

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

Date of Decision: February 17, 2018

(i) + **CRL.A. 412/2017**

KAMAL Appellant

Through: Mr. Sumeet Verma &
Mr. Aman Chaudhary, Advocates

Versus

STATE Respondents

Through: Mr. Amit Ahlawat, Additional Public
Prosecutor for State with SI Ramesh Kumar, Police
Station Sultan Puri, Delhi

(ii) + **CRL.A. 441/2017**

DEEPAK @ RAHUL Appellant

Through: Mr. Dhan Mohan, Ms. Thanu B. Mishra,
Mr. Ravi Mishra, Mr. Jitendera, Ms. Harkamal Jeet
Kaur, Mr. Gagandeep Kulyana & Ms. Manisha
Saharan, Advocates

Versus

STATE (GNCT) OF DELHI Respondent

Through: Mr. Amit Ahlawat, Additional Public
Prosecutor for State with SI Ramesh Kumar, Police
Station Sultan Puri, Delhi

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

JUDGMENT
(ORAL)

SUNIL GAUR, J

1. The above captioned two appeals arise out of common impugned judgment of 28th November, 2016, vide which both the appellants have been held guilty of the offence under Section 302/34 of IPC and vide impugned order of 30th November, 2016, they have been sentenced to imprisonment for life and fine with default clause.

2. Since these two appeals arise out of common impugned judgment and order, therefore, with the consent of counsel representing both the sides, these appeals have been heard together and are being disposed of by this common judgment.

3. The substratum of the prosecution case, as noticed in the impugned judgment, is as under:-

“2. Case of the prosecution is that on 10.12.2013 at about 8:00 pm. Surender Nagar (the complainant) came to Shani Bazar, Near Government School in his vehicle to collect the fare of his vehicle and once he reached Kirari Road, he saw his nephew Satish who was sitting on his motorcycle no.DL4SBT-2806 and was talking to Kamlesh w/o Kamal. The moment he parked his vehicle in front of meat shop and came out, he noticed that Kamal (the accused no.2/husband of Kamlesh) and one more boy attacked upon Satish. Accused no.2 was carrying a knife in his hand and gave the knife blows on the stomach and thigh of Satish. The boy who accompanied the accused no.1 put his hand on the chick of Satish and inflicted blow with some sharp object. To save himself, Satish ran towards the market and fell down unconsciously. The complainant raised alarm. In the meantime, two police officials, who were patrolling in the

area came on foot at the spot. The complainant along with the said police officials apprehended the accused no.2 and his associate. The complainant pulled the knife from the hand of the accused no.2. On inquiry, name of second boy came to know as Rahul (the accused no.1). Ct. Nausahd Ali removed Satish in the hospital in an auto rickshaw (TSR) where he was declared dead”

4. During trial, prosecution has relied upon evidence of complainant – *Surender Nagar (PW25)*, who happens to have witnessed this incident, the medical evidence and the other evidence on record. Injured Satish was medically examined by Dr. Ankur Jain and MLC prepared by him is proved by Dr. Gupta (PW17). Dr. Manoj Dhingra (PW18) had conducted post mortem on the body of deceased and post mortem report prepared by him has been proved by Dr. Vivek Rawat (PW22).

5. Prosecution has relied upon evidence of Nodal Officers- PW14 and PW15 and ‘*Call Detail Record*’ of mobile phones of deceased and that of *Kamlesh*, wife of appellant-*Kamal*. *Madhu* (PW20), sister of deceased, in her evidence has asserted that mobile phone No. 9716375206 belonged to her but it was being used by the deceased. It has come in the evidence of Nodal Officer *Chander Shekhar* (PW15) that mobile No. 9818251808 was in the name of *Mrs. Raj* (PW21), mother-in-law of appellant- *Kamal*. Prosecution has relied upon ‘*Call Detail Record*’ (EX PW14/C) to show that on 9th and 10th December, 2013, various calls were made from mobile No.9716375206 (*which was with the deceased*) on mobile No.9818251808, which was issued in the name of *Mrs. Raj* (PW21), mother-in-law of appellant-*Kamal*, who has deposed that she had given this mobile number to her daughter *Kamlesh* (PW26) for her personal use.

The forensic evidence on record reveals that the recovered knife (Ex-1) was blood stained.

6. Though it is the prosecution case that there were illicit relations between *Kamlesh* -wife of appellant- *Kamal* and the deceased but *Kamlesh* (PW26), has not supported the prosecution case. However, trial court has relied upon deposition of eye witness-*Surender Nagar* (PW25), medical evidence and the other evidence on record to hold that both the appellants are guilty of commission of offences in question.

7. Both the appellants in their statements under Section 313 of Cr.P.C. have denied the prosecution case but have not chosen to lead any evidence in their defence.

8. The challenge to the impugned judgment and the order on sentence by learned counsel for appellants is on the ground that the fatal injury suffered by deceased- *Satish* was on his thigh and as per ocular version, this injury has not been attributed to any of appellants/ accused persons. It is pointed out that the injury on the thigh of deceased alone was found to be fatal.

9. Learned counsel for appellant- *Kamal* submits that apart from evidence of *Surender Nagar* (PW25), this incident was witnessed by one *Suresh* and he has not been got examined by prosecution and *Kamlesh* (PW26) has turned hostile to the prosecution case. It is submitted that the solitary evidence of *Surender Nagar* (PW25) cannot be relied upon for the reason that his conduct is unnatural. It is next submitted that although this witness-*Surender Nagar* (PW25) had overpowered the appellants, but he had not sustained any injury and he had not accompanied his nephew *Satish* to the hospital and had remained at the spot. It is further submitted

by counsel for appellant-*Kamal* that though it is the prosecution case that appellant-accused was arrested from the spot but as per their Arrest Memo, they were arrested at 03:00 a.m. on 11th December, 2013 and not on the day of incident i.e. on 10th December, 2013.

