

(2012) 07 SC CK 0073

In the Supreme Court Of India

Case No : Criminal Appeal No's. 824-825 of 2011

Brijesh Mavi

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 03-07-2012

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 120B, 302, 34, 460

Citation : (2012) ACR 2682 : AIR 2012 SC 2657 : (2012) AIRSCW 3858 :
(2012) 2 ALD 865 : (2012) 2 ALD(Cri) 865 : (2012) CriLJ 3616 : (2012) 3 JCC
1999 : (2012) 6 JT 108 : (2012) 2 NCC 461 : (2012) 7 SCC 45 : (2012) 4
Supreme 299 : (2012) 3 UC 1648

Hon'ble Judges : Swatanter Kumar, J;Ranjan Gogoi, J

Bench : Division Bench

Advocate : A. Sharan, S. Chandra Shekhar, Neeraj Walia, Sanchit Guru, Manoj Kumar and Suraj Rathi, for the Appellant; J.S. Attri N.K. Srivastava, Priyanka Bharihoke, K.K. Tvasgi, Anil Katiyar and B.V. Balrarn Das, for the Respondent

Final Decision : Disposed Of

Judgement

Ranjan Gogoi, J.—These appeals are directed against the common judgment and order dated 10.08.2009 passed by the High Court of Delhi whereby the conviction of the Appellant under Sections 302 and 460 read with Section 34 of the Indian Penal Code as well as u/s 25 of the Arms Act has been affirmed. The Appellant has been sentenced to undergo rigorous imprisonment for life for the offence u/s 302 read with Section 34 Indian Penal Code whereas for the offence u/s 460 read with Section 34 Indian Penal Code sentence of seven years rigorous imprisonment has been imposed. Insofar as the offence under the Arms Act is concerned, the accused-Appellant has been sentenced to undergo rigorous imprisonment for one year. All the sentences have been directed to run concurrently.

2. The short case of the prosecution is that on 06.06.2001, H.C. Brij Pal (PW 11),

who was posted in the PCR, received an information at about 10.35 PM that firing is taking place at Savitri Nagar near a sweet shop. Accordingly, PW 11 alongwith other police personnel reached the said place and saw that a crowd had gathered near a STD booth where blood was splattered and some articles were lying scattered in broken condition. The STD booth belonged to one Omiyo Das of Malik Communications, who having been injured in the firing had already been removed to the hospital.

The said information was passed on to the local police station which was duly recorded in the Daily Diary of the Police Station and marked to SI - Sudhir Sharma, PW 24, who along with Constable-Bajrang Bahadur reached the place of occurrence. On reaching the said place the police party could come to know that the injured Omiyo Das had already been declared brought dead to the hospital.

Further more, according to the prosecution, one Vicky Malik (PW 1) was an eye witness to the occurrence. Accordingly, his statement (Ex.PW-1/A) was recorded where he had stated that on 06.06.2001 at about 10.20 P.M. when he was sitting outside his STD booth and sweet shop at J-196, Savitri Nagar, he had noticed a white Maruti Car stopping on the other side of the road. In the statement recorded by the police, PW 1 has stated that two men alighted from the vehicle and entered the STD booth whereafter they started firing at his maternal uncle, Omiyo Das. According to PW 1 he tried to intervene and in fact had brought a palta from his nearby sweet shop but his uncle told him to run away from the place and save his life. PW 1 had further stated that blood was oozing out from the injuries suffered by his uncle and he ran towards his house No. 86B shouting for help. According to PW 1, thereafter, the assailants fled away and he had along with his younger brother -Raj Kumar Malik -PW 3 and another maternal uncle - Ravi Kumar Dass - PW 4 had removed the injured to the hospital. In his statement, PW 1 had categorically stated that one Satish Kumar who had killed his father and who had been acquitted about a month ago in the case arising from the said incident was one of the assailants whereas the other/second assailant was about 25-26 years of age and was a well built person. On the basis of the aforesaid statement made by PW 1 - Vicky Malik, the FIR -Ex.PW-6/A was lodged and FIR Case No. 438/2006, Police Station Malviya Nagar (hereinafter referred to as the present case) was registered. Three live cartridges cage of 0.380 bore; one empty cartridge of 0.380 bore and four lead pieces of fired bullets were seized from the place of occurrence by PW 24 - Sudhir Sharma. The blood stained baniyan of PW 3; blood stained earth etc. were also seized from the place of occurrence by the Investigating Team.

