

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

% *Date of decision : April 05, 2016*

+ **CRL.A. 519/2000**

JISHAN ALI ..... Appellant

Represented by: Mr.Harsh Prabhakar, Adv.  
(Amicus Curiae)

versus

STATE ..... Respondent

Represented by: Mr.Varun Goswami, APP for  
State.

**CORAM:**

**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**

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

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

1. Vide judgment dated July 29, 2000 Jishan Ali has been convicted for murdering Julfikar and directed to undergo imprisonment for life vide order on sentence of even date.
2. Learned counsel for the appellant urges that the eye-witness account is suspect in view of the fact that the investigating officer found no eye-witness either at the place of occurrence or at the hospital after the incident. This fact is fortified by DD No.20 received at PS Bhajanpura on February 28, 1997 at 9.35 PM informing that a man was lying unconscious near the Phool Wali Masjid, Chautha Pushta, Kartar Nagar. Further Mohd.Riaz Khan PW-12 the alleged eye-witness did not support the prosecution case. Statement of Mohd.Riaz Khan on the basis of which FIR was registered does not refer to the presence of Anis or Nabi Sher at the time of incident.

Even Nabi Sher in his statement under Section 161 Cr.P.C. does not mention about the presence of Anis at the time of incident or even thereafter. The presence of Anis and Nabi Sher is also not reflected in the site plan which is a contemporaneous document. Though the investigating officer stated that the statements of Anis and Nabi Sher were recorded on the spot after they came from the hospital, however according to the two witnesses their statements were recorded at the Police station. As per the post-mortem report, besides the stab injury, Julfikar also suffered abrasions on the lower back of the right side of chest leading to an inference that a scuffle took place before the stab wound was given. Though Anis and Nabi Sher claim that their clothes got blood-stained however according to Insp.Ravinder Kumar PW-19 he did not notice any blood-stain on the clothes of Anis and Nabi Sher. There are contradictions in the statements of Police witnesses. Though Nabi Sher initially stated that he did not meet the Police personnel at JPN hospital however later in the supplementary statement, he got recorded that he met the SHO at JPN hospital to inquire as to how the injury took place, however since the SHO did not question him with regard to the identity of assailant, he did not inform the SHO. Presence of Nabi Sher at the time of incident near the place of occurrence is highly doubtful. The fact that he has not witnessed the incident is also evident from the MLC as the name of the assailant has not been stated therein. Hence Jishan Ali is entitled to acquittal. In the alternative, it is urged that even accepting the version of the prosecution witnesses at best an offence under Section 304 IPC is made out and the conviction be modified to one under Section 304 IPC.

3. Three informations were received at PP Gamri, PS Bhajanpura being

DD No.20, 22 and 23 at 9.35, 9.45 and 9.55 PM respectively on February 28, 1997. As per DD No.20 a man was lying unconscious near Phool wali Masjid, Chautha Pushta, Kartar Nagar whereas DD No.22 informed that a man had been stabbed at Gali No.2 near Phool Wali Masjid, Chautha Pushta, Kartar Nagar, and an officer be sent. DD No.23 which was received from duty Constable JPN hospital gave the information that one Julfikar, S/o Shamsheer, R/o J-200/17 Kartar Nagar, Phool Wali Masjid, Chautha Pushta has died due to stab injury and an officer be sent. It also informed that Julfikar was admitted in hospital by Nabi Sher, S/o Nathu Khan. On the receipt of DD No.20 Insp.Ravinder Kumar, Addl.SHO PS Bhajanpura PW-19 along with Constable Balraj PW-1 and SI Manoj Mishra PW-5 reached the spot and thereafter to the JPN hospital. It is the case of PW-19 that he met none at the hospital and thus came back to the spot where he found an eye-witness, Mohd.Riaz Khan PW-12 whose statement was recorded and a rukka was sent for registration of FIR.

4. Mohd.Riaz Khan PW-12 stated that he was a resident of gali No.4, Kachhi Khajoori, Delhi and was working in the factory in H.No.J-200/17, Kartar Nagar, Phool Wali Gali, Chautha Pushta. In the factory, school bags were made and Riaz used to do the stitching work. The factory was owned by Nabi Sher, R/o L-1/6, Gali No.6, Shivaji Marg, Chautha Pushta, Kartar Nagar and the supervisor in the factory was the brother-in-law of Nabi Sher i.e. Julfikar. Jishan, a permanent resident of Village Haiderpur, District Kanpur, U.P. was working in the factory. In the morning Nabi Sher and Julfikar settled the account of Jishan as he was asking for higher rates for making school bags. Along with Jishan they settled the account of Ram Kishan and R.K. who also belonged to Jishan's village. In the evening at

around 8.30 PM he along with Julfikar was working on a machine when Jishan came inside the factory and reaching near Julfikar he stabbed on the chest of Julfikar with the knife in his hand. Julfikar immediately fell down on the floor. On this Jishan ran away from the place with the knife. Riaz saw the incident but he was perplexed to do anything. Nabi Sher got admitted Julfikar in the hospital.

