

**Rajvir and anr. Vs. State**

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**Court :** Delhi

**Decided On :** Jan-04-2005

**Reported in :** 2000CriLJ1652; 117(2005)DLT164; 2005(79)DRJ667

**Judge :** Pradeep Nandrajog, J.

**Acts :** Indian Penal Code (IPC) - Sections 34, 307, 324, 326, and 330

**Appeal No. :** Crl.A. 630/1999

**Appellant :** Rajvir and anr.

**Respondent :** State

**Advocate for Def. :** Anil Soni, Adv.

**Advocate for Pet/Ap. :** Aman Lekhi, Adv

**Judgement :**

**Pradeep Nandrajog, J.**

1. Machinery of law was put into motion when police post Wazirpur Industrial Area received a telephonic information at 10.15 P.M. on 10.4.1996 from Ct. Danvir (No. 1291/North) who was posted at Hindu Rao Hospital that one Chandreshwar S/o. Sh. Tale Singh R/o. N-18B/330 Chander Shekhar Azad Colony was admitted in a serious condition by one Rajvir Verma S/o Ram Lal, R/o Chander Shekhar Azad

Colony. Report was recorded vide DD No. 26 (Ex. PW. 8/A). Pursuant thereto S.I. Kapil Parashar (PW.8), in charge of the police post, accompanied by H.C. Rohtash Singh, Ct. Narinder and Ct. Swaraj left for Hindu Rao Hospital. On reaching the hospital they found 3 persons, Nirmal (PW.2), Gorakh (PW.4) and Chandreshwar (PW.5) admitted in injured condition. SI Kapil Parashar recorded statement of Gorakh (Ex. PW. 3/A) and after making endorsement (Ex. PW. 8/B) sent the ruqqa to P.S. Ashok Vihar through Ct. Narinder for registration of FIR (Ex. PW. 3/A). [I may note that statement of Gorakh and FIR have both been exhibited as Ex. PW. 3/A]. Case was registered under Section 307/34 IPC vide FIR No. 194/1996 dated 11.4.1996 at 12.10 in the night.

2. In his statement Ex. PW.3/A, Gorakh stated that he was a resident of jhuggi No. N-28B-337, Chander Shekhar Azad Colony and that he earned his living by selling readymade garments on a handcart. On 10.4.1996 at about 7.00 PM he was going towards Civil Lines area. He met Sonu (@ Rajvir) who resided in his neighborhood. He enquired from him the whereabouts of his tenant Mohinder as he, i.e. Gorakh wanted employment for his uncle. At that, Sonu reported that he was not his servant and abused him. He told Sonu why was he abusing him. They had a verbal altercation. Sonu left stating that he would teach him a lesson. Sensing danger he i.e. Gorakh returned towards his house. Suddenly, Sonu and his friends which included Mohinder, Jagdamba and a bearded person came from behind and surrounded him. He ran to save himself but was caught by Mohinder in front of factory No. C-60/3. Sonu stabbed him in the stomach with a knife. On hearing his shrieks, his friends Nirmal and Chandreshwar came to the spot and asked why were they beating him. At that Sonu said why were they sympathising with him. Sonu told them do you also want to go to heaven. So stating, Sonu stabbed Chandreshwar and Jagdamba caught hold of Nirmal and the bearded person stabbed Nirmal. After causing injury to them, the accused ran away. He, Nirmal and Chandreshwar took a rickshaw and went to S.L. Jain Hospital from where they were referred to Hindu Rao Hospital.

3. As per case of the prosecution, accused Sonu @ Rajbir and Mohinder were arrested on 11.4.1996. On interrogation Rajbir made a disclosure statement (Ex.PW. 8/C) and got recovered a knife.

4. For unexplainable reasons, only the appellants, Rajvir and Mohinder were sent to trial. Neither in the chargesheet which was filed nor in the statement of the investigating officer, SI Kapil Parashar (PW.8) it has come as to why Jagdamba who was named in the FIR was not made an accused, nor is there any Explanation as to what happened to the bearded person who was identified as the person having stabbed Nirmal.

