
(2013) 07 DEL CK 0413
In the Delhi High Court
Case No : Criminal A. 92 of 2003

Dharam Pal and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 18-07-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 308, 325, 34

Citation : (2013) 3 JCC 1873

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : R.N. Mittal and Mr. Manoj Kumar, for the Appellant; Manoj Ohri, APP, for the Respondent

Final Decision : Dismissed

Judgement

Mukta Gupta, J.—PW 1, Laxmi Chand lodged a complaint on the basis of which FIR No. 197/1995 under Sections 308 /34 IPC was registered at PS Najafgarh against Sahib Singh, Dharam Pal, Anil Kumar and Parvinder Kumar. Pursuant to the trial, the Appellants Dharam Pal and his sons Anil Kumar and Parvinder were convicted for offence under Sections 325 /34 IPC and released on probation which period is also over. As the Appellant No. 1 is a government servant he presses the appeal and states that the conviction is illegal and contrary to the facts of law. Learned counsel for the Appellants contends that in the Ruqqa, besides the Appellants, PW 1 named two other persons, that is, the maternal grandson of Hoshiar Singh, Ravinder and son of Prem Singh, that is, Praveen who were also attributed the same role however, they were not prosecuted and since the Investigating Officer was not examined, the valuable right to cross-examine that witness has been lost to the Appellants. The learned Trial Court after discarding the testimony of two eye witnesses PW 2 and PW 3, that is, the brother and nephew of PW 1 Laxmi Chand the injured however, based the conviction solely on the testimony of PW 1 Laxmi Chand and medical evidence. The medical evidence has not been proved in accordance with law as PW 7 Dr.

Sudhir Bajaj who proved the opinion of Dr. Rajiv Khanna did not produce x-ray plates, nor was a radiologist nor had seen Dr. Rajiv Khanna writing or signing at any time. Thus no conviction under Sections 325 /34 IPC could have been passed. PW 5 Constable Suresh Kumar who took the Ruqqa admitted that he reached the police station at 7.00 p.m. and in order to cover up the time as FIR was lodged belatedly there is a overwriting in the time from 7.30 p.m. to 8.00 p.m. with regard to dispatch of ruqqa. Since the Investigating Officer, in whose hand writing the ruqqa was sent, has not been examined, the Appellants could not extract the explanation of this overwriting. Despite the fact that it is the case of the prosecution that besides Hoshiar Singh, the father of the Appellant No. 1 and grandfather of Appellant Nos. 2 and 3, two other persons were also playing cards however, they were neither cited nor examined as witnesses. The learned Trial Court rightly discarded the testimony of PW 2 Man Singh and PW 3 Dinesh Kumar as PW 1 Laxmi Chand, the injured Complainant in his testimony had stated that he had not seen Man Singh and Dinesh Kumar, his brother and nephew respectively at the time of incident. The prosecution also failed to explain the injury on Hoshiar Singh, father of Appellant No. 1 and grandfather of Appellant Nos. 2 and 3 which the defence proved by examining DW 1 Dr. Deepak Verma. Reliance is placed on Ashok Kumar Vs. State, and Abdul Rahim Vs. The State (Delhi Admn.), .

2. Learned APP for the State on the other hand contends that the case of the prosecution is proved beyond reasonable doubt by the testimony of PW 1 Laxmi Chand, the injured witness whose version is corroborated by his MLC which has been duly proved by the doctors who appeared in the witness box. PW 1 Laxmi Chand, the injured was suggested that he hit Hoshiar Singh with Lathi thus the presence of PW 1 is not doubted. Immediately after the incident, the MLC of PW 1 was got prepared and hence the chances of manipulation are totally ruled out. Though the Investigating Officer has not been examined however, PW 5 Constable Suresh Kumar, who accompanied the Investigating Officer at every step has been examined, who has deposed regarding the steps taken in investigation. Thus no prejudice has been caused to the Appellants for non-examination of the Investigating Officer. Hoshiar Singh has not filed any complaint against the Complainant/PW 1 and in the absence thereof it cannot be said that he was injured in the same transaction and injuries on him have not been explained by the prosecution. PW 1 Laxmi Chand, the injured has ascribed the role of each Appellant, thus there is no infirmity in the impugned judgment and the appeal be dismissed.

