
(2012) 03 DEL CK 0631

In the Delhi High Court

Case No : Criminal Appeal 638 of 2009

Manoj Kumar and Others

APPELLANT

Vs

The State (NCT of Delhi)

RESPONDENT

Date of Decision : 27-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161

Evidence Act, 1872 — Section 134

Penal Code, 1860 (IPC) — Section 299, 300, 302, 304, 34

Citation : (2012) 129 DRJ 525 : (2012) 2 JCC 1128

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

Bench : Division Bench

Advocate : Vivek Sood, for the Appellant; Sanjay Lao, APP, for the Respondent

Judgement

S.P. Garg, J.—The appellants Manoj Kumar (A-1), Rajesh Kumar (A-2) and Rattan Dixit (A-3) have preferred the present appeal against the judgement dated 23.07.2009 and order on sentence dated 28.07.2009 of the Ld. Addl. Sessions Judge in SC No. 252/2008 by which they were convicted for committing the offences punishable u/s 302/34 IPC and were sentenced to undergo imprisonment for life with fine of Rs. 3,000/- each. The prosecution alleges that on 29.09.2002 at 10.40 P.M. Daily Diary Entry (DD) No. 35 Ex. PW-17/A was recorded at police post Shakti Vihar by Const. Mahesh Kumar on getting information from lady Const. Kismat of PCR that an individual had been stabbed near liquor shop, house No. 6, Pitam Pura. Investigation was assigned to SI Dharambir Singh; HC Lala Ram, Const. Sukhbir and Const. Vinod Kumar were already on patrolling duty in the area, near Dudyal Apartments, near Madhuban Chowk. At about 10.00 P.M., on hearing cries of "pakdo-pakdo" they succeeded in nabbing A-1 and A-2 after chase with public. Const. Vinod took the injured Raj Kumar to the Baba Sahib Ambedkar Hospital where the doctor declared him "brought dead". SI Dharambir on reaching the hospital collected the MLC. At the spot, Muni Sahni, the deceased's brother made statement to SI Dharambir and stated that when his brother Raj Kumar was returning to the house at 10.00 P.M.

with his "rehdi", the accused who was present near the toilet, outer ring road, demanded "namkeen" from him and on his refusal to do so, A-1 started beating him. He further stated that his brother Raj Kumar also slapped A-1. Then on the exhortation of A-2, A-3 stabbed him with a knife on his chest while A-2 caught hold him and A-1 gave fist blows.

2. SI Dharambir Singh made an endorsement on the statement and sent the rukka at 12.15 A.M. for registering the case u/s 302/34 IPC. IO summoned the crime team and the photographer; he prepared rough site plan; arrested A-1 and A-2; recorded their disclosure statements; and seized their pants and shirts. A-2 pursuant to disclosure statement, led the police team to a park and from the bushes got recovered a "chura" used for stabbing the deceased. On 02.10.2002, the police arrested A-3 near the bus stand, Govind Puri and recorded his disclosure statement. During the course of the investigation, the IO conducted inquest proceedings and Dr. Ashok Jaiswal conducted the post-mortem of the body. The IO sent the exhibits to CFSL and collected its report. After completion of the investigations, the accused were charge-sheeted for committing aforesaid offences and were duly charged and brought to trial.

3. During the proceedings before the Trial Court, the prosecution examined nineteen witnesses. After considering the testimonies of the witnesses and the materials placed on record, the Court convicted the present Appellants.

4. It is argued on behalf of the Appellant that the Trial Court did not appreciate the evidence in its true perspective and fell into grave error in relying upon the uncorroborated testimony of PW-2 Muni Sahni whose presence at the spot was highly doubtful. Counsel referred to the cross-examination, in which PW-2 categorically admitted that the incident was not witnessed by him and the public had already nabbed the accused before his reaching the spot. PW-2, urged the counsel, was not expected to be present at the spot as he had not accompanied the deceased from the liquor shop and was busy in performing duties there. Had the witness been present at the spot, his first instinct would have been to inform the police or take the injured to the hospital, but he did nothing. The conduct of the witness is unnatural in that he did not intervene to save his brother. The Counsel pointed out a number of contradictions and variations in the testimonies of the prosecution witnesses assigning inconsistent overt acts to the accused about inflicting injuries to the deceased and contended that no reasons were assigned by the Trial Court for ignoring them. PW-2, pointed the counsel, even wrongly identified Rajesh (A-2) and Rattan (A-3) caught hold at the spot. But in the cross-examination by APP, he improved the statement, stating that he did not remember if A-1 or A-3 fled the spot. The counsel further challenged the recovery of knife. PW-19 SI Dharambir Singh in the examination-in-chief, stated that it had been recovered at the instance of A-1, however, in the cross-examination by APP with the permission of the Court, he changed his version and stated that it was recovered at the instance of A-2. The recovery was also challenged for not joining independent public witness. Since nothing

