

(2005) 09 DEL CK 0160

In the Delhi High Court

Case No : Criminal Appeal No. 143 of 1992

Raj Kumar

APPELLANT

Vs

The State of NCT of Delhi

RESPONDENT

Date of Decision : 12-09-2005

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 428
Evidence Act, 1872 — Section 27, 32(1), 6, 8
Penal Code, 1860 (IPC) — Section 302, 304, 307

Citation : (2005) CriLJ 3883 : (2005) 123 DLT 491 : (2005) 84 DRJ 340

Hon'ble Judges : Manmohan Sarin, J; Manju Goel, J

Bench : Division Bench

Advocate : K.B.Andley and M.L. Yadav, for the Appellant; Ravinder Chadha, Assistant Public Prosecutor and Jagdish Prasad, for the Respondent

Judgement

Manmohan Sarin, J.—This is an appeal preferred against the judgment dated 30.7.1992, convicting the appellant for offence punishable u/s 302 of the Indian Penal Code in short "I.P.C.". Vide order dated 19.8.1992 appellant was sentenced to undergo rigorous imprisonment for life and also to pay a fine of Rs. 10,000/-, or in default to further undergo simple imprisonment for 10 months. The appellant had been acquitted of the offence u/s 27 of the Arms Act since the knife recovered did not fall within the ambit of the notification under the Act.

2. The prosecution's case in brief is that on 3.4.1988 at about 1.00 P.M. appellant Raj Kumar assaulted, Darshan Singh with a knife at Gandhi Park, Hari Nagar. As a result of the injuries sustained, Darshan Singh succumbed to the same on 5.4.1988. Darshan Singh, the deceased was playing cricket along with Sunil Kumar and others at Gandhi Park, when the appellant Raj Kumar happened to pass-by. Darshan Singh asked him to return the hockey stick, which he had borrowed. The appellant allegedly replied that he had lost the same, but Darshan Singh insisted on getting another hockey stick in lieu thereof, resulting in a verbal duel. Appellant left the spot saying that he would come back and see

Darshan Singh. It is alleged that after some time appellant returned and gave a knife blow on the left side of the chest below the arm pit of Darshan Singh, who was sitting near the statue. Injured Darshan Singh attempted to chase him but appellant managed to run away. Niranjana Singh, PW-4 who happened to be present at the spot advised him to go to the Hospital and seek medical aid. Sunil Kumar, one of the playmates, accompanied Darshan Singh to the Police Station Hari Nagar, where Head Constable Rohtas Singh recorded statement of Darshan Singh in the Daily Diary register being Entry No. 8A, Exhibit 15/A. The Duty Officer filled up the injury sheet and sent Darshan Singh with Constable Raj Pal Singh to Deen Dayal Upadhyay Hospital. At the Deen Dayal Upadhyay Hospital, the doctor, who examined him observed that it was a case of stabbing of the lower chest resulting in internal trauma and the patient needed wound exploration under General Anesthesia and necessary operative procedures. He advised transfer of the patient to Dr. R.M.L. Hospital. There is no record of admission on 3.4.1988 or treatment accorded at Dr. R.M.L. Hospital or discharge there from. Darshan Singh on 4.4.1988, was at his residence where his statement was recorded by the S.I u/s 161 Cr.P.C. On the morning of 5th April, 1988, he was rushed to Ganga Ram Hospital in a critical state. The resuscitation or other measures taken did not help and Darshan Singh succumbed to the injuries on 5.4.1988.

3. The case was initially registered u/s 307 of the I.P.C. Subsequently it was converted to Section 302, I.P.C. The appellant Raj Kumar had been apprehended standing near a bus stand at Hari Nagar. On his interrogation the appellant is stated to have led the SI and the Constable to a DDA Park near Maya Puri and recovered the dagger from a pit which was wrapped in a rexene cover.

4. Inquest proceedings and autopsy were got done. The relevant portion of the postmortem report is as under:-

"Local examination of the external wound shows non union of the skin margins which are however healthy and devoid of any sign of infection.

Injury is ante mortem caused by sharp penetrating weapon and is sufficient to cause death in the ordinary course of nature. Death is due to partition it is consequent upon injury to the abdominal viscera. Time since death is about 6 hours. Blood and viscera is duly preserved for Chemical analysis."

