

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

Judgment Reserved on: May 23, 2016

% *Judgment Delivered on: May 27, 2016*

+ **CRL.A. 1403/2014**

KARAN

..... Appellant

Represented by: Mr.Sunil Kumar, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Ms.Rajni Gupta, APP for the
State with Inspector Birender
Singh, PS Shahdara.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Aakash suffered a stab injury on July 11, 2010 in the presence of his friend Sameer PW-3 when both of them had gone to Gulshan Dhaba near Hanuman Mandir, G.T.Road, Shahdara, Delhi owned by the two brothers Raju PW-1 and Shalu PW-2. Statement of Aakash was recorded on July 12, 2010 after he underwent the surgery and was declared fit for statement. Aakash was later shifted to GTB Hospital where he died on December 27, 2010. A charge-sheet was filed against Karan, the appellant herein for offence punishable under Section 304 IPC, however while framing the charge the learned Trial Court besides framing charge under Section 304-I IPC framed an alternative charge for offence punishable under Section 302 IPC. As per the autopsy surgeon, out of 7 external injuries only injury at Sl.No.7 corresponded with the wound in the MLC and other injuries were bedsores etc., hence Karan was convicted for offence punishable under

Section 307 IPC and acquitted of the charges for offences punishable under Sections 304 and 302 IPC. The present appeal challenges the said judgment dated August 14, 2014 convicting Karan for offence punishable under Section 307 IPC and the order on sentence dated September 15, 2014 directing him to undergo rigorous imprisonment for a period of 5 years and to pay a fine of ₹5,000/- in default whereof to undergo simple imprisonment for 3 months.

2. Learned counsel for the appellant challenging the conviction states that both Raju and Shalu PW-1 and PW-2, the public witnesses have not supported the prosecution case as both stated that they did not see who stabbed Aakash. As per PW-1 neither he witnessed the stabbing nor his brother PW-2 as he was not present at the shop. Even PW-2 reiterates that he did not see the person who stabbed. Sameer PW-3 who supported the case of the prosecution in examination-in-chief could not withstand the cross-examination and admitted that there were 4-5 persons and he did not know who stabbed Aakash. Sameer PW-3 is not an eye-witness which is apparent from the fact that he said that Aakash was stabbed twice whereas in the MLC only one stab injury was noted. Even as per the statement of Aakash, on the basis of which FIR was registered, the stab injury is not attributed to Karan. This version of Aakash is also fortified by the fact that for 5 months no action was taken by the Police. Only after the death of Aakash, Section 304 IPC was added to the investigation and Karan was arrested. PW-2 categorically stated that even after the incident Karan continued having regular meals at their hotel. The alleged weapon of offence has not been recovered. Hence Karan is entitled to be acquitted.

3. Learned APP for the State on the other hand contends that the

aberration in the statement of Aakash on the basis of which FIR was registered, was for the reason that he was not in a fit state of mind as the same was taken immediately after he was operated. Sameer has identified Karan as the assailant who stabbed Aakash even in the cross-examination and thus testimony of Sameer is sufficient to uphold the conviction. Though PW-2 stated that Karan used to visit their hotel even after the incident, however PW-1 stated that Karan did not visit the hotel after the incident. PW-8 has deposed that injury No.7 was sufficient to cause death and thus Karan has been rightly convicted for offence punishable under Section 307 IPC.

4. FIR No.396/2010 was registered on the complaint of Aakash, the injured for offence punishable under Section 324/34 IPC at PS Shahdara on a rukka sent by SI Kapil Kumar PW-14. In his statement Aakash S/o Ram Gopal stated that he was residing with his family at M.S.Park, G.T.Road, Shahdara. On July 11, 2010 at around 9.00 PM he along with his friend Sameer was going to his uncle's house at Circular Road, Ram Lila ground. On the way he and his friend Sameer stopped for taking dinner at Gulshan Dhaba. At around 10.00 PM while they were having dinner one boy misbehaved with him. When Aakash protested, the boy engaged in a scuffle with Aakash. In the meantime few more friends of that boy came and they also started beating Aakash. Out of those boys one boy took out the knife and stabbed him due to which he got injured. His friend Sameer took him to GTB hospital where he was under treatment. He stated that he can recognise the boys and action be taken against them who gave knife blow to him.

