

(2011) 09 DEL CK 0366
In the Delhi High Court
Case No : Criminal A. 341 of 1997

Naushad Ali and Another

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 27-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2011) 10 AD 227

Hon'ble Judges : Veena Birbal, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : K.B. Andley and M.L. Yadav, for the Appellant; Richa Kapoor, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—This appeal is directed against the judgment dated 20.08.1997 passed by the learned Additional Sessions Judge, New Delhi in Sessions Case No. 37/1990 arising out of FIR No. 151/1990 registered at Police Station Defense Colony u/s 307/302/34 Indian Penal Code whereby the co-convict Bobby @ Massey was found guilty of having committed the offence punishable u/s 302 Indian Penal Code and the present Appellant Naushad Ali was found to be guilty of having committed the offence punishable u/s 302 read with Section 34 Indian Penal Code. The Appellant is also aggrieved by the order on sentence dated 20.08.1997 whereby the present Appellant Naushad Ali was sentenced to undergo imprisonment for life and was also required to pay a fine of Rs. 200/- and in default of payment of the fine he was required to undergo simple imprisonment for 7 days.

2. We must point out at this juncture that the co-convict Bobby @ Massey had also filed an appeal being Crl. Appeal No. 368/1997 but, during the pendency of the appeal, he died in a road accident on 09.03.2010. Consequently, by an order dated 02.06.2011 passed by this Court, after recording the factum of the death

of the co-convict Bobby @ Massey, the Crl. Appeal No. 368/1997 was disposed of in view of the fact that the same had abated in respect of the co-convict Bobby @ Massey on account of his death. It is also relevant to point out that initially there were three accused i.e., the present Appellant Naushad Ali, co-convict Bobby @ Massey and one Rajan, who was declared to be a proclaimed offender and has not yet been arrested.

3. The Charge against the Appellant and the other co-accused was framed on 20.02.1991 by the learned Additional Sessions Judge, Delhi in the following manner:

CHARGE

I, J.D. Kapoor, Addl. Sessions Judge, New Delhi do hereby charge you Naushad Ali and Bobby @ Massey etc as under:

That on 5.6.1990 at about 9.30 p.m. at Road No. 7, Andrews Ganj within the jurisdiction of Police Station Defense Colony, both of you along with your co-accused namely Rajan, (now P.O.) you accused - Babu @ Massey armed with a dagger and in furtherance of common intention of all of you, caused the death of Shiv Parshad when you accused-Naushad Ali caught hold of the deceased and gave a blow on his head and you accused-Babu @ Massey stabbed him in his chest and abdomen and accused Rajan (now P.O.) had caught hold the hands of the deceased and, thus, thereby committed an offence punishable u/s 302 read with Section 34 of the Indian Penal Code and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the above said charge.

Dt: 20.2.1991

(J.D. KAPOOR)

Addl. Sessions Judge, New Delhi

Charge has been read over and explained to the accused and has been questioned as follows:

Q. Do you plead guilty or not?

Ans. I plead not guilty and claim trial.

Dt: 20.2.1991

A.S.J., New Delhi

4. Since the Appellant as well as the other co-accused Bobby @ Massey had pleaded not guilty, the matter proceeded for trial. The prosecution examined as many as 20 witnesses. Thereafter, the statements of the accused Naushad Ali and Bobby @ Massey were recorded u/s 313 Code of Criminal Procedure. Neither of the accused led any evidence in their defense and, consequently, after arguments were advanced by the counsel on both sides, the impugned judgment

and order on sentence were delivered.

