

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

+ CRL.A.287/2018

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Reserved on: September 18, 2018
Date of decision: October 23, 2018

1. **CHHOTA SALMAN**
S/o Late Md. Jamshed Ali
R/o I-8, Vijay Vihar, Phase-1,
Shani Bazaar Road, Delhi ...Appellant No. 1

2. **RAMAN**
S/o Sh. Shyam Veer
R/o H.No. G-87, Vijay Vihar,
Phase-1, Delhi ...Appellant No. 2
Through: Ms. Rebecca M. John, Senior
Advocate alongwith Mr. Gaurav &
Mr. Kushdeep Gaur, Advocates.

versus

THE STATE ... Respondent

Through: Ms. Kusum Dhalla, APP alongwith SI
Vijay Singh

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE I.S.MEHTA

JUDGEMENT

23.10.2018

I.S. Mehta, J.:

1. The instant appeal assails the impugned judgment dated 22.01.2018 and order on sentence dated 30.01.2018 passed by learned Additional Sessions Judge, Rohini Courts, New Delhi in Session Case No.149/17, arising out of FIR No.829/16 registered at Police Station Prashant Vihar, Delhi convicting both the Appellants – who were accused Nos.1 and 2 for the offence under Section 302/34 IPC and sentencing the appellants to life imprisonment and a fine of Rs.5,000/- each. In default of payment of fine, they have been directed to undergo further simple imprisonment for 6 months. They were further sentenced to 7 years Rigorous Imprisonment under Section 307 IPC with fine of Rs. 5,000/- each, in default of payment of fine, to undergo further simple imprisonment for 6 months. There were 3 other accused in the case. Accused Nos. 3 and 4 Sunil Kumar @ Lala and Salman Khan respectively were acquitted. Accused No.5 Kapil was not tried as he was declared as proclaimed offender. A Juvenile in conflict with the law (JCL) Adil was also allegedly involved in the crime.

2. Brief facts stated are that on 21.11.2016 in the night hours at about 11:00-11:15 PM one Lakshit Gaur (PW3) heard some noise and he went out of his house. His two neighbours also came out of their house. He noticed a boy lying injured in front of a shop No. G-2/34, Sector 11, Rohini and made a call from his mobile no. 9650044092 to the PCR. ASI Jagbir (PW11) on receiving the said information reached to the spot alongwith driver of PCR van and met the injured Ashish, and took him to hospital. On the way to the hospital, injured informed them that 3-4 unknown persons gave beatings to him and stabbed him and thereafter they ran away from the spot. He also informed that another person is lying nearby that spot. S.I. Vijay Kumar

(PW34) alongwith Ct. Sunny (PW23) reached the spot and found that the other injured person Pankaj Gupta (PW7) was already taken to BSA hospital. They found blood on *chabutra*, ground, mattress, quilt and concrete block and seized samples of the same vide seizure memo Ex.PW23/A. Ct. Sunny was kept to guard the crime spot. S.I. Vijay Kumar reached BSA hospital. He found the injured Ashish admitted vide MLC No. 15206 and he was unfit for statement. Another injured Pankaj Gupta (PW7) was also admitted in the same hospital vide MLC No. 15207. S.I. Vijay Kumar received *pulandas* containing clothes of the injured Ashish and blood sample alongwith seal of BSA hospital, which was seized vide seizure memo Ex.PW34/A. He made endorsement Ex.PW34/B; prepared rukka, and handed over same to Ct. Sunny for registration of FIR No. 829/16 Ex.PW9/B. On 22.11.2016 S.I. Vijay received information that the injured- Ashish succumbed to his injuries.

