

Dalip Kumar Alias Pinki Vs. State

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Court : Delhi

Decided On : Jan-23-1995

Reported in : 1995CriLJ1742

Judge : P.K. Bahri and; S.D. Pandit, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 307 and 326; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161

Appeal No. : Criminal Appeal 40 and 65 of 1990

Appellant : Dalip Kumar Alias Pinki

Respondent : State

Advocate for Def. : Ms. Neelam Grover, amices Curiae and ; R. D. Jolly, Adv.

Advocate for Pet/Ap. : K.B. Andley and; Sunil Sethi, Adv

Judgement :

S.D. Pandit, J.

1. Dalip Kumar alias Pinki and Mahesh Kumar alias Lapper original accused in Section's case No. 9/87 have preferred the present appeals against the judgment passed by the Additional Sessions Judge on 20th February, 1990 by which he held them guilty of the offence punishable under Section 302 read with S. 34 of the

Indian Penal Code and sentenced each of them to suffer imprisonment for life and to pay a fine of Rs. 10,000/-, in default to suffer rigorous imprisonment for, six months. As these two appeals are arising out of one and the same trial and are preferred against one and the same judgment they are heard together and they are disposed of by this common judgment.

2. Deceased Shiv Kumar alias Nodhi was younger brother of first informant, Satinder Kumar Kohli r/o 11/81, Geeta Colony, Delhi. Deceased Shiv Kumar alias Nodhi as well as his brother, first informant, Satinder Kumar Kohil are rickshaw drivers. The present two appellants Dalip Kumar alias Pinki and Mahesh Kumar alias Lapper are also rickshaw drivers. On 2nd October, 1986 it seems that there was some quarrels and disputed between deceased Shiv Kumar alias Nodhi and the present appellants on the question of picking up of passengers out of turn but it seems that at that time the deceased Shiv Kumar alias Nodhi had managed to escape from clutches of decision of the present appellants.

3. On 3rd October, 1986 at about 10.45 p.m. when first informant Satinder Kumar Kohil came with his rickshaw bearing No. DHR 5439 ITO Flyover Chowk he found that his younger brother Shiv Kumar alias Nodhi was also present there with his rickshaw bearing No. DEN 6392. Besides him one Jagdish Kumar alias Lukka with scooter No. DER 1777, Arun Kumar alias Fauji with scooter No. DER 6633 and 2-3 other scooter, drivers were also standing there at that place waiting for passengers before going home. First informant Satinder Kumar also stopped his rickshaw behind those rickshaws and after he had stopped his rickshaw, within a few minutes the present appellants came there in rickshaw bearing No. DER 8709. Appellant Mahesh Kumar alias Lapper was driving that rickshaw whereas appellant Dalip Kumar alias Pinki was sitting on the rear side of the rickshaw. When the rickshaw came in the chowk on seeing Shiv Kumar alias Nodhi standing there, Dalip Kumar alias Pinki abused Shiv Kumar alias Nodhi in the name of his sister and said that on the previous day he had managed to escape but he would not spare him on that day and they stopped there rickshaw. Then Dalip Kumar alias Pinki took a screw driver from the tool box of that rickshaw belonging to the Lapper alias Mahesh Kumar. On seeing the same Shiv Kumar alias Nodhi started to run away but appellant Mahesh Kumar alias Lapper ran

ahead and caught hold of Shiv Kumar alias Nodhi and then appellant Dalip Kumar alias Pinki went ahead and gave a blow of the screw driver in his hand on the head of Shiv Kumar. On that first informant Satinder Kumar raised cries that they were going to kill him and catch them. Thereupon, the appellant returned to the rickshaw, boarded the same and fled away.

4. Shiv Kumar alias Nodhi had fallen down after sustaining that blow of the screw driver of his head and blood had started oozing out from that injury near the ear on the left side of his head. Then first informant P.W. 4 Satinder Kumar with the help of Arun Kumar alias Fauzi, P.W. 2 and Jagdish Kumar alias Lukka, P.W. 3 lifted Shiv Kumar alias Nodhi and put him in his rickshaw and then all of them took him to Jai Prakash Narain Hospital. When Shiv Kumar alias Nodhi was taken to Jai Prakash Narain Hospital he had become unconscious and he was not in a position to talk. Then the constable on duty in Jai Prakash Narain Hospital gave the intimation to the police of I.P. Estate Police Station of his having been admitted by his brother in injured condition.

