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

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Reserved on: 1st December, 2016

Date of decision: 3rd January, 2017

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CRL.A. No. 523/2000

NARESH KUMAR @ RAJU & ORS. Appellant

Through: Mr.Vinod Pant with
Mr.Deepak Kumar Raut, Advs.

versus

STATE OF DELHI Respondent

Through: Ms. Aashaa Tiwari, APP for
the State

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CRL.A. No. 535/2000

MUKESH KUMAR Appellant

Through: Mr.Vinod Pant with
Mr.Deepak Kumar Raut, Advs.

versus

STATE OF DELHI Respondent

Through: Ms. Aashaa Tiwari, APP for
the State

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

GITA MITTAL, J.

1. These two appeals assail the judgment dated 7th August, 2000 finding the appellants guilty of commission of the offence under Section 302 read with Section 34 of the IPC in Sessions Case No. 246/1996, arising out of FIR No.603/1995 which was registered by the police station Nand Nagri, after a joint trial by the common judgment. Pursuant to their conviction by a separate order of 7th August, 2000 itself, the appellants were sentenced to imprisonment for life each and fine of ₹5,000/- each, in default of payment of fine, it was directed that they shall undergo simple imprisonment for one month each.

2. Inasmuch as the appellants Naresh Kumar @ Raju, Purshottam Kumar @ Kaku and Mukesh Kumar have filed Crl.A.Nos.523/2000 & 535/2000 assailing this common judgment and order on sentence, we have taken them together for consideration and adjudication.

3. The record of the case shows that one Kashmiri Lal, 16 year old resident of D-3/356, Nand Nagri, Delhi was admitted to the Tandon Nursing Home, D-229, Vivek Vihar, Delhi by his brother Billu (PW4) and a cousin brother Vinod Kumar (PW7) who had “*presented C (with) H/o (History of) fall in park while running and sustaining injury*”. He was examined by Dr. S.N. Sharma, the Resident Medical Officer (PW16) who recorded the following history sheet of the patient (Exh.PW16/A) and made the following observation with regard to his condition:

“O/E
P. Fully conscious
Pulse – 100/ms
BP – 110/70 mmh
Temp – N
R/R – 18/mt.
Local Er :- Penetrating injury in Rt Lower Chest

(4x1 cm)
Bleeding ++
Superficial injury Rt arm and neck
Abrasions over B/L Knee’s present
Systemic Ex :-
PiA – Tenderness over Rt upper Abdomen
Chest – B/L Air Ending equal
CVS – NHD
CNS – Fully”

Thus, at the time of his admission to the hospital and examination by the doctor, the patient Kashmiri Lal was fully conscious. It is also in the testimony of Dr. S.N. Sharma (PW16) that the above noted history as noted in Exh.PW16/A was given by the patient himself.

4. It appears that at about 2.40 a.m. on 3rd December, 1995, Dr. S.N. Sharma (PW16) also telephonically informed the police station Vivek Vihar about the admission of injured Kashmiri Lal who got himself admitted in the Tandon Nursing Home which information was logged as DD-24A by HC Vijay Kumar. Information of this report was given to SI Pyar Singh via the wireless.

5. Pursuant to the receipt of the information, it appears that SI Pyar Singh proceeded to the Tandon Nursing Home and made enquiries. Upon return to the police station at about 7.15 a.m., he got his observations and enquiries logged as DD no.2A by HC Vijay Kumar (PW2) (Exh.PW2/B). SI Pyar Singh has reported therein that at the Tandon Nursing Home, the mother of Kashmiri Lal who had informed that Kashmiri Lal had fallen to the ground in the park near their house and got injured with some glass lying there. He had reported that the mother of the injured had stated that no one was to be blamed for this injury.

6. Mr. Vinod Pant, learned counsel appearing for the appellants has drawn our attention to a handwritten letter (Ex.PW16/B) in vernacular by Billu (PW4), brother of Kashmiri Lal. This letter is duly witnessed by their cousin Vinod Kumar (PW7). The letter Exh.PW16/B has been translated in the following terms :

“Our patient has received hurt by a pointed thing through his own mistake. His condition is precarious. We want his treatment here of our own free will and we do not want any police action. The Doctors have explained about the condition of the injured to us very well. If need arises, the patient may have to undergo major operation. We are fully ready for that.”