5. The main prosecution witnesses are PW-1 (Madan Gopal), PW-2 (Surender Kumar @ Kaku), PW-3 (Harish Kumar), PW-13 (Dr. M.S. Sagar), and PW-19 (SI Raghubir Singh). As per the prosecution case, there was an altercation between the accused and the deceased Shiv Prasad and PW-2 Surender Kumar @ Kaku about 5-6 days prior to the date of the incident i.e., 05.06.1990. The altercation, according to the prosecution, was over the alleged fact that the accused had made certain lewd remarks in respect of PW-2 Surender Kumar @ Kaku's sister. It is further the case of the prosecution that on 05.06.1990 at about 09.30 p.m. when PW-1 (Madan Gopal), PW-2 (Surender Kumar @ Kaku) and PW-3 Harish Kumar were inside the house of PW-1 (Madan Gopal) and were watching a television programme, the deceased Shiv Prasad, who was the younger brother of PW-1 Madan Gopal, had gone outside to set up his bed for the night. When he went outside, Shiv Prasad was met by the accused Naushad Ali, Bobby @ Massey and Rajan and thereafter an altercation took place during which it is alleged that one of the accused shouted: " Dekhta kya hai mar chaku sale ko". Upon this, as per the prosecution, Bobby @ Massey stabbed Shiv Prasad with a dagger. It is then the case of the prosecution that as PW-1 (Madan Gopal), PW-2 (Surender Kumar @ Kaku) and PW-3 (Harish Kumar) had, in the meanwhile, come out of the house upon hearing the commotion, the assailants, which included the Appellant, fled from the scene.

6. In order to establish this, the prosecution has relied heavily on the testimonies of PW-1 (Madan Gopal) and PW-2 (Surender Kumar @ Kaku), who are alleged to be eye witnesses.

7. Mr. K.B. Andley, the learned senior counsel, appearing on behalf of the Appellant, assailed the impugned judgment and order on sentence on the ground that the learned Additional Sessions Judge failed to give due credence to the statement (Exhibit PW-17/D) of the deceased Shiv Prasad which was recorded on 05.06.1990 itself by PW-19 (SI Raghubir Singh). It is on the basis of the statement (Exhibit PW-17/D) that the FIR was registered. It was pointed out by Mr. Andley that in the said statement, there is no mention of any of the accused catching hold of the deceased Shiv Prasad. He also pointed out that there is no reference to any exhortation by any of the alleged assailants. Furthermore, he pointed out that the statement does not indicate the presence of either PW-1 (Madan Gopal) or PW-2 (Surender Kumar @ Kaku) or PW-3 (Harish Kumar). Lastly he pointed out that the statement (Exhibit PW-17/D) does not mention the names of any of the accused. On the contrary, the statement indicates that Shiv Prasad did not know any of his assailants but that he could recognize them. On the basis of the aforesaid statement, Mr. Andley submitted that the testimonies of PW-1 (Madan Gopal), PW-2 (Surender Kumar @ Kaku) as also PW-3 (Harish Kumar) become extremely doubtful, in the least. He therefore submitted that once due credence is given to the statement (Exhibit PW-17/D), the prosecution case becomes extremely doubtful and a conviction cannot be returned when such

doubt exists. He also pointed out that PW-19 (SI Raghubir Singh) has clearly stated that it is he who had recorded the statement of Shiv Prasad on 05.06.1990 after the endorsement was made by the doctor that Shiv Prasad was fit for making a statement.

8. Ms Richa Kapoor, appearing on behalf of the State, supported the impugned judgment and order on sentence and she stated that when there are two eye witnesses namely PW-1 (Madan Gopal) and PW-2 (Surender Kumar @ Kaku) and their testimonies have not been dented by the defense, then there is no question of acquittal of the present Appellant. She further submitted that both these witnesses had clearly indicated that the Appellant participated in the crime in more than one way, that is, by catching hold of the deceased Shiv Prasad as also by exhorting Bobby @ Massey to stab Shiv Prasad. She also submitted that the presence of PW-1 (Madan Gopal), in any event, is established by MLC (Exhibit PW-13/D) which indicates that the injured Shiv Prasad had been brought to the hospital by his brother PW-1 (Madan Gopal) from the place of incident which is the house of PW-1 (Madan Gopal). She therefore submitted that the conviction as well as the order on sentence does not warrant any interference.

