

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

% *Judgment Reserved on: 7th January, 2010*
Judgment Delivered on: 11th January, 2010

+ **CRL.APPEAL NO.989/2002**

FURKANAppellant
Through: Ms.Rakhi Dubey, Advocate

Versus

STATERespondent
Through: Mr.M.N.Dudeja, Advocate

CRL.APPEAL NO.706/2002

SURINDER SINGHAppellant
Through: Ms.Rakhi Dubey, Advocate

Versus

STATERespondent
Through: Mr.M.N.Dudeja, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J.

1. The appellants in the above captioned appeals have challenged the judgment and order dated 22.7.2002 passed by

the learned Trial Judge convicting them of the offences punishable under Sections 302/307/34 IPC. The appellants have been sentenced to undergo imprisonment for life and to pay a fine in sum of Rs.1,000/- each for the offence of murder and for the offence punishable under Section 307/34 IPC they have been sentenced to undergo RI for five years and to pay a fine in sum of Rs. 1000/- each.

2. Briefly stated, the case of the prosecution is that at around 5:30 PM on 21.8.1998 appellants Surinder and Furkan along with one more associate were travelling on a two wheeler scooter in a street near House No.RZ-15, Mahinder Park, Uttam Nagar and they hit a dog. The dog belonged to Sanjay PW-18 who was a resident of RZ-15, Mahinder Park, Uttam Nagar. Sanjay questioned the appellants whether they were blind and hence a quarrel ensued. The appellants got enraged and started abusing Sanjay and tried to enter his house. On this, Smt.Bhagwan Devi the sister of Sanjay intervened and slapped appellant Surinder twice. Though at that time the appellants went away, after about half an hour they returned with 5 or 6 more associates. While some, including appellant Furkan caught hold of Sanjay in order to prevent him from intervening,

appellant Surinder stabbed Bhagwan Devi in her abdomen. When Vinod Kumar PW-4, son of Bhagwan Devi, who was also present there intervened to save his mother, Surinder stabbed Vinod in his chest region. After stabbing Bhagwan Devi and Vinod, while appellant Furkan and their other associates managed to escape, appellant Surinder was chased by the mob present there and was apprehended and beaten at the spot. Bhawan Devi was immediately taken to DDU Hospital where she was declared brought dead. Vinod PW-4 and appellant Surinder were also taken to the hospital.

3. Process of criminal law was set into motion when at 6:40 PM information was received at police post Uttam Nagar that a person had been stabbed with a knife at Jeevan Park, Pankha Road, Shukar Bazar, and DD No.32 was recorded. A copy of said DD was entrusted to SI Jagbir Singh for investigation, who accompanied by Const.Karamvir, Const. Karan Singh and Const.Kabul Singh reached the spot. On learning that the injured had already been removed to DDU Hospital, SI Jagbir Singh proceeded to said hospital. He learnt that Smt.Bhagwan Devi had been declared brought dead and he collected the MLC Ex.PW-20/B of Bhagwan Devi. He met Sanjay

PW-18 at the hospital and recorded his statement Ex.PW-1/A, made an endorsement thereunder and sent the same for the registration of an FIR for the offence punishable under Section 302/34 IPC.

4. Further investigation was transferred to Insp.Lakhvinder Singh PW-22 who had also reached the spot in the meantime. He inspected the site and after carrying out the necessary investigation, proceeded to DDU Hospital. At the hospital both the injured Vinod PW-4 and appellant Surinder were declared unfit for making a statement. He collected their MLCs. The MLC Ex.PW-20/C of Vinod records 4 incised wounds around the chest of Vinod and one wound on his finger. The injuries were opined to be caused by a sharp edged weapon and were grievous in nature. MLC Ex.PW-20/A of Surinder records 8 injuries on the person of the deceased being 3 bruise injuries on knee, thigh and forearm and 4 abrasion injuries on the thumb, foot, chin and parietal region and 1 CLW on the parietal occipital region.

5. Insp.Lakhvinder Singh sent the body of Bhagwan Devi for post-mortem which was conducted by Dr.L.K.Barua PW-19. The post-mortem report Ex.PW-19/A records 2 incised

wounds on the left breast and lower chest of the deceased and 2 horizontally placed scratches on the left side lower part of the chest of the deceased. The injuries were opined to be caused by a sharp edged weapon and both the incised wounds were opined to be sufficient to cause death in the ordinary course of nature.

6. On 23.8.1998 appellant Surinder was discharged from the hospital and was arrested. Insp.Lakhvinder Singh recorded the disclosure statement Ex.PW-9/B of Surinder and attempted to recover the weapon of offence, but the same could not be traced. The co-accused could also not be arrested and were declared proclaimed offenders.

