

\$~3, 4 & 5

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

% *Date of Decision: September 23, 2014*

+ **CRL.A. 32/2012**

RAJESH KUMAR Appellant
Represented by: Mr.Vivek Sood, Advocate with
Mr.Prem Prakash and Mr.Jaydeep
Tandon, Advocates

versus

STATE Respondent
Represented by: Ms.Aashaa Tiwari, APP
Insp.Ram Kanwar Dahiya, PS
Subhash Place

CRL.A. 36/2012

RAMESH KUMAR Appellant
Represented by: Mr.Vivek Sood, Advocate with
Mr.Prem Prakash and Mr.Jaydeep
Tandon, Advocates

versus

STATE Respondent
Represented by: Ms.Aashaa Tiwari, APP
Insp.Ram Kanwar Dahiya, PS
Subhash Place

CRL.A. 66/2012

VADIWEL Appellant
Represented by: Mr.Sunil Dalal, Advocate with
Mr.Himanshu Aggarwal, Advocate

versus

GOVT OF NCT OF DELHI

..... Respondent

Represented by: Ms.Aashaa Tiwari, APP
Insp.Ram Kanwar Dahiya, PS
Subhash Place

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. Rajesh Kumar, his father Ramesh Kumar and Vadiwel, a bosom pal of Rajesh have been convicted for having murdered Jagdish S/o Mangal Chand on April 29, 2010 at around 11:45 PM. The judgment is dated October 07, 2011. Vide order on sentence dated October 11, 2011 the three have been sentenced to undergo life imprisonment and pay fine in sum of ₹5,000/-, in default of payment of fine to undergo rigorous imprisonment for six months. One Ambu @ Ammu was declared a proclaimed offender. The verdict of guilt is based upon a motive being proved : accused Rajesh and Ramesh bearing a grudge against Jagdish who used to trouble Rajesh's sister Sangeeta The learned Trial Judge has believed the testimony of Kamaal PW-3, Dilip Kumar PW-19 and Sushil Kumar PW-21. From the call record details Ex.PW-28/B and Ex.PW-28/F the learned Trial Judge has found corroboration to the testimony of Dilip Kumar PW-19.

2. Learned counsel for the three accused have urged at the hearing today that truth has emerged from the testimony of Kamaal PW-3 and that the contours of the incident have been graphically narrated by Kamaal. Learned counsel argued that the material improvements in the deposition of Dilip Kumar PW-19 who was an interested witnesses has been overlooked by the

learned Trial Judge.

3. The FIR in question is pursuant to the statement Ex.PW-2/A made by Mohan PW-20, who unfortunately for the prosecution did not support the case of the prosecution, in that, he stood by his statement Ex.PW-20/A of returning home and being outside Om Telecom at House No.A-236, Shakurpur at 11:45 PM. He disclaimed seeing the incident at which Jagdish received injuries. He said that he saw Jagdish lying on the ground with Dilip and Sushil near him. He said that he removed Jagdish in his TSR to the hospital. Mohan's statement Ex.PW-20/A reads as under:-

“Statement of Sh.Mohan, S/o Munni Ram, R/o A-308, J.J.Colony, Shakurpur, Delhi aged 26 years.

I reside at the above given address. I am a TSR driver. Today on April 29, 2010 I was returning to my house in my TSR No.DL 1RE 6843. The time was 11:45 PM when I reached Om Telecom at House No.A-236, Shakurpur. I saw three boys quarrelling with Jagdish, S/o my maternal uncle, Mangal Chand R/o, A-302, Shakurpur, Delhi. The three were holding on to him. The name of one boy is Rajesh, S/o Rames, R/o A-239, Shakurpur. The second was Vadiwel and the name of the third is Ammu, both of whom reside at G Block, Shakurpur. I had seen the two in the company of Rakesh earlier on and thus I know the three. But I do not know the house number of the two. Rajesh was abusing Jagdish and was accusing him of telephoning his sister and harassing her. He threatened to teach Jagdish a person. At that all three started boxing and kicking Jagdish. Jagdish yelled 'bachao bachao'. I parked my TSR. By then Vadiwel and Ammu had caught hold of Jagdish and Rajesh picked up a stone lying on the street and hit the same on the head and face of Jagdish uttering contemporaneously that he would now be rendered unfit to speak over the telephone. Because of the injury Jagdish started bleeding from his nose and mouth. He fainted. On hearing the noise Dilip @ Raju the elder brother of Jagdish and his friend

Sushil reached. On seeing them the three boys ran away. Sushil informed the police by ringing the number 100. We three removed Jagdish in my TSR to Bhagwan Mahavir Hospital where the doctor found Jagdish to be grievously injured and in an unconscious condition.”

