
(2012) 05 DEL CK 0270
In the Delhi High Court
Case No : Criminal Appeal 681 of 2009

Abdul Rahim Alias Indori

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 04-05-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Evidence Act, 1872 — Section 142, 154, 155
Penal Code, 1860 (IPC) — Section 302, 365

Citation : (2012) 190 DLT 155

Hon'ble Judges : S.P. Garg, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Ajay Verma, for the Appellant; Richa Kapoor, APP., for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice S. Ravindra Bhat

1. The appellant challenges an order of the learned Additional Sessions Judge (ASJ) dated 20.05.2009 in S.C. 172/2004 vide which he was convicted for the offence punishable u/s 302 IPC, and sentenced to imprisonment for life besides payment of fine and in default sentence of six months" simple imprisonment. The prosecution alleged that on 13.07.2004, one Akram (the complainant, PW-12, who was also the deceased"s son) reported to Police Station Srinivaspuri that his father was missing since the previous evening. This intimation was taken on record (Ex.PW B-6). PW-12 stated that his father, Phundan, used to stay at Shop No. 24, Okhla Sabzi Mandi and sold vegetables. He used to consume liquor with Saleem and on the previous day, i.e. 12.07.2004, both of them left to have liquor. Phundan did not return during the night. Thus, the next morning, the complainant reported the matter to the police, which registered a case u/s 365, IPC. It was further alleged that PW-13, SI Pankaj Singh, with PW-6-Suresh Chand and PW-15 Sawant searched for Saleem and Abdul Rahim at Okhla Sabzi Mandi but they could not find them. Thereafter they started searching the railway

track near the "theka" (liquor vend) at Srinivasपुरi. They found a dead body about 20 paces from the Sulabh Shauchalaya. With the aid of a search light, PW-12 was able to identify the body as that of his father - Phundan. Apparently, the body disclosed a gash on the neck, the result of a knife cut. The deceased's kurta was soaked in blood. PW-13 informed the SHO and the other police officials, who reached the spot. The crime team was summoned which inspected the spot and photographed it. The body and articles in the pocket of the deceased's kurta were seized. The post-mortem of the body was conducted and report was taken on the record. It was alleged that on 16.07.2004, the IO arrested the present appellant and at his instance, a blood-stained knife was recovered and taken into possession. The statements of various witnesses were recorded during the course of investigation; the prosecution also alleged that their statements were recorded u/s 164 Cr.PC.

2. After conclusion of the investigation, the accused/appellant was charged with committing crime; he entered the plea of not guilty and claimed trial. During the trial, the prosecution relied on the testimony of 15 witnesses, besides materials, exhibits and documentary evidence. On an overall conspectus of these facts and circumstances, the Trial Court concluded that the accused's guilt had been proved beyond reasonable doubt and convicted him as charged. It also imposed a sentence described in the earlier part of the judgment.

3. The Trial Court held that the testimonies of PWs-1, 2, 3 and 4 seen cumulatively and in the light of the previous statements of three of them, recorded u/s 164 Cr.PC established that they had consumed liquor together. PWs-3 and 4, who supported the prosecution fully during the examination-in-chief mentioned that a scuffle took place between the deceased and the accused during the course of which the latter attacked the late Phundan with knife and slit his throat which ultimately resulted in his death. Before the Trial Court, some of the witnesses turned hostile. Yet the impugned judgment relied on the testimony to the extent it supported the prosecution in the examination-in-chief, in the light of their previous depositions to the Magistrate u/s 164 Cr.PC which had been proved by the production and deposition of PW-10. The Trial Court also held that the external circumstances in the form of recovery of blood-stained knife and the nature of injuries, proved through medical evidence corroborated the eyewitness testimony.