5. Thereupon P.W. 6 S. I. Raghunandan Singh went to Jai Prakash Narain Hospital with constable Som Nath. There he found that Shiv Kumar alias Nodhi was not in a fit condition to make a statement as per the opinion of the medical officer. By that time P.W. 7 Prit Pal Singh, SHO also reached the hospital and they first recorded the first information report of P.W. 4 Satinder Kumar and sent the same to the police station house in order to register the offence under Section 307 of the Indian Penal Code. The said FIR was registered at No. 576/86.

6. After sending the first informant report to the police station house P.W. 7 Prit Pal Singh started the investigation. He seized the rickshaw in which the deceased Shiv Kumar alias Nodhi was brought to the hospital and he had also collected the blood which was lying in the said rickshaw with the help of the cotton gauze. Then with the help of P.W. 3 Jagdish Kumar alias Lukka and P.W. 2 Arun Kumar alias Fauji he went to the respective houses of the present appellants and arrested them. He had also gone to the spot where the incident in question took place and prepared a memorandum as well as the sight plan of the said spot. He also recorded statements of both P.W. 2 Arun Kumar alias Fauji and P.W. 3 Jagdish

Kumar alias Lukka. Then at the instance of appellants he seized the screw driver. He had found blood stains on the pant of appellant Dalip alias Pinki. He, therefore seized the same and then he also recorded statement of P.W. 7 Nirmal Singh regarding the incident of the previous day. He had produced both the appellants before the Metropolitan Magistrate and had obtained their remand orders.

7. But injured Shiv Kumar alias Nodhi did not regain consciousness and he ultimately succumbed to the injuries sustained by him on 5th December, 1987 at about 5.30 p.m. Thereafter necessary inquest proceedings were taken and dead body was sent to the medical officer for carrying post mortem. In the post mortem it was found that there was a crack in the scalp bone and the injury to the brain matter and Dr. Vishnu Kumar who had performed post mortem had found that the death was due to haemorrhage as well as of stab injury to brain on account of external injury No. 1 The second external injury was a minor injury on account of his fall or running. After the death of Shiv Kumar alias Nodhi Section 302 was added and on the completion of necessary investigation a charge sheet was sent up against the present appellant for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code. As the offence punishable under Section 302 read with Section 34 of the Indian Penal Code is exclusively triable by the Court of Sessions the appellants were committed to the Court of Sessions by the Metropolitan Magistrate.

8. A charge is framed against the appellants on 10th May, 1988 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Both the appellants pleaded not guilty to the offence with which they were charged. Their defense is of total denial and false implication.

9. In order to prove its case against the present appellants the prosecution has examined in all 17 witnesses. Out of 17 witnesses P.W. 2 Arun Kumar alias Fauji, P.W. 3 Jagdish Kumar alias Lukka and P.W. 4 Satinder Kumar were examined as direct eye witnesses to the incident in question. But out of these three witnesses both P.W. 2 Arun Kumar alias Fauji and P.W. 3 Jagdish Kumar alias Lukka turned hostile and they did not support the prosecution case. Thus there was only direct

evidence of P.W. 4 Satinder Kumar. The trial Court found that the evidence of Satinder Kumar was quite believable and acceptable. It was corroborated by the necessary circumstantial and medical evidence on record. He, therefore, held both the appellants guilty of the offence with which they were charged and sentenced them as stated earlier. Accused have not examined any witnesses in support of their defense.

10. Being felt aggrieved by the said decision both the original accused have preferred the present two appeals. It is vehemently urged by Mr. Andley, learned counsel for Dalip Kumar that the evidence of P.W. 4 Satinder Kumar was not at all believable and acceptable. He contended that there is no cogent and clear evidence on record and it could not be said that the prosecution had proved its case against the appellants beyond reasonable doubt. He contended that there are various circumstances which indicate that the prosecution case could not be accepted beyond reasonable doubt. He has further contended that the appellant could not be said to have committed an offence punishable under Section 302. At the most he could be had guilty for commission of an offence under Section 326. Ms. Neelam Grover, learned counsel for the appellant Mahesh Kumar alias Lapper has contended before us that there is absolutely no evidence on record to show that appellant Mahesh Kumar alias Lapper was sharing the common intention of killing the deceased. According to her the material on record shows that appellant Mahesh Kumar alias Lapper was not also aware that the appellant No. 1 Dalip Kumar alias Pinki was going to give a blow of screw driver. therefore, in these circumstances appellant Mahesh Kumar alias Lapper could not be held guilty of the offence punishable either under Section 302 or any other offence with the aid of Section 34 of the Indian Penal Code. As against this the learned counsel for the State Mr. Jolly supported the findings of the trial Court and contended that there are no grounds to reject the findings recorded by the trial Court.

