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

% **Date of decision : 26th September, 2016**

+ **CRL.A.No.375/2015 & Crl. M(Bail) No.1516/2016**

RAJENDER @ KALLU Appellant
Through: Mr. Jivesh Tiwari, Adv.

versus

STATE Respondent

Through: Ms. Aashaa Tiwari, APP.

CRL.A.No.529/2015

RAJESH Appellant
Through: Mr. K. Singhal and Mr.
Prasanna, Advs.

versus

STATE Respondent

Through: Ms. Aashaa Tiwari, APP.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE P.S. TEJI

JUDGMENT (ORAL)

GITA MITTAL, J.

1. By way of the instant appeals, the appellants have assailed the impugned judgment dated 30th September, 2014 whereby the appellant

(in CrI.A. 375/2015) Rajender @ Kallu has been found guilty for commission of the offences under Section 392 r/w 397 IPC and under Section 302 r/w 34 IPC, whereas the appellant (in CrI. A. 529/2015) Rajesh has been found guilty for commission of offences under Section 393 IPC and Section 302 r/w 34 IPC.

2. By the consequential orders on sentence dated 10th October, 2014 they were sentenced as follows:

<i>Rajender @ Kallu (Appellant in CrI. A. 375/2015)</i>	
<i>Offence</i>	<i>Sentence</i>
<i>Section 392 r/w Section 397 IPC</i>	<i>Rigorous Imprisonment for 10 years and a fine of Rs. 1,000 and in default of fine to undergo Simple Imprisonment for 2 years.</i>
<i>Section 302 r/w Section 34 IPC</i>	<i>Rigorous Imprisonment for Life and a fine of Rs. 1,000 and in default of fine to undergo Simple Imprisonment for 3 years.</i>
<i>Compensation of Rs. 75,000 was additionally directed to be paid to the family of deceased Neeraj, and in default of payment to undergo Simple Imprisonment for 6 months.</i>	

<i>Rajesh</i> <i>(Appellant in Crl. A. 529/2015)</i>	
<i>Offence</i>	<i>Sentence</i>
<i>Section 393 IPC</i>	<i>Rigorous Imprisonment for 7 years and a fine of Rs. 1,000 and in default of fine to undergo Simple Imprisonment for 1½ years.</i>
<i>Section 302 r/w Section 34 IPC</i>	<i>Rigorous Imprisonment for Life and a fine of Rs. 1,000 and in default of fine to undergo Simple Imprisonment for 3 years.</i>
<i>Compensation of Rs. 50,000 was additionally directed to be paid to the family of deceased Neeraj, and in default of payment to undergo Simple Imprisonment for 6 months.</i>	

The substantive sentences were directed to run concurrently and the benefit of Section 428 of the C.r.PC was allowed to the appellants.

3. As the two appellants were subjected to a common trial, stood convicted by the same judgment dated 30th September, 2014 and sentenced by orders dated 10th October, 2014, we propose to decide both their appeals by this common judgment.

4. It is the case of the prosecution that on the 6th of June 2010 at 14:02:14, information was received by the Police Control Room to the effect that one boy had been stabbed at the Pitampura District Park, who is unconscious.

5. The prosecution has placed the record of the police control room on the 6th of June 2010 at 14:02:14 hrs (Ex.PW21/A) which

includes four reportings and read as follows :

