

\$~\$Part-A (R-13 to 18)

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRIMINAL APPEAL NO. 503/2013

Date of decision: 24th February, 2015

NEERAJ Appellant

Through Mr. Deepak Vohra, Advocate.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through Mr. Varun Goswami, APP along with Inspector Ajay Kumar Singh, PTC.

CRIMINAL APPEAL NO. 406/2013

RAJEEV Appellant

Through Mr. Anurag Jain, Mr. Rohit Chauhan &
Mr. Ravi Prakash, Advocates.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through Mr. Varun Goswami, APP along with
Inspector Ajay Kumar Singh, PTC.

CRIMINAL APPEAL NO. 529/2013

KANHAIYA Appellant

Through Mr. R.K. Anand & Ms. Payal Juneja,
Advocates.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through Mr. Varun Goswami, APP along with
Inspector Ajay Kumar Singh, PTC.

CRIMINAL APPEAL NO. 551/2013

MANOJ Appellant

Through Ms. Inderjeet Sidhu, Advocate.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through Mr. Varun Goswami, APP along with
Inspector Ajay Kumar Singh, PTC.

CRIMINAL APPEAL NO. 552/2013

SONU @ MUCHMUNDA Appellant

Through Mr. R.K. Anand & Ms. Payal Juneja,
Advocates.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through Mr. Varun Goswami, APP along with
Inspector Ajay Kumar Singh, PTC.

CRIMINAL APPEAL NO. 506/2013

UMESH Appellant

Through Ms. Saahila Lamba, Advocate.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through Ms. Aashaa Tiwari, APP along with
Inspector Ajay Kumar Singh, PTC.

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

SANJIV KHANNA, J. (ORAL):

This common judgment will dispose of these six appeals impugning judgment dated 23rd November, 2012, arising out of charge sheet filed in FIR No.13/2008, Police Station New Usmanpur. By the impugned judgment, the appellants have been convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC, for short). By the order on sentence dated 30th November, 2012, the appellants have been sentenced to imprisonment for life for the offence under Section 302 read with Section 34, IPC and fine of Rs.1,000/- each. In default of payment of fine, they have to undergo Rigorous Imprisonment for one year each.

2. As per the police version, one Akash was also involved in the said occurrence, but he is absconding. The said Akash has been declared a Proclaimed Offender (PO, for short). Three others, whose names are withheld, were tried under the Juvenile Justice (Care and Protection of Children) Act, 2000.

3. DD No. 2A (Exhibit PW-16/A) was recorded at 8.20 A.M. on 13th January, 2008 to the effect that an unknown dead body was lying near Shastri Park ground near hospital where fairs were held. This DD entry was marked to SI Sharif Ahmad (PW-16) and Constable Khubi Ram (PW-4) for investigation. Both of them reached Sabhagar Bhawan (auditorium), DDA Building, Shastri Park, where they found a dead body of a boy whose face was smeared with blood. The deceased had injuries on his left eye and the left ear. There were also injuries on the right side of the stomach and on the back side. Blood was also found lying near the dead body and

one stone was lying at some distance with leather belt in addition to two monograms of belt having blood-stain mark and a blood stained jeans. The deceased was not wearing any shirt but was wearing black pants with striped black socks. The deceased also had about Rs.830/- in cash in his pocket. The identity of the deceased could not be ascertained. No eye witness was available. However, the *chowkidar*, namely, Babu Ram, who deposed as PW-12 in the trial court, was found at the spot. We shall be referring to the site plan of the spot, which is material and relevant, subsequently.

4. The aforesaid dead body, as per the testimony of Constable Khubi Ram (PW-4) and SI Sharif Ahmad (PW-16), was taken to the GTB Hospital Mortuary and deposited.

