

(2006) 08 DEL CK 0029

Delhi High Court

Case No: Criminal Appeal No"s. 459 and 484 of 2004

Furkan @ Javed

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Aug. 25, 2006

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 428
- Penal Code, 1860 (IPC) - Section 120B, 302, 307, 34, 392

Citation: (2006) 92 DRJ 618

Hon'ble Judges: R.S. Sodhi, J; P.K. Bhasin, J

Bench: Division Bench

Advocate: Seema Gulati Sumeet Verma and Sumeet Verma, No, for the Appellant;
Ravinder Chadha, Assistant Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

R.S. Sodhi, J.

Criminal Appeals No. 459 of 2004 and 484 of 2004 seek to challenge the judgment and order dated 29.05.2004 of the Additional Sessions Judge in Sessions Case No. 14 of 2001, whereby the learned Judge, while acquitting the accused, Gayur, has convicted accused, Furkan and Pappu (the two appellants herein) under Sections 302/307/392/394/34 IPC and also u/s 397 IPC and Further by his order dated 31.5.2004 sentenced both the convicted accused to imprisonment for life and a fine of Rs. 500/- and in default simple imprisonment for one month u/s 302/34 IPC; three years rigorous imprisonment and a fine of Rs. 500/- and in default of payment of fine simple imprisonment for one month u/s 307/34 IPC; seven years rigorous imprisonment and a fine of Rs. 500/- u/s 392/34 IPC read with Section 397 IPC and in default of payment of fine, simple imprisonment for one month; three years rigorous imprisonment and a fine of Rs. 500/- and in default of payment of fine, simple imprisonment for one month u/s 394/34 IPC. All the substantive sentences of imprisonment were directed to run concurrently. Benefit of Section 428 CrP.C. was

also given to the accused. Since both the appeals arise out of the same judgment of the trial court, they were heard together and are now being disposed of by this common judgment.

2. Brief facts of the case, as have been noted by the Additional Sessions Judge in his judgment under challenge and put up by the Prosecution, are:

That on 10/03/96 a complaint was made by Ashok Kumar son of Shri Saudagar, resident of Rohtak, Haryana, that he and his brother Subhash are in the business of sale and purchase of Buffaloes in and around Delhi on credit basis and that they recover the amount-in installments. It was stated that on 9th, 10th & 11th of every month, they recover the installments from their customers.

On 10.03.96, at about 6:45 a.m., he and his brother Subhash had come to Delhi from Rohtak in their maruti car No. DL-4C-B4489; blue colour, being driven by their driver Ajmer Singh. After recovering the installments from Ghaziabad, Seelampur, Delite Cinema, they had come to Mool Chand Basti, Pustha, Delhi to recover the installments from Nassruddin @ Nasso and Bhendu. At about 11:45 a.m., after recovering the amount, both the brothers had come at Pustha where their car was parked Subhash purchased Raspberries from a rehri standing at the back side of their car and as he was coming to sit in the car, four assailants came from behind and one of them wearing a green pant, white check shirt, height about 5'10", slim, fair complexion with long hairs, took out a katta and fired at the head of Subhash whereas the two other assailants having deshi kattas in their hands and the fourth having a knife came near Ashok and threatened him to hand over cash, ring and watch etc. As Ashok Kumar and driver Ajmer Singh tried to alight from the car, one assailant aged about 30-32 years, 5'8" of height, wheatish complexion with strongly built body and light mustaches fired at the left arm pit of Ashok Kumar and the third assailant aged about 25-30 years of normal height had given a knife blow on the back of driver Ajmer Singh and the fourth assailant pushed Ashok Kumar at the back seat of the car showing him the katta and took away yellow colour cloth bag containing Rs. 34,800/- from the back seat of the car. The strongly built assailant snatched the gold ring, Citizen watch of golden colour of Ashok Kumar and some documents in the yellow colour clothes. Thereafter they threw both Ashok Kumar and Ajmer Singh at the spot and sped away in their car. Injured Subhash was lying unconscious. Ashok Kumar and Ajmer Singh put injured Subhash in a TSR and took him to JPN Hospital, Delhi and lodged a complaint with the police.

On the basis of above complaint FIR bearing No. 108/96 was registered and investigation started. On completion of investigation, challan was filed before the Court of Ld. MM, Delhi.

3. Charges were framed initially against three accused Pappu, Jaipal and Gayur on 27.1.1998 u/s 120-B and under Sections 302/307/392/397 read with Section 120-B IPC. On 8.9.1998 the charges were amended by mentioning the robbed amount

therein. After the arrest of accused Furkan, who was earlier declared proclaimed offender, similar charges were framed against him also. On 17.10.2002 the charges were re-framed under Sections 396/302/307/395/397 read with Section 120-B IPC against accused Pappu, Jaipal, Furkan and Gayur. After the charges were amended, the accused persons made a Statement to the effect that they do not intend to re-summon all the witnesses examined prior to the amendment and only requested for re-examination of PW-1 Ashok Kumar, PW-2, Ajmer Singh, PW-5, SI Devender Kumar, PW-12, Inspector V.P. Singh and PW-14, HC Satya Prakash and accordingly they were examined and cross-examined afresh.

