

(2011) 09 DEL CK 0077

In the Delhi High Court

Case No : Criminal Appeal No. 672 of 2011

Dharamraj @ Sanjay @ Siktan

APPELLANT

Vs

State NCT of Delhi

RESPONDENT

Date of Decision : 22-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302

Citation : (2011) 9 AD 735

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

Bench : Division Bench

Advocate : Ashutosh Nath and Ms. Himani Bhatnagar, for the Appellant; Sanjay Lau, APP, for the Respondent

Final Decision : Allowed

Judgement

MR. Justice S. Ravindra Bhat,J.

1. This appeal challenges a judgment and order of the learned Additional Sessions Judge dated 07.04.2011, in SC No. 56/2010. The Appellant (hereinafter called "Dharamraj") was convicted for the offence punishable u/s 302 Indian Penal Code and sentenced to undergo life imprisonment. The co-accused, his wife Niamala was acquitted of the charges. The appeal was listed for possible final hearing today, the first time after its admission. With consent of counsel for both parties, the case was heard finally.

2. The prosecution case was that Dharamraj and Nisha another co-accused (referred to Juvenile Justice Board) were seen chasing Rajendra Singh (hereafter referred as to "the deceased") near a country liquor vend at 60 feet road Mahavir Enclave, New Delhi around 07.30 PM on 25.02.2010. It was alleged that when Rajender entered the crowd into a liquor vend shop, Dharamraj who had an iron rod (saria) in his hand, hit the deceased on the head and exhorted his other two associates i.e. Nirmala and Nisha to finish him. It was alleged that Nirmala and Nisha also beat the deceased with chappals and he collapsed there on the

ground. The accused fled the spot. This information was recorded on the narrative of PW-4, Sanjay whose statement Ex. PW4/A was recorded late that evening the same day, around 10.10 PM. The deceased had been taken to Deen Dayal Upadhaya Hospital the same night at 9.30 PM and was declared dead. The fact testified by the MLC PW 9/A. The First information Report (FIR Ex. PW7/A) was registered at 10.25 PM on the basis of PW-4's statement. It was alleged that during the proceedings, the State also relied on a Death report prepared on 26.07.2010. It was marked as Ex. PW 14/C. The deceased's post mortem examination was conducted and the report was marked as Ex. PW14/E was placed on record during the trial. After conclusion of investigation Dharamraj and Nirmala were charged with offence. They denied guilt and claimed trial. The prosecution relied upon the testimonies of 15 witnesses besides other documentary evidence; the weapon of offence i.e. iron rod was also apparently seized during the investigation. The seizure memo was marked as Ex. PW 4/L. After considering all the materials, the trial court acquitted Nirmala but held appellant Dharamraj guilty of having committing the offence and sentenced him to undergo life imprisonment.

3. Mr. Ashutosh Nath, the Appellant's counsel argued that the prosecution had relied upon the testimony of two eye witnesses i.e. PW-3 and PW-4. It is submitted that PW-3 in his evidence did not support the prosecution story and merely mentioned about the fight which took place in front of a liquor shop 150 meters away from his shop on the concerned day. He also mentioned that about 60-70 persons gathered at the spot. He flatly denied that the Police recorded his statement. He could not identify any of the accused or even mention their ages etc. As far as PW-4 is concerned, Learned Counsel urged that this witness too was declared hostile. The sum total of his testimony including the answers given to leading question put by the prosecution were that he had started taking liquor that day around 06.00 PM and continued to do so for about an hour. He, however, denied that having seen anyone aged 42 or so running from the nala side followed by the accused. He denied the contents of Ex. PW 14/A, i.e. intimation (rukka) recorded by the Police. It was submitted that totality of evidence could not have led any criminal court to conclude that the prosecution had proved the Appellant's guilt beyond reasonable doubt. Even though at the time of framing charges, the prosecution could legitimately rely upon Ex. PW 3/A, and PW 4/A statements recorded by the alleged eye witnesses u/s 161 Cr.P.C, yet their categorical denial to support the statements during the testimony in Court undermined the entire prosecution story.