3. On 22/11/2016, investigation was handed over to Inspector Hans Raj Thakran (PW35). He prepared the death report Ex.PW35/B and got conducted Post Mortem of Ashish Ex.PW8/A, in BSA Hospital. Thereafter, Inspector Hans Raj alongwith S.I. Vijay Kumar reached the spot and found one CCTV camera installed at G-2/30 Sector 11, Rohini i.e. house of Faisal Raza. He collected the relevant CCTV footage of 21.11.2016 midnight in a pen drive and seized it vide seizure memo Ex.PW35/C. On 23.11.2016, he recorded the statement of injured eye witness Pankaj Gupta who was admitted in BSA Hospital. PW7- Pankaj Gupta handed over his clothes worn by him at the time of incident to PW35 and the same were seized vide seizure memo Ex.PW7/A.

4. On 25.11.2016, PW35 received secret information on 25.11.2016 on the basis which, JCL Adil was apprehended. His version was recorded and during his personal search one mobile phone bearing phone No. 9717825490 was got recovered. The IO received further secret information on 28.11.2016, on the basis of which, Chhota Salman (A-1) was apprehended and arrested vide Arrest Memo Ex.PW14/A. His personal search was conducted vide Personal Search Memo Ex.PW14/B. On 28.11.2016, accused Sunil Kumar @ Lala was apprehended at pointing of Chhota Salman. He was interrogated and arrested vide Arrest Memo Ex.PW14/E. His personal search was conducted vide Personal Search Memo Ex.PW14/F and one mobile phone with Vodafone SIM was seized vide Seizure Memo Ex.PW14/G. On 05.12.2016, accused Raman (A-2) surrendered in Court and was arrested vide Arrest Memo Ex.PW35/D. His personal search was done vide Personal Search Memo. Ex. PW35/E. On 14.12.2016, another Accused Salman Khan surrendered in Police Station- Prashant Vihar. He was interrogated and was arrested vide Arrest Memo Ex.PW35/J. His personal search was carried out vide Personal Search Memo. Ex. PW35/K.

5. Accused Salman Khan lead the police team to a workshop and pointed out Maruti Alto car bearing registration number HR 10 J 3159, used in committing the offence. The same was seized vide Ex.PW35/N. The I.O. Inspector Hans Raj prepared Site Plan Ex.PW35/O.

6. Learned Metropolitan Magistrate after complying with the provisions of Section 207 Cr.P.C. committed the case to Sessions Court as offence under Section 302 and 307 IPC are exclusively triable by the Sessions Court. All the four accused were charged for the offence punishable under Section 302/307 read with 120B to which they pleaded not guilty and claimed trial.

7. Prosecution has examined 35 witnesses including PW3- Lakshit Gaur; PW7- Sh. Pankaj Gupta, injured eye-witness and PW11-ASI Jagbir after which the Prosecution Evidence was closed and thereafter statements of accused persons under Section 313 were recorded. Accused Sunil led Ms. Kiran, Deputy Superintendent, Jail-5 as DW1. Thereafter, Defence Evidence was closed and arguments were heard and learned trial Court passed the impugned Judgment and Order on Sentence. Hence the present appeal.

8. Learned senior counsel for the appellants, Ms. Rebecca John has submitted that the prosecution's case is based on testimony of Pankaj Gupta (PW7)- the injured eye-witness. She submits PW7 is not a reliable witness because his statement is not the basis of the present FIR No. 829/16 and as such, it does not inspire confidence. There is no satisfactory explanation coming on the record as to why his statement was not recorded at the initial stage.

9. Ms. Rebecca John has further submitted that PW7 had consumed a full bottle of alcohol, and so was highly intoxicated, and so he could not have identified the assailant in his highly inebriated condition. She further submits that there was no source of light, and it was dark for any one to be able to identify the assailants with any definiteness. Thus, the theory of correct identification creates doubt for want of sufficient source of light, such as, street light. In this regard, she points out that there is no street light shown in the site plan. The accused were strangers and their features were not disclosed by PW-7, which could have lent credibility to his statement regarding the identity of the accused.

10. Ms. Rebecca John has pointed out that TIP proceedings Ex.PW7/B and Ex.PW7/C are not reliable, as the photograph of the accused Chhota

Salman (A-1) was already shown to PW7 prior to TIP proceedings. She submits that PW7 has not identified Sunil, the co-assailant, during TIP proceedings, while co-accused Sunil was also present amongst nine other persons. However, he was identified in the Court, which probablises the fact that the accused were shown to PW7 before his deposition in the Court.