5. In the endorsement to the rukka SI Kapil Kumar noted that he had

received the MLC No.C-3241/2010 of Aakash and the Doctor has declared him fit for statement. But since the injured had been taken for the operation, his statement was recorded when the injured came back of the operation theatre. As Aakash was not giving his statement properly, after some time his statement was recorded. It is on the basis of this endorsement learned APP contends that Aakash was not in a fit state of mind when his statement was recorded, so he could not specifically state that Karan was the person who gave him the knife blow.

6. It would be appropriate to note testimony of SI Kapil Kumar in this regard who stated that when he reached GTB hospital along with Constable Krishan, he obtained the MLC of injured Aakash in which he was endorsed fit for statement. He took the statement of injured Aakash when he came out from the operation theatre. In his cross-examination he admitted that he correctly recorded the statement of injured Aakash verbatim.

7. Dr.Jatin Bodwal PW-8 who conducted the post-mortem on the body of the deceased Aakash on December 28, 2010 noted the following injuries:

“1) Infected bedsore 7 cm x 5 cm in size was present on the inner halves of both buttocks. Indurated and blackened in appearance with necrosis of the skin.

2) Drainage wound of size 2 cm was present over the front of right chest 8 cm from midline and in 5” intercoastal space.

3) Drainage wound of size 2 cm was present over the front of right chest 8 cm from midline and in 4” intercoastal space.

4) An infected wound 4 cm x 1 cm was present over the front of abdomen in midline just below xiphisternum.

5) An infected open wound 3 cm x 2 cm was present over

the right and left knee respectively.

6) *An infected open wound 2 cm x 1 cm was present over the outer of right ankle joint.*

7) *A scar mark 2 cm x 0.2 cm was present over on the right side of anterior abdominal wall (as injury mentioned in MLC)."*

8. According to the history available with PW-8, Aakash was assaulted on July 11, 2010 at 10.20 PM at Gulshan Restaurant, Shahdara, Delhi whereafter his MLC was prepared at GTB hospital and on October 26, 2010 he was taken to G.B.Pant hospital where he died during the course of treatment on December 27, 2010 at 10.20 AM. According to PW-8, cause of death was shock as a result of septicaemia and peritonitis in an operated case of stab injury. He stated that 6 wounds i.e. from Sl.No.1 to 6 found on the body of Aakash had happened in the management of patient during the treatment and only injury No.7 corresponded with the MLC. The best possible treatment was given to Aakash and injury mentioned in the MLC was sufficient to cause death in the ordinary course of nature.

9. Testimony of PW-8 and the opinion has been noted not for the purposes that Karan has been acquitted for offence under Section 304 or 302 IPC to which there is no challenge and rightly so, but for the purpose of whether the statement of Aakash can be read in evidence under Section 32 of the Indian Evidence Act.

10. Section 32 of the Indian Evidence Act reads as under:

“32. Case in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant –

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has

become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases: –

(1) When it relates to cause of death – *When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.*

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

11. Statement of Aakash, on the basis of which FIR was registered, indubitably explains the circumstances resulting in the death of Aakash. Section 32 of the Indian Evidence Act is different from the English Evidence Act where death must be imminent if the statement of the deceased is used as a dying declaration. Thus even if death was not imminent to Aakash when his statement was recorded, it can still be used under Section 32 of the Indian Evidence Act.

