

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

% Decided on: 10<sup>th</sup> May, 2023

+ **CRL.A. 1263/2018**

HARENDER KUMAR @ KAKE .....Appellant

Represented by: Mr.Avadh Kaushik, Mr.Ashok  
Kumar Singh, Ms.Saloni Mahajan  
and Mr.Ankit Singh, Advocates.

versus

STATE (NCT OF DELHI) ..... Respondent

Represented by: Ms.Shubhi Gupta, APP for the State  
with Inspector Mukesh, PS  
Ambedkar Nagar.

+ **CRL.A. 150/2019**

LALIT alias ISHU .....Appellant

Represented by: Mr.Avadh Kaushik, Mr.Ashok  
Kumar Singh, Ms.Saloni Mahajan  
and Mr.Ankit Singh, Advocates.

versus

STATE ..... Respondent

Represented by: Ms.Shubhi Gupta, APP for the State  
with Inspector Mukesh, PS  
Ambedkar Nagar.

**CORAM:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

**HON'BLE MS. JUSTICE POONAM A. BAMBA**

**MUKTA GUPTA, J. (ORAL)**

1. By these two appeals, the appellants challenge the impugned judgment dated 18<sup>th</sup> October, 2018 whereby they have been convicted for offence punishable under Sections 397/34 of Indian Penal Code, 1860 ("IPC") and Sections 302/34 IPC and order on sentence dated 28<sup>th</sup> July, 2018 whereby the appellants were directed to undergo rigorous

imprisonment for seven years and life imprisonment respectively for the two offences and to pay a fine of ₹10,000/- each on both counts; in default whereof to undergo rigorous imprisonment for six months on each count.

2. Investigation was set into motion on an information received at PS Ambedkar Nagar at 12.40 AM on 17<sup>th</sup> January, 2017 regarding a quarrel near Block -18, Barat Ghar. The said DD No.3A was assigned to SI Satish Kumar and subsequently at 1.40 AM an information was received from AIIMS Trauma Centre that the injured brought to the hospital was declared dead. The information to the PCR was given by one Mukesh from his mobile no.9599859210 who appeared in witness box as PW-3. In his statement under Section 161 Cr.P.C. it was claimed that he was an eye-witness and had seen the deceased in quarrel with three persons out of whom one turned out to be a juvenile for whom inquiry report was submitted before the Juvenile Justice Board and two were the present appellants. However, before the Court Mukesh (PW-3) deposed that on 17<sup>th</sup> January, 2017 when he was returning from his duty, at about 12.05 AM/12.10 AM he reached Block No.18 in front of Barat Ghar, where he found a person lying in an injured condition on the road. He alighted from the scooter with his friend and reached near the injured person and on inquiry the said injured person told his name which he did not remember and when asked about the phone number of his house, he told the said number. Mukesh tried to call on the phone number given by the injured however, nobody responded. He made a PCR call and, in the meantime, one Constable Sandeep reached the spot and asked them to take the injured to the hospital. Thereafter, he along with his friend Sumit took the injured to Batra Hospital on the asking of Constable Sandeep who was following

them. When they reached near Khanpur Mandi, a PCR Van arrived and the PCR officials then took the injured in the PCR Van to the Trauma Centre. Mukesh and his friend came back to the spot from where they had lifted the injured in TSR and found some police officials. The police officials asked them to go home and he along with his friend went back home. On the next day, he met the police officials and came to know that the injured had passed away. He reiterated that he saw the injured lying at the spot alone. He was extensively cross-examined by the learned APP. He denied the suggestion that he had seen three boys beating one boy in the age group of 20-22 years. The other friend of Mukesh i.e. Sumit who purportedly helped Sumit to take the injured in the TSR has not been examined by the prosecution as a witness. Thus, there is no eye-witness evidence to support the prosecution case.