4. It was urged that the trial court fell into a serious error in ignoring a vital circumstance i.e. that the evidence pointed out to about 60-70 persons having gathered at the spot where the assault allegedly took place on the deceased. Yet the Police did not join anyone during the investigation; nor did such people depose during the trial. Had the incident occurred in the manner alleged and if the Appellant was really involved, there would have been other witnesses to support the prosecution.

5. Learned Counsel urged that the conclusions recorded by the trial court in the impugned judgment particularly pars 26, 31 to 33 are unsupportable in law. It was argued that once the witness PW-4 resiled from his statement made u/s 161, it was not open for the trial court to appreciate the other circumstances and speculate whether what was recorded during the investigation was truthful version and prefer it over the version deposed in the Court. In other words, unless the material on record strongly corroborated the contents of the PW-4/A through other admissible evidence, the Appellant could not have been convicted on the basis of surmises. Learned Counsel also highlighted that the trial court appeared to have been swayed by the subsequent supplementary statement recorded by PW-4 which was not even brought on file. Counsel lastly submitted that the nature of injuries which were deposed to be the cause of death i.e iron rod blows allegedly given by the Appellant, were directly contradicted by the post-mortem report (Ex. PW15/A) which pointed to cause of death as Asphyxia as a result of manual throttling. The injury on the head was clarified in a subsequent opinion by PW-15 marked as Ex. PW 15/B dated 12.02.2011) which stated that external injury i.e. a laceration of 3.0 cm x 2.0 cm x bone deep present on the left temporal region of head could have been caused by the iron rod produced by the prosecution. However, the effect of the medical opinion was that cause of death was asphyxia and not the direct result of blow on the head. In these circumstances, the entire prosecution was based upon false facts and the trial court fell into an error in convicting the Appellant.

6. Learned Counsel for APP submitted that the judgment of the trial court does not call for any interference. He stated that PW-4 had initially resiled from his statement but was permitted to be cross-examined. Counsel pointed to the observation of the Court that the witness appeared to have been in some fear and argued that so long as he submits the basic facts such as his presence at the site, and the murder of someone taken place after which the Police reached the spot around 8.00 PM, the Court could proceed further and infer from other circumstances whether the prosecution story had been established. In this connection, learned APP argued that the witness had testified to the arrest memo to being present when Dharamraj was arrested and other documents such as personal search memo, arrest memo of Nisha and her personal search memo, disclosure statements of Dharamraj and Nisha, Ex. PW 4/F and PW 4/L and seizure memos Ex. PW 4/K and PW 4/L were signed by him. Such being the case and having regard to the recovery of iron rod, the existence of the injury No. 2 observed in the post mortem Ex. PW 15/A, the trial court's findings that the Appellant was the guilty of murder was justified.

7. We have gone through the impugned judgment and the trial court records. Before the analysis of submissions, it would be essential to extract the reasoning of the trial court which led it to conclude that Dharamraj was guilty. This reasoning is to be found in the following discussion:

He admitted that a person coming from the side of Ganda Nala would pass in

front of that Rehri. He further denied that at 7.30 p.m. he was standing in front of the liquor shop and saw a person aged 42 years coming running from Ganda Nala side followed by the two accused and their associate Nisha. He also denied the other suggestion put to him by Ld. APP regarding the manner in which the incident is alleged to have happened. However, he admitted that he accompanied the police on 28.7.2010 and volunteered that he was lifted by the police on the same day from his workplace at Palam. He was not drunk at that time. While denying that accused Dharam Raj and Nirmala were arrested from their residences in his presence, he admitted that their arrest memos bear his signatures at point A. He also admitted that the personal search memos of the two accused also bear his signatures at points A and their disclosure statements also bear his signatures at points A. He also admitted that the pointing out memos prepared at the instance of the two accused i.e. Ex.PW4/H and Ex.PW4/J also bear his signatures at points A. He also admitted that the seizure memos Ex.PW4/K (in respect of earth control, blood from the spot and blood stained earth) and Ex.PW4/L (in respect of iron rod got recovered by accused Dharam Raj) bear his signatures at points A.