9. We have heard the Learned Counsel for the parties and have gone through the evidence on record. The first thing that strikes us is that Shiv Prasad in his statement (Exhibit PW-17/D) has not mentioned the names of his assailants. This is particularly important because PW-2 (Surender Kumar @ Kaku) has deposed that 5-6 days prior to the incident he and Shiv Prasad had an altercation with the accused persons. PW-2 (Surender Kumar @ Kaku) categorically deposed that he, Ramesh, Katara and 2-3 other small boys had gone to the accused persons to enquire as to why they had passed remarks against his sister. At that point of time Shiv Prasad was also approaching from the opposite direction. When the accused persons were attempting to flee from the spot, Shiv Prasad tried to apprehend them and thereafter PW-2 (Surender Kumar @ Kaku) and Shiv Prasad had beaten the accused persons. From this testimony it is clear that PW-2 (Surender Kumar @ Kaku) as also the deceased Shiv Prasad had already had an altercation with the accused persons and therefore it is hard to believe that Shiv Prasad did not know those persons. But we find that in the statement (Exhibit 17/D), Shiv Prasad has categorically stated that he did not know the assailants but could recognize them.

10. In an attempt to explain this deficiency, PW-2 (Surender Kumar @ Kaku) has stated that he did not tell Shiv Prasad anything about the accused and had not disclosed their names to Shiv Prasad. This is very difficult for us to believe. When both Shiv Prasad and PW-2 (Surender Kumar @ Kaku) were involved in an incident 5-6 days prior to the date on which Shiv Prasad received the stab injury, it is highly unlikely that PW-2 (Surender Kumar @ Kaku) would not have disclosed the names of the persons they beat up to his friend Shiv Prasad.

11. Apart from this, we also find that in Exhibit PW-17/D, which is admittedly the statement made by Shiv Prasad and has been recorded by PW-19 (SI Raghubir

Singh), there is no mention of anybody catching hold of Shiv Prasad or of anybody exhorting the actual assailant to stab Shiv Prasad. But both PW-1 (Madan Gopal) and PW-2 (Surender Kumar @ Kaku) have ascribed the role of "catching hold" to the Appellant Naushad Ali. Insofar as the exhortation is concerned, PW-1 (Madan Gopal) stated that it was either Naushad Ali or the other accused person who exhorting Bobby @ Massey by using the words - "Dekhata kya hai mar chaku sale ko". On the other hand PW-2 (Surender Kumar @ Kaku) stated that it was Naushad Ali who had given the said exhortation. Both PW-1 (Madan Gopal) and PW-2 (Surender Kumar @ Kaku) have stated that there were only three assailants namely the present Appellant Naushad Ali, the co-accused Bobby @ Massey and Rajan, who is absconding. However, in (Exhibit PW-17/D) Shiv Prasad has clearly stated that there were three to four boys who had attacked him.

12. If PW-1 (Madan Gopal), who was the elder brother of the deceased Shiv Prasad, had been an eye witness to the incident, he would have given out the names of the assailants both to his brother Shiv Prasad as also to the police. His statement was unfortunately recorded, as per his own admission, on the next day i.e., on 06.06.1990 at about 1.30 p.m. PW-1 (Madan Gopal) was present in the hospital and even at the time of preparation of the MLC. Yet, the names of the assailants had not been disclosed. This also creates a doubt in our minds as to whether PW-1 (Madan Gopal) was actually an eye witness of the incident. It more likely appears that the names have been given as an afterthought.

13. Insofar as PW3 (Harish Kumar), who is also a brother of the deceased Shiv Prasad, is concerned, even as per his own testimony, he arrived after the incident and therefore cannot be regarded as an eye witness of the incident.

14. In view of the foregoing, we find that the prosecution has not been able to prove its case beyond reasonable doubt. Consequently, the benefit of the doubt would have to go to the Appellant. The impugned judgment and order on sentence are set aside. The Appellant is on bail. His bail bond stands cancelled and the surety stands discharged.

The appeal is allowed.