incriminating was found on the knife such as the blood of the accused or deceased, the recovery was of no consequence. The counsel further pleaded that even if the prosecution case is taken at its face value, Section 302 IPC was not attracted. The stabbing incident took place suddenly without pre-planning or premeditation and the accused, in a fit of rage stabbed the deceased when he, without any cogent reason denied to sell "namkeen" to them, thus annoying them. The counsel further alleged that slap given by the deceased triggered the situation ruling out "intention" to murder the deceased.

5. On the other hand, Ld. APP supported the judgment and urged that it did not call for an interference. The incident was witnessed by PW-2 Muni Sahni who reached the spot on hearing the cries of his brother. He further referred to the "rukka" recorded soon after the incident where the accused were named and specific role was attributed to them ruling out manipulation whatsoever. All the accused, urged the counsel, committed the murder of the poor vendor in furtherance of common intention because they all actively participated in the crime. "Intention" to murder was apparent, stressed the counsel, because they inflicted forceful blows on the vital part of the body of the deceased causing instantaneous death at the spot itself. PW-8 Const.Vinod and PW-19 SI Dharambir Singh who succeeded in apprehending A-1 and A-2 at the spot have no axe to grind in falsely implicating the accused and they corroborated PW-2 on material facts. The recovery of the knife is a relevant circumstance to prove complicity of the accused in the crime.

6. We have considered the submissions of the parties and have scrutinised the Trial Court record.

7. Before we proceed to decide the case on merits, it is desirable to highlight that the homicidal death of Raj Kumar Sahni is not under challenge. It is also not in controversy that A-1 and A-2 were apprehended at the spot.

8. According to the prosecution, PW-2 Muni Sahni was a material eye witness present when the incident occurred. The Trial Court also heavily relied upon his deposition to base its conviction. The counsel vehemently emphasised that the prosecution did not produce any independent witness for proving its case and PW-4 and PW-5 turned hostile. PW-2 being a relative of the deceased is an interested witness and no reliance can be placed on his testimony.

9. So far as the legal position for appreciating the evidence of such witnesses is concerned, it will suffice to mention that law was laid down by the Apex Court in the case of " Dalip Singh and Others Vs. State of Punjab, in which it has been held as under :

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a

tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship, far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

10. The aforesaid view has been followed by the Supreme Court in its subsequent judgments namely Guli Chand and Others Vs. State of Rajasthan, and Kalegura Padma Rao and Another Vs. The State of A.P., rep. by the Public Prosecutor, .

11. Coming to the factual aspect, apparently the incident took place at about 10.00 P.M. on 29.09.2002. DD No. 35 Ex. PW-17/A was recorded at 10.40 P.M. on the information given by lady Const. Kismat of PCR regarding the stabbing incident and the investigation was assigned to SI Dharambir who alongwith HC Lala Ram and Const.Vinod Kumar was already present in the area on patrolling duty since 9.15 P.M. vide DD No. 33 (Ex. PW-17/B). SI Dharambir Singh prepared the rukka (Ex. PW-19/A) on the statement of PW-2 Muni Sahni (Ex. PW-2/A) and sent it for registering the case at 12.15 A.M. There was no delay in registering the FIR thus, excluding any possibility of fabrication or concoction of false story. In the statement (Ex. PW-2/A), PW-2 gave a vivid description of the occurrence and named the accused for inflicting injury to his brother. Specific role was assigned to each accused in the commission of the crime. He also narrated the genesis of altercation, i.e, the refusal to provide the "namkeen".

12. Before the Court PW-2 Muni Sahni fully proved the version (Ex. PW-2/A) in entirety without any material variations. He proved the role played by each accused in the incident; the apprehension of A-1 and A-2 after some chase by police officials with the help of public; the beating given to them by public and identified the accused to be the perpetrators of the crime.