5. SI Sharif Ahmad (PW-16), who was also the first Investigating Officer, has deposed that on 14th January, 2008 the said dead body was identified by one Rakesh Kumar, brother-in-law of the deceased in the GTB hospital in his presence and in the presence of Constable Khubi Ram (PW-4). Thereupon, they came to know that the deceased was Sanjeev Kumar. Constable Khubi Ram (PW-4) in his examination-in-chief has deposed similar lines, accepting that on 14th January, 2008 he along with SHO Kishan Lal, SI Sharif Ahmad (PW-16) and Rakesh Kumar had gone to the GTB Hospital Mortuary and the dead body was identified as that of Sanjeev, s/o Hira Lal by the said Rakesh Kumar. We shall be dealing and referring to the statement of Rakesh Kumar (PW-2) separately as the said witness is of some relevance, when we examine the question of involvement of the appellants as the perpetrators, who had committed the offence in question.

6. The Post-mortem on the dead body of Sanjeev Kumar was conducted by Dr. Sumit Tellewar (PW-20). The post-mortem report stands proved and marked as Ex.PW-20/A. The said report elucidates 39 external injuries, out of which except for injury No.37, all injuries were caused by blunt object. Injury No.37 was caused by pointed blunt object like an iron rod, screw driver, blunt scrap iron or likewise. The details of the 37 injuries mentioned in the post-mortem report are not being reproduced, but we would like to reproduce details of injury Nos.6 & 7, which the post-mortem report opined were sufficient to cause death individually in the ordinary course of nature. These injuries are as under:-

“6. Lacerated wound measuring 5 cm x 1 cm x bone deep present obliquely over the left side of forehead, 1.3 cm away from midline and lower end is 0.2 cm above mid of left eyebrow with fracture of underneath frontal bone.

7. Lacerated wound measuring 3 cm x 0.3 cm x bone deep present around the lateral canthus of left eye extending on to the left eyebrow with fracture of underneath orbital bone.”

The post-mortem report also opines that injuries Nos.1 to 8, 9, 10, 11, 16 to 22 and 28 to 32 were sufficient to cause death collectively in the ordinary course of nature.

7. As noticed above, in the present case the First Information Report does not record or mention the name of the deceased or of the perpetrators. The deceased, as per the prosecution version, was identified by Rakesh Kumar (PW-2) on 14th January, 2008 more than 24 hours after the dead body was discovered. The time of the occurrence was earlier. Rakesh Kumar (PW-2) also did not name or suspect anyone. Rakesh Kumar (PW-2) in his court deposition asserted that the deceased-Sanjeev Kumar was his brother-in-law and on 14th January, 2008, one Mandola (also known as Manoj), had gone with the deceased and had shown him a newspaper report regarding murder of Sanjeev Kumar. Prior to that, Rakesh Kumar

(PW-2) was not aware that his brother-in-law had died. After reading the news, he went to the Police Station, New Usmanpur, where he was shown a photograph of Sanjeev Kumar which he identified as of his brother-in-law. The photograph seen by Rakesh Kumar (PW-2) was marked as Ex.P1.

8. It is clear from the testimony of Rakesh Kumar (PW-2) that on 14th January, 2008 the police was not aware of the suspects. Till 14th January, 2008, Rakesh Kumar (PW-2) was not aware that Sanjeev Kumar had died. He did not suspect or name any person, who would have committed the said offence. Mandola (Manoj), who had gone with the deceased, had not mentioned or reported to him about any occurrence on 13th January, 2008. Mandola (Manoj) had also not suggested or revealed the culprits. On the other hand, Mandola (Manoj) had shown a newspaper clipping that Sanjeev Kumar had died. Mandola (Manoj) had not claimed or asserted that he was an eye witness or that he knew who killed Sanjeev Kumar.

9. This brings us to the testimony of Mandola (Manoj), who deposed as PW-1. In his examination-in-chief, Mandola (Manoj) (PW-1) has testified that he along with the deceased Sanjeev Kumar, who was also known as Sandeep, had gone to Bhairon Mandir at about 1:30 AM at night. He knew the accused, i.e. the appellants herein, prior to the occurrence. The appellants had forced and made the deceased-Sanjeev Kumar sit in an auto-rickshaw and had taken the deceased to Shastri Park. After alighting from the three-wheeler auto-rickshaw, they started beating the deceased-Sanjeev Kumar with pieces of bricks on his face. He watched the incident from a distance of about 20-25 yards. Sanjeev Kumar became unconscious and fell down. Thus, Mandola (Manoj) (PW-1) claims that he was an eye witness to the said occurrence.