11. The prosecution had examined P.W. 2 Arun Kumar alias Fauji, P.W. 3 Jagdish Kumar alias Lukka and P.W. 4 Satinder Kumar, the first informant as the direct eye witnesses to the incident in question. Out of these three witnesses both P.W. 2 Arun Kumar alias Fauji and P.W. 3 Jagdish Kumar alias Lukka have turned hostile and have not supported the prosecution case. If their testimonies are seen then it

would be quite clear that they have gone to the level of not only not supporting the prosecution case but they have also gone a step further in order to show that P.W. 4 Satinder Kumar was not also present there, at the time of incident of assault on Ashok Kumar. Then if the evidence of P.W. 4 Satinder Kumar and Investigating Officer, P.W. 17 Prit Pal Singh is taken into consideration then it would be quite clear that both these witnesses P.W. 24 Arun Kumar alias Fauji and P.W. 3 Jagdish Kumar alias Lukka were telling lies before the Court and they were out and out to help the appellants, their co-rickshaw drivers. therefore, in the circumstances, there remains only the evidence of P.W. 4 Satinder Kumar.

12. P.W. 4 Satinder Kumar is the first informant in this case and he is also only eye witness to the incident in question in view of the hostility of P.W. 2 Arjun Kumar alias Fauji and P.W. 3 Jagdish Kumar alias Lukka. Admittedly, he is the real brother of Ashok Kumar. It is settled law that merely because a witnesses happened to be near relative of the deceased or interested in the deceased, his evidence could not be thrown away or could not be taken into consideration. We are aware that the law expects in such a case that the evidence of such relative or interested witness must be scrutinised scrupulously and must be accepted after close scrutiny. therefore, bearing this aspect regarding the appreciation of evidence, P.W. 4 Satinder Kumar we would proceed to consider as to whether the evidence of this witness Satinder Kumar has been rightly accepted by the trial Court or not.

13. P.W. 4 Satinder Kumar has deposed that on that day of 4th December, 1987 at about 10.45 p.m. he happened to come to ITO Flyover Chowk with his rickshaw while proceeding to his house in order to pick up some passengers. When he came there he found that his younger brother Shiv Kumar alias Nodhi had also parked his rickshaw in that chowk and so also the P.W. 2 Arun Kumar alias Fauji and P.W. 3 Jagdish Kumar alias Lukka and 2-3 other rickshaw drivers were present along with their rickshaws in that chowk. When he came there he stopped his rickshaw there where all those other rickshaws were standing. Then the present to appellants came there in rickshaw bearing No. DER 8709 which was being driver by appellant Mahesh Kumar alias Lapper and appellant Dalip Kumar alias Pinki was sitting in the said rickshaw. When they saw his brother they

stopped the rickshaw and accused Dalip Kumar alias Pinki had threatened him by saying 'SALAY TO KAL TO BHAG GAYA that AAZ NA CHHOREGA'. Then he has further deposed that thereafter both of them got down from the rickshaw and appellant Mahesh Kumar alias Lapper went and caught his brother and asked Dalip Kumar alias Pinki to assault him and Dalip Kumar went there with a screw driver after taking the same from the tool box of rickshaw DER 8709 and gave one blow on the left region of head of Shiv Kumar. By that time he raised an alarm whereupon the present appellants took seat in their rickshaw and ran away towards Shakarpur. He has further deposed that his brother had fallen down and then with the help of P.W. 2 Arjun Kumar alias Fauji and P.W. 3 Jagdish Kumar alias Lukka he put his brother in this brother's rickshaw and then all of them took him to Jai Prakash Narain Hospital. It is very pertinent to note that both the hostile witnesses P.W. 2 Arjun Kumar alias Fauji and P.W. 3 Jagdish Kumar alias Lukka have stated in their evidence that they have helped P.W. 4 Satinder Kumar in lifting his brother Shiv Kumar alias Nodhi and putting him in his rickshaw and then all the three of them had taken him to Jai Prakash Narain Hospital. No doubt from the material on record it is quite clear that the other version given by these two witnesses regarding the incident in question is contrary to their own statements under Section 161. It is also contrary to the first information report in this case and the said version given by them also stands falsified by the testimony of P.W. 4 as well as other circumstantial evidence on record. therefore, that version of them is being ignored by us but the part of their evidence namely, that they have helped P.W. 4 Satinder Kumar in putting the deceased in the rickshaw and all three of them have taken him to Jai Prakash Narain Hospital could be accepted and relied for the purpose of corroborating the version of P.W. 4 Satinder Kumar. Though both of them are declared hostile and we are not ready to accept the other parts of their testimonies, this part of story could be taken into consideration. For holding, thus we rely on the following observation of the apex Court in *Dhananjay Chatterjee alias Dhana v. State of West Bengal*, : [1994]1SCR37 :

