

\$~R-35 to 38 (Part-A)

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

% **Reserved on: 7th September, 2015**
Date of Decision : 14th October, 2015

+ **CRL.A. 549/2012**

RAHUL @ PUNEET @ PHILIP
THR. PAROKAR RAJINDER Appellant
Through Mr. Azhar Qayum, Adv.

versus

STATE Respondent
Through Ms. Aashaa Tiwari, APP with
Insp. Bageshwar Kaushik, PS-
Anand Vihar

CRL.A. 581/2012
SANDEEP Appellant
Through Mr. K. B Andely, Sr. Adv.
with Mr. Mohd. Shamik, Adv.

versus

STATE Respondent
Through Ms. Aashaa Tiwari, APP with
Insp. Bageshwar Kaushik, PS-
Anand Vihar

CRL.A. 856/2012
PANKAJ KUMAR Appellant
Through Ms. Saahila Lamba, Adv.

versus

STATE Respondent

Through Ms. Aashaa Tiwari, APP with
Insp. Bageshwar Kaushik, PS-
Anand Vihar

CRL.A. 1140/2012

CHET RAM @ RAVI Appellant
Through Mr. S B Dandapani, Adv.

versus

STATE Respondent
Through Ms. Aashaa Tiwari, APP with
Insp Bageshwar Kaushik, PS-
Anand Vihar

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

R. K. GAUBA, J:

1. This case may be described as one of murder over *paaparh* (a savoury Indian snack made with round flattened wafer-thin dough, generally served after roasting or frying). The four appellants herein have been held guilty, primarily on the basis of ocular evidence, on the allegations that they, on feeling infuriated over not being timely served with the savoury, in spite of demand and wait, in furtherance of their common intention knifed four persons, one after the other, one of the wounded ones dying as a result.

2. The venue of the incident that occurred statedly at about 10.30 PM on 11.10.2008, which is subject matter of the case from which these appeals arise, was an eatery run in the name of “Zaika Bar and Restaurant”, Community Centre, Karkardooma, Delhi (hereinafter

referred to as “the restaurant”), within the jurisdiction of Police Station Anand Vihar. Four persons received stab injuries, they being Shahid (who resultantly died), Sheikh Pappu (PW-4), Mohd. Jaffar (PW-5) and Mohit Dhingra (PW-19). Mohit Dhingra (PW-19) is the son of Rajesh Dhingra who, in turn, owns the restaurant. He (PW-19) would assist his father in running the establishment. Shahid (hereinafter referred to as “the deceased”), Sheikh Pappu (PW-4), Mohd. Jaffar (PW-5) and Raju (the first informant) were employed in the restaurant- the former three as cooks and the fourth one as a bearer (waiter). The FIR (Ex.PW-1/B) was registered at 02:20 hours on 12.10.2008 on the basis of *rukka* (Ex.PW-12/C), sent by ASI Yashpal (PW-12) primarily founded on the statement (Ex.PW-12/B) made by Raju before PW-12, after the latter had reached the place of occurrence pursuant to intimation vide DD No.32A (Ex.PW-1/A) given telephonically by the said Raju to the Police Station at 23:12 hours on 11.10.2008.

3. On the basis of evidence gathered during the investigation into the aforesaid FIR, the four appellants were put to trial in sessions case No.13/2009, they being Rahul @ Puneet @ Philip (Accused No.1), Pankaj Kumar (Accused No.2), Sandeep (Accused No.3) and Chet Ram @ Ravi (Accused No.4). The trial was held on the charge for offence under Sections 302 read with 34 IPC for the murder of Shahid, under Section 307 read with Section 34 IPC for attempted murder of Sheikh Pappu (PW-4) and Mohd. Jaffar (PW-5), and under Section 324/34 IPC for simple injuries inflicted with sharp edged weapon to Mohit Dhingra (PW-19). In addition, Rahul (A-1) was

also charged for offence under Section 25 of Arms Act on the allegations that he had been found in possession of a country-made pistol of prohibited category with one live round of ammunition.

4. By judgment dated 30.03.2012 of the trial court, all the four appellants were held guilty, as charged, by the Additional Sessions Judge. By separate orders, each passed on 04.04.2012, the trial court awarded life imprisonment with fine of ₹1,000/- for offence under Section 302/34 IPC, rigorous imprisonment for five years with fine of ₹1,000/- for offence under Section 307/34 IPC and rigorous imprisonment for two years with fine of ₹500/- for offence under Section 324/34 IPC to each of the four convicts. It was directed that, in case of default in the payment of fine, they shall undergo simple imprisonment for one month, one month and fifteen days respectively. Rahul (A-1) was also awarded rigorous imprisonment for two years with fine of ₹500/- and in default simple imprisonment for 15 days for the offence under Section 25 of Arms Act. All the sentences were directed to run concurrently with benefit of Section 428 Cr.P.C. also accorded.

5. Feeling aggrieved with the judgment dated 30.02.2012 and orders on sentence dated 04.04.2012, the convicted persons have come up with these appeals.

6. The evidence showing that Mohit Dhindra (PW-19) is the son of the owner of the restaurant and would assist him in running the same and was present at the place when the incident occurred was not disputed at the trial. Further, the evidence showing that Sheikh Pappu

(PW-4), Mohd. Jaffar (PW-5), Shahid (the deceased) and Raju (the first informant) were employed in the restaurant has also gone unchallenged.