7. In the form (Exh.PW10/B), the family of Kashmiri Lal has clearly stated that they do not want any police action.

8. It is in the evidence of Dr.S.N.Sharma (PW-16) that Kashmiri Lal was given first aid at 2.20 a.m. For the purposes of the surgery, Dr. Tilak Gupta (Surgeon) was informed at 2 a.m. The notes of the surgeon have been proved on record as Exh.PW16/D. These notes manifest that even at the time of examination by the surgeon, the vital parameters of Kashmiri Lal were normal. The surgeon has noted that the patient was conscious. It has been opined in the notes that the abdomen had to be examined for which purpose, surgery had to be performed and an anaesthesiologist was required to be informed for surgery. Dr. Anil Kapur (PW-9), the Anaesthesiologist was also called as an operation was required to be performed on the patient.

9. The surgical procedure was explained to the family members of the Kashmiri Lal. The Nursing Home had required the consent of the patient's family for the purposes of administering anaesthetic performance of the surgical procedure. The consent obtained for a laprotomy was obtained in writing under signatures of the patient's cousin Vinod Kumar. The signatures of Vinod Kumar were duly witnessed by Billu (PW-4) and Sant Ram (PW-6) which is Exh.PW16/C as well as signatures of Billu (PW-4) were obtained.

10. We find that the prosecution has examined the anaesthesiologist Dr. Anil Kapur as PW-9 as well who has proved his notes as Exh.PW9/A. Dr. Kapur has recorded that upon examination of the patient, he had found him to be conscious without any respiratory distress. There was no cyanosis. His

general condition was low with a severe pallor, pulse of 96 per minute which was regular and blood PP 100/60 of Hg. The anaesthesiologist noted the injury on his right upper abdomen. Even post operation, the patient was found fully conscious and talking and the anaesthesiologist (PW-9) had even advised that he be shifted to the regular ward.

11. Kashmiri Lal was next examined by Dr. Sudha Bhardwaj (PW13), a resident medical officer at the Tandon Nursing Home who attended to him at about 8.30 a.m. on 3rd December, 1995 and found him to be conscious with his vitals being normal. According to Dr. Bhardwaj, the patient complained regarding pain on the side where he was operated whereupon she discussed his condition with Dr. Tilak Gupta, the surgeon who advised her to continue the medication. The patient thereafter became restless and was sinking. He was given emergency treatment including intubation and cardiac massage. However, at 9.30 a.m. of the 3rd of December 1995, the patient expired. PW13 proved her medical notes as Exh.PW13/A.

Post mortem

12. After the death of Kashmiri Lal, Inspector Rajbir Sharma (PW22) had prepared the brief facts of the case (Exh.PW22/A) and also made an application for conducting the post-mortem examination on the dead body (Exh.PW22/C).

13. A post-mortem was conducted on the body of Kashmiri Lal by Dr. S.K. Verma on 4th December, 1995 (Exh.PW15/A) at 2.10 p.m. vide post mortem report bearing no.803/1995 (Ex.PW15/A). The doctor had found the following ante-mortem injuries on the body of the deceased:

“1. A reddish Brown Abrasion of size 2x0.4 cm placed in the supra clavicular region on right side neck 0.5 cm above the superior border of right clavic and 9 cm right of mid-line.

2. A reddish brown abrasion of size 1.5x0.4 cm placed 1.2 cm to the right of injury no.1 just over the clavicle.

3. A reddish brown abrasion in an area of 6x2.5 cm on the posterior surface of right upper arm 15 cm. Above the dip of the elbow and 18 cm below the acromion process.

4. A reddish brown abrasion of size 1.3x7 cm placed 0.8 cm above the superior border of right patella in the right upper leg region over front medial surface.

5. A reddish brown abrasion oval in shape of size 1x0.6 cm placed on the front of the knee 3.7 cm to the right of medial border of patella.

6. A reddish brown abrasion of size 8x1 cm placed over the right leg shin 5.5 cm below the lower border of right patella.

7. A reddish brown abrasion of size 4.5x1.8 cm placed in the front of left thigh 39.5 cm below the out superior liac spine.

8. A reddish brown abrasion of size 3x3.3 cm placed on the left upper leg 1 cm below the lower border of left patella.

9. A reddish brown oval abrasion of size 1.5x1.0 cm placed on the medial side of left leg 4 cm below the lower border of left patella.

10. A midline surgical wound 16 cm long having 10 interrupted silk sutures.

11. Incised wound 10 cm long stitched with 6 interrupted silk sutures present in the right hypochondrium and right lower chest starting 2.5 cm below the coastal margin. The wound was directed medially downwards and backwards in the abdominal cavity, cutting the 9th inter-coastal space (6.5x0.5 cm) entering into the liver through the superior surface and coming out through inferior surface (5x0.5 cm) of right lobe. The wound at the superior surface was stitched with momentum. Haematoma of size 10x8x1 cm was found between the surface of liver and diaphragm. The total depth of the wound was approximately 9 cm. The wound over liver shows one angle more acute than the other.