3. The further case of the prosecution is that on the next day, i.e. on 07.06.2001, PW 9 -Dr. T. Milo had conducted the post mortem on the body of the deceased in the course of which nine ante-mortem bullet injuries were noted and four bullets had been extracted from the body which along with one cotton underwear; one cotton baniyan, one long pant was handed over to the Investigating Officer, PW 24-SI-Sudhir Sharma. The cause of death was stated to

be coma due to head injuries caused by a firearm.

4. According to the prosecution on 16.11.2001, the IO-PW 24-SI -Sudhir Sharma arrested accused Satish Kumar who was already arrested by the Faridabad police in connection with FIR No. 339/2004 of Police Station GRP, Faridabad u/s 25 of the Arms Act. The prosecution has alleged that Satish Kumar made a disclosure statement (Ex.PW-24/D) in the instant case and had also disclosed about the involvement of two other persons in the offence, i.e. one Med Singh and the present Appellant - Brijesh. On the basis of the said disclosure statement made by accused Satish, a .30" pistol along with 3(three) .30" calibre live cartridges was recovered. Thereafter, on 09.01.2002, PW 25 - SI - Sanjeev Sharma arrested Med Singh who was already arrested on 05.01.2002 in a separate case under the Arms Act. Three sealed parcels containing the .30" calibre pistol with three 7.62mm/.30" live cartridges recovered at the instance of accused Satish, the three .380" live cartridges; one .380" cartridge cage, two bullets and two defused bullets recovered from the place of occurrence and the four bullets recovered from the dead body in the course of post-mortem examination were all sent to the Forensic Science Laboratory, Rohini, Delhi on 03.12.2001. Thereafter, the report of one Shri KC Varshney, Senior Scientific Officer, FSL, Rohini, Delhi (Ex.PW-21/A) was received which was to the effect that the bullets marked as EB-1, EB-3 to EB-8 (seven in number) had been discharged through a standard .380" calibre firearm. On these facts, the two apprehended accused Satish and Med Singh were sent for trial. As the two accused persons denied the charges levelled against them the trial proceeded. The third accused was neither identified nor traced out at that stage.

5. While the trial of the case was in progress the present Appellant, Brijesh, was arrested on 12.8.2003 in connection with another case, i.e., FIR No. 575/2003 Police Station, Malviya Nagar. According to the prosecution, on interrogation, the accused Appellant disclosed/admitted his involvement in the present case and made a statement on the basis of which a .380" calibre revolver was recovered from the second floor of an Apartment bearing No. F-4/64, Sector 16, Rohini, Delhi alongwith 3 live .380" calibre cartridges. In respect of the said incident a separate FIR No. 456 of 2003 u/s 25 of the Arms Act of Prashant Vihar Police Station was registered. It may be noticed, at this stage, that the aforesaid recovery of the weapon was in the presence of SI-Satish Kumar, ASI - Ravinder and Head Constable - Rajiv Mohan who had been examined as PWs. 1, 2 and 3 in the case arising out of FIR No. 456/2003. It may also be noticed that Head Constable -Rajiv who was examined as PW 3 in connection with FIR No. 456/2003 was again examined in the present case as PW 19. Both the cases, i.e. the present as well FIR No. 456/2003 were clubbed together by order of the learned Additional District and Sessions Judge dated 10.03.2005 and charges under Sections 302 and 460 of the Indian Penal Code read with Section 34 were framed against the accused-Appellant in the present case. A separate charge u/s 25 of the Arms Act was also framed against the Appellant in FIR Case No. 456/2003.