5. Vide judgment dated 5.10.1999 in Sessions Case No. 146/1997, learned Additional District Judge held the appellants guilty of offence under Section 307 read with Section 34 IPC. It was held that the appellants had a common intention to kill Gorakh and in furtherance thereof inflicted injuries with a knife.

6. Vide order of sentence dated 25.10.1999, appellants was sentenced to 10 years RI and a fine of Rs. 5000/-. In default of payment of fine they were to undergo SI for one year.

7. Charge framed against the appellant on 9.12.1997 reads as under:-

I R.S. KHANNA ADDITIONAL SESSIONS JUDGE DELHI do hereby charge you 1. Rajvir s/o Ram Parkash Sharma, 2. Mohinder s/o Ram Bhaj as under:

That on 10.4.96 at about 7 p.m. opposite Factory No. C-60/3 Wazir Pur Industrial Area within the jurisdiction of P.S. Ashok Vihar you Rajvir @ Sonu along with your co-accused Mohinder caused dangerous injuries to Nirmal Singh and Gorakh and simple injuries with sharp object to Chander Shekhar with such intention and knowledge and under such circumstances that if by that act you had caused the death of said persons you would have been guilty of culpable homicide amounting to murder and thereby committed an offence punishable under Section 307/34 IPC & within the cognizance of this court.

I hereby direct that you both be tried by this court for the said offence.'

8. As noted above, learned Additional Sessions Judge has found the appellant guilty only qua the assault and injuries inflicted on Gorakh and Chandreshwar (Chander Shakher).

9. Learned Additional Sessions Judge, after noting the evidence on record, has held that the testimony of PW.2, PW.4 and PW.5 established that Rajvir inflicted knife injuries on Gorakh and Mohinder had facilitated the commission of the crime. Both had a common intention to cause death of Gorakh. It has been held that recovery of the knife at the instance of Rajvir was established. Qua Rajvir, it has been held that he assaulted Chandreshwar with a knife.

10. On the issue of recovery of the alleged weapon of offence, it has to be noted that no independent public witness has been associated with the recovery. By itself, namely, no public witness being associated with a recovery would not mean that the recovery has to be ignored. It would not mean that the evidence pertaining to recovery has to be ignored on said count alone. However, it requires the court to see under the microscope, the facts stated leading to the recovery and be satisfied that prosecution has proved the case beyond reasonable doubt on the factum of recovery at instance of accused Rajvir as also to link the knife with the offence.

11. PW.8, SI Kapil Parashar deposed that on 11.4.1996 he received secret information that the appellants were present near railway line. He, along with H.C. Rohtas and Ct. Narinder reached the railway line. On pointing out by the informer, both were arrested. They were interrogated. Rajvir made a disclosure statement Ex. PW. 8/C and lead the police party to the place of occurrence and from an open area near the jhuggis got recovered one knife which was lying in mud. In cross-examination witness admitted that he did not prepare the site plan of the place from where knife was recovered. In cross-examination he further deposed that site plan of the place of occurrence was prepared by him on 15.4.1996, when he met injured Gorakh in his house. He admitted in cross-examination that he had not shown the place where injuries were inflicted.

12. As per the testimony of PW.2, 4 and 5, to which I would be adverting to in a little more details, place of occurrence was a little away from a main road, in the narrow lanes within a jhuggi jhompri complex. The alleged recovery is from an open space within the jhuggi jhompri complex. Unfortunately, exact place from where knife was recovered, having not been shown in a site plan by PW.8, it

cannot be ascertained as to how far off from the jhuggis, said place was. In my opinion, recovery of a knife lying in the open and that too without indicating, in reference to a site plan, place of recovery, entitles the appellants to a finding in their favor pertaining to the alleged recovery. The alleged weapon of offence cannot be linked to the appellants. Recovery is from an open field near jhuggies, a site accessible to all. Recovery of knife at the instance of Rajvir has to be ignored. Since I am ignoring the recovery of the knife at the alleged instance of Rajvir, I need not discuss issue of his arrest for that ultimately was linked to the disclosure and recovery.