12. Surgical drain wound in right iliac fossa.

The abdominal cavity contains about 1500 ml. Of clotted and fluid blood. All other internal organs were pale. Time since death is about 30 hours and the cause of death was shock due to haemorrhage due to injury no.11 likely to produce by sharp edged weapon and is sufficient to cause death in ordinary course of nature."

14. So far as the cause of death is concerned, the doctor had opined that shock due to haemorrhage due to injury no.11 likely to have been produced by a sharp edged weapon was sufficient to cause death in the ordinary course of nature. The doctor had also opined that the time since death was about 30 hours.

15. A blood sample of the deceased Kashmiri Lal in gauze as well as the clothes which he was wearing were preserved and handed over to the police.

16. The dead body was identified by Mukesh and Billu, brothers of the deceased vide Ex.PW22/D and Ex.PW22/E respectively.

After the post mortem was conducted, Inspector Rajbir Sharma (PW22) handed over the dead body of Kashmiri Lal to Billu vide memo Exh.PW22/G who brought it home.

17. At about 10.35 a.m., information was received by the wireless operator at police station Nand Nagri from L.Ct. Vandana that there was a quarrel at the premises C-1/6, Nand Nagri and that the police should be sent there. This information was logged as DD 9B (Exh.PW11/B) on 3rd Decemember, 1995 at the police station. Copy of DD 9B (Exh.PW11/B) was handed over to Additional SHO Inspector Rajbir Sharma (PW22) who proceeded to the residence of the deceased at D-3/356 and found the dead body of Kashmiri Lal on the ground.

18. At this stage, he recorded the statement of Billu Kumar @Billu (PW4) (Exh.PW4/A) who stated that in the night intervening 2/3rd December, 1995, the deceased Kashmiri Lal and he had gone to attend a wedding in the neighbourhood; that after having their dinner, both of them with some other boys were singing and dancing. After some time, Billu (PW-4) asked for change of the cassette. At this, Raju and his brother Kaku who were residents of B-3/337, Nand Nagri started abusing PW4. At this, PW4 gave a fist blow at Raju's face but they did not allow him to change the cassette. Some guests at the wedding intervened ("*bee ch bachao karaya*") and both the parties returned to their respective homes. PW4 has further stated in Exh.PW4/A that after that, his brother started warming his hands at the "*tandoor*" near the wedding while he, along with a neighbour Sant Ram, were

sitting on a cot in front of their house and conversing. About half an hour so passed when, at about 11.30 p.m., Raju, Kaku and Mukesh, who were known to Billu from before, came there and started saying that now they would teach him a lesson for inflicting the fist blow. Raju was holding a sword (“*talwar*”), Kaku was holding an iron rod (“*lohe ki chad*”) and Mukesh was holding a stick (“*danda*”). Mukesh and Kaku held Kashmiri by both his hands while Raju stabbed his brother with the sword which was in his hand. When Sant Ram and he moved towards his brother to save him, those persons ran away from the spot. At that time, Vinod Kumar (Billu’s mausi’s maternal aunt’s son), heard the noise and reached there. With the help of Sant Ram and his cousin Vinod Kumar, Billu rushed Kashmiri Lal to the Tandon Nursing Home, Vivek Vihar in Titu’s (another son of his mausi - maternal aunt’s) car and got him admitted there where he had been operated upon and expired.

19. Inspector Rajbir Sharma, Additional SHO, Police Station Nand Nagri, made an endorsement (Ex.PW3/A) on the statement (Ex.PW4A) and handed it over to Constable Pawan Kumar for registration of the First Information Report.

20. This statement formed the basis of FIR No.603/95 which was registered by Head Constable Ravinder Kumar (PW-3) between 12.45 p.m. (DD8A) and 1.20 p.m. (DD9A) at the police station Vivek Vihar, a carbon copy whereof was proved on record as Exh.PW3/B. Ct. Pawan Kumar brought a copy of the FIR to the spot and handed it over to Inspector Rajbir Sharma (PW22) on 3rd

December, 1995 itself along with the *rukka*. Inspector Rajbir Sharma (PW-22) has proved at that time that one Billu (PW-4) produced one bloodstained white shirt with blue colour stripes which the deceased was wearing at the time of the incident which was seized vide Exh.PW4/B and sealed with the seal of RS.