7. The fact that Shahid died a homicidal death is not disputed. There is abundant material on record to substantiate the case for the prosecution to such effect. The testimonies of Sheikh Pappu (PW-4) and Mohd. Jaffar (PW-5) about the stabbing of Shahid in the kitchen area of the restaurant some time around 10.30 PM on 11.10.2008 is confirmed by the Medico Legal Report (MLC) of the deceased, prepared in Max Balaji Hospital where three of the injured persons had been taken. The MLC (Ex.PA-3) was admitted by the appellants under Section 294 of the Code of Criminal Procedure (Cr.P.C.) by statement made on 14.03.2012. The admitted document shows that deceased Shahid, then in injured state, had been brought to the said hospital at 11.30 PM on 11.10.2008 with stab injury across his abdomen. The document notes that the deceased had been first taken to Shanti Mukund Hospital from where he was shifted to Max Balaji Hospital. Shahid was unconscious and not responding to the commands. His vital signs indicated he was in critical state. The deep injury across the abdomen showed omentum and intestines in exposed condition. He was referred to surgery department for further management. He succumbed to the injuries at 08:30 hours on 12.10.2008 during treatment. Information about the said event was communicated to the Police Station immediately whereupon it was recorded vide DD No.17A, PW-1/D by Head Constable Rajender Kumar (PW-1), the duty officer. It was also documented in the death

report (PW-20/C) prepared by Inspector Bageshwar Kaushik, the Investigating Officer (IO), who had prepared the inquest papers including brief facts (Ex.PW-20/D), with which he had later submitted application for post-mortem examination on the dead body (Ex.PW-20/D1) reiterating the date and time of reported death in the hospital.

8. The post-mortem examination on the dead body of Shahid was conducted by Dr. S. Lal (PW-9), who proved his report (Ex.PW-9/A) confirming, with no contest from the defence, the fact that the autopsy had revealed the following ante mortem injuries :

“1. Surgical laprotomy wound in middle abdomen from xiphi to paraumbilicus region of size 21 x 0.1 cm with stitches and the drainage wound on left side middle abdomen.

2. Stab incised wound surgically stitched, on opening the stitches the size of the wound is 4.5 x 0.2 cm x cavity deep, obliquely placed over left side upper abdomen. The lower outer angle of wound is acute and the other angle is blunt. The wound is placed 5 cm away from midline and 16 cm below the left nipple. The wound enters the abdomen cavity in downward and backward direction by cutting lower inter costal cartilage and then given the nick in small intestine which is surgically repaired in hospital. The total depth of the wound is approximate 14 cm.

3. Stab incised wound surgically stitched, on opening the stitches the size of the wound is 3.2 x 0.2cm x cavity deep in left side upper abdomen, obliquely placed. The lower outer angle is acute and the other angle is blunt. The wound is placed 15 cm left to midline and 17 cm below the left nipple. The wound enters the abdomen cavity in downward and inward direction to cut the intestine

where surgically repair seen. Total depth of the wound is about 13 cm.

4. Stab incised wound 0.9 x .0.2 x 1 cm deep present over left side lower chest over anterior axillary line, obliquely placed. The lower inner angle is acute and the other angle is blunt. The wound is placed 4 cm outer to injury No.3.

5. Stab incised wound surgically altered by midline incision of size 1.6 x 0.2 cm x cavity deep over left side epigastric region, horizontally placed outer angle is acute and the other angle is merged with the incision given in the midline. The wound is placed just outer to midline and 2 cm below the xiphi-stenum. The wound enter the abdomen cavity and cut the distal part of greater curvature of stomach which is surgically repaired in hospital. The total depth of the wound is about 10 cm.

6. Incised wound surgically stitched of size 6 x 0.1 cm x muscle deep over left dorsum of lower one-third of arm, obliquely placed and 4.5 cm above the knuckled of elbow.”

9. Opinion of the autopsy doctor is as follows :

“the cause of death is hemmorahgic shock consequent upon stab injury on abdomen produced by single pointed sharp edged weapon and sufficient to cause death in ordinary course of nature. Injury No.1 was caused by surgical intervention and injury No.2 to 6 was caused by single pointed sharp edged weapon. Injury No.2,3,4 and 5 were sufficient to cause death in ordinary course of nature both individually and collectively. All injuries were antemortem in nature and fresh in duration. Time since death was approximately consistent with the time mentioned in the death certificate.”

10. The autopsy report vividly shows that Shahid was stabbed thrice in the abdominal region and once in the lower chest on the left

side. Given the nature of these stab wounds the body parts where they were directed and the depth thereof (particularly injury nos.2,3,4 and 5), there is no doubt about the fact that the assailant(s) had inflicted the said wounds intentionally and with knowledge that such injuries were likely to result in death will have to be attributed. In this view of the matter we uphold the finding of the learned trial court that the death of Shahid was a case of culpable homicide. We reserve to a later stage our judgment on the issue as to whether this culpable homicide amounted to murder or not, in the light of the ocular evidence to be noted in due course hereinafter.

11. The evidence about the stab injuries suffered by Sheikh Pappu (PW-4), Mohd. Jaffar (PW-5) and Mohit Dhingra (PW-19) is also beyond reproach. Dr. S.K.Tiwari (PW-6) has referred to MLCs (Ex.PA2 and PA4) of Sheikh Pappu and Mohd. Jaffar respectively as documents Mark 'A' and Mark 'B' respectively. The MLCs had been prepared in the casualty of Max Balaji Hospital. The authors of these MLCs have not been examined as the documents (Ex.PA-2 and Ex.PA-4) were admitted under Section 294 Cr.P.C. by the appellants on 14.03.2012. PW-6 with Dr. A. Sabharwal had examined both the said injured persons and had recorded opinion thereupon in the general surgery unit of the hospital. Both the documents show that these persons had been earlier taken to Shanti Mukund Hospital from where they were shifted to Max Balaji Hospital.