5. The prosecution examined in all 15 witnesses. Eye witnesses were Sunil Kumar PW-1, Satinder Kumar PW-2 and Sanjog Kumar PW-3, who were playing cricket with the deceased. Niranjana Singh PW-4 is a chance witness, whose evidence is crucial. It may be noted that Sunil Kumar PW-1, Satinder Kumar PW-2 and Sanjog Kumar, PW-3 in their depositions admit their presence in the park and playing with the deceased. They denied having seen Darshan Singh being assaulted by the accused/appellant. However, they admit Darshan Singh being injured and bleeding. Sunil Kumar admits taking Darshan Singh to the Police Post and Deen Dayal Upadhyay Hospital. However, he denied knowledge as

to who had stabbed or assaulted Darshan Singh. Similar is the position of Satinder Kumar PW-2. Sanjog Kumar PW-3 also claimed that he did not see as to what had happened. These witnesses had been duly cross-examined by the Public Prosecutor who confronted them with the statement u/s 161 Cr.P.C. In short they had turned hostile.

6. Niranjana Singh PW-4 is the only eye witness from the public who has fully corroborated the prosecution case and deposed against the accused. The appellant Raj Kumar in his statement recorded u/s 313, Cr.P.C. denied having stabbed Darshan Singh. He denied the factum of arrest near the DDA park on 3rd April and leading the SI, following a disclosure statement, to the spot from where the dagger was recovered. He claims to have been falsely involved at the behest of the Investigating Officer, who wanted to purchase a chit from his father, who had been operating a Chit Fund.

7. Mr. K.B.Andley, learned Senior Counsel for the appellant firstly assailed the prosecution case as being improbable and against the natural course of events. He submitted that three eye witnesses, who were playing with the deceased had not supported the prosecution version of the appellant having stabbed the deceased. He submits that incident had taken place in broad day light in the afternoon in a public park, where a game was being played. The prosecution version that deceased ran after the accused to catch him after being stabbed, was highly improbable. Especially with a match in progress and so many persons present, it was unlikely that the assaulted person would chase the assailant and none others would raise an alarm or join him. It was against natural course of conduct. None of the eye witnesses except PW-4, Niranjana Singh have supported the prosecution version. He questions the presence of Niranjana Singh, to which we shall advert later. In these circumstances, he submitted that the case was not free from doubt. The prosecution had failed to establish the case beyond reasonable doubt.

8. Mr. Andley next submitted that as demonstrated by the defense in evidence, there were other persons by name of "Raj Kumar" living in the area. In view of the depositions of the eye witnesses, the possibility of another person by the name of Raj Kumar having stabbed the deceased could not be ruled out.

9. Mr. Andley next assailed the reliance by the Addl. Sessions Judge on the evidence of Niranjana Singh PW-4. He submits that the presence of Niranjana Singh, a 60 year old man at the park at 1.00 P.M. was highly improbable. He submits that the reasons for his presence i.e getting his refrigerator repaired from a shop in the locality outside the park did not appear credible. A person who wants to get his refrigerator repaired would normally get the mechanic to his house for repair and in case the refrigerator had been taken to the shop for repairs, it was unlikely that the person would come out on an afternoon in the month of April and sit in the park, waiting for repairs to be done. He would rather be at the shop itself. In short, he submits that Niranjana Singh PW-4 was a planted witness, who was not present and no credence ought to be given to his

testimony.

10. Further, the recovery of the knife was not pursuant to any disclosure statement u/s 27 of the Indian Evidence Act made by the Appellant and as such no credence could be given to it. The MLC mentioned it as a case of stabbing but did not name the appellant.

11. Coming to the procedural and other lapses, Mr. Andley submitted that there were serious lapses as copy of FIR and the special report had not been sent to the Metropolitan Magistrate. This would thus raise the presumption that FIR and other documents had been prepared subsequently and doctored with deliberation. Mr. Andley submitted that DD Entry No. 8A recorded as a complaint of the deceased as also the statement allegedly recorded by Sub Inspector at the residence of the deceased on 4th April, 1988, ought not to be relied upon as dying declarations. These do not meet the requirement of being acted upon as dying declarations inasmuch as having not been certified by any medical authority that the deceased was in a fit state to make the statement. Rather MLC dated 3rd April, 1988, exhibit PW 13/A carries an unsigned notation of being unfit for statement. He further submits that inquest papers which are mandatorily required to be sent for postmortem were not sent.