Investigations

21. On 7th December, 1995, Purshottam Kumar @ Kaku was arrested and his personal search was conducted vide memo Exh.PW4/D and Naresh @ Raju was arrested outside the house of his maternal uncle and his personal search was conducted vide memo Exh.PW4/E.

22. The prosecution relies on their pointing out of the place of occurrence in front of D-3/344, Main Road, Nand Nagri, Delhi and the pointing out memos in this regard were proved on record as Exh.PW4/C and Exh.PW4/F.

23. The prosecution has also placed reliance on a disclosure statement of Naresh @ Raju who pursuant thereto, got recovered a sword (*'talwar'*) from his house B-3/337, Nand Nagri vide memo Exh.PW4/G. The sword was found to have a length measuring 70 cms. So far as the other dimensions of the sword was concerned, it had a blade of 60 cms. and an iron handle of 10 cms. The sword had a wooden covering and was seized vide memo Exh.PW4/H. The sword was deposited in the malkhana. The seizures were witnessed by ASI Gopal Singh and Ct. Praveen from police station

Nand Nagri as well as Billu Kumar (PW4). The sword was brought on the court record as Exhibit P4.

24. On 7th December, 1995, Mukesh surrendered before the concerned court. He was arrested in the case vide Exh.PW18/A and was taken on police remand of one day.

25. On 3rd December, 1995, Inspector Rajbir Sharma had got the scene of the occurrence photographed vide photos Exh.P-1 to P-4. At the instance of Billu Kumar, a rough site plan (Exh.PW22/H) was prepared by Inspector Rajbir Sharma, Additional SHO (PW22).

26. Subsequently, on 31st January, 1996 Inspector Rajbir Sharma took SI Mukesh Kumar to the place of occurrence to prepare a scaled site plan after taking rough notes and measurements at the instance of PW-22. However, in the scaled site plan (Exh.PW20/A) the two small parks shown in Ex.PW22/H are not shown creating doubt on its correctness.

27. The investigating officer recorded the statements of witnesses and also collected the report of the post-mortem as well as the treatment papers from the Tandon Nursing Home.

28. So far as the seized articles are concerned, the same were sent to the Forensic Science Laboratory, Chandigarh by Inspector Rajbir Sharma (PW22). The report of the Forensic Science Laboratory dated 29th August, 1996 (Exhibit PX) notes that four sealed parcels alongwith the sample seal were sent through Ct. Hari Singh and received by the Laboratory on 14th February, 1996. The Laboratory marked the articles as follows:

“Exhibits Description

- 1. A sword with black iron blade.*
- 2. A full sleeved shirt with black longitudinal bands on white.*
- 3a A grey full sleeved shirt.*
- 3b. A deep purple pant with faded red lines on it.*
- 4 A stained gauze.”*

29. After a scientific examination of the exhibits, as per Exh.PX, it was opined as follows:

“Report

- i. Blood was detected exhibit 2,3a,3b and 4.*
- ii. Its human origin was confirmed on 2, 3a and 4.*
- iii. Exhibits 2 and 4 gave positive grouping tests for group ‘AB’. No blood group could be found on exhibit 3a.*
- iv. Blood was not detected on exhibit 1.”*

30. Therefore, the bloodstained gauze i.e. the sample of deceased Kashmiri Lal showed that his blood belonged to the Group AB. Human blood was confirmed on Exh.P2 which was the full sleeved shirt with black longitudinal bands on white. Human blood was identified additionally on the Ex.3a being the grey full sleeved shirt. The scientific tests reported that there was no blood on Exh.1 which was the sword with the iron blade.

Proceedings before the court

31. After completion of investigation, the challan was filed before the court of the learned Metropolitan Magistrate on or about

the 4th March, 1996. By an order dated 16th April, 1996, the proceedings were committed for trial to the Sessions Court.

32. After consideration of the material on record, the learned Additional Sessions Judge, Shahdara, Delhi had found a prima facie case under Section 302/34 of the IPC made out against the appellants. Consequently, by an order dated 1st November, 1996, the trial court framed the charge against the appellants for commission of offences punishable under Section 302/34 of the IPC. The appellants pleaded not guilty and claimed trial.

33. During trial, the prosecution examined 22 witnesses in support of the charge. The trial court examined the appellants under Section 313 of the CrPC and gave them an opportunity to explain the evidence against them. The appellants examined one witness HC Naresh Kumar (DW1) in defence. It appears that this witness was unable to produce the summoned record relating to DD Register B for the period 2nd December, 1995 and 3rd December, 1995 by police station Nand Nagri for the reason that this record stood destroyed pursuant to the order no. 964-1013/HAR/NE dated 26th March, 1998.

