

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

% *Judgment delivered on: 15.05.2019*

+ **CRL. A. 562/2014**

MUKESH LAL ... Appellant

VERSUS

STATE ... Respondent

+ **CRL.A. 629/2014**

DHIRAJ SOLANKI ... Appellant

VERSUS

STATE ... Respondent

+ **CRL.A. 635/2014**

CHANDGI RAM ... Appellant

VERSUS

STATE ... Respondent

+ **CRL.A.715/2014**

PRAMOD KUMAR SHARMA ... Appellant

VERSUS

STATE ... Respondent

+ **CRL.A. 817/2014**

NARENDER CHAUHAN ... Appellant

VERSUS

STATE

... Respondent

+

CRL.A. 838/2014

MANOJ

... Appellant

VERSUS

STATE

... Respondent

+

CRL.A. 1636/2014

STATE

... Appellant

VERSUS

SUNIL CHAUHAN

... Respondent

+

CRL.A. 53/2015

STATE (GNCT) OF DELHI

... Appellant

VERSUS

CHANDGI RAM & ORS.

... Respondents

Advocates appeared in this case:

For the Appellants: Mr. Joginder Tuli, Mr. Ashu Kr. Sharma, Ms. Joshini Tuli & Ms. Babita Rana, Advocates in Crl. A. 562/2014.
Mr. Ravi Nayak, APP for the State in Crl. A. Nos. 1636/2014 & 53/2015.
Mr. Bharat Dubey, Mr. Paul N. Prem & Ms. Divyansha Dubey, Advocates in Crl. A. Nos. 629/2014, 635/2014,
Mr. Neeraj Bhardwaj, Advocate in Crl. A. Nos. 817/2014 & 838/2014.

For the Respondents: Mr. Joginder Tuli, Mr. Ashu Kr. Sharma, Ms. Joshini Tuli & Ms. Babita Rana, Advocates in Crl. A. 1636/2014 & 53/2015.
Mr. Ravi Nayak, APP for the State in Crl. A. Nos. 562/2014, 629/2014 & 635/2014.

Ms. Rajni Gupta, APP for the State in CrI. A. Nos. 715/2014, 817/2014 & 838/2014.

Mr. Neeraj Bhardwaj, Advocate for R- 4 & 5 in CrI. A. 53/2015.

Mr. Ashok Kr. Singh, Sr. Adv. with Ms. Nikita Batra, Ms. Mona Tomar, Advs. for complainant/ victim.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE NAJMI WAZIRI

JUDGMENT

NAJMI WAZIRI, J.

1. These eight appeals impugn the order on conviction and sentence dated 23.04.2014 and 29.04.2014, respectively passed by the learned Additional Sessions Judge 01 (East), Karkardooma Court, Delhi wherein the five accused, the appellants in CrI.A. 562/2014, CrI.A.629/2014, CrI.A. 635/2014, CrI.A.838/2014 and CrI.A.817/2014, have been held guilty. The order has acquitted one accused viz Sunil Chauhan, which decision has separately been challenged in CrI.A.715/2014 filed by the father of the deceased and CrI.A.1636/2014 filed by the State. The State (GNCT of Delhi) has also filed an appeal against the quantum of sentence passed against the five convicts which is subject matter of CrI.A.53/2015.
2. It is the prosecution's case that DD No. 69B was registered at P.S. Anand Vihar on 30.09.2009 at 10.51 p.m. regarding gun shots having been fired at Masih Petrol Pump, Anand Vihar, in which one person had sustained injuries. ASI Ramesh Chand (PW36) alongwith Ct. Ashok Kumar (PW-9) reached the spot, where they met the accused Mukesh. He informed the policemen that 4-5 persons in a Honda City motor car bearing registration number UP 16A 3510, had come to the petrol pump at about 10.00 p.m.; that they were evidently inebriated and one of them started to relieve himself in front of 'In and Out'-- a convenience shop located

within the premises of the petrol station. Mukesh objected to the urination; it led to a quarrel, which became a scuffle and then a fight; the security guard at the petrol pump fired his gun five times; one of the gunshots hit one of the visitors- Himanshu. He died of the gun shot injury.