11. Ms. Rebecca John has further submitted that no weapons of offence were recovered during investigation at the instance of accused person. She submits that prosecution failed to effect recovery of clothes or other material which could connect the accused with the crime and establish the chain of circumstances to show guilt of appellants. Ld. Senior counsel has further submitted that so far as the injuries caused on the person of the deceased and PW7 are concerned, the same could possibly have been inflicted by them on each other (deceased and PW7), as both of them were heavily drunk, and PW7 is not coming out with the true facts. Therefore, Ms. Rebecca John submits that finding of the Court below is contrary to facts emerging on record and is liable to be set aside, and she prays that the appellants be acquitted. She has placed reliance on the following judgments:

- i. ***Md. Sajjad @ Raju @ Salim v. State of West Bengal***, SC CrI. A. No. 1953/2010.
- ii. ***Bhimappa Chandappa Hoshamani v. State of Karnataka***, 2006 (3) JCC 1670.
- iii. ***Kuna V. State of Odisha***, AIR 2017 SC 5363.
- iv. ***Shaikh Umar Ahmed Shaikh & Another v. State of Maharashtra***, (1998) 5 SCC 103.
- v. ***Joseph vs. State of Kerala***, (2003) 1 SCC 465.

12. On the contrary, Ms. Dhalla has submitted that the present appeal is based on eye witness account of Pankaj Gupta, PW7 and further submits that

PW7 has fully supported the prosecutions case. All accused persons - at around 11:15 PM reached at spot as shown in site plan Ex.PW33/A where deceased and injured PW7 were sleeping under the quilt and were assaulted with knife blow and a blow with screwdriver due to which Ashish succumbed to his injuries in hospital on the very next day. Public came and the accused persons fled away from the spot.

13. Somebody made a telephone call to the police station and PCR reached to spot and deceased Ashish was taken in PCR van to BSA Hospital and examined vide MLC No. 15206/16 Ex.PW25/A. Ashish informed about the presence of another injured person at the spot on way to the hospital. Thereafter, one another PCR van came and PW7 was taken to BSA hospital and admitted vide MLC No 15207/16 Ex.PW6/A. Ms. Dhalla further pointed out that deceased Ashish deposed on the way to the hospital that he was assaulted by 3-4 unknown persons. Ms. Dhalla further submits that on the assailants being arrested, PW7 correctly identified Chhota Salman and Raman in TIP proceeding and also in Court proceeding.

14. Ms. Dhalla further submitted that PW7 is an injured eye witness and his testimony carries much weight and cannot simply be brushed aside.

15. Ms. Dhalla relies on the testimony of Javed (PW13), that the co-accused Salman Khan used to collect waste from SFS apartments and Salman's contract got cancelled and now he collects the waste from those Apartment. Because of this reason, relations between PW13 and co-accused Salman deteriorated. It was PW13 who used to sleep outside the shop, and in order to eliminate PW13 the conspiracy was hatched. However on the date of the incident, Ashish was sleeping outside the shop and not Javed. Thus Ashish got killed due to mistaken identity. After committing the crime all the

three assailants ran away. The statement of PW13 is corroborated by S.P. Aggarwal (PW5).

16. Ms. Dhalla further submitted that PW7 is an injured Eye Witness who has identified both the appellants during TIP proceedings and in Court. The facts on record show that the accused wanted to eliminate Javed, and mistakenly murdered Ashish. Therefore, there exists the motive and the prosecution has proved its case beyond reasonable doubt and the Court below has rightly convicted the appellants.