PW 1 - Vicky Malik who was already examined was recalled for further examination after charges were framed against the present Appellant. While the trial of the two cases was in progress, accused Satish died and the proceedings stood abated against him. As many as 25 witnesses were examined by the prosecution in the present case and a large number of documents were also exhibited. Two witnesses were examined by the defence. DW-1 -Vijay Gupta claimed to be owner of the Apartment No. F-4/64, Sector 16, Rohini. This witness has stated that while he had occupied the ground floor of the apartment the first floor was vacant for repairs. The second floor was under the occupation of a tenant, one Rajiv Chauhan. According to DW-1, no recovery was made as claimed by the police on 12.08.2003. DW-2-Rajiv Chauhan, the tenant, had fully corroborated the above version of DW 1. Both the accused persons - Med Singh and Appellant Brijesh were examined u/s 313 Code of Criminal Procedure. At the conclusion of the trial both Med Singh and the present Appellant Brijesh were convicted for the offences for which they were charged. Separate appeals were filed by both the accused before the High Court. By the impugned judgment dated 10.08.2009 while the accused Med Singh was acquitted, the present Appellant has been convicted of the charges framed in both the cases and sentenced as aforesaid giving rise to the present appeal.

6. Before proceeding to notice and examine the arguments advanced on behalf of the Appellant, the bare facts proved and established by the evidence on record which would be required to be considered may be set out here in below.

7. In the initial deposition tendered in court by PW 1 - Vicky Malik, the witness had categorically stated that the second assailant who was accompanying accused Satish was not known to him. After the arrest of the present accused-Appellant on 11.08.2003 PW 1 was recalled and examined once again on 21.10.2005. On this occasion PW 1 had clearly denied that in his statement to the police that he had named the accused-Appellant-Brijesh or that he had identified the present accused-Appellant before the police. In fact, in his further examination PW 1 had categorically stated that "the accused-Appellant Brijesh Mavi present in court was not there on the date of incident" and further that "accused present in the court Brijesh Mavi is not the person who had killed my uncle. I have seen Brijesh Mavi first time". PW 1 was not declared hostile.

8. PW 24 - Sudhir Kumar, the IO of the case, in his deposition, as already noted, had deposed about the recovery of three live cartridges, one empty cartridge and 4 bullets (all of 0.380 calibre) from the place of occurrence. He has also deposed about the receipt of four bullets which were extracted from the body of the deceased at the time of post-mortem. According to PW 24 the cartridges and bullets recovered from the spot were sealed with the initial SK whereas the bullets recovered from the dead body were sealed with the seal of Forensic Medicine AIIMS Hospital. PW 24 has also deposed with regard to the arrest of accused Satish; the disclosure statement made by him and the recovery of one pistol of .30" calibre alongwith three live cartridges. In his cross-examination, he

has stated that in the course of interrogation it was revealed that the .380 calibre revolver was with the accused Satish and the .30" calibre pistol was with accused Brijesh.

9. From the evidence of PW 21 - Shri KC Varshney, Sr. Scientific Officer and his report Ex.PW-21/A it is evident that along with the .30" calibre pistol and the three .30" calibre live cartridges, the .380 cartridges(3 in No.), one .380 cartridge cage and the four bullets recovered from the spot along with the four bullets recovered from the body of the deceased were sent for the examination and the report thereof is that 7 bullets marked as EB-1, EB-3 to EB-8 had been fired from a .380 calibre fire arm.

10. From the evidence of PW 25, SI-Sanjiv Sharma, it also appears that after the recovery of the .380 calibre revolver from Apartment No. F-4/64, Sector 16, Rohini, Delhi, the said revolver and the empty and live .380 calibre cartridges and the four bullets recovered from the place of occurrence were sent to the CFSL, Chandigarh for examination and "matching" report, namely, whether the cartridges and bullets bore any relation to the fire arm recovered. The report of examination (Ex. PW -20/B) submitted by Dr. P. Siddambary Junior Scientific Officer (Ballistics), CFSL, Chandigarh (PW 20) is to the effect that the .380 revolver (bearing No. 25502) was in working condition and the crime fired bullets marked B/1, B/3 and B/4 had been fired through the said .38" revolver bearing No. 25502 and further that the said bullets could not have been fired through any other firearm. Insofar as the live cartridges are concerned, the report of PW 20 is silent where as in regard to the cartridge cage marked as EC.1 by the Ballistic Expert the opinion was inconclusive. From the above, it will be clear that the four bullets sent to the CFSL, Chandigarh and examined by PW 20 were the bullets recovered from the place of occurrence. The bullets recovered from the dead body though sent to the FSL, Rohini and were examined by PW 21 were however not sent by the prosecution to the CFSL, Chandigarh and are not a part of the report submitted by PW 20 in his report (Ex. PW-20/B)

