

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

% *Judgment Reserved on: 3rd May, 2010*
Judgment Pronounced on: 5th May, 2010

+ **CRL.APPEAL No.20/2010**

PANKAJ BISWAS Appellant
Through: Mr.Deepak Vohra, Advocate

versus

STATE Respondent
Through: Mr.M.N.Dudeja, Advocate

CRL.APPEAL No.405/2010

VISHWAJEET DASS @ NIRMAL Appellant
Through: Mr.Avninder Singh, Advocate

versus

STATE Respondent
Through: Mr.M.N.Dudeja, Advocate

CRL.APPEAL No.406/2010

ZAHOOR ALAM Appellant
Through: Mr.Rajesh Mahajan, Advocate

versus

STATE Respondent
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?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. We are commencing our judgment in an unconventional manner, for this is requirement of the instant case inasmuch as what we need to decide is: whether the prosecution has successfully proved the facts mentioned in the statement Ex.PW-16/A made by Const.Naresh Pal to Insp.Harcharan Verma PW-26 and the facts mentioned in the endorsement Ex.PW-26/A made by Insp.Harcharan Verma beneath the statement Ex.PW-16/A. The statement Ex.PW-16/A made by Const.Naresh Pal reads as under:-

“Statement of Const. Naresh Pal No. 2477/SD PIS No. 28881444 Police Station C. R. Park, New Delhi.

I am posted at Police Station Chitaranjan Park as a constable. Today i.e. 30.10.2000 from 4 p.m. to 12 O'clock in the night I am on duty along with Constable Rambir Singh No. 2456/SD for patrolling the area on M/Cycle SM-5 No. DL-1S-L-5016. At about 7.45 p.m. in the evening when we reached Mandakini Enclave while patrolling, one guard told us that some ruffians had entered in House No. 55, Mandakini Enclave where upon we stopped our motorcycle and went near the aforesaid house and I cordoned off the aforesaid house from the front side whereas Const. Rambir Singh cordoned off the house from the rear portion. At that time we heard some noises from inside the house, on this I got suspicious and telephonically informed the police station and I stood there for keeping surveillance after covering the doors. In the mean time people also collected over there. 5/7 minutes thereafter you reached the spot along with S.I. Balram, S.I. Lalit Kumar, Const.Harinder No. 723/SD, Const.Ramdiya No. 1454/SD, Driver const. Prakash Masih, Operator Const.Harsahay No. 1643/SD by means of a Govt. Gypsy No. DL-1C-F-6899 where I told the

circumstances. On seeing the situation prevailing over there you cordoned off the said house with the help of staff members and then you, after opening the door entered the house along with S.I. Balram, S.I. Lalit Kumar, Const.Harinder, Const.Ramdiya and myself. As we entered the house, we found the dead bodies of two persons lying in a pool of blood on the carpet spread on the floor in the drawing room. The blood was lying on the floor in a large quantity. The carpet was smeared with blood. A blood stained knife was also found lying on the said carpet. You in a loud voice warned the persons hidden inside the house to come out saying that the house is cordoned off by the Police. When nobody came out, you and the staff members while holding revolvers and pistols and carefully checking the rooms and bathrooms etc. situated down stairs reached a room situated on the left side upstairs where after opening the right side wooden almirah built with the wall, a person was found hidden in sitting condition who was over powered by you with my help and whose name was learnt on enquiry as Zahoor Alam S/o Abdul Hamid, aged 23 years r/o Zali Mohalla, Tuglakabad, New Delhi. On conducting his personal search cursorily one country made revolver was recovered from the right dub of his wearing pants. Sub-Inspector Lalit Kumar opened the left side almirah in which a person was found hidden in sitting condition who was over powered by S.I. Lalit Kumar with the help Const.Ram diya and whose name and address was learnt on interrogation as Pankaj Biswas s/o Sunil Biswas, aged 18 years r/o Gali No. 14, Chhuriya Mohalla, Tuglakabad, New Delhi. On conducting his personal search cursorily, two golden coloured small sized Jayco and Kim's table clocks were recovered from the right pocket of his wearing pants. After searching the entire house S. I. Balram and Const.Harinder removed the lid of the water tank built on the floor in the gallery in which a person was found sitting therein who was taken out by S.I. with the help of Const.Harinder, who was holding a knife in his left hand and he was over powered; whose name and address were learnt on enquiry as Vishwajeet Dass alias Nirmal s/o Nagender Das r/o House No. 16, Chhuriya Mohalla, Tuglakabad, New Delhi. Blood stained pants and T-shirt were found near the bed beside the kitchen. Droplets of blood were also found