34. The Id. Trial Judge considered the matter at length and by the impugned judgment dated 7th August, 2000 found the appellants guilty of the offences with which they were charged and thereafter by the impugned order dated 7th August, 2000 sentenced the appellants as noted above.

Discussion

35. We have heard Mr. Vinod Pant, learned counsel for the appellants and Ms. Aashaa Tiwari, learned APP for the State at great length and carefully scrutinised the record of the trial court.

36. The above narration would show that there can be no dispute that Kashmiri Lal suffered injuries in the very late hours of 2nd December, 1995 and was admitted to the Tandon Nursing Home, Vivek Vihar, Delhi. He was admitted to the hospital and a MLC prepared vide Exh.PW13/A and was treated by Dr. S.N. Sharma (PW16). Thereafter, he underwent surgery which was performed by Dr. Tilak Gupta, Surgeon (Exh.PW16/D and Exh.PW16/E). Anaesthesia was administered by Dr. Anil Kapur (Exh.PW9.A). Kashmiri Lal was recovering when his condition suddenly worsened in the morning at about 9.30 a.m. (Exh.PW13/A) and he unfortunately expired in the presence of Dr. Sudha Bhardwaj (PW13).

37. The prosecution has primarily relied upon the testimony of Billu (PW-4), brother of Kashmiri Lal as an eye-witness account of the incident in which the deceased suffered the injuries. During trial, Billu (PW4) gave a testimony on the same lines as his statement to the police on which basis FIR No.603/95 was registered. What has to be seen is whether this is a truthful account and sufficient to hold the appellants guilty of murder of Kashmiri Lal or are there serious infirmities in the evidence, sufficient to doubt this version?

38. We have extracted above the record of the Tandon Nursing Home as well as the police documentation till such time Kashmiri Lal expired. Dr. S.N. Sharma, Kashmiri Lal's treating doctor at the Tandon Nursing Home has proved the history sheet Exh.PW16/A of Kashmiri Lal which was recorded at the time of his admission at 1.50 a.m. when the patient was conscious. As per Dr.S.N. Sharma (PW16), the history extracted above to the effect that Kashmiri Lal had suffered a fall in the park while running and sustained injuries was actually given by the patient himself.

39. We find that Dr. S.N. Sharma (PW16) who had examined Kashmiri Lal and also reported the admission of the injured in the hospital to the police, has testified that when the police arrived and made enquiries, the patient Kashmiri Lal was conscious. He has also specifically testified that the police had made enquiries from the deceased. This fact is also confirmed by Vinod Kumar (PW7), cousin of Kashmiri Lal who has submitted that the police had made enquiries from the injured Kashmiri Lal.

40. We have noted above that Kashmiri Lal was conscious at all material times. It is also in the prosecution evidence and noted on the Treatment Sheet (Ex.PW16/A) that Dr. S.N. Sharma from the Tandon Nursing Home had himself informed Mr. Sunil Kumar, Duty Officer at the police station Vivek Vihar at 2.40 a.m. by a telephone call about the admission of Kashmiri Lal. A noting to this effect stand made on Ex.PW16/A itself. This information has been logged as DD 24A (Exh.PW2/A) which also records that it

was the doctor who had informed the police that the patient had got himself admitted.

41. Receipt of this information was handed over to SI Pyar Singh for appropriate action. As a result, SI Pyar Singh had proceeded to the spot and upon his return to the police station from the Tandon Nursing Home at 7.15 a.m. documented the same as DD No.2A wherein he has categorically recorded the information disclosed to him by Kashmiri Lal's mother to the effect that Kashmiri Lal had fallen on the floor and was injured.

42. The prosecution has also proved in evidence the letter dated 3rd February, 2015 (Exh.PW16/B) as well as the consent for laprotomy (Exh.PW16/C) given by Billu (PW-4) endorsed by Kashmiri Lal's relatives wherein also it is stated that Kashmiri Lal got injured by his own fault and that he was getting himself treated with his own consent at the hospital.

43. In the *rukka* Exh.PW4/A as well as in the witness box, Billu has thus set up a version completely contrary to that contained in Exh.PW16/A, 16/B and 16/C. So what is the witness' explanation and is it reliable? In the witness box, Billu (PW4) has attempted to explain that the version recorded in Exh.PW16/A, B and C was at the instance of the doctors so that they may treat Kashmiri Lal and that it was on their suggestion that he had told the doctors that Kashmiri Lal was playing in the park and fell over broken glass which pierced his abdomen. However, this explanation is not supported by the record.