"06/06/2010 14:13:25 I/C VAN AUR SHO PARK KE ANDER CHEK KAR REHE HAI AB KOI NAHI MILA. 06/06/2010 14:23:48 FROM c=30 RCD 3 MIN FROM BASE PITAM PURA PAWER HOUSO I/C VAN STACHER LE KAR PARK KE ANDER DAYA HAI LP SATH HAI WAIT FOR FURTHER HALAT. 06/06/2010 14:30:55 FROM C=30 INJ KO BEHOSI HALAT NEN AMEDKAR HOSPITAL LE KAR JA REHE HAI 06/06/2010 14:47:41 FROM C-24 = **INJ NAMELY NEERAJ S/O PADAM SINGH AGE 25-26 YRS** R/O NOOR NAGAR MARUT JO ABHI SHALIMAR BAGH MAI RAHTA HAI JO (1) **LADKI NAME AND R/O U/K KE SATH PARK MAI BAITHA THA.** (3) **LADKE U/K CAME AND JHAGDA KIYA. JHAGDA MAI CHAKU MAR KAR BHAG GAYE AUR LADKI BHI MOKA PAR NAHI HAI.** INJ KO C=30 BAHOSHI HALAT MAI HOSP LE JA CHUKI HAI. SHO WITH STAFF IS ON THE SPOT. C/ROOM IS INFORMED. 06/06/2010 15:17:08 FROM C-30=INJ KO DR. SHAHAB NE AMBEDKAR HOSP MAI BROUGHT DEAD DECLARE KIYA HAI. ISHKE CHHATI MAI DO DEEP CHAKU LAGE HAI JINME SE (1) CHAKU CHEST KE LEFT SIDE MAI AUR (2) CHAKU CHEST KE RIGHT SIDE MAI LAGA HAI JO BAHUT DEEP HAI. DR. NE CHAKU KE GHARAI NAHI BATAI HAI. JAMA TALASI MAI (1) ELECTION I/CARD ISH PAR SE HI ISHKA NAAM AUR PATTA CHALLA HAI JO C-24 NE UPPAR BATLAYA HAI. PURSE SE RS.-112/-(2) PHOTO SOME VISITING CARD AND (1) PHONE DIARY. H/O TO D/CT AMBEDKAR HOSP. C/ROOM IS INFORMED."

(Emphasis supplied)

6. This information was conveyed to the Police Station Maurya Enclave and logged as DD No. 19A (Ex.PW31/K) at 2:05 pm and was sent to Head Constable Harish (PW30). The SHO was also telephonically informed. Accordingly, HC Harish along with Constable Rajbir (PW18) reached the spot at District Park, Pitampura.

In the meantime, SHO Inspector Ram Sunder (PW-31) also reached the spot.

7. At the spot, the police personnel found one person lying in a pool of blood who disclosed his name as Neeraj son of Padam Singh r/o Noorpur, District Meerut (U.P.) and that his telephone number was 09756030927. So far as the incident was concerned, Neeraj had disclosed that he had been stabbed by three boys who had also snatched his mobile. The injured was found having two stab wounds on his chest. Neeraj was removed to the hospital by the PCR van for treatment, leaving Constable Rajbir to guard the spot.

Appearing as PW-8, Constable Rajbir corroborates the testimony of HC Harish (PW30) to this effect.

8. Inspector Ram Sunder has also testified that no other witness was found on the spot and that he had called SI Suraj Pal and Constable Rajbir to reach at the spot.

9. After getting the injured admitted to the Baba Saheb Ambedkar Hospital, SHO Inspector Ram Sunder (PW-31) returned to the spot with SI Suraj Pal (PW28).

10. At the spot, they met Anita (PW7), daughter of Vikram who disclosed herself to be an eye-witness of the incident. Inspector Ram Sunder (PW31) recorded her statement which formed the *tehreer* (Ex.PW7/A) and after endorsing the *rukka* thereon, sent the same to the police station for registration of a case. This resulted in registration of the FIR No.223/2010 under Section 392/397/302/34

IPC (Ex.PW1/A) at 5:15 pm. The information of the registration of the case was noted as DD No.23A at 5:15 pm in the daily diary. The crime team was also called to the spot which inspected the scene of the crime and submitted its report (Ex.PW4/A).

11. The crime team (Ex.PW4/A) noted the presence of one pair of white sports shoes, which were blood laden. The shoes were seized by Inspector Ram Sunder vide Seizure Memo Ex. PW7/C.

12. Inspector Ram Sunder (PW31) also prepared a rough site plan of the place of occurrence at the instance of Anita (Ex.PW7/B). Inspector Ram Sunder (PW31) seized blood stained soil from three places where injured Neeraj had been lying as well as sample soil from three places as earth control vide seizure memo Ex.PW7/D, Ex.PW7/E and Ex.PW7/F.

13. The plastic container's containing the blood stained earth were marked as B1, B2 & B3, whereas the containers containing the earth control were marked as E1, E2 & E3.

