

40

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

+ **Criminal Appeal 471/2012**

% **Reserved on: 20th February, 2015**

Date of Decision: 22nd May, 2015

SACHIN AND ANR

..... Appellant

Through Mr. Jitendra Sethi, Advocate
for Sachin and Ms. Inderjeet Sidhu,
Advocate for Sunil.

Versus

STATE NCT OF DELHI

..... Respondent

Through Ms. Aashaa Tiwari, APP with
Inspector Joginder Singh, PS-Nabi Karim.

Criminal Appeal 403/2012

JAGDISH PARSHAD

..... Appellant

Through Mr. Jitendra Sethi, Advocate.
versus

STATE NCT OF DELHI

..... Respondent

Through Ms. Aashaa Tiwari, APP with
Inspector Joginder Singh, PS-Nabi Karim.

CORAM:

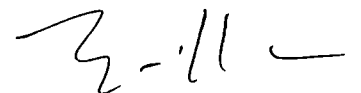
HON'BLE MR. JUSTICE SANJIV KHANNA

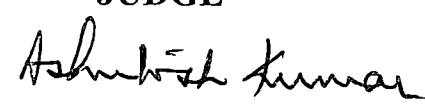
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J.

For detailed order see Crl.A. 469/2012 titled ***Mukesh Kumar***

Vs. State, NCT of Delhi pronounced today.


(SANJIV KHANNA)
JUDGE


(ASHUTOSH KUMAR)
JUDGE

41

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versus

STATE NCT OF DELHI Respondent

92

Through Ms. Aashaa Tiwari, APP with
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CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J.

This common judgment will dispose of the aforementioned appeals filed by Mukesh Kumar, Sachin, Sunil and Jagdish Parshad. The appeals impugn judgment dated 2nd March, 2012 in Sessions Case No.55/10 arising out of charge sheet filed in FIR No.177/2006, Police Station Nabi Karim and relate to the homicidal death of Anil @ Pangey.

2. The appellants have been convicted under Section 302 read with Section 149 of the Indian Penal Code, 1860 (IPC, for short), apart from Section 147/148 of the IPC. By the impugned order on sentence dated 14th March, 2012, the appellants have been sentenced to undergo imprisonment for life for the offence under Section 302/149 IPC, to pay a fine of Rs.2 lacs each and in default of payment of fine, to further undergo simple imprisonment for three years. Cumulative fine of Rs.8 lacs has been directed to be paid to the legal heirs of the deceased Anil @ Pangey as compensation. For the offence under Section 147/148 IPC, the appellants have been

Cri A Nos.469/2012, 471/2012 & 403/2012 Page 2 of 32

43

sentenced to rigorous imprisonment of one year each. The sentences, it was observed, would run concurrently and benefit of Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C., for short) has been granted.

3. The impugned judgment also acquits Praveen Kumar, Shanky and Vijay @ Vicky. Neither the State nor the victim has preferred any appeal against their acquittal. As per the prosecution version, another person, R (name withheld) was also involved in the commission of the offence, but being a juvenile, he was tried under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. One Naresh was also charge-sheeted, but had died during the pendency of the trial and the proceedings against him have abated.

4. On the question of homicidal death suffered by Anil @ Pangey, Dr. C.S. Aarthy (PW23) has deposed that on 6th June, 2006, at about 10 P.M., injured Anil @ Pangey was brought to the casualty ward by his paternal aunt (*bua*), namely, Draupati (PW1) with alleged history of assault by known persons. The injured was unconscious and there were stab wounds over the lower left chest, CLW of 4 cm x 1 cm over right arm and CLW of 5 cm x 1 cm over parietal region or scalp. These facts were duly recorded in the MLC, marked Ex.PW23/A.

The injuries were fresh and caused by a sharp object. After receiving first aid, the injured was referred to the surgery department. Post-mortem of the deceased was conducted by Dr. Sharbana Kumar Nayak (PW3), who testified that Anil @ Pangey had succumbed to his injuries on 6th June, 2006, at 11.30 P.M. On examination, he noticed the following external injuries:-

“1. Incised wound of size 4.6 cm x 1 cm part thickness of skull situated almost horizontally over the middle or posterior frontal region 11 cm behind the glabella. Margin of the wound (*sic, wound*) are found regular and right end is found lying little bit anteriorly than the left 5 cm and 3 cm right to the left end of anterior margin of the wound, one lacerated wound of size 3 cm x 0.5 cm. x scalp deep extends anteriorly to the right side, the anterior end lying 9 cm behind medial end of right eyebrow.

2. Stitched incised wound of 6 cm long containing 3 black colour silk sutures situated almost horizontally on the outer aspect of right arm, 15 cm below the right acromial tip. On removal of sutures wound margins are found regular, anterior end is acute whereas posterior end is superficial (skin deep) for 1.5 cm. Rest part of the wound is muscle deep.

