

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

RESERVED ON : February 12, 2014

DECIDED ON : April 30, 2014

+ CRL.A. 648/2012

SHIVENDER PANDEY @ PANDIT & ORS Appellants
Through : Mr.Rajender Yadav, Advocate.

versus

STATE Respondent
Through : Mr.M.N.Dudeja, APP.

AND

+ CRL.A. 644/2012

VIRENDER KUMAR @ KALA Appellant
Through : Mr.Rajender Yadav, Advocate.

versus

STATE Respondent
Through : Mr.M.N.Dudeja, APP.

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

S.P.GARG, J.

1. Shivender Pandey @ Pandit (A-1), Virender @ Kalia (A-2), Pushpender @ Praveen (A-3) and Dinesh @ Guddu (A-4) impugn a judgment dated 25.04.2012 in Sessions Case No.41/2011 arising out of FIR No.102/2011 registered at Police Station Ashok Vihar by which they

were convicted under Section 308/34 IPC. By an order dated 08.05.2012 they were sentenced to undergo RI for three years with fine ₹2,000/- each.

2. Allegations against the appellants, as projected in the charge-sheet, were that on the night intervening 20/21.04.2011 at around 12.15 AM (night), A-1 to A-3 took victim-Rohit to Wazirpur Industrial Area, near Railway Line, in front of Jhuggi No.N-28A-591, Chander Shekhar Azad Colony. The fourth accused (A-4) was already present there with a country-made pistol. It is alleged that A-4 handed over the 'katta' to A-1. A-2 and A-3 caught hold of Rohit and raised his hands in different directions; A-1 fired at him as a result of which Rohit fell down. It is further alleged that, thereafter, A-1 took out Rohit's mobile bearing No.9278857814 and A-4 took out his purse containing identity card and cash ₹200/-. Someone made a call to the police at 100. PCR van arrived at the spot; took Rohit to Babu Jagjivan Ram Memorial hospital; and referred to Lok Nayak Jai Prakash Narayan hospital from there. DD No.3A (Ex.PW19/A) was recorded at police station Ashok Vihar at 01.05 A.M. regarding the incident. The investigation was assigned to ASI Om Pal who with Ct. Devendra went to the spot. The victim was 'unfit' to make statement. The Investigating Officer lodged First Information Report by sending rukka (Ex.PW-19/C). During investigation, statements

of witnesses conversant with the facts were recorded. The accused persons were arrested and pursuant to their disclosure statements, mobile phone and purse belonging to the victim were recovered. Exhibits were sent to Forensic Science Laboratory. After completion of investigation, a charge-sheet was submitted against the accused persons for committing offences under Section 307/201/34 IPC; they were duly charged; and brought to trial. To substantiate the charges the prosecution examined 20 witnesses in all. In 313 statements, the accused persons pleaded false implication and denied their complicity in the crime. They examined DW-1 (Ram Prakash) in defence. After considering the rival contentions of the parties and appreciating the evidence and documents on record, the trial court by the impugned judgment held all of them guilty under Section 308/34 IPC. It is relevant to note that the State did not challenge the conviction under Section 308/34 IPC instead of Section 307 IPC. Being aggrieved and dissatisfied, the appellants have preferred the appeals.

3. I have heard the learned counsel for the parties and have examined the record. The occurrence took place on the night intervening 20/21.04.2011 at about 12.15 A.M. PW-4 (SI Zile Singh) in his affidavit (Ex.PW-4/1) stated that at about 01.00 A.M. on receipt of a call from Police Control Room, he went to the spot i.e. railway line, near Aara

machine chowk, in front of jhuggies of Chander Shekhar Colony, and found a boy lying there in injured condition. He revealed his name Rohit s/o Kalicharan. He was taken to BJRM hospital. In the cross-examination, he revealed that when the injured met him, he was conscious and did not tell him the name of the assailants. He merely told him that 3-4 persons had fled after firing at him. The victim was treated first at Babu Jagjivan Ram Memorial hospital and MLC (Ex.PW-6/A) records the arrival time of the patient there at 01.30 a.m. brought by ASI Zile Singh of PCR. It further records that the patient was 'unfit' for statement at that time though he was oriented and conscious. There are endorsements dated 21, 22, 23 and 26.04.2011 when the victim was not 'fit' to give statement. On 04.05.2011, the victim was declared 'fit' for statement. The nature of injuries was opined as 'grievous.' The prosecution produced PW-6 (Dr.Lavnish), PW-7 (Dr.Neeraj Chaudhary), PW-10 (Dr.Brahmanand Lal) and PW-15 (Dr.Vikas Singh Tomar), who examined the patient who underwent exploratory laparotomy and was discharged from the hospital on 13.05.2011. Injuries suffered by the victim are not under challenge. Appellants' only plea is that they were not the author of the injuries and have been falsely named by the victim due to previous enmity.

