

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

% Judgment reserved on: 11.02.2014
Date of Decision: 17.02.2014
+ **CRL.A. 846/2013**

HAMEED KHAN Appellant

Through: Mr. Riaz Mohd, Adv

versus

STATE NCT OF DELHI Respondent

Through: Mr. Feroz Khan Ghazi, APP for
State

+ **CRL.A. 991/2013**

NAUSHAD @ SONU Appellant

Through: Mr. Riaz Mohd, Adv.

versus

STATE NCT OF DELHI Respondent

Through: Mr. Feroz Khan Ghazi, APP for
State

+ **CRL.A. 1162/2013**

DILSHAD KHAN Appellant

Through: Mr. Riaz Mohd, Adv.

versus

STATE NCT OF DELHI Respondent

Through: Mr. Feroz Khan Ghazi, APP for
State

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

On 02.09.2008, at about 4.56 PM, Police Station Seema Puri received information with respect to quarrel and injury near fish market. The information was recorded vide DD No. 65B and its copy was handed over to ASI Harbhajan for necessary action. On receipt of the information, the aforesaid police officer reached the place of incident, opposite Khan Tailor near police booth, New Seema Puri. He found lot of blood on the road. The injured had already been taken to Guru Teg Bahadur Hospital by Police Control Room official. On reaching the hospital, the police officer obtained MLC of the injured Rajiv and Babar. Rajiv was unfit for statement, whereas Babar was fit for making a statement. In his statement, Babar Khan told the police officer that on the aforesaid date, he was purchasing fruit in New Seema Puri Market, whereas his brother Rajiv was parking his auto-rickshaw on the side of the road. The auto rickshaw of his brother accidentally hit a bicycle which led to a scuffle between his brother Rajiv and one Dilshad who was present on the shop of Khan Tailor at that time. He further stated that when he intervened, Naushad, brother of Dilshad, came out of the shop of Khan Tailor with a knife (*Chhura*) in his hand, whereas his father Hamid came out with a scissor in his hand. Hamid handed over the scissor to Dilshad. Naushad gave a blow at the

neck of Rajiv using the knife for the purpose, whereas Dilshad struck his brother with the scissor he was carrying. He further stated that Hamid while handing over the scissor to Dilshad had asked him to kill them. He also claimed that when he tried to save his brother, Dilshad gave scissor blow on his back as a result of which he also sustained injuries. Rajiv succumbed to his injuries on the same date.

2. This is also the case of the prosecution that on receipt of a secret information that Hamid was present on the roundabout of old Seema Puri, police officers reached there and apprehended him at 9.00 PM. Dilshad, son of Hamid, reached the police station on the same date in injured condition and was arrested. The scissor used in causing injuries to Rajiv and Babar is alleged to have been got recovered by the appellant Dilshad from the roof of his house.

3. On 03.11.2008, information was received at Police Station Seema Puri with respect to arrest of Naushad in the jurisdiction of Police Station Krishna Nagar under Section 41 of the Code of Civil Procedure. He was arrested in this case and his police remand was taken. During the course of investigation, he got recovered a knife (*chhura*) lying in rags near Shalimar Bagh Garden drain and the aforesaid knife was seized after it had been duly sealed.

4. After completion of investigation, all the three accused, i.e., Hamid, Naushad, Dilshad were charge-sheeted under Section 302 of IPC read with Section 34 thereof. Since the appellants are pleaded not guilty to the charges against them as many as 21 witnesses were examined by the prosecution to prove its case. One witness was examined in defence.

5. Vide impugned judgment dated 24.05.2013 and Order on Sentence dated 28.05.2013, all the three appellants were convicted under Section 304 (Part I) as well as under Section 308 of IPC read with Section 34 thereof. The appellants Dilshad and Naushad were sentenced to undergo RI for eight years each and to pay a fine of Rs 50,000/- or to undergo RI for two years each in default under Section 304 (Part-I). The appellant Hamid was sentenced to undergo RI for seven years and to pay a fine of Rs 40,000/- or to undergo RI for 1 ½ years in default under Section 304 (Part-I) of IPC. The appellants Dilshad and Naushad were sentenced to undergo RI for six years each and to pay a fine of Rs 30,000/- each or to undergo RI for two years each under Section 308 IPC. The appellant Hamid was sentenced to undergo RI for five years and to pay a fine of Rs 25,000/- or to undergo RI for 1 ½ years in default under Section 308 of IPC. Being aggrieved from their conviction and sentence awarded to them, the appellants are before this Court by way of these appeals.