3. Abrasion of size 1.5 cm. x 1 cm situated over the tip of right shoulder.

4. Abrasion of size 1.5 cm x 1 cm situated over the right shoulder blade 1.5 cm medial to the previous injury.

5. Incised wound of size (*sic, size*) 1.5 cm. 0.4 cm. x 0.3 cm. (subcutaneous tissue deep) situated horizontally on the right side front of abdomen 10.5 cm. above and 4 cm away from the umbilicus (*sic, umbilicus*).

6. Stitched midline incised wound of 16 cm long containing 7 black colour silk stitches on the front of abdomen just above umbilicus (*sic, umbilicus*). From the upper end the wound, another stitched incised wound of 11 cm long extends downward and to the left along with

45

subcostal margin containing 4 black colour silk stitches. The lower end of extended incised wound lies 16 cm below the left nipple and 7 cm left lateral to the midline. On removal of stitches, the wounds are found abdominal cavity deep.

7. Stitches stab wound of 4.2 cm. long containing 3 black colour silk stitches situated almost vertically on the left side anterior lateral aspect of chest 114 cm above the left heel and 12 cm left lateral to the midline. On removal of stitches the margins of upper end of the wound is found irregular and surrounded by abrasion of 0.2 cm. width. The lower end of the wound is found acute whereas rest of the wound margins are found regular. Left margin of the (sic, the) wound 0.5 cm above the lower end show an extension of incision for 0.3 cm. in a downward and outward direction with acute ending. The wound is found abdominal cavity deep."

PW3 has also given details of the internal examination. He opined that the cause of death was haemorrhage and shock as a result of multiple injuries including 'spleen injuries'. The injuries were ante-mortem in nature. External injury No.6 and absence of spleen were due to surgical intervention. External injury Nos.1, 2, 5 and 7 together and external injury no.7 with corresponding internal injuries individually, were fatal and in ordinary course of nature would have caused death.

6. On the question of involvement of the appellants, the prosecution primarily relies upon the testimony of Draupati (PW1), who is stated to be an eye witness. Reliance is also placed on the

testimony of Premwati (PW5) and Chankey (PW8), brother of the deceased Anil @ Pangey.

7. Draupati (PW1's) examination-in-chief was recorded on three dates, viz. 19th February, 2007, 18th February, 2008 and 2nd April, 2008. She was cross-examined on 2nd April, 2008 and recalled for further cross-examination which was conducted on 13th March, 2009 and 4th May, 2009. Learned counsels for the appellants are right in their submission that the examination-in-chief and cross-examination should be conducted without time-gap and delay. However, two facts are noticeable. While adjourning examination-in-chief on 19th February, 2007 and on 18th February, 2008, the court has recorded that PW-1 was not feeling well. Secondly, the appellants themselves were responsible for the adjournment, which was sought and granted on 2nd April, 2008, on account of the fact that one of the accused on bail was absent. The cross-examination on 13th March, 2009, was deferred at the request of some of the accused, including the appellants-Mukesh, Sachin and Jagdish Parshad.

8. We shall, while inquiring into and scrutinizing the deposition of Draupati (PW1), examine the question of purported improvements or discrepancies in her testimony and decipher and highlight what is acceptable and should be treated as the true and correct version given

47

by Draupati (PW1). In her deposition on 19th February, 2007,

Draupati (PW1) had testified:-

“The 5 persons who came near us were Jagdish @ Jaggi, Suneel, Mukesh, Shanky and Sunny, present in the court, (correctly identified) and all of them were armed. Accused Jagdish Parshad @ Jaggi was having a knife in his hand, accused Suneel was having a hockey in his hand, accused Sunny was having a cricket stump (*killi*) in his hand and Shanky was having *danda* in his hand and accused Ravi was having a *darati* in his hand (the tool used to cut grass). The other name of accused Sunny is Sachin. I do not know the names of accused persons who were standing at some distance from our house, however, they are present in the court today except accused R who is facing trial in the Juvenile Court. The witness has pointed towards accused Parveen, Vicky and Naresh. Again said, accused Naresh was also amongst those persons who came near us. Accused Vikcy was having *danda* in his hand. All the 5 persons named above who had come towards us asked Anil@Pange about the whereabouts of his brother, namely, Bunty. Accused Suneel gave hockey blow on the head of Anil@Pange and he became unconscious. Thereafter, accused Suneel gave knife blows on the hands of Anil@Pange. Thereafter, accused Naresh gave knife blow on the stomach of Anil@Pange.”

In her deposition recorded on 18th February, 2008, Draupati (PW1)

had stated:-

“...Five persons reached there from the side of Chhota Mandir at about 9-9.30P.M. Anil@Pange was also sitting with us. Those persons asked the whereabouts of Bunty who was the brother of

48

Anil. Those persons took some steps towards us and they talked "MAAR DO ISKO". The accused Mukesh present in the court today gave Hockey blow to Anil. Accused Naresh, Sunil and Sachin were having knife in their hands who gave knife blows on the stomach, arms, and on the shoulder of Anil. Accused Naresh, Sunil and Sachin are present in the court today, correctly identified. The accused Jagdish also accompanied them. When the accused persons gave the above said blows I took out a thapki (*shotha*) which was lying near me and threw away on the accused persons...."

