

(1978) 09 DEL CK 0024

In the Delhi High Court

Case No : Criminal Revision Appeal No. 326 of 1976

Rafiq Ahmed and Another

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 11-09-1978

Acts Referred:

Citation : (1979) 15 DLT 188

Hon'ble Judges : Yogeshwar Dayal, J; V.D. Misra, J

Bench : Division Bench

Advocate : B.B. Lal and S.K. Agarwal, for the Appellant;

Judgement

V.D. Misra, J.

(1) Rafiq Ahmed and Musharraf Ali were convicted u/s 302/34, Indian Penal Code, for the murder of Parkash Chand and sentenced to imprisonment for life. They were also convicted u/s 307/34, Indian Penal Code, for stabbing Suresh Kumar Public Witness . and each of them was sentenced to rigorous imprisonment for three years and a fine of Rs. 200.00 . Each of them was also convicted u/s 27 of the Arms Act and sentenced to rigorous imprisonment for one year. All the substantive sentence awarded to them were directed to run concurrently. They now appeal against their convictions and sentences.

(2) The prosecution case is this. Sardari Lal, Suresh Kumar, Parkash Chand deceased and another Parkash Chand, members of the territorial army, were in Delhi in connection with the railway strike. They were staying in their barracks near Red Fort. On April 7, 1974 at about 7 P.M they were coming back to their barracks from Chandni Chowk. When they reached the crossing of Subhash Marg and Khas Road, the two appellants came there. Rafiq put his hand on Sardari Lal's wrist watch. Sardari Lal pulled back his hand and there was an altercation. Both the Appellants took out their lives when Sardari Lal and others wanted to catch hold of the appellants. Rafiq stabbed Suresh Kumar in the stomach, whereas Musharraf stabbed Parkash Chand (deceased). Thereafter the appellants

ran and were chased by Sardari Lal and Parkash Chand (This Parkash Chand was not injured). The appellants threatened to kill them and so they gave up the chase. Sardari Lal and Parkash Chand noticed that a person standing on the other side of the road exhorted the appellants to run away. Parkash Chand and Sardari Lal took Suresh Kumar and Parkash Chand (deceased) to a hospital run away the army in the Red Fort.

PARKASHChand injured was declared dead, while Suresh was given first aid and sent to the base hospital at Delhi Cantonment. Sardari Lal went to the police-station and lodged his report (Exhibit Public Witness PW21/A). Sub-Inspector Ram Phal was entrusted with the investigation of this case.

(3) On April 11, 1974 the sub-inspector arrested Rafiq Ahmed, Musharraf Ali and one Mohd. Mursaleen on the basis of a secret information. He warned the accused to cover their faces as they would be needed for investigation. They were produced before the Magistrate and sent to judicial lockup to await test identification parade. On April 17, 1974 the sub-inspector requested the Magistrate to fix a date for test identification parade. The Magistrate fixed April 20, 1974, However, on that date the sub-inspector requested the Magistrate to fix another date since Suresh Kumar injured was not fit to leave the hospital. The Magistrate fixed April, 27, 1974 for the parade, On April 27, 1974 the sub-inspector again requested the Magistrate to fix another date because of the physical condition of Suresh Kumar. The Magistrate now fixed May 4, 1974 for identification parade at Central Jail, Tihar. On May 4, 1974 only Sardari Lal and Parkash Chand went to the Central Jail since Suresh Kumar was still unfit to move out of the hospital. The accused ,however, refused to take part in the parade on the ground that they have been photographed and have been shown to the witnesses. .

(4) On May 9, 1974 the police obtained the custody of the accused. They were interrogate May 9, 0, 11 and 12, 1974. On May 12, 1974 Kafiq Ahmed and Musharraf Ali made is closure statements and got recovered knives Exhibits P 0 and P 11 respectively. These were duly taken in to possession.

(5) The appellants and Mursaleen were charged under Sections 398, 302/34 and 307/34, Indian Penal Code, Musfarraf Ali and Rafiq Ahmed were also individually charged u/s 27 of the Arms Act. The trial court acquitted Mursaleen but convicted Rafiq Ahmed and Musharraf Ali as aforesaid.

(6) The main contention of Mr. B.B. Lal, learned Counsel for the appellants, is that investigation relating to thi recovery of knives from the appellants is rotten to the core, and that Sardari Lal and Suresh Kumar should not be relied upon as regards the identity of the assailants.