3. I have heard learned counsel for the parties.

4. PW 1 Laxmi Chand, the injured Complainant stated that on 27th May, 1995 at about 4.15 p.m. he went to the shop of Angoori Devi to purchase articles, who was running a grocery shop in his neighbourhood as tenant of Hoshiar Singh. Three-four persons including Hoshiar Singh, Pt. Amar Singh and two other persons were playing cards there. While the Complainant was purchasing the

goods, he heard noise of something hitting the shutter. The lathi that had hit the shutter thereafter fell on his shoulder. PW 1 turned and saw that Appellant Dharam Pal was holding a lathi and he gave a lathi blow on his head. He also saw his son Prem who lived in the Akahara having a lathi in his hand. Two of his nephews namely Sunil and Ravinder and two sons namely Happy and Happy were also present there. Sunil was holding stick made out of branch of Kikar and others were armed with lathis. When Dharam Pal gave a lathi blow, he was asked by Sunil to be at a distance and he would do the needful. Sunil gave a lathi blow on the legs of the Complainant and Parvinder gave a lathi blow on his left waist. Due to the injury on the legs he fell down from the stairs and all the accused persons again gave beatings to him with lathis/sticks etc. This witness in his cross-examination stated that he did not see Man Singh or his son Dinesh on the spot during the quarrel and then stated that they were not there in the beginning and saw them when the Complainant was being carried away after the beating. In view of this testimony of PW 1 Laxmi Chand according to which PW 2 and PW 3 were not present at the time of incident, the learned Trial Court rightly rejected the evidence of PW 2 and PW 3.

5. There can be no dispute that the conviction of the Appellants can be based on the testimony of PW 1, the Complainant duly corroborated by the medical evidence on record. The testimony of PW 1 clearly ascribed the roles to each of the Appellants and that they acted in furtherance of common intention. The issue that requires consideration is whether the MLC of the Complainant has been properly exhibited and proved so as to prove the opinion that the injury was grievous in nature thus warranting the conviction under Sections 325 /34 IPC. The MLC of Laxmi Chand, son of Chander Bhan has been proved by PW 6 Dr. Seema, CMO RML Hospital who identified the signatures of Dr. Sanjay Banga, who had left the hospital. As per the MLC, PW 1 Laxmi Chand received following injuries: i. CLW 3 cm long on right parietal region near mid line.

ii. CLW 1/2 cm on left hand near base of left little finger based dorsal side.

iii. Swelling on left hand.

iv. Swelling and bruises left elbow.

v. Multiple bruises present on back.

vi. Abrasion right knee.

6. There is no contest to the proof of this MLC. The only contest is to the opinion of Dr. Rajiv Khanna, who opined the injuries to be grievous in nature. PW 7 Dr. Sudhir Bajaj from RML Hospital appeared and saw the MLC Ex. PW 5/F. He stated that he had seen the opinion about the nature of injuries as grievous and the same was in the handwriting of Dr. Rajiv Khanna and which he identified. This witness also brought with him the original record relating to MLC Ex. PW 5/F and on the basis of the record this witness opined that nature of injury mentioned in Ex. PW 5/F was grievous in nature. This witness further went on to explain that

the injury was multiple fractures on the patient.

7. Learned counsel for the Appellants has sought to assail the testimony of PW 7 Dr. Sudhir Bajaj on the ground that he personally had no knowledge about the MLC, because the x-ray plates were not produced and he had not seen Dr. Rajiv Khanna writing and signing, thus he could not have proved the injury to be grievous in nature. No doubt PW 7 Dr. Sudhir Bajaj admitted that he had not seen Dr. Rajiv Khanna writing and signing however, he clearly stated that he was aware of his handwriting and he could identify his signatures at point "B" on Ex. PW 5/B. It is thus evident that this person in the course of events was familiar with the hand writing of Dr. Rajiv Khanna. Further when this witness appeared, all original records were produced and the opinion that the injuries were grievous in nature was reiterated by this witness after examining the record. This witness specified that the injury was multiple fractures. Non-retention of the x-ray plates on the Trial Court record would not wash away the testimony of this witness, who has clearly opined, on the basis of record, that the injury was multiple fractures and thus grievous in nature.

8. Reliance of the learned counsel for the Appellants on Ashok Kumar (Supra) is misconceived. In the said case the prosecution examined the Record Clerk and did not produce any radiologist or the x-ray reports on the basis of which it could be said that the doctor examined therein gave the opinion. In the present case the prosecution has examined two doctors one is PW 6 Dr. Seema who proved the MLC Ex. PW 5/F and PW 7 Dr. Sudhir Bajaj, who proved the opinion about the nature of injuries as grievous on the MLC Ex. PW 5/F. This witness produced the original records before the Court and on the basis of records he opined that the nature of injuries mentioned in the Ex. PW 5/F was grievous in nature. He also described the injuries to be multiple fractures which he could have stated only on the basis of record which was produced in the Court.

