

(2015) 07 RAJ CK 0181

In the Rajasthan High Court

Case No : Criminal Appeal Nos. 565 and 705 of 2008

Abdul Saleem and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 29-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157, 173(8), 437-A
Penal Code, 1860 (IPC) — Section 302, 304, 34

Citation : (2015) 07 RAJ CK 0181

Hon'ble Judges : Kanwaljit Singh Ahluwalia, J; Banwari Lal Sharma, J

Bench : Division Bench

Advocate : Ravi Kasliwal, for the Appellant; Aladeen Khan, Public Prosecutor, Advocates for the Respondent

Final Decision : Allowed

Judgement

Kanwaljit Singh Ahluwalia, J—Ashfaq s/o. Ameen Beg, r/o. Sangod on 29.7.2002 at about 1.50 PM near Koliyon Ka Bar in town Sangod, was murdered by Pappu @ Abdul Kalam. The case of the prosecution is that Pappu @ Abdul Kalam armed with knife had caused a blow on the left side of chest resulting into puncture of left lung and cavity was filled with about 500 ml. of blood. The solitary injury caused on the chest of Ashfaq by Pappu @ Abdul kalam was proved fatal.

2. Naeem Khan and Abdul Saleem sons of Sultan Khan present appellants had allegedly caught hold of the deceased Ashfaq facilitating causing of solitary knife blow by their brother Pappu @ Abdul Kalam on the person of Ashfaq deceased. Investigating agency had sent Pappu @ Abdul Kalam for trial and investigation qua Naeem Khan and Abdul Saleem was kept pending under Section 173(8) Cr.P.C. Subsequently, the police had submitted a Final Report in the negative form, but on the protest petition filed, the Court of Magistrate has after taking cognizance had summoned the accused-appellants to stand for trial.

3. Pappu @ Abdul Kalam was convicted for offence under Section 302 IPC by the Court of Additional Sessions Judge No. 2 (Fast Track), Kota vide its judgment

dated 4.2.2004. The said court vide a separate order of even date sentenced Pappu @ Abdul Kalam to life imprisonment and to pay a fine of Rs. 2000/-, in default thereof to undergo two months simple imprisonment.

4. Aggrieved against his conviction and sentence Pappu @ Abdul Salam filed D.B. Criminal Appeal No. 245/2004 in this court. During pendency of the appeal of Pappu @ Abdul Kalam, trial commenced against two brothers of Pappu @ Abdul kalam, namely Naeem Khan and Abdul Saleem present appellants who had allegedly caught hold of Ashfaq deceased.

5. Naeem Khan and Abdul Saleem both sons of Sultan Khan were tried by the Additional Sessions Judge No. 2 (Fast Track), Kota and the said court vide impugned judgment dated 22.5.2008 held both the appellants guilty of offence under Section 302 with the aid of Section 34 IPC and vide a separate order of even date sentenced them to undergo life imprisonment and to pay a fine of Rs. 2000/-, in default thereof to undergo two months simple imprisonment. Aggrieved against their conviction and sentence, Abdul Saleem filed D.B. Criminal Appeal No. 565/2008 and Naeem Khan instituted D.B. Criminal Appeal No. 705/2008. Sentence awarded upon both the appellants was suspended. However, since one of the accused appellant Abdul Saleem was in government employment, an application for early hearing was filed and a coordinate Bench on 7.5.2013 passed the following order:-

"An application has been filed for early hearing and it is submitted that permission be granted to prepare mini paper-book out of Court, as he is out of the employment because of his conviction and the matter needs urgent hearing.

The application (IA No. 2487/2013) is allowed, as prayed.

The appellant is given liberty to prepare mini paper-book out of Court. On filing of the same, Office to check and report and list the matter thereafter for hearing."

6. In pursuance of the above said order, paper-book was prepared and the matter has been listed before us. Since in both the appeals common judgment has been assailed, we shall decide both the appeals together.

7. In the present case, criminal proceedings were set into motion on the basis of written report (Ex. P. 3) submitted by Abrar Ahmad (P.W. 5) brother of Ashfaq deceased, in his written report (Ex. P. 3), Abrar Ahmad (P.W. 5) stated that he was working on a saw mill of Nazeer Bhai s/o. Kalu Ji when Mujahid (P.W. 4) came and informed that his brother Ashfaq near Koliyo Ke Bar has been given beating by Naeem, Saleem and Pappu @ Kalam. As per the information relayed, Naeem and Saleem had caught hold of Ashfaq and Kalam @ Pappu gave a knife blow on the back of Ashfaq. Abrar Ahmad (P.W. 5) further stated that he and Mujahid (P.W. 4) carried his brother to Sangod Hospital where, looking to the condition of Ashfaq, Dr. Laxmi Narain Meena (P.W. 1) referred Ashfaq to Kota. While Ashfaq was being transported, he regained consciousness and demanded water. He further made an oral dying declaration before Abrar Ahmad (P.W. 5)

that Naeem and Saleem had caught hold of him, whereas Kalam @ Pappu had given a knife blow on his back. Saying so, Ashfaq became unconscious. It was further stated that the said injury was caused due to previous grudge. It was averred that five years ago Ashfaq caused injury to Farooq, brother of three named accused, and Farooq was instigating them for committing murder of Ashfaq.