14. On examination, the doctor at Dr. Babasaheb Ambedkar Hospital had recorded MLC No.53-4450/10 (Ex.PW6/A) at 2:40 pm declaring Neeraj as having been brought dead to the emergency of the hospital. None of his vitals were recordable by the doctor.

15. So far as deceased Neeraj is concerned, a post-mortem was conducted on his body by Dr. V.K. Jha on the 7th of June 2010 at 1:00 pm (Ex.PW14/A). The doctor had opined the time since death as 24 hours which would take the time of death to about 1:00 o'clock of the

6th of June 2010. This corroborates the ocular evidence as well as the reporting to the police with regard to the alleged incident. So far as injuries are concerned, the post-mortem doctor had found the following injuries on his body :

“I observed following external injuries on the dead body of the deceased:-

1. Incised wound on front of chest right side 4 cm below the right nipple of size 3.5 cm x 2 cm x chest cavity deep. Both angle were acute.
2. Incise wound on left front of chest above left nipple 2.5 cm medial to left nipple of size 2.5 cm x 1.8 cm. Both angle were acute.
3. Abrasion on right knee, left knee of size 3 cm x 2 cm x 1cm respectively.

Internal Examination :-

On internal examination of injury no.1, it has cut skin, intercostals muscle of 7th intercostals space entered the chest cavity, entered the pleura and lacerated right lung lower lobe. Blood and blood clots present.

On dissection of injury no.2, it has cut skin muscle 5th intercostals space entered the chest cavity and punctured the pleura. Blood and Blood clots present. Stomach was having undigested food.”

16. The doctor had opined the cause of death as “*hemorrhagic shock as a result of stab injury to lungs inflicted by other party*”. The doctor had also opined that the injury no.1 noted above was sufficient to cause death in the ordinary course of nature. The doctor had preserved and handed over clothes of the deceased as well as blood gauze piece containing the blood sample of the deceased to the police.

These were sent along with other recoveries to the Forensic Science Laboratory, Rohini on the 9th of August 2016 for its opinion. After examination of the same, seized articles were returned to the police and were lodged in the *malkhana* on the 8th of December 2010.

17. During investigation, PW-31 Inspector Ram Sunder also recorded statements of the witnesses including the crime team incharge namely, SI Satpal (PW4) and the constable photographer under Section 161 of the Cr.P.C. A supplementary statement of Anita was also recorded and steps were taken to arrest the accused persons. So far as the juveniles were concerned, the chargesheet against them was filed before the Juvenile Justice Board-II and they were separately tried in accordance with provisions of law governing them. The juveniles had pleaded not guilty and were tried by the court. The prosecution examined three witnesses including Dr. V.K. Jha, who conducted the post-mortem and the investigating officer of the case.

18. After completion of investigation, the police filed the chargesheet under Section 173 of the Cr.P.C. before the magistrate who committed the case to the Court of Sessions for trial, in accordance with law.

19. After consideration of the material on record, the learned Additional Sessions Judge framed charges against the appellants.

20. By an order dated 2nd June 2011 the appellants were charged for commission of offences under Section 392 read with Section 34, Section 393, Section 397 and Section 302 read with Section 34 of the

IPC. The appellants pleaded not guilty and claimed trial. The prosecution examined a total of 31 witnesses in support of its case. the trial court examined evidence against them put by the prosecution and recorded statements under Section 313 of the Cr.P.C.

21. After consideration, by the impugned judgment dated 30th September, 2014 the appellants were found guilty of the commission of the offence and sentenced them by the order dated 10th October, 2014 as noted above. We have heard Mr. Jivesh Tiwari & Mr. K Singhal, learned counsels for the appellants and Ms. Aashaa Tiwari, learned APP for the State at length. We have also carefully scrutinized the record.

22. The evidence on record establishes that the deceased Neeraj had befriended Anita, a resident of Shalimar Bagh, Delhi. Anita was employed as a maid in Fulwari School, Shalimar Bagh for about 6-7 months prior to the incident (i.e. the 6th of June 2010) at a monthly salary of ₹3,500/-. She claimed to have been called for some cleaning work to the school on Sunday, 6th of June 2010, as it was a holiday. She left the school on receipt of telephone call from the deceased Neeraj to join him at District Park, Pitam Pura, Delhi at about 11:00 am.