9. Coming to the contention of learned counsel for the Appellants that the Investigating Officer has not been examined, thus his legal right to cross-examine him has been lost resulting in causing serious prejudice to the Appellants. The order sheet dated 1st November, 2001 reveals that the Investigating Officer of the case had gone aboard and there was no possibility of his returning in the near future, thus he was not examined and the learned APP closed the prosecution evidence. PW 5 Constable Suresh Kumar, who accompanied the Investigating Officer to the spot and was throughout in the investigation was duly examined. He deposed that on receiving DD No. 21 he went to the Investing Officer SI Ram Singh who was busy in the investigation in another case and from there they both went to the spot where it was revealed that the injured had been removed to the hospital. The inquires were made from many persons on the spot but none claimed to be the eye witness thus PW 5 and the Investigating Officer went to the RML Hospital. On the way, the motorcycle went out of order and after getting the same repaired, they reached RML hospital. The injured Laxmi Chand was found admitted there and the

Investigating Officer filed an application before the Doctor seeking opinion whether the injured was fit for the statement or not. The doctor opined the injured fit for statement and thus statement of Laxmi Chand was recorded. PW 5 along with the Investigating Officer came to the spot where he was handed over the statement to be taken to PS Najafgarh for registration of FIR. After getting the FIR registered, he again went back to the spot and handed over the Tehrir and copy of the FIR to the Investigating Officer. The Investigating Officer arrested the Appellants Dharam Pal, Sahib Singh and prepared the personal search memo which bore the signatures of PW 5 Suresh Kumar. It is thus evident that PW 5 Constable Suresh Kumar accompanied the Investigating Officer at every stage and thus was aware of the investigation carried out. The Appellants could have thus cross-examined this witness on all these material aspects qua which now prejudice is being alleged. However they failed to do it. The contention now being raised is that this witness stated that he reached the Police Station about 7.30 p.m. and handed over the Tehrir immediately however, there is an overwriting in the Tehrir to 8.30 p.m. The attention of this witness was not drawn to Ex. PW 1/A despite the fact that this witness had taken the ruqqa and could have thus explained this fact. Thus the Appellants cannot take any benefit out of the alleged overwriting on Ex. PW 1/A or the non-examination of the Investigating Officer.

10. Learned counsel for the Appellants relies upon Abdul Rahim (Supra) to contend that in the absence of Investigating Officer having been examined the prejudice is caused to the defence of the Appellant as he has been deprived to the right of cross-examine the witness. In the said case several opportunities were given to the prosecution to produce the Investigating Officer but he was not examined and there was no explanation for his non-examination. In the case in hand the Investigating Officer was not available for examination as he was not likely to come back to the country in near future and thus he was given up, however the prosecution examined PW 5, who was assisting the Investigating Officer on each step and the Appellants did not cross-examine him on any of the aspects except the MLC of Hoshiar Singh and thus they cannot now claim prejudice.

11. Assuming that two other persons were also accused with the Appellants and they were not prosecuted, the same would not absolve the Appellants of the offence committed by them. The same may at best be negligence on the part of the Investigating Officer for which no mileage can be taken by the Appellants herein. The Appellants in their defence have examined DW 1 Dr. Deepak Verma, SMO, DDU Hospital who exhibited the MLC of Hoshiar Singh conducted on 27th May, 1995 at 6.00 p.m. in DDU Hospital vide Ex. DX. Injuries No. 1 was small swelling over forehead and No. 2 small CLW 1.5 x 1 cm on the right eye brow. There is no evidence on record led by the defence that the injury was caused by PW 1 except making a suggestion to him. Hoshiar Singh has not appeared as a defence witness to state as to who inflicted the injuries. Thus the Appellants have not even proved by preponderance of probability that the injuries were caused by

the complainant.

12. Thus the Appellants have not proved that the injuries were caused by the Complainant. Since this fact was being relied by the Appellants they ought to have proved the same, in which case the onus would have shifted on the prosecution regarding non-explanation of the injuries on Hoshiar Singh. Further the injuries on Hoshiar Singh were simple and blunt and non-explanation of minor injuries does not affect the otherwise credible evidence of the prosecution. In view of the aforesaid discussion I find no infirmity in the impugned judgment convicting the Appellants for the offence under Sections 325 /34 IPC. Appeal is accordingly dismissed.