'Testimony of hostile witness need not be ignored totally and the Court can scrutinise his testimony and accept that portion of the same which receives corroboration from other evidence on record. The testimony of a hostile witness is not liable to be rejected without even scrutinising it, although great care and

caution is required to analyze the same before accepting any part of it as is otherwise found reliable and consistent with the prosecution case.'

14. The evidence of Investigating Officer P.W. 17 Prit Pal Singh clearly shows that when he went in the hospital he present two witnesses P.W. 2 Arun Kumar alias Fauji and P.W. 3 Jagdish Kumar alias Lukka were present in the hospital premises and his evidence further shows that they led the police party to the appellants respective house where they were found and arrested. If at all these two witnesses were not present and had not seen the incident as deposed to by P.W. 4 Satinder Kumar they would not have helped the police in going to the house of the present appellants and pointing out their houses.

15. The first information on record shows that version, which P.W. 4 Satinder Kumar had deposed in Court, which P.W. 4 Satinder Kumar had deposed in Court, was given by him in his first information report and his testimony is fully supported by his first information report. The first information report is recorded by the police in the police station register at 4.15 a.m. on 4th October, 1986 and it was dispatched after recording from the hospital at about 3.30 am. It must be mentioned here that when this first information report was recorded and the offence was registered, it was registered for the offence punishable under Section 307 of the Indian Penal Code and not under Section 302 of Indian Penal Code. As per the Punjab Police Rules only in case of offence punishable under Section 302, the first information report must be sent with special messenger immediately to the concerned Magistrate and other superior police officers and the copies of other first information report are to be sent in routine course. therefore, in the circumstances, naturally copy of the first information report in this case was sent to the Magistrate in routine course not by special messenger. It must be mentioned here that the incident had taken place by about 11.00 p.m. because as per the version given by the first informant P.W. 4 Satinder Kumar he had reached the spot by about 10.45 p.m. and about 4-5 minutes after his reaching there the present two appellants had arrived there and thereafter the incident in question took place. Shiv Kumar was immediately rushed to the hospital and the MLC on record shows that he has admitted in the hospital at 11.10 p.m. The said MLC report is proved. Witness P.W. 16 K. K. Chibber had stated that the Medical

Officer who had prepared the said medico legal case papers had left the job and his whereabouts are not known. If cross-examination of P.W. 16 is seen then his claim that he knows the handwriting and signatures of the the medical officer who has prepared the said medico legal papers is not at all challenged and disputed. Not only that his claim that the doctor had let the job and his whereabouts are not known is not also disputed and the said medico legal paper is admitted in evidence and exhibited. Once a document is admitted in evidence after due proof the contents in the said document would be admissible in evidence. It, must be also said that MLC is prepared by public servant in discharge of his duties. That document is prepared in due course of his duty as public servant and thereforee it would be a public document. Contents of public document will be admissible in evidence. (See Friths Chand v. State of Him-Pra, : 1989 CriLJ841 , MLC report Exhibit 16/A and 16/B shows that injured Shiv Kumar alias was brought by his brother and the said brother had given the history of the injuries as under :-

'Alleged history given by the person who brought the injured as being hit by one Pinki by screw driver on, the left side of the head and also by his associate Lapor.'

16. The above history is recorded in the medico legal papers at 11.10 p.m. The contents of the said history given by witness P.W. 4 Satinder Kumar falsifies the contention raised by the learned counsel for the appellant that there was delay in lodging first information report and that a concoction was made to incorporate the names of the present two appellants in that alleged delayed first information report.

17. It must be mentioned here that as a matter of fact no material is brought out in the Cross-examination of either P.W. 4 Satinder Kumar or the I.O. to infer or hold that there was purposeful delay in lodging the first information report and that a prejudice is caused to the appellants. There is also nothing on record to infer that the prosecution has made improvement and for that purpose there was delay in lodging the FIR. In view of the endorsement made by the Medical Officer in Ex. 16/A & 16/B regarding the history given by the witness at 11.10 p.m. the registration of FIR at 4.15 a.m. and recording the same at 3.30 a.m. could not be

fatal to the prosecution case or could not be taken into consideration for rejecting the testimony of P.W. 1. In the case of State of U.P. v. Gokaran, : 1985 CriLJ511 , it has been held that mere delay of some time in lodging FIR could not be taken into consideration in every case unless some prejudice is shown to have been caused to the accused.