23. The two were in each other's company on a bench in the park for about 2 to 2½ hours when, from the left side, three boys which included the appellants and one Dulal Rai, approached them.

24. Anita (PW-7) had identified the taller of these boys as Rajender

@ Kallu who queried from Neeraj as to where he had come from. Neeraj objected stating *“kahin se bhi aayein ho, tumhein isse kya matlab hai”* at which the two appellants asked Neeraj as well as Anita (PW7) to hand over their mobile phones to them. Upon their refusal, arguments were exchanged between the boys and the two on the bench. It is in evidence that Rajender @ Kallu took out a knife and caught hold of Neeraj. Anita (PW7) told Neeraj to run from there but he was unable to escape the clutches of Rajender @ Kallu and the other boy who was also holding him. When Anita ran from the spot, she was also chased by the appellant Rajesh, who had pointed a knife at her abdomen. She claimed that she raised an alarm whereupon Rajesh left her and returned to the spot where his two other associates were catching hold of Neeraj. Anita witnessed that Rajesh alongwith his other associate one Dulal Rai (a juvenile who she had identified at the Juvenile Justice Board enquiry as well) had caught hold of Neeraj while Rajender @ Kallu was giving knife blows to him. Anita (PW7) identified Rajender in the court as the person who had given the knife blows. After inflicting the injuries to Neeraj, according to Anita (PW7), the three persons ran away in the direction from which they had come.

25. Anita (PW7) has further stated that after they had fled, she returned to Neeraj and tried to assist him out of the park but he fell down on the ground. She raised an alarm whereupon a gardener, Sh. Asharfi Rai (PW15), a boy and a girl reached the spot. As Anita was

unable to reach the police control room at the telephone no.100 from her mobile, she requested the boy, who came to the spot, to make a telephonic call.

26. The PCR record (Ex PW2/A) shows that the call has been received from one Vikram through his mobile number 9211454982, thus corroborating the testimony of eye witness.

27. Anita was not permitted to return home alone. No one at the spot assisted her in informing about the occurrence telephonically to her residence. Thereafter she left for her home with one park guard leaving one guard and some other persons near Neeraj. Anita has claimed that she returned again to the spot along with her mother, by which time the police at the spot had shifted Neeraj to the hospital.

28. Anita has proved her statement (Ex.PW7/A) which was recorded by Inspector Ram Sunder (PW-31). We may note that Anita also proved his signatures on the seizure memo's Ex.PW7/B, Ex.PW7/C, Ex.PW7/D, Ex.PW7/E and Ex.PW7/F recorded on the spot.

29. We find that Anita's evidence is also corroborated in all material particulars by the testimony of Sh. Asharfi Rai (PW-15) who was a gardener by profession and was employed in such position at the District Park, Pitam Pura on the fateful day.

30. As per Asharfi Rai (PW15) on 6th June 2010, he was on duty at the park from 9:00 am to 5:00 pm. He had marked his attendance and at about 1:30 pm was present near his office when he heard some

noise. On approaching the point of the noise, he found Neeraj lying injured and unconscious on the spot and while Anita (PW7) was trying to lift him and saying that she wanted to call a friend of the injured. Asharfi Rai (PW15) has disclosed that he had accompanied Anita to the school which was closed; he thereafter accompanied her to her house. Thereafter accompanied by her mother, they returned to the District Park, Pitam Pura where they found police personnel at the spot and that the injured person had been removed to the hospital. PW-15 Asharfi Rai had stated that when he reached near the injured person, he had seen some persons running away from the spot.

31. One Rinku, a juvenile was apprehended in this case on the 7th of June 2010 who is alleged to have made a disclosure statement giving the names of the co-accused in the case. Rinku was handed over to JJO SI Naresh Kumar. On the next day Rinku was produced before the JJB and sent to the Juvenile Home.

32. Based on information disclosed by Rinku, the police traced and effected the arrest of another juvenile Dulal Rai on 12th of June 2010 along with the two appellants. Rajender @ Kallu was taken into custody vide arrest memo Ex.PW28/A at 5:00 pm while Rajesh was arrested from the Power House, Outer Ring Road, Pitampura, Delhi vide arrest memo Ex.PW28/B.