lying in the said house and household articles were found scattered. Sub-Inspector Ashok Kumar has also arrived at the spot. All the aforesaid three persons have murdered two persons after having entered the house and committed the loot in the house. Appropriate action may please be taken. I have heard the statement and the same is correct.

Sd/- Naresh

Sd/- H.C.Verma

S.H.O. P. S: C. R. Park

Date: 30.10.2000”

2. The endorsement Ex.PW-26/A beneath the statement Ex.PW-16/A reads as under:-

“To

The Duty Officer P. S.: C. R. Park New Delhi

Sir,

It is submitted on receipt of an information through DD No. 15A dated 30.10.2000, I, the Inspector along with S.I. Balram, S.I. Lalit Kumar, Const. Harinder No. 723/SD, Const. Ramdiya No. 1454/SD, Driver Const.Prakash Masih No. 1006/SD and Operator Const.Harsahay No. 1643/SD reached the spot i.e. Flat No. 55, Mandakini Enclave by means of a Govt. Gypsy no. DL-1C-F-6899 where Const.Rambir and Const.Naresh Pal who were present over there, revealed the circumstances. A crowd of people was present at the spot. I, the Inspector along with Const.Naresh Pal and the aforesaid staff carefully entered the house from the main door holding revolvers and pistols etc. Immediately on entering, we found the dead bodies of two persons lying on the carpet spread on the floor in the drawing room in a pool of blood. Blood was found lying in large quantity

on the floor. The carpet was also smeared with blood. And a blood stained knife was found lying on the said carpet. I had loudly warned the persons hidden inside to come saying that the house is cordoned off by the Police. When nobody came out, I, the Inspector with the help of the aforesaid staff members while holding the weapons carefully searched the said house. We overpowered a person namely Zahoor Alam along with a country made pistol from the right side almirah built in the right room situated on the upstairs of the house. Likewise, we overpowered Pankaj Biswas along with Jayco and Kim's clock (table) from left side almirah. We over powered Vishwajeet after taking him out from water tank along with a knife. The articles of the said rooms were found scattered. The names of deceased persons were learnt as Siddharth Mukhopadhyaya aged 58 years and Somiya Mukherjee aged 26 years. Wounds caused by knife were visible on the aforesaid dead bodies. Injuries were visible on the head and small finger of right hand of Pankaj Biswas. An Injury was found in the fore finger of Zahoor Alam. The wearing clothes of all the aforesaid three accused persons were found stained with blood. Const.Naresh Pal got his foregoing statement recorded to me, the SHO which I attested. The circumstances prevailing at the spot, Inspection of the dead bodies reveal the commission offences punishable under Sections 302/394/397 IPC. Hence, this writing is being sent through const. Rambir No.2456/SD to the Police Station for the purpose of registration of a case (FIR). After registration of the case, its number may please be intimated. Senior officers may be informed through special messenger. The crime team and photographer may be sent to the spot. Sub-Inspector Ashok Kumar has also reached the spot. Separate action is being carried out by S.I. Ashok Kumar in respect of the country made revolver recovered from Zahoor Alam. I, the Inspector am busy with the investigation at the spot.