4. It was urged by the learned counsel for the appellant that the findings and conviction recorded by the Trial Court are unsustainable. Elaborating on this, it was argued that PW-12 had initially voiced his suspicion about the role played by PW-1, at the time he made the complaint. Instead of pressing that angle, the police inexplicably ruled out his involvement and completely accepted the statement recorded by PW-1. This witness, it was argued, completely turned hostile and did not support the statement allegedly recorded by him u/s 164 Cr.PC. Similarly, PW-2 also did not support the prosecution case. In fact, he was not even cross-examined by either party. Learned counsel argued that although

PW-3 seemingly supported the prosecution story, the fact remained that he admitted that on the day of the incident, all concerned had consumed liquor and that he was not in his senses thereafter. He also admitted during the cross-examination, to not having seen the accused taking out any knife from his pocket and attacking the deceased. It was argued that similarly, PW-4, in his cross-examination admitted that all the four had consumed liquor; he even went to the extent of saying that he had about two liquor bottles at 12 noon and there was no quarrel amongst any one of them. The witness specifically stated that since he was drunk, he did not know if the appellant had taken out knife to quarrel with Phundan. He again reiterated on 18.12.2008 that he had not seen the appellant taking out the knife and also denied having seen the accused attacking the deceased.

5. Learned counsel emphasized that the testimonies of PWs-1, 3 and 4, in cross-examination, clearly brought out the fact that the previous statements recorded by the police as well as by the Magistrate were under duress. In these circumstances, it was not appropriate for the Trial Court to reject their testimonies to the extent they disproved the prosecution and took into consideration what was deposed during the examination-in-chief.

6. It was urged that since the testimonies of the witnesses were contrary, to the prosecution story the Trial Court ought to have been cautious in either accepting or rejecting parts of their deposition. Learned counsel emphasized that PW-2 claimed to have seen the deceased at 11.45 AM on the day of the incident, i.e. 12.07.2004. On the other hand, PW-3 stated that the deceased was with them at 06.00 PM whereas PW-4 stated that all of them were together at 03.00 or 04.00 PM. Apart from these inherent contradiction about the time when they were together and the duration for which the witnesses, were with the deceased and the accused, and when they sat and drank liquor, the Trial Court completely ignored a vital circumstance, i.e. that the Postmortem Report in the case (Ex.PW-7/A) fixed the time of death at around 2 days. The postmortem was conducted on 14.07.2004 at 02.35 PM. Thus, according to the prosecution itself, the time of death was around 02.00-02.30 PM on 12.07.2004. None of the material witnesses, i.e. PWs-1, 3 and 4 were consistent on this and on the other hand, gave varying versions about when they were together with the deceased. The earliest point in time was around 03.00-04.00 PM (PW-3) whereas according to PW-4, the deceased was with them even at 06.00 PM. In either case, their testimonies were not supported by an objective factor, i.e. the Postmortem Report, which fixed the time of death at around 02.30 PM. Therefore, the testimonies of these witnesses were not trustworthy.

7. It was argued that the Trial Court fell into error in accepting the prosecution story that the weapon of offence, i.e. a knife had been recovered from a shelf - "Taand" of a wall on a platform near his house. It was emphasized here that the alleged recovery was not supported by any independent witness and was made just in order to bolster the prosecution case and implicate the appellant.

8. It was argued lastly that even though under certain circumstances, the Court can discard parts of the Court deposition of witnesses, if it was convinced that they had turned hostile on account of intimidation or allurement, yet the Court has to take into consideration all the facts and circumstances. Here, the complainant had expressed his apprehension and openly voiced suspicion regarding the role of PW-1. All the material witnesses, i.e. PWs-1, 3 and 4 clearly stated that they had consumed liquor and were in an inebriated condition. In fact, that was prosecution case right since inception, since PW-12 stated that the deceased used to go with PW-1 to consume liquor. If that indeed was the case and all the witnesses were in an inebriated condition, their conduct in not reporting the matter to the police at all when they came to their senses, even though they had claimed at one stage or another about witnessing a serious crime, was a highly suspicious circumstance, which ought to have alerted the prosecution and the Court into examining their role and at least treading with caution. In the absence of any external corroboration in regard to the testimony of PWs-1, 3 and 4, the Court ought not to have proceeded to convict the appellant, especially when the medical evidence, pointing to the timings of the attack and death of the late Phundan, was contrary to the oral evidence.

