

(2011) 02 DEL CK 0285

In the Delhi High Court

Case No : Criminal Appeal No. 1443 of 2010 and Criminal M.B. 1729 of 2010

Manoj and Another

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 15-02-2011

Acts Referred:

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

Citation : (2011) 3 AD 233

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Manish Kumar and Gunjan Sharma, for the Appellant; Pawan Bahl, APP., for the Respondent

Final Decision : Dismissed

Judgement

Mukta Gupta, J.—By this appeal the Appellants lay a challenge to the judgment dated 28th October, 2010 convicting them for offences punishable under Sections 308/34 IPC and order on sentence dated 10th November, 2010 awarding them Rigorous Imprisonment for a period of three years and a fine of Rs. 4000/- each and in default of payment of fine, to further undergo Rigorous Imprisonment for two months.

2. Briefly, the prosecution case is that the Appellants in furtherance of their common intention assaulted Tirath PW4 by means of a danda blow on his head when the PW4 demanded his full amount for the meat and bread they took from his "Rehri".

3. Learned Counsel for the Appellant contends that there is no evidence against the Appellants as all the witnesses have turned hostile. The learned trial court has convicted the Appellants relying on the statement of the witnesses in examination-in-chief only and has not looked at the cross-examination. PW3 Tejpal, the Complainant and allegedly an eye-witness, though in his examination-in-chief has stated that Appellant Manoj gave a danda blow on the head of Tirath

when Parveen caught hold of his hands, however, in cross-examination he has stated that he did not see the accused persons. Similarly, PW8 has stated that he saw Tirath lying in an injured condition on the ground and took him to the Trauma Centre in a "Vikram" with the help of one Sushil. He has categorically stated that no incident has taken place in his presence. PW4 Tirath, the injured though in his examination-in-chief has stated that Appellant Parveen caught hold of the hands of PW4 and Manoj gave danda blow on his head on which he fell down and got unconscious, has not supported the prosecution case in cross-examination. Thus, there is no evidence on record to implicate the Appellants for offence u/s 308 IPC. Moreover PW4 has stated that the Appellants were in drunken condition and thus, the Appellants could not have formed the intention to commit the said offence. The learned trial court has convicted the Appellants in view of the fact that the Appellants got recovered the weapon of offence pursuant to their disclosure u/s 27 of the Act. However, the prosecution has failed to connect the danda with the injuries on the injured and thus the said recovery cannot be used against the Appellant.

4. Per contra, learned APP for the State contends that PW3 and PW4 in their examination-in-chief on 18th March, 2009, have categorically stated about the role of the Appellants as re-produced above and their cross was deferred on the request of the Appellants. Their cross-examination was then conducted on the 15th April, 2009 wherein both of them turned hostile. No suggestion has been given to any of the police officers of false implication. On re-examination PW3 and PW4 have denied being under any pressure on the 18th March, 2009 and also denied having met any police officer on that day thus belying the pressure by the police officer. The Recovery of weapon of offence has been proved. The testimony of PW3 and PW4 is corroborated by the MLC Ex. PW7/A which shows head injuries.

5. I have heard learned Counsel for the parties and perused the record. The evidence of PW3 and PW4 in the present case has to be examined in the light of the law laid down by the Hon"ble Supreme Court in Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, has held that:

The examination-in-chief of this witness was recorded on November 16, 1976 when he identified all the assailants by name. He stated that he knew the six accused persons in court and they were the persons who had surrounded the rickshaw and launched an assault on PW 4 and the deceased Gulab. Of them Gopal struck PW 4 with a chain. He also stated that the Appellant Khujji and his companions Gudda and Parsu were armed with knives and when Khujji tried to assault PW 4 with a knife, Gopal shouted "Khujji that man is not Gulab". Thereupon Khujji and his companions ran after the Gulab, overtook him and the Appellant, Parsu and Gudda assaulted Gulab with their weapons. Gudda struck Gulab from the front on his chest, Parsu stabbed him on the side of the stomach while Ram Kishan and Gopal held him and the Appellant attacked him from behind with a knife whereupon Gulab staggered shouting "save-save" and fell in

front of the house of Advocate Chintaman Sahu. Thereafter all the six persons ran away. His cross examination commenced on 15th December, 1978. In his cross-examination he stated that the Appellant Khujji and Gudda had their backs towards him and hence he could not see their faces while he could identify the remaining four persons. He stated that he had inferred that the other two persons were the Appellant and Gudda. On the basis of this statement Mr. Lalit submitted that the evidence regarding the identity of the Appellant is rendered highly doubtful and it would be hazardous to convict the Appellant solely on the basis of identification by such a wavering witness. The High Court came to the conclusion and, in our opinion rightly, that during the one month period that elapsed since the recording of his examination-in-chief something transpired which made him shift his evidence on the question of identity to help the Appellant. We are satisfied on a reading of his entire evidence that his statement in cross-examination on the question of identity of the Appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. Since the incident occurred at a public place, it is reasonable to infer that the street lights illuminated the place sufficiently to enable this witness to identify the assailants. We have, therefore, no hesitation in concluding that he had ample opportunity to identify the assailants of Gulab, his presence at the scene of occurrence is not unnatural nor is his statement that he had come to purchase vegetables unacceptable. We do not find any material contradictions in his evidence to doubt his testimony. He is a totally independent witness who had no cause to give false evidence against the Appellant and his companions. We are, therefore, not impressed by the reasons which weighed that the trial court for rejecting his evidence. We agree with the High Court that his evidence is acceptable regarding the time, place and manner of the incident as well as the identity of the assailants.