Date and hour of the occurrence: 30.10.2000, at about 07.45p.m.

Place of occurrence: 55, Mandakini Enclave

Date and hour of despatch of

30.10.2000 at 10.30 p.m.

Sd/- Har Charan Verma

SHO, C.R. Park

30.10.2000”

3. Suffice would it be to state that the instant case required no further investigation qua the appellants but since in their disclosure statements they named four other persons namely, Mohd.Israil, Shankar, Vinod and Sunil as their associates, the investigating officer searched them out, but we need not note any evidence pertaining to said accused, for the reason they are not before us since Sunil was acquitted and the other three have been convicted for the offence punishable under Section 411 IPC, for which offence they have been sentenced to undergo RI for a period of 3 years and pay fine in sum of Rs.5,000/-. Probably for the reason by the time said sentence was imposed upon said three co-accused, they had already undergone a sentence much in excess of what was inflicted upon them.

4. From the statement Ex.PW-16/A made by Const.Naresh Pal it is apparent that he and Const.Rambir were on patrolling duty when a guard informed them of ruffians

having entered House No.55, Mandakini Enclave and the said two officers telephonically informed the police station and stood guard, one each on the front and the rear of House No.55, Mandakini Enclave and continued to remain there till Insp.Harcharan Verma, SI Balram, SI Lalit Kumar, Const.Harender and Const.Ramdiya reached the spot. It may be noted that though the reference is to the house, but it is actually Flat No.55, Mandakini Enclave on the ground floor of the cluster of buildings in Mandakini Enclave.

5. Const.Naresh Pal has been examined as PW-16. Const.Rambir has been examined as PW-15. Both of them have deposed in sync with each other and save and except difference in the choice of words used have deposed facts as aforementioned in para 4 above. The two have further deposed the facts as disclosed in the statement Ex.PW-16/A of the events which transpired when police reinforcement reached the house. The two have deposed of Zahoor Alam being apprehended from a wooden almirah towards the right in a bedroom and a revolver recovered from his pant. Pankaj Biswas being apprehended from an almirah on the left side of the bedroom and a small sized jayco and a kim table clock recovered from the right side of his pant and Vishwajeet Dass

being apprehended from the water tank on the roof with a knife in his hand.

6. Insp.Harcharan Verma PW-26 and SI Balram PW-19 have deposed in harmony with each other and have corroborated Const.Naresh Pal and Const.Rambir Singh pertaining to the appellants being apprehended at the spot.

7. No blemish or an infirmity was brought to our notice pertaining to the testimony of Const.Naresh Pal, Const.Rambir Singh, Insp.Harcharan Verma and SI Balram and thus we hold that the testimony of said police officers inspires confidence.

8. That apart, on being examined under Section 313 Cr.P.C. appellant Zahoor Alam and Pankaj Biswas admitted their presence at House No.55, Mandakini Enclave but stated that their curiosity led them there. They were onlookers in the crowd which had gathered but were falsely arrested. The third appellant claimed that he was a rag picker and was picked up on 31.10.2000.

9. We have two independent witnesses to support the case of the prosecution and disprove the claim of the appellants. They are Pulin Nayak PW-3 and V.K.Nayyak PW-6. Pulin Nayak has deposed that on 30.10.2000 he was in flat No.61, Mandakini Enclave belonging to his brother-in-law

V.K.Nayyak and at 7:30/7:45 PM heard commotion from outside and saw a crowd around Flat No.55. He saw police personnel. People were talking that bad element had entered Flat No.55. Police entered the house and after 15 minutes brought out two persons and thereafter another. Accused Zahoor Alam was one out of the three whom he could recognize in Court out of the 7 accused. He could not identify appellant Vishwajeet Dass and Pankaj Biswas. His brother-in-law V.K.Nayyak deposed in harmony with Pulin Nayak but with a difference, that he identified the appellants as the three persons who were apprehended by the police and brought out from the flat. It may be noted that of the two persons who were murdered inside Flat No.55 Mandakini Enclave, one was Sidhartho Mukhupadhaya, the owner of the flat, whose son Sujoy PW-2 deposed that when he reached his house at around 10:00 in the night he saw the appellants in the custody of the police.