3. Vineet Sharma (PW5) made a complaint to the police stating that at around 10 p.m. he, alongwith his friends Anikesh (PW1), Rahul (PW2), Manoj (PW4) and Himanshu, went to the Masih Petrol Pump in their Honda City car bearing no. UP 16A 3510. After the car was parked, Himanshu started relieving himself against the wall adjacent to the 'In and Out' outlet. A man, later identified as Mukesh Lal- accused, attempted to stop him, which led to an altercation between the parties. PW-5, alongwith his three other friends came to help the deceased, meanwhile the accused, Mukesh Lal called his employees, who started beating Himanshu with a stick and chains. Accused - Mukesh Lal also exhorted co-accused Chandgi Ram to fire at Himanshu. About 4-5 shots were fired from a double barrel gun by co-accused Changdi Ram, one of the shots fatally hit Himanshu in his armpit.
4. With the help of his other friends complainant PW-5, rushed Himanshu to Pushpanjali Hospital, where he was declared brought dead by the attending doctor. On the basis of the Medical Report (PW36) of the attending doctor the police prepared a rukka (Ex.PW5/A), later an FIR bearing no.433/09 was registered at P.S. Anand Vihar under sections 302/34, 323/34, 325/34 IPC. Charges were framed against accused Chandgi Ram, Mukesh Lal and Dhiraj Solanki vide order dated 25.03.2010, to which they pleaded "not guilty" and claimed trial. A

supplementary Chargesheet was also filed, and Charges were framed against the other co-accused Narender Chauhan, Manoj and Sunil Chauhan vide order dated 01.06.2010, to which, these co-accused too pleaded “not guilty” and claimed trial. Chandgi Ram was additionally charged under section 30 Arms Act, 1959 on 25.03.2010 and also under section 27 Arms Act, 1959 on 04.04.2013 to which he pleaded “not guilty” and claimed trial.

Crl.A.562/2014, Crl.A.629/2014, Crl.A. 635/2014, Crl.A.838/2014 and Crl.A.817/2014

5. The convicts have preferred these five appeals under section 374(2) of the Code of Criminal Procedure, 1973, seeking *inter alia* the setting aside of the orders of their respective conviction and sentences. They have assailed the prosecution’s story, which formed the basis for the conviction.
6. The common ground of challenge of all five appellants is that although they have not denied the factum of death of Himanshu by the fifth round fired from a fire arm by co-accused Chandgi Ram, the cause for the shooting is sought to be justified on the ground that the deceased, alongwith PW-1, PW-2, PW-4 and PW-5 were accompanied by two other persons on a motorcycle and had attempted to commit theft at the fuel station and were firing indiscriminately. Resultantly, as a protective measure, the guard viz. accused Chandgi Ram, stationed there, first fired four rounds in the air to scare away the assailants, but when the deceased tried to snatch the rifle from Chandgi Ram, the fatal round was fired, hitting the deceased.
7. The learned counsel for Chandgi Ram, contends that the said appellant’s fifth round became fatal as it was fired only in the extreme and inevitable

circumstance when the deceased attempted to snatch the rifle from him although the appellant had shown extreme restraint and prudence in first firing four shots in the air to scare and chase away the aggressive lot of them who were attempting to loot the petrol pump. It is argued that the fact of close range fire has been proved from the testimony of PW-20, wherein blackening and tattooing is shown to be present around the deceased's wounds. However, this Court is not persuaded by the said argument as the MLC and Forensic Report show otherwise; in the Post Mortem Report, it is clearly stated that there is no blackening or tattooing present around the injury wound. It is also clear from the Report that 15 pellets were recovered from the body of the deceased, but the 'wad' was not recovered from the body. In a close range gun-shot wound, generally there is presence of blackening and tattooing, and most of the pellets and the 'wad' are recovered from the body; but in the present case it was not so, therefore, it could safely be deduced that the gunshot was not accidental or resulting from a close range gun-shot wound. In the circumstances, contention of the appellant that the injury to the deceased was accidental, is untenable.

8. The Appellant-Chandgi Ram has further challenged his conviction under Section 27/30 of the Arms Act for carrying a double barrel gun from Uttar Pradesh to Delhi without a valid license. It is argued that the appellant was unaware of the fact that the license was fake, as he was given this license by his lawyer in U.P. This however, is not a valid ground of defence under the IPC or Arms Act. Moreover, there is no complaint on record filed by the appellant against the lawyer, for cheating, as claimed by the appellant. The learned counsel for the State

contends that a separate FIR No. 543/09 dt.14.12.2009 was filed against the appellant in P.S. Anand Vihar under Section 420/466/467/468/471 IPC for carrying forged document. However, the appellant Chandgi Ram was acquitted in the said case. The said ground will not sustain as that FIR was for a different offence, which was independent of the present case. A copy of that judgment is not part of the record; even otherwise acquittal from charges of keeping and using forged document is distinct from the use of arms without a valid license. It has been established that the appellant-Chandgi Ram had no license to carry his double barrel gun to Delhi, yet he possessed and used it, in contravention of the Arms Act. Hence, the conviction and order on sentence under Sections 27 and 30 of the Arms Act shall sustain.

