

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

Judgment Reserved on: March 21, 2016

% *Judgment Delivered on: March 29, 2016*

+ **CRL.A. 602/2000**

KYAMUDDIN

..... Appellant

Represented by: Mr.Gagan Chhabra, Ms.Richa
Narang and Ms.Vaishnavi Rao,
Advocates.

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP for
the State with SI Ashok Tirkey,
PS Nand Nagri.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Kyamuddin has been convicted for the offence of murder of Pappu @ Anis and for causing sharp injury to Naushad and directed to undergo imprisonment for life vide the impugned judgment and order on sentence dated September 21, 2000.

2. On receipt of DD No.31A, Ex.PA ASI Rajbir Singh PW-15 reached the GTB hospital. MLC of Naushad was collected which showed sharp incised wound and an abrasion and his statement was recorded on the basis of which FIR was registered. Naushad stated that he was working at shop No.106, Murga Market, Sunder Nagri for the last 20-25 days with Kyamuddin. On March 06, 1999 at around 5.30 PM Pappu s/o uncle of Kyamuddin had come to the shop and asked about Kyamuddin. After about

15-20 minutes Kyamuddin, Pappu and two other boys namely Iqbal and Saleem came to the shop and Kyamuddin took out the money. All four of them went to eat food and came back around 9.30 PM. Thereafter Saleem and Iqbal left the place. Leaving Pappu and Kyamuddin behind at the shop Naushad went to Rahis Kabab Hotel to take his dinner. When he came back after one hour and opened the shutter, Kyamuddin and Pappu were putting cloth on the floor and were preparing to sleep. Naushad also lied down in one corner. In the night he suddenly woke up and found Kyamuddin and Pappu doused in blood. Kyamuddin was having a knife used for cutting chicken and Pappu's shoulder had been cut badly. Pappu had caught hold of Kyamuddin's hand which was having the knife and in their fight he received injury on his left hand. He ran towards Murga Market, shop No.118 to call Sultan who was from his own village. After some time when he and Sultan came back, they found body of Pappu in the gali outside shop No.104 and he had died with his throat slit. Sultan took Naushad to GTB hospital. Statement of Sultan was also recorded who supported the version of Naushad. Statement of Naushad was also recorded under Section 164 Cr.P.C.

3. Dr.S.K. Verma conducted the post-mortem on the body of deceased Pappu and found the following ante-mortem injuries:-

“1. Incised, wedge shaped stab wound of size 2.5 x 0.4 x 8 cms placed on left side chest 2.5 cms above the coastal margin and 1.5 cms lateral to midline going downwards, backwards and towards left side cutting the skin, intercostal muscles, pleura and lower lobe of right lung. Blood was present all along the track.

2. Incised wound of size 30 x 0.5 x 0.5 cms placed on right superior orbital margin 1.2 cms lateral to midline.

3. *Incised wound of size 5.0 x 1.0 x 0.5 cms placed on left side forehead 5.3 cms lateral to midline.*
4. *Incised wound cutting the upper lip in the middle of size 1.0 x 0.5 x 0.8 cms.*
5. *Incised cut throat wound of size 24 x 3 x 5 cms placed 9.0 cms above the sternal notch in the midline front of neck going horizontally on either sides of neck cutting the skin, neck muscles, blood vessels of neck and ant. surface of vertebral column along with trachea and oesophagus.*
6. *Incised wound of size 14 x 10 x 3 cms placed on the right shoulder back 2.0 cms below shoulder tip and 4.0 cms lateral to base of neck.*
7. *Incised wound of size 9 x 1 x 0.5 cms placed on right upper arm laterally 3.0 cms below the shoulder tip.*
8. *Incised wound of size 2 x 0.6 x 0.3 cms placed on right forearm medially 5.5 cms above the wrist joint.*
9. *Incised wound of size 2.5 x 0.7 x 0.5 cms present on outer aspect of left forearm 9 cms below the olecranon.*
10. *Incised wound over right auricle (ear) of size 2 x 0.5 x 0.5 cms.*
11. *Incised wound on posterior aspect of proximal phalanx of left index finger of size 1.5 x 0.5 x 0.2 cms.*
12. *Incised wound of size 1.5x0.5x0.2 cms on the middle phalanx on palmer aspect of right ring finger.*
13. *Four incised wounds of size 6.0x0.5x0.8 cms, 6.5x0.5x0.8 cms., 4x0.5x0.8 cms. and 5x0.5x0.8 cms. Intermingling with each other present over right temporoparietal region, all scalp deep.*
14. *Multiple abrasion reddish in colour in an area of 5.5x3.5 cms. present over middle of right side abdomen placed 2.0 cms to the right of umbilicus and 7.0 cms. below right costal margin.*
15. *Reddish abrasion of size 2x0.5 cms. placed on the right iliac fossa, 8.0 cms. above right anterior superior, iliac spine.*
16. *Contusion reddish of size 8.0x4.0 cms. present over both*

scrotum.