13. The prosecution adduced convincing evidence to establish PW-2's presence at the spot. Rukka (Ex. PW-19/A) was prepared on his statement soon after the occurrence. Undisputedly, PW-2 used to work at a liquor shop and the deceased used to sell "namkeen" on a rehdi in front of the said liquor shop. Both PW-2 and the deceased resided together, it was their routine to depart together to the house after finishing their day's work. On the fateful day at about 10.00 P.M., the deceased left the place of work alone because PW-2 was getting somewhat late. However, while leaving, the deceased asked PW-2 to follow him on his bicycle. Soon thereafter, the occurrence took place at Shiva Market, a short distance from the liquor shop. Since, PW-2 was to follow his brother on cycle soon, and the deceased had covered only a short distance, it was not improbable for PW-2 to join him after closing the shop. He revealed in the cross-examination that his deceased brother assisted him in closing the shutter of the liquor shop;

handed over the key and instructed him to follow him. PW-2 had no occasion to remain behind after the closure of the liquor shop. The presence of this witness, thus, at the spot was quite probable due to negligible distance covered by the deceased. PW-2 narrated the detailed sequence of the occurrence; assailants' names and nabbing two of them after chase. In the cross-examination, no suggestion was put that he was not present at the spot and had not witnessed the occurrence. PW-2 had even confronted A-1 and A-2 for the cruel act of stabbing his brother and emphatically pointed towards A-2 who had disclosed that the cause of stabbing was refusal to give "namkeen". The accused did not deny the conversation spoken by him.

14. PW-8 Const.Vinod Kumar (who alongwith his colleagues was on patrolling duty) deposed PW-2's presence with whose help injured Raj Kumar Sahni was taken to the hospital. PW-9 ASI Sukhbir Singh was categorical that injured Raj Kumar Sahni was taken to the hospital by Const.Vinod Kumar (PW-8) and Muni Sahni, (deceased's brother) accompanied him. These police officials having no prior animosity with the accused had no ulterior motive to falsely claim PW-2's presence at the spot.

15. Coming to the cross-examination, undoubtedly, PW-2 stated that he did not see the incident and nothing happened in his presence and the public had already nabbed the accused before his reaching the place of incident. Counsel emphasised that PW-2's "admission" ruled out his presence at the spot and the Trial Court erred in placing reliance on his testimony. We are not persuaded to discard his entire testimony on this score. PW-2, in his examination on 11.02.2004 claimed himself present assigning specific role to each accused and did not budge from his version in cross-examination by A-1 and A-2. The Trial Court while deferring further cross-examination, made vital observation :

further cross-examination deferred as it appears to me that the witness is either not understanding the questions put to him or is scared.

PW-2 appeared after seven months on 14.09.2004 pursuant to issuance of bailable warrants, and reiterated about the apprehension of the two accused by him. He further stated that A-2 had informed him why his brother was stabbed. The analysis of the PW-2's testimony reveals that material facts asserted by the witness earlier recorded remained unchallenged in the cross. In response to which question, PW-2 changed his version is not understandable because he was not confronted with his earlier statement made on 11.02.2004. Neither the Trial Court nor APP sought clarification from him about which of his statement/version was true.

16. Apparently PW-2 is an illiterate witness from the poor strata of the society. The testimony of such an ignorant, illiterate and rustic person hailing from the country-side cannot be judged by the same standard of exactitude and consistency as that of a sophisticated witness. Such evidence has necessarily to be tested on an anvil of objective circumstances of the case. The Court should

not indulge in hair-splitting of the evidence of such witnesses as they are not familiar with the subtleties of the language employed in the Court, where they are in an artificial surrounding. Persons from villages, most of whom are illiterate and ignorant, who figured as witnesses try, while giving truthful evidence, to supply some answer or the other to questions put in cross-examination for fear that their inability to give answer would be put down to their lack of knowledge of the incident of which they were giving evidence, and thus there is an adverse reflection on their truthfulness. That is why, some care has to be taken in scrutinising as well as appreciating and assessing the value to be attached to the evidence given by such witnesses. PW-2's testimony cannot be taken out of context and cannot be read in isolation just by picking out favourable answers and ignoring the residue. It has to be understood in the context in which it was spoken.

17. In view of the above legal position and the factual position, the eye witness produced by the prosecution cannot be termed as a partial and interested witness, therefore, we overrule the aforesaid objection.