4. The Prosecution, in order to establish its case, examined as many as 21 witnesses. Of these, PW-1, Shri Ashok Kumar, is the complainant. He is also the injured witness who narrates the incidence of 22.3.1996 and identifies the roles ascribed to Furkan, Pappu and one Jamil, who was declared a proclaimed offender, along with two other accused, Nafiz and Mehraban, and had been kept in Column No. 2 of the challan. He identified Pappu on 22.3.1996 and on 16.4.1996 accused Furkan in the Police Station as both of them had refused test identification parade. PW-2, Ajmer Singh, has supported the version of PW-1, Ashok Kumar. He too is an injured witness. PW-3, Satish Kumar Dhingra, identified dead body of the deceased, Subhash, vide Ex. PW-3/A. PW-4, SI Roshan Singh, recorded the information on 10.3.1996 at about 8.45 p.m. received from JPN Hospital vide DD No. 21/A, Ex. PW-4/A in respect of death of Subhash.

5. PW-5, SI Devender Kumar, brought Furkan to Delhi and produced him before the Magistrate on 12.4.1996. He has deposed that Furkan refused test identification parade on 15.4.1996. On 17.4.1996, Furkan made a disclosure statement and led the police party to his house at Ghonda, from where he got recovered a polythene bag consisting of a deshi katta and one live cartridge. The polythene bag also contained a pocket diary bearing name of the deceased, Subhash, with his address, visiting cards of PW-1, Ashok Kumar. PW-5 identified the country-made pistol vide Ex. PX1, cartridge as Ex. PX2, the election identify card of accused Furkan as Ex. PX3, pocket diary of the deceased, Subhash as Ex. PX7 along with visiting cards etc. and various other articles, all of which were taken into possession vide memo Ex. PW-5/C.

6. PW-6, Head Constable Ashok Kumar, is the witness to the disclosure statement made by Furkan on 12.4.1996, Ex. PW-67A. PW-7, Constable Amar Pal took the rukka to the police station from JPN Hospital for registration, of the case and handed over the copy of the FIR and rukka to the SHO at the spot. PW-8, Bawar Singh, did not support the Prosecution. PW-9, Constable Bijender Singh, is a witness to recovery of the car No. DL-4C-4489 which was found abandoned at Geeta Colony, New Delhi. This car was seized by PW-10, Zaheer Ahmad, vide memo Ex. PW-10/A. PW-11, Ashok Kumar, identified the dead body of Subhash. PW-12, Inspector V.P. Singh, prepared the crime report and handed it over to the Addl. SHO Satish Ken. PW-14, Head Constable Satya Prakash, took photographs of the place of incident and produced

negatives Ex.PW-14/A1 to A4 and the positives, Ex.PW-14/A5 to A8.

7. PW-15, Rajpal, deposed to the effect that the Investigating Officer lifted blood and blood stained earth from the spot and seized it vide memo Ex. PW-15/B and PW-15/C and also in his presence clothes of the deceased and the injured, Ashok Kumar, were taken into possession vide memo Ex. PW-15/D. Two parcels and one sample seal were also seized vide memo Ex. PW-15/E. On 10.3.1996 two empties were also recovered from the spot which were seized vide memo Ex. PW-15/A. This witness was declared hostile since he did not stand by his earlier statement.

8. PW-16, Inspector Rakesh Bhatnagar, reached the spot and was deputed to guard the same. In his presence, the blood and blood stained earth was lifted and seizure memo prepared. PW-17, S.D. Sharma, proved the MLC of injured Ashok Kumar, deceased Subhash and injured Ajmer Singh. The injuries on Ashok Kumar showed one incised wound on his left armpit under arm region caused by a sharp weapon while MLC of deceased Subhash, Ex.PW-17/B showed 1 cm. wound on his left temporal bone near and front to the left ear whereas MLC of Ajmer Singh, Ex. PW-17/D showed a stab wound by a sharp weapon over his lower back region with blood oozing out.

9. PW-18, Inspector Satish Ken, is the witness to collection of empties of cartridges fired. He took samples of blood and earth from the spot and arrested Jaipal (who during the trial absconded and so was declared as proclaimed offender) who further led to the arrest of Gayur and Pappu. Accused, Pappu, got recovered deshi katta, Ex. P-11, and cartridge, Ex. P-12. He also effected the arrest of Furkan who led to the recovery of deshi katta, Ex.PX1 and cartridge Ex.PX2 as also the pocket diary of Subhash, Ex. PX7, two visiting cards, Ex. PX8 and PX9 as also the letter head of M/s Ashok Kumar & Sons, Ex. PX10.