17. Reddish abrasion (4) in number present just below patella in an area of 4x3 cms below right knee.

18. Partially healed wound with bandage tied over left great toe.

4. Dr. S.K. Verma opined the cause of death to be shock due to injury Nos. 1, 5 and 13 produced by sharp edged weapon which were sufficient to cause death in the ordinary course of nature both independently and collectively. On being shown the two weapons of offence i.e. the daw and knife he opined that injuries No. 3,5,6,7 and 13 were possible by daw and injury Nos. 1,2,3,4,7,8,9,10,11 and 12 were possible by the knife. This witness has not been cross-examined and his testimony has gone unchallenged.

5. During the course of trial Naushad did not fully support the prosecution case and stated:

“In the night of 6/7-3-99 I was sleeping. About 20 days before I had been working as a chicken slaughter at the shop of Kyamuddin accused present in the Court (shop number 6, Sunder Nagri). At about 2.30 AM I felt some disturbance on my palm (hand) and I woke up and came out of the shop No.6 that my hand was bleeding. A crowd was there. Somebody told me that Pappu (deceased) sustained injuries and Police took me to the hospital and took my signatures on blank papers. Thereafter I do not know what the Police wrote. I was neither read over nor I know what was written therein.

6. Thus, Naushad was cross-examined by the learned APP wherein he admitted his signatures at point A on Ex.PW-4/A i.e. rukka on the basis of which FIR was registered.

7. Before Court Sultan deposed as PW-5 and stated:

“About 9/10 months back in the night at 2/2.30 AM I was sleeping in shop No.118. Naushad came and told me that there was a quarrel going on in between Kyamuddin and Pappu and he wanted to awake me. Kyamuddin is present in the Court. He is known to me. He had also told me that in the quarrel knife was used. Thereafter I saw Pappu murdered. Naushad had only told me that there was a quarrel and did not tell me who was assaulted and beaten. There after I went on road in front Gagan Cinema and found Pappu dead in the Nali, near shop No.105. Then we went to P.S. and informed the matter to the area Police. Then Police came there. I do not know anything else.”

8. Even Sultan was cross-examined by the learned APP wherein he admitted having got recorded his previous statement and that he had told that Kyamuddin was hitting Pappu with knife, Naushad had injuries on his person and Naushad told him that he had sustained injuries during quarrel between Kyamuddin and Pappu. He also admitted having taken Naushad to GTB hospital which fact is corroborated by the MLC of Naushad Ex.PW-15/A. He also admitted recording of the statement of Naushad in the hospital.

9. The explanation of Kyamuddin in his statement under Section 313 Cr.P.C. was of denial, false implication, that Police got signed blank papers from him and he was not sleeping with Naushad on the night intervening March 6/7, 1999.

10. Kyamuddin was arrested on March 08, 1999 itself where after he made the disclosure. On his medical examination he was found to be having multiple abrasions on both knees, chin and the right shoulder and a cut on the tip of the nose. His MLC is exhibited as Ex.PW-13/A. Kyamuddin made a disclosure statement pursuant where to he led the Police to the

boundary at Wazirabad and got recovered one Hasia (Ex.P-1) having handle of wood with blood stains and one chhuri the blade of which was twisted. As per the FSL report, the knife was stained with human blood of 'A' group which tallied with that of the deceased. The learned Trial Court on the basis of evidence of Naushad and Sultan applying the principles of res gestae convicted Kyamuddin as noted above.

11. Learned counsel for the appellant contends that there are contradictions in the statement of Naushad. Statement of Sultan could not have been used by the learned Trial Court for convicting Kyamuddin by applying principle of res gestae which is an exception to the rule of hearsay and in view of there being no evidence against Kyamuddin he is entitled to acquittal.

12. The legal position in relation to the evidence of res gestae under Section 6 of the Evidence Act was considered by a Division Bench of this Court in the case reported as ILR(2009)Supp.(3)Delhi380:2009 SCC OnLine Del 4099 Tejinder Viridi @ Dolly Vs. State authored by one of us (Pradeep Nandrajog, J.) wherein it was held –

“127. What is the law of res gestae?