18. The evidence on record shows that deceased Shiv Kumar alias Nodhi was taken to Jai Prakash Narain Hospital after he was examined by the casualty medical officer. He was removed from that place to another ward by the hospital vehicle. That is quite clear from the evidence of P.W. 6 S. I. Raghunandan as well as P.W. 17 Prit Pal Singh. P.W. 4 Satinder Kumar had come back after his brother was admitted in the another ward from the casualty, room and thereafter his first information report was recorded. It must be remembered that the constable on hospital duty had informed the police station officer about Shiv kumar alias Nodhi having been brought in injured condition and had asked for deputing some officer for further purpose and therefore, the first information report was naturally recorded by the officer after coming there and the recording of the FIR within four hours form the incident and that too after the first informant had taken the steps in admitting his brother in hospital and giving his medical aid could not be said to be a delayed first information report. From the material on record it is not also possible to hold that there was any improvement or concoction by the prosecution and that any prejudice was caused to the appellants.

19. The version of P.W. 4 Satinder Kumar further gets corroboration from the medical evidence on record. The medical evidence on record shows that there were only two injuries, one on the left temporal region of the head of Shiv Kumar alias Nodhi and another on the big toe of his right foot. The injury on the big toe of the right leg was of two small abrasions. The second injury of the two small abrasions on the right big toe of his foot might be due to of falling on the ground after sustaining injuries or they might have also been caused when he was trying to run away on seeing appellants marching towards him. It is also very pertinent to note that even in his first information report as well as in the history given to the medical officer, P.W. 4 Satinder Kumar has not alleged or claimed that appellant Mahesh Kumar alias Lapper had caused any injury to his brother or had given a

slap or assaulted his brother. He has only stated that this appellant Mahesh Kumar alias Lapper had caught his brother. He has also stated that only single blow was given by appellant Dalip Kumar alias Pinki. That conduct of the appellant also clearly indicates and shows that he did not want to exaggerate the incident and he had not made any attempt to falsely implicate the appellants.

20. The evidence on record further shows that the deceased Shiv Kumar alias Nodhi was actually taken to the hospital by the rickshaw of Nodhi alias Shiv Kumar because the evidence of P.W. 17, the investigating officer shows that the rickshaw of the deceased was lying near the casualty ward of the hospital and in the said rickshaw he had found a pool of blood and he had taken the sample of blood with the help of cotton gauze. If the version given by two hostile witnesses, namely, P.W. 2 Arum Kumar alias Fauji and P.W. 3 Jagdish Kumar alias Lukka is seen then if deceased Shiv Kumar alias Nodhi was lying in the injured condition there before their arrival their arrival there as well as of the arrival of P.W. 4 Satinder Kumar then in the natural course of human conduct Satinder Kumar would have gone on the spot where his brother was lying and would have put him in his rickshaw and taken him to the hospital. As per the version given by P.W. 4 Satinder Kumar when he came there at ITO Flyover Chowk his brother Shiv Kumar alias Nodhi had parked his rickshaw and besides him the rickshaw of P.W. 2 and P.W. 3 and 2-3 other rickshaw drivers were standing in that queue and thereafter his rickshaw was parked and then the appellants came there in their rickshaw and then they attacked his brother who was trying to run away from his rickshaw. therefore, in view of the said incident rickshaw of Shiv Kumar alias Nodhi would be naturally near to the spot where he was lying and consequently he was lifted and put in his rickshaw and taken to the hospital. But if the version given by the two hostile witnesses was true and correct then in the natural course of human conduct if Satinder Kumar had come there later on then they would have called him ahead with his rickshaw and would have pointed out to him his injured brother Shiv Kumar alias Nodhi lying there and then Shiv Kumar alias Nodhi would have been taken to the hospital in the rickshaw of P.W. A Satinder Kumar. Then in our opinion the taking of Shiv Kumar alias Nodhi in his own rickshaw supports the version given by P.W. 4 Satinder Kumar.