In the examination-in-chief conducted on 2nd April, 2008, Draupati (PW1) had averred:-

"...Accused Mukesh gave hockey blow on the head of the deceased. Accused Naresh and Sachin were armed with knives who gave blows of the same to the deceased. Others were having *dandas*. Accused persons namely Jagdish@Jaggi, Mukesh, Sunil, Naresh, Sachin, Salim, Shanky and R, (witness correctly identified each accused), are present in the court today. Again said R is in children court while Praveen is present in the court. They are the persons who attacked the deceased in my presence."

9. We have intentionally quoted the deposition of Draupati (PW1) recorded in her examination-in-chief on 19th April, 2007, 18th February, 2008 and 2nd April, 2008, so that the alleged "inconsistency" and "improvement" can be examined and understood.

In her first deposition, Draupati (PW1) had initially identified the five assailants as Jagdish Parshad, Sunil, Mukesh, Sachin @ Sunny and one

Shanky. She immediately rectified her deposition and implicated Naresh (since deceased) as amongst the five persons. Sunil, she averred, had given the hockey blow and, thereafter, a knife blow. Naresh (since expired) had also given a knife blow on the stomach of Anil @ Pange. Draupati (PW1) has asserted that Jagdish Parshad had a knife, Sunil had a hockey and Sachin @ Sunny had a cricket stump. She claimed that Shanky was carrying a *danda*. The said Shanky, as noticed above, has been acquitted. PW1 claimed that another person R (Juvenile) had a *darati*. Draupati (PW1) in her examination-in-chief recorded on 18th February, 2008, claimed that Mukesh had given hockey blows and that Naresh (since deceased), Sunil and Sachin were having knife in their hands and had given knife blows. Draupati (PW1) implicated the appellant-Jagdish Parshad, stating that he had accompanied them but did not attribute any actual act to him for the injuries caused to Anil @ Pange. Similarly, in her deposition recorded on 2nd April, 2008, PW1 had stated that Mukesh had given hockey blows, Naresh (since deceased), Sachin, who were armed with knife had given knife blows while others were having *dandas*.

10. What is discernible and apparent to us from the deposition of Draupati (PW-1) is the certainty and certitude as to the presence of Mukesh, Sunil and Sachin in the group of five or four persons who
 Cri A Nos.469/2012, 471/2012 & 403/2012

50

assaulted the deceased. She had on each occasion taken the name of appellant-Jagdish Parshad as a member of the group of five or four, but had also referred to Shanky, Naresh (since deceased) and R (juvenile). If we add Naresh (since deceased), Shanky and R (juvenile) to the four appellants, the total number of assailants would be seven. Draupati (PW1) is also the complainant and her statement Ex. PW1/DA made to SI Surya Prakash (PW22), was the first statement made immediately after the occurrence, at about 12.40 A.M. on 7th June, 2006. In the said statement, she had referred to the presence of Premwati (PW5) and that Anil @ Pange was sitting and conversing with them. At about 9.30 P.M., four or five boys, including Mukesh, Sachin (Sunny) and Sunil, who were residing in their neighbourhood, came there. There were two more boys with them whom she did not identify by name, but claimed that she would be able to recognise them if they are shown to her. Thus, in Ex. PW1/DA, PW1 had identified and named the appellants Mukesh, Sachin (Sunny) and Sunil, but it is apparent that the other two were not identified by their names, inference being that PW1 did not know them. Ex. PW1/DA records that Mukesh had enquired from Anil@Pangey about Bunty and on getting a non-confirmatory response, had hit him on the head with a hockey stick stating that if

Bunty was not available, he (Anil @ Pangey) should be taken to task.

Sunil had stabbed Anil with a knife in his stomach and Sachin @

Sunny had stabbed him with a knife on his hand. Anil@ Pange fell

down. The assailants, thereafter, ran away. She has referred to the

earlier incident at 6.30 P.M. as the cause or reason for the said assault.

Thus, when we examine and read Ex. PW1/DA, it is confirmed and

affirmed that, at the earliest and first opportunity, Draupati (PW-1)

had specifically identified Mukesh, Sunil and Sachin as the

perpetrators. Two others were also present but weren't identified by

their names. Ex. PW1/DA refers to the name of the father of Mukesh,

Sunil and Sachin as Mohan Lal, which is correct. Conspicuously,

name of Jagdish Parshad is not mentioned. It also transpires that

Jagdish Parshad is not a young boy of the same age as Mukesh, Sunil

or Sachin. Appellant-Jagdish Parshad was about 48 years old on 10th

October, 2011, when his statement under Section 313 Cr.P.C. was

recorded, whereas Sachin, Mukesh and Sunil were between the age

group of 26-32 years at that time. Jagdish Parshad is the father of

Shanky, who has been acquitted by the trial court. It is apparent to us

that there is some discrepancy and uncertainty as to the identity of

other persons who had accompanied Mukesh, Sunil and Sachin and

were the participants present in the group of five or four assailants.