6. PW-1 Babar is the star witness of this case, he being the only eye-witness. He stated that on 02.09.2008, he along with his family members had gone to meet his uncle at New Seema Puri. At about 4.30 PM, he went to fruit market to purchase fruit so as to break the fast he was observing during Ramzan. His brother Rajiv Khan also came there in three-wheeler. When his brother was parking the three-wheeler on a side in front of Khan Tailor, his auto-rickshaw hit a cycle, which fell on the ground. This led to grappling between his brother Rajiv and the appellant Dilshad who had come from inside the shop of Khan Tailors. According to the witness he tried to intervene, but in the meanwhile Naushad, brother of Dilshad, came out of the shop with a knife in his hand, whereas his father came out with a scissor in his hand. Hamid handed over the scissor to Dilshad. Naushad stabbed his brother with the knife, on his neck, whereas Dilshad stabbed him on his head with scissor. He also claimed at the time of handing over the scissor to Dilshad, Hamid was exhorting his sons to kill them. He further stated that when he tried to save his brother, Dilshad stabbed him on the back near his neck and below his armpit, using the scissor for the purpose. When the witness was examined in Court, he also showed his injury marks to the learned Trial Judge. The witness identified all the three appellants who are present in the Court.

7. PW-3 Chaudhary Nawab is the uncle of PW-1 Babar. He stated that on 02.09.2008, he had accompanied the Investigating Officer and the appellant Dilshad to the house of Dilshad bearing No.F-237, New Seema Puri. They went to the roof of the second floor, where Dilshad took out a scissor lying near boundary of the water tank and handed over the same to the IO, who prepared its sketch and seized it after it was duly sealed. He also identified the scissor Ex.PW-1/Article 1 which he claimed to have been found on the roof of the house of the appellants. PW-14 Constable Naveen Kumar deposed with respect to the appellant Dilshad taking them to the upper floor of house No.F-237, New Seema Puri, picking up the scissor, lying near water tank and handing it over to the IO of the case. PW-17 Inspector Pankaj Sharma deposed with respect to the disclosure statement Ex.PW-17/A-2 made by the appellant Dilshad while in police custody and recovery of scissor Ex.PW-1/Article 1 from the third floor terrace of house No. F-237, New Seema Puri, at his instance.

PW-18 Inspector Netra Pal Singh deposed with respect to the formal arrest of the appellant Nausahd in this case and recovery of one *Chhura* Ex.PW-1/D-1 at his instance from near Shalimar Garden drain, Sahibabad, U.P.

PW9 Dr. Sumit Tellewar, who conducted postmortem on the dead body of deceased Rajiv Khan noticed the following wounds on the dead body:

- “1. Incised stabbed wound measuring 3.3 cm X 0.5 cm present over the left temporal scalp, 4 cm above left ear and 6.5 cm above left eyebrow (outer end), its anterior angle is blunt and posterior angle is acute, track of the wound goes slightly inwards and downwards cutting the soft tissues of the scalp to a depth of 4.2 cm.
2. Lacerated wound measuring 4.3 cm X 0.4 cm bone deep present over the left frontal scalp, its lower end is 6.5 cm above lateral end of left eyebrow and upper end is 3 cm from midline, margins are contused.
3. Lacerated wound measuring 2 cm x 0.3 cm x bone deep present on the left parietal scalp, its lateral end is 8.5 cm above left ear and upper medial end is 3 cm from midline, margins are contused.
4. Lacerated wound measuring 5.4 cm x 0.3 cm x bone deep present on the posterior parietal scalp, its left end is 10 cm medial to left ear and right end is 13.5 cm from right ear.
5. Lacerated wound measuring 5.2 cm x 0.3 cm x bone deep present on the left occipital scalp, 9.5 cm behind left ear and 3 cm below injury No. 4

6. Reddish abrasion 0.5 cm x 0.3 cm present on left forehead, 2 cm above mid of left eyebrow, 9.5 cm medial to left ear.

7. Reddish bruise 2 cm x 1 cm present on right side face, 2 cm lateral to lateral canthus of right eye.

8. Reddish bruise 2 cm x 2.5 cm on right shoulder joint area.

9. Reddish abrasion 1 cm x 1 cm on right side neck, 10 cm below right ear lobule and 8 cm from mid line.

10. Multiple scratch abrasions ranging in size from 1.7 cm x 0.1 cm to 0.4 cm x 0.1 cm present on left sides of a face in an area of 8 cm x 3.5 cm.