12. The MLC Ex.(PA2) in respect of Sheikh Pappu (PW-4) shows that he was brought in the hospital at 11:50 PM on 11.10.2008 with history of stab injury across abdomen suffered at 10 PM in the Zaika

Restaurant. The MLC noted that Sheikh Pappu (PW-4) had suffered two stab injuries, one in the abdominal region and the other on the mid right arm. In the opinion of PW-6, recorded in due course, the injuries were dangerous. Similarly, according to the MLC (Ex.PA4), Mohd. Jaffar (PW-5) had been brought in the hospital at 11:50 PM with history of stab wound inflicted over the abdomen around 11 PM at Zaika Restaurant. The stab injury found suffered by Mohd. Jaffar (PW-5) was described in the MLC as linear horizontal wound on the upper abdomen. This was also opined to be dangerous in nature by PW-6. Noticeably, both Sheikh Pappu (PW-4) and Mohd. Jaffar (PW-5) were found by the examining medical officers to be conscious and oriented. Thus, the history of the injuries would have been narrated by the said persons on their own to the medical officer.

13. The injuries of Sheikh Pappu (PW-4) were apparently quite grave and serious. He has deposed that he had remained hospitalised for 20-22 days. During cross-examination of Dr. S K Tiwari (PW-6), questions were raised as to the correctness of the opinion given by him, when he referred to the operation notes (Ex.PW-6/DA) which prove that Sheikh Pappu (PW-4) had undergone surgical procedure, which had brought out that the incised wound was of the length of 4.5 cm linear (horizontal) in anterior axilla above the costal margin. The left subdiaphrag fossa and left paracardiac gutter were found full of fresh blood to the extent of 750 ml.

14. Mohit Dhingra (PW-19) had also been taken, with the other victims of stabbing incident, to Shanti Mukund Hospital. He was entertained there and MLC (Ex.PW-7/A) in his regard was prepared

by Dr. Basharat Mujtaba (PW-7), the examining medical officer in the department of surgery. The MLC indicates that Mohit Dhingra (PW-19) had been brought by a police official named Mahavir (not examined) at 11:25 PM on 11.10.2008 with history of assault. The medical examination indicated a deep bleeding incised wound of the size of 2-3 cm near left knee. PW-19 was also conscious and oriented and apparently would have given the history to the medical officer on his own. There is endorsement on this MLC confirming Mohit Dhingra (PW-19) to be fit for statement at 11:45 PM on 11.10.2008.

15. The prosecution case is that the first three appellants viz., accused No.1 Rahul (A-1), accused No.2 Pankaj (A-2) and accused No.3 Sandeep (A-3) were regular patrons of the restaurant. They would come to the place quite often and, thus, were known to the restaurant owner and staff by their names and faces. This is what was reflected by DD No.32A (Ex.PW-1/A) based on telephonic intimation given by the first informant (Raju) and also in his statement (Ex.PW-12/B) leading to the registration of the FIR. The first informant (Raju) has not been examined by the prosecution. PW-4 and PW-5 have stated in their respective depositions that though they were able to identify the appellants as the assailants, they had not known them by names or otherwise prior to the occurrence. PW-19, on his part, also did identify the appellants as the persons responsible for the stabbing incident, but referred to assistance given by the investigating officer in such identity being established. The defence has argued that the dock identification by PW-4, PW-5 and PW-19 should not be

believed or acted upon particularly in absence of the testimony of the first informant Raju.

16. We have given our thoughtful consideration to the above argument but find it unacceptable as the other evidence on record, which we shall take note of in due course, confirms the identity of the appellants and their presence at the scene of incident. The non-examination of Raju, the first informant, cannot lead to any adverse inference for the reason that, in spite of best efforts, he could not be traced. The report of the investigating agency, taken note of in the order dated 03.08.2011 by the trial court, shows Raju had not been heard of even at his native place for over two years.

17. The fact that Raju was employed as a bearer in the restaurant has not been questioned by the defence at any stage. It has to be remembered that Raju was a menial employee for whom an incident of such nature where his co-worker had been stabbed to death in front of his eyes would have come as a matter of utter shock. The trial court record shows that PW-19, the owner of the restaurant had received threat calls asking him to desist from giving evidence at the trial. He brought the facts relating to such intimidatory tactics, which could not have been made but at the instance of the defence, to the notice of the learned trial court on several occasions, seeking measures to be taken for his security. Mohit Dhingra (PW-19) avoided appearing as a witness on account of such threat perception for quite a long time. In these circumstances, the evasion on the part of Raju (the first informant) from deposing in the court cannot come as a matter of surprise or cause for adverse inference against the

prosecution. No wonder then that Sheikh Pappu (PW-4), Mohd. Jaffar (PW-5) and Mohit Dhingra (PW-19) also showed hesitation in confirming that they knew A-1, A-2 and A-3 from before.

18. The presence of Rahul (A-1) at the scene of the incident is proved beyond the pale of all doubts by the fact that he was apprehended at the spot. The FIR (Ex.PW1/B) noted the well documented fact that after the stabbing incident while his accomplices had run away, Rahul (A-1) had attempted to flee away in Maruti No.DL 3CM 7755 (hereinafter referred to as “the Maruti car”) stationed in the parking. The Maruti car, the trial court record shows, was owned by mother of Rahul (A-1). The car was seized during the course of investigation formally vide seizure memo (Ex.PW-8/D) by the Investigating Officer, in the presence amongst others, Constable L.K. Sharma (PW-8) and ASI Yashpal (PW-12), Raju (the first informant) and Constable Dinesh Maan being other signatories. It was later claimed and its custody obtained on *superdgi* by Smt. Manju, wife of Rajender Kumar, mother of Rahul (A-1), on the basis of her application dated 25.10.2008.