44. In Exh.PW16/B, it has been stated by Billu that they did not want any police action. However, we find that despite this expressed desire of the patient Kashmiri Lal's relatives, Dr.S.N. Sharma (PW16) has, shortly after the patient's admission, informed the police at 2.40 a.m. on 3rd December, 1995 itself. Clearly, if the Nursing Home and the doctors had not wanted police intervention and had actually told the patient's relatives to change their version of the circumstances in which the deceased suffered the injuries, they would not have informed the police of Kashmiri Lal's admission.

45. Dr.S.N Sharma (PW16) has clearly stated that the history written by him on Exh.PW16/A was disclosed by Kashmiri Lal who was fully conscious.

46. Pursuant to the intimation by the police logged as DD No.24A (Exh.PW2/A), S.I. Pyar Singh visited the hospital and himself met the patient Kashmiri Lal. His mother also had told SI Pyar Singh that no one was at fault for the injury suffered by Kashmiri Lal which fact was recorded by him in DD No.2A upon his return to the police station.

47. The explanation tendered by Billu (PW4) and Vinod Kumar (PW7) for the version given in the *rukka* and in the witness box is not supported either by the testimony of the doctors at the Tandon Nursing Home nor by the record relating to Kashmiri Lal and cannot be relied upon to base a conviction.

48. Even in the changed version given in court, Vinod Kumar (PW7) refers to Billu having told him that Kashmiri had been stabbed by “*some boys*” without naming the assailants. The evidence on record establishes that the deceased explained his injuries to the doctor and also spoke to the police, he clearly did not name the appellants as his assailants.

49. It is noteworthy that the factum of giving a false statement to secure treatment of the injured at the time of admission in the Tandon Nursing Home is not mentioned in the *rukka* Exh.PW4/A. It is also not mentioned in the brief facts of the case as made out by the investigating officer at the time of making the request for the autopsy.

50. Our attention has been drawn to the testimony of Sant Ram (PW-6) and Vinod Kumar (PW-7) who were also examined by the prosecution. Sant Ram (PW6) is concerned, he has stated at one place in court that he had named only Raju with other boys involved in the attack while at another place, he has stated that he had only told the name of Vinod to the police as one of the assailants.

51. It is noteworthy that the police reached the hospital when Kashmiri Lal was receiving treatment at the Tandon Nursing Home. Billu (PW4) who was present there, Sant Ram (PW-6) and Vinod Kumar (PW-7) would have come to know that the doctor had informed the police. They made no disclosure of the version to the police which finds recorded in the *rukka* or in their court testimony.

52. The suggestion of urgency in taking Kashmiri Lal to the Tandon Nursing Home is also falsified inasmuch as it is in the evidence of PW-4 that two government hospitals, Guru Teg Bahadur Hospital and Swami Dayanand Hospital fell on the way. The witnesses mentioned some reservation about taking Kashmiri Lal to Guru Teg Bahadur Hospital because of death of a relative prior thereto in that hospital but there was no reason as to why the deceased could not be taken to the other Hospital. In fact, these hospitals were closer to the residence of the deceased.

53. Vinod Kumar (PW7) has submitted that 15-20 persons had gathered at the spot. No members of the public have been examined or produced as a witness by the prosecution. Sant Ram (PW6) has stated that 5-7 persons were chasing the assailants and that some of them were "*bakriwala ladka*". He names them as "*Billu*", "*Titoo*" and others.

54. Inspector Rajbir Sharma (PW22) has also referred to having made enquiries from some persons on the spot but these persons had not seen the incident.

55. If what was stated by these witnesses was correct, the testimony of these persons of the public, especially those who chased the assailants, was material which has not been produced before the court.

56. It is suspicious that despite their presence at the wedding and singing and dancing going on, PW4 and PW6 are the only witnesses to the incident which is alleged to have taken place at

about 11.30 p.m. No other guests from the wedding or the member of the public has been examined.

57. Both Billu (PW4) and Sant Ram (PW6) have stated that blood had fallen on the ground. However, the police has found no blood on the spot and no bloodstained soil has been recovered or sealed In the endorsement made by Additional SHO Rajbir Sharma on the *rukka* (Exh.PW3/A), Inspector Sharma has clearly written that there were no bloodstains on the spot. The police has also not bothered to investigate the presence of the blood in the car in which Kashmiri Lal was taken to the hospital.

58. SI Pyar Singh who actually went to the hospital and met Kashmiri Lal while he was undergoing treatment at the Tandon Nursing Home has not been examined. His testimony was certainly an important piece of evidence.