128. Section 6 of Evidence Act embodies the principle of law usually known as the rule of res gestae recognized in English law. The essence of the doctrine is that facts, though not in issue, but so connected with the fact in issue as to form part of the same transaction, become relevant and hence admissible. The reason is that the circumstances, facts and declarations which grow out of the main facts are contemporaneous with it and serve to illustrate the fact in issue. In that sense, they can safely be said to be an incident of the event under circumstances, and being made or done under the immediate

influence of the principal transaction, characterize or explain the principal transaction.

129. Thus, spontaneity and immediacy of the statements or facts in relation to the fact in issue which are made without premeditation or artifice and without a view to the consequences are admissible, because they are the natural result of the act they characterize or elucidate. To form a particular statement as a part of the same transaction, utterances must be simultaneous with the incident or soon after it so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. To put it simply: Everything that may be fairly considered an incident of the event under consideration would be admissible. However, it has to be guarded that there should be no time interval to allow fabrication or to reduce the statements to the mere narrative of a past event. If there is an interval, however slight it may be, which was sufficient for fabrication then the statement is not part of res gestae.

130. The principles relatable to the rule of res gestae are four in number:-

I The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto.

II The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.

III The declaration and the act may be by the same person, or they may be by different persons, eg, the declarations of the victim, assailant and by-standers.

IV Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated.

131. To appreciate as to what would be admissible as res gestae we may note two decisions taking the extreme view

points and thereafter, with reference to the principles applicable to res gestae, determine what evidence is admissible as res gestae.

132. In the decision reported as R v. Bedingfield, 1879, 14 Cox CC 341, in a charge of murder, the exclamation of the deceased while rushing with the throat cut, out of his house a minute or two before, shouting 'oh aunt see what Bedingfield has done to me' was rejected as admissible evidence on the premise that the transaction was over. This is the narrowest view ever taken by any Court in the field of admissibility of res gestae evidence. The swing in the other extreme is in the decision of Lord Denham C.J. in Rough v. Gw Rly. Co., 1841

(1) QB 51 wherein it was held that concurrence of time when something was spoken or done, though material, is not essential. As per this view, anything said much after the incident was admissible, as long as it related to the incident in question.

133. The correct view is the middle view extracted by us in paras 128 to 130 above."

13. In the light of the law as noted above we now examine the two statements made by Naushad and Sultan also keeping in mind that Naushad was an injured witness whose presence at the spot cannot be doubted. As per Naushad he woke up at 2.30 AM in the night intervening March 6/7, 1999 and felt some problem in his palm. His hand was bleeding and he came out of the shop. Further as per Sultan at about 2.00-2.30 AM Naushad came to his shop No.118 and told him that a quarrel was going on between Kyamuddin and Pappu and in the quarrel knife was being used. This statement of Naushad to Sultan is admissible under the rule of res gestae as in the middle of the night with an injured bleeding hand Naushad had gone to Sultan when the quarrel was going on and made the statement. It is not

material even if Sultan has not deposed that Pappu told him that Kyamuddin was inflicting injury on Pappu with knife which was elicited on cross-examination by the learned APP for the reason applying the principles of res gestae and juxtaposing the circumstances that after Naushad informed about the quarrel between Kyamuddin and Pappu, Sultan immediately went to the place of incident and found Pappu murdered. In the midst of night there was no one else and thus the only inference that could be drawn by the facts deposed by the two witnesses is that Kyamuddin gave knife blows to Pappu who was found murdered when Naushad and Sultan reached back.

14. The evidences of these two witnesses is corroborated by the recovery of the hasia and knife at the instance of Kyamuddin for which the Doctor opined that the injuries No.3,5,6,7 and 13 were possible by hasia and injuries No.1,2,3,4,7,8,9,10,11 and 12 possible by the knife.

15. Though the explanation of Kyamuddin is that he was not present in the shop on the night intervening March 6/7, 1999, Kyamuddin in his MLC Ex.PW-13/A got recorded history himself alleging of receiving injuries while having scuffle with another person on the night of March 6/7, 1999 around 2.00 AM. The injuries were opined by Dr.V.K.Jain to be 36-48 hours old at the time the MLC of Kyamuddin was done i.e. 10.20 PM on March 08, 1999. We may note that Dr.V.K.Jain PW-13 has not been cross-examined and thus his testimony with regard to the time of injuries received and one injury being sharp and the other blunt on Kyamuddin has gone unchallenged.

16. In view of the evidence on record we find no infirmity in the impugned judgment convicting the appellant and order on sentence. Appeal is dismissed.

17. Bail bond and the surety bond of the appellant are cancelled. The appellant will surrender to custody.
18. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.
19. TCR be returned.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MARCH 29, 2016
‘ga’