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Except for the presence of Mukesh, Sunil and Sachin@ Sunny, presence of others including Jagdish Parshad is, therefore, debatable and uncertain. Therefore, we would require corroboration, before accepting the involvement of Jagdish Parshad. Draupati (PW1) had propounded the two group catharsis, one group which came forward and the other which remained in the background and this assertion was the foundation for the prosecution of Praveen Kumar, Shanky and Vijay @ Vicky. However, the trial court did not accept the two groups version and, as noted above, it has acquitted Praveen Kumar, Shanky and Vijay @ Vicky.

11. The second eye witness is Premwati (PW5). Her examination-in-chief was first recorded on 4th September, 2008. In the said examination, she testified that on 6th June, 2006, at about 8.30 or 9 P.M. she was sitting on a cot in front of her house with Draupati (PW1) and they were talking to each other. In the meanwhile, Anil@Pange came there, sat on the same cot and started speaking to them. At about 9.30 P.M., the accused persons (which would mean reference to the four appellants, Naresh (since deceased), Praveen Kumar, Shanky and Vijay (who have been acquitted) came there. Except for Naresh (since deceased), whom she correctly identified, Premwati (PW5) could not name the other accused, including the four

Cri A Nos:469/2012, 471/2012 & 403/2012 Page 12 of 32

appellants. She asserted that the accused were armed with knife, *dandas* and hockies, but she was unable to recollect and associate the weapon with each accused. Anil@Pange was given blows with knife, *dandas* and hockies. Alarm was raised, but before people could react, the accused persons escaped towards Gali No. 9. Premwati (PW5) was cross-examined on 7th July, 2009. In her cross-examination, she deposed that a mob had come to kill Anil@Pange, son of her sister. She was present at the place of occurrence but could not state as to who had inflicted injuries upon Anil@Pange since she had fainted on seeing the mob. Further, there was darkness as the street light was not working. On being cross-examined by the Additional Public Prosecutor, PW5 denied that she had named Sachin, Mukesh, Sunil, Jagdish Parshad and others in the court on 4th September, 2008. She claimed that her deposition of 7th July, 2009 was correct and whatever was deposed on 4th September, 2008 was untrue. Voluntarily, she added that some persons had assaulted Anil@Pange and caused injuries upon him with knife and *dandas* and that she had not seen who had assaulted Anil@Pange as there was a big mob. While being cross-examined, she voluntarily declared that she was an illiterate lady aged sixty years and on the said date, her husband was seriously ill.

12. On reading the deposition of Premwati (PW5), it is lucid that in her first version i.e. her examination-in-chief recorded on 4th September, 2008, PW5, without naming, had identified the four appellants. She had certainly deposed that she knew that they had come to the spot. At the same time, she had also referred to the presence of Praveen Kumar, Shanky, Vijay and Naresh (since deceased). She did not differentiate or refer to two groups as has been deposed to and stated by Draupati (PW1). We have already referred to the first statement of Draupati (PW1) (Ex. PW1/DA). The said statement does not mention about the presence of two groups or the factum that a group of four persons had stayed back at a distance and the second group consisting of five boys had come forward and assaulted Anil@Pange. In these circumstances, we would hold that Premwati (PW5) has partly corroborated the statement of Draupati (PW1) to the extent of involvement of Mukesh, Sunil and Sachin @ Sunny, that they were the persons who were present at the place of occurrence and had assaulted the deceased Anil@Pange.

13. The prosecution has also relied upon and claimed that Chankey (PW8) was the third eye-witness. In the impugned judgment, the trial court has observed that the deposition of PW8 (brother of deceased Anil@Pange), was weak and quite suspicious, after noticing the fact

Cri A Nos.469/2012, 471/2012 & 403/2012 Page 14 of 32

55

that neither had he taken the injured Anil@Pange to the hospital nor had he informed the police. Moreover, he had not met the police at the spot. It is also recorded that Chankey (PW8), in his cross-examination, had accepted the suggestion that the accused, including the four appellants, had already fled away from the spot by the time he came down from his room. Yet, the trial court has observed that PW8's testimony is not totally redundant as he had seen the accused, including the four appellants assemble close to the spot at 9.15 P.M. with the weapons of offence, which were used in the occurrence. Trial Court observed that his testimony would be relevant because he had seen the accused, including the four appellants, minutes before the assault. We would observe and hold that the testimony of Chankey (PW8) is not reliable and credible for the reasons rightly recorded by the trial court. However, we would also disbelieve and discard PW8's assertion that he had seen the accused, including the appellants, before the occurrence while returning from work. In his cross-examination, PW8 had stated that he had heard the noise "save me save me" (*bachao bachao*) and, thereafter, had rushed to the place of occurrence. Initially, he claimed that he had seen the injured lying and became perplexed and, therefore, did not run after the accused and had called out his elder brother Sunil. Subsequently, when cross-

56

examined, PW-8 accepted that when he reached the spot, Anil@Pange had already been removed to the hospital. PW8 accepted that he did not accompany Anil@Pange to the hospital and did not inform the police as well. On further cross-examination, he accepted as correct the suggestion that the accused had already fled from the spot by the time he came down. He denied the suggestion that he had seen Anil@Pange going to the hospital with Rajesh (PW6), Premwati (PW5) and Draupati (PW1). He accepted as correct that he was informed by his uncle that the injured had been taken to the hospital about ten minutes back and thereafter, he and Sunil proceeded to the hospital. His clothes were not blood-stained, though he claimed that his hands had blood-stains. Noticeably, Draupati (PW1) and Premwati (PW5) have not deposed and affirmed about the presence of Chankey (PW8) at the spot.