19. The FIR had mentioned that Rahul (A-1) was apprehended by Constable Lalit Kumar (PW-8) and Constable Dinesh, who was accompanying him, both on patrolling duty in the area, when their attention was drawn by the commotion resulting from the stabbing incident, they finding Rahul (A-1) trying to start the car to hurriedly move away. The evidence of PW-8, as confirmed by PW-12 to whom custody of Rahul (A-1) was handed over in due course, has gone unimpeached. In his statement under Section 313 Cr.P.C. Rahul

(A-1) claimed that he was lifted from his house to be falsely implicated in the case. Suggestions to this effect were given during cross-examination of PW-12 and were suitably denied. Noticeably, however, no such suggestion was given to the Investigating Officer. Further, the evidence about the recovery of the Maruti car from the parking outside the restaurant has gone unchallenged. In these circumstances, the finding of the trial court that Rahul (A-1) was arrested from outside the restaurant in the parking lot after being apprehended by PW-10, assisted by the other Constable on beating duty with him, must be upheld. From this, it naturally follows that since Rahul (A-1) has not explained his presence at the place in any other manner, the evidence of PW-4, PW-5 and PW-19 about his visit to the restaurant and, consequently, their ability to identify him, at least on the basis of the said visit and the incident which happened during their stay, must be believed.

20. The evidence on record shows that the names of Pankaj (A-2) and Sandeep (A-3) on the basis of their past acquaintances and earlier visits in the company of Rahul (A-1) had figured in the DD No.32-A (Ex.PW-1/A) and the statement (Ex.PW-12/B) of Raju (the first informant) at very initial stages of the police proceedings. The FIR, however, contained an admission on the part of the first informant that he had not known Chet Ram (A-4) from before and that he had picked up the said name only on the basis of the exchange between the four said visitors to the restaurant on the date of the incident. Thus, the full identity of Chet Ram (A-4) would have been revealed, upon interrogation, by Rahul (A-1) around the time he was shown to

have made the disclosures (Ex.PW-12/E) to the IO in the presence, amongst others, of ASI Yashpal (PW-12). Be that as it may, A-2, A-3 and A-4 were not immediately traceable.

21. The evidence of the Investigating Officer (PW-20) brings out that Pankaj Kumar (A-2) and Sandeep (A-3) came to be arrested on the very next day i.e. 13.10.2008 in FIR No.285/2008 (Ex.DW-2/B) of Police Station Gokulpuri involving offences under Section 307/186/353/34 IPC committed in the course of an incident that had statedly occurred at 6.10 PM on 13.10.2008. A copy of the FIR No.285/2008 (Ex.DW-2/B) was proved by Head Constable Dinesh (DW-2), MHC (R) of Police Station Gokulpuri. It shows arrest of Pankaj (A-2) and Sandeep (A-3), along with another associate, at a time when they were also found in possession of a button actuated knife, a country-made firearm and ammunition respectively. Interestingly, Ved Prakash Sharma (DW-1), father of Sandeep (A-3) also appeared as a witness in his defence to confirm his arrest by the police officials of Police Station Gokulpuri on 13.10.2008 setting up the theory of he having been picked up from the house rather than in the circumstances narrated in the FIR No.285/2008 (Ex.DW-2/B). It may be mentioned that the evidence of Head Constable Dinesh (DW-2) has also proved on record copy of FIR No.268/2008 (Ex.DW-2/A) regarding another case involving offence under Section 307/34 IPC pertaining to an incident of 29.09.2008 in which role of Sandeep (A-3) had also come up besides the names of two others. The FIR No.268/2008 of Police Station Gokulpuri indicates that Sandeep (A-3) was wanted by the officials of the Police Station Gokulpuri in

connection with the said earlier case registered on 30.09.2008. But, the fact remains that Sandeep (A-3) with Pankaj (A-2) are shown by this material to have come in the custody of the Police Station, Gokulpuri definitely on 13.10.2008.

22. In the case at hand, we need not go into the correctness or otherwise of allegations made against Pankaj (A-2) and Sandeep (A-3) in the case(s) of Gokulpuri. For present purposes, it is sufficient that the evidence proves that they were in formal custody of PS Gokulpuri w.e.f. 13.10.2008. Information about the said arrests was conveyed by ASI Subhash Chand (PW-17), the IO of FIR No.285/2008 of Police Station Gokulpuri, to the Investigating Officer (PW-20) of the present case on 14.10.2008 vide DD No.41B. The Investigating Officer has proved that on the basis of his applications (Ex.PW-20/J and Ex.PW-20/M), the Magistrate at Karkardooma courts had granted him permission to interrogate and cause formal arrests of Pankaj (A-2) and Sandeep (A-3), in the case at hand, at a stage when both of them were being produced in the said court in connection with the extension of remand of case of Gokulpuri. The documents prove that both Pankaj (A-3) and Sandeep (A-3) were produced from the judicial custody with muffled faces in the court of Metropolitan Magistrate, when permissions as requested were granted on 23.10.2008 and 27.10.2008. The Investigating Officer has also proved formal arrest of Pankaj (A-2) and Sandeep (A-3) on 23.10.2008 and 27.10.2008 respectively after the said initial interrogation, vide memos Ex.PW-11/B and PW-10/B, in the

presence of Constable Avinash (PW-11) and Constable Vinod Kumar (PW-10) respectively.

23. The Investigating Officer (PW-20) has proved that after he had arrested Pankaj (A-2) on 23.10.2008 with the permission of the Metropolitan Magistrate, he had moved an application (Ex.PW-20/K) for test identification parade (TIP) and the matter was made over by the jurisdictional Magistrate for necessary action to Mr. Vivek Kumar Guliya, Metropolitan Magistrate. Similarly, after Sandeep (A-3) had been arrested on 27.10.2008, with permission of the Metropolitan Magistrate dealing with the Gokulpuri case, the Investigating Officer had moved an application (Ex.C1) for TIP to be conducted in this case. This application came to be dealt with eventually by Ms. Sunaina Sharma, Metropolitan Magistrate. Pursuant to these requests, TIP proceedings were conducted in respect of Pankaj (A-2) on 23.10.2008 by Mr. Vivek Kumar Guliya, Metropolitan Magistrate and in respect of Sandeep (A-3) by Ms. Sunaina Sharma, Metropolitan Magistrate on 03.11.2008.