18. True, PW-2 is the brother of the deceased but he cannot be called an "interested" witness. He is related to the deceased. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of litigation. In the instant case, PW-2 had no interest in protecting the real culprit and falsely implicating the accused. It is not shown at all that PW-2 had any enmity or grudge against the accused. Additionally, the arrest of A-1 and A-2 at the spot while escaping after the crime lends support to PW-2's version. Medical evidence is in consonance with the oral version. Police witnesses i.e. PW-8, 9 & 13 have all spoken on similar lines and stood the test of cross-examination. PW-5 (Manish Sobti) and PW-4 (Sandeep Sobti) opted not to support the prosecution and resiled from their statements mark "X" and "Y" previously recorded u/s 161 Cr.P.C., but that that does not efface the credible evidence of PW-2. There is no legal impediment to convict the accused upon the sole testimony of a reliable witness. In the case of " Chittar Lal Vs. State of Rajasthan, Supreme Court observed that :

...The legislative recognition of the fact that no particular number of witnesses can be insisted upon is amply reflected in Section 134 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). Administration of justice can be affected and hampered if number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of one witness, leaving aside those cases which are not of unknown occurrence where determination of guilt depends entirely on circumstantial evidence. If plurality of witnesses would have been the legislative intent, cases where the testimony of a single witness only could be available, in number of crimes the offender would have gone unpunished. It is the quality of evidence of the single witness whose testimony has to be tested on the touchstone of credibility and reliability. If the testimony is found to be reliable, there is no legal impediment to convict the accused on such proof. It is

the quality and not the quantity of evidence which is necessary for proving or disproving a fact. This position has been settled by a series of decisions. The first decision which has become locus classicus is *Mohd. Sugul Esa Mamasan Rer Alalah v. R. 2*. The Privy Council focused on the difference between English law where a number of statutes make conviction impermissible for certain categories of offences on the testimony of a single witness and Section 134 of the Evidence Act....

19. We find substance in the plea that the recovery of the weapon, i.e., the knife is doubtful. There is no cogent evidence on record to prove that knife (Ex. P1) was used in the crime and recovered pursuant to A-2's disclosure statement. No serious reliance was placed on this circumstance by the State. Non-recovery of the weapon of offence is not always fatal.

20. Counsel submitted that no overt act was alleged against A-1 and A-2 and they had not caused any injury to the deceased. In the circumstances, the Trial Court has committed illegality in convicting them with the aid of Section 34 IPC.

21. We have considered the submission. Section 34 IPC requires common intention of the accused which has to be proved by the prosecution. Pre-arranged plan may be inferred from circumstances and conduct. Prior concert or prior plan of the accused has to be judged from the facts and circumstances of the case as direct evidence in respect thereof is difficult to come by. Only the acts of the parties will make out the intention and so, this factual aspect is to be inferred from the facts and circumstances.

22. The Apex Court has held in the case of "*Antar Singh v. State of Madhya Pradesh*" 2007 (1) Crimes 226 that whether in a given situation, accused persons had shared common intention to commit murder must be judged having regard to the facts and circumstances of the case. In the aforesaid case, all the accused persons were held liable for the offences as they went inside the house of the victim.

23. It is crystal clear, that in the present case all the accused participated in the crime; they were all friends and had consumed liquor together. They demanded "namkeen" from the deceased and on his refusal, got annoyed. They tried to escape from the spot together, one of them succeeded in doing so, while two were apprehended from the spot and none bothered to take the injured to hospital. The facts and the circumstances, unmistakably lead to the conclusion that there was a union of minds of the accused to commit the offence and thereby all of them are liable jointly for the criminal act committed by them. They all shared common intention to cause injury to the deceased. Common intention can develop at the spur of the moment. The case for common intention is thus spelt out.