4. So far as A-4 is concerned, it is on record that he was not acquainted with the victim and had no animosity with him. It is pertinent to note that A-1 arrested on 24.04.2011 in the disclosure statement (Ex.PW-14/C) did not attribute any role to A-4 and claimed that only he, A-2 and A-3 had caused injuries to the victim. Subsequently, on 25.04.2011, supplementary disclosure statement (Ex.PW-14/L) was recorded where A-1 implicated A-4 and disclosed that he had handed over a country made pistol to him at the crime spot to fire at Rohit and had removed a purse from Rohit's pocket. Prior to that, the Investigating Officer had no incriminating material to effect A-4's arrest on 25.04.2011 itself on the pointing out of the secret informer. Allegedly, pursuant to his disclosure statement (Ex.PW-14/O), purse (Ex.P-5) containing I-card and 2-3 visiting cards of the victim were recovered and seized vide seizure memo (Ex.PW-14/Q). Despite attempts made by the prosecution, the crime weapon i.e.pistol could not be recovered. It is relevant to note that the trial court in the impugned judgment did not believe the recovery of mobile phone and purse. Only evidence that emerged against A-4 was the sole testimony of PW-8 (Rohit), who identified him in the court as the assailant who had made available the country-made pistol to A-1 to fire at him and had taken out his purse. PW-8 (Rohit) did not assign any motive

to A-4 for assisting or facilitating A-1 to A-3 to inflict injuries to him. He (A-4) had not accompanied them (A-1 to A-3) at the house of the victim when allegedly they had taken him along. PW-16 (Ravi), Rohit's brother and (PW-17) Rohit's father, did not ascribe any role to A-4 in taking away Rohit from the house. There was no earthy reason for A-1 to A-3 to involve A-4 in the conspiracy. Admittedly, after A-4's apprehension, the Investigating Officer did not move any application for holding Test Identification Proceedings. The occurrence had taken place at night time and A-4 was not acquainted with the victim prior to the occurrence. It was expected to get his identity established from the victim whose statement was recorded after a considerable delay on 05.05.2011. A-4's identification for the first time in the court is not enough to prove his involvement in the crime particularly when no crime weapon was recovered at his instance and the recovery of the purse was disbelieved by the trial court. Even in Court statement, Rohit did not identify A-4 by name and merely pointed at him as one of the assailants to whom A-1 to A-3 had met at the crime spot. In the information recorded in PCR Form (Ex.PW-12/A), the victim did not give the exact number of assailants and merely described it three-four. Earlier the information conveyed to the PCR was that an individual has been stabbed by a 'knife'. The

complainant who had revealed his name to PW-4 (ASI Zile Singh) did not name A-4 as one of the assailants. Considering all these deficiencies in the evidence, it was not safe to convict A-4 with the aid of Section 34 IPC. A-4 deserves benefit of doubt and is acquitted.

5. Regarding A-1 to A-3, admitted position is that they were known to the victim prior to the incident. The victim-Rohit admitted in his Court statement that he knew A-2 and A-3 who were related to each other and lived in Azadpur and Sawan Park respectively. He also knew A-1 who used to reside in A-2's house. They all were friends. Injuries sustained by the victim-Rohit are not under challenge. The incident took place on the night intervening 20/21.04.2011. Information was conveyed from mobile No.9599876649 to Police Control Room at 0:58:59 about the 'stabbing' of an individual by a knife and it was recorded in the PCR form (Ex.PW-12/A). As observed above, PW-4 (SI Zile Singh) of PCR found the injured conscious at the spot. The victim, however, did not tell him the names of the assailants and merely informed that three/four persons had run away after firing at him. He claimed that the PCR van reached at the spot within three minutes after receipt of information. No eye-witness/informant was found present at the spot. The victim claimed that when he was lying on the railway line after sustaining injuries, to attract

the attention of a passerby, he threw stones at him. The said passerby made a telephone call to PCR. The said informant has not been examined and his identity could not be established. It is unclear as to how the informant came in possession of mobile bearing No. 9599876649 whose SIM was in the name of Ravi (PW-16), victim's brother, and was allegedly given about 15 days prior to the incident to A-1. As discussed above, MLC (Ex.PW-6/A) records that the patient was orient and conscious. However, the victim did not narrate the name of the assailants to the doctors. Since the victim was unfit to make statement, the Investigating Officer lodged First Information Report after making endorsement on DD No.3A (Ex.PW-19/A) at 03.15 a.m. The victim was not found to have sustained any injury by a knife. Rather it was a case of 'gunshot' injury sustained by him. Apparently, the information conveyed and recorded in PCR Form (Ex.PW-12/A) was incorrect. Statement of the victim was recorded under Section 161 Cr.P.C. for the first time after a considerable delay on 05.05.2011. It is alleged that the victim's statement could not be recorded earlier as he was 'unfit' to make statement. Medical record, however, does not substantiate the explanation. MLC (Ex.PW-6/A) records that the patient was 'unfit' for statement on 21/22/23/26.04.2011. The inordinate delay to record the statement on

05.05.2011 has remained unexplained. It is not clear if the victim was 'fit' to make statement in between 26.04.2011 and 04.05.2011. It is unclear if the Investigating Officer visited the patient to record his statement during that period.