8. As stated in the written report (Ex. P. 3), Abrar Ahmad (P.W. 5) had taken Ashfaq s/o. Ameen Beg to Community Health Center, Sangod where he was attended by Dr. Laxmi Nath Meena (P.W. 1), who referred Ashfaq to Kota, Dr. Meena (P.W. 1) also informed P.S. Sangod on telephone. While on the way to Kota, Ashfaq died and on the same day of occurrence on 29.7.2002 at 6.30 P.M. Dr. P.K. Tiwari (P.W. 2) conducted autopsy on the dead body of Ashfaq. As per post-mortem report (Ex. P. 13), the doctor had found following injuries on the person of deceased Ashfaq:-

9. A perusal of the injuries would reveal that injury No. 1 is a stab wound over back of the chest of the deceased and said injury proved fatal, whereas injuries No. 2 and 3 are abrasions on 2nd, 3rd and 4th fingers and thumb of left and right feet of the deceased.

10. To prove its case, the prosecution examined Mujahid as P.W. 4. This witness in court has reiterated the case of the prosecution that both the appellants Abdul Saleem and Naeem Khan had caught hold of deceased Ashfaq and their third brother Pappu @ Abdul Kalam had caused injury with a knife on the back of the deceased.

11. Shri Aladeen Khan, learned Public Prosecutor, has very fairly admitted that only role assigned to the present appellants is that they had caught hold the hands of the deceased and their third brother Pappu @ Abdul kalam had caused knife blow on the back of the deceased.

12. During pendency of D.B. Criminal Appeal No. 565/2008 preferred by Abdul Saleem and D.B. Criminal Appeal No. 705/2008 preferred by Naeem Khan, the appeal of Pappu @ Abdul Kalam bearing D.B. Criminal Appeal No. 245/2004 was decided by a coordinate Bench of this court (Mohammad Rafiq, J. and S.S. Kothari, J.). It was expected from the Registry to club all the three appeals, so that appeals could be decided separately but simultaneously.

13. Shri Ravi Kasliwal, learned counsel for the appellants, has placed on record photocopy of the judgment rendered in the case of co-accused Pappu @ Abdul Kalam in D.B. Criminal Appeal No. 245/2004 decided on 14.9.2011. A coordinate Bench consisting of Mohammad Rafiq, J. and S.S. Kothari, J., in the said judgment had returned a finding that the principal accused Pappu @ Abdul Kalam who had caused only fatal injury on the person of deceased Ashfaq had no intention to commit murder and at the best, knowledge can be attributed to him. By returning said finding, the Division Bench of this court converted the conviction of Pappu @ Abdul Kalam from Section 302 IPC to Section 304 Part-II

IPC and considering that he had undergone nine years of sentence, reduced the sentence to the period already undergone. We reproduce the finding given by the coordinate Bench in the case of co-accused Pappu @ Abdul Kalam as under:-

14. Shri Ravi Kasliwal has submitted that once the finding returned by this court qua the principal co-accused Pappu @ Abdul Kalam who had caused the fatal injury has attained finality, the judgment of this court rendered in the case of Pappu @ Abdeul Kalam (supra) should be taken into consideration for persuasive value. It is contended that once it has been held by the Division Bench of this court that co-accused Pappu @ Abdul Kalam had no intention, but knowledge to cause death, the present appellants cannot be convicted with the aid of Section 34 IPC. It is submitted that knowledge is personal whereas common intention can be shared. It is canvassed that there is no provision in the Code which prescribe offence of common knowledge. It is further contended that once the court has held that there was no intention on the part of Pappu @ Abdul Kalam, Section 34 of Indian Penal Code which prescribe common intention cannot be applied qua the appellants.

15. We have perused the record and the paper-book of the case qua the present two appellants.

16. Having heard the learned counsel for the parties, by appreciating that investigating agency found the appellants innocent, had submitted final report in negative form and the trial against the present two appellants commenced upon their summoning on protest petition filed, we are also of the opinion that Pappu @ Abdul Kalam had no intention to cause murder and his conviction for offence under Section 302 IPC has rightly been converted to the offence under Section 304 Part-II IPC by a Division Bench of this court consisting of Mohammad Rafiq, J. and S.S. Kothari, J. We are in respectful agreement with the finding given in the appeal, titled D.B. Criminal Appeal No. 245/2004, Pappu @ Abdul Kalam v. State of Rajasthan, decided on 14.9.2011.