12. Considering the admissibility, relevancy and reliability of a statement made by the deceased, Supreme Court in the decision reported as 1997 (4) SCC 161 Rattan Singh vs. State of Himachal Pradesh held:

“12. If the said statement had been made when the deceased was under expectation of death it becomes dying declaration in evidence after her death. Nonetheless, even if she was nowhere near expectation of death, still the statement would become admissible under Section 32(1) of the Evidence Act, though not as dying declaration as such,

provided it satisfies one of the two conditions set forth in the sub-section. This is probably the one distinction between English law and the law in India on dying declaration. In English law, unless the declarant is under expectation of death his statement cannot acquire the passport of admissibility, (Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622] ; Tehal Singh v. State of Punjab [1980 Supp SCC 400 : 1979 SCC (Cri) 722 : AIR 1979 SC 1347]).

13. Section 32(1) of the Evidence Act renders a statement relevant which was made by a person who is dead in cases in which cause of his death comes into question, but its admissibility depends upon one of the two conditions: Either such statement should relate to the cause of his death or it should relate to any of the circumstances of transaction which resulted in his death.

14. Three aspects have to be considered pertaining to the above item of evidence. First is whether the said statement of the deceased would fall within Section 32(1) of the Evidence Act so as to become admissible in evidence. Second is whether what the witnesses have testified in Court regarding the utterance of the deceased can be believed to be true. If the above two aspects are found in the affirmative, the third aspect to be considered is whether the deceased would have correctly identified the assailant? ”

13. Having noted the statement of the injured Aakash, the only other statement required to be considered is that of Sameer PW-3 who had accompanied Aakash and took him to the hospital after he was injured. Sameer PW-3 deposed that on July 11, 2010 he along with his friend Aakash was taking meals at Gulshan Dhaba at around 9.30 PM or 10.00 PM. One person was present at Dhaba, his friend was talking to Raju when quarrel

took place between Aakash and that person. During the quarrel, the said person stabbed Aakash with knife in his abdomen. He removed Aakash to GTB hospital on the bike of Aakash and admitted him there. He identified Karan as the person present in the Court who stabbed Aakash with the knife in his presence. He was cross-examined on the same day when in his cross-examination in the pre-lunch session, he admitted that there were 5-6 persons, however knife attack was made by Karan only. In his further cross-examination in the post-lunch session on October 28, 2013 he stated that Aakash had taken liquor and had misbehaved with other persons who were taking their meals due to which he had an altercation with the persons with whom he misbehaved. He volunteered to add that Karan was one of them who left the place and then came along with 5-6 associates. On a specific question put that Aakash was not stabbed by Karan, he stated that it was dark and there were 5-6 persons out of whom he specifically did not know who stabbed Aakash. This is contrary to the statement made in the examination-in-chief and cross-examination in the pre-lunch session on October 28, 2013 and the reason is obvious. The statement of Sameer in his examination-in-chief and part cross-examination is corroborated by the dying declaration of the deceased. It is trite law that the statement of a witness in examination-in-chief who does not support the case of the prosecution in cross-examination can be relied upon if corroborated in material particulars. In the present case, Sameer has supported the case of the prosecution even in the cross-examination conducted in pre-lunch session.

14. A perusal of the statement of Aakash admissible under Section 32 of the Indian Evidence Act and the deposition of Sameer PW-3 would show

that initially one boy engaged Aakash in an altercation followed by a scuffle where-after a few more boys started beating him and one boy took out the knife and stabbed on the abdomen of Aakash. From the evidence it is also not apparent that Karan came with the other boys with a common intention to assault Aakash so as to constitute the offence punishable under Section 307/34 IPC.

15. As per the testimony of Sameer PW-3 and the statement of Aakash it is further apparent that there was an altercation whereafter a single knife blow was given. Thus it cannot be held that Karan caused the injury with the intention to cause death of Aakash. As per the MLC the injury is grievous in nature. The conviction of Karan is altered to offence punishable under Section 326 IPC. Karan has already undergone nearly 2 years 5 months imprisonment including remissions. The sentence of the appellant is modified to the period already undergone. Superintendent Tihar Jail is directed to release the appellant forthwith if not required in any other case.

16. Appeal is disposed of.

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

18. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 27, 2016
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