24. The TIP proceedings recorded (Ex.PA-7) in respect of Pankaj (A-2) have been admitted by him under Section 294 Cr.P.C. Similarly, TIP proceedings recorded in respect of Sandeep (A-3) (Ex.PA-6) have been admitted by him under Section 294 Cr.P.C.. While Sandeep (A-3) refused to join the TIP on the ground that he had been shown to the witnesses by the Investigating Officer in Police Station Gokulpuri, Pankaj (A-2) declined to join TIP stating that the witnesses including Mohd. Jaffar (PW-5) knew him well before the date of incident. Interestingly, Pankaj (A-2) also admitted

before the Metropolitan Magistrate at the time of TIP (Ex.PA-7) that he was present at the site at the time of incident though the role alleged against him was questionable.

25. In the face of the above material, there can be no doubt about the fact that Pankaj (A-2) was present in the restaurant at the time of the incident and that the witnesses, particularly Mohd. Jaffar (PW-5), not only know him from before but also are able to correctly identify him. The refusal of Sandeep (A-3) to join TIP, on the other hand, must lead to adverse inference to the effect that if he had participated, the witnesses would have positively identified him. Noticeably, he did not adduce any material in support of the reasons for his stated refusal to co-operate with the TIP proceedings.

26. Thus, we are satisfied that the testimony of the eye-witnesses to the incident viz., PW-4, PW-5 and PW-19, with regard to their ability to identify Pankaj (A-2) and Sandeep (A-3) must be accepted as credible.

27. Chet Ram (A-4) was not known, at least to the first informant, prior to the date of incident. This is what he had mentioned even in the FIR. He had picked up the name from the drift of conversation of the appellants, which he claimed to have overheard. The investigating agency claimed that information as to the particulars of Chet Ram (A-4) were ascertained on the basis of disclosures of the earlier three arrestees. Chet Ram (A-4) came to be arrested in FIR No.279/2008 under Sections 302/323/324/201/109/212/34 IPC of Police Station Gokulpuri. Upon information in this regard coming his

way, the Investigating Officer (PW-20), moved an application (Ex.PW-20/O) in the court of Metropolitan Magistrate at Karkardooma courts on 13.11.2008. The proceedings recorded on the said application by the Duty Magistrate, and the evidence of the Investigating Officer (PW-20), show that Chet Ram, then in judicial custody in case FIR No.279/2008 of Police Station Gokulpuri, had not been produced for purposes of the investigation of the case in hand in spite of production warrant having been issued on an earlier application of the Investigating Officer on 08.11.2008. The Investigating Officer had made a fresh request informing the Magistrate that TIP of the accused was to be got conducted and so the jail administration be directed to ensure that he was produced in muffled face. The Metropolitan Magistrate, however, recorded his displeasure over the fact that the Investigating Officer himself was not present in the court and issued show cause notice to him for the following day. The evidence shows that the Investigating Officer eventually went to the Central Jail No.3, Tihar on 17.11.2008 and interrogated Chet Ram (A-4) in prison, in presence of SI Rupesh Khatri leading to his disclosure statement (Ex.PW-15/C) being recorded. He (A-4) was formally arrested in the prison as per arrest memo (Ex.PW-15/A). Since no fact is shown to have been discovered pursuant to the statement attributed to Chet Ram (A-4), the document described as disclosure statement (Ex.PW-5/C) cannot be read against him.

28. In the wake of his arrest on 17.11.2008, Chet Ram (A-4) was produced in the Court of the Metropolitan Magistrate on 18.11.2008

when the Investigating Officer moved an application for TIP to be conducted. According to the evidence of PW-20, Chet Ram (A-4) had been produced from jail with his face muffled. The proceedings of TIP (Ex.PA-8) in respect of Chet Ram (A-4) were admitted by him under Section 294 Cr.P.C. as per statement made on 14.03.2012. These proceedings show that Chet Ram (A-4) refused to join the TIP on the ground that his face had been shown to the witnesses. It is not elaborated by the defence either during cross-examination of the relevant witnesses or by way of any evidence independently led as to how or on what stage or to which of the witnesses the face of Chet Ram (A-4) had been shown prior to the TIP being conducted.

29. Sheikh Pappu (PW-4) and Mohd. Jaffar (PW-5) have testified confirming the prosecution case in all material particulars and corroborating the word of each other. Both of them were employed, with Shahid (the deceased), as cooks in the restaurant of Mohit Dhingra (PW-19). They would not know any of the appellants prior to the incident by names or faces. It is quite apparent that given the nature of duties for which their services were being availed by the restaurant, they would generally have no occasion to come across any of the patrons to the eatery. Their evidence, however, confirmed that Raju (the first informant) was working as one of the waiters in the restaurant. The evidence shows that, besides Raju, there were a number of other waiters employed, the total number of employees may be exceeding the figure of twenty. It is Raju (the first informant), who is stated to be responsible for serving at the table where the four appellants were sitting. Though PW-4 and PW-5 did

not offer this information in their examination-in-chief, at the outset of cross-examination of PW-4 clarified, and the defence made no effort to discredit him on this score, that it was Raju, who was fetching preparations from the kitchen for being served to the said customers (the appellants) and, thus, he (PW-4) had asked him (Raju) to collect the *paaparh* from the kitchen and serve it as per demand.