6. The material/crucial document is PCR Form (Ex.PW-12/A). It records various pieces of information received at Police Control Room from time to time till 02:38:38. It is recorded therein that an individual was being taken to hospital; he was disclosing that three/four individuals had fired at him; the victim-Rohit was handed over to the Duty Head Constable at BJRM hospital and he had sustained bullet injury on his chest. It further records that the victim disclosed that three/four individuals were on foot; met him near Wajir Pur Industrial Area, Aara Chowk, and fled away after firing at him. It further disclosed that the victim was coming after meeting his friend. Apparently, the victim did not disclose the name of the assailants to PCR officials or to the doctor. The victim did not give any reason for not disclosing the names of A-1 to A-3, who were well acquainted with him prior to the incident. While appearing as PW-8, in his Court statement, he identified all of them and assigned a specific and definite role to each of them. He did not claim that he was unable to identify the culprits at that time or was not

physically fit to name them. The very fact that the victim had attracted the attention of a passerby by throwing stones at him, reveals that he was conscious and was in a position to reveal the name of the assailants. A-1 to A-3's involvement emerged only on 05.05.2011 when the complainant recorded 161 statement. In this statement (Ex.PW-8/DA), there is no mention if the victim had any conversation with any of the appellants on mobile. Only in the supplementary statement recorded on 14.07.2011, the victim informed that he had conversation with the appellants on mobile before he accompanied them to the place of occurrence. Again, no reasons have given to omit these facts in his earlier statement recorded on 05.05.2011. The complainant/victim disclosed that after causing injuries to him, A-1 took out his mobile phone make Tata indicom having SIM No.9278857814 from his pocket and A-4 took out his purse containing ₹200/- and I-card. The Trial Court, however, did not believe the recovery of mobile (Ex.P-4) and purse (Ex.P-5). The crime weapon i.e. pistol could not be recovered during investigation. The Trial Court examined the call details of mobile phone Nos. 9278857814 and 9266485948. As per the call details from 19.04.2011 to 22.04.2011, three calls were made from mobile No. 9278857814 to mobile No. 9266485948 at 22:40:29; 23:40:45; and 00:07:25. The Trial Court concluded that these calls were

made by the victim to A-2 and not vice-versa as claimed by him. The victim did not explain as to why at odd hours, he had made repeated calls to A-2 and what were the contents of the said conversation. The call details proved on record falsifies the victim's plea that the appellants had made a plan and had conversation with him on mobile before taking him to the place of occurrence with them.

7. Besides above, no cogent evidence has come on record to establish as to, to whom these mobile numbers belonged. It has come in evidence that mobile No. 9266485948 was in the name of Kusum, wife of Virender @ Kalia (A-2). PW-9 (M.N.Vijayan) and PW-11 (S.N.Jha) proved that mobile No. 9278857814 was in the name of one Dolly, d/o Kamal Singh, r/o A-15, Nihal Vihar, Phase-2, Nilothi Ext., Nangloi, Delhi. He proved customer application form (Ex.PW-9/D), Election Card (Ex.PW-/E) and call detail record (Ex.PW-9/F). The complainant did not divulge as to how the number taken in the name of Dolly came into his possession. Dolly has not been examined. Similarly, PW-11 (S.N.Jha) proved that mobile No.9599876649 was in the name of Ravi Kumar Shahu (Victim's brother). The complainant disclosed that he had given his SIM issued in the name of his brother Ravi, to A-1 about 15 days prior to the incident. PW-16 (Ravi Kumar Shahu) did not claim so. The

victim further claimed that SIM No. 9278857814 was taken by him from his friend Narender. Narender has not been examined to substantiate it.

8. PW-16 (Ravi) deposed that his mother received a call from PCR about the incident and handed over the phone to him. He, however, did not reveal the mobile number on which he or his mother had received information from PCR. PW-17 (Kali Charan) on the contrary claimed that at about 01.45 am, he received a call from his son Ravi about the incident. Again, telephone numbers in possession of Kali Charan and Ravi, on which they exchanged the information, have not been revealed. PW-8 (Rohit), in the cross-examination disclosed that at the time of incident three mobile phones were in use in his family. However, he did not disclose their mobile numbers. Apparently, the prosecution witnesses including the victim have not presented true facts about the incident and have improved their version from time to time. Mere conversation between the victim and A-2 on the relevant date cannot be taken as incriminating circumstance as they were known to each other and were friends. The statements of PW-16 (Ravi) and PW-17 (Kali Charan) that the assailants had taken Rohit with them cannot be taken at their face value for the reasons mentioned above. There is no mention in the statement of PW-16 that the victim's father had any confrontation or

conversation with the assailants at that time. There was no sound reason for all the assailants to go to the victim's house when the victim was in touch with A-2 on phone.

In the light of the above discussion, conviction and sentence of appellant Nos.1 to 3 also cannot be sustained. They also deserve benefit of doubt.

9. The appeals preferred by the appellants are accepted and their conviction and sentence are set aside. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back along with a copy of this order. The appellants shall be released forthwith if not required to be detained in any other case. The bail bonds and surety bonds also stand discharged.

(S.P.GARG)
JUDGE

April 30, 2014
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