14. What is also noticeable is that Rajesh (PW6), brother of Chankey (PW8) and the deceased Anil@Pange, had stated that on 6th June, 2006, at about 9.30 P.M., he was present on the first floor of his house and had heard some noise in the street (*gali*). He saw that Anil@Pange had been injured and was lying on the cot. Premwati (PW5) and Draupati (PW1) were present in the street making hue and cry. Draupati (PW1) and Premwati (PW5), at that time, had told him

Cri A Nos.469/2012, 471/2012 & 403/2012 Page 16 of 32

that sons and family members of Taro and Heero had given beating to Anil@Pange with knife, hockey and *danda* and had run away from the spot. Rajesh (PW6) had brought a cycle rickshaw and had taken Anil@Pange to the hospital with the help of Premwati (PW5) and Draupati (PW1). Rajesh (PW6) has not deposed and affirmed about the presence of Chankey (PW8) at the place of incident.

15. At this stage, we would like to deal with contentions raised on behalf of the appellants-Mukesh, Sunil and Sachin, to reject the prosecution case against them, to disbelieve Draupati (PW-1) and to reject the reliance placed on the part-testimony of Premwati (PW5). Similarly, contentions in alternative have also been raised on behalf of the appellant-Jagdish Parshad.

16. The first submission made on behalf of the appellants was that Draupati (PW1), on 13th March, 2009, in her cross-examination on behalf of Vijay @ Vicky and Naresh (since deceased), had stated that her first statement was recorded in the hospital on 6th June, 2006, at 9.30 P.M. It has been submitted that in spite of the said assertion, the Additional Public Prosecutor did not re-examine PW1 and, therefore, the said statement of PW1 should be treated as correct. It is not possible to accept this argument. The MLC (Ex. PW23/A) of the

8

deceased was recorded on 6th June, 2006, at 10 P.M. Anil @ Pangey, thereafter, died at about 11.30 P.M. on the same day. This minor mistake or error in the oral deposition as to the time when statement of PW1 was recorded would not overthrow and set at naught the entire prosecution case. Perfection and eidetic recollection should not be expected and is not required. Human imperfections and fallibilities, which occur when a person recalls and reminisces, are natural and normal. There is ample evidence, which we have referred to and will be referring to subsequently, to show that the statement (Ex. PW1/DA) of Draupati (PW1) as to the factum of occurrence, which was subsequently recorded as the FIR (Ex. PW27/A), was made at 12.30 A.M., on 7th June, 2006. We have the testimonies of SI Surya Prakash (PW22) and Insp. Jogender Singh (PW26) to the said effect. It may be noticed that Draupati (PW1) was illiterate. Thus, PW1, in her cross-examination on 13th March, 2009, was unable to recollect the exact time of recording of her statement (Ex. PW1/DA). It is noticeable that in her cross-examination on 4th May, 2009, PW1 had stated that she could not tell the time when Ex. PW1/DA was recorded. However, PW1 has been unambiguous and categorical about the three appellants (Mukesh, Sunil and Sachin) in her cross-examination on 13th March, 2009. Similarly, the contention of the

59

appellants that PW1 has stated that her statement (Ex. PW1/DA) was recorded in the police station, would not affect the prosecution case in view of the time gap, imperfections and vulnerabilities associated with human memory and the factum that PW1 was an illiterate person.

17. Learned counsel for the appellants have referred to the fact that in Ex. PW1/DA, the name of Mohan Lal, father of the appellants Mukesh, Sachin and Sunil is mentioned. PW1 voluntarily stated that the said accused persons had disclosed the name of their father and, therefore, she had mentioned the same in her statement. Undisputed position is that the appellant Mukesh, Sachin and Sunil had not been detained or arrested when Ex. PW1/DA was recorded. The said assertion of PW1 is obviously incorrect and should be rejected. On this aspect, we would like to state that PW1 has deposed that she knew the accused person, i.e. the persons who had assaulted Anil @ Pange, as already noted in the MLC (Ex. PW23/A). The statement of Draupati (PW1) (Ex. PW1/DA) was recorded past midnight at about 12.15 A.M. By that time, several others including the relatives of the deceased Anil @ Pangey had reached the hospital. There is ample evidence to show that these persons knew the parentage and other details of the assailants. We do not think that reference to parentage

Cri A Nos. 469/2012, 471/2012 & 403/2012

62

of the assailants i.e. the three appellants would justify rejection of the eye witness testimony or is a valid ground to question the identity of the three appellants-Mukesh, Sunil and Sachin as mentioned in Ex.PW1/DA. As to the presence of family members, we would like to make reference to the cross-examination of Chankey (PW8) on 3rd November, 2009, wherein he had asserted that, at the time of death of Anil @ Pangey, Sunil, PW8's elder brother; Vijay Kumar (PW2), who had identified the dead body of Anil @ Pangey; Rajesh (PW6); Draupati (PW1); Premwati (PW5); Roshan, PW8's Chacha; Pappy bhai; Nikki bhai; Mukesh bhai; Ashok bhai; Lale Chacha; Kammo Chachi; and other relatives were present in the hospital. SI Surya Prakash (PW22) also stated that 5-7 relatives of the deceased were present in the hospital.