7. Appellant Surinder was charged for the offences punishable under Section 302/307/34 IPC and it was only after the trial of Surinder began and after all 22 prosecution witnesses were examined that appellant Furkan was arrested. He was also charged and all the 22 witnesses examined by prosecution against Surinder were recalled to depose against appellant Furkan.

8. Needless to say, the case of the prosecution hinged upon the eye witness account of Vinod PW-4 and Sanjay PW-18.

9. Vinod PW-4 deposed that deceased Bhagwan Devi was his mother. On 21.8.1998 he along with his mother was present at Shukar Bazar at Mahinder Park, selling vegetables. His maternal uncles Sanjay resided in a house close to where he sold vegetables. At about 5:30 PM appellant Surinder, appellant Furkan and one more boy were riding a two wheeler scooter when a puppy belonging to his uncle Sanjay came under the wheel of their scooter. When his uncle asked the appellants that did they not know how to drive, the appellants started beating his uncle. His mother Bhagwan Devi intervened, but the accused held a finger of Bhagwan Devi. It was on his intervention that his mother was saved and the appellants left the place threatening that they would come back. At about 6:00 PM the appellants returned to them and appellant Surinder inflicted 3 blows on the abdomen of his mother with a sharp object. When his uncle Sanjay and he intervened to save Bhagwan Devi he also received injuries on his wrist, hand and chest. His uncle Sanjay however managed to avoid any injuries on his person.

10. Sanjay PW-18 deposed that he used to sell vegetables in front of his house. Deceased Bhgawan Devi was

his sister and she along with her son Vinod also used to sell vegetables near his shop. On the day of the incident at about 5:00 or 6:00 PM appellants Surinder and Furkan and one more boy were on their two wheeler scooter when they ran over his dog. As a result a quarrel ensued. The appellants entered his house and were using abusive language. His sister Bhagwan Devi objected to the appellants doing so, and slapped appellant Surinder twice. Though at that time the appellants went away, they returned after about half an hour with 5 or 6 more associates. Appellant Furkan and the others caught hold of him and appellant Surinder stabbed his sister Bhagwan Devi. When Vinod attempted to intervene, Surinder stabbed Vinod on his chest and hand. The place being a crowded place around 100 people gathered and gave beatings to Surinder, while his other associates managed to escape.

11. Vide impugned judgment and order dated 22.7.2002 learned Trial Judge convicted the appellants Surinder and Furkan for the murder of Smt.Bhagwan Devi and for an attempt to murder Vinod PW-4. Needless to state reliance was placed upon the testimonies of PW-4 and PW-18 and that Surinder was apprehended at the spot by the mob.

12. At the hearing of the appeals, the counsel for the appellants urged that Vinod PW-4 and Sanjay PW-18 were most unreliable witnesses inasmuch as there are material contradictions in the versions deposed by them. It was highlighted that while Vinod PW-4 stated that when the appellants ran over the dog of Sanjay a quarrel ensued between Sanjay and the appellants and the appellants gave beatings to Sanjay, but Sanjay PW-18 did not state so. He merely stated that a quarrel ensued and the appellants abused him. Further, while Vinod PW-4 nowhere stated that the assailants entered the house of Sanjay and it was on this issue that Bhagwan Devi quarreled with the appellants and slapped Surinder, Sanjay PW-18 deposed that when the quarrel took place the appellants forcibly entered his house and objecting to the same, Bhagwan Devi slapped appellant Surinder.

13. The counsel further urged that the only evidence against Furkan is his dock identification when Vinod PW-4 and Sanjay PW-18 deposed in Court against him after more than 2 years of the incident and thus the same has to be treated with suspicion for the reason Furkan was not known by name or face to Vinod and Sanjay and the altercation which took place on

21.8.1998 was a chance encounter. Counsel highlighted that the prosecution deliberately did not get conducted any test identification of Furkan. Thus, it was urged that the rule of prudence adopted by the Courts requiring corroboration should be followed and there being no corroborative evidence, Furkan should be acquitted by giving him the benefit of doubt.

14. Pertaining to the alleged discrepancies in the deposition of Sanjay and Vinod, we have noted the same in para 12 above while noting the contentions urged by learned counsel for the appellants. To every reader it would be apparent that the slightly different versions are not of a material nature so as to discredit the two witnesses. These are natural variations which occur when two persons deposed on the same facts in relation to an incident after months have passed. With passage of time human memory fades and the facts at the fringes are either forgotten or become hazy. Only the core remains. Thus, we hold that Sanjay and Vinod have not deposed with any material difference on material points and have withstood the test of cross-examination. In this context it becomes important to note that Surinder was apprehended by the public at the spot and was beaten, a fact which stands corroborated from the MLC

Ex.PW-20/A of Surinder. The injuries recorded thereon show that Surinder has been beaten with blunt force i.e. fist blows.