5. Dr.S.K.Khanna PW-8 who conducted the post-mortem on the body of Julfikar S/o Shamsheer found the following external injuries:

*“EXTERNAL INJURIES:*

*1. Stab wound 2.6 x 1 x 7 cm on the right side of chest 10 cm away from midline and 13 cm below the clavical. Both the angles of the wound were acute and the margins were clean cut. After cutting through the skin and sub-cutaneous tissues it had entered the chest cavity through third inter-costal space and had caused a wound in the upper lobe of right lung of size 1.5 x 0.5 x 2 cm.*

*2. Abrasion lower back of right side of chest parallel to midline size 5 x 1 cm.”*

6. Dr.S.K.Khanna opined the cause of death to be due to haemorrhage and shock consequent upon damage to right lung via injury No.1. All injuries were opined to be ante-mortem in nature and recent in duration. Injury No.1 had been caused by double-edged sharp weapon and was sufficient to cause death in the ordinary course of nature. Injury No.2 had been caused by blunt force.

7. The learned Trial Court convicted Jishan Ali on the strength of testimony of eye-witness Anis PW-3 and Nabi Sher PW-4 who immediately after the incident sprung into action and got admitted Julfikar in the hospital. The complainant Mohd.Riaz Khan PW-12 on whose statement FIR was

registered did not support the prosecution case nor was the weapon of offence recovered and thus the limited scope in this appeal is to determine whether Anis and Nabi Sher are reliable witnesses and whether with or without corroboration conviction can be safely based on their testimonies.

8. As noted above Mohd.Riaz Khan did not support the prosecution case before the Court and stated that on February 28, 1997 at about 8.30-8.35 PM he was working in the factory of Nabi Sher when Julfikar came to the factory in injured condition and fell down near the chabutara where he was working. He went to call Nabi Sher who took Julfikar to the hospital. He however identified his signatures on the rukka Ex.PW-12/A. In cross-examination he admitted that Jishan left the work in the factory of Nabi Sher on account of a dispute regarding the rate of work and that the accounts of Jishan Ali, Ram Kishan and R.K. were settled on February 27, 1997. He was confronted with his previous statement however he denied all other facts stated therein.

9. Anis PW-3 deposed that he was working in the factory of Nabi Sher which was in Kartar Nagar since his childhood. On February 28, 1997 he had gone to the market and when he reached back at the factory at about 8.00 PM he saw Jishan Ali present there giving knife blows on the person of Julfikar. On seeing the incident he got terrified and moved a side whereafter Jishan went out of the factory. In the meantime Nabi Sher entered the factory. When the incident took place Riaz was also sitting and working in the factory. Since they were terrified they took care of injured Julfikar and did not run after Jishan Ali. He stated that his statement was recorded at the Police Station on the night of February 28, 1997 after they returned from the hospital and thereafter on March 01, 1997. He stated that his clothes were

bloodstained but were not seized by the police officer. In his lengthy cross-examination, nothing material has been elicited.

10. Nabi Sher PW-4 deposed that he had a factory of making school bags at J-200/17, Kartar Nagar. His sister's husband Julfikar had been working in the factory as supervisor. Jishan Ali, Ram Kishan and R.K. and few other workers were also working in the factory. On February 28, 1997 in the morning R.K., Ram Kishan and Jishan Ali asked Julfikar to increase the rates of the work which they were doing in his factory which Julfikar refused to accept. He thereafter settled the accounts of R.K., Ram Kishan and Jishan Ali and made the payments to them. After settling of the accounts R.K., Ram Kishan and Jishan Ali left the factory. While leaving the factory Jishan Ali stated "*yeh tumne accha nahi kiya, mein tumhe iska maja chakhaunga.*" In the evening while other workers were working in the factory, Nabi Sher went to take food and read Namaz. When he returned back to the factory he saw his brother-in-law Julfikar lying in a pool of blood and Jishan Ali was standing near him holding a knife which was bloodstained. On seeing Nabi Sher, Jishan Ali started coming to the gate of the factory where he was standing. Since Jishan Ali was carrying a knife in his hand, Nabi Sher got scared and moved aside. Jishan Ali left the factory and ran away. He immediately rushed to Julfikar and found him unconscious. Riaz Khan was also standing there in a perplexed situation. Thereafter, he along with Anis and Riaz Khan brought Julfikar outside the factory. Anis went to get a scooter from the main road, whereafter he along with Anis took Julfikar in an injured condition to Irwin Hospital. On reaching the hospital doctor examined Julfikar and declared him dead. Thereafter for informing the relations they came back to the factory. On

reaching the factory they found SHO and 5-7 police officials present who recorded the statement of Riaz and seized the blood sample and concrete earth. The dead body was released to them only on March 02, 1997. After about four months of the incident, Inspector Ravinder Kumar brought Jishan Ali to the factory.

11. Version of Nabi Sher to the extent that there was a dispute with regard to the accounts between Jishan Ali and Zulfikar is supported by Mohd.Riaz Khan, the maker of the FIR though he stated that the accounts of Jishan Ali, R.K. and Ram Kishan were settled on February 27, 1997.