33. Both these appellants are stated to have made disclosure statements and led the police to the recovery of one knife each. Rajesh had got recovered one shirt and a metal knife bearing the mark

Mingkai vide recovery memo Ex.PW28/L on 12th June, 2010. He had also pointed out to the police and got recovered a white shirt with black checks and bearing the label '*Levis Levi Strauss & Co*' at the same time. These articles were sealed and taken into custody by the police and subsequently sent to the FSL.

34. So far as Rajender @ Kallu is concerned, on his disclosure the police recovered a knife, with a blade of 10.5 cms in length and having a wooden handle measuring 9.5 cms bringing the total length of the knife as 20 cms. The sketch of this knife was prepared by the police which had been proved on record vide Ex.PW28/H while the sketch of the knife bearing the mark *Mingkai* was proved as Ex.PW28/K.

35. On the 13th of June 2010, the arrested persons were subjected to a test identification parade ('*TIP*') which was conducted by the police. Anita had duly identified the juvenile Dulal Rai and Rinku.

36. The investigating officer had sought to get a *TIP* of the appellants Rajender @ Kallu and Rajesh conducted on the 1st of June 2010. However, they refused to participate in the *TIP*. These two appellants however, were clearly identified by Anita in her testimony given as PW-7 during trial.

37. The two recovered knives were sent to Dr. V.K. Jha, Medical Officer, BJRN Hospital, Jahangir Puri for an opinion as to whether they could have been the weapon of offence. The sealed knife recovered from Rajesh was produced before the doctor as Packet No.1

while the sealed recovery from Rajender @ Kallu was produced before the doctor as Packet No.2. The doctor had also drawn sketches of the knives produced for his opinion regarding the possibility of the injuries suffered by the deceased. Dr. V.K. Jha, who appeared in the witness box as PW14, proved the sketch of the knife recovered from Rajender @ Kallu produced before him as Ex.PW14/B and sketch of the knife allegedly recovered at the instance of Rajesh as Ex.PW14/C. This doctor has clearly opined that the injuries mentioned in the post-mortem report could have been caused by the knife in packet no.2. This was the knife which the prosecution had allegedly recovered on the pointing out of the appellant Rajender @ Kallu.

38. The opinion of the doctor is corroborated by the report of the Forensic Science Laboratory dated 29th November, 2010 (Ex.PW31/A) which has clearly opined that blood was detected on the knife with a wooden handle which had been recovered from the accused Rajender @ Kallu. In the FSL report (Exh. PW31/B), this knife is mentioned as Ex.No.10 though the blood group could not be identified on it.

39. So far as the metallic knife examined as Ex.No.9 by the Forensic Science Laboratory recovered by the police on the pointing out of Rajesh is concerned, no blood was detected thereon.

40. The dock identification by PW-7 of the appellants as well as the details of the other persons involved in the commission of the offence remains completely un rebutted on record.

41. We may note that Anita had identified the presence of the fourth person Rinku at the spot who she stated had been apprehended on her pointing out. This fourth person was a juvenile and pursuant to the apprehension memo, he was also tried by the Juvenile Justice Board. The apprehension memo was not put to Anita and no question was asked of her with regard to his apprehension in the witness box. The Juvenile Justice Board noted that the prosecution had failed to prove the apprehension memo dated 7th of June 2010 so far as the juvenile Rinku was concerned and consequently granting him benefit of doubt, acquitted him for commission of the alleged offence. An order dated 17th October, 2011 of the Juvenile Justice Board-II has been handed over to us whereby Dulal Rai was found guilty of commission of the offence punishable under Sections 304/392/120B/34 IPC along with his other associates in furtherance of the common intention in the presence of Anita who was present in the park along with Neeraj.

Injuries on Rajesh

42. It may be noted that the prosecution has led evidence of injuries which was suffered by the Rajesh during the incident.