10. The question which arises for consideration is whether this assertion of Mandola (Manoj) (PW-1) is credible and trustworthy and, therefore, we should accept that he was an eye witness to the incident, who had seen the occurrence taking place at the under-constructed auditorium at Shastri Park.

11. There are several reasons why we feel that the ocular testimony of Mandola (Manoj) (PW-1) is highly debatable and unreliable. We shall now be indicating our reasons for disbelieving and not accepting the prosecution version that Mandola (Manoj) (PW-1) was an eye witness to the said occurrence. The first fact, which has to be noticed, is that Mandola (Manoj) (PW-1) had failed and not pointed out about the occurrence on 13th January, 2008, to the police or even to the family members of the deceased Sanjeev Kumar. As noticed above, Rakesh Kumar (PW-2), brother-in-law of the deceased Sanjeev Kumar has stated that Mandola (Manoj) (PW-1) had come to him on 14th January, 2008 with a newspaper cutting reporting murder of Sanjeev Kumar. Till 14th January, 2008, Rakesh Kumar (PW-2) was not aware about the death of Sanjeev Kumar. Rakesh Kumar (PW-2), as already recorded above, did not state or depose that Mandola (Manoj) (PW-1) had informed him that he was an eye witness to the incident in which the appellants had beaten up Sanjeev Kumar and were responsible for his death. Rakesh Kumar (PW-2) has also not deposed that Mandola (Manoj) (PW-1) had stated that he knew the culprits. As per the police version, they had interrogated Mandola (Manoj) (PW-1) only on 15th January, 2008, and then they came to know that he was an eye witness along with one Bobby (PW-3). It is noticeable that Rakesh Kumar (PW-2) has not mentioned and referred to Bobby (PW-3) in his testimony.

12. Mandola (Manoj) (PW-1) in his court deposition has stated that the appellant-Umesh was a leader of pick-pocketers, who was having an old enmity with the deceased-Sanjeev Kumar, as the latter had slapped one of his gang members, namely, Kaka. At Bhairon Mandir, appellant-Umesh had caught hold of the deceased-Sanjeev Kumar and thereupon, the deceased-Sanjeev Kumar was surrounded by others, including the appellants herein. The deceased was compelled to sit in a three wheeler auto-rickshaw bearing No. DL-1R-K-5121 and driven to Shastri Park. The said three-wheeler belonged to one of the appellants Rajeev, who was a friend of Akash (PO). PW-1 followed the said three-wheeler in another three-wheeler auto-rickshaw to Shastri Park where he had seen the entire occurrence.

13. It is difficult to accept and believe that Mandola (Manoj) (PW-1) had followed the three-wheeler auto-rickshaw in which the deceased Sanjeev Kumar was being taken and had, thereafter, got down and witnessed the entire occurrence from a distance of 20-25 yards, but would not have contacted the police or even the family members of the deceased immediately after the occurrence, and for the entire day on 13th January, 2008. Mandola (Manoj) (PW-1) antithetically claims that he was a close friend of deceased Sanjeev Kumar and they used to share their feelings with each other.

14. In the cross-examination, Mandola (Manoj) (PW-1), accepted that he was also a pick-pocketer like the appellants and he had been taught the said skills by the appellants. He was then about 10-12 years old. PW-1 claimed that he had stopped pick-pocketing and had left their company after he was beaten up by the appellants about a year prior to the incident. He claimed that he was having barely Rs.50/- in his pocket when he had reached

Bhairon Mandir and out of the said amount he had made offerings of Rs.21/- while the auto-rickshaw driver had charged him Rs.20/- for the return journey. In the cross-examination, PW-1 has stated that there was no traffic when he got down from the auto-rickshaw and there were only fields and some public persons were passing in the area. However, he did not notice any police officers from Bhairon Mandir to Shastri Park. It is accepted position that the distance between Bhairon Mandir and Shastri Park is about 10 km. Thus, Shastri Park is at a considerable distance from Bhairon Mandir. However, Shastri Park is near the residence where the deceased-Sanjeev Kumar and Mandola (Manoj) (PW-1) used to reside. The said assertions reflect that Mandola (Manoj) (PW-1) did not hesitate or out of fear did not waver and avoid following the appellants and pry on them. But conflictingly and discordantly, it is claimed that PW-1 because of anxiety or trepidation had maintained silence and stupor.