3. The other piece of evidence being relied upon by the prosecution is that of the CCTV footage retrieved from the shop of one Nitin Bansal (PW-12). Nitin Bansal (PW-12) in his deposition before the Court stated that he was residing on the first floor of J-157, Dakshin Puri, Ambedkar Nagar and also running a shop in the name and style of 'Balaji Home Appliances' on the ground floor of the said address and used to sell mobile and electronic items. CCTVs were installed inside and outside his shop in the gali. On 17<sup>th</sup> January, 2017 some police officials had come from P.S. Ambedkar Nagar in the morning hours and told him that a murder has taken place nearby the spot and they wanted to see the CCTV footage which was installed. The police officials took the DVR with them, though no document was prepared at that time however, the next day he visited the police station, when the DVR and CD were seized and the seizure memo Ex.PW-12A bore

his signatures. He also identified the DVR. On playing the CD of the CCTV footage he stated that the footage in the CCTV covered the area outside his shop. He also exhibited the certificate under Section 65B of the Indian Evidence Act vide Ex.PW-12B.

4. During the course of investigation, the three persons seen in the CCTV footage were identified by one Islamuddin, who appeared as PW-13, however did not support the prosecution case. Also, Smt.Shobha (PW-14) and Vishal (PW-15), wife and brother-in-law of the deceased, who appeared in the witness box identified the two appellants and the third one who was purportedly a juvenile could not be identified as his face was covered.

5. The CCTV footage of the shop of Nitin Bansal (PW-12) showed that three persons were outside his shop at around 11.30 PM on 16<sup>th</sup> January, 2017. No arms and ammunitions are evident in their hands and since from the CCTV footage the two appellants along with the juvenile were identified to be the persons in the area, they were claimed to be the suspects. However, the serious infirmity in the case of the prosecution is that this CCTV footage is of 11.30 PM at J-157, Dakshin Puri whereas the incident took place around 12.15 AM on 17<sup>th</sup> January, 2017, i.e. approximately after 45 minutes in front of J-125, Dakshin Puri. The site plan filed by the prosecution does not even indicate the distance between J-125, Dakshin Puri and J-157, Dakshin Puri, and whether they are on the same road or on different roads and whether there were other connecting roads or not.

6. An inference that the appellants were the one who committed the alleged offence at 12.15 AM could have been safely arrived at only if the prosecution was in a position to demonstrate that during this period no other person came in the said gali at J-125, Dakshin Puri and from J-157 to J-125,

Dakshin Puri there was no other exit or entry permitting any other person to join in the said road. Besides no site plan being exhibited none of the witnesses have also deposed about the proximity of the area thereby ruling out the possibility that besides the two appellants and the juvenile there was no other person seen at the road at the relevant time.

7. The main evidence on which the prosecution now relies is the so-called recovery at the instance of Harender and Lalit. As per the prosecution after Harender was apprehended, one black purse with an ATM card of Suresh and three photos one of Suresh, one of his wife and one of his child was recovered. Further at the instance of Harender the Jacket, he wore at the time of the alleged incident was recovered from his house. The said jacket recovered from Harender was sent to FSL and no blood or any incriminating evidence was recovered from the same to connect appellant Harender to the alleged offence.

8. As regards the alleged recovery of ATM and three photographs from Harender is concerned, it may be noted that the PCR form (Ex.PW-2/A) notes in the final conclusion "*Inj. jo behoshi halat me mila tha jisko Trauma centre AIIMS me through D/Ct Admit kiya, Jahan per doctor ne brought dead bataya hai. Jisko total 04 chaku lage hai, ek left hand per, ek left leg per aur ek peeche kamar me aur ek chest per hai. Kis ke sath jhagra hua aur kisne maara iska kuch pata nahi hai hai, yeh behoshi halat me inj. mila tha, Jama Talashi me ek black colour ka bag hai jisme do dairy aur kuch documents hai, ek golden wrist watch hai jo hawale D/CT kiya, documents me iska naam suresh S/o Sehdevu Age-21 yrs. RO K-422, 4<sup>th</sup> Floor, Dakshin Puri Mila hai.*"

9. It is thus evident that the black bag containing the documents of identity and other documents of the deceased were found with the deceased thus, it is highly unlikely having the bag, wrist watch and other articles with the deceased, the accused would take away the purse with only an ATM card and three photos. Further in the absence of any other incriminating evidence, the only recovery of the ATM card and three photos is not sufficient to complete the chain of circumstances against appellant Harender.

