

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

Judgment Reserved on: October 15, 2014

% *Judgment Delivered on: November 03, 2014*

+ **CRL.A.781/2011**

AFZAL SHA @ SURAJ ALI Appellant

Represented by: Mr.Ajay Verma, Advocate with
Ms.Neha Singh, Ms.Pankhuri
Mehndiratta, Advocate

versus

STATE (NCT OF DELHI) Respondent

Represented by: Mr.Varun Goswami, APP
Inspector Anil Kumar Pandey, PS
Kashmere Gate

CRL.A. 784/2011

AJAY Appellant

Represented by: Mr.Ajay Verma, Advocate with
Ms.Neha Singh, Ms.Pankhuri
Mehndiratta, Advocate

versus

STATE (NCT OF DELHI) Respondent

Represented by: Mr.Varun Goswami, APP
Inspector Anil Kumar Pandey, PS
Kashmere Gate

CRL.A. 1270/2013

SONU Appellant

Represented by: Mr.S.B.Dandapani, Advocate

versus

STATE Respondent

Represented by: Mr.Varun Goswami, APP
Inspector Anil Kumar Pandey, PS

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Believing the testimony of Mithun Kumar PW-10 and holding the same to be a truthful eye-witness account; finding corroboration to the testimony of PW-10 with respect to the knife got recovered by appellant Sonu on which human blood was detected and as per the doctor who conducted the post mortem of the dead body of the deceased the injury to the deceased could be caused by the knife in question and lastly, holding that the recovery(s) got effected pursuant to the disclosure statements made by the three accused were proved to be the fruits of the robbery, vide impugned decision dated March 14, 2011, all appellants have been convicted for the offence punishable under Section 302/34 IPC, the offence punishable under Section 392/34 IPC, as also for the offence punishable under Section 411 IPC. Vide order on sentence dated March 19, 2011, for the offence of murder the three have been sentenced to undergo imprisonment for life and pay fine in sum of ₹5,000/- and in default of payment of fine have been directed to undergo simple imprisonment for a period of six months. For the offence of robbery, the three have been sentenced to undergo rigorous imprisonment for seven years and pay fine in sum of ₹2,000/- and in default of payment of fine have been directed to undergo simple imprisonment for a period of two months. For the offence punishable under Section 411 IPC, the three have been sentenced to undergo rigorous imprisonment for a period of one year.

2. The appellants challenged their conviction pleading that though Mithun PW-10 has been proved to be in the company of the deceased when

the robbery took place, his testimony of dock identification of the appellants is unworthy of credence and thus, the appellants have not been linked to the crime. Recoveries made pursuant to the disclosure statements made by the appellants are questioned as lacking incredibility on the plea that the same were from open spaces accessible to the public and further that no TIP was conducted qua the articles recovered. The argument was that the crime took place at around 11 PM on July 29, 2010 and the appellants were arrested on August 11, 2010. During this period the various exhibits recovered at the instance of the appellants could be in public gaze and the possibility of the investigating officer having noticed them and the same being thereafter planted on the appellants cannot be ruled out. An alternative submission was made that if appellants contentions challenging as aforementioned are not to be accepted, the offence made out concerning the death of deceased Mukesh would be culpable homicide not amounting to murder punishable under Section 304-II IPC.

3. The place of the incident is the road beneath ISBT flyover near Kudesiya park.

4. As deposed to HC Jitender PW-6, at around 11 PM on July 29, 2010 he was on duty in the police control room and was attending to channel no. 135. He received information of stabbing near ISBT flyover which information he recorded in the PCR form Ex.PW-6/A. This triggered the involvement of the police. The information being flashed over the wireless was picked up by HC Kishan Singh PW-7, the incharge of a PCR van 'Sugar-51', who as deposed to in court reached Kudesiya park and met Mithun PW-10 and injured Mukesh who was removed to Aruna Asaf Ali hospital where, as deposed to by doctor Ruby Kumari PW-3, he was declared brought dead as per MLC Ex.PW-3/A which records that one penetrating wound was noted on the left side of chest just below the left

nipple.

5. The information received at the police control room was conveyed to P.S. Kashmere Gate where SI Gopeshwar (not examined) recorded the same vide DD No.35A, Ex.PW-1/A, proved at the trial by HC Hari Kishan PW-1.