11. Another significant fact that has to be noticed is that in the report of CFSL, Chandigarh Ex. PW-20/B it is not mentioned that one of the bullets recovered from the place of occurrence and marked as B.2 by the Ballistic Expert had been fired from the revolver bearing No. 25502 though according to both the reports, i.e. Ex.PW-21/A and Ex.PW-20/B the said bullet is also a .380 calibre bullet.

12. Shri A. Sharan, learned senior Counsel for the Appellant, has argued that from the evidence of the sole eye witness, PW 1 Vicky Malik, it is clear and evident that he had not identified the accused-Appellant Brijesh to be the person accompanying the accused Satish to the STD booth where the firing took place. In fact, according to the Learned Counsel, PW 1 has categorically stated in Court that the accused-Appellant Brijesh was not present at the place of occurrence and that he had seen the accused Appellant for the first time in court. Learned Counsel therefore has contended that there is no direct evidence to link the accused-Appellant with the offence for which he has been charged. In the

absence of identification of the accused-Appellant, the conviction, it is contended, is wholly without any basis. Shri Sharan has further contended that the recovery of the revolver from Apartment No. F-4/64, Sector 16, Rohini, Delhi, as claimed by the prosecution, has not been proved in any manner inasmuch as no independent witness has been examined to prove the same. Furthermore, DW 1 and DW 2 had clearly deposed that no police party has come to the apartment on 12.08.2003 and no recovery had taken place on the said date. Shri Sharan has also contended that the scrutiny of the evidence tendered by the defence witnesses would go to show that there is no basis for not accepting the same.

Continuing, Shri Sharan has argued that the bullets extracted from the body of the deceased, admittedly, had not been sent for examination to the ballistic expert to prove that the same were fired from revolver No. 25502 allegedly recovered from Apartment No. F-4/64, Sector 16, Rohini, Delhi. Therefore, according to Learned Counsel, even if the recovery of the revolver is to be assumed there is no proof that the same was fired to cause the injuries resulting in the death of the deceased. Insofar as the three bullets proved by Ex.PW -20/B to have been fired from the recovered weapon is concerned, Shri Sharan has argued that the same had not been sent for serological examination to prove the presence of human blood so as to establish that the said bullets had entered and exited the body of the deceased. It is also argued that the report of the CFSL Chandigarh (Ex.PW-20/B) read with the report of the FSL, Rohini (Ex.PW-21/A) would go to show that the bullet marked as Ex.B2 in the report of CFSL, Chandigarh (Ex.PW-20/B) was not fired from the recovered weapon. Yet, according to the prosecution, the same was a .380 calibre bullet recovered from the place of occurrence which facts open up the possibility of the use of another .380 revolver in the incident. No Evidence to the aforesaid effect is forthcoming. In these circumstances Shri Sharan has argued that the conviction of the accused -Appellant cannot be approved. In support, reliance has been placed on the judgment of this Court in Abdulwahab Abdulmajid Baloch Vs. State of Gujarat, Placing the said judgment before the court Shri Sharan has contended that in the present case even if it is assumed that recovery of the offending weapon has been proved by the prosecution the said fact is only one adverse circumstance against the Appellant. The same by itself, would not give rise to a complete chain of events and circumstances from which the only inference that can be drawn is one of culpability of the accused. Shri Sharan has also sought to draw the attention of the court to a recent judgment in Musheer Khan @ Badshah Khan and Another Vs. State of Madhya Pradesh, to contend that the recovery of the alleged weapon, even if assumed, cannot reasonably lead to a conclusion which would justify the conviction of the accused-Appellant.