(7) We find that it took four days for the investigating officer to get disclosure statements from the appellants. These disclosure statements are Exhibits Public Witness Public Witness 14/A and Public Witness Public Witness 14/D. We hive perused the original statements which have been recorded in Urdu since their

English translation does not convey the same idea. The most surprising thing to note is that the disclosure statement of each one of them is literally word for word the same.

It consists of one sentence. However, as usual, part of the sentence is confessional in nature which has nothing to do with the discovery of the knife. We will reproduce the whole of the sentence and then dissect it. Literally translated it reads thus .

"One month earlier had injured a person by giving a knife blow at the crossing of Khas Road and Subhash Road, and had buried the knife in a mound of earth opposite Vijay Ghat near the wall of Red Fort which I can get recovered after pointing out".

(8) The disclosure statements are witnessed by Amar Nath and Devi Ram P.Ws. The first part of the sentence about stabbing a person with knife at the crossing of Subhash Road and Khas Road is inadmissible in evidence.

(9) We have gone through the statements of Amar Nath and Devi Ram as well as of the investigating officer. We find that there are material contradictions in their statements. Amar Nath (Public Witness 14) is a tea Vendor; whereas Devi Ram is a hawker. They would have us believe that they went to the police-station because their servants, had quarrelled and had been taken to the police-station the investigating officer deposed that he had summoned the servants but in the same breath states that he had brought the servants to the police-station, The witnesses, who were their employers, were never summoned and they had come to the police-station to find out the fate of their servants. The investigating officer admits that no report about the quarries among the servants was recorded nor was there anything on his record to show that the servants had been brought to the police-station. Be that as it may. we find that both the witnesses categorically state that all the three accused were brought in handcuffs and were interrogated simultaneously when both the appellants made the disclosure statements. But the investigating officer would have us believe that each of the appellant was brought separately to the room where the witnesses were present. He categorically states that they were never together at any time when they made their statements. According to him, first Musharraf was interrogated and after his statement had been recorded Rafiq was summoned, interrogated and his statement recorded. The investigating officer deposes that the disclosure statement of Musharraf Ali was that "he had concealed the weapon of offence in front of Shanti Vana". This is definitely not his statement which has been reproduced earlier. The investigating officer then tells us that Rafiq stated that "he had placed the weapon of offence near Red Fort back wall opposite Shanti Vana ". Again, this is not the statement. Shanti Vana and Vijay Ghat that are absolutely two different places and we know that the back of Red Fort wall is only opposite Vijay Ghat and not Shanti Vana, the investigating officer does not tell us where he took these accused for the recovery of the weapons but goes on to say that he took them " to the place

referred to in their respective disclosure statements". The contract shows that he had taken the accused to place opposite Shanti Vana. and never to any place opposite Vijay Ghat. It is surprising indeed that both the knives in question were got recovered by the accused from practically the same place. We have seen the knives, the knives are practically of the same shape. However, that does not matter. These knives were put into sealed parcels and taken into possession. They were sent to the Serologist. The report does not show any human blood on these weapons. These knives, even if their recovery was to be believed (which we do not), have not been connected with the incident. Keeping in view the contradictions pointed out above and the fact that Amar Nath and Devi Ram, who are persons of no substance and had no ostensible reason to go to that police-station, we disbelieve the recovery of these knives.

(10) The next question which falls for determination is about the identity of the assailants. The prosecution produced Sardari Lal (Public Witness 24) and I Suresh Kumar Ahluwalia (Public Witness 24) to establish the identity of the culprits. Now Sardari Lal is the person who lodged the first information report. In this report he talks of two boys" as the assailants but does not give any other description. Neither their approximate height body built, age, colour and the clothes they were wearing are mentioned. The only thing stated by him is "I can identify them if confronted." The statement was recorded after about two hours of the incident, i.e.. at 9 P.M. and he should have been in a position to give the description of the assailants.

