* **HIGH COURT OF DELHI : NEW DELHI**

\+ **Criminal Appeal Nos.193/2000**

Judgment reserved on: December 06, 2006

% Judgment delivered on: January 29, 2007

Nand Lal @ Nandu
S/o Sh. Jadha Ram
Presently lodged in Central Jail No.4,
Tihar, New Delhi ..... Appellant

Through Mr. D.K. Mathur, Amicus Curiae

versus

State ..... Respondent

Through Mr.Anil Soni,
Additional Public Prosecutor

WITH

Criminal Appeal No.468/1998

Lajpat @ Billu
S/o Sh. Hir Lal
Presently lodged in Central Jail No.4,
Tihar, New Delhi ..... Appellant

Through Mr. Arvind Gupta, Amicus Curiae

versus

State ..... Respondent

Through Mr.Anil Soni,
Additional Public Prosecutor

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, J.

These are two appeals, one filed by Nand Lal @ Nandu and the other filed by Lajpat @ Billu. Both the appeals are directed against the judgment and order dated 2nd February, 1998 passed by the learned Additional Sessions Judge in Sessions Case No.141/1996. Both the Appellants were held guilty of an offence punishable under Section 392 and 397 of the Indian Penal Code (for short the IPC) read with Section 34 thereof. They were also convicted of an offence punishable under Section 300 read with Section 302 and 34 of the IPC for having caused the murder of Sunil and

under Section 307 read with Section 34 of the IPC for attempting to murder Sunil's brother Mukesh. Subsequently, by an order dated 3rd February, 1998, the Appellants were sentenced to undergo imprisonment for life for the offence of murder and to pay a fine. They were also sentenced to undergo rigorous imprisonment for 7 years for attempting to murder Mukesh and for committing a robbery with a dangerous weapon. They were also fined.

2. The case of the prosecution is that on 16th January, 1994 at about 10.15 pm Mukesh and his brother Sunil (since deceased) were returning home. They were accosted by the Appellants and according to Mukesh, in his statement under Section 161 of the Code of Criminal Procedure (for short Cr.P.C.), he was caught by one of them who was carrying a long knife, while the other person caught hold of his brother Sunil. He was asked to empty out his pocket and when both Mukesh and Sunil resisted, Mukesh was stabbed in his abdomen. Sunil came to save him but he was stabbed in

his chest by the same person. On this, the other person uttered the words "Nandu ye to mar gaya. Bhag lo". Thereafter, both the persons ran away. On hearing the cries of Mukesh, one or two persons came there. Mukesh gave them his address and asked them to inform his house.

3. From the above description, it appears that according to Mukesh, Nandu was carrying a long knife and he stabbed both Mukesh and Sunil. The statement does not indicate whether the other person (later identified to be Billu) was carrying a knife or not.

4. Among the persons who came to the scene of occurrence on hearing the cries of Mukesh was one Chetan Lal who informed Imrati Devi, the mother of both the injured brothers. It seems that Imrati Devi then took Sunil and Mukesh to RML Hospital but Sunil was declared as brought dead.

5. On his part, Chetan Lal also went to the shop of one Mahi Lal and

asked him to inform the police, which he did. Thereupon, the police reached the scene of occurrence and took necessary steps for investigating the crime. There was no other eyewitness to the crime except Mukesh, who was hospitalised and declared unfit for making a statement.

6. The dead body of Sunil was sent for a post-mortem examination and it was found that he had six injuries on his person, all of them being ante-mortem and recent. According to the doctor who conducted the post-mortem, Dr. Basant Lal, PW-17 injury No.6 which was an incised stab wound in the chest cavity, was sufficient to cause death in the ordinary course of nature. The cause of death was opined to be hemorrhage and shock consequent upon the incised stab injury to the heart. According to the doctor, injuries 1 to 5 were caused by a blunt object/surface impact while injury No.6 was caused by a single edged sharp penetrating weapon.