15. It is settled law that substantive evidence in a criminal trial is the evidence in Court and pertaining to identification of an accused, the substantive evidence is the evidence of identification in Court. Under Section 9 of the Evidence Act, facts which establish the identity of the accused are relevant under Section 9 of the Evidence Act.

16. Test Identification pertains to the domain of investigation. There is no provision in the law which obliges the investigating agency to hold Test Identification Proceedings or confers any right upon the accused to claim a Test Identification. Test Identification Proceedings do not constitute substantive evidence and are essentially governed by Section 162 of the Code of Criminal Procedure.

17. The genesis of Test Identification of accused during investigation has its route in human psychology. As opined by Professor Borchard in his Article 'Convicting the Innocent' referred to in para 9 of the decision reported as 1988 SC 345 *Hari Nath & Anr. Vs. State of UP*, the emotional balance of the victim or eye-witness is so disturbed by his extra-ordinary

experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused.

17. In Halsbury's laws of England there exists a passage being para 363, Vol. II, 6th Edition which is worth recalling. It reads as under:-

"It is undesirable that witnesses should be asked to identify a defendant for the first time in the dock at his trial; and as a general practice it is preferable that he should have been placed previously on a parade with other persons, so that potential witness can be asked to pick him out."

18. We need not catalogue the various decisions relating to Test Identification Proceedings for the reason we find that the law has been very succinctly penned in para 11 of the decision in *Hari Nath's* case (supra), which reads as under:-

"It is, no doubt, true that absence of corroboration by test identification may not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of

the identity on the mind and memory of the witness are, otherwise, brought out.”

19. Clearly, in the instant case the witnesses namely Vinod and Sanjay had the opportunity of seeing the appellants for a considerable length of time. They first saw the appellants, when the two-wheeler scooter of the appellants ran over the dog of Sanjay. Both Vinod PW-4 and Sanjay PW-18 have deposed that the running over of the dog was followed by a quarrel between the appellants on one side and PW-18, Bhagwan Devi and PW-4 on the other side. An exchange of hot words and even some grappling between appellants and Sanjay took place. When Bhagwan Devi intervened there was some exchange of hot words with her as well, before the appellants left. So much of action would have taken at least some 2-3 minutes, and would have enabled PW-4 and PW-18 to see the appellants for said time span. Thereafter, when the appellants returned after about half an hour, with their other associates, appellant Furkan and the associates caught hold of Sanjay and immobilized him and appellant Surinder stabbed Bhagwan Devi. The post-mortem report of Bhagwan Devi evidences that she was stabbed twice. She had two scratches wounds. When Vinod

PW-4 intervened, he was also assaulted. His MLC evidences that he was given 5 stab wounds. It is not the case that both the appellants and their associates attacked Bhagwan Devi and Vinod simultaneously. The assailant was only one i.e. Surinder. The others were only facilitating the offence by immobilizing Sanjay and preventing him from saving his sister. Obviously, the incident of stabbing would have spanned over at least 3-4 minutes, thus enabling both PW-4 and PW-18 to see the appellants once again, for said span. In effect, PW-4 and PW-18 would have seen the appellants Surinder and Furkan for a good 7-8 minutes, which is sufficient time for any prudent person to develop an impression in his mind of the face of the assailant, and be able to identify him at a later date.

20. It may also be noted, that the incident took place on 21.8.1998 between 5.00 PM to 6:15 PM. In North India, in the month of August the visibility is good till about 7.00/7:15 PM and it is only after 7.00/7.15 PM that it gets dark.

21. We see no reason to doubt the dock identification of appellant Furkan by Vinod PW-4 and Sanjay PW-18. We hold that both PW-4 and PW-18 are truthful witnesses. We hold that

appellants are guilty of the offence of murder of Bhagwan Devi and for the offence of attempting to murder Vinod.

22. We dismiss the appeals and uphold the conviction of the appellants Surinder and Furkan for the offences punishable under Sections 302/307/34 IPC.

23. Appellant Surinder is on bail. We cancel his bail bond and surety bonds and direct him to surrender and suffer the remaining sentence.

24. Appellant Furkan is in jail. We direct that a copy of this order be sent to the Superintendent Central Jail Tihar for necessary action and to be made available to Furkan.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**JANUARY 11, 2010
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