10. It is thus apparent that three independent public witnesses have supported the case of the prosecution of three persons being apprehended from the flat where the crime took place. One of them, Pulin Nayak could identify only one out of three persons apprehended but his brother-in-law V.K.Nayyak identified the three. Sujoy also identified all three.

11. As per the statement Ex.PW-16/A, Pankaj Biswas had an injury on his head and the small finger of the right hand. Zahoor Alam had an injury on his forefinger. Indeed, the MLC Ex.PW-21/A of Pankaj Biswas evidences that he was got examined at 1:31 AM in the intervening night of 30th and 31st October 2000 at AIIMS and Dr.Ravi Desai who examined him noted a 0.5 cm CLW on the scalp and a 1 cm CLW on the distal phalynx of the right little finger. The MLC of Zahoor Alam has unfortunately not been exhibited but is at page 389 of the Trial Court record which shows swelling on right hand dorsum and tenderness on the left hand index finger.

12. The instant case has a checkered history for the reason, without putting the incriminating circumstances to the appellants, vide judgment and order dated 28.9.2004, they were convicted. Vide order dated 5.2.2009 the said decision was set aside and the matter was remanded after a coordinate Division Bench of this Court recorded supplementary statements of the appellants under Section 313 Cr.P.C. with a direction that the appellants may be given opportunity to lead defence evidence if any. At the remanded stage the attempt of the appellants by examining Lal Mohan Dass DW-1 proved futile as he disclaimed knowing the appellants.

13. There is hardly much more for us to write any further for the reason the prosecution claims to have apprehended the appellants at the spot, which fact has been proved through the testimony of four police officers and three independent witnesses.

14. It was not disputed before us that House No.55, Mandakini Enclave, (in fact a flat on the ground floor) was the place of a dacoity where two persons Sidhartho Mukhupadhaya and Somiya Mukherjee were brutally murdered. The post-mortem report Ex.PW-4/A of Somiya Mukherjee shows 11 stab/incised wounds. The post-mortem report Ex.PW-4/B of Sidhartho Mukhupadhaya shows that he was inflicted multiple stab as well as incised wounds and one on the left side of the chest was sufficient in the ordinary course of nature to cause death.

15. During argument in the appeals it was urged that with as many as 7 police officers at the spot, being (i) Const.Naresh Pal, (ii) Const.Rambir Singh, (iii) SI Balram, (iv) SI Lalit Kumar, (v) Const.Harender, (vi) Const.Ramdia and (vii) Insp.Harcharan Verma and a crowd outside the flat, it was not possible for four accused to flee from the spot. It was thus urged that the defence of Zahoor Alam and Pankaj Biswas that they were curious onlookers along with the crowd and were

falsely picked up is probablized; the reason why Insp.Harcharan Verma did so was to save his face for if all accused had fled he would have no face to show.

16. The argument presupposes the fact that by the time the police arrived all those who had illegally entered the flat continued to remain inside the flat. It is possible that some had fled by the time the police reached. The testimony of Const.Naresh Pal shows that before the police force requisitioned by him reached, a crowd had gathered. It needs to be noted that the date was 30.10.2000 and the time was 7:45 PM. In the city of Delhi it gets dark by 7:45 PM on 30.10.2000 and thus somebody escaping without being noticed cannot be ruled out as also the fact that they fled before Insp.Harcharan Verma and his team of police officers reached.

17. Further, on said speculative argument it would be difficult for us to brush aside the testimony of four police officers which finds full corroboration through the testimony of V.K.Nayyak and partial corroboration through the testimony of Pulin Nayak. Though Pulin Nayak could identify only Zahoor Alam as one out of the three persons apprehended from the flat, but he supported the case of the prosecution that three

persons were apprehended. Thus, the question of the appellants being planted as accused does not arise.