17. We have heard the learned counsels and perused the evidence on record.

18. The prosecution has examined the injured witness Pankaj Gupta (PW7) who deposed that he works as a scrap dealer for last twelve years. He used to ply cargo tricycle. On 21.11.2016, in the night hours, he took dinner and slept outside the shop of *Kabari*- Javed situated at G-2/34 Sector 11-Rohini, Delhi. When he was sleeping, three boys came to the spot, and assaulted Ashish. PW7 woke up and objected to that assault, on which those three persons assaulted him too. Those persons were armed, one of them was carrying a knife, another was carrying a screw driver and the third boy was armed with some weapon but he is not able to recollect the type of weapon. Those boys gave knife blows on his hip, on his right arm with screw driver, and also on the chest and stomach. Some public persons gathered there and all the three persons ran away. Someone made call to police on 100 number. PCR van reached there and took Ashish in the PCR van. Ashish had sustained knife injuries in his stomach and was bleeding profusely. Another PCR van came and took him (PW7) to BSA hospital where both were medically examined by the doctor. PW7 was given stitches on the back i.e.

hip where the stab wound was caused. Javed also reached the hospital. After sometime, Javed told him that doctors had declared Ashish dead. Police made inquiries from him but due to pain he could not give any statement. His statement was recorded by police on 23.11.2016. The witness pointed towards three persons, who attacked him. He identified all accused persons except accused Salman Khan. He also gave his blood stained clothes to the police in the police station and police seized the same vide seizure memo Ex.PW7/A. PW7 was cross examined on behalf of the accused.

19. We have examined the testimony of PW-7 threadbare. The statement of the PW7 does not inspire confidence of it being entirely reliable to found the conviction of the accused on, particularly when there is no corroboration of the said statement, for the following reasons:-

PW-25 Dr. Satya Ranjan Panda, who examined the deceased as well as PW-7 stated that PW-7 was brought by a PCR Constable Bhagirath at 12:13 a.m. on 22.04.2016, but the patient left the casualty at that time. He came to the casualty at 3:45 a.m. with alleged history of stab injury approximately four hours back as told by the patient himself. He was conscious and oriented and smell of alcohol was present in the breath. PW-7 was having percentage of alcohol in breathe as 718.6 mg/100 ml, which was highly excessive. Pertinently, the level of alcohol in the blood of PW-7 taken note of herein above was found even after the expiry of at least 4-5 hours of the incident. PW-35 IO during cross examination on behalf of the accused Chhota Salman stated that he reached the hospital at 11:30 a.m. i.e. during the day on 22.11.2016. PW-7 Pankaj Gupta was found admitted in the BSA hospital. He was not fit for statement. The statement PW-7 Pankaj Gupta was recorded only on 23.11.2016 at 5:00 p.m. PW-34 SI Vijay

Kumar, inter alia, stated that he along with Const. Sunny went to BSA hospital and collected the MLC of the two injured. In the hospital, he met PW-7, who was under the influence of liquor and, therefore, his statement was not recorded. PW-34 also stated that he met the injured PW-7 Pankaj at 4:30 a.m. on the same day and he concluded that he was under the influence of liquor and was not able to give any coherent reply.

20. Thus, it is evident that the reason for the statement of PW-7 not being recorded earlier was his highly inebriated condition. The same could be recorded only on 23.11.2016 at 5:00 p.m. when the effect of intoxication had faded away sufficiently to enable PW-7 to make a statement. PW7 being in such a highly toxic condition at the time of the incident; his being asleep and suddenly woken up on account of the deceased Ashish being attacked, raises doubt about the capacity of PW-7 to clearly identify the assailants. In such a situation it cannot be said with definiteness that PW7 would have had the alertness to absorb the situation and register the identity of the assailants in his mind. The possibility of his not being able to register the facts of the assailants due to his own inebriated condition; due to the fact that he was sleeping and was suddenly woken up; due to no known source of light, and; due to the fact that the incident took place in a very short span of time, cannot be ruled out. It has not even been established on record that there was sufficient light at the place of incident at the relevant point of time. PW-7 admitted to have consumed a whole bottle of liquor on his own, which he purchased from a shop in Sector-11, Rohini.

21. PW-7 during his cross examination stated that he woke up after sustaining injury and that Ashish had already sustained injury before he died.

