

(2015) 02 RAJ CK 0179
In the Rajasthan High Court
Case No : Criminal Appeal No. 994 of 2005

Amit	Vs	APPELLANT
State of Rajasthan		RESPONDENT

Date of Decision : 10-02-2015

Acts Referred:

Arms Act, 1959 — Section 25, 3, 4
Criminal Procedure Code, 1973 (CrPC) — Section 173
Evidence Act, 1872 — Section 6
Penal Code, 1860 (IPC) — Section 302, 324, 34, 452

Citation : (2015) 02 RAJ CK 0179

Hon'ble Judges : R.S. Chauhan, J; Kanwaljit Singh Ahluwalia, J

Bench : Division Bench

Advocate : K.L. Meena and Anil Sharma, for the Appellant; N.S. Dhakad, Public Prosecutor, Advocates for the Respondent

Judgement

Kanwaljit Singh Ahluwalia, J.

1. In the instant case, on 10.08.2003 at about 10:00 P.M. one Ajay Telli S/o. Rammilan Telli was murdered in a room, which he had taken on rent. One of the accused viz., Amit @ Topan was apprehended on the spot. Another co-accused, namely Jaiprakash @ J.P. @ Anil @ Devi Yadav had decamped from the spot.
2. Amit @ Topan S/o. Rammilan Telli and Jaiprakash @ J.P. @ Anil @ Devi Yadav S/o. Bhagwan Yadav were tried by the Court of Additional District and Sessions Judge, No. 1, Alwar.
3. The trial Court, vide its impugned judgment dated 24.02.2005 held appellant, Amit @ Topan, guilty of offences punishable under Sections 302, 452 and 324/34 of Indian Penal Code.
4. Another co-accused, namely Jaiprakash @ J.P. @ Anil @ Devi Yadav was convicted for offences punishable under Sections 302/34, 324 of Indian Penal Code and under Section 3/4 of the Arms Act.

5. Vide a separate order of even date, another co-accused, Jaiprakash @ J.P. @ Anil @ Devi Yadav was sentenced to undergo life imprisonment and to pay a fine of Rs. 1000/- for offence under Section 302/34 I.P.C. In default thereof to further undergo two months rigorous imprisonment. He was further sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs. 500/- for offence under Section 324 I.P.C. In default thereof to undergo one month's rigorous imprisonment. He was also sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs. 500/- for offence punishable under Section 4/25 of the Arms Act. In default thereof to undergo one month rigorous imprisonment.

6. All the sentences were ordered to run concurrently.

7. Since on the day the judgment was pronounced, accused, Amit @ Topan was not present, vide a separate order dated 25.08.2005, accused, Amit @ Topan was sentenced to undergo life imprisonment and to pay a fine of Rs. 1000/- for offence under Section 302 I.P.C. In default thereof to further undergo two months additional rigorous imprisonment. He was further sentenced to undergo two years rigorous imprisonment and to pay a fine of Rs. 500/- for offence under Section 452 I.P.C. In default thereof to undergo one month additional rigorous imprisonment. Furthermore, for offence under Section 324/34 I.P.C. accused, Amit @ Topan was sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs. 500/-. In default thereof to undergo one month additional rigorous imprisonment.

8. All the sentences awarded on different counts to both the accused were ordered to run concurrently.

9. Accused, Amit @ Topan instituted instant appeal i.e. D.B. Criminal Appeal No. 994/2005 to assail his conviction and sentence awarded. Whereas another co-accused, namely Jaiprakash @ J.P. @ Anil @ Devi Yadav, had preferred D.B. Criminal Appeal No. 273/2005.

10. During pendency of the appeal, accused, Jaiprakash J.P. @ Anil @ Devi Yadav expired and, vide a separate order passed today, his appeal has been disposed of having abated.

11. Criminal proceedings were set into motion on the basis of written-report (Exhibit-P/4) lodged by one Subodh Kumar (P.W.-9).

12. In the written-report (Exhibit-P/4), Subodh Kumar (P.W.-9) stated that on 10.08.2003 he was sitting along with Ajay Telli S/o. Rammilan Telli in a room of the house bearing No. 4-K/210. On the said date, at about 10:00 P.M., two young persons, namely Amit @ Topan S/o. Prayag Narayan Soni and Jaiprakash @ J.P. @ Anil @ Devi Yadav S/o. Bhagwan Yadav entered into the room, and they threatened Subodh Kumar (P.W.-9) and Ajay Telli to immediately vacate the room. They further threatened that they will throw out his articles from the house. Upon which, Ajay Telli said that he will vacate the room within two/ three

days. But Amit @ Topan gave a knife blow in the chest of Ajay Telli. When Subodh Kumar intervened to rescue, Ajay Telli, Jaiprakash @ J.P. @ Anil @ Devi Yadav with an intention to cause murder gave knife blow in the abdomen of Subodh Kumar. The said blow caused injury on the left hand of Subodh Kumar. Meanwhile, Amit @ Topan gave another knife blow to Ajay Telli. On noise raised by both, Subodh Kumar and Ajay Telli, accused ran away from the spot. Subodh followed them. Ajay Telli fell outside the house on the "chabutara". Amit @ Topan was followed by Vipin Tripathi (PW-10), Pramod (PW-11) and Pradeep (PW-11) and was apprehended at the spot. Meanwhile, other neighbours also arrived at the spot. Amit @ Topan who was apprehended at spot had while running away also received injury due to fall. Ajay Telli was brought for the first-aid to the hospital at Alwar. In the darkness of night, Amit @ Topan had thrown his knife some where. Amit @ Topan was handed over to the Police, who arrived at the spot. Subodh Kumar went to the hospital where Ajay Telly was declared dead. Subodh Kumar (P.W.-9) presented the written-report to Man Prakash (P.W.-13), Station House Officer, Police Station, Shivaji Park, Alwar.