30. PW-4 and PW-5 testified that they were working in the kitchen with other employees (including the deceased Shahid), and that Mohit Dhingra (PW-19) was also present at the stage when the two customers came in and protested that *paaparh* had not been served in spite of their demand. According to these witnesses, Mohit Dhingra (PW-19) took them out requesting that they may wait at their table and assuring that the savoury demanded would be served. Their word in this regard is confirmed by Mohit Dhingra (PW-19). PW-4 and PW-5 testified that after about five minutes, four persons including the two, who had come earlier, came into the kitchen and one of them at that stage was holding a knife. Both identified Rahul (A-1) as the person wielding the cutting instrument. The two witnesses stated that while each of them including Shahid (the deceased) were held by one each of the said persons, the one wielding the knife, i.e. Rahul (A-1), stabbed them, starting with Shahid (the deceased), one after the other. Both have confirmed the role of A-2, A-3 and A-4 in assisting A-1 in the stabbing incident. PW-4 specifically pointed out Sandeep (A-3) as the person, who had caught hold of him to facilitate he to be stabbed in the abdomen by Rahul (A-1). Similarly, PW-5 identified

Pankaj (A-2) as the person who had held on to him at the stage when he was given the knife injury in the abdominal region by Rahul (A-1).

31. Mohit Dhingra (PW-19) confirmed the incident of stabbing wherein three of his employees including Shahid (the deceased), Sheikh Pappu (PW-4) and Mohd. Jaffar (PW-5) working in the kitchen area of the restaurant had been injured with knife in their respective abdominal regions. He has stated that the appellants were abusive and were uttering words to the effect that they had been insulted. He, however, would not specify as to which of the assailants had made the said utterance. He had tried to intervene. But, Rahul (A-1) had attacked him with knife aiming at his stomach upon which he had tried to save himself by ducking and received a stab injury on his left knee. He has stated that he had raised alarm and the assailants ran away.

32. Both PW-4 and PW-5 deposed that after receiving the stab injuries they had become unconscious. Whilst the MLCs in their respect do not confirm the theory of they having become unconscious, and consequently, this claim appears to be a little exaggeration, there cannot be any doubt about the fact that they had actually received the stab wounds as testified by each of them inasmuch as the same were duly documented in due course upon they being taken to Max Balaji Hospital where they were given medical assistance after examination against MLCs.

33. In our considered opinion Sheikh Pappu (PW-4), Mohd. Jaffar (PW-5) and Mohit Dhingra (PW-19) are witnesses whose credibility

cannot be doubted. They have given evidence restricted to the facts which were in their personal knowledge. They have made no efforts whatsoever to vouchsafe anything to which they could not have been privy. There is absolutely no reason why their word should be disbelieved.

34. The prosecution case was that while running away from the kitchen, after stabbing four persons, the knife used in the crime had slipped out of the hand of Rahul (A-1). It was stated that on the asking of Rahul (A-1), the weapon was picked up by Chet Ram (A-4). It was claimed that during investigation, pursuant to disclosure of Sandeep (A-3), the knife used in the crime was recovered from an open drain running from a deserted place with bushes all around along the road known as Mangalam Road in the Institutional Area as per seizure memo (Ex.PW-16/D), in the presence of Constable Bijender Singh (PW-16) on 03.11.2008. The knife (Ex.PW-16/Article 1) has been produced in evidence and it is stated that the same was seized after its sketch (Ex.PW-16/C) had been prepared. We may, however, note that no blood stains were found on this knife. In fact, there is no evidence confirming the prosecution theory that it was this knife which was used by Rahul (A-1) in the course of stabbing the four persons. There is no clarity in the evidence as to how the knife used by Rahul (A-1), and picked up by Chet Ram (A-4) after it had slipped from the hands of the former, had come in the possession or control of Sandeep (A-3) so as to be recovered at his instance. In these circumstances, we are constrained to reject the evidence about the recovery of the weapon of offence (the knife).

35. As mentioned earlier, two Constables of the local police station, viz., Constable Lalit Kumar Sharma (PW-8) and Constable Dinesh were on patrolling duty of the area of the restaurant around the time the incident was happening. It is but natural that after the stabbing when the assailants were fleeing away, there was commotion. It was this which attracted the attention of the two beat Constables in the direction of the restaurant. PW-8 has been examined to prove as to what happened in the wake of these events. He testified that he had noticed Rahul (A-1) sitting in the driver's seat of the Maruti car in the parking lot and trying to start the vehicle. Upon seeing the police personnel approaching, Rahul (A-1) left the vehicle and started running. PW-8 deposed that he along with the other Constable had chased and had caught Rahul (A-1). On checking, he found Rahul (A-1) was having in his possession a country-made pistol with one live round loaded in it kept concealed beneath *dub* (i.e. beneath the belt) of the trousers and another live cartridge kept in the right side pocket of his trousers. ASI Yashpal (PW-12), who in due course had reached the place pursuant to DD No.32A (Ex.PW-1/A), confirms the word of PW-8 to this effect and stated that he had taken the said firearm with ammunition in his possession vide formal seizure memo (Ex.PW-8/B), after its sketch (Ex.PW-8/A) had been prepared.

36. The seizure of the country-made pistol (Ex.PW-12/Article 1) and the two cartridges (collectively, Ex.PW-12/Article 2) are shown to have been attested by Constable Lalit Kumar Sharma (PW-8), Raju (the first informant) and the other beat officer Constable Dinesh. We

have already noted the explanation of the prosecution as to why Raju (the first informant) could not be examined. Constable Dinesh was not examined as the public prosecutor in-charge of the case made a statement before the trial court on 20.07.2010 that his evidence would be repetitive. The defence did not object at any stage to this reason. Thus, on the seizure we have the word of ASI Yashpal (PW-12) and Constable Lalit Kumar (PW-8) but on recovery of the said articles from the possession of Rahul (A-1), the prosecution rests its case on the sole word of Constable Lalit Kumar (PW-8).

37. In our opinion, the evidence of PW-8 deserves to be believed. He was present on account of his official duties as the beat Constable of the area. There is no case set up of any past acquaintance with Rahul (A-1) or, for that matter, any reasons for false implication by this witness. The country-made pistol and the ammunition found therewith are articles which cannot be easily procured. The possibility of the same having been planted by PW-8, in the facts and circumstances of the case, is non-existent.