4. Om Prakash the brother of Kamaal PW-3 runs a PCO Booth from a room on the ground floor of House No.A-309, Shakurpur, J.J.Colony, and as deposed to by him i.e. Kamaal he was manning the PCO Booth and at around 11:30 PM saw Rajesh in the company of Ammu and Vadiwel. They started beating Jagdish inflicting kicks and fists. Ramesh was instigating them to kick and beat Jagdish. While being beaten Jagdish made a telephone call from his mobile phone and he heard him say ‘*bhai mujhe aakar bacha le, mujhe gali ke bahar maar rahe hain*’. The accused snatched Rajesh’s mobile phone and broke it by throwing it on the road. Jagdish ran towards Sushil’s house to save himself and at that time he saw him bleeding from the nose. Vadiwel apprehended Jagdish at some distance. Ramesh exorted ‘*khinch ke la sale ko, yahan par la, yahan marenge*’. Rajesh, Vadiwel and Ammu brought Jagdish back to the corner of the street in front of his shop and started beating him again and while beating Rajesh said ‘*sale tu phir meri bahan ko phone karega*’. Jagdish said ‘*mene nahin kiya bhai*’. Despite that Rajesh picked up a stone which was lying outside the street and hit on the head and face of Jagdish. In the meanwhile Mohan arrived in his TSR. Jagdish became unconscious. Mohan went to the house of Jagdish and returned with Dilip and Sushil. Rajesh said ‘*le jao isko, is saale ka kaam tamam ho chukka hai*’. They took Jagdish in an auto to the hospital. Wife of Sushil made a call to the police. Jagdish was having affair with Sangeeta, sister of Rajesh and he knew of said fact because Sangeeta used to

call Jagdish from his STD booth. Even after marriage Sangeeta used to call Jagdish from his STD booth.

5. From the testimony of Kamaal PW-3, it is apparent that neither Dilip nor Sushil could have witnessed the incident of assault, which as per the testimony of Kamaal would have a time span of 2 to 3 minutes.

6. Kamaal has withstood the test of cross examination and learned counsel for the appellants concede so. There is independent corroboration to the testimony of Kamaal from the call record details Ex.PW-28/B and Ex.PW-28/F which show that from the mobile number 9278667856 which was with the deceased Jagdish he had made two calls to Sushil's mobile number 9871745351 at 23:57:19 and 23:59:15 hours on April 29, 2010. Sushil PW-21 is a friend of Jagdish who has deposed that on his mobile number 9871745351 he got a call from Jagdish which got disconnected and within a minute or two he received another call from Jagdish that he was being beaten on the street outside his house. Sushil resides at A-30, J.J.Colony, Shakurpur and obviously must have taken at least 2 to 3 minutes to reach the place of the incident. He is a truthful witness because he does not claim having seen the incident.

7. Dilip Kumar PW-19 is the brother of Jagdish and has deposed that as he was preparing to sleep in his house his brother Jagdish received a call on his mobile phone and he heard Jagdish say '*Rajesh bhai main tumse kal mil lunga, abhi main so raha hun*'. After 2 or 4 minutes Jagdish once again received a call on his mobile phone, Jagdish went outside the house. After 15 or 20 minutes he heard shrieks of bachao bachao and went outside the house. He has deposed to have seen the incident, but we refrain from noting the full contours of his testimony because we find he having made

considerable improvements regarding exhortations by Ramesh. He has also given details of the incident, which at first blush appear to be slight variations. With the version stated by Kamaal PW-3, but we find the same to be material because from the testimony of Kamaal it is apparent that at the instigation of Ramesh Kumar, Rajesh, Vadiwel and Ammu inflicted fist blows and kicked Jagdish and when Jagdish tried to run away it was the three who chased him and brought back at the exhortation of Ramesh and started punching him once again. Out of the blue, Rajesh picked up a stone lying nearby on the street i.e. a handy object of assault and struck one blow on the head of Jagdish. Kamaal's version would bring out the intention of Ramesh to ensure that Jagdish would be taught a lesson of his life because Jagdish could not get over his infatuation with Sangeeta, and probably neither could she, in spite of Sangeeta being married and in an Indian society a father and a brother would be annoyed when a male friend would continue to maintain contact with a married daughter of the family. The only truth spoken about this witness is of Rajesh calling up Jagdish for the reason the call details Ex.PW-28/B and Ex.PW-28/F would evidence that from Rajesh's mobile phone 9250514708 two calls at 23:45:50 hours and 23:53:30 hours were made to Jagdish's mobile phone number 9278667856 and as noted above two calls were made by Jagdish to Sushil at Sushil's mobile number 9871745351 at 23:57:19 hours and 23:59:15 hours.