6. Investigation was entrusted to SI Purushottam PW-16 who proceeded towards the ISBT flyover along with Ct.Pushpender PW-14. Ct.Neeraj Kumar PW-15 who was on patrolling duty at Kashmiri Gate received information of a person being stabbed near ISBT flyover and this led him, as deposed to him in court, towards ISBT flyover. As deposed to by SI Purushottam, Ct.Pushpender and Ct.Neeraj when the three reached ISBT flyover they met nobody, for the obvious reason in the meanwhile the injured and his friend had been removed in the PCR van to Aruna Asaf Ali hospital. As deposed to by the three, they learnt that an injured had been removed in a PCR van to Aruna Asaf Ali hospital. Therefore, SI Purushottam accompanied by Ct.Neeraj proceeded to the hospital and Ct.Pushpender remained at the spot where blood stains were noted by the three, obviously to ensure that the place of the crime was not disturbed.

7. As deposed to by SI Purushottam and Ct.Neeraj, when the two reached the hospital they learnt that an injured named Mukesh had been declared brought dead and his brother Mithun was present at the hospital. SI Purushottam recorded the statement Ex.PW-10/A of Mithun and made an endorsement Ex.PW-16/A beneath the same and handed over the rukka to Ct.Pushpender for FIR Ex.PW-13/A to be registered as also requested that a crime team be sent to the spot. He sent the dead body to the mortuary. He then returned to the spot. After some time after the FIR for the offence of robbery and murder was registered the crime team reached the scene of the crime and as deposed to by Ct.Inderjeet PW-4, a photographer, twelve photographs Ex.PW-4/13 to Ex.PW-4/24, negatives whereof are Ex.PW-4/1

to Ex.PW-4/12 were taken. Nothing else which could be incriminating was found. SI Purushottam completed the formality of lifting blood on a gauze, blood stained earth and concrete from the place of the crime as recorded in the seizure memo Ex.PW-10/O, obviously to gather evidence to prove that Mukesh was stabbed at the spot from where blood sample was lifted. He prepared the rough site plan Ex.PW-16/DA.

8. In the statement Ex.PW-10/A, which resulted in registration of the FIR, Mithun PW-10 stated that along with his brother Mukesh, as the two were proceeding to the bus stand near Kudesiya park, they saw 3-4 boys sitting on the railing who suddenly sprang towards them and demanded to hand over whatever he and Mukesh were carrying to them. They threatened that if he and Mukesh did not obey their command they would not hesitate to use a knife. One boy caught him by his collar and removed a red coloured rexine purse from his pocket which contained ₹10/- and three photographs of his brother as also a small pocket diary on which he had written telephone numbers. The other boy removed a black coloured rexine purse from the pocket of his brother Mukesh which contained ₹300/- and another boy removed mobile phone 'Make G-5' having number 8800219684 of his brother. His brother resisted. The third boy stabbed his brother in the chest. All boys ran away. He and his brother ran for their lives towards ring road but at some distance his brother fell down. Somebody rang up the police and a PCR van came and removed his brother to the hospital.

9. Relevant would it be to note that Mithun gave the description of the three boys who participated in the robbery i.e. the one who removed Mithun's purse and the boy who removed the purse and the mobile phone of Mukesh as also the boy who stabbed Mukesh. He described the third as a fair coloured boy having a round face and height 5'5" and the other two being thin and lean having wheatish complexion and age between 20-22

years. He said that if the three are brought before him he could recognise them.

10. It thus became a case where the only thing which the investigating officer could do was to move around with Mithun in the area for the reason the manner in which the crime was committed made it known to an experienced police officer that vagabonds/petty criminals were the offenders. Recce was thus required to be done in the area, for the reason petty criminals have their own territory within which they operate.

11. But before recce operations commenced, the post mortem of Mukesh's dead body was got conducted at the Subzi Mandi mortuary. Dr. S. Lal PW-2 conducted the post mortem on July 30, 2010 and authored the report Ex.PW-2/A opining that cause of death was haemorrhagic shock due to the stab injury on the chest which was opined to be sufficient to cause death in ordinary course of nature. The solitary stab wound was incised, obliquely placed over left side middle front of chest. Entering the chest cavity through the sixth intercostals space, the weapon of offence traversed backward and downward perforating the lower left lobe of the left lung, giving a nick in the apex of the heart it perforated the diaphragm.