18. The argument that when heinous crimes are committed, people tend to tell lies cannot be accepted by us to disbelieve Pulin Nayak and V.K.Nayyak for the reason if this argument is accepted, the credibility of every eye witness would be in doubt. Of course, where there is material to suspect the testimony of an eye witness, it may assume importance to consider the possibility of the witness spinning facts out of his imagination, for it does happen that heinous crimes do attract a feeling of revenge and hatred and the human mind, unmindful of it being poisoned, misleads itself to the belief that what it thinks is the result of what it saw. But, this would be in exceptional cases.

19. We do agree with the argument advanced that the reasoning of the learned Trial Judge in para 25 of the impugned decision is not sound. In para 25 the learned Trial Judge has raised a presumption as under:-

“25. From the facts and after comprehending the legal position, it is clear that the said presumption that the accused had committed robbery and murdered the deceased can very well be raised and which has gone unrebutted i.e. the accused have not been able to relieve themselves from the said burden for rebutting the presumption though the initial burden by the prosecution has been discharged but it. The robbery and murder have been proved to

have been integral part of same transaction in the present case and, therefore, the presumption arising under illustration (a) of Section 114 of Evidence Act is that only the accused persons have committed the murder of the deceased but also committed the robbery of the articles as discussed above.”

20. We fail to understand as to how illustration (a) to Section 114 of the Evidence Act is attracted. The same is attracted when the issue arises whether the person from whom the recovery is made is the thief or recipient of stolen property. It may be extended to cases when stolen property is recovered and simultaneously with the theft, robbery or dacoity being committed, a murder takes place. In the instant case the appellants have been apprehended from the flat which they had illegally entered into and in which flat two persons were murdered. Since the appellants have given no explanation as to what they were doing inside and under what authority or permission they entered the flat, inference of guilt is writ large and plain upon the appellants and we see no scope to apply illustration (a) to Section 114 of the Evidence Act. The Evidence Act requires a fact to be treated as proved where on the material before her a prudent person would either act on the supposition that the fact exists or would believe that it exists. 100% proof is a myth in law. If three persons having no concern with a flat and disclosing no authority or permission to enter a flat are found in or at the

roof of the flat with two occupants of the flat brutally assaulted with knives and dying due to the injuries inside the flat, any prudent person would return the verdict that it stands proved that the three persons who trespassed into the flat are the offenders. Logical reasoning so requires.

21. Before concluding we may record that there is no evidence of the FIR being ante timed. The first information recorded at PS C.R.Park vide DD No.15A, Ex.PW-8/A is at 7:50 PM on 30.10.2000 recording telephonic information passed on by Const.Naresh that gangsters have entered flat No.55, Mandakini Enclave. The endorsement Ex.PW-26/A beneath Const.Naresh Pal's statement Ex.PW-16/A shows that the statement and the endorsement were dispatched from the spot at 10:30 PM.

22. Receiving information at the police station at 7:50 PM; same being passed on to Insp.Harcharan Verma who left with 5 other police officers and reached the place of the crime; a careful entry had to be made after warning the gangsters inside as claimed to by Insp.Harcharan Verma. Three persons were apprehended at the spot. Time would be consumed for said activities. Thereafter Naresh Pal's statement Ex.PW-16/A spanning a little over 2 pages followed by the endorsement Ex.PW-26/A spanning a little less than 2 pages being penned

would consume further time. It is thus apparent that the rukka was dispatched most promptly from the spot ruling out anything being manipulated at the spot.

23. We find no merit in the three appeals which are dismissed.

24. Since the appellants are still in jail we direct that a copy each of the instant decision in the three captioned appeals be sent by the Registry to the Superintendent Central Jail Tihar for being made available to the appellants.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**MAY 05, 2010
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