6. PW 4, the injured in his testimony has stated that on 21st July, 2008 at about 10:30 p.m. he was selling meat on his "Rehri" on the Roshanara Road when the Appellants along with one or two persons came on his "Rehri" and at that time they were drunk. The Appellants took meat and bread from his "Rehri" worth Rs. 200/- and gave him Rs. 50/-. When he objected and demanded the full amount, they started abusing him and Appellant Parveen caught hold of his hand from the back and Appellant Manoj gave danda blow on his head. He fell down and became unconscious. PW4 has stated that the Appellants used to come to his Rehri before the incident also and that PW3 Tejpal was also present and he saved him from the accused person. This statement of PW4 was recorded on the 18th March, 2009 and the cross-examination was deferred on the request of the Appellants. When he appeared on the 15th April, 2009, in cross-examination PW4 stated that he came to know the names of the accused when he got conscious and told their names at the instance of people. He further stated that he could not see the accused persons as he became unconscious. He further stated that he had given statement on 18th March, 2009 under the pressure and influence of the police and he and the Appellants belong to the different political

parties. This witness was re-examined by the learned APP and in the re-examination he stated that it was correct that he sold meat and bread in conscious state of mind and he could not tell the names of the police officials who put pressure on him on 18th March, 2009. He further stated that no police officer met him outside the Court room on 18th March, 2009. He has requested the Court to take his statement on the 18th March, 2009. He further reiterated that there was no pressure on him on that date and he gave his statement voluntarily. From the testimony of this witness, it is clear that he did not support the prosecution case in the cross-examination for extraneous reasons in the interregnum. Similar is the version of PW3 Tejpal who was present at the spot and is an eye-witness. This witness in his examination-in-chief has duly proved the complaint Ex.PW3/A, on the basis of which FIR was registered. In the said complaint the name and role of both the Appellants is described. PW3 also took the police to the house of Appellants but they were not found present in the house and pointed to the place of incident. The site plan was prepared at his instance. However, these two witnesses in their cross-examination have stated same facts. PW3 has gone to the extent of stating that he did not see the accused persons, when he received injuries and he gave the names only when he was discharged. This witness was not injured nor admitted to the hospital. Thus, the version of these two witnesses in the cross-examination cannot be relied upon.

7. It is well-settled that it is the duty of the Court to separate the grain from the shaft and not discard the testimony of any witness in to when he vacillates in the testimony before the Court. From the entire conspectus of the evidence it is clear that the statements made by the PW3 and PW4 in their examination-in-chief were not under any pressure and were made voluntarily. However, when the witnesses vacillate, it is always appropriate to seek corroboration. The MLC Ex. PW7/A corroborates the version of PW4 and PW3 as there is an injury in the form of an abrasional swelling on the right occipital region of the skull and swelling on the right pinna with ear bleeding. The prosecution has proved the recovery of a danda on the disclosure of Appellant Manoj. Though PW4 and PW3 in their testimony have not been shown the danda, however, the recovery of danda duly proved by PW7 and PW11 at the instance of Appellant Manoj, is connected to the injuries caused by the opinion of PW7 Dr. J.K. Basu rendered vide Ex.PW7/A.

8. The defiance version of false implication at the instance of the police officers who were under the influence of the political party is also not fortified as no suggestion has been given to any of the police officers that the Appellants were falsely implicated at their instance. PW10, SI Bansi Lal, recorded the statement Ex.PW3/A of PW3 on the basis of which FIR has been registered, wherein both the Appellants are named, has not even been cross-examined. Thus the testimony of this witness has gone unchallenged. Even PW11, SI Prabhat Sharma, the subsequent Investigating Officer has not been cross-examined. The defiance of the Appellants was that they were falsely implicated because they belong to different political parties is not proved as the suggestion given to PW3

and PW4 is that they belong to Congress Party whereas the Appellants belong to BJP and the persons who told PW3 and PW4 the name of assailants belong to BJP.

9. Thus there is sufficient evidence on record to corroborate the testimonies of PW3 the Complainant and PW4 the injured. Thus there is no merit in the appeal and the same is dismissed. The application also stands dismissed.

10. The Appellants are in custody. Copy of this judgment be sent to the Appellants through the Superintendent, Tihar Jail, Delhi.