13. In this connection I may also note that the knife was not sent for forensic examination to determine whether it had blood stains, much less human blood. Even the doctors who were examined were not shown the said knife to ascertain whether the injuries could be caused with the said knife.

14. Turning to the ocular evidence, it has to be noted that in his statement, Ex.PW. 3/A, Gorakh had implicated Mohinder as the person who caught him. Rajvir as the person who stabbed him. He implicated one Jagdamba and a bearded person. In the said statement he clearly stated that Rajvir stabbed Chandreshwar who responded to his cries and that Jagdamba caught hold of Nirmal who responded to his cries and that the bearded person stabbed Nirmal.

15. Examined as PW.4, Gorakh stated that after he had a verbal altercation with Rajvir when he enquired about the whereabouts of Mohinder, Rajvir left and thereafter Rajvir returned with 2 to 3 boys. He stated that Mohinder was one amongst said 2-3 boys whom Rajvir brought with him. He stated that Mohinder caught him and Rajvir stabbed him in the stomach. He cried for help. Nirmal and Chandreshwar came to save him. Rajvir stabbed Nirmal and Chandreshwar. He categorically deposed that Rajvir managed to stab Nirmal and Chandreshwar because Mohinder had caught hold of them. He stated that after stabbing, all assailants fled. He, Nirmal and Chandreshwar went to S.L. Hospital from where they were referred to Hindu Rao Hospital.

16. It has to be noted that Gorakh gave a different version vis--vis his earlier statement made to the appeals (Ex.PW. 3/A) pertaining to the injury on Nirmal. In

a statement to the police, Gorakh categorically stated that when Jagdamba caught hold of Nirmal, bearded person stabbed Nirmal.

17. Learned counsel for the prosecution, Shri Anil Soni stated that it is a case of a minor variation in testimony. Gorakh may be a little confused when he deposed in court as to who stabbed Nirmal. He urged that save and except said aberration, deposition of Gorakh conforms to Ex.PW. 3/A.

18. I may noted that in cross-examination, Gorakh stated that accomplices of the accused had wooden sticks and that the accused Rajvir and Mohinder had knife. He stated in cross-examination:-

'After shouting Nirmal and Chandreshwar came within seconds. Fight continued for 10 minutes. After getting injured we went to police station, I, Nirmal and Chandreshwar went to Ashok Vihar, Police Station after being injured. From there I and Nirmal went to Sunder Lal Jain Hospital in the same rickshaw. We stayed at Police Station for minutes.'

19. Nirmal who was examined as PW.2 stated that on 10.4.1997 he was present in his jhuggi in the evening. He heard a noise Bachao Bachao coming from the side of jhuggis. He reached there. He saw Rajvir beating Gorakh. There were 4-5 more persons whom he did not recognise. There was a knife in the hand of Rajvir and other persons had caught hold of Gorakh. Chandreshwar was also present with him. He saw a stab wound in the stomach of Gorakh but did not see the stabbing. He stated that Jagdamba caught him and Vinod stabbed him. He stated that they all went to the Police Station and from there to Sunder Lal Hospital from where they were referred to Hindu Rao Hospital. In cross-examination, Nirmal stated that he did not see accused Mohinder on the spot. He also stated that he did not see Rajvir stab Chandreshwar.

20. A comparison of testimony of PW.4 and PW.2 would reveal that both were unanimous that rescue came to PW.4 within seconds of his crying for help. Both are in harmony that Rajvir had a knife with him. Both stated that Rajvir stabbed Chandreshwar. But thereafter, their testimony differs. PW.4 states that Rajvir stabbed Nirmal. Nirmal states that Jagdamba caught him and Vinod stabbed him.