12. Statement of Nabi Sher is corroborated by the three DD entries which as noted above were received at PP Gamri, Police Station Bhajanpura explaining the sequence of events. The first DD entry was received at 9.35 PM on February 28, 1997 when Julfikar was brought out from the factory and search was made for the scooter, second at 9.45 PM and the third at 9.55 PM. As per the MLC Ex.PW-18/A, Julfikar was brought by Nabi Sher for examination at 9.40 PM on February 28, 1997. Immediately after the incident Julfikar was admitted in the hospital by Nabi Sher. Thus his having reached the spot immediately and seeing Jishan Ali fleeing away from the spot cannot be doubted.

13. The version of Nabi Sher is also corroborated by Anis who speaks about the presence of Riaz at the time of incident and Nabi Sher immediately after the incident.

14. Statement of Anis is corroborated by the post-mortem report which shows one stab injury on the chest of the deceased.

15. Merely because in the FIR, Riaz did not speak about the presence of Anis and Nabi Sher at the time of incident, the same would not lead to an

inference that the two did not witness the facts deposed by them. Undoubtedly, there is contradiction insofar as whether the statements of Anis and Nabi Sher were recorded at the spot or at the police station, suffice it is to note that even as per cross-examination of Anis and Nabi Sher, their statements were recorded soon after they reached the spot from the hospital in the night of February 28, 1997.

16. Since the MLC notes the presence of Nabi Sher as the person who took Julfikar to the hospital the statement of the Investigating Officer that he did not find any witness in the hospital loses significance.

17. Contention of learned counsel for the appellant that there was a scuffle between Zulfikar and Jishan Ali before the stabbing in view of the abrasion on the lower back right side of the chest of the deceased deserves consideration. As noted above Jishan Ali was asking for increase of their rates for the work order which was denied by Julfikar at whose instance Nabi Sher settled the accounts of Jishan Ali and two others. The abrasion on the lower back on the right side chest is not attributed to the fall. Both the witnesses i.e. Anis and Nabi Sher could not have deposed about the scuffle as Anis reached the factory when Jishan Ali was inflicting the knife blow and Nabi Sher entered when he had inflicted the knife blow. From the circumstances, it can safely be deduced that Jishan Ali did not come with the intention to kill. There was a scuffle between the two whereafter a single blow was inflicted by Jishan Ali on Zulfikar.

18. Relying upon the testimonies of Anis and Nabi Sher we find that the prosecution has proved beyond reasonable doubt that Jishan Ali committed the offence punishable under Section 304 Part-II IPC.

19. The Supreme Court in the decision reported as 2000 (10) SCC 225

Bhera vs. State of Rajasthan has held:

*“2. The learned counsel for the appellant contended before us that the learned Sessions Judge having disbelieved the evidence of the aforesaid two witnesses PWs 2 and 3 for the reasons indicated in the judgment, the High Court was not justified in believing those witnesses and in interfering with an order of acquittal. The learned counsel further stated that even if the evidence of PWs 2 and 3 is believed, taking into account the fact and scenario under which the alleged assault was given by the accused, the offence could not be under Section 302 but at the best would be under Section 304 Part II. So far as the first submission of the learned counsel for the appellant is concerned, we are unable to persuade ourselves to agree with the same and on going through the evidence of PWs 2 and 3 which is produced before us we are of the considered opinion that the High Court rightly relied upon the same which was erroneously discarded by the learned Sessions Judge. On the basis of the said evidence of PWs 2 and 3, the High Court, therefore, rightly came to the conclusion that on the relevant date the accused gave a stabbing blow on the chest of the deceased on account of which the deceased ultimately died. But so far as the second contention raised by the learned counsel for the appellant is concerned, we find sufficient force in the same. From the evidence of PWs 2 and 3 it is crystal clear that the accused and the deceased had some quarrel in the house of Bhana. On the road while they quarrelled with each other, suddenly the accused brought out the knife and gave the blow which struck the chest of the deceased. On these facts, it is difficult to hold that the accused gave the blow with the requisite intention of causing murder of the deceased. In this view of the matter, the conviction of the appellant under Section 302 cannot be sustained. Since in anger while quarrelling, the accused had given the blow which ultimately resulted in the death of the deceased, the offence would be one under Section 304 Part II. We, therefore, set aside the conviction of the appellant under Section 302 and instead convict him under Section 304 Part II and sentence him to 5 years.”*

20. Considering the facts and circumstances of the case as noted above, the conviction of Jishan Ali is modified to one under Section 304 Part-II IPC. Before his sentence was suspended by this Court vide order dated July 25, 2003 Jishan Ali had undergone more than six years of actual imprisonment excluding remissions. Hence we modify the sentence of the appellant to the period already undergone.

21. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

22. TCR be returned.

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

**(PRADEEP NANDRAJOG)**  
**JUDGE**

**APRIL 05, 2016**  
**‘ga/vn’**