12. Inspector Kishore Kumar PW-17 took over the investigation from SI Purushottam after the FIR was registered. As deposed to by him and Mithun the two made recces in and around the area of Kudesiya park where many vagabonds were shown to Mithun but he did not identify any as the robbers. It was only on August 11, 2010 that Mithun could spot Sonu near Kelaghat and informed Inspector Kishore Kumar that he was the boy who had stabbed his brother. The boy was nabbed. He was Sonu. He revealed name of Ajay and Afzal who were also arrested soon thereafter. Sonu's disclosure statement Ex.PW-17/B was recorded by Inspector Kishore Kumar in which he disclosed that he could get recovered the knife Ex.P-4 from

Kudesiya park. He got recovered the knife from Kudesiya park lying hidden in bushes which was seized vide memo Ex.PW-1/N. Sketch Ex.PW-10/M of the knife was drawn by Inspector Kishore Kumar. Ajay's disclosure statement Ex.PW-17/C and Afzal's disclosure statement Ex.PW-17/D was recorded pursuant where to Ajay got recovered two purses Ex.P-1 and Ex.P-2 from a space between pillar No.6 in Jamuna iron bridge. Afzal got recovered a mobile phone of 'G-5' series, Ex.P-3.

13. The knife Ex.P-1 was sent to Dr. S. Lal for his opinion and he opined vide Ex.PW-2/B that the injury mentioned in the post mortem report Ex.PW-2/A could be possible when said knife was used.

14. All exhibits seized during investigation were sent for forensic examination and vide report Ex.PW-11/B human blood, group whereof could not be detected, was found on the knife Ex.P-4.

15. At the trial various witnesses involved in the investigation deposed to facts as narrated above and proved various memos drawn up recording seizure of exhibits and thus we need not note the testimony of said witnesses. Mithun PW-10 deposed in sync with what he had disclosed in his statement Ex.PW-10/A and additionally identified the two purses Ex.P-1 and Ex.P-2 as also the mobile phone Ex.P-3 belonging to him and the deceased which were got recovered by Ajay and Afzal. He identified Sonu as the one who had stabbed his brother. He identified Afzal and Ajay as the two other boys who had participated in the commission of the crime. Inspector Kishore Kumar PW-17 deposed of the various recs he made in the company of Mithun and proved the disclosure statements and recoveries made pursuant thereto. He identified the two purses Ex.P-1 and Ex.P-2 as also the mobile phone Ex.P-3 and the knife Ex.P-4 which he had seized during investigation.

16. Learned counsel for the appellants showed nothing to us from the cross-examination of any witness which could discredit the witnesses.

17. As noted in paragraph 2 above the testimony of Mithun and dock identification by him of the appellants and Ex.P-1, Ex.P-2 and Ex.P-3 was questioned urging that no TIP of either the three accused or of the three exhibits was got conducted. It was further urged that the crime took place around 11 PM when it was dark and it is next to impossible that Mithun could recognise the three assailants.

18. As noted above, in his statement Ex.PW-10/A, Mithun gave a description of the three boys who participated in the crime. It being late night is irrelevant for the reason the site plan to scale Ex.PW-12/A shows that a mercury light was illuminating the area. We take judicial notice of the fact that at night, the flyover crossings in Delhi are well lit by sodium or mercury lights hoisted on tall poles. There was sufficient light for a person to see three persons.

19. As regards dock identification of the three accused and of the two purses Ex.P-1 and Ex.P-2 as also that of the mobile phone Ex.P-3, it may be true that no TIP was conducted either of the accused or of the three exhibits, but the consequences thereof would not be the same.