59. Kashmiri Lal's mother, whose statement is mentioned in DD 24A recorded at about 7.15 a.m. on 3rd December, 1995 has also not been examined as a witness. In fact, Billu (PW4) has testified that it was his mother who called the police from the hospital when the deceased had died.

60. Mr. Vinod Pant, learned counsel for the appellants has pointed out that the presence of a park close to the residence of the deceased is established on the court record. In this regard, our attention is drawn to the testimony of Vinod Kumar (PW7) about the existence of a park at a distance of 2 or 3 galis from the alleged place of occurrence in which household waste i.e. broken glass was being thrown. We also find that in the rough site plan

Exh.PW22/H, two parks are shown in the area. It has been pointed out that this supports the possibility that deceased Kashmiri Lal had actually suffered injury as revealed to the Tandon Nursing Home by the deceased.

Recovery of the sword

61. Apart from the oral evidence of PW4 and PW6, the prosecution has placed heavy reliance on the alleged recovery of the sword. Unfortunately, this recovery is also not above suspicion. This sword was not produced for an opinion before the post-mortem doctor - Dr. S.K. Verma (PW15) to seek his opinion as to whether it could possibly have been the weapon of offence. In the court, when the sword was shown to Dr. S.K. Verma (PW15), after examination of the injuries noted by him in the post mortem report Exh.PW15/A, he had opined that injury no.11 mentioned therein was possible with the sword shown to him in court only in case the sword was straight at the time of occurrence or use. We have no evidence of the position in which the weapon was used to inflict the injury upon Kashmiri Lal, if at all.

62. It is in evidence of the investigating officer Inspector Rajbir Sharma (PW22) that he had not prepared any sketch of the sword Exhibit P4.

63. The report of the Forensic Science Laboratory (Exh.PX) has found no blood on the blade of the sword. This sword is clearly not the weapon of the offence.

Non-compliance of Section 157 CrPC

64. The Code of Criminal Procedure (“Cr.P.C.” hereafter) requires certain mandatory compliances which have been stipulated by the legislature to ensure credibility in the lodging of the complaint and the investigation. The requirement of Section 157 Cr.P.C. is one such stipulation. As per Section 157 of the Cr.P.C., it is mandated thus :

“157. Procedure for investigation preliminary inquiry.

*(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of **an offence which he is empowered under section 156 to investigate**, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that-*

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub- section (1), the officer in charge of

the police station shall state in his report his reasons for not fully complying with the requirements of that subsection, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.”

Thus, Section 157 of the CrPC mandates that an officer incharge of a police station to forthwith send report of the commission of an offence which he is empowered under Section 156 to investigate, to the Magistrate, empowered to take cognizance of the offences upon a police report. Section 156 empowers a police officer to investigate cognizable offences.

65. In the present case, we are concerned with commission of an offence punishable under Section 302 of the IPC which is a cognizable offence. It was mandatory for the SHO of the police station Vivek Vihar to send a report of the same to the concerned Magistrate.

66. We find that in the present case, there is no evidence that special report of the registration of the offence of murder was ever sent to the higher police officers. There is no evidence of any entry in the daily diary of the police station regarding handing over of the special report to a police official for service upon the Magistrate, nor an entry of it having been actually served. No evidence in this regard has been cited. Given the positive evidence of the doctors at the Nursing Home, the documentary evidence of the treatment, letters executed by the relatives of the deceased and

the contemporaneous record of the police station and the volte face by Billu (PW4) and Sant Ram (PW6), the compliance with Section 157 of the CrPC cannot be overlooked. In fact, it casts substantial doubt on the entire prosecution case against the appellants.

67. Failure to comply with the requirements of sub-section 3 of Section 157 of the CrPC is coupled with delay in making the complaint by the brother of deceased and consequential delay in recording the first information report. The incident happened in the late night of 2nd December, 1995, despite the police intervention at the earliest at around 2 a.m. on 3rd December, 1995 and the evidence of police officials having met Kashmiri Lal, then injured as well as his mother when the other prosecution witnesses including Vinod (PW7) were present at the Nursing Home, no complaint was made to them. The evidence establishes that the report of the admission of Kashmiri Lal in injured condition was given by Dr. S.N. Sharma (PW16) to the police station.

68. The witnesses do not even suggest any reason why they did not disclose the incident in terms of their subsequent allegations. In these circumstances, the delay in informing the police at the earliest of the version disclosed in Exh.PW4/A suggests that it may be an afterthought, renders the same suspect and has to be treated as fatal to the prosecution case.