13. On the basis of the written-report (Exhibit-P/4), a formal First Information Report (Exhibit-P/12) was registered at Police Station, Shivaji Park, Alwar.

14. The above said First Information Report was investigated. A report under Section 173 of Code of Criminal Procedure, 1973 was submitted. The report of investigation along with the accused was committed to the Court of Sessions and the same was entrusted for trial to the Court of Additional District and Sessions No. 1, Alwar.

15. The appellant was charged for various offences. He pleaded not guilty and claimed trial.

16. Prosecution, in the present case, had examined as many as thirteen witnesses and proved on record documents i.e. Exhibit-P/1 to Exhibit-P/30 respectively. Whereas accused, in defence, had examined one witness and proved on record documents i.e. Exhibit-D/1 to Exhibit-D/5 respectively.

17. In the present case, the injured eye-witness, Subodh Kumar (P.W.-9) and other four eye-witnesses, namely Pradeep Sahni (P.W.-1), Vipin Tripathi (P.W.-10), Pramod (P.W.-11) and Dinesh Tripathi (P.W.-12), who have allegedly apprehended accused, Amit @ Topan, have turned hostile and have not supported the prosecution case.

18. We shall first briefly notice the testimony of the eye-witnesses, who have feigned their ignorance regarding the occurrence and have stated in categorical terms that they have not witnessed the occurrence.

19. Pradeep Sahni (P.W.-1), in the Court stated that on 10.08.2003 at about 09:00/10:00 P.M. he was going to Tijara crossing. He heard noise and when he went to the door of the house, then found that Vipin Tripathi was having a knife in his hand and he had caused injury to Jaiprakash @ J.P. @ Anil @ Devi Yadav.

This witness stated that he had not seen Jaiprakash @ J.P. @ Anil @ Devi Yadav at the place of occurrence where the injury with knife was caused. This witness further stated that in his presence, no injury was caused and thereafter, the mob had gathered there. This witness stated that Subodh Kumar (P.W.-9) and Ajay Telli were not known to him. This witness was declared hostile and was duly confronted with his previous statement by the Additional Public Prosecutor (Exhibit-P/1). This witness denied having made statement to the Police.

20. In cross-examination by the counsel for the defence, this witness stated that Dinesh Tripathi (P.W.-12) was pressurizing Ajay Telli to evict the room. He further stated that it to be correct that when he reached at the spot, he had seen Vipin Tripathi armed with knife and he caused injury to Ajay @ Telli. Thus, this witness has substituted the accused, and has totally gone against the prosecution case.

21. Subodh Kumar (P.W.-9) was injured in the occurrence. His deposition in the Court, when translated into English reads as under :--

"About one year ago, I was present in my house along with my family. We were watching Television. From the outside, I heard noise "chor-chor". On hearing the noise, I came outside the house and found that people were following one person. I also ran behind them. The said person was armed with a weapon. He caused me injury in the hand due to which I fell and became unconscious. I cannot identity the person, who ran away as his face was muffled. I have suffered injury on my hand."

22. This witness was declared hostile and was duly confronted with his previous statement by the Additional Public Prosecutor. This witness denied that he apprehended the accused Amit @ Topan. He further denied presentation of written-report (Exhibit-P/4) to the Station House Officer, Police Station, Shivaji Park, Alwar.

23. Vipin Tripathi (P.W.-10) was also declared hostile having resiled from his previous statement.

24. Examination-in-chief of this witness, when translated into English reads as under :--

"About one year ago, around 10:30 P.M., we were watching picture on television. From outside, we heard a noise. Then I and my brother came outside and saw that one person was running and he was followed by all neighbourers. It was night time. We could not see the person, who was running away. The said person was not apprehended. I do not know who killed Ajay Telli."

25. This witness was declared hostile and was also duly confronted with his previous statement. He denied having made any statement to the Police. He stated that the Police had obtained his signatures on blank papers.

26. In cross-examination by the counsel for the accused, this witness stated that nobody was arrested by the Police in his presence. No weapon was recovered.

27. Pramod (P.W.-11) had also not supported the prosecution case. For ready reference, we will also reproduce here true translation of examination-in-chief of this witness:--

"I knew Ajay Telli. He was resident of my Village. He has died. I do not know who killed Ajay Telli. I had not seen anybody causing him injury. When Ajay Telli was murdered, I had just returned after selling ice-cream. I do not know, at that time Ajay Telli was dead or was unconscious. Nobody told me the name of the assailants and crowd had gathered there. Ajay was lying on the ground."