43. The prosecution examined Shri Hriday Narain as PW-8 who proved that on 6th of June 2010, three boys had come to his clinic. The witness pointed out the accused Rajesh as the one out of them who was having injury on his hand. PW-8 Shri Hriday Narain pointed

out the appellant Rajender as the person who was accompanying Rajesh at that time. The witness disclosed that Rajesh had explained that he had sustained injury due to the fall in the canal and that he was wet at that time. Shri Hriday Narain claimed that he had given first aid to Rajesh and asked him to get an injection from a doctor. The testimony of this person could not be shaken in cross-examination.

44. In this regard, after his arrest, the police had got the appellant Rajesh medically examined and MLC No. 40-4638/10 (Exh. PW17/A) was recorded at the Dr. BSA Hospital, Rohini, Delhi as well. The MLC was recorded by Dr. Florence (who has been examined as PW17 during trial). The doctor has noted the history of having sustained injury as the victim had been held by the examinee (Rajesh-appellant) while Rajender @ Kallu was assaulting the victim with knife on 6th of May 2010. This endorsement has been corroborated in the oral testimony of the doctor who categorically stated that the examinee had given his history to her. The doctor has noted that on local examination, Rajesh has a clean incised wound with gapping wound measuring 10 cms by 3 cms on the medial border of the forearm which was opined to have been caused by a sharp weapon. In the cross-examination, it was suggested that the injury could have been caused by a fall on broken pieces of bottle/glass which the doctor agreed with.

45. Before us, Mr. Singhal, learned counsel for the appellant would try to cast a doubt on the date of the injury pointing out that the doctor

had not noted the duration of the injury.

46. We find apart from the clean incised wound, the doctor has noted multiple scars of incised wounds on the forearms as well as on the chest of the examinee which he had explained as having been self-inflicted with a blade.

47. So far as the present case is concerned, the circumstance of the existence of the injury has been pointed out by Ms. Aashaa Tiwari, learned APP for the State to support the implication of the appellant Rajesh in the offence. In our view, nothing substantial would turn on even this evidence inasmuch as the mainstay of the prosecution case rests on the unshaken ocular account of the eye-witness Anita (PW7).

48. The appellants have attempted to cast a doubt on the testimony of PW-7 Anita only urging that there is a time gap between the time of the incident and when she has returned to the spot. It is also contended that Anita (PW-7) has claimed that she tried to assist the deceased after he had suffered injury and if she had really had done so, the police could have found blood on her clothes. It is submitted that the evidence on record would show that when her statement was recorded, there was no blood on her clothes.

49. So far as this aspect of the matter is concerned, we find that Anita (PW-7) has explained that upon reaching her home accompanied by PW-15, she had washed and changed her clothes. This adequately explains the reason why the clothes she was wearing when she returned to the spot, did not have any presence of Neeraj's

blood on them. However, the testimony of Anita is clear and unshaken in her cross-examination.

50. We find no reason at all to disbelieve PW7 Anita's clear testimony. She has unequivocally described the manner in which the offence was committed and Neeraj was fatally stabbed by Rajender @ Kallu and his escape stood physically prevented by Rajesh and Dulal Rai.

51. It is on record of the Delhi Police Control Room which notes that the deceased was there with a girl. The fact that Anita left the spot to her home leaving Neeraj in the care of park gardeners or caretakers and some unknown persons is corroborated by the testimony of PW-15 who accompanied her home as well as the testimony of several police persons who reached the spot and found Neeraj in an injured condition.

52. Thus there is no reason at all to doubt the presence of Anita. The knife which caused the fatal injury stands recovered at the instance of the appellant Rajender @ Kallu and at his pointing out after his arrest. It has been authoritatively established by Dr. V.K. Jha (PW-14) that the injury no.1 which was sufficient to cause death in normal course of nature stood caused by the knife recovered at the instance of the appellant Rajender @ Kallu.

53. The trial court has relied upon these very prosecution witnesses and evidence in support of the impugned judgment dated 30th September, 2014. Nothing has been pointed to us which would enable

this court to take a view different from the view taken in the impugned judgment.

54. In view of the above, we find no merit in these appeals, which are hereby dismissed.

Let a copy of this judgment be sent to the Superintendent, Tihar Jail forthwith.

GITA MITTAL, J

P.S. TEJI, J

SEPTEMBER 26, 2016/aj