
(2011) 04 DEL CK 0141
In the Delhi High Court
Case No : Criminal A. 63 of 1998

Nafis @ Babli

APPELLANT

Vs

State NCT of Delhi

RESPONDENT

Date of Decision : 26-04-2011

Acts Referred:

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

Citation : (2011) 2 JCC 1403

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

Bench : Division Bench

Advocate : B.S. Rana, Yashvinder and Party in Person, for the Appellant; Jaideep Malik, APP, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—This appeal is directed against a judgment and order of a Learned Additional Sessions Judge dated 28-01-1998 in FIR No. 490/1992, P. S. Seelampur, convicting the Appellant for having committed the offence u/s 302 IPC.

2. The prosecution alleged that on 08.09.1992, at about 02:40 A.M. intimation was received from the police control room about a lady named Ruksana informing that someone had been shot dead in the Jhuggies near K- Block, PS Seelampur. The police who reached the spot were met by one Kalu (PW-3); a statement was recorded. It was alleged that Chotey Khan, a rickshaw puller was related to PW-3; he was the latter's mama. The night intervening 07/08.09.1992, Chotey Khan, Kalwa, Babli Panwala and one Yunus were playing cards. PW-3 was sitting there and witnessing the game. At about 02:30 AM in the morning, when the game of cards stopped and they were leaving for their houses, Babli Panwala @ Nafees (the Appellant, referred to as such hereafter) stated that Chotey Khan had spoiled his brother Anis, and that they all would kill him (Chotey Khan). Thereafter, the Appellant and Kalwa caught hold of the

deceased and Yunis fired a shot at him with a country made pistol. PW-3 raised an alarm upon which they ran away. The injured, Chotey Khan, went out of the jhuggi and fell down; he was later lifted and kept on a cot, where he breathed his last breath. Ruksana (PW-2) informed the police. The first information report (FIR) was registered, and the police investigated the matter. The Appellant was arrested on 08.09.1992; his statement was recorded, pursuant to which the country made pistol was recovered. Kalwa was arrested; pursuant to his statement, a packet of cards was recovered. Yunis could not be arrested; he was declared as a proclaimed offender.

3. The Appellant and Kalwa were charged for having committed the murder of Chotey Khan; they claimed to be not guilty and were therefore tried. The prosecution relied on the testimony of 20 witnesses besides material objects and forensic reports which were placed on the record. After considering the materials and the depositions, the Trial Court concluded that Kalwa was not guilty as charged. It proceeded however, to convict the Appellant and awarded life imprisonment.

4. Learned Counsel for the Appellant contended that the prosecution had relied upon the testimony of three eyewitnesses, namely PW-1, PW-2 and PW-3. In the impugned judgment, the Court held that the depositions of PW-1 and PW-2 were unworthy of credence and therefore discarded their testimonies. However, as far as PW-3 was concerned, the Trial Court held that the testimony of that witness did not implicate Kalwa, whereas on the other hand it proved the Appellant's guilt. It was submitted that this conclusion was not only erroneous but contrary to settled principles of appreciation of evidence in a criminal case. It was submitted that the Trial Court fell into error in not considering that PW-3's evidence was unreliable even as far as the Appellant's role was alleged by the prosecution for the same reasons why the co-accused was held not guilty. It was submitted here that the Trial Court ignored and overlooked the improvements and material contradictions in the testimony of PW- 3 so far as the Appellant's role was described. It was submitted that the only incriminating evidence was the so-called recovery of the country made pistol. Learned Counsel submitted that the mere recovery of some article based on a disclosure statement, most part of which is inadmissible in evidence, is insufficient for a court to conclude the accused's guilt in a given case.

5. The Learned APP argued that the Trial Court did not commit any error, either in law or in the appreciation of facts and material evidence led before it. It was argued that PW-3 had clearly stated that at about 01:55 AM, the Appellant had gestured to Yunis, after which he went out and returned five minutes later. This established the conspiracy between the said two assailants. Furthermore argued the APP, even though Yunis had fired with the country made pistol, and later fled, it was the Appellant's disclosure statement which led to the recovery of the weapon of offence. The CFSL in this case, submitted the APP, gave its opinion that the country made pistol recovered further to the Appellant's statement was

indeed used for the offence.