11. Reddish bruise 4 cm x 3 cm present on mid line lower neck, just above supra sterna notch.

12. Incised stabbed wound measuring 6.5 cm x 0.2 cm on surface present horizontally over the posterior aspect of left shoulder blade, 1.5 cm lateral to base of neck. Its both the angles are acute. The track of the wound goes forwards, downwards and medically cutting the soft tissues and muscles of the left side of the neck, going forward it cuts the left jugular vein and internal carotid artery and ends by cutting the soft tissues in the mid line of the neck anteriorly, thus making a total depth of 9.5 cm. Entire track is haemorrhagic.”

8. In their statements under Section 313 of Cr.P.C., the appellants denied the allegations against them and claimed that in fact there was a quarrel between the deceased between and injured PW-1 Babar in front of

their shop. Hamid Khan intervened in the quarrel and tried to pacify both of them. Thereupon, deceased Rajiv caused injury to Hamid Khan using a broken bottle. On seeing the injury when Dilshad tried to save him, the deceased caused injury to him on his dorsal region and then both the deceased and the complainant ran away from the spot.

9. DW-1 Nawab Ali is the neighbour of the appellants. He stated that on the first day of Ramzan in the year 2008, two boys were quarreling in front of his shop at about 4.00 PM. The appellant Hamid tried to pacify them and in the process, Hamid and Dilshad sustained injuries on their person. Thereafter, the boys, who were quarreling with each other, left the spot.

10. The impugned judgment was assailed by the learned counsel for the appellants primarily on the following grounds:

- i. Admittedly, none of the appellants was previously known to PW- 1. Therefore, he could not have identified them. No attempt was made to get the appellants identified in a judicial TIP;
- ii. According to PW-1 only one scissor blow was given to the deceased, whereas the post mortem report of the deceased shows that he had one incised wound and four lacerated wounds besides one incised stab wound near his neck;

iii. The lacerated wounds could not have been caused either by scissor or with knife (*chhura*), both of which are sharp weapons;

iv. The knife alleged to have been recovered at the instance of the appellant Naushad was not sent to the doctor to take opinion as to whether injury No. 12 which is a stab wound near the neck of the deceased could have been caused by that knife or not.

v. No one from the neighbourhood was joined in the recovery of the scissor or the knife and therefore the recovery is doubtful;

vi. The prosecution has not explained the injuries sustained by the appellants Dilshad and Hamid.

11. Coming to the first contention, I find that it has come in the deposition of PW-1 Babar that his uncle who lives nearby, at a distance of about 100 metres from the place of occurrence, had told him the name of Khan Tailor and his sons. He also stated that his uncle, his aunt and his mother reached the spot after the incident. According to him, all his relatives were present on the spot when the police arrived. It is thus evident that the identity of the appellants came to be revealed to this witness through his uncle who had come to the spot immediately after the incident. The names of all the three appellants were disclosed by PW-1 in the FIR Ex.PW-1/A which was recorded at about 6.00 PM on the same date. More importantly, this is appellant's own case in their statement under Section

313 of Cr.P.C. that the appellant Haimd, who is the father of the other appellants had intervened in the quarrel between the deceased and his brother and he got an injury on his palm. This is also their case that on seeing the injury on the palm of his father, the appellant Dilshad tried to save him and in the process sustained injury on his dorsal region on the left hand. The case of the appellant Naushad in his statement under Section 313 Cr.P.C. is that on Dilshad getting injured he also came to the spot, but by that time people had gathered there and they separated the deceased and his brother. Thus, he also admits his presence on the spot.

The medical examination report of Hamid is Ex.PW-20/A, whereas the MLC of Dilshad is Ex.PW-20/B. The OPD treatment card of the appellant Dilshad is Ex.PW-21/A, which clearly show their involvement in the incident.