15. Mandola (Manoj) (PW-1), in his cross examination, described that the occurrence had taken place in fields and he had concealed himself behind the wall at some distance from the accused, i.e. the appellants. Residential flats were situated at a distance of 50 to 60 steps from the place where the occurrence had taken place and the deceased had cried and raised noise when he was beaten up. At the same time, PW-1 has also stated that the deceased was beaten inside a confined area, which was under construction and he was outside the boundary wall. The boundary wall was about 5-5½ feet high, which was higher than his height. There is, therefore, an apparent contradiction in the testimony of Mandola (Manoj) (PW-1) as to the exact location or the place where violence had taken place. On the said aspect, we would now like to refer to the scaled site plan relied upon by the prosecution marked as Ex.PW-10/A. The same was prepared and proved by SI Mukesh Kumar Jain (PW-10), Draftsman,

who had visited the spot on 15th February, 2008 at the request of the Investigating Officer Inspector A.K. Singh (PW-21). He had taken measurements and had also prepared rough notes. As per the said site plan (Ex.PW-10/A), the occurrence had taken place at two different places. The dead body was found inside the auditorium, which was under construction, next to the wall at the extreme end. At the said place, wooden planks and two blood stained bricks were lying. Blood could also be seen on the wall. The second occurrence had taken place at a substantial distance from the said place and behind the auditorium building and after another boundary wall. The site plan (Ex.PW-10/A) indicates the second spot, as behind a boundary wall constructed after the auditorium building. At the second spot, blood stained stone, blood stained jeans, blood stained leather belt and two belt monograms were lying. The site plan (Ex.PW-10/A) would clearly reflect that the violence had taken place at two different places, and the entire episode could not have been seen by the same person unless he had come inside the complex under construction. In view of the construction, including the boundary walls it was not possible to watch the occurrence from outside. It is, therefore, difficult to accept that the Mandola (Manoj) (PW-1) had hidden himself behind the boundary wall of the main building under construction and yet at the same time, he could notice what was going on beyond the auditorium and behind the boundary wall. It is difficult to believe and accept the said version given by Mandola (Manoj) (PW-1) as to his presence as an eye witness, who had seen the entire violence happening before his eyes.

16. Mandola (Manoj) (PW-1) had, in his cross-examination, accepted that he had not made any effort to call the police and inform them about the occurrence, but claimed that he had informed at the house of the deceased. As noticed above, it is apparent that the house of the deceased was not

informed on 13th January, 2008. Mandola (Manoj) (PW-1) at another place in his cross-examination has testified that he did not talk to the police officers 2-3 days after the incident and had come to know about the occurrence from some boys, who had gone to play cricket in a park. At another place, he had stated that police had taken him in custody, the next day after the incident and he was kept in the police station for 2-3 days and his signatures were obtained on documents. In the cross-examination, he also testified to the effect that prior to the arrest of the accused, police was telling him that he was one of the persons, who had killed the deceased. He was beaten up by the police and thereafter had disclosed the names of the appellants.