PW.4 does not talk about the person of Vinod. Qua appellant Mohinder, variation in the testimony is relevant. Whereas PW.4 stated that Mohinder caught him when Rajvir stabbed him, PW.2 stated that some person had caught Gorakh. In cross-examination, he categorically deposed that he had not seen accused Mohinder at the spot.

21. The third victim who was also an alleged eye witness, Chandreshwar who was examined as PW.5 stated that on hearing noise he went to the place from where noise was coming and saw Gorakh being beaten up. He saw Rajvir with a knife in his hands. Jagdamba and another person cautioned him not to become a well-wisher of Gorakh. 3-4, persons caught him and Rajvir stabbed him with a knife. He stated that Nirmal was stabbed but he was not aware as to who stabbed Nirmal. He deposed that he did not see Gorakh being stabbed.

22. It is apparent that there was a free for all. In all probability, accused Rajvir accompanied by his gang were aggressors.

23 Recovery of knife at the instance of Rajvir is doubtful. Said knife has not been linked to Rajvir. Would that mean that Rajvir suffers no conviction?

24. What if the weapon of offence was not recovered? Case would have to be decided on the basis of oral evidence.

25. PW.2, 4 and 5, are all unanimous on PW.4 being assaulted at the first instance. All are unanimous that Rajvir was seen with a knife. PW.4 states that Rajvir stabbed him. PW.2 and 5 say that they responded to the rescue cry of PW.4 and saw Rajvir with a knife in his hand. PW.4 states that Rajvir stabbed him. PW.2 states that he did not see Rajvir stab Chandreshwar. PW-5, Chandreshwar states that Rajvir stabbed him. In the free for all, it is possible that PW.2 did not see who stabbed PW.5.

26. Ocular evidence clearly implicates Rajvir as the assailant and notwithstanding that recovery of knife is doubtful, injuries on the person of Gorakh and Chandreshwar established assault with a sharp edged weapon.

27. That the prosecution has not conducted itself with diligence, in that neither chargesheeted Jagdamba nor made attempts to identify the bearded person and further erred in not sending the alleged weapon of offence for forensic examination, the entire version of the prosecution cannot be thrown out of the window.

28. It is not the case of the defense that Gorakh had previous enmity with Rajvir.

29. Mr. Aman Lekhi, learned counsel appearing for the appellants contended that testimony of the witnesses show that they responded within seconds to the rescue call of Gorakh. PW.2 categorically deposed that he did not see Mohinder at the spot. PW.5 also did not implicate Mohinder. Only PW.4 implicated Mohinder. Counsel urged that not only presence of Mohinder is doubtful but this discredits the testimony of PW.4. He would be an unreliable witness to sustain conviction. Counsel urged that WP.2 and 5 clearly stated that they did not see as to who inflicted the stabbed wound on Gorakh.

30. As far as accused Mohinder is concerned, the testimony of PW.2 is clearly exculpatory of his participation in the offence. PW.5 did not implicate Mohinder. In my opinion it would be unsafe to sustain conviction of Mohinder on the sole testimony of PW.4, more so when PW.2 who was also an injured person clearly stated that he did not see accused Mohinder at the spot. In any case, Mohinder would be entitled to the benefit of doubt as prosecution witnesses have given a contradictory statement pertaining to his presence.

31. That leaves the matter to be considered a little deeper as far as accused Rajvir is concerned.

32. As noted above, it is not the case of the defense that PW.2, PW.4 or PW.3 were inimical towards him. All witnesses are in unison that Rajvir was armed with a knife. PW.4 names him as the person who assaulted him. Assault took place when PW.2 and PW.5 were not present. But they deposed having seen Sonu armed with a knife within seconds of hearing cries of PW.4. Evidence on record unerringly points towards the culpability of Rajvir and excludes his absence or non-participation in the crime.

33. Since conviction has been rendered against Rajvir pertaining to the injuries inflicted upon Gorakh and Chandreshwar it would be useful to refer to the MLC of Gorakh (Ex.PW. 6/B). Unfortunately, M.L.C of Chandreshwar, though on judicial record, remained unproved and unexhibited. It cannot be looked into. I may note for record that the MLC shows no date of discharge. It shows that Chandreshwar absconded.