38. The ballistic report (Ex.PA-5), also admitted under Section 294 Cr.P.C. by Rahul (A-1) on 14.03.2012, confirms that the country-made pistol and the two cartridges are firearm and ammunition respectively. There is no evidence adduced to show that they had been kept lawfully against a proper license.

39. In above view of the matter, the prosecution has succeeded in proving that Rahul (A-1) was found having in his possession the firearm and ammunition unlawfully within the mischief of Section 25

of Arms Act. Since the prosecution on the said charge was initiated on the basis of appropriate sanction under Section 39 of the Arms Act (Ex.PA-1), admitted under Section 294 Cr.P.C. by statement made on 14.03.2012, the judgment of the trial court convicting Rahul (A-1) on the said charge cannot be assailed.

40. It is the common argument of the appellants that the prosecution case of stabbing of four persons in the small kitchen area is highly improbable, what with there being not enough space for the victims to be cornered, lined up, or held, particularly in the presence of a large number of other employees of the restaurant, the owner's son himself also being around. The argument is that if a group of customers had come in the kitchen area and held even one employee working there with the intention to inflict stab injuries with a knife openly held, the other employees would have immediately raised alarm, converged together not only to ward off the attack but also to apprehend the assailants, who would be out-numbered, and that it is inconceivable that they would meekly allow four persons to be stabbed, one after the other in the manner stated. The defence further argued that Raju (the first informant) was the most important witness since it is he alone who claimed to have been acquainted with the first three appellants from before. The submission is that non-examination of Raju should result in adverse inference against the prosecution case. It was also submitted that PW-4 has ruled out the possibility of Mohit Dhingra (PW-19) witnessing the occurrence since, according to him, he had entered the kitchen after the stabbing.

41. The defence further argued that the MLC (Ex.PA-3) of Shahid (the deceased) shows that he had been stabbed by a “colleague” rather than by the appellants. It appears from the said document that the Medical Officer, who prepared it had initially recorded the history of stab injury to be one inflicted by a colleague of Shahid. The word “colleague”, however, was scored off and instead the medical officer added the words “unknown person”. The argument of the defence is that since even the MLC (Ex.PA-4) of Mohd. Jaffar (PW-5) shows the history narrated to the medical officer attributing a role to an “unknown person”, the involvement of the appellants is rendered doubtful inasmuch as, per the prosecution case, they were regular customers of the restaurant and would be “known” to the restaurant staff rather than be described as “unknown persons”. At the same time, the appellants argued, the reference to stabbing by a “colleague” initially recorded in the MLC of the deceased indicates the possibility that the restaurant staff, for some reason, had gone berserk in the kitchen area and may have stabbed or injured each other in the process.

42. We have considered the above noted arguments of the appellants but find no substance therein. The absence of Raju (the first informant) from the witness box has been duly explained. The prosecution cannot achieve the impossible. If the witness has rendered himself unavailable, even to his family, it cannot be said that the prosecution withheld him from the witness box. His presence indeed would have added strength to the prosecution case but his absence cannot mean that the evidence of the three injured witness,

particularly Sheikh Pappu (PW-4) and Mohd. Jaffar (PW-5), who were in the kitchen area throughout, should be disbelieved.

43. It does appear that the kitchen where the stabbing incident took place is a hall with lot of furniture and equipment placed around, leaving small corridors of space for movement. But, it has to be remembered that a number of workers were deployed in the facility that covered not only the kitchen on separate floor but the dining area at different level. The scaled site plan (Ex.PW-2/A) describes the hall to be more than six meters in length and more than five meters in breadth. It is, thus, not so congested a place as the defence has tried to project. The investigation brought out tell-tale signs of blood spilled at the place. The same was collected, *inter alia*, vide seizure memo (Ex.PW-12/D). In the facts and circumstances, it was not difficult for the four assailants to come in and round up the intended victims holding them physically and leaving them with stab wounds.

44. The evidence clearly shows that the incident of stabbing took place in a couple of minutes. It appears that tempers were getting frayed over lack of service for some time. Protest had already been lodged by two of the assailants by a visit to the kitchen. But then, no one could have possibly anticipated that the said customers would become so infuriated as to come collectively again to the kitchen and injure the workers one after the other. Since the stabbing was a matter of surprise, it would not have given time for the other workers in the restaurant to become alive to the situation or to react by coming to the rescue of their colleagues or making effort to stop the assailants. The fact that one of the assailants was holding a knife,

which he had openly used to cause injuries against four persons, including the owner's son who had tried to intervene, would have added to the element of deterrence against others to come forward.

45. The word "colleague" appearing in the MLC (Ex.PA-3) of the deceased, as originally recorded but later scored off, was apparently an error committed by the medical officer. Definitely, such information about a colleague could not have come from Shahid (the deceased) himself since he had been brought in the hospital casualty in an unconscious state. There is no possible reason as to why the colleagues would have stabbed each other and then blamed others for the incident. PW-4, PW-5 and PW-19 have made it clear that they did not know the identity of the appellants prior to the incident. Thus, while they were under medical examination, they could not have given any description of the assailants but by using the expression "unknown person". Detention of Rahul (A-1) was almost simultaneous and immediately after the occurrence.

46. It has been argued on behalf of Rahul (A-1) that he was picked up from his house and the case has been falsely planted. In this context, reference is made to the arrest memo (Ex.PW-20/A), which indicates the time of arrest as 5 AM of 12.10.2008. Indeed, the incident having occurred at about 10.30 PM on the previous night, Rahul (A-1) having been apprehended immediately thereafter in the parking lot, the formal arrest seems to be a bit belated. But, we have to bear in mind that the investigation was being done by ASI Yashpal (PW-12) throughout the night and initial steps required a lot of footwork. Upon receiving the information vide DD No.32A (Ex.PW-

1/A) at 11.12 PM, he had rushed to the restaurant where he learnt about the event from the two beat constables, inspected the scene of crime, met the first informant, took the necessary steps of calling the crime team, made arrangements for guarding the place and then rushed to Shanti Mukund Hospital followed by a visit to Max Balaji Hospital where the injured persons had been taken and were under treatment. After ascertaining the respective status of the four victims, he returned to the place and then undertook the formal exercise of recording the statement of the first complainant, completing this part of the exercise by 2 AM on 12.10.2008 when he had dispatched the *rukka* (Ex.PW-12/C) to the police station. This entire sequence is sufficient to explain the delay in the formal arrest of Rahul (A-1). We may add that Rahul (A-1), on his part, has not adduced any evidence in support of the plea that he was picked from his house to be shown arrested from the restaurant area. On the contrary, the fact that the Maruti car of his mother was found in the parking of the restaurant area lends assurance to the evidence as to his presence and apprehension at the spot.