20. As regards the dock identification of the accused, we find that in his statement Ex.PW-10/A, Mithun gave a description of the three boys who had participated in the commission of the crime. It is obvious that the three boys were in the constant gaze of Mithun for sufficient long time. The area being well lit with a mercury light on a pole, if we look at the testimony of Mithun we find that from the commencement of the first act towards the crime till the completion of the last at least 20-25 seconds lapsed during which time Mithun was relieved of the purse in his pocket and the deceased was relieved of his purse and the mobile phone. As the deceased resisted, he was stabbed. Mithun and the deceased were walking side by side and thus we have evidence that the three assailants were at arm's length distance of Mithun. It

was useless to subject Mithun to the rigours of a TIP, which relates to investigation and not the trial. Besides, we have evidence that the appellants were apprehended when Mithun and Inspector Kishore Kumar made recces from July 31, 2010 to August 11, 2010 and only on August 11, 2010 could Mithun spot Sonu. The recces were made because the nature of the crime suggested that petty criminals in the area were involved and would in all probability be found sitting idle or sleeping on the pavements. The three accused were arrested during one such recce and obviously when Mithun identified them to the Investigating Officer. It would be not wrong on our part to once again re-emphasize that in the statement PW-10/A Mithun was able to give a description of the accused. To satisfy ourselves, during argument of the appeal on October 14, 2014 we had directed the three accused to be produced in court on October 15, 2014. The three were produced in court on said date and we had an occasion to see the three, who obviously have aged by 4 years from when the crime was committed. Save and except their age, the body features matched with the description given by Mithun to the police soon after the incident.

21. We overlook the incriminating evidence of the recoveries of the two purses and the mobile phone for the reason the two purses are ordinary rexine purses and the mobile phone is of an ordinary kind.

22. In our opinion Mithun's testimony is sufficient to prove the accomplicity of the appellants in the robbery.

23. The question which now arises is whether the three accused are guilty of the offence of murdering Mukesh?

24. From the testimony of Mithun it is apparent that when the three accused accosted Mithun and the deceased they only threaten that unless Mithun and the deceased handed over their belongings, the two would be harmed. At that point of time neither accused had a knife in his hand. After

relieving Mithun and the deceased of their belongings, upon the deceased trying to retrieve his mobile phone, and in the process obviously holding on to Sonu, Sonu took out a knife from his pocket and stabbed the deceased. He stabbed him only once. This was to free himself from the grip of Mukesh the deceased. The three accused fled. From the fact that the three accused threatened Mithun and the deceased that if they did not voluntarily hand over their belongings they would be harmed, we can infer the fact that Afzal and Ajay were aware that Sonu was carrying a knife with him. That Sonu used the knife to free himself when the deceased tried to retrieve his mobile phone leads us to the conclusion that all three accused shared the common intention of not only robbing Mithun and Mukesh but also using force and if necessary the knife to further their common object i.e. robbery. But certainly they did not share any common intention to cause anybody's death. The fact that Sonu stabbed Mukesh only once and fled leads us to the conclusion that intention of Sonu was to injure Mukesh so that Mukesh would let go his grip on Sonu. It could thus be said that the common intention shared by the three accused was to not only commit robbery but even use reasonable force to commit the robbery and escape. The common intention was to use the knife to scare or cause an injury if necessary to complete the robbery. Under the circumstances the act of Sonu for which the other two co-accused would be liable under Section 34 of the Penal Code would be culpable homicide not amounting to murder. The three would thus be liable for having committed an offence punishable under Section 304 Part-II/34 IPC. The three would be liable for having committed the offence punishable under Section 392/34 IPC, notwithstanding our finding that the two purses and the mobile phone got recovered is being ignored by us as incriminating evidence for the reason Mithun's testimony establishes that he and Mukesh were robbed of their purses and additionally Mukesh was robbed of his mobile phone.

25. Maintaining the sentence imposed upon the appellants for the offences punishable under Section 392/34 IPC and Section 411 IPC, we partially allow the appeals and convict appellants for the offence punishable under Section 304-II/34 IPC for which offence we sentence them to undergo rigorous imprisonment for seven years and pay fine in sum of ₹2,000/- and in default of payment of fine to undergo simple imprisonment for three months. All sentences shall run concurrently. The appellants would be entitled to the benefit of the Section 428 Cr.P.C.

26. Four copies of this decision be sent to the Superintendent, Central Jail Tihar, three to be supplied to the appellants and the fourth for his record.

27. TCR be returned.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

NOVEMBER 03, 2014

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