(11) This witness, during his statement before the Court, swore that he had given the description of the assailants to the police. He was duly confronted with his statement Exhibit Public Witness . 21/A where it was not recorded. The witness had no explanation .He was also present when the conquest report (Exhibit Public Witness Public Witness 23/B) about the death of Parkash Chand was prepared by the investigating officer. Brief facts of the case have been recorded in therep3rt. The statement of Sardari Lal has been reproduced in extenso. However, not a single word about the description of the assailants finds place in the report. This witness made another vital improvement in his statement in the court. For the first time he talked about a third man being present on the other side of the road who told the assailants to run away. The trial court disbelieved this witness as well as Suresh Kumar (Public Witness 24) about the presence of the third person.

It also disbelieve these witnesses with regard to the charge u/s 398, Indian Penal Code, by holding that there was no attempt by Rafiq to rob Sardari Lal.

(12) The evidence of identification by itself is usually considered a weak type of evidence. The ability of a witness to identify an assailant, who was not previously known, will depend on many factors. Some of these are the condition of light at the place of incident, the opportunity to see the assailant closely ; the duration for which the assailant was seen ; the memory of a witness to remember the features ; the period which elapses from the date of incident to the identification;

and the like. It has also to be borne in mind that at the time of incident the victim is likely to get a shock by the sudden attack. He may be worrying more for his safety than for trying to scrutinize the features of the assailant. It at night .he place of incident does not have sufficient light, the victim is likely to get a vague idea of the features of the assailant. By the passage of time the shape of the assailant is likely to be blurred especially where a long period elapses between the incident and the identification.

(13) The practice of holding test identification parades is very useful indeed. It enables an investigating officer to test the memory and the statements of the witnesses as well to know whether the investigation is proceeding on the right lines. However, before such parades can serve any useful purpose, it is necessary that the accused is warned immediately at the time of his arrest to cover his face as he would be put up for identification. This ensures that the witnesses get no chance of seeing the accused in custody. The parade should be held soon after a suspect is arrested. Needless to say that the successful identification or an accused by a witness in the test identification parade is not substantive evidence. But it is definitely a very valuable corroborative piece of evidence. The substantive evidence will be the identification of the accused by a witness in the court. It is sometimes contended that much value should not be attached to the identification of an accused by a witness in the court as the witness is not called upon to pick up an assailant from among other persons and, in any case, mind of the witness gets seriously prejudiced by the fact that a person, after due investigation, has been put up for trial as the assailant. The value to be attached to identification in court will depend on the circumstances of each case. If a witness is otherwise absolutely reliable a very great weight may be attached to such identification. However, one has to be on guard as very honest persons sometimes get mentally convinced by seeing a person in dock that he must have been the assailant whom the witness had seen at the time of incident. It is for that reason that usually, as a matter of prudence, some corroborative evidence regarding the identity of the assailant, in addition to his identification only in court, is looked for.

(14) New in the present case Sardari Lal Public Witness . is not a wholly reliable witness. He has been disbelieved completely in respect to the presence of third person as accused and of the fact that there was an attempt of robbing him of his wrist watch by Rafiq. He deposes that after the incident he was seeking the accused for the first time in the court, The whole occurrence had taken place within 4 or 5 minutes. The sun had set. According to the witness : "It was dark but lighting was there,". The lamp poles were at a distance. About two years and four months had elapsed from the date of the incident before the witness came to depose in court and identify the accused in the dock.

(15) I may be repeated that " Sardari Lal Public Witness . had not given any description of the assailants in the first information report. No corroborative evidence whatsoever regarding the identity of the assailants is on the record.

In these circumstances we do not find it safe to rely on the evidence of identification in the dock to uphold the conviction of the appellants. It is true that the appellants had refused to take part in the identification proceedings but we are not satisfied with the conduct of the investigation. We have already criticised the conduct of investigating officer on recording the disclosure statements of the appellants and the recovery of the knives. We may now recapitulate his conduct after the arrests of the accused.

the accused were arrested on April 11, 1974 but no request for arranging an identification parade was made at that time. Six days were to elapse before such an application was made on April 17, 1974. The Magistrate fixed April 20, 1974 for the parade but the investigation officer got it postponed on the ground that Suresh Kumar was not fit to leave the hospital and take part in the identification parade. Now that was no reason for not asking the other witnesses to take part in the identification proceedings. As the remand for judicial custody expired on April 25, 1974, the appellants were produced for further remand. The next date for identification parade was April 27, 1974. Again the investigating officer got it adjourned on the same ground and the parade was thereafter fixed for May 4, 1974, when Sardari Lal and Parkash Chand were taken to Central Jail for identification. It is on this date that the appellants refused to take part in the identification parade on the ground that they had been photographed and shown to the witnesses. The investigating officer has given no reason for not requesting the magistrate on the very day the appellants were produced before the latter for holding an identification parade. The reasons for getting the parade adjourned from time to time do not appear to be sound. In these circumstances no adverse presumption can be drawn against the appellants.