17. On the question of involvement or the role of appellant-Rajeev, Mandola (Manoj) (PW-1) has oscillated on 2-3 occasions. As per Mandola (Manoj) (PW-1), appellant-Rajeev was a friend of Akash (PO) and was a three-wheeler auto-rickshaw driver. This vehicle driven by the appellant-Rajeev was used by the appellants and their gang in pick-pocket operations. In his cross-examination on 19th March, 2009, Mandola (Manoj) (PW-1) with reference to appellant-Rajeev had stated that Rajeev was neither named nor was a member of the gang and it was correct that Rajeev was not involved in beating the deceased. Rajeev was standing at a distance of 10-15 steps from the place of incident. However, the said witness was recalled for examination on behalf of the prosecution and in his deposition on 20th September, 2010, contradicted himself by ascertaining that Rajeev had also given beating to Sanjeev Kumar @ Sandeep and he had earlier out of fear testified that Rajeev had no role to play in the murder. He claimed that he was now deposing truthfully and earlier he had made a wrong statement under fear. On the same day, upon cross-examination by counsel for Rajeev, Mandola (Manoj) (PW-1)

reciprocated that he was not aware whether Rajeev was an auto driver or not, and he had not met Rajeev prior to the occurrence. He solemnly pronounced that the said statement in cross-examination was not out of any fear or pressure.

18. This brings us to the testimony of Bobby (PW-3), the other eye witness, who turned hostile and did not effectively support the prosecution version. Bobby (PW-3) in his court deposition has testified that he along with Mandola (Manoj) (PW-1), deceased-Sanjeev Kumar and others had gone to Bhairon Mandir in a three-wheeler auto-rickshaw, after they agreed to share the fare. They had reached Bhairon Mandir at about 12:30/1:00 A.M. and had paid their respects inside the temple. On coming out, they had soft drinks and then proceeded to a *bhandara* where the deceased-Sanjeev Kumar met some persons, who started quarrelling with him. He did not know the reason or the cause, why they were quarrelling. Sanjeev Kumar escaped and ran away towards the park and Mandola (Manoj) (PW-1) also ran away from there. Thereafter, he hired an auto-rickshaw to proceed to the Red Fort from where he had hired another three-wheeler auto-rickshaw to reach his residence. Bobby (PW-3) asserted that he was not an eye witness and had not seen the appellants beating Sanjeev Kumar. After about three days, Mandola (Manoj) (PW-1) had come to their house and PW-3 was taken to the police station at about 3:30 A.M. and interrogated. Thereafter, at about 10:00 P.M., PW-3 was allowed to go. The Additional Public Prosecutor had cross-examined Bobby (PW-3) but the said witness was resolute and reiterated what he had deposed in his examination-in-chief. Bobby (PW-3) did not recognise the appellants. It is noticeable that Mandola (Manoj) (PW-1) in his testimony, has also accepted that Bobby (PW-3) was not with him at the time when he had seen the occurrence taking place at the under-construction auditorium at

Shastri Park. Therefore, we do not consider that Bobby (PW-3) is an eye witness to the occurrence.

19. Once we discard the ocular testimony of Mandola (Manoj) (PW-1) as an eye witness to the actual violence, we are left with the purported occurrence which had taken place at the Bhairon Mandir. The testimony of Mandola (Manoj) (PW-1) and Bobby (PW-3) would indicate that the two witnesses, deceased-Sanjeev Kumar and others had gone to the Bhairon Mandir in the intervening night between 12th and 13th January, 2008. As per the deposition of Mandola (Manoj) (PW-1), quarrel and a fight had ensued between the appellants and the deceased at Bhairon Mandir. Bobby (PW-3) has, however, stated that he did not know the third party involved in the said quarrel. As per Mandola (Manoj) (PW-1), the appellants were involved in the said quarrel. However, we are not inclined to accept and believe the testimony of Mandola (Manoj) (PW-1) that he had seen the deceased-Sanjeev Kumar going in a three-wheeler auto-rickshaw with the appellants from Bhairon Mandir. The reason is obvious and apparent. In case Mandola (Manoj) (PW-1) had seen the deceased being taken away by the appellants in a three-wheeler auto-rickshaw, he would have certainly got in touch with Sanjeev Kumar or his family members on 13th January, 2008 itself, to ascertain his well being and whether anything wrong or untoward had happened. As per the prosecution version, Mandola (Manoj) (PW-1) had remained silent and did not get in touch with either the police or the family members of Sanjeev Kumar on 13th January, 2008. Mandola (Manoj) (PW-1), it is apparent, had not tried to get in touch with the deceased-Sanjeev Kumar on 13th January, 2008. It is plausible that Mandola (Manoj) (PW-1) suspected and believed that the appellants may be involved in the said offence. It is also possible that the deceased-Sanjeev Kumar may have left Bhairon Mandir to proceed to his residence