18. We have already referred to and elucidated why testimony of Draupati (PW-1) identifying and naming the appellants Mukesh, Sunil and Sachin should be accepted. The contention that the version of Premwati (PW5) is at variance with the testimony of Draupati (PW1) has been rejected. We reiterate that on the question of involvement of the three appellants, we are inclined to accept the version given by Premwati (PW5) to the extent it relates to the presence of Draupati (PW1) at the place of occurrence. The fact that

Premwati (PW5) was not able to identify the appellants by name would not negate or topple the prosecution case. PW5 did state that she did not know the assailants except Naresh (who has died). Further, the occurrence in question had taken place about 3 years before the date of her examination in the court. She was an illiterate lady of about 60 years of age. She has deposed that her husband was ailing. It is obvious that she was under pressure and constraint. The deposition of PW5 does emphatically support the prosecution version about the presence of Draupati (PW1) at the place of occurrence and that she had seen the occurrence. This fact is also asserted and corroborated by Rajesh (PW6).

19. At this stage, it would be appropriate to refer to the site plan (Ex. PW26/A), which was proved by Insp. Jogender Singh (PW26), and scaled site plan (Ex. PW10/DA) proved by Ct. Rajesh Kumar (PW10). The site plan (Ex. PW26/A) indicates a cluster of small tenements bearing the same house number, i.e. 8004/10, where the deceased Anil @ Pangey, Draupati (PW1), Premwati (PW5) and several others used to reside. These were like one room dwelling units with adjoining walls without any gap/distance between them. In places where there is cluster-living in small tenements, whenever violence or occurrence of such nature takes place, neighbours do tend

Cri A Nos. 469/2012, 471/2012 & 403/2012 Page 21 of 32

to come out immediately. Reaction could, in many cases, be instantaneous and without any time gap, but this does not mean that each one in the neighbourhood, would have seen the accused. Two neighbours Draupati (PW1) and Premwati (PW5) have deposed. Rajesh (PW6) was present, but by the time he came down, the perpetrators had fled. The contention that the other neighbour did not join has to be rejected. The prosecution evidence cannot be disbelieved for this reason.

20. Rajesh (PW6) has also affirmed the presence of Draupati (PW1) and Premwati (PW5) and that they had raised a clamour. They informed PW6 that family members of Heero and Taro had given beatings to Anil @ Pangey with knife, *lathi*, *dandas* and hockey. On the same day, earlier at about 6 P.M., quarrel had taken place between Bunty, brother of the deceased Anil @ Pangey, and the assailants. He asserted that the accused including the appellants were the family members of Heero and Taro. In the cross-examination, PW6 reiterated that Taro and Heero were sisters and he knew them as they used to reside near his house. He had been residing there for the last 20 years. The contention of the appellants that the alleged blood-stained shirt of Rajesh (PW6) was not seized, would not shake the prosecution version. It would be illusory and unwise to reject and

Cri A Nos. 469/2012, 471/2012 & 403/2012 Page 22 of 32

discard the testimony of Rajesh (PW6) for this lapse or failure on part of the investigating authorities.

21. On the question of any earlier fight and quarrel, in the evening at about 6 P.M., on 6th June, 2006, we have the deposition of HC Satbir Singh (PW28). On 6th June, 2006, at 6.17 P.M., PW28 was marked DD No. 40B regarding quarrel at House No. MHC-82, Yogmaya Mohalla, Nabi Karim. PW28 along with Ct. Raj Kumar, on reaching the spot, had learnt that the injured had been taken to the Lady Hardinge Medical College and Hospital. PW28 went there and collected the MLCs of Heero and Taro. He had recorded the statement of Heero and FIR No. 176/06 under Sections 325/341/506 IPC was registered. The aforesaid FIR and other documents have not been brought on record, but according to us, this would not be a ground to ignore and not accept ocular testimony of Rajesh (PW6) and HC Satbir Singh (PW28). Testimony of Rajesh (PW6) and HC Satbir Singh (PW28) indicate and establish the propelling cause and the motive behind the fatal attack on Anil @ Pangey. The attack was in retaliation for the injuries caused to Heero and Taro. It is proved beyond doubt and an accepted position that the appellants herein are family members and are related to Heero and Taro.

22. Now, we would like to take on record another corroborative and supporting evidence, which would show that Draupati (PW1) had taken Anil @ Pangey to the hospital. We would refer to the two *chunnis*, Exs.P1 and P2, which were tied around the waist/stomach of Anil. As per the CFSL report (Ex.PW26/O), blood was found on Ex.1d and Ex.2, i.e. the two *dupattas/chunnis*. As per the serological examination, human blood of 'AB' group was found on the clothes worn by the deceased and on Ex.2. Human blood was detected on *dupatta* (Ex.1d), but blood group could not be ascertained for want of reaction (see report, Ex.PW26/P).