9. It has also been established that none of alleged first four shots fired by Chandgi Ram, hit any of the witness or any object or machinery installed or fastened at the fuel station. Nevertheless, the fifth and the fatal round was the cause of death of the deceased, which as per the depositions of PW1, PW2, PW4 and PW5, was on the exhortation of the appellant Mukesh Lal to Chandgi Ram to 'take proper aim and fire at the person'. This fact remains shaken in the cross examination of all the four witnesses.
10. The learned counsel for the appellant Mukesh Lal, relying upon the testimonies of PW-7, DW-1 and DW-7 states that the appellant had an alibi at the time of occurrence of the incident; he has also alleged that he offered a bribe of Rs. 10 lakhs to PW-36-the Investigating Officer (IO) on October 01, 2009 to close the matter, but the IO demanded Rs. 20 lakhs; on his failing to pay, he was unnecessarily arrayed and implicated as an

accused in the present case. Appellant Mukesh Lal's alibi is based on the testimony of PW6, PW7 and DW7. However, PW6 has neither supported the prosecution case nor the case of the defence. DW7 was produced before the Court as a chance and independent witness, but even after a careful reading to his testimony no reasonable person could be persuaded to accept the testimony, because even after witnessing the shooting incident, the said witness did not approach the police or any authority and was introduced by the defence at a much later stage. PW7 has not been completely relied by the learned Trial Court, because the said witness retracted his earlier statements made to the investigating officer, furthermore, he was a colleague of appellant Mukesh Lal, and therefore was deposing in favour of the accused. The reasoning is cogent and logical and calls for no interference.

11. Appellant, Dhiraj Solanki, contends that he was not named in the FIR; that he was illegally kept in police lockup by the police from October 19 to 25, 2009, during which his photographs were shown to PW1, PW2, PW4 and PW5 to falsely implicate him; later when he failed to oblige the police officer, he was arrested on 25.11.2009. DW2 and DW6 were produced in defence by this appellant, to state that Dhiraj was carrying a mobile phone number 9899005109 ever since 2007 and from this number he had called DW6 while in police custody. Both DW2 and DW6 were colleagues of Dhiraj at the Masih Fuel Station and there is all likelihood that they would be communicating with each other in the normal course, but it is not established that the said calls were made by Dhiraj while in alleged illegal police custody. It has also come on record that DW2 did not make any formal request to the service provider for change of the

mobile number. It is odd that despite being in illegal confinement but being able to call DW6, neither Dhiraj Solanki nor DW2 or DW6 reported the illegal act of the police to any authority or senior official, nor brought it to the notice of their employer. Dhiraj claimed to have been illegally confined alongwith other employees of the Masih Fuel Station namely Jitender and Vijay Pal. It is contended that the latter two were conveniently let off when they obliged the police officers with illegal gratification. None of the said persons were produced in their defence. It is also noteworthy that the *danda* was recovered from the roof of the fuel station at the instance of the appellant Dhiraj.

12. Similarly, appellants Manoj and Narender have contended that they were arrested after some time and falsely implicated that the only role assigned to them is that of assault, but they had not fired any gun shot. It is further argued that there are inconsistencies in the testimonies of the prosecution's eye-witnesses; that there was a sudden quarrel between the appellant-Chandgi Ram and the deceased; that appellants Manoj and Narender did not share a common intention to cause death of the deceased. It is further contended that PW1, PW2 and PW4 failed to identify the appellants in judicial TIP, whereas only PW5 was able to identify both of appellants. However, it is on record from the testimonies of PW1, PW2 and PW4 that PW5 Vineet Sharma, was closest to deceased Himanshu, in the whole incident. PW5 had more opportunities to see the culprits and assign specific role apropos each accused. PW5 has identified appellant Narender as well Manoj in the judicial TIP and also before the Court. PW1, PW2 and PW4 have identified the appellants in the Court only. Since each accused was assigned specific roles by the

four witnesses and their testimony has been consistent. There was thus, no denying the involvement of the five accused in the alleged incident.