Thus, he also stated that he raised an alarm after sustaining injury and on raising alarm, the assailants ran away. He raised alarm as soon as he sustained injury. He did not chase the assailants.

22. The statement of PW-7 in his cross examination goes against the case of the prosecution that PW-7 woke up when Ashish was being attacked and when he tried to intervene, he too was attacked. As noticed herein above, he stated that he woke up after sustaining injury. While the case of the prosecution and the deposition of PW7 in his examination in-chief was that he and Ashish were taken to the hospital in different vans in his cross examination PW7 stated that he and Ashish were taken in the same van to the hospital. Thus, PW-7 was wavering in his statements. While PW-7 claimed that his statement could not be recorded earlier due to pain, the testimonies of PW-34 and PW-35 show that his statement could not be recorded on account of his intoxication. Thus, it appears that PW-7 was not truthful with regard to the reason for his statement not being recorded before 5:00 p.m. on 23.11.2016.

23. He claimed that he was not conscious in the PCR van and therefore, did not tell anything to the PCR officials as to how he sustained injury. However, he explained his leaving the hospital for a few hours by stating that since he was not being attended to, he left the hospital and came back after four hours. If he was unconscious, he would not have walked away from the hospital as claimed by him. Pertinently, he claimed that he regained consciousness in the morning at the hospital at 6:00 a.m. and that the doctor did not inquire from him as to how he sustained the injuries. This statement of PW-7 is contradicted by the statement of PW-25 Dr Panda, who

stated that PW-7 was brought to by PCR Const. Bhagirath at 12:13 a.m., and he left the casualty at that time. He came back to the casualty only at 3:45 a.m. with the alleged history of stab injury approximately four hours back as told by the patient himself.

24. On cross examination on behalf of the accused Raman, PW-7 stated that he could not tell the colour of the clothes of the accused persons due to night time. He only stated that one of the assailants was wearing a monkey cap and that one was wearing a jacket, but he could not tell about the other two assailants. However, in another part of his cross examination, he stated that there was light at the place of incident.

25. Neither the rough site plan Ex. PW-34/C nor the scale site plan Ex. PW-33/A show the source of light at the place of incident. Pertinently, no weapon of offence has been recovered in the present case; no blood stained clothes of the accused have been recovered - which could be matched with the blood of either the deceased or PW-7 injured; the evidence with regard to the mobile phone was of no avail – since either the witnesses produced turned hostile or the relevant witnesses were not examined, and; the CCTV footage was of no avail on account of low pixel.

26. In *Bhimappa Chandappa Hoshamani* (supra), the Supreme Court has observed that on the basis of the testimony of a single eye witness a conviction may be recorded, but it has also been cautioned that while doing so, the court must be satisfied that the testimony of the solitary eye witness is of such sterling quality that the court find it safe to base the conviction safely on the testimony of that witness. In doing so, the court must test the

credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion and must impress the court as wholly truthful. It must appear to be natural and so convincing that the court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness.

27. Looking to the highly inebriated condition in which PW-7 was at the relevant time; the fact that he was sleeping when the incident occurred and he was woken up suddenly on account of the attack on Ashish; the place of incident is not shown to have had sufficient light, and; the several contradictions in the testimony of PW7 we are of the considered view that the testimony of PW-7 in the present case cannot be considered as credible and, therefore, safe enough to base the conviction of the appellants upon.

28. We may also refer to the decision of the Supreme Court in ***Kuna*** (supra). In this case, the prosecution had based its case upon the testimony of PW-1 the solitary eye witness to the incident. The incident had taken place between 1:00 a.m. and 2:00 a.m. The spot map Ex. PW-11 did not mention about any source of light in the locality. It did not indicate whether the area was lighted at the time of the incident so as to make the viewing of the incident possible by PW-1 from the place where he was located. PW-1 at the relevant time was intoxicated. After noticing several other aspects, the Supreme Court held that the evidence of PW-1 was not reliable.