6. Commenting on the testimony of PW-1, the Trial Court in the impugned judgment (Para-07) concluded that he had sought to improve upon the previous version given by him to the police and sought to build an exaggerated story. It therefore held that PW-1 was not a reliable witness and discarded his testimony from the consideration. As far as the testimony of PW-2 was concerned, the Trial Court noticed that she improved on the facts previously stated by her to the police particularly regarding the position that the three accused were running near her cot; all of them had gone towards the jhuggi; having seen husband playing cards; PW-3 informing her that the deceased would return later etc. The Trial Court held that her testimony could not be relied upon, in the following terms:

Thus, it became clear that this lady had also improved a lot from her previous statement EX. PW- 02/A. She's the wife of the deceased and probably with psychological hatred against the supposed murderer, she had deposed the facts and improved her version on the material points. By discarding the improved portion of her testimony, it would only be left that her husband was murdered on that night and when she reached near the drain, she found his dead body lying there. Therefore it is crystal clear that the testimony of Mst. Ruksana is also of no avail to the prosecution. Her depositions are also brushed aside from consideration of the guilt of the accused persons.

7. The Trial Court held that PW-3 could be believed and proceeded to convict the Appellant in this case. However it held that the said witness had not implicated the co-accused Kalwa and therefore acquitted him. In concluding so, the Trial Court was impressed by the fact that some improvements and exaggeration about Kalwa's role had been made by PW-3 during his deposition in the court. It seems to this Court that the Trial Court has completely misled the evidence and material before it particularly that the deposition of PW-3. While the witness claims to have been present when Chotey Khan was attacked and fatally injured, what is important is that in the previous statement recorded u/s 161 CR PC, PW-3 did mention about Nafis entering the place where the deceased and the other accused were playing cards at 01:55 AM and gesturing to the accused Yunis after which Yunis went out and consulted the Appellant. He had attributed identical roles to the Appellant and the other co-accused, Kalwa. His testimony was also discrepant in some other particulars. Those discrepancies were held to be improvements and exaggerations, which led to Kalwa's acquittal. However, the Appellant was held guilty, on the assumption that PW-3 was consistent in statements before the court as well as before the police - a gross misreading of the evidence. What the Trial Court lost sight of here, was that PW-3 never mentioned about the incident in his earlier statement, whereby Yunis went out at 01:55 AM to have a word with the Appellant, and thereafter, when the card game was over, proceeded to attack him, by firing the shot. This aspect assumes critical importance, because barring it, the role attributed to Kalwa and the

Appellant was identical. The findings of the Trial Court, on this score, are therefore, not sustainable.

8. As regards the Trial Court reasoning that the Appellant was involved in the murder goes, it is the prosecution story that Yunis had allegedly shot the deceased. If the testimony of PW-3 is to be discarded vis-à-vis the Appellant, for the same reasons why it could not be used in respect of Kalwa- the co-accused, the mere recovery of some article, which might be connected with the offence, based on a disclosure statement is not enough to justify a conviction. Long ago, in *Sanwat Khan and Another Vs. State of Rajasthan*, the Supreme Court stated that the correct position in law, in such cases was as follows:

Beaumont, C.J. and Sen, J. in *Bhikha Gober v. Emperor* rightly held that the mere fact that an accused produced shortly after the murder ornaments which were on the murdered person is not enough to justify the inference that the accused must have committed the murder. There must be some further material to connect the accused with the murder in order to hold him guilty of that offence. Our attention was drawn to a number of decisions which have been summed up in a Bench decision of the Allahabad High Court in *State v. Shankar Prasad* in some of which a presumption was drawn of guilt from the circumstance of possession of stolen articles soon after a murder. We have examined these cases and it appears to us that each one of these decisions was given on the evidence and circumstances established in that particular case, and no general proposition of law can be deduced from them. In our judgment, no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof.

9. Besides the above aspect, we also notice that some other object was recovered, further to the disclosure statement, of the co-accused Kalwa, which could not - other than the statement, be linked with the offence. In this case, the recovery of the country made pistol, by itself could not be linked to the Appellant's presence, nor establish it. The only witness who could have corroborated or affirmed his presence, PW-3 is unworthy of credence. Therefore, the recovery of the country made pistol is of no avail.

10. For the foregoing reasons, this Court is of the opinion that the findings and conclusions of the Trial Court cannot be sustained. They are accordingly set aside; the appeal has to succeed. The bail bond of the Appellant as well as the sureties provided by him, are hereby discharged. The appeal is allowed in the above terms.