17. Admittedly, both the appellants had caught hold of the deceased, they have caused no injury in the occurrence. There are two abrasions on the feet, they are not attributed to the appellants. The abrasions on feet can be result of fall also. Solitary blow which has proved fatal is attributed to Pappu @ Abdul Kalam. To us, the role assigned to the appellants is an exaggeration. The role assigned to the appellants is a blemish in the prosecution case and same has been introduced as an afterthought after consultations and deliberations.

18. Occurrence in the present case has taken place on 29.7.2002 at 1.50 PM, written report was submitted by Abrar Ahmad (P.W. 5) on 29.7.2002 at 5.45 PM and the special report reached the Ilaka Magistrate on 30.7.2002 at 11.45 AM at Sangod. Sangod is a small town. Police station, court and residence of the Magistrate are situated nearby. Thus, the delay in lodging of FIR and reaching of the said report to the Ilaka Magistrate has led to over-implication of the appellants. Complainant party had inflated the number of accused.

19. In *Bijoy Singh and Another Vs. State of Bihar*, AIR 2002 SC 1949 : (2002) CriLJ 2623 : (2002) 2 Crimes 437 : (2002) 1 JT 372 Supp : (2002) 3 SCALE 592 : (2002) 9 SCC 147 : (2002) 3 SCR 179 : (2002) 1 UJ 749 : (2002) AIRSCW 1873 : (2002) 4 Supreme 362 , the Hon"ble Supreme Court has held as under:-

"6. This Court in *Meharaj Singh (L/Nk.) vs. State of U.P.* held that FIR in a criminal case and particularly in a murder case, is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used as also the names of the eyewitnesses, if known to the informant. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought.

7. Sending the copy of the special report to the Magistrate as required under Section 157 of the Criminal Procedure Code is the only external check on the working of the police agency, imposed by law which is required to be strictly followed. The delay in sending the copy of the FIR may by itself not render the whole of the case of the prosecution as doubtful but shall put the court on guard to find out as to whether the version as stated in the court was the same version as earlier reported in the FIR or was the result of deliberations involving some other persons who were actually not involved in the commission of the crime. (Emphasis supplied). Immediate sending of the report mentioned in Section 157 Cr.P.C. is the mandate of law. Delay wherever found is required to be explained by the prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not. Insisting upon the accused to seek an explanation of the delay is not the requirement of law. (Emphasis supplied). It is always for the prosecution to explain such a delay and if tendered, no adverse inference can be drawn against it.

8. In the instant case, the copy of the report referred to in Section 157 Cr.P.C. is shown to have been received by the Magistrate on 27-8-1991. Even though there is a mention in the FIR that its copy was sent through special messenger, yet no date or time of sending the said report is mentioned. The Magistrate, receiving the copy of the report, has also not noted the time of its receipt on 27-8-1991. We are of the opinion that the Magistrate receiving reports under Section 157 Cr.P.C., particularly when it relates to the commission of the heinous crime are required to note not only the date but also the time of the receipt of the copy thereof. Mr. B.B. Singh, learned counsel appearing for the State has pointed out the existence of various circumstances which may perhaps be the cause of delay in sending the copy of the report and its receipt by the Magistrate but surely there is a difference between the "may be" and "must be". The prosecution has apparently failed to explain the delay in sending the copy of the said report in terms of Section 157 Cr.P.C. to the Magistrate of the area. This aspect has been

highlighted by the learned counsel for the appellant to contend that many of the accused were innocent and wrongly roped in the case allegedly on account of enmity existing between the complainant and the accused party. There is some substance in such a submission."

20. Thus, looking to the finding returned by a coordinate Division Bench in the case of Pappu @ Abdul Kalam (supra) that the main accused Pappu @ Abdul Kalam had no intention to cause murder and further the role assigned to the appellants in the present case and the fact that due to delay in reaching of the special report to the Ilaka Magistrate, the possibility that the complainant party has resorted to over-implication cannot be ruled out, we shall as a matter of abundant caution, extend the benefit of doubt to the present appellants who have not caused any injury in the occurrence.

21. As a result of above discussion, both the appeals are accepted. Conviction and sentence awarded by the trial court upon the appellants is set aside by giving benefit of doubt to them. Both the appellants are on bail. They need not surrender and their bail bonds stand cancelled. The trial court shall call the appellants and shall ensure that Section 437-A Cr.P.C. is complied with.