7. It may be mentioned here that subsequently, the knife that was

allegedly used to stab Sunil was recovered by the police on the basis of a disclosure statement made by Nandu. However, that knife was not single edged but was double edged. It may also be mentioned that the learned Trial Judge did not accept the version of the prosecution with regard to the recovery of the knife.

8. As mentioned above, Mukesh was hospitalised and was not fit to make a statement and it was only on 21st January, 1994 that he was declared fit. At that time the details given by him (which are mentioned above) were recorded. Further investigations by the police revealed that Nandu had about 17 cases of snatching and robbery against him.

9. On 21st January, 1994 secret information was received by the police about the presence of both the Appellants near some bushes near a telephone exchange in Prasad Nagar. They went to that place and arrested the Appellants who were interrogated and their statements recorded.

10. Both the Appellants were also produced before the Court for a test identification parade (for short TIP) but they refused to participate in these proceedings on the ground that they were shown to the witnesses at the police station. The learned Metropolitan Magistrate who conducted the test identification parade adequately cautioned the Appellants of the consequences of their failure to participate in the TIP.

11. On these broad facts, a challan was filed under Section 173 of the Cr.P.C. and the following charges were then framed against both the Appellants.

> "That on 16.1.1993 at about 10.23 P.M. in front of H.No.5781 & 5780 in gali No.1, block No.5, Dev Nagar, Karol Bagh, New Delhi, within the jurisdiction of P.S. Prasad Nagar, you both in furtherance of your common intention robbed Sunil Kumar of his cash at the point of knife and in that process you also caused dangerous injuries to Mukesh and you thus both thereby committed an offence punishable under section 392/397 read with section 34 IPC and within my cognizance.
>
> Secondly, on the aforesaid date, time and place you both in furtherance of your common intention committed murder of Sunil

Kumar son of Bishan Lal and you thus both committed an offence punishable under section 302 read with section 34 IPC and within my cognizance.

Thirdly, on the aforesaid date, time and place you both in furtherance of your common intention voluntarily caused injuries to Mukesh son of Shri Bishan Lal and if the injured Mukesh would have died by the injuries caused by you, you both would have been guilty of culpable homicide amounting to murder and you thus both committed an offence punishable under section 307 read with section 34 IPC and within my cognizance.

Lastly, you Nand Lal alias Nandu son of Jodha Ram on the aforesaid date, time and place used the knife for unlawful purposes i.e., in causing murder of Sunil and causing dangerous injuries to Mukesh which you later on got recovered on 21.1.1994 and you thus thereby committed an offence punishable under section 27 Arms Act and within my cognizance."

12. The Appellants pleaded not guilty and claimed trial. The prosecution exemined as many as 27 witnesses but only three of them are of some consequence, that is, Mukesh PW-4, Gul Mohammad PW-5 and Chetan Lal PW-6. The testimony of Dr. Basant Lal, PW-17 has already been adverted to.

13. Mukesh, PW-4 confirmed in the witness box what he had stated during the course of investigations. But he made a material departure on oath by asserting that Billu had stabbed Sunil and Nandu had stabbed him (Mukesh). We will consider the effect of this material improvement a little later. Gul Mohammad, PW-5 reached the scene of occurrence at about 10.30 pm on 16th January, 1994. He stated that he saw both the Appellants, present in Court, running with knives in their hands. Other than this, his testimony does not lead us any further.

14. Chetan Lal, PW-6 confirmed the events that we have narrated above, but it is important to note that he did not say anything about the Appellants' running away from the scene of crime or that any one of them was armed with a knife.

15. From the above narration, it is clear that the entire case of the prosecution is dependent upon the statement of Mukesh, PW-4. As we have

noted above, there is a material change and an improvement in the statement made by Mukesh on oath as per what he had stated before the police during investigations. It may be recalled that during investigations, it was stated by Mukesh that both he and Sunil was stabbed by Nandu but on oath he stated that only he was stabbed by Nandu and while Sunil was stabbed by Billu.