21. The learned counsel for the appellant Dalip Kumar alias Pinki, Shri Andley vehemently urged before us that the conduct of P.W. 4 Satinder Kumar as revealed by the record indicates and shows that his version must not be true and he must not be present at the time of incident of assault on his brother. According to him P.W. 4 Satinder Kumar has not acted and behaved at the time of incident as the brother of the victim. According to him P.W. 4 Satinder Kumar does not say that he had made any attempt to save his brother and he had tried to intervene when present appellants had gone to assault his brother and that behavior of him could not be conduct of a brother. He further contended that this P.W. 4 Satinder had stated during his cross-examination that he had put the deceased Shiv Kumar alias Nodhi at the footrest of his rickshaw and had carried him to hospital and that is also not a conduct of a brother of victim. He has cited in support of his contention a case reported in *Maharaj Singh v. State of U.P.* : 1995 CriLJ457 .

22. But before considering the facts of the case of : 1995 CriLJ457 , and the contentions made by the learned counsel Shri Andley for the appellant, it must be said that there are no set rules regarding human behavior and conduct in a given set of situation or incident, different persons react differently. In the case of *Rana Partap v. State of Haryana*, : 1983 CriLJ1272 , the following principles are laid down (at p. 1274 of Cri LJ) :-

'Even person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.'

23. In that case of the eye witnesses was the real brother of the deceased and the learned Sessions Judge had discarded the presence of the brother in view of his conduct in not going to rescue the deceased when he was in the clothes of the assailant by saying that that conduct was unnatural and approach of the learned

Sessions Judge has been commented by the apex Court by making the above observations.

24. Now turning to the facts of the case before us it must be said that as per the version given by the first informant in his first information report as well as deposition the incident in question had taken very swiftly. It must be also mentioned here that as per the version given by the first informant between the first informant and his brother there were 5-6 rickshaws and deceased Nodhi was ahead of first rickshaw when the accused located him. Then Shiv Kumar alias Nodhi started running away and then he was chased by the appellant Mahesh Kumar alias Lapper. Mahesh Kumar caught hold him immediately and Dalip Kumar alias Pinki had given one single blow of the screw driver on the left parietal region of his head and then both the accused took seat in the rickshaw and ran away. therefore, in the circumstances, he could not have any other mode of rescuing his brother except raising hue and cry as deposed by him and rushing towards his brother. It is not the case where the deceased and the first informant were together and the appellant had attacked the deceased who was standing by the side of the first informant. It must be also further mentioned that actually till the appellant Pinki alias Dalip Kumar gave the blow of his screw driver it was not thought that he was going to kill him. He had only said earlier that Nodhi had escaped on the previous evening and he would not leave him. The deceased, first informant as well as the accused are rickshaw drivers and it seems they are used to quarrels and disputes between them on account of picking up of passengers and therefore, in the circumstances when the accused Pinki alias Dalip Kumar has stopped on seeing Nodhi and shouted that he would not leave him the first informant could not have thought of immediately at that time that he was going to finish his brother. therefore, in the circumstances of the case the conduct of the first informant could not be said too be unnatural, unbelievable or improbable.

25. The next attack by Shri Andley is that the first informant has put his brother in the footrest of the rickshaw. It must be remembered that the injured had become unconscious and he was physically lifted and put in the rickshaw and then he was carried to the hospital and therefore, in the circumstances if he puts him in the rickshaw at the foot rest and takes him to hospital with the help of other rickshaw

drivers then that conduct of him could not be said to be unnatural. The learned counsel has cited before us the case of Meghraj Singh v. State of U.P. : 1995 CriLJ457 , and he put reliance on certain observations made in para No. 13 (at p. 463 of Cri LJ) :

'In a situation like this, the normal conduct of the wife would be firstly to make an effort to save her husband even by taking blow on herself and if that is not possible then at least to go so close to the person at least after the assailants had left that there would be no escape of the oozing out of the injuries of the deceased to come on to her cloths.'

But the above contents of the said para No. 13 will have to be in context of the earlier observations made by their Lordships of Supreme Court. The said para No. 13 begins to run as under (at p. 463 of Cri LJ) :

'It appears that it was a blind murder and none of the eye-witnesses were actually present at the scene. The ante-timing of the FIR was obviously in order to introduce eye-witnesses to support the prosecution case. We may demonstrate this by noticing that though PW. 3 Smt. Kamlesh the widow of the deceased claimed that she was present with her husband at the time of the occurrence, her conduct was so unnatural that not only she did not try to save her husband but trying to provide a cover but even after her husband fell down and was injured by repeated injuries with the knife by the appellant Meharaj Singh, she did not even tried to go any where near her husband and even later on hold his head in her arms and try to provide some comfort to him. This becomes obvious from the absence of any bloodstains on her clothes. She admitted that she had not even received scratch during the occurrence. In a situation like this, the normal conduct of the wife