10. PW-19, ASI U.R. Khan is witness to the arrest of the accused persons, Jaipal, Gayur and Pappu and is also witness to the recovery of deshi katta, Ex.P-11, a live cartridge, Ex.P-12 recovered at the instance of Pappu. PW-20, Dr. P.C. Dixit, conducted the post mortem on the body of Subhash and proved his report, Ex. PW-20/A. The death was caused due to certain cerebral damage consequent upon bullet injury to the head via Injury No. 1 and 3. All injuries were ante mortem caused by fire arm discharged from close range and while Injury No. 2 caused by blunt force. Injury Nos. 1 and 3 were sufficient to cause death in the ordinary course of nature. PW-21, Subhash Chand, recorded the FIR, Ex. PW-21/A. Shri Gurinder Pal Singh, learned Metropolitan Magistrate, Delhi was produced as witness to show that Pappu and Furkan had refused to participate in the test identification parade on 19.3.1996 and 15.4.1996 respectively.

11. It was argued by counsel for the appellants that PW-1 and PW-2 are not reliable witnesses. Their testimony is full of contradictions and is devoid of any truth in which event they should be discarded from consideration. This argument is

primarily based on the statement of the witness PW-1 who says that he was injured under the armpit as a result of gun fire whereas the injury in the MLC of Ashok pk Kumar suggests that the same is by a sharp edged weapon. Similarly, PW-2 supports the statement of Ashok Kumar, PW-1. Counsel submitted that the ocular evidence being contrary to medical evidence shows that the witnesses are not truthful. Their evidence, if not taken into consideration, the Prosecution would have miserably failed to link the accused with the incidence she also contended that Furkan has not been identified by any of the witnesses.

12. We have carefully examined the material available on record and find that PW-1, in his deposition, has stated that on 10.3.1996 he, along with his brother Subhash, was in their Maruti Car No. DL-4C-B-4499 and traveled from Rohtak along with their driver, Ajmer, for collection of money from Ghaziabad, Seelamour Delite and Mpol Chand Basti pusta Having collected money from various persons, they stopped on the pushta when he, along with his brother Subhash, had gone to Basti pusta and collected money from Radhey, Narsuddin and Bindo. When they returned to the pusta, where their car was parked, they noticed that one rehriwala was selling "rushbari". Subhash stopped to purchase raspberry while this witness continued towards the car and sat down in the same. When Subhash was coming back after having purchased raspberry, four persons, one of whom was the accused Pappu present in Court. Three of the four persons were armed with deshi kattas and fourth one was armed with knife. The witness goes on to say that he can identify the other three persons who were present along with Pappu at that time, if shown to him. One of those persons, namely, Furkan, fired a shot at the head of Subhash. Thereafter, the accused along with Jamil, who was not present in court and who was armed with knife, along with another person who was armed with katta had encircled the car. Pappu threatened asking this witness to remove his wrist watch, gold chain, gold ring as also to hand over the cash to them. This witness tried to alight from the car when Pappu shot at him hitting the left side chest near the armpit. At that time, Jamil gave stab injury to Ajmer on his back and the 4th person who was also armed with katta pushed them inside the car and snatched away the money bag together with some documents, gold chain, gold ring and wrist watch, letter pad, visiting cards, pocket diary etc. and fled away in the victims' car. At the time of the incident, Jaipal was also present on the spot and fled away with the accused persons. Jaipal was known to this witness earlier as he had seen him at pusta and Delite cinema area. The witness goes on to depose that Subhash had become unconscious. This witness along with Ajmer took Subhash to JPN Hospital where he was examined. After about one hour Police arrived at the Hospital and recorded his statement, Ex.PW-1/A, He admits his statement to be correct. On the same day, Subhash died while this witness remained in the Hospital for 3-4 days till he was discharged. On 17.3.1996, he received a telephonic message from the Investigating Officer. He went to Tihar Jail where he was asked to come on 19.3.1996. Accordingly, on 19.3.1996 he along with Ajmer reached Tihar Jail at about

11.00 a.m. where 2/3 hours later he came to know that those arrested persons had refused to participate in the test identification parade. On 22.3.1996, he went to the Police Station in connection with the progress of the case and saw Pappu in Court with the Investigating Officer. The witness identified the accused as being the same person who was amongst the four who had caused fire arm injuries to him and stolen the articles.