28. This witness after being declared hostile was duly cross-examined by the Additional Public Prosecutor and he was confronted with his previous statement. This witness stated that the Police had obtained his signature on blank papers.

29. To the similar effect is the statement made by Dinesh Tripathi (P.W.-12). This witness, in his deposition in the Court denied having seen the occurrence. We shall also reproduce here the true translation of examination-in-chief of this witness :--

"I knew Ajay Telli. He was resident of my Village Murenakalan (U.P.). Ajay Telli had come along with me to Alwar for doing business. On my asking, House bearing No. 4-K/210 at Shivaji Park, Alwar was given on rent to him. Ajay Telli has died. He was murdered. At the time of occurrence, I was at Jaipur. I received an information on telephone that Ajay Telli had died. My wife had informed me on phone that Ajay Telli has died, who killed him, she had no information."

30. This witness was also cross-examined by the Additional Public Prosecutor. This witness also stated that his signatures were obtained by the Police on blank papers.

31. The Court below for recording the conviction of the appellant has relied upon statement of Prem Narayan Tripathi (P.W.-3). This witness in the Court stated that on 10.08.2003 at about 10:30 P.M. he received a telephonic call from his nephew Vipin, who informed that somebody has caused injuries to Ajay Telli and we should reach hospital. Upon which, this witness reached at hospital where Vipin, Pramod, Shivram Tripathi and other residents of Shivaji Park met him. Subodh, who had suffered knife blow on his hands was also present. Ajay Telli was admitted to the hospital. As and when, he reached at the bed of Ajay Telli, he died. Subodh told him that two boys, namely Amit @ Tapan and Jai Prakash had come to evict Ajay Telli from the room. Ajay Telli asked for two/four days time to vacate the room. Then Amit @ Tapan and Jaiprakash caused injuries to Ajay Telli with knife. The Police also arrived at the hospital. This witness on dictation of Subodh had recorded the written-report (Exhibit-P/4) in his hand writing.

32. We need not notice the evidence of remaining witnesses, who had participated in the investigation.

33. Furthermore, since it is not in dispute that Ajay Telli had died due to violence,

we shall skip the testimony of Dr. Amar Singh Rathore (P.W.-8), who had conducted the autopsy on the dead-body.

34. The trial Judge has recorded the conviction of the appellant holding that the statement made by Prem Narayan Tripathi (PW-6) is admissible in evidence under Section 6 of the Indian Evidence Act as *res gestae* evidence.

35. Section 6 of the Indian Evidence Act, which defines *res gestae* is an exception to hearsay evidence.

36. Having heard the learned counsel appearing for the parties, we are of the firm view that the statement made by Prem Narayan Tripathi (P.W.-3) shall not qualify as *res gestae* evidence. The information received by witness (Prem Narayan Tripathi PW-3) first was a telephonic message from Vipin Tripathi (P.W.-10). Vipin Tripathi (P.W.-10) had not relayed the name of the accused. He only stated that Ajay Telli has died. Thereafter, this witness Prem Narayan Tripathi (PW-3) reached hospital. On dictation of Subodh, this witness had recorded the written-report (Exhibit-P/4). Subodh has turned hostile and has stated that he had not presented the report. Thus, written-report (Exhibit-P//4) has been given by a non-eye-witness. Necessary ingredients of *res gestae* evidence that same must be qualified at unity of time, space and action are lacking. What is immediately heard at the scene of occurrence is admissible. Delayed information received from non-eye-witness at the hospital cannot fall within *res gestae* evidence. Thus, we shall exclude the testimony of Prem Narayan Tripathi (P.W.-3). Furthermore, the information received by this witness at the hospital in no way proves the identity of the present appellant, Amit @ Topan, as assailant.

37. Having excluded evidence of Prem Narayan Tripathi (P.W.-3) from consideration, we are left only with recovery of knife on the basis of disclosure statement made by the present appellant. To us, mere recovery of the knife from the appellant is not sufficient to come to a conclusion that offence of murder has been committed by him.

38. We have also perused the arrest memo of accused (Exhibit-P/23). The arrest of present appellant has been effected on 11.08.2003 at 02:00 A.M. It is true that the appellant was arrested on the same night of the occurrence. However, in the arrest memo of the appellant, no where it is stated that he was apprehended at the scene of occurrence. Vipin Tripathi (P.W.-11), witness to the arrest memo, has turned hostile. The other witness, Sushil Tripathi has not been examined by the prosecution.

39. Since in the present case, there is no eye-witness account and the circumstances relied upon by the trial Court after exclusion of evidence of Prem Narayan Tripathi (P.W.-3), in our view are not sufficient to circumstances to arrive at a conclusion that appellant alone, who is languishing behind the bars for a period of about last eleven-years, is the only person, who had committed offence of murder and same has not been committed by anybody else.

40. Thus, we shall extend the benefit of doubt to present appellant and acquit him of the charges.

41. As a result of above said discussions, we accept the present appeal, set aside the impugned judgment of conviction and sentence passed by the trial Court and acquit the appellant of the charges.