34. It must be noted at the outset that PW.6 who proved the MLC was not the doctor who had examined Gorakh. MLC shows that it was prepared by Dr. Rajiv Gupta. PW.6, Dr. Vijay Thakur proved the MLC being a colleague of Dr. Rajiv Gupta and had seen him writing and signing.

35. MLC records only one incise wound on right perumbilici region about 2 c.m. long on the person of Gorakh.

36. MLC records that the injury has been caused by a sharp edged weapon. On the MLC injury has been recorded as being dangerous.

37. Medical history sheet of Gorakh containing notes of doctors was not was produced during trial to show whether he underwent any surgery or not. We, therefore, have no evidence to ascertain the extent of penetration by the sharp edged weapon which caused the injury. How deep was the injury is not known. However, PW-7, Dr. Sunil Kumar stated that Dr. Satish Tyagi had done exploratory laprotomy on Gorakh and noted intra abdominal injuries. He identified signature of Dr. Satish Tyagi at point X on the M.L.C., Ex. PW-6/B. I have seen point X on the M.L.C. It bears some signatures under which 'Dr. Rajiv Gupta' is written. The witness has obviously deposed callously and the learned Trial Judge too has been negligent. The M.L.C does not record about exploratory laprotomy or nature of intra abdominal injuries. PW-7 was not the doctor who performed exploratory laprotomy. Thus, one is left in complete darkness qua the depth of the wound.

38. Injury on the person of Gorakh is only one. Testimony of PW.8 shows that on 15.4.1996, Gorakh met him in his i.e. Gorakh's house. Obviously, Gorakh was in a position to move around on the 5th day of the incident.

39. Though PW.4 stated that it was a pre-meditated attack, testimony of PW.2, PW.4 and PW.5 does not ruled out the possibility of a sudden fight.

40. Recovery of weapon of offence being doubtful, nature of injury has reflected in the MLC and the broad features of the case not ruling out a sudden fight, intention has to be gathered from the nature of injuries as recorded in the MLC and no other evidence.

41. We do not have the penetration i.e. the depth of the wound. Only one injury was caused, may be in the stomach, but the same does not reflect an intention to cause death. It is trite that to come within the four corners of Section 307 IPC, all ingredients of murder save and except death of the injured are to be found.

42. Conviction of appellant Rajvir under Section 307 cannot be sustained on the evidence on record.

43. Notwithstanding that the weapon of offence has not been linked to Rajvir, as noted, oral evidence is clear that he had used a knife when he attacked Gorakh. Case of voluntary causing hurt by a dangerous weapon is made out.

44. Only thing to be seen further is whether case is made out under Section 324 or Section 326 IPC. Grievous hurt is defined under Section 330 IPC. Seven categories of hurt are listed as being grievous. The stab wound in question does not fall in any of the first 7 categories. The 8th category of injury is, hurt which endangers life or which causes the sufferer to be during the space of 20 days in severe bodily pain or unable to follow his ordinary pursuits.

45. I have already held that the injury has not been proved to be of the kind which can be labeled as endangering life. Testimony of PW.8 shows that Gorakh was found by him in his house on 15.4.1996. There is no evidence that Gorakh suffered severe bodily pain for 20 days or was unable to follow his ordinary pursuits.

46. Appeal in so far as it relates to accused Mohinder succeeds. His conviction and sentence are set aside.

47. Appeal by Rajvir succeeds partially. Conviction and sentence under Section 307 IPC is set aside. Conviction is converted to one under Section 324 IPC. As per the nominal roll of Rajvir, as of 24.10.2000 he had undergone a sentence of one year. He was released on bail vide order dated 18.10.2000.

48. Considering that age of Rajvir was 22 years and there is no past history of criminal activity, sentence imposed for conviction under Section 324 IPC is the period already undergone.

49. Both accused are on bail. Bail bonds and surety bonds stand discharged.

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