16. It is submitted by learned counsel for the Appellants that even if the statement of Mukesh on oath is taken to be correct, Nandu cannot be convicted of murder – it is only Billu who can be convicted of murder. In ***Dhanna vs. State of Madhya Pradesh, 1996 Cri.LJ 3516***, the Supreme Court accepted the view of the Trial Court to the effect that when a statement is made under Section 161 of the Cr.P.C. and that is improved upon at the trial, then a conviction for the offence of murder ought not to be made. Applying the law laid down by the Supreme Court, we are of the view that even if Mukesh stated the truth on oath it would be unsafe to

convict Billu only on the basis of his statement in Court which was an improvement over what he had stated to the police during investigations. Therefore, whichever way one looks at the issue, it is not possible for us to identify on the basis of the evidence on record as to who caused the murder of Sunil, whether it was Nandu or whether it was Billu. This being the situation, we cannot convict either of them for the offence of murder since the issue is not free from doubt.

17. The testimony of Mukesh is, however, quite categorical that both the Appellants had wanted to (and did) rob him and Sunil. That either Nandu or Billu or both were armed with a knife is quite clear because of the fact that Sunil was stabbed to death. Additionally, Gul Mohammad, PW-5 had stated that he saw both the Appellants running away and they had knives in their hands. However, it appears that only Nandu was charged with carrying a knife and was alleged to have committed an offence punishable under Section 27 of the Arms Act. The learned Trial Judge has acquitted

Nandu of this offence and the State has not challenged the decision given by the learned Trial Judge. But there is no doubt, given the facts and circumstances of the case, that the intention of the Appellants was to rob Mukesh and Sunil, which they successfully did, making them liable to punishment under Section 392 and Section 397 of the IPC.

18. In ***Ashfaq v. State (Govt. of NCT of Delhi), AIR 2004 SC 1253***, the Supreme Court considered the applicability of Section 397 of the IPC and its essential ingredients. It was said that there is a misconception that unless a deadly weapon is actually used to inflict an injury in the commission of an offence, the essential ingredients to attract Section 397 of the IPC cannot be held to have been proved or substantiated. The Supreme Court explained the meaning of the word "uses" found in Section 397 of the IPC by relying upon an earlier decision in ***Phool Kumar v. Delhi Administration, AIR 1975 SC 905***. The Supreme Court cited the following passage with approval:-

> "Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of 7 years under S. 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under Section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections, viz "uses" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery."

Explaining this, the Supreme Court held that for the purposes of Section 397 if a robbery is committed by a person who is armed with a

deadly weapon and that deadly weapon is within the vision of the victim so as to be able to create terror in his mind, then there is no necessity of further showing that the deadly weapon has been actually used for any other purpose such as cutting, stabbing, shooting, etc. This being the legal position, we have no hesitation in upholding the conviction of the Appellants under the provisions of Sections 392 and 397 of the IPC.

19. In so far as the offence of attempt to murder Mukesh is concerned, we find that in the absence of anything to suggest who wielded the knife, it is not possible to say with certainty which of the Appellants attempted to murder Mukesh. They are, therefore, entitled to the benefit of doubt in this regard.

20. In view of the above, we set aside the conviction of the Appellants on all counts except for the offence punishable under Section 392 read with Section 397 of the IPC. We find that the maximum term of imprisonment

for the offence of committing robbery (Section 392 of the IPC) is ten years while the offence of committing a robbery with the use of a deadly weapon (Section 397 of the IPC) is a minimum of seven years. Both the Appellants have already spent more than eleven years in custody and we are of the opinion that they have been adequately punished for the offences committed by them in this regard. The Appellants be released forthwith unless they are required in some other case. The appeals are partly allowed.

Madan B. Lokur, J

January 29, 2007 **Aruna Suresh, J**

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