13. On 12.4.1996, he received a message to reach Tihar Jail on 15.4.1996 since another accused persons had been, arrested. Accordingly, he went to Tihar Jail on 15.4.1996 but came back after 2/3 hours since the accused had refused to participate in the test identification parade. On 16.4.1996, he saw accused, Furkan, and identified him as the person who had first fired at his brother, Subhash, and was amongst the four assailants. On 30.5.1996, he was called by the Police and taken to the spot along with the draftsman. At the pointing of this witness, a plan was drawn. The witness was subjected to lengthy cross-examination and stuck to his version that Pappu had fired a shot at him which hit him on the left side of the armpit.

14. PW-2, Ajmer Singh, states that he was working as a Driver with Ashok Kumar, PW-1 and Subhash, the deceased. Ashok Kumar and Subhash had been doing the business of sale and purchase of by follows in Delhi and nearby areas and normally on 9th, 10th and 11th of each month, they used to go for recovery of their dues in respect of the aforementioned business to various places. They normally used to go in the car and I used to normally accompany them as a driver. On 10.3.1996 the along with his employer, Ashok and Subhashj started from Rohtak at around 6.30/6.45 a.m. in their Maruti Car No. DL-4C-B-4489 and had visited Ghaziabad, Seelamour etc. to collect the money. At Pushta Basti Mool Chand the car was parked and both, Ashok Kumar and Subhash, had gone to Basti for collection while this witness remained with the car. Both, Ashok Kumar and Subhash, returned within 10-15 minutes and Ashok Kumar had taken a seat straightaway while Subhash was purchasing raspberry from a nearby rehri. Suddenly four persons pounced upon Subhash, out of them three were armed with deshi katta and one was armed with knife. The witness had seen accused, Pappu, present in court, as being one of them. He was having a deshi katta. There were other persons amongst whom Furkan had shot at Subash causing injury on his head and the rest encircled the car. They directed Ashok Kumar, who was sitting in the car, to remove his ring, wrist watch and cash etc. and accused Pappu had immediately fired shot at Ashok which hit him on his left armpit. At the same time, another accused stabbed this witness on his back. The accused persons, armed with deshi katta, pushed Ashok and this witness into the car and then snatched away a yellow bag lying in the rear seat of the car from Ashok. Pappu had go removed gold chain, gold ring, wrist watch from Ashok Kumar forcibly and thereafter Ashok Kumar and the driver were thrown out of the car which was used by the accused as their "get away vehicle". Subhash had fallen unconscious. This witness along with Ashok took Subhash to JPN Hospital in a three

wheeler where the injured was medically examined. Out of fear, this witness after being treated at the Hospital ran away, but in the evening came to the Police Station where his statement was recorded. He also deposed to the refusal of test identification parade by the accused. The witness was subjected to cross-examination in which he has reiterated that Pappu shot at Ashok. The witness also deposed to the effect that four shots were fired though none of them struck the car.

15. The oral testimony of the witness is strengthened by the medical evidence to the effect that an incised injury has been found on the left arm under the arm region. This injury has been stated to be by a sharp edged weapon while the injury on Subhash is a gun shot wound. Although the injuries get support from the MLC, yet the nature of injury on PW-1 is not of a gun shot, as has been deposed to by this witness and by PW-2. However, this part of the statement of the witness need not trouble us too much since the MLC states that PW-1 had, at the time of medical examination, himself stated that the injury inflicted upon him was with a knife. At the highest, there appears to be an attempt by this witness to rope in Pappu by assigning a specific role to him. But, this in itself is no reason to discard the evidence of PW-1 in its entirety. On all material facts, PW-1, Ashok Kumar, has been corroborated by PW-2 who himself was injured and the stab wound in his back was such that blood was oozing from the same. The presence of the witnesses at the spot of occurrence cannot be doubted merely because a stab wound was sought to be replaced by a gun shot wound. It is no one's case that the injuries on PW1 were self inflicted. The presence of all the accused persons has been deposed to by these witnesses who had identified the appellant also. The role of convicted accused persons including the appellant, in coming together armed with deadly weapon and using them in the commission of the crime makes them all jointly responsible for the acts of each of them. Furthermore, the recoveries of the katta and cartridges has not seriously been attacked by counsel. The fact that empties recovered from the spot match the weapons recovered at the instance of Furkan and Pappu lend corroboration to the statements of the eye witnesses. Recovery of the diary of Subhash, visiting cards and letter head from Furkan from the iron box which was kept in his house, is yet another pointer to his guilt.

16. From the totality of the material placed on record and the testimony of the witnesses, we find that the appreciation of evidence by the trial court cannot be faulted with. The reasoning of the trial court to arrive at its conclusion is, in no way, defective since we ourselves have gone through the material and are satisfied that the trial court judgment does not suffer from any infirmity. We, accordingly, uphold the same. Both the appeals are dismissed.