26. Evidently, this witness also tried to hide truth from this Court but could not do so as he had in fact accompanied police on the day following the day of incident and had signed various documents prepared by the police. If he was drunk how did he notice and remember the crowd in front of liquor shop. If he had not seen anything untoward, how does he remember the date 25th or 26th July, 2010. It implies that some incident was witnessed by him on that day. Besides there are various discrepancies in his testimony. In the examination-in-chief, he stated that he had taken liquor at 6 p.m. and was on his way home when he saw a crowd gathered in front of the liquor shop at Mahavir Enclave Part II. He did not go near the crowd. In the cross examination by Ld. APP, he stated that he had started taking liquor at 6 p.m. and continued to do so for about one hour i.e. upto 7 p.m. He also deposed that he purchased the liquor quarter after quarter and consumed the same accordingly. This implies that he must have gone to the liquor shop during this one hour almost three or four times to buy quarter bottles of liquor. Therefore, he must have clearly seen what had happened in front of the liquor shop. Moreso, the rehri on which he was taking liquor is towards the side of the Ganda Nala and admittedly any person coming from the side of Ganda Nala would pass in front of the Rehri. Though, he denied having seen anything at the spot but admitted his signature on his statement Ex.PW4/A. He nowhere explains in what context and under what circumstances, was the statement recorded by the police. He also nowhere states that he does not know what is contained in the statement or that its contents are false.

27. The manner in which PW4 has deposed in this case his statement Ex.PW4/A assumes significance. The recording of his statement by PW14 stands amply proved by the deposition of PW14 as well as by his own deposition. PW14 has deposed that on reaching the spot, he recorded statement of PW Sanjay prepared rukka on the basis of the same and sent it for registration of the FIR. In

his cross examination, he denied that he took the signature of witness Sanjay on blank papers. Similarly, PW4 has admitted his signature on the statement and nowhere says that his signature was taken on blank papers or that he did not make this statement to the police.

31. In the aforesaid statement Ex.PW4/A, witness Sanjay has mentioned in detail and clearly the manner in which the death of deceased Rajender Singh happened. He has also mentioned the necessary details of the assailants and has give the specific role which each assailant had played in the occurrence. The assailants i.e. the two accused herein and the juvenile Nisha were known to him as they resided in the area in which he resides. No previous enmity between PW4 and the accused has come on record. I find nothing on record to doubt the version given by PW4 in the statement Ex.PW4/A.

32. Even though witness PW4 deposed before the Court that he does not know anything about the incident, he fails to explain why did he accompany the police the next day i.e. 26.7.2010 and why did he sign the arrest memos, personal search memos and seizure memos prepared by the IO. He nowhere states that his signatures were taken on blank papers or that he was made to sign these forcibly by the IO. Therefore, the pointing out memo Ex.PW4/H and Ex.PW4/J got prepared by the two accused stands duly proved. The relevant portion of the disclosure statement made by accused Dharam Raj Ex.PW4/F, pursuant to which he got recovered the iron rod from a room on the second floor of his house which was taken into possession vide seizure memo Ex.PW4/L also stands proved. Hence, the recovery of weapon of offence stands duly proved. The aforesaid iron rod (Saria) got recovered at the instance of accused Dharam Raj was sent to PW15 Dr. B.N. Mishra for his opinion. He, vide his opinion Ex.PW15/B has stated that external injury No. 2 mentioned in his postmortem report is possible to be inflicted by the iron rod produced before him.