9. The learned APP, arguing for the state, submitted that the impugned judgment does not call for any interference, because the findings recorded were justified. It was submitted that the material witnesses in this case, who supported the prosecution case were PW-3 and PW-4, even if one were to disregard the statement of PW-1. These witnesses were consistent in their examination in chief, and had also been examined u/s 164, Cr. PC. Their cross examination took place more than two years after the examination in chief, during which period they had apparently been won over by the appellant. Having regard to these circumstances, the Trial Court was perfectly justified in treating these witnesses as partly hostile, and discarding those portions of their statements, which were untrustworthy, and accepting in those which seemed credible. The Trial Court relied on several judgments of the Supreme Court to hold so, including the judgment in Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, , where it was observed that:

the evidence of a witness, declared hostile, is not wholly effaced from the record and that part of evidence which is otherwise acceptable can be acted upon. It seems to be well settled by the decisions of this Court Bhagwan Singh Vs. The State of Haryana, Shri Rabindra Kumar Dey Vs. State of Orissa, and Syad Akbar Vs. State of Karnataka, that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

10. It was submitted that the eyewitness testimony of the material witnesses at least in their examination in chief, coincided completely with what they stated

during investigation, and more importantly, in the statement u/s 164, Cr. PC, to a Magistrate, who was also examined during the trial. It was also emphasized that the recovery of the knife, from a shelf, could not be discounted as urged by the appellant, since it was pursuant to his disclosure statement, and showed his special knowledge of the place where the weapon of the offence had been hidden. Neither the article nor the place where it had been kept, was known to the police.

11. The genesis of the present case was in the missing person's report given by the deceased's son, PW-12. At that stage, the complainant had stated that his father used to frequently go out with PW-1, and both used to consume liquor. Later, after a search, the deceased's body was found. PW-13, the IO stated that the statements of the witnesses were recorded thereafter. The witnesses in this case are PW-1, PW-3 and PW-4. The prosecution case is that the FIR (Ex. PW-9/A) was recorded at 6:45 PM after the discovery of the body, on 13-7-2004. The statements of the three witnesses (PW-1, PW-3 and PW-4) u/s 164 were recorded on 23-7-2004. Very importantly, they deposed on oath that the incident occurred on 12-7-2004, when there was a quarrel between the deceased and the accused, regarding some old quarrel. The deceased slapped the accused, upon which the latter took out a knife and inflicted a blow on his neck. Though this version was repeated by the witnesses, during the examination in chief, the witnesses turned hostile, in the cross examination.

12. The first question is as to what is the weight to be attached to the testimony of a witness who does not support the prosecution version. In *Gura Singh, Appellant v. State of Rajasthan*, reported in AIR 2001 SC 330 it was observed as follows :-

11. There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in *Bhagwan Singh Vs. The State of Haryana*, held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. In *Shri Rabindra Kumar Dey Vs. State of Orissa*, it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases

the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.

12. The terms "hostile","adverse" or "unfavourable" witnesses are alien to the Indian Evidence Act. The terms "hostile witness","adverse witness", "unfavourable witness", "unwilling witness" are all terms of English Law. The rule of not permitting a party calling the witness to cross examine are relaxed under the common law by evolving the terms "hostile witness and unfavourable witness". Under the common law a hostile witness is described as one who is not desirous of telling he truth at the instance of the party calling him and a unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. In India the right to cross-examine the witnesses by the party calling him is governed by the provisions of the Indian Evidence Act, 1872. Section 142 requires that leading questions cannot be put to the witness in examination-in-chief or in re-examination except with the permission of the court. The court can, however, permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the court in its discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness. Extensively dealing with the terms "hostile, adverse and unfavourable witnesses" and the object of the provisions of the Evidence Act this Court in *Sat Paul Vs. Delhi Administration*, held:

To steer clear of the controversy over the meaning of the terms "hostile" witness, "adverse" witness, "unfavourable" witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared "adverse" or "hostile". Whether it be the grant of permission under Sec.142 to put leading questions, or the leave u/s 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of AIR 1922 409 (Privy Council)).The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the court from the witnesses's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to

the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts.

It is important to note that the English statute differs materially from the law contained in the Indian Evidence Act in regard to cross-examination and contradiction of his own witness by a party. Under the English Law, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In India, this can be done with the consent of the court under S. 155. Under the English Act of 1865, a party calling the witness, can "cross-examine" and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be "adverse". As already noticed, no such condition has been laid down in Ss. 154 and 155 of the Indian Act and the grant of such leave has been left completely to the discretion of the court, the exercise of which is not fettered by or dependent upon the "hostility" or "adverseness" of the witness. In this respect, the Indian Evidence Act is in advance of the English Law. The Criminal Law Revision Committee of England in its 11th Report, made recently, has recommended the adoption of a modernised version of S.3 of the Criminal Procedure Act, 1865, allowing contradiction of both unfavourable and hostile witnesses by other evidence without leave of the court. The Report is, however, still in favour of retention of the prohibition on a party's impeaching his own witness by evidence of bad character.