29. We may also refer to the decision of the Supreme Court in ***Joseph*** (supra). The Supreme Court observed that when the case of the prosecution rests mainly on the sole testimony of an eye witness, it should be wholly

reliable even in the case of an injured eye witness, when his evidence is in conflict with the other evidence. In the present case, there is no corroboration of the statement of PW7 to nail the appellants for commission of the crime.

30. We also find merit in the submission of Ms. Rebecca John that if it were to be believed that PW7 was not highly inebriated at the time of the incident, in that case the statement of PW-7 was not recorded at the earliest stage, and there is no cogent explanation for the same. The MLC Ex. PW-6/A does not record that PW-7 was unfit for making statement. In fact, the MLC records that he himself disclosed that he had been stabbed.

31. As per the case of the prosecution, the accused Raman in pursuance of his disclosure statement, got recovered a grey T-shirt Ex. PW-30/Article 1, which was seized vide seizure memo Ex. PW-30/B. Pertinently, the T-shirt of the accused Raman Ex. PW-30/Article 1 tested negative for blood as per the FSL report Ex. PW-22/A. In this regard, our attention has been drawn to Ex.10 of the description of articles contained in the parcel as received by FSL.

32. As argued by Ms. Rebecca John, the identification of the accused also appears to be doubtful in the present case. The accused Chhota Salman was arrested on 28.11.2016. However, his TIP was conducted only on 03.12.2016 i.e. 5 days later. There is no explanation for this delay. It is pertinent to note that the accused No.3 Sunil Kumar @ Lala was also lined up during the identification parade. PW-7 did not identify him during the TIP. However, Sunil Kumar was identified in Court. This itself raises doubt

about the genuineness of the TIP proceedings as well as the dock identification proceedings. PW7 during the cross examination has admitted that the voice in video recorded in mobile phone Ex.PW7/articleX belongs to him which gives rise to the doubt that the photographs of the appellant Raman was shown to PW7 at police station prior to the TIP Proceedings.

33. PW-29 Faizal Raza produced the CCTV footage of his DVR. However, as per the forensic report Ex. PW-35/T on account of low pixel, it was not possible to identify the persons seen in the said CCTV footage. The said CCTV footage was, therefore, found to be of no avail. We may also observe that the prosecution sought to lead in evidence the CDRs of the mobile phones stated to have been used by the accused. However, the prosecution witnesses PW-21 Sagar and PW-28 Govinda turned hostile. At the same time, the prosecution did not examine the registered user of mobile phone no.7053025701 – allegedly used by Chhota Salman, which was in the name of Rohit, as well as the registered user of mobile phone no.7551156462 – allegedly used by the accused Raman, which was in the name of Gaya Prasad, to establish their location at the crime scene at the relevant time. We may also observe that the Trial Court has not placed reliance on the said evidence led by the prosecution while convicting the appellants.

Conclusion

34. As discussed above the prosecution case is based on sole eye witness statement of (PW7) which does not inspire confidence. The weapon of offence i.e. knife and screwdriver was not recovered at the instance of the accused persons. The recovery of grey T-Shirt Ex.PW30/article1 at the

instance of the accused Raman does not connect to two appellants with the crime. The CCTV Footage Ex.PW35/C also failed to connect accused persons to the alleged offence. None of the circumstances connect the accused persons to the alleged offence. The appellants have raised sufficient doubt on the case of the prosecution. Therefore, both the accused persons are acquitted from charges framed against them.

35. As such, we set aside Judgment dated 22.01.2018 and order on sentence dated 30.01.2018 and acquit both the appellants A-1 and A-2.

36. The appeal is accordingly allowed, with no orders as to costs. Unless wanted in any other case, both the appellant-accused shall be released forthwith. They will comply with the requirement of Section 437A Cr.P.C by furnishing a bond to the satisfaction of the trial Court for the amount as may be determined by the Trial Court. Fine amount, if deposited as per the impugned Judgment and order, be refunded to the Appellants.

37. The trial Court record be sent back together with a certified copy of this judgment.

**I.S.MEHTA
(JUDGE)**

**VIPIN SANGHI
(JUDGE)**

OCTOBER 23, 2018