recovered a knife from him. On October 10, 2008, as deposed to by HC Mukesh Kumar a secret informer informed that Riyaz Khan was in front of Aakash cinema and was involved in the commission of crime and thus, even he was apprehended.

18. As claimed by Insp. Naresh Kumar PW-36 pursuant to his disclosure statement Ex.PW-26/A, Riyaz Khan led him to bushes near Samaipur Badli Railway Station and got recovered the knife Ex.P-2. He refused to participate in the TIP proceedings. We do not note the investigation conducted after Mohd. Mukkaddar was apprehended concerning recoveries attributable to him because he was not tried by the court of sessions.

19. The mobile phone of deceased Sunil could not be recovered. But we note that the bill Ex.PW-27/F establishes that a mobile phone make 'Nokia -2300' having IMEI No.355360002813342 has been proved to have been purchased by deceased Sunil and the person who sold the same to Sunil is Pradeep Nayak PW-31 who not only brought the cash memo book in court when he deposed but additionally proved the cash memo Ex.PW-31/A.

20. Call details record Ex.PW-20/A would establish that the mobile phone in question was used on another sim card even after the incident took place, meaning thereby that somebody else other than Sunil who died on September 25, 2008 was using the mobile phone.

21. Deposing as PW-1, Suresh Kumar has deposed in sync with his statement Ex.PW-1/A and has identified Riyaz Khan as one of the two assailants. Learned counsel for the appellant has not pointed out

anything from the cross-examination of Suresh Kumar to discredit his testimony save and except to urge that the dock identification by the witness of his client was not possible because the incident took place on September 25, 2008 and the witness deposed in the court on July 09, 2009, September 05, 2009 and January 15, 2010.

22. We transpose ourselves to the midnight in question and recreate the sequence of events for the purposes of identifying as to for what duration of time Suresh had within his gaze Riyaz Khan and juvenile co-accused. The reason being that if it is a case where the witness had a fleeting glimpse of the assailants the same would have a bearing on the dock identification of the accused, but if the assailants were under the gaze of Suresh for 30 seconds or more, the same would have a different bearing. It is trite that imprints form in the mind and last, depending upon how deeply they are etched in the memory. It is trite that longer is the duration of the imprints being formed, longer would be the duration of the etching and vice versa. We take judicial notice of the fact that platforms at railway stations are well lit during the night and find support thereto from the site plan to scale Ex.PW-11/A which records the presence of the railway electricity poles on the platform. The said site plan to scale would reveal that Suresh and Sunil were first accosted by the two accused at point A on the platform when Suresh saw the two accused face to face. The exchange of dialogue was the two accused demanding a *biri* from Sunil and this means that the face to face interaction was of three to four seconds. As per the testimony of Suresh he walked ahead, not unnatural thing to do i.e. ignoring strangers who asked you for a smoke. He walked ahead telling Sunil to return home because the train to Gannaur was soon to arrive. He heard shrieks of Sunil. He heard Sunil beg the two assailants who were stabbing him to

spare his life and take whatever he had. He then rushed towards his friend to save him. This means that the two assailants were under the constant gaze of Suresh for a further duration of five to seven seconds. When he reached Sunil the two accused assaulted him. As he ran for his life towards point H covering a distance of about 50 metres on the platform, he was chased by Mukkaddar and his friend Sunil ran outside the platform towards the gate of the railway station. Obviously, during this period of chase Suresh could not see Riyaz Khan, but could see Mukkaddar closely once again because as deposed to by him Mukkaddar managed to catch up to him half way down the chase and stabbed him and continued to follow him thereafter till he was stabbed once again at the cemented seat. Thus, there is sufficient evidence that Riyaz Khan was under the gaze of Suresh for at least 8 to 12 seconds duration. The area being well lit, lasting impressions of Riyaz Khan would etch in the memory of the witness. It is not out of place to mention that in his statement Ex.PW-1/A Suresh was able to tell the Investigating Officer the complexion of the two accused, one wheatish and the other a shade darker.

23. The obvious reason why Suresh was chased and stabbed was to kill him because the assailants were conscious of the fact that Suresh had seen them intimately and would be able to identify them. No attempt was made to remove the personal belongings of Suresh proved by the seizure memo Ex.PW-3/A which records the personal belongings handed over by the doctor who examined Suresh at the hospital. The same inter alia consist of cash in sum of ₹2000/-.

24. We thus hold that the testimony of PW-1 establishes the complicity of Riyaz Khan. The motive of the crime was obviously robbery. Notwithstanding the mobile phone of the deceased not being

recovered, from the testimony of Aashish Kumar Gupta we have proof of the fact that injured Sunil when requested by Aashish Kumar Gupta to let him inform Sunil's relatives of he being injured, by using Sunil's mobile phone, told him that the robbers had taken away his mobile phone, meaning thereby the mobile phone being robbed. The testimony of Pradeep Nayak PW-31 and the cash memo Ex.PW-27/F would prove that a mobile phone make 'Nokia -2300' having IMEI No.355360002813342 was sold by him to Sunil, meaning thereby there is proof that Sunil was possessing a mobile phone which was not on his person when he was taken to the hospital by Aashish Kumar Gupta. The call record details Ex.PW-20/A would prove the use of the said mobile phone instrument after Sunil's death, meaning thereby it was in the possession of somebody else. It thus hardly matters not that the mobile phone was not recovered for the purposes of proof of robbery.

25. The injuries caused on Sunil would evince a murderous assault and the injuries caused on Suresh would also evince an intention to murder.

26. We therefore concur with the view taken by the learned trial Judge in convicting Riyaz Khan for the offences for which he was charged of. We maintain the sentence imposed upon him.

27. The appeal is dismissed.

28. TCR be returned.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

OCTOBER 31, 2014
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