and on the way back, violence had taken place at the under-construction auditorium at Shastri Park. It is not the case of the prosecution that Mandola (Manoj) (PW-1) had gone back to New Usmanpur along with the deceased-Sanjeev Kumar. We have already discarded the version given by PW-1 to the effect that he had followed the deceased-Sanjeev Kumar along with the appellants in another hired three-wheeler auto-rickshaw.

20. Where and when a single eye witness account is found to be credible and trustworthy, a finding of conviction can be recorded, for Section 134 of the Indian Evidence Act, 1872 affirmatively states that no particular number of witnesses are required to prove any fact. Proof of fact, therefore, does not depend upon the number of witnesses. Evidence has to be weighed and not counted. Thus, we have to examine the quality of the testimony and assertions made by Mandola (Manoj) (PW-1). In *Vadivelu Thevar versus The State of Madras*, AIR 1957 SC 614, it was observed that generally oral testimonies can be classified into three categories; namely, wholly reliable, wholly unreliable, and neither wholly reliable nor wholly unreliable. The first two categories pose no difficulty but in the third category, the Court has to be circumspect and look for corroboration in material particulars by reliable testimony and evidence, direct and circumstantial. However, while examining the said aspect the Courts should not insist on plurality of witnesses for proving a fact for they would be then encouraging subordination of witnesses. We have applied the aforesaid tests with reference to the deposition of Mandola (Manoj) (PW-1). In this context, we have found his testimony and assertion that he was an eye witness who had followed the six appellants and four others in a three-wheeler auto-rickshaw from Bhairon Mandir, located near Pragati Maidan, to Shastri Park about 10 km away without being noticed and then had hidden behind a wall to see the entire occurrence is rather imaginative

and unbelievable. Importantly and significantly, Mandola (Manoj) (PW-1) did not deem it appropriate and necessary to inform the family members of the deceased about the occurrence as to the culprits and then evaded and lied to the family members of the deceased-Sanjeev Kumar. Mandola's (Manoj) (PW-1) assertions as to how and what he saw are belied and do not match with the site plan (Ex.PW-10/A) which indicates that the violence had occurred at two places. One of the places was behind the second boundary wall which was constructed after the under-constructed auditorium. No one standing outside the first wall on the other side of the auditorium could have seen the occurrence at this location. The dead body of Sanjeev Kumar was found lying at the last end of the auditorium. It appears that the violence had taken place at two separate locations which were at a substantial distance. The circumstantial evidence, therefore, does not corroborate the eye-witness account as stated by Mandola (Manoj) (PW-1). Thus, to reach to our conclusion as to doubt, we have not only referred to unnatural and improbable conduct of Mandola (Manoj) (PW-1) but also the prosecution version as to the place or location where the offence had occurred and compared it with the eye-witness account as deposed to by Mandola (Manoj) (PW-1). The site plan (Ex.PW-10/A) relied upon by the prosecution dents and exposes the weaknesses in the assertions of the aforesaid eye witness.

21. In these circumstances, the present appeals are allowed and the appellants are granted the benefit of doubt. Their conviction under Section 302 read with Section 34, IPC for having committed murder of Sanjeev Kumar in the intervening night between 12th and 13th January, 2008, is accordingly set aside. The appellant Rajeev and Umesh have been granted suspension of sentence pending decision of their appeal. The bail bonds furnished by the said two appellants will be treated as

discharged/cancelled. The other appellants will be released unless required to be detained in accordance with law in any other case.

22. The appeals are accordingly disposed of. Lower Court Record will be sent back.

SANJIV KHANNA, J.

ASHUTOSH KUMAR, J.

FEBRUARY 24th, 2015
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