23. Head Constable Mahesh (PW30) has testified that on 6th June, 2006, at about 9.30 or 9.45 P.M., he had received information that a person named Anil @ Pangey had been stabbed by someone. PW30 recorded the said information in the PCR form and flashed the message through the Communication Branch. ASI Iqbal Singh (PW18) has deposed that DD No. 51B (Ex.PW22/A) was marked to him and that he along with Ct. Rajpal (PW9) had reached the house of Anil at 8004, Gali No.10, Multani Dhandra, Nabi Karim. In the meantime, SI Surya Prakash (PW22) and Insp. Jogender Singh (PW26) reached the spot and were informed that the injured had been taken to the hospital. ASI Iqbal Singh (PW18) and Insp. Jogender

Cri A Nos.469/2012, 471/2012 & 403/2012

Singh (PW26) left for the hospital leaving Ct. Rajesh (PW10) and Rajpal (PW9) at the spot. SI Surya Prakash (PW22) recorded the statement of Draupati (PW1), prepared *rukka* and handed over the same to ASI Iqbal Singh (PW18) for registration of FIR. Thereafter, ASI Iqbal Singh (PW18) left for the police station, got the FIR registered and came back at the spot, where he met SI Surya Prakash (PW22) met Insp. Jogender Singh (PW26) and handed over the copy of FIR to him. In the cross-examination, PW18 reiterated that he had reached the police station with the *rukka* at about 12.35 A.M. and had reached the spot after recording the FIR at about 1.45 A.M.

24. SI Surya Prakash (PW22) has affirmed and supported the prosecution case. He had first proceeded to the spot and then to the hospital, where he had recorded the statement of Draupati (PW-1), aunt of the deceased Anil @ Pangey. He had collected the MLC of the injured Anil @ Pangey (Ex.PW23/A). After Anil @ Pangey was declared dead by the doctors, SI Rajesh came to the hospital with DD No.24A, (Ex.PW22/B) regarding death of Anil @ Pangey. The doctor had handed over the clothes of the deceased to him, which were seized and sealed by him vide seizure memo, Ex.PW22/C and Ex.PW22/D. *Rukka* was prepared and handed over to ASI Iqbal Singh (PW18) for registration of FIR, who later came to the spot with

Cri A Nos.469/2012, 471/2012 & 403/2012

the copy of the FIR. Crime team had also reached the spot and had cut the *Niwar* (plastic *patti*) of the cot, which was seized vide seizure memo, Ex.PW11/A. He has also deposed as to the two *chunnis*, Exs.P1 and P2, which were taken into possession and seized from Draupati (PW1). In the cross-examination, PW22 has stated that he had reached the spot of occurrence at about 10 P.M., but at that time he did not meet any eye witness.

25. Inspector Jogender Singh's (PW26) deposition is identical and he has referred to the factum that statement of Draupati (PW1), a relative of Anil @ Pangey was recorded in the hospital by SI Surya Prakash (PW22), who had also prepared the *rukka*. Thereafter, ASI Iqbal Singh (PW18) had gone to the police station along with *rukka* and the FIR was registered. He had prepared the unscaled site plan (Ex.PW26/A), conducted inquest proceedings, filled up Form No.25.35 and prepared brief facts (Ex.PW26/C).

26. From the aforesaid testimonies and evidence, it is apparent that the contention of the appellants that the FIR is ante-timed is untenable and baseless. We notice that the FIR (Ex.PW27/A) has the endorsement of the Additional Chief Metropolitan Magistrate that he had received the same at his residence at Gulabi Bagh on 7th June,

2006 at 9.55 A.M. The factum that the FIR (Ex.PW27/A) was duly sent to the authorities is also recorded in the computer version of the said FIR placed on record.

27. The contention of the appellants that the aforesaid police officers had never reached the hospital till 11.30 P.M. or even thereafter, relying upon DD Entry No. 24A marked Ex.PW22/B is unacceptable and merits rejection. The said DD entry was recorded at 11.50 P.M., on 6th June, 2006, at police station Nabi Karim. The said entry does mention that a police officer should be sent to the hospital, but this does not mean that no police officer was already present in the hospital. SI Surya Prakash (PW22) has stated that SI Rajesh had met him in the hospital along with DD Entry No.24A (Ex.PW22/B). HC Jai Singh (PW-15) has stated that in the intervening night of 6th and 7th June, 2006, he was posted at the mortuary of Lady Hardinge Medical College and Hospital. On that day, SI Rajesh had met him and dead body of Anil @ Pangey was preserved.

28. Learned counsel for the appellants has laid considerable emphasis on the fact that SI Rajesh was not cited and produced as a witness. SI Rajesh was cited as a witness but did not depose. We do not think that failure to record deposition of SI Rajesh would

materially affect the prosecution case, so as to disbelieve the prosecution evidence on record.