It has also come in the deposition of PW-1 that the incident took place in front of the shop of Khan Tailor. Blood was found by the police in front of the shop of Khan Tailor and was seized vide memo Ex.PW-8/B. The blood lifted from in front of the shop of Khan Tailor when examined in FSL was found to be human blood. This is not the case of the appellants that some other incident had taken place in front of their shop on that date and someone other than deceased Rajiv was injured during that incident.

This is yet another circumstance, which shows their involvement in the incident in which Rajiv Khan lost his life.

12. As regards the number of injuries caused to the deceased by scissor though PW-1 did not specifically say that multiple blows were given to his brother deceased Rajiv Khan, the post mortem report Ex.PW-9/A, coupled with the deposition of PW-9 Dr. Sumit Tellewar would show that the injuries No. 1,2,3,4,5,7,8 and 11 were possible with the scissor which the police had sent to him while seeking his opinion. Injury No. 1, as noted earlier, is an incised stab wound measuring 3.3 centimeter X 0.5 centimeter which was present over the left temporal scalp, 4 centimeter above left ear and 6.5 centimeter above left eye-brow (outer end), whereas injuries No. 2 to 5 were lacerated wounds and injuries No. 7,8,11 were reddish bruises. Ex.PW-9/C is a sketch of the scissor which was recovered at the instance of the appellant Dilshad. This would show that the steel arm of the scissor was about 0.5-0.7 centimeter thick and the side of the scissor was blunt. The lacerated wounds as well as the reddish bruises are quite plausible from the blunt side of the arm of the scissor. That precisely is the reason why the doctor opined that the injuries No. 1,2,3,4,5,7,8, and 11 are possible from the scissor which the police had sent to him, while seeking his opinion.

13. Coming to recovery of the scissor, it has come in the deposition of PW-3 Chaudhary Nawab that it was recovered in his presence and was seized vide memo Ex.PW-3/C which bears his signature. The sketch of the scissor Ex.PW-3/C was also prepared in the presence of this witness. The scissor was having stains at the time it was recovered. A perusal of the report of FSL would show that stains of human blood were found on the aforesaid scissor when it was examined in the laboratory.

It is true that PW-3 Chaudhary Nawab is related to the deceased, but the Court cannot be oblivious to the reluctance of a common man, including the neighbours to join efforts organized by the police lest they are compelled to attend first the police station and then the Courts umpteen times at the cost of considerable inconvenience to them, without any benefit. Moreover, being related to the deceased, PW-3 Chaudhary Nawab would not like an innocent person to be convicted and the real culprit to get scot free and, therefore, is not likely to connive with the police officer in planting a weapon upon an innocent person.

Moreover, there is no legal requirement to join independent witnesses when a recovery is sought to be made pursuant to a disclosure statement made by an accused while in police custody. In **State of NCT of Delhi v. Sunil and Anr.** 2000 VIII AD (SC) 613, a plea was taken that there was no independent witness of the recovery made by the police

pursuant to the statement of the accused while in police custody. The following observations made by the Hon'ble Supreme Court in this regard are pertinent:

“Hence, it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witness. Of course, if any such statement leads to recovery of any article it is open to the Investigating Officer to take the signatures of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.”

14. Coming to the injuries sustained by the appellant Dilshad and his father Hamid, a perusal of Ex.PW-20/A, which is the medical examination report of the appellant Hamid, would show that he had sustained only gaping injuries on the palm side of his right hand besides abrasions over his right chin. Five stitches were given to seal the injury on the palm side of his hand. A perusal of the MLC of the appellant Dilshad would show that he had a cut wound on the left hand dorsal region which was 2 centimeter long. Neither Hamid nor Dilshad required admission in the hospital for treatment of the said injuries. The injuries

sustained by them were minor and it is by now settled legal proposition that the prosecution does not need to explain the minor injuries suffered by the accused during the course of an incident.

In *Bai Fatima* (1975) 2 SCC 7, the Supreme Court specifically held that there may be cases where the non-explanation of injuries by the prosecution may not affect the prosecution case. This principle would apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, witnesses are independent and disinterested, and their testimony is so probable, consistent and creditworthy that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.