(16) The prosecution failed to examine Parkash Chand who was an eye-witness and was expected to identify the accused. No value can be attached to the identification of the accused in court by Suresh Kumar Ahluwalia (PW24). He categorically stated that the police had shown him all the three accused while he was in the hospital. Moreover he is the first person who was stabbed in the and abdomen on the left thigh. This seems to have happened within less than a minute. He immediately sat down on the ground. He must have been in agony and shock. In these circumstances he did not have much opportunity to pay attention to the features of his assailant and his companions. He was also identifying the accused in court after about two years of the date of the incident.

(17) It has been contended that the delay in recording the statements of the prosecution witnesses cannot be attributed to the prosecution. We find that the prosecution had filed the charge-sheet in August, 1974, i.e. within about four months from the date of incident. But the trial court was to take about two years for framing the charge. It is true that the matter adjourned by Mr. G.C. Jain, the then Additional Sessions Judge, between August 5, 1974 to October, 1974 when the case came up for the first time before Mr. Mahesh Chander, Additional Sessions Judge. We are constrained to remark that thereafter it is a story of

unnecessarily adjourning the case time after time till March, 11, 1976 when the charge was framed. The order-sheet shows that the case was adjourned many a time with the cryptic words: "Part arguments heard. For remaining arguments to come up on....."or "Heard. For remaining arguments to come upon". It is most unfortunate that the trial of Sessions cases, which should be held from day to day, is in fact held in Installments spread over very long periods. Long delay in disposing of a sessions trial is likely to result in injustice. It has to be remembered that the acquittal of a guilty person is as much injustice as the conviction of an innocent person. Where the accused are under detention, and in most of the sessions trials the accused remain under detention, the cases have to be decided with utmost dispatch. Such trials should have priority over all appeals and revisions and cases in which the accused have been released on bail, with the passage of time the memories of the witnesses are likely to fade and they are likely to either forget or mix up various facts which might affect their credibility.

In the instant case though neither the investigating agency nor the prosecution can be blamed at all for the very unreasonable delay in examining witnesses, the accused cannot be made to suffer for the same.

(18) We find that the learned trial judge did not take into consideration the material facts discussed above which affected the prosecution case. The whole emphasis of the learned judge seems to be on the adverse presumption drawn against the appellants for their refusal to take part in the identification proceedings. It is true that the judge has reproduced practically verbatim the statement of each witness to begin with as well as at the time of discussing the case against each accused. However, there is no critical examination of any statement or fact. The relevant portion of judgment with respect to identification reads:

"IT is then submitted that there was no description of the accused persons either in the F.I.R. or in the inquest report. Be it as it may, there was no reason for the accused persons to refuse identification when it was requested by the police. The factum Of refusal to participate in identification parade a circumstance which by it self goes quite heavily against the accused persons. It would not be out of place to mention in this context that neither Public Witness .23norP.W.24are residents of Delhi. It is not even remotely suggested that they bear any ill-will against the accused persons and there was no reason for them to falsely implicate the accused persons and Therefore mere fact that full description was not given in the F.I.R. Exhibit Public Witness PW21/A or the inquest report Exh. Public Witness PW23/B would not affect prejudicially the case of the prosecution."

(19) This can hardly be called a critical appreciation of any evidence. The learned judge failed to appreciate that the eye-witnesses might have been honestly convinced after seeing the accused in the dock that these were the very persons who had attacked them. In such like circumstances it is not a question of ill-will or enmity between an accused and a witness, but it is the test of the memory of

a witness. The learned judge also fell into an error in not noticing that the recovered knives could not be connected with the present crime. He also did not take note of the material contradictions in the statements of various witnesses in respect of the recovery of the knives, and thus not only believed their recovery but used this fact against the appellants for their conviction.

(20) The upshot of the discussion is that the appeal is allowed. The convictions of the appellants are hereby quashed and their sentences set aside. They are directed to be released forthwith unless they are detained in any other case.