47. It is the argument of Rahul (A-1) that the incident occurred in the heat of the moment and there was no intention to cause death. We reject this argument as unmerited. As noted earlier, Shahid had suffered not one, not two, but five stab injuries, four of which were in the vital abdominal region. The nature of the injuries, the depth to which they had gone and the damage that each had done to the insides, is graphically noted in the post-mortem report (Ex.PW-9/A). We accept the opinion of the autopsy doctor (PW-9) that the said four

injuries were sufficient, individually and collectively, to cause death in ordinary course of nature. Thus, even if we were to believe that Rahul (A-1) did not intend to cause the death of Shahid, there is no escaping the conclusion that the injuries in question, which were definitely intentionally caused, were sufficient in the ordinary course of nature to cause death. This leads to the logical conclusion that the death of Shahid was a case of murder within the meaning of the expression defined in the third clause of Section 300 of Indian Penal Code.

48. We do not accept the submission of the defence that the death of Shahid was caused without pre-meditation or in a sudden fight in the heat of passion or upon a sudden quarrel. There was no suddenness in the entire episode. The appellants had come together to the restaurant and had ordered drinks. They had demanded savouries to be served along with the drinks. The order was not complied with. The delay angered them. This led to the two of them going into the kitchen to lodge protest. When they were sent out by the restaurant owner's son, they waited for some more time. Since the eatable ordered was not forthcoming, they converged together, all four of them, into the kitchen, now one (A-1) holding a knife openly in his hand. Immediately after entering the kitchen, the other three appellants held one each of the three of the cooks, while Rahul (A-1) holding the knife stabbed them one after the other. When the owner's son (PW-19) tried to intervene Rahul (A-1) assaulted him as well though, with the former ducking, the knife landed on his lower limb. This sequence does not show any sudden fight or sudden quarrel. It

was rather entirely a one-sided affair with the assailants feeling provoked over triviality. No injury was suffered by the appellants. No one but four persons were assaulted by a sharp weapon. The case, thus, cannot fall under any of the exceptions to Section 300 IPC. The case of *Raju V. State of Haryana 2010 (3) SCC 235* has no parity to the factual matrix of the case at hand.

49. Given the dangerous injuries inflicted on the persons of Sheikh Pappu (PW-4) and Mohd. Jaffar (PW-5), inasmuch as the stab wounds in the abdominal region, inflicted with sufficient force so as to cause deep cuts, there can be no dispute about the fact that the injuries were inflicted intentionally and with knowledge that the same were likely to result in death. In these circumstances, the prosecution case about the attempted murder of Sheikh Pappu (PW-4) and Mohd. Jaffar (PW-5) also stands established.

50. It is the common argument of Rahul (A-2), Sandeep (A-3) and Chet Ram (A-4) that they had no way of knowing that Rahul (A-1) was armed. It is also their submission that they can only be accused of assisting Rahul (A-1) in belabouring the three employees in the kitchen and that common intention to commit murder cannot be attributed to any of them. Reliance is placed on *Ramashish Yadav V. State of Bihar 1999 (8) SCC 555*. Again, the sequence of events here is distinct. Unlike the case of *Ramashish Yadav* (supra), here all the four appellants had paid the visit to the kitchen with the declared intention that the insult (over being ignored in service) had to be avenged. Rahul (A-1) was holding the knife in his hand and it is at his behest that the other three caught hold of the three victims, each

presenting their respective captive to him for being stabbed. Since the stabbing occurred in sequence, within the sight of the three appellants assisting the one holding the knife, each continuing to aid, it has to be inferred that the intention of inflicting the knife injuries was shared by one and all. Their participation in the core set of acts leading to the fatal wounds being suffered by Shahid, and near fatal wounds suffered by Sheikh Pappu (PW-4) and Mohd. Jaffar (PW-5), leaves us with no hesitation in accepting the prosecution charge that pre-concert not merely to belabour but to inflict knife injuries, on the part of appellants must be read into their conduct.

51. Thus, in our judgment, the learned trial court has correctly appreciated the evidence, applied the proper law and has reached appropriate conclusions. The impugned judgment cannot be faulted. Given the nature of charge brought home, in our opinion, the sentences awarded against the appellants cannot be said to be disproportionate or unduly harsh. We find no reasons for interference.

52. The appeals are found devoid of merit and are consequently dismissed.

53. The appellants Pankaj (A-2) and Sandeep (A-3) are on bail, the sentences awarded against each of them having been suspended, pending consideration of their respective appeals by orders dated 21.12.2014 and 05.12.2014 respectively. They are directed to surrender to custody within fifteen days of this judgment to undergo the sentences awarded against each of them in the impugned

judgment and order. The learned trial judge (successor judge) and the Station House Officer of Police Station Anand Vihar are directed to take necessary steps to ensure due compliance.

54. The other two appellants viz., Rahul (A-1) and Chet Ram (A-4) are in custody. They be informed by serving a copy of this judgment on each of them through Superintendant Jail.

R. K. GAUBA
(JUDGE)

SANJIV KHANNA
(JUDGE)

OCTOBER 14, 2015

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