In *State of Madhya Pradesh v. Sardar* 2001 (v) AD (SC) 566, the Supreme Court held that where the evidence is clear, cogent and creditworthy, a reasonable inference which can be drawn is that the accused received injuries during the course of occurrence and some members of the prosecution party inflicted such injuries.

In *Rajender Singh v. State of Bihar*, AIR 2000 SC 1779, the Supreme Court reiterated that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries may have been caused in the course of the occurrence, provided that the injuries are

minor in nature. But if the prosecution fails to explain a grievous injury to one of the accused persons, which is admitted to have been caused in the course of the same occurrence, then certainly the court looks at the prosecution evidence with a little suspicion on the ground that the prosecution has suppressed true version of the incident.

15. Though no attempt was made by the Investigating Officer to send the knife (*Chhura*), alleged to have been recovered at the instance of the appellant Naushad, to the doctor, to obtain his opinion as to whether injury No. 12 could have been caused by that knife (*Chhura*) or not, that, to my mind, would not be fatal to the case of the prosecution since in the absence of opinion of the doctor in this regard, the Court could proceed on the assumption that the knife (*chhura*), alleged to have been recovered at the instance of the appellant Naushad was not used by him for causing injury to the deceased. However, since it has come in evidence that Naushad had given a blow to the deceased with a knife (*chhura*), near his neck, the appellant Hamid, while handing over the scissor to the appellant Dilshad, had exhorted his sons to kill PW-1 and his brother and the injury No. 12 being an incised stab wound could have been caused by a sharp edged weapon, such as a knife (*chhura*) though the knife alleged to have been recovered at the instance of the appellant Naushad, may not be that very knife which was used for causing the said injury, it is quite apparent that

all the three appellants shared a common intention to cause culpable homicide not amounting to murder.

16. The defence taken by the appellants is that deceased Rajiv and PW-1 Babar had quarreled with each other in front of their shop and during the course of the said quarrel, PW-1 caused injuries to the deceased. However, neither the said defence could be substantiated during trial nor does it otherwise appear to be plausible. There is no evidence of PW-1 and PW-2 having any dispute with each other. Therefore, there could be no reason to them to start quarreling with each other all of a sudden, in a market place. Moreover, this is not the case of the appellants that PW-1 was armed with some weapon which could have caused the injuries which were found on the dead body of the deceased Rajiv.

Had a broken bottle of glass been used by the deceased, the pieces of glass would have been found scattered on the spot. However, no glass pieces were found when the spot was inspected by the IO. This is yet another circumstance which negates the version given by the appellants noted earlier, deceased Rajiv had a number of lacerated wounds on his body. This is not the case of the appellants that PW1 Babar was armed with a weapon. Therefore, the version given by the appellants does not explain the lacerated wounds found on the body of the deceased. I, therefore, find no merit in the defence set up by the appellants.

17. For the reasons stated hereinabove, no fault can be found with the conviction of the appellants under Section 304 Part I and 308 of IPC read with Section 34 thereof. However, in the facts & circumstances of the case, the sentence awarded to the appellants is modified as under:

Under Section 304 Part I of IPC read with Section 34 thereof, the appellants Dilshad and Naushad are sentenced to undergo RI for seven (7) years each and to pay fine of Rs.40,000/- each or to undergo SI for six (6) months each in default; under Section 304 Part I of IPC read with Section 34 thereof, the appellant Hamid Khan is sentenced to undergo RI for five (5) years and to pay fine of Rs.40,000/- or to undergo SI for six (6) months in default.

Under Section 308/34 IPC, the appellants Dilshad & Naushad are sentenced to undergo RI for three (3) years each and to pay fine of Rs.20,000/- each or to undergo SI for three (3) months each in default. Under Section 308/34 of IPC, the appellant Hamid Khan is sentenced to undergo RI for three (3) years and to pay fine of Rs.20,000/- or to undergo SI for three (3) months in default.

Out of fine, if realized from the appellants, Rs.1.25 lakh be paid to the legal heirs of deceased Rajiv Khan whereas Rs.25,000/- be paid to the injured Babar.

The appeals stand disposed of accordingly.

One copy of this order be sent to the concerned Jail Superintendent.

LCR be sent back along with a copy of this order.

FEBRUARY 17, 2014

V.K. JAIN, J.

BG