Then their Lordships had clearly found that though she had claimed that appellant Meharaj Singh and given repeated blows of the knife on her husband, the injuries found by the medical officer were of different weapons of different sizes. Then she had deposed that other appellants had fired repeated shots from three different firearms but their Lordships had found that the injuries by firearm must have been caused by only one firearm in view of the nature of the injuries and therefore in

the background of all these circumstances, they had taken her behavior and conduct into consideration when she was claiming that her deceased husband and she herself were bringing the second bundles of jawar, her husband was attacked by four persons from a very close distance. The facts of the case before us are quite distinct. In this case first informant was not near the injured. He was a quite distance away from the injuries and the assailants were also ahead of him and only one blow was given by the assailants on his brother. therefore, those observations of 1994 Supreme Court Cases (Criminal) 1391 are not applicable on facts of the case before us.

26. Thus we are of the view that the trial Court was quite justified in accepting the testimony of P.W. 4 Satinder Kumar and to hold that the injury on his head was sustained by deceased Nodhi alias Shiv Kumar on account of blow of the screw driver given by the appellant Dalip Kumar alias Pinki. He was also justified in accepting the participation of appellant Mahesh Kumar a Lapper in the commission of the said crime by pursuing and catching deceased Nodhi alias Shiv Kumar who was trying to run away.

27. The learned counsel Shri Andley urged before us that the doctor Vishnu Kumar, P.W. 10 has not specifically stated that the injury in question was in ordinary course of nature sufficient to cause death and therefore, the accused could not be held guilty under Section 302 of Indian Penal Code. In support of that submission he has cited before us the case of Chilamakur Nagiredy v. State of Andhra Pradesh : 1977 CriLJ1602 , and put reliance on the following observations (at p. 1604 of Cri LJ) :

'In absence of the specific and definite opinion of the Doctor in that regard, we did not consider it, safe to form our own opinion as it was difficult to say that the external or the internal injuries caused by accused 6 with a spear were such that one could say with certainty that they were also fatal by themselves. In that view of the matter we do not think that the conviction of accused 6 under Section 302 is sustainable. The injury caused by him, however, was grievous in nature. He, is, therefore, guilty of an offence under Section 326 of the Penal Code.

28. In that case the injury caused by accused No. 6 was described by doctor as under :

'Piercing wound of 1-1/2' long from above downwards 2' deep from back to front and medial side cutting open into the abdomen over right over back.'

No corresponding internal injury was found by doctor. The doctor in that case had found that injuries caused by accused Nos. 1 and 9 were in ordinary course of nature sufficient to cause the death of the deceased. Those injuries, had caused fracture of skull bone and injury to descending aorta, liver, large intestines. therefore, in view of those peculiar facts of that case the accused was not held guilty under Section 302. Thus the said case is not applicable on facts before us. We would deal with nature of, injury caused by appellant Dalip Kumar alias Pinki and consider as to whether he could be held guilty under Section 302 of the Indian Penal Code.

29. The learned counsel for the appellants urged before us that from the material on record both appellant No. 1 as well as appellant No. 2 could not be held guilty for an offence punishable under Section 302 and Section 34 of the Indian Penal Code. According to Shri Andley appellant Dalip Kumar alias Pinki had given only one blow and there is no evidence on record to show that actually he was motivated in killing and finishing deceased Shiv Kumar alias Nodhi. It must be remembered that the weapon used the particular part of the body aimed at may spell intention to murder. (See State of Karnataka v. Vedanaayagam, : (1995)1SCC326). The fact that it was a single injury inflicted at the spur of moment would not render it a case of culpable homicide not amounting to murder. It must be remembered here that the appellant Pinki had chosen to pick up only a screw driver and not a spanner or the rod of the screw jack for the purpose of assaulting the deceased. Thereofre, he has chosen a particular weapon namely, a screw driver, which is a pointed weapon. Then he was chosen the vital part of the head, namely, the left temporal region above and by the side of the left ear and had given the said single blow with such a velocity that it had gone inside to a depth of 7 to 8 centimeters as per the evidence or P.W. 10 Dr. Vishnu Kumar. Dr. Vishnu Kumar has deposed regarding the said external injury No. 1 as under :

'Cut lacerated stab wound 0.8 x 0.2 cms. Over the upper front part of left ear at its junction with scalp, running before back-wards. The upper margin was undermined while lower was bevelled. A small abrasion of 0.8 x 0.2 cms. was present on the upper margin of the injury and the injury was cranial cavity deep with brain matter coming out of it.'