13. In reply Shri J.S. Attri, learned senior Counsel for the State has contended that the failure of PW 1 to identify the accused-Appellant as being present at the place of occurrence would not be fatal to the prosecution case, inasmuch as in the present case the prosecution has succeeded in proving, beyond all reasonable doubt, that the weapon recovered at the instance of the accused-

Appellant from Apartment No. F-4/64, Sector 16, Rohini, Delhi was used to fire upon the deceased. It is contended that the three bullets recovered from the spot have been fired from the said weapon (Ex. PW 20/B). The said circumstance, according to the learned State Counsel, clinches the issue beyond all reasonable doubt. It is argued that a firm conclusion with regard to the culpability of the accused can be reasonably drawn from the aforesaid circumstance proved in the present case.

14. The brief conspectus of facts set out above demonstrates that there is no direct evidence to connect the accused-Appellant with the firing incident involving the deceased. The only eye-witness examined by the prosecution, namely, PW 1 has categorically deposed that the accused-Appellant Brijesh was not present at the place of the crime on the date of occurrence and, in fact, he had seen the accused-Appellant for the first time in court. The second person accompanying the deceased accused Satish to the STD booth along with the firearm therefore remained unidentified. The prosecution, in the absence of any direct evidence, has sought to build up its case on the basis of circumstantial evidence.

15. The principles of law governing proof of a criminal charge by circumstantial evidence need hardly any reiteration. From the several decisions of this Court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime. The above principle is deducible from the five propositions laid down by this Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, which principles have been consistently followed in *Tanviben Pankaj Kumar Divetia Vs. State of Gujarat*, *Vikram Singh and Others Vs. State of Punjab*, *Aftab Ahmad Anasari Vs. State of Uttaranchal*, *Sanatan Naskar and Another Vs. State of West Bengal*, and *Mohd. Arif @ Ashfaq Vs. State of NCT of Delhi*,

16. The next question that has to engage the attention of the court is what are the circumstances that the prosecution has succeeded in proving in the present case and if so proved what is the conclusion that can be reached on the proved circumstances in the light of the principles of law indicated above.

17. The prosecution has asserted that on 12.08.2003 the accused-Appellant, after being arrested in connection with another case admitted his involvement in the present case. On the basis of statement made by him before SI - Satish Kumar (PW 1); ASI - Ravinder (PW 2) and Constable - Rajiv (PW 3) a .380 Calibre revolver was recovered from the second floor of Apartment No. F-4/64, Rohini, Delhi. The evidence of PWs 1, 2 and 3 examined in connection with FIR Case No. 456/03 as well as the evidence of Head Constable Rajiv (PW 3) in FIR Case No. 456 who was examined as PW 19 in the present case indicates without doubt or ambiguity the detailed facts in which the recovery was effected. The

cross-examination of three witnesses has not revealed any fact which would go in favour of the accused. The defence witnesses, DW 1 and DW 2, examined, in our considered view, have not succeeded in demolishing the prosecution version inasmuch as DW 1 - Vijay Gupta admittedly was being interrogated in the police station on the date when the recovery was made. On the other hand, DW 2 - Rajiv Chauhan has failed to prove that he was a tenant under DW 1, in respect of the second floor of the Apartment in question at the relevant time. In such circumstances the court will have to proceed on the basis that the recovery, as claimed by the prosecution, has been proved by the evidence on record.