10. As regards the alleged recovery of shirts, sweater, jeans and shoes of Lalit, which he was allegedly wearing at the time of incident from his house is concerned, it may be noted that though blood was detected on the jacket and jeans recovered from appellant Lalit, however, no DNA profile could be generated from the said two clothes connecting the appellant Lalit with the offence. Further it is the case of the prosecution that one knife was also recovered at the instance of Lalit however, as per the FSL report, DNA profile could not be generated from the alleged knife.

11. As per the post-mortem report the deceased suffered following injuries:

*“External ante-mortem injuries:*

- 1. A reddish contused abrasion of size 2x1cm is present over right cheek.*
- 2. An inclined wound of size 2x.5 cm is present over chin having clear cut and regular margins.*
- 3. A gaping incised wounds of size 9x 2 cm is present over outer aspect of left lower arm, 121 cm above left heel and 41 cm from below vertex. The margins are clean cut and regular. The wound is muscle flare deep (1cm)*
- 4. A stab wound of size 3x1 cm is present over left posterior axillary line in the third intercostal space, 35 cm from below*

vertex, 127 cm from above left heel and 24 cm left lateral to midline. The track of wound traverses medially, horizontally and anteriorly passing through skin, subcutaneous tissue, intercostal muscles, parietal and visceral pleura and culminates in the upper portion of lower lobe of left lung creating a wound (clean cut) of size 3x2 cm. The track of wound is lined by fluid and clotted size 3x2 cm. The track of wound is lined by fluid and clotted blood. 1500 ml fluid and clotted blood is present in the pleural cavity. The angles of the spindle shaped stab wound are acute.

5. A spindle shaped stab wound of size 2x1 cm having both angles acute is present over the left flank region, 97 cm from above heel, 65 cm from below vertex and 21 cm left lateral to the midline. The track of wound is directed medially, anteriorly, and upwards and pass through the skin, subcutaneous tissue, the abdomen musculature and halts just before the parietal peritoneum. The peritoneum and visceral abdominal organs are intact. The wound track is lined by fluid and clotted blood.

6. A stab wound of size 2x1 cm, 3cm deep is present over the upper 1/3rd of back of left thigh just below the gluteal fold. The spindle shaped stab wound is 68 cm from above heel, 25 cm from below and medial to posterior superior ilac spine and 94 cm from below vertex having both angles of wound acute. The track of wound passes from skin, subcutaneous tissue, hamstring muscles and ends up with a clean cut nick in the sciatic nerve. The track is lined by fluid and clotted blood.

7. An incised wound of size 3x1cm is present over lateral aspect of left leg 28 cm from above heel, 15 cm from below the popliteal fossa and 134 cm from below the vertex. The margins are clean cut and regular. The wound is muscle flare deep(1cm).

Opinion: Shock due to haemorrhage consequent upon above mentioned injuries. All injuries are antemortem in nature. Injury no. 4 individually and combined is fatal in ordinary course of nature/sufficient to cause death in ordinary course of nature."

12. The prosecution did not even bother to take the subsequent opinion from the concerned post-mortem doctor to connect the recovery of the knife with the alleged offence. Thus, in the absence of either the eye-witness evidence or circumstantial evidence, which forms a chain ruling out every hypothesis of innocence of the two appellants, this Court finds that the prosecution has miserably failed to prove beyond reasonable doubt that the two appellants committed the alleged offence as held by the learned Trial Court.

13. Learned APP for the State submits that jeans of the JCL were found to be stained with blood which tallied with that of the deceased. We are not returning any finding on the same because we are not dealing with the inquiry of the JCL and are dealing only with the appeals pertaining to appellants Harender and Lalit.

14. Consequently, the impugned judgment of conviction and order on sentence is set aside. Appeals are disposed of.

15. The appellants are directed to be released forthwith if not required in any other case. Copy of the judgment be uploaded on the website of this Court and be also sent to the Superintendent, Jail for updation of the record.

**(MUKTA GUPTA)**  
**JUDGE**

**(POONAM A. BAMBA)**  
**JUDGE**

**MAY 10, 2023**  
**‘vn’**