13. In their deposition, all the four witnesses had identified all the six accused in the Court. The Ld. Trial Court found consistency in the depositions of the four witnesses i.e. PW-1, PW-2, PW-4 and PW-5 and they remained unshaken even after lengthy cross examinations which took place on various dates spanning some months.
14. Correspondingly, the Post Mortem Report proves the time of death to be around 11:15 pm. It noted six injuries and opined blunt assault before death. The report further states that injury no. 1 and 5 are caused by blunt force impact. Injury no.3 is caused by some sharp pointed object. Injury no. 2 and 4 are imprint injuries caused by blunt objects like belt and chain, etc. These injuries correspond to the testimonies of the four witnesses that the accused were armed with deadly weapons namely knife like object, broken glass bottle, *danda*, chain, belt, etc. The alleged stick/*danda* was recovered from the roof of the fuel station at the instance of appellant Dhiraj and the pieces of broken bottle was recovered by the Investigating Officer.
15. PW49, Assistant Director, Ballistic, FSL Rohini proved the Ballistic Report establishing that the pellets corresponded to gunshot no.1 from the same rifle seized from appellant Chandgi Ram.
16. The appellants never stepped into the witness box to explain the incident of alleged theft by the deceased along with PW1, PW2, PW4, PW5 and two other persons who had allegedly accompanied them on a motorcycle. The accused had contended that there were other employees present at the fuel station, but none of them were examined by them. The appellants

have also not explained as to which person attempted to loot the fuel station and how much cash was looted from which employee, if any. The details of telephone calls made to the PCR, registered at DD no. 59B, conspicuously do not mention any looting of cash. Interestingly, between 30.09.2009 to 5.10.2009, the managers and owners of the fuel station did not act reasonably to preserve the video camera footage of 30.09.2009 or otherwise report their being looted, to any police official. Furthermore, neither was any weapon recovered from the possession of PW1, PW2, PW4 or PW5 nor was any empty cartridge recovered from the spot or from the car of the aforementioned witnesses, which could have shown that shots were fired by the deceased or his friends to facilitate dacoity or looting.

17. Exhibit marked as Ex. PW21/C is the DD Entry made on the basis of information received from PW33, who was the first police official to reach the spot. He specifically records that there was a quarrel at the fuel station, during which the security guard of the said station had fired gun shots. There is no report of a theft or looting having taken place. The said information was received at 11:16 pm. The incident of firing took place between 10:30 pm – 10:45 pm and the above said information was gathered within one hour. There was no delay in filing of the FIR by the police which was filed on the basis of the aforementioned *rukka*. The plea raised by the appellants that the police officials have deliberately turned the case on its head under the influence of the father of the deceased, is not tenable.
18. As regards the plea against presence of ‘common intention’ it is settled law that for section 34 IPC to be invoked, the prosecution must prove (a)

presence of common intention; and (b) active participation. From the evidence on record, it is proven that the deceased was assaulted by some sharp weapon, stick, chain, etc. The Post Mortem Report stated that injuries on the body of the deceased were caused by sharp weapons, sticks, chains, etc., apart from gunshot wound. The appellants have not been able to satisfactorily explain the cause of the said injuries. Whereas, the friends of the deceased, the eye witnesses to the incident, have been able to cogently explain the said wounds, as a result of the assault by the appellants in various ways.

19. It is a settled proposition of law that: i) common intention can be formed at the spot of the crime, and ii) there need not be actual participation of all present to inflict the fatal blow. The accused were armed with deadly weapons and overpowered the deceased who was not armed. The use of deadly weapons, the act of surrounding the car, dragging the deceased out of it on the exhortation of accused Mukesh Lal to kill the deceased, establishes the common intention shared by the accused. The ingredients of section 34 IPC are therefore, clearly established against appellant Mukesh, Dhiraj, Manoj and Narender, whereas appellant Chandgi Ram had himself inflicted the fatal wound. The finding of the learned Trial Court that section 34 IPC incorporates the doctrine of vicarious liability and no overt act is required to be attributed to the individual accused cannot be faulted. The accused were acting upon the exhortation given by accused Mukesh Lal and as proved from the aforementioned testimonies, the exhortations were directly aimed at eliminating the deceased. The accused did not allow the deceased and his four friends to leave the spot and exhorted Chandgi Ram to aim specifically and fire the gun.