10. On behalf of appellant- *Deepak @ Rahul*, learned counsel for appellant submits that even if the prosecution case is taken as it is, still no motive can be attributed to appellant - *Deepak @ Rahul* and that this appellant had not facilitated the offence of murder and only simple injuries have been attributed to him and that the blood on the blade did not match with the blood of the deceased and so, *Deepak @ Rahul*'s conviction ought to be altered from Section 302/34 of IPC to Section 323/34 of IPC. It is submitted that appellant- *Deepak @ Rahul* has already undergone sentence of four years, out of the sentence awarded to him and so, the sentence awarded to him deserves to be reduced to the period already undergone by him.

11. Upon hearing and on perusal of evidence on record, we find that the sole testimony of eye witness-*Surender Nagar (PW25)* cannot be discarded merely because he has not sustained any injury while overpowering the appellants or that he had not accompanied his nephew to the hospital and because on these aspects, this witness has not been cross-examined. Had there been cross-examination of this witness on these aspects, perhaps a plausible answer could have been given by this witness (*PW25*). We have meticulously analyzed the evidence of eye witness-*Surender Nagar (PW25)* and we find that his presence on the spot cannot be doubted and that his conduct is quite natural. Merely because corroborative evidence of *Suresh*, who was also present at the

time of this incident, is not forthcoming, would not be a ground to discard the otherwise reliable evidence of *Surender Nagar (PW25)*. In a case of eye witness account, the evidence of motive pales into insignificance and so, hostility of *Kamlesh (PW 26)* to the prosecution case does not in any way demolish the otherwise reliable prosecution version. The ocular version reveals that this incident was witnessed by eye witness-*Surender Nagar (PW25)* from a little distance and so, this witness is not required to graphically disclose as to how many blows exactly were inflicted by appellant- *Kamal* on the person of deceased. The medical evidence reveals that five injuries were sustained by the deceased which are as under:-

1. *Stab wound over right thigh medical aspect. 3cm X 2 cm.*
2. *Stab wound over abdomen above umbilicus right side. 2cm X 1.5 cm.*
3. *Stab wound over abdomen above umbilicus left side. 3cm X 2 cm.*
4. *Incised wound over right side of face. 5 cm X 0.5 cm.*
5. *Incised wound over left side of face. 6 cm X 0.2 cm and 3cm X 0.2 cm.*

12. The injury on the thigh of deceased has been opined to be fatal and the ocular version reveals that this injury was also inflicted by appellant- *Kamal* while giving multiple blows to the deceased. So far as appellant- *Deepak @ Rahul* is concerned, the evidence on record is clear that only two injuries on the cheeks of deceased are attributed to him. Although there is nothing on record to show that these two injuries on the cheeks of deceased were of simple nature but even if it is taken that the two injuries attributed to appellant - *Deepak @ Rahul* were of grievous nature, still these two injuries on the cheek of deceased have not proved to be fatal.

13. The discrepancy pointed out in the prosecution case regarding the time of arrest of accused does not in any way cause dent to the prosecution case for the reason that though appellants were apprehended on the spot but after spot proceedings, they were formally arrested and it is for this reason that arrest of appellant is shown to be at 03:00 a.m. on the night intervening 10th and 11th December, 2013.

14. Upon indepth appreciation of evidence on record, we are of the considered opinion that the deposition of eye witness-*Surender Nagar (PW25)* remains unshaken and infact it firmly establishes the prosecution case. The sequence of events reveals that the prosecution version is consistent and reliable and there is no basis to hold that appellant- *Kamal* had no intention to cause death of the deceased. Infact, appellant- *Kamal* had inflicted multiple grievous injuries to the deceased and the grievous injury on the thigh of the deceased proved to be fatal. It cannot be inferred that the incident in question took place on the spur of moment. The complicity of appellant –*Kamal* in intentionally causing death of *Satish* is established, which justifies the sentence awarded to him.

15. So far as appellant - *Deepak @ Rahul* is concerned, we find that he had no intention or knowledge that by inflicting two blows on the cheek of deceased, it would result in causing death of *Satish*. It is also not the prosecution case that *Satish* had died due to two blows on cheek of deceased attributed to appellant- *Deepak @ Rahul* or that appellant *Deepak @ Rahul* had shared intention of main accused to cause death of *Satish*. Thus, it cannot be said that appellant- *Deepak @ Rahul* had any intention/knowledge to cause death of *Satish*. The offence committed by

appellant- *Deepak @ Rahul* comes within the ambit of Section 325 of IPC, which is punishable with imprisonment upto seven years and fine.

16. Consequentially, while upholding the conviction and sentence awarded to appellant –*Kamal*, the conviction of appellant- *Deepak @ Rahul* is altered from Section 302 of IPC to Section 325 of IPC and he is accordingly sentenced to rigorous imprisonment for five years with fine of ₹15,000/- and in default thereof, to undergo simple imprisonment of three months.

17. The above captioned two appeals are disposed of in the aforesaid terms.

(SUNIL GAUR)
JUDGE

(PRATHIBA M. SINGH)
JUDGE

FEBRUARY 17, 2018

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