29. From the aforesaid discussion, it is apparent that the prosecution version has to primarily rely upon the testimony of Dropati (PW1). Contrary to the complaint (Ex.PW1/DA), which made reference to Mukesh, Sachin @ Sunny and Sunil and one or two others, PW1 had tried to implicate as many as 9 persons in two groups of 5 and 4 persons all belonging or connected with the family of Taro and Heero. Resultantly, Sections 147/148 IPC were also invoked and as noticed above, the appellants have been also convicted under Sections 147/148 IPC and convicted for rigorous imprisonment for one year. The trial court had acquitted Praveen Kumar, Shanky and Vijay @ Vicky. Naresh who was charge-sheeted had died during the course of proceedings and one R (name withheld) being a juvenile was dealt with under the Juvenile Justice (Care and Protection of children) Act, 2000.

30. We have also referred to the testimony of Prem Wati (PW5) and observed that we would believe the testimony only to the extent of involvement of Mukesh, Sunil and Sachin @ Sunny noticing her statement recorded on 4th September, 2008 and then on 7th July, 2009.

69

We have partly accepted the testimony of Premwati (PW6) for upholding convicting of Mukesh, Sunil and Sachin @ Sunny.

31. We have rejected the testimony of Chanki (PW8) on the ground that he was not an eye-witness and his assertion as to unlawful assembly prior to the occurrence is unbelievable and untrustworthy. We have, therefore, proceeded with caution and care to ensure that no-one is falsely implicated and have sustained the conviction of Mukesh, Sunil and Sachin (Sunny) who were named at the very instance of Draupati (PW1) as recorded in Ex.PW1/DA. The appellant Jagdish Parshad would be entitled to benefit of doubt and hence his appeal is allowed and his conviction and sentence are set aside.

32. This brings us to the question of sentence. In paragraph 2 above, we have noticed that the appellants Mukesh, Sachin @ Sunny and Sunil have been convicted under Sections 147/148 IPC as well as Sections 302 read with Sections 149 IPC. It was highlighted that in Ex. PW1/DA, Draupati (PW1) had referred to presence of 4 or 5 persons though she had specifically named Mukesh, Sunil and Sachin @ (Sunny). Ex.PW1/DA does indicate that in addition to the 3 convicted appellants, 2 more persons were present and even if they

were not identified or arrested, conviction under Sections 147/148 IPC can be sustained. However, if only one person was present, conviction under Section 147/148 cannot be sustained. We would prefer to rely upon Section 34 IPC in the present case in view of the specific involvement of Mukesh, Sunil and Sachin @ Sunny. They were present at the spot and had inflicted injuries with common intention. As noticed above, possibly Section 147/148 IPC were invoked because initially as per the prosecution, possibly 9 persons were the perpetrators and involved in the occurrence. Thus, we would prefer to convert the conviction of the appellants Mukesh, Sunil and Sachin @ Sunny to Section 302 read with Section 34 IPC instead of Section 302 read with Section 149 IPC. The 3 appellants should not be separately punished under Sections 147/148 IPC. We record that the trial court had observed that sentences would run concurrently. We uphold the trial court order awarding the sentence of imprisonment for life imprisonment. Fine of Rs.2 lacs stands imposed on the appellants and it has been directed that the amount recovered through the fine would be paid to the legal heirs of the deceased Anil @ Pangey as compensation. In default of payment of fine, the appellants have been directed to undergo simple imprisonment for three years. Considering the facts, we reduce the

amount of fine to Rs.10,000/- each and in default, the three convicted appellants shall undergo simple imprisonment of one year.

33. We feel that it would be appropriate and proper to direct that the convicted appellants Mukesh Kumar, Sunil and Sachin @ Sunny shall pay the compensation of Rs50,000/- each under Section 357, Cr.P.C. We have fixed the amount of compensation keeping in view the facts of the case, nature of the crime as well as the capacity of the appellants to pay the compensation.

34. Appeal filed by Jagdish Parshad (CrI.A. No. 403/2012) is accordingly allowed and his conviction is set aside. Appeals filed by Mukesh Kumar, Sunil and Sachin @ Sunny challenging their conviction under Section 302 IPC are dismissed and they are convicted under Section 302 IPC read with Section 34 IPC instead of Section 149 IPC. Mukesh Kumar, Sachin @ Sunny and Sunil have not been separately convicted and punished under Section 147/148 IPC. The appellants Mukesh, Sachin @ Sunny and Sunil are sentenced to imprisonment for life under Section 302 IPC. They shall also pay a fine of Rs 10,000/- each and in default of payment of fine, they shall undergo simple imprisonment for six months. Appellants Mukesh Kumar, Sunil and Sachin @ Sunny have also been directed

92✓

to pay the amount of Rs 50,000/- each as compensation to the legal heirs of Anil @ Pangey under Section 357, Cr.P.C. Appeals are accordingly disposed of. Trial Court Records will be sent back.

(SANJIV KHANNA)
JUDGE

(ASHUTOSH KUMAR)
JUDGE

May 22nd, 2015
NA/VKR/KKB