20. The appellants also contend that the charge of culpable homicide even if made out, will be covered under Exception IV of the section 302 IPC, since there was no premeditation and the injury was caused due to a sudden quarrel and in the heat of the moment; that the accused took no undue advantage of the deceased. The Court is unable to accept the above reasoning, because no doubt the incident had a genesis in a sudden quarrel when tempers flared-up, however the accused armed themselves with deadly weapons; while the deceased who was unarmed attempted to escape from the place in his car but the accused dragged the deceased out of his car, grievously assaulted, wounded and then shot him fatally. The defence of Exception IV therefore, cannot be accorded to the appellants in this case.
21. What emerges from the preceding discussion is that the testimonies of eye-witnesses PW-1, 2, 4 and 5 are consistent and have remained un-rebutted. The Supreme Court has held in a catena of judgments, that if the testimony of an independent witness is cogent, consistent and corroborative, there would be no cause to discredit the same. Apropos inconsistencies between the TIP and identification of the accused in court, what is to be seen is whether the accused was identified correctly in court. Keeping in mind that the TIP exercise is for the benefit of the police when conducting investigations; that a specific role has been assigned to each of the five accused by the four eyewitnesses; that there is no evidence on record to show that the deceased and his friends were part of a bigger conspiracy to commit theft on the petrol pump; that the gun-shot injury sustained by the deceased is opined to be not from a close range; that there existed common intention amongst the accused to harm

the deceased as can be seen, by the use of chains and sticks to assault the deceased and also accused Mukesh Lal exhorting co-accused Chandgi Lal to "take proper aim and shoot the deceased" and that the deceased was unarmed and not in a position to retaliate, the charges stood duly proved.

22. As a result of the discussion above, the present appeals are dismissed and the conviction and sentencing order passed by the learned Trial Court is upheld.

CRL.A.715/2014 AND CRL.A.1636/2014

23. These two appeals: one filed by the father of the deceased under section 372 Cr.PC and another filed by the State under section 378 Cr.PC are against the acquittal order of the sixth accused, Sunil Chauhan, by the learned Trial Court. The appellant has based his appeal on the premise that Sunil Chauhan was absconding since the date of incident and non-identification in the Test Identification Parade during investigation will not diminish the credibility of identification done during the deposition in the court. The grounds of appeal are that the eye-witnesses have clearly identified respondent Sunil during their deposition in the court and have deposed that Sunil held a chain in his hand while assaulting the deceased. The fact that injuries caused by a chain were proved from the medical report of PW17 and that the name of the respondent is present in the record of attendance submitted by the Manager of the fuel station is proof enough to show the respondent's presence on the date of incident.
24. On the basis of the records, the Court would note that although it has been alleged that during the roll call/attendance, other employees also were marked present at the fuel station on the date of incident, in addition to the accused, but the mere presence of Sunil Chauhan at the fuel station

would not prove his participation in the alleged incident. It is also on record that the present respondent was arrested by the Investigating Officer after almost six months of the date of incident and was subjected to TIP through PW1, PW2, PW4 and PW5, but, all the above four witnesses failed to identify the said accused. Moreover, no weapon was recovered from the respondent.

25. In view of the above discussion, the present appeals are dismissed and the order passed by the learned Trial Court, apropos Sunil Chauhan is upheld.

CRL.A. 53/2015

26. The State filed this appeal under section 377 Cr.PC seeking enhancement of sentence. The State has pleaded that the offence which was committed was done in an extremely brutal manner so as to arouse intense and extreme indignation of the community and in the given case it was an inhuman and merciless act of murder which shocked the conscience of the society. Based on the above grounds the appellant- State have prayed for enhancement of sentence for the offence punishable under section 302 IPC from life imprisonment to death penalty and also enhancement of sentence for the offence under section 325/34 IPC from rigorous imprisonment for three years to seven years.
27. It is a settled principle of law that where the State pleads for capital punishment it is the duty of the Court to weigh all the aggravating as well as mitigating factors of each case. The aggravating factors in the present case are that the deceased was a young boy in his early twenties, he was unarmed, and was mercilessly beaten by deadly weapons on a trivial issue and then killed. The mitigating factors on the other hand are that there was no previous enmity between the parties, only a single shot was fired

at the deceased, despite the accused having 13 other live cartridges, and that there is no criminal antecedent of any of the five accused. From the above factors, the mitigating factors outweigh the aggravating factors and therefore this case would not warrant capital punishment.

28. In view of the above, this Court finds no reason to interfere with the impugned judgment and this Court is of the view that the punishment awarded by the learned Trial Court is to be upheld as being just and fair. Accordingly, Crl. A. No. 53/2015 is dismissed.
29. In the circumstance, all the appeals are without merit and are accordingly dismissed.

NAJMI WAZIRI, J.

SIDDHARTH MRIDUL, J.

15th May, 2019