Then he has further deposed as under :-

'On internal examination, blood effusion was present on the left side of head under ear and around, under injury No. 1 Skull showed an irregular defect somewhat oval, irregular margin at places. Measuring 1.1 x 0.7 cms. Under injury No. 1 with small bone chip at its lower marginal. Thick sub-dural haemorrhage was present all around the left temporal, parietal and occipital regions and basal portions of temporal lobes. Massive sub arachnoid haemorrhage was present around both temporal occipital regions with sub arachnoid haemorrhage communicating with intra-cerebral haemorrhage in mid line and around brain stems. The outer border of base of left temporal lobe showed lacerated punctured wound going 6 cms. deep in the brain substance under injury No. 1 up to the mid-line directed upwards.

Then he has deposed further as under :-

'Injury No. 1 entered the cranial cavity after causing a hole like defect in skull, then caused a hole in durameter, then went through other membrane and brain matter over left temporal lobe and finished in brain matter at mid-line. The total depth of the injury was 7 to 8 cms. and it was directed left to right and upwards.'

30. The above description of the said injury and the damage caused by the said injury clearly indicates that the blow of the screw driver was given, by the appellant Dalip Kumar with great velocity. therefore, in view of the weapon the force used in giving of the blow on the vital part of the body aimed at by the appellant Pinki clearly indicates and shows that he intended to kill and murder deceased Shiv Kumar alias Modi. therefore, in the circumstances, we are not in least hesitation to come to the conclusion that the trial Court was justified in coming to the conclusion that the appellant Dalip Kumar alias Pinki had caused murder of deceased Shiv Kumar alias Modi.

31. It has been urged before us by Ms. Grover that from the material on record it is difficult to hold that the appellant Mahesh Kumar alias Lapper had the common intention of killing deceased Nodhi alias Shiv Kumar. The quarrel which had taken on the previous day was between Dalip Kumar and Pinki and not with Mahesh Kumar alias Lapper who was the friend of Dalip Kumar alias Pinki. When the appellant Dalip Kumar had stopped on seeing the deceased he had not made a declaration that he was going to finish the deceased. Then P.W. 4 Satinder Kumar has stated in his cross-examination regarding the appellant Mahesh Kumar alias Lapper as under :-

'It is correct that at the time when Dalip Kumar alias Pinki got down from the scooter, my brother Modi as well as accused Mahesh Kumar had their backs towards Pinki.'

32. From the above admission of the sole eye-witness shows that he had no knowledge that appellant Pinki was going to kill Nodhi. There is absolutely no material on record to infer or hold that appellant Mahesh Kumar alias Lapper was sharing the intention of appellant Dalip Kumar alias Pinki of causing homicidal death of Shiv Kumar alias Nodhi. No doubt he was aware that appellant Dalip Kumar alias Pinki was going to cause some injury to deceased Shiv Kumar alias Nodhi and he was taking some instrument from the dicky of the scooter rikshaw. thereforee in the circumstances it could be, that the appellant Mahesh Kumar alias Lapper had not shared the common intention and had the knowledge that appellant Dalip Kumar alias Pinki was going to cause at least a greivous hurt with some dangerous weapon to Nodhi alias Shiv Kumar. thereforee, in the circumstances we are of the view that appellant Mahesh Kumar alias Lapper could be held guilty under Section 326 read with Section 34 of the Indian Penal Code whereas appellants Dalip Kumar alias Pinki is guilty of the offence punishable under Section 302 of the Indian Penal Code. Thus we hold that the appeal preferred by appellant Mahesh Kumar alias Lapper bearing Criminal Appeal 65/90 will have to be partly allowed and the appeal preferred by Dalip Kumar alias Pinki bearing Criminal Appeal 40/90 will have to be dismissed.

33. Thus the appeal preferred by Dalip Kumar alias Pinki bearing Criminal Appeal No. 40/90 is dismissed. However, he is held guilty of the offence punishable under Section 302 instead of Section 302 read with Section 34 of the Indian Penal Code and order of sentence passed by the trial Court is maintained and confirmed. The criminal Appeal bearing No. 65/90 preferred by Mahesh Kumar alias Lapper is partly allowed. The order of conviction and sentence passed against him for the offence punishable under Section 302 read with Section 34 or the Indian Penal Code is set aside. However, the appellant Mahesh kumar alias Lapper is held guilty of the offence punishable under Section 326 read with Section 34 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for nine years and to pay a fine of Rs. 500/- and in default to suffer rigorous imprisonment for six months.

34. Order accordingly.

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