18. Our above finding would render the conviction of the accused-Appellant u/s 25 of the Arms Act wholly justified. However, insofar as the charges u/s 302 and Section 460 read with Section 34 of the Indian Penal Code is concerned, there are certain other connected facts and circumstances proved by the evidence on record which will have to be weighed by us in order to determine the consequence(s) that can be attributed to the accused from the recovery of the weapon in question. The recovery was affected after more than two years. The incident had occurred on 06.06.2001 and the recovery was made on 12.08.2003. The prosecution has not proved that during the intervening period the weapon had not changed hands and the same was consistently possessed by the accused Appellant Brijesh. The live and fired cartridges alongwith the bullets recovered from the place of occurrence and also the bullets recovered from the dead body in the course of post mortem were sent to the FSL Rohini. The report has been exhibited as Ex.PW-21/A. The said report is dated 28.02.2002, i.e. before the recovery of the .380 calibre revolver. After the recovery of the weapon said was made, the weapon itself along with the cartridges (live and empty) as well as the four bullets recovered from the place of occurrence was sent to the CFSL Chandigarh and is covered by the report of PW 20 dated 28.11.2003 (Ex.PW-20/B). However, surprisingly, the bullets recovered from the dead body at the time of post mortem were not sent to the CFSL, Chandigarh. This is evident from the evidence of PW 25 - SI-Sanjiv Sharma. No explanation for what appears to us to be a serious lapse on the part of the prosecution is forthcoming. That apart, in Ex.PW-20/B it is recorded that three out of the four bullets (recovered from the place of occurrence) were fired from the recovered weapon. The said bullets were not sent for serological examination to establish that the three bullets fired from the recovered weapon had entered and exited from the body of the deceased. In such a situation a lingering doubt remains as to whether the prosecution in the present case has succeeded in proving the charge against the accused-Appellant beyond all reasonable doubt. Furthermore, from Ex.PW-20/B it is evident that one bullet (marked as B.2 by the Expert) was not fired from the .380 calibre firearm recovered at the instance of the Appellant. The first report of the FSL, Rohini, Delhi - EX.PW21/A also indicates that one bullet of .380 calibre did not have any striations of rifling marks. The prosecution has remained silent on the aforesaid aspect of the matter, though, from the two reports, the possibility of use of another fire arm of .380 calibres cannot be ruled

out.

19. In the above context the decision of this Court in Abdulwahab Abdulmajid Baloch v. State of Gujarat (supra) would be a particular significance. Though the observations contained in Paragraphs 37 and 38 of the judgment have to be understood to have been rendered in the context of the facts of the case we find that the said observations would squarely apply to the present case. Consequently the aforesaid two paragraphs may be usefully extracted hereinbelow:

37. Be that as it may, we feel that only because the recovery of a weapon was made and the expert opined that the bullet found in the body of the deceased was fired from one of the weapons seized, by itself cannot be the sole premise on which a judgment of conviction u/s 302 could be recorded. There was no direct evidence. The accused, as noticed hereinbefore, was charged not only u/s 302 read with Section 34 of the Penal Code but also u/s 302 read with Section 120-B thereof. The murder of the deceased was said to have been committed by all the accused persons upon hatching a conspiracy. This charge has not been proved.

38. The learned trial Judge himself opined that the recovery having been made after nine months, the weapon might have changed in many hands. In absence of any other evidence, connecting the accused with commission of crime of murder of the deceased, in our opinion, it is not possible to hold that the Appellant on the basis of such slender evidence could have been found guilty for commission of offence punishable u/s 302 of the Penal Code.

20. Though the above discussions would lead us to the conclusion that the prosecution, in the present case, has succeeded in proving a highly incriminating circumstance against the accused -Appellant, yet, we do not consider that it would be wholly safe to hold that the only conclusion that can follow from the aforesaid proved circumstance is that the accused Brijesh is responsible for the death of the deceased that had occurred on 06.06.2001. We have also noticed that the High Court has convicted the accused-Appellant u/s 302 as well as Section 460 Indian Penal Code with the aid of Section 34. In a situation where co-accused Satish had died during the trial and the other co-accused Med Singh had been acquitted by the High Court, the culpability of the present accused-Appellant with the aid of Section 34 will be open to serious doubt. Such culpability will have to be determined on the basis of individual overt acts on the part of the accused Appellant for which we do not find any cogent and reliable material on record.

21. Consequently, we hold that while the conviction of accused-Appellant u/s 25 of the Arms Act and the sentence imposed is justified, the accused-Appellant is entitled to the benefit of our doubts with regard to the offences u/s 302 and Section 460 read with Section 34 of the Indian Penal Code. We, therefore, set aside the judgment of the High Court insofar as the offence u/s 302 and Section

460 read with Section 34 of the Indian Penal Code is concerned. The conviction of the accused-Appellant u/s 25 of the Arms Act and the sentence imposed is upheld. If the Appellant is presently in custody and he has undergone the sentence imposed u/s 25 of the Arms Act he be released forthwith unless wanted in any other case.

The appeals are disposed of in the aforesaid terms.