69. The discussion advanced in the impugned judgment for the registration of the FIR only after the death of the deceased is clearly unacceptable in as much as the police was present in the hospital itself.

70. The finding of the trial court that the FIR was not ante-timed or that the non-compliance with requirements of Section 157 Cr.P.C. was only a formality and inconsequential, is clearly unsustainable.

Failure to establish delivery of the sealed samples to the Central Forensic Science Laboratory

71. The prosecution has led the evidence of HC Ashwini Kumar (PW1) to the effect that he had taken the five pullandas to the CFSL on 28th February, 1996 including the sample seal. However, the CFSL report (Exh.PX) has mentioned that on 14th February, 1996, four sealed parcels were brought by Ct. Hari Singh. The record of the case shows that the entries in Register No. 19 support the Forensic Science Laboratory report Exh.PX to the effect that it was Ct. Hari Singh who carried the pullandas on 14th February, 1996.

72. Another circumstance which would show that it was not article which was seized during investigation which was sent for a forensic examination to the laboratory is illustrated by the Forensic Science Report Exhibit PX. As per the investigating officer Inspector Rajbir Sharma (PW22) as well as the brother of the deceased Billu (PW4), on 3rd December, 1995, Billu (PW4) had produced a white bloodstained shirt having blue colour stripes which the deceased was wearing was seized vide Exh.PW4/B. However, we find that the Forensic Science Laboratory in its report dated 29th August, 1996 (Exhibit PX) makes a reference to Exhibit PX being a “full sleeved shirt with black longitudinal bands on

white”. There is a lot of difference between blue and black suggesting that the police had not sent the shirt which was seized to the Forensic Science Laboratory. The benefit of doubt must enure to the benefit of the appellants.

73. Even the trial court has noted in para 17 of the impugned judgment that the prosecution has failed to explain as to why Ct. Ashwini Kumar was cited and examined as a witness and how his wrong statement has been recorded.

Conclusion

74. A perusal of the impugned judgment would show that the learned trial judge has accepted the explanation for change of version of Billu (PW4) completely ignoring the other evidence on record, both oral of the three doctors at the Nursing Home as well as the documentary evidence of the version of the deceased as to how he had suffered the injuries. The learned trial judge has completely ignored the evidence on record which included not only statements attributed to the deceased of the circumstances leading to his death but also the explanation given by the mother of deceased Kashmiri Lal to Ct. Pyar Singh as noted in DD 24A. The fact that the deceased Kashmiri Lal himself had given the history to not only the doctors but had also spoken to the police also militates against the explanation admitted to be given by Billu (PW4) to explain his turn around.

75. The fact that Kashmiri Lal was conscious when he was admitted in the hospital and thereafter stands established not only

from the oral testimony of Dr. S.N. Sharma (PW16) but also of Dr. Sudha Bhardwaj (PW13) and the treatment sheets. There is no basis for the finding returned by the trial judge that the deceased Kashmiri Lal could not have talked to anybody or given his history to the concerned doctor or that the doctor had slipped on this count.

76. In the light of the above discussion, it has to be held that the version put forth by Billu (PW4), Sant Ram (PW6) and Vinod (PW7) in the witness box is not above suspicion and cannot be relied upon to uphold the conviction of the appellants. There is, therefore, no credible evidence to support the conviction of the appellants.

Result

77. For this reason, the judgment dated 7th August, 2000 passed by the learned Additional Sessions Judge, Karkardooma in Sessions Case No.246/96 and the consequential order on sentence dated 7th August, 2000 and the same are hereby set aside and quashed. The appellants Naresh @ Raju, Purshotam @ Kaku and Mukesh Kumar are, therefore, acquitted in relation to the alleged commission of the offence punishable under Section 302/34 of IPC 1860 in relation to FIR No.603/95 PS Nand Nagri.

78. The record shows that in CrI.A.523/2000, the sentence imposed upon Naresh @ Raju was suspended by the order dated 15th January, 2003 while that of Purshottam Kumar @ Kaku was suspended by the order dated 4th August, 2003. So far as Mukesh Kumar is concerned, in CrI.A.535/2000, his sentence was also

suspended by an order dated 4th August, 2003. In view thereof, the bonds submitted by them and on their behalf shall stand discharged.

The Criminal Appeal No.523/2000 and 535/2000 are thus allowed.

The Trial Court record be returned.

Copy of this judgment be sent to the Superintendent, Tihar Jail, Delhi.

GITA MITTAL, J

JANUARY 3, 2017
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ANU MALHOTRA, J