24. This takes us to the alternative plea taken by the counsel that even assuming the case to be true, the matter would still not fall within the definition of murder but would be culpable homicide not amounting to murder punishable u/s 304

part-I IPC. On scrutinising the evidence and considering the circumstances in which the occurrence took place, we are also of the view, that the accused had no "intention" to murder the deceased. The altercation took place suddenly on refusal to sell "namkeen" to the accused who were in drunken state. They had no prior animosity and were not even acquainted with him. They were present before the arrival of deceased at the place of incident and had not gathered there to commit an offence. To enjoy consumption of liquor, they seem to have demanded "namkeen" from the deceased who incidentally or unfortunately happened to reach there on his way to his house after finishing the day's work. They had not anticipated his arrival. All of them were not armed with deadly weapons as the knife blow was given only by A-3. None of the other accused was armed with any such weapon. The refusal to sell "namkeen" worth less than Rs. 10/-, resulted in the altercation, and in a fit of rage, the single stab blow was inflicted. The slap given by the deceased in retaliation triggered the altercation and which turned fatal. The accused did not take undue advantage and did not repeat stab blow on the vital parts of the deceased. They had no previous deliberation or determination to fight seriously. The incident lasted for a few minutes. Intention to kill being sine qua non in a case of murder, the absence of the same amounts to culpable homicide not amounting to murder and an offence can be said to have been committed u/s 304 Part-I IPC. From all these circumstances one cannot conclusively say that they intended to cause death. By inflicting injuries with a deadly weapon i.e. knife on a vital part of body, it can be inferred that they had intention to cause said bodily injury which was likely to cause the death of the deceased.

25. A similar situation had arisen in the case of Sukhbir Singh Vs. State of Haryana, In that case also there was no enmity between the parties. The occurrence had taken place when Sukhbir Singh got mud stains on account of sweeping of a street by Ram Niwas and a quarrel ensued. The deceased slapped the Appellant for no fault of his. The quarrel was sudden and on account of the heat of passion. The accused went home and came armed in the company of others without telling them of his intention. The time gap between the quarrel and the fight was a few minutes only. The Supreme Court observed that it was, therefore, probable that there was insufficient lapse of time between the quarrel and the fight which meant that the occurrence was sudden within the meaning of Exception 4 of Section 300, IPC.

26. In the case of Golla Yelugu Govindu v. State of Andhra Pradesh (2008) 16 SCC 769, at about 2:00 A.M., when the deceased was in the house there was exchange of hot words and quarrel took place between the accused and the deceased. This happened in the presence of the children. Suddenly the accused hacked the deceased in the neck with a sickle and the deceased fell down and the accused once again hacked on the neck and the left ear of the deceased causing severe bleeding injuries. It resulted in the death of the lady. The Appellant therein submitted that Section 302 IPC has no application to the assault made during the course of a sudden quarrel and Exception 4 of Section

300, IPC applied. The Supreme Court discussing the law in detail converted the conviction to Section 304 Part 1 IPC.

27. In the case of " Kalu Ram Vs. State of Rajasthan, the Supreme Court held that conduct of the accused can not be seen divorced from the totality of the circumstances. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that the victim might die. Para No. 7 of the aforesaid judgment is as follows :-

7. But then, what is the nature of the offence proved against him? It is an admitted case that the appellant was in a highly inebriated stage when he approached the deceased when the demand for sparing her ornaments was made by him. When she refused to oblige he poured kerosene on her and wanted her to light the matchstick. When she failed to do so he collected the matchbox and ignited one matchstick but when the flames were up he suddenly and frantically poured water to save her from the tongues of flames. This conduct cannot be seen divorced from the totality of the circumstances. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die he would not have alerted his senses to bring water in an effort to rescue her. We are inclined to think that all that the accused thought of was to inflict burns to her and to frighten-her but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. Therefore, we are persuaded to bring down the offence from first degree murder to culpable homicide not amounting to murder.

28. The distinction between culpable homicide and murder was aptly drawn by the Supreme Court in Kandaswamy Vs. State of Tamil Nadu, It was held that:

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whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder," on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third Clause of Section 299 is applicable. If this question is found in the

positive, but the case comes, within any of the Exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the First Part of Section 304, Penal Code.

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29. In the light of the above discussion, we are of the opinion that conviction of the accused is required to be altered from Section 302 IPC to Section 304 Part-I IPC. Considering the role played by each accused, we are of the view, that interest of justice would be served if A-3 (Rattan Dixit) who stabbed the deceased is sentenced to undergo rigorous imprisonment for 7 years and A-1 (Manoj Kumar) and A-2 (Rajesh Kumar) who caught hold the deceased are sentenced to undergo imprisonment for a period of 5 years for committing offence u/s 304 Part I IPC. Other sentences are left undisturbed. The appeal is partly allowed and orders of conviction and sentence are modified in the above terms.