8. It may be true that in the statement Ex.PW-20/A role of Ramesh Kumar is not disclosed, but it happens that while narrating an incident soon after it took place, the emotions of a witness somewhat blurring the rational mind, the maker of the statement would give the details of facts which he perceives to be the wrong facts and overlooks stating facts which are

perceived as incidental. Since Ramesh Kumar did not participate in the physical assault, it is possible that Mohan PW-20 overlooked stating his role of exhortation. We are handicapped in taking the dialogue any further because Mohan PW-20 has turned hostile, and had he truthfully disclosed what he saw, only he could have thrown light on his statement Ex.PW-20/A.

9. The position would be thus : angered by Jagdish maintaining a contact with Sangeeta, evidence suggests that Ramesh Kumar, father of Rajesh and Sangeeta told Rajesh to muster help and Vadiwel and Ammu, friends of Rajesh agreed to extend a helping hand. Rajesh rang up Jagdish and called him outside his house. On the saying of Ramesh to teach the scoundrel a lesson of his life, Rajesh, Vadiwel and Ammu started punching and kicking Jagdish who in the melee contacted his brother Sushil but before anybody could rescue him, Rajesh picked up a handy stone nearby and hit Jagdish on the head. The utterance attributed to Rajesh by Mohan in the statement Ex.PW-20/A, from which Mohan resiled : he would now be rendered unfit to speak over the phone, brings out that the target of the assault was the mouth of Jagdish. Be that as it may one thing is clear, neither Ramesh nor Vadiwel nor Ammu had any intention to either kill Jagdish or to cause any life threatening injury. Similarly would be the position qua Rajesh. None of them came armed. All of them came premeditated, but being unarmed, and the manner of assault deposed to by Kamaal PW-3 shows the intention to simply give a beating by fist and leg blows to Rajesh. All of a sudden Rajesh picked up the stone and gave one hard blow on the top of the head of Jagdish. Jagdish died 3 days after the incident and the cause was cranio cerebral injury to the brain.

10. Neither accused shared any common intention, nor anyone else

participated in concert with Rajesh to inflict the blow on the skull of Jagdish.

11. Rajesh alone must suffer the consequences of his act, which would constitute the offence of culpable homicide not amounting to murder punishable under Section 304 Part II IPC. As regards Ramesh Kumar and Vadiwel, from their acts the offence committed by the two would be to cause simple injuries to Jagdish : Ramesh exhorting to beat Jagdish and Vadiwel along with absconder Ammu kicking and punching Jagdish. The grievous injury which has proved fatal was not inflicted by Vadiwel, nor was it infliction at the exhortation of Ramesh. But for the blow on the head with a stone, the injuries on Jagdish are not grievous because none of the impairment of the body envisaged under firstly to eighthly of Section 320 IPC has resulted from the kicks and the fist blows. Thus, Vadiwel and Ramesh would be liable for voluntarily causing hurt to Jagdish.

12. We dispose of the appeals setting aside the conviction of the appellants for the offence of Jagdish's murder but convicting and thereafter sentencing them as under:-

13. Crl.A.No.32/2012 filed by Rajesh Kumar is disposed of convicting him for the offence punishable under Section 304 Part II IPC and for which we sentence him to undergo RI for five years and pay fine in sum of ₹50,000/-, in default of payment of fine to undergo SI for six months. Fine in realized shall be paid to the mother of Jagdish.

14. Rajesh shall be entitled to the benefit of Section 428 of the Code of Criminal Procedure.

15. Crl.A.No.36/2012 and Crl.A.No.66/2012 filed by Ramesh Kumar and Vadiwel are disposed of convicting them for the offence punishable under

Section 323 IPC for which we sentence them to undergo no further imprisonment noting that as per law we can sentence them to undergo imprisonment only for one year and the two have suffered incarceration since they were arrested the day after the incident. The two shall be set free forthwith unless required in custody in some other case.

16. Two copies of the present decision be supplied to the Superintendent Central Jail Tihar for necessary action and compliance.

17. The Trial Court Record be returned.

CrI.M.B.No.10443/2014 in CrI.A.No.66/2012

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 23, 2014

mamta