8. It is evident that the trial court considerably swayed by the previous statement recorded by the Police PW-4, u/s 161 Code of Criminal Procedure. during investigation. As regards PW-4, the sum total of his deposition (i.e. the examination-in-chief and the cross-examination of this witness during his deposition in Court) what emerged was an admission by him of being present at the site; that he had purchased and consumed liquor for an hour after 6.00 PM and that murder had taken place in the vicinity due to which Police visited the spot around 8-8.30 PM. He clearly denied having recorded statement Ex. PW 4/A. However, he admitted his signature on some of the documents Ex. PW 4/B to PW 4/J which were the arrest memo, disclosure statements and recovery memo and all dated 26.07.2010. If seen from the background of PW-3's testimony (who was another eye witness cited by the Police) there is a direct contradiction between the two prosecution witnesses. That apart this Court is of the opinion that in the absence of any other corroborative material, the proof that PW-4 was a witness to the arrest of the accused or was a witness to certain recoveries made by the Police during investigation pursuant to the statements by the

accused is insufficient to fasten criminal responsibility on the Appellant. The only effect of the admissible part of PW-4's testimony in Court is that he had bought and consumed liquor between 6.00-7.00 PM on the day of incident; and murder had taken place and the Police visited the site. He also admitted to have been associated by the Police on two other dates i.e. 26.07.201 and 28.07.2010. By no stretch of imagination these facts point an accusing finger against the Appellant. It has been held that the mere recovery of an article (in this case, the iron rod) in itself even if at the behest of the accused would be insufficient to support a conviction: See Sanwat Khan and Another Vs. State of Rajasthan, ; K. Chinnaswamy Reddy Vs. State of Andhra Pradesh, .

9. We also notice that the prosecution story consistently was that the deceased had been beaten on the head with an iron rod that resulted in his death. The trial court has disbelieved the prosecution story implicating Nirmala and acquitted her. Therefore, the only allegation against the Appellant was that he chased the deceased near nala and beat him with iron rod and inflicted iron rod injuries to his head which lead to his death. The post mortem report mentioned the following injuries Ex. PW 15/A:

(1). Abraded bruise of size 6.0 cm x 3.0 cm present on back over right scapular region with reddish brown in colour.

(2). Laceratio of size 3.0 cm x 2.0 cm X bone deep present on left temporal region of head with irregular and raged margins and covered by dark red blood clots.

(3). Bruise of size 8.0 x 4.0 cm present over upper part on right chest just below the right clavicle. On section bluish blood clots revealed.

(4). Four - five a partly and circular shape bruises preset on the anterior aspect of neck with crescentic shaped with size of 1.0 cm - 1.2 cm in diameter each nail marks imprinted over the peripheral region of each bruising (suggestive of fingers tip pressure marks during the attempt of throttling). On dissection of the neck the underlying soft tissues showed multiple scattered collection of blood clots in to the soft tissue. Fractured cornua of hyoid bone with mid line placement and fractured right lamellae of thyroid cartilage with collection of dark reddish blood clots adjacent to fracture site.

10. The report clearly stated the cause of death as asphyxia caused by manual throttling precipitated by head injury. This opinion was confirmed in Ex. PW 15/B which stated that External injury No. 2 - mentioned above -would have been the result of blows by the iron rod. We notice here that the prosecution had relied upon the statement Ex. PW 4/A on the basis of which the FIR Ex. PW 7/A was recorded. The cause of death was mentioned as head injury in the death report Ex. PW 14/C and the brief facts Ex. PW 14/B. Furthermore, the police document MLC Ex. PW 9/A mentions about head injury. None of these mention any ligature mark or neck injury (later observed in the post mortem report Ex. PW 15/A) which was the primary cause of death. This case clearly is one where the ocular

testimony relied upon is contradictory to the medical evidence. Although there is no hard and fast rule that where medical evidence conflicts with the ocular testimony that the Courts have to prefer the former, since the facts of each case would differ depending upon the powers of observation of eye witnesses, the nature of the injury the manner, of attack, etc, at least in a case like the present where the ocular testimony merely points to head injuries which are not the primary cause of death and the prosecution is silent as to what could have caused the neck injury which resulted in asphyxia and ultimately death of Rajender, the Appellant cannot be implicated.

11. In view of the foregoing discussion, we are of the opinion that the appeal deserves to succeed. It is accordingly allowed. The Appellant shall be set at liberty forthwith.