The danger of importing, without due discernment, the principles enunciated in ancient English decisions, for, interpreting and applying the Indian Evidence Act has been pointed out in several authoritative pronouncements. In *Profulla Kumar Sarkar and Others Vs. Emperor*, an eminent Chief Justice, Sir George Rankin cautioned, that "when we are invited to hark back to dicta delivered by English Judges, however, eminent, in the first half of the nineteenth century, it is necessary to be careful lest principles be introduced which the Indian Legislature did not see fit to enact". It was emphasized that these departures from English Law "were taken either to be improvements in themselves or calculated to work better under Indian conditions".

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From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stand thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence

of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in to.

13. The above observations would reveal that there is no doctrinaire or stereotypical approach which can be applied by Courts, whenever a witness for the prosecution turns hostile. Each case and the deposition of each witness, has to be considered in the light of its peculiar circumstances, having regard to the rule of reason, prudence and credibility which has to be applied.

14. As observed earlier, the three witnesses deposed identically, in examination in chief; later they uniformly turned hostile in the cross examination. Significantly, however, all of them deposed before the Magistrate, u/s 164 Cr.PC about the sequence of events which led to death of Phundun. Each of them also stated that they went to the police station, the morning after the incident (12-7-2004). If that were the case, they went to the police station the morning of 13-7-2004. Yet, the police version about the crime is that it was reported in the evening by PW-12, and the body was recovered pursuant to his complaint. The FIR was registered at 6-45 PM, on 13-7-2004. These two versions seriously contradict each other. Moreover, there is no explanation how PW-3 and PW-4 were traced, and their statements recorded by PW-13; he merely deposed to having recorded it after 6-45 PM. These facts have to be viewed in the backdrop of the Post mortem report, which stated that the death occurred 2 days before the commencement of the procedure, i.e 2-35 PM of 14-7-2004. Such being the case, death occurred probably at around 2-30 or 3:00 PM on 12-7-2004. This is at complete variance with eyewitness testimony of PW-3, PW-4 and PW-2, each of whom gave a different version. PW-3 claimed to have seen the deceased around 6 PM on 12-7-2004; PW-4 claimed that he saw him around 3 PM. PW-2 said that he saw the deceased at 11-45 PM.

15. In a similar situation, while dealing with variations between ocular testimony and the medical evidence, in a criminal case, the Supreme Court in Khambam Raja Reddy and Another Vs. Public Prosecutor, High Court of Andhra Pradesh, observed as follows:

The present case is an example of contradiction between the ocular evidence and the medical evidence, where the medical evidence is not borne out by the ocular evidence. In such a situation it was suggested on behalf of the appellants on the authority of a decision of this Court in the case of State of Madhya Pradesh Vs. Dharkole @ Govind Singh and Others, where the medical evidence was at variance with the ocular evidence, the testimony of the eye-witness should be decided independently and if found trustworthy, the same could not be discarded merely because it is at variance with medical opinion. While there can be no difference of opinion with the principle explained in the aforesaid decision, the application thereof will depend on whether the story as made out by the

prosecution is trustworthy and can be related to the injuries suffered by the victim in the manner as sought to be projected. If the ocular testimony is such that it is not possible to relate the injuries with the circumstances in which they were said to have been inflicted, the court has the discretion not to accept the ocular evidence. The principle enunciated in Dharkole's case (supra) may be applied in an appropriate case, but each case has to be determined having regard to its own set of facts. In the instant case, in the absence of any depressed injury and in the absence of any bleeding from the nose and ears of the deceased, we are unable to give credence to the evidence of PW-1 as to the manner in which the incident is said to have occurred.

In the present case, the unnatural conduct of the three witnesses, in saying that they reported the incident to the police in the morning, which was not true, seen coinjointly with the varying time (when they saw him) and most importantly, the variation between ocular testimony and medical evidence, renders it extremely hazardous for the Court to believe one and discard the other. The Court is of opinion that the prosecution could not have based its case against the appellant, on these grounds. Consequently, the appeal has to succeed; it is accordingly allowed. The appellant shall be released forthwith, unless required in any other case.