12. Mr. Andley assails the conviction by the Addl. Sessions Judge u/s 302 IPC. He submits that at worst if the court was not inclined to give the benefit of doubt, it would be a case u/s 304 Part-II IPC. This was a case, where even as per prosecution version, there was an altercation and verbal duel over non return of hockey stick and the deceased was allegedly stabbed by the appellant. None of the eye witnesses has supported the prosecution version of there being an earlier altercation and the appellant returning as allegedly threatened and stabbing the deceased. The crucial eye witness PW-4 Niranjana Singh even did not mention any earlier quarrel. DD Entry No. 8A also which is a report by the deceased himself does not mention that after the altercation the appellant had returned and stabbed the deceased. In these circumstances, at best, it could be a case of a sudden quarrel in which a single blow was inflicted. The case accordingly, he submits, would not fall for conviction u/s 302 IPC. He places reliance on Gurain Singh v. State of Punjab 1994 S C C (Cri) 1399 and Dashrath Singh v. State of U.P 2004 S C C (Cri) 1932.

13. Lastly, learned counsel for the appellant submitted that, in the alternative, if for some reason, the court was not inclined to grant benefit of doubt to the appellant, he deserves clemency. When the offence was committed in 1988, the appellant was a young man in his teens. Appellant has since got married in 1991. He has a 12 year old son and 5 year old daughter and incarceration at this belated juncture of life, would completely shatter the life of the appellant and his family. Appellant, it appears, has undergone only two and a half years of sentence and has been on bail.

14. We have heard Mr. Ravinder Chadha, learned counsel for the State in

opposition. Mr. Chadha submits that unfortunately, eye witnesses on account of their friendship with the appellant turned hostile despite being confronted with their statements u/s 161 Cr.P.C. However, the statement made by the deceased himself to Sub Inspector would be relevant under Sections 6 and 8 of the Indian Evidence Act since it related to the same transaction and conduct of the accused. This would be the position even if the same was not to be treated as a dying declaration. Mr. Chadha states that statement recorded on 4th April, 1988, mentions an earlier altercation and the appellant returning to stab the deceased. This would show that he had enough cooling time and it would not be a case under Exception 4 of Section 302 IPC. He also submits that PW-4 Niranjan Singh was a credible witness and the learned Addl. Sessions Judge had rightly convicted the appellant and sentenced him to life imprisonment.

15. Before coming to the consideration of the respective submissions and propositions as urged by the appellant, certain peculiar factual aspects particularly with regard to treatment of the deceased deserve to be noted. Deceased Darshan Singh after alleged incident was not immediately rushed to the Hospital. Rather, he was taken to the police station by his friend Sunil and later on, he had been taken to Deen Dayal Upadhyaya Hospital. As is seen from M.L.C, he was administered Tetanus injection and given I.V saline and pain killer. He was advised transfer to Dr. R.M.L.Hospital since he required wound exploration under General Anesthesia and necessary operative procedures. There is no record available of his admission or treatment at Dr. R.M.L.Hospital except that there is only a reference by the SI in the application for Postmortem that the deceased had gone to Dr. R.M.L.Hospital on 3rd April, 1988, where he had been discharged and he returned to Deen Dayal Upadhyay Hospital. Deceased had again visited Deen Dayal Upadhyay Hospital on 4th April, 1988 as his condition did not improve and subsequently his father rushed him in the morning of 5th April, 1988 to Sir Ganga Ram Hospital in a critical state, where resuscitation measures failed and he expired.

16. In these circumstances, in the absence of record of admission/discharge or medical treatment of the deceased at Dr. R.M.L.Hospital or his re-admission on 4th April, 2005 at Deen Dayal Upadhyay Hospital, no inference regarding adequacy or inadequacy of the treatment accorded can be conclusively drawn. Even the aspect of his admission in Deen Dayal Upadhyay Hospital on 4th April, 1988 would be questionable as the police claims that he was at his residence where the Sub Inspector recorded his further statement u/s 161 Cr.P.C on which prosecution has heavily relied. All that can be said is that it was a case of a single stab injury which did not disable the victim from going to the police station and thereafter to the Hospital. Death had occurred after two days. There is nothing to show that deceased had been given wound exploration and treatment, as initially recommended.

17. Let us consider the submission of Mr. Andley that none of the eye witnesses P.Ws 1-3 had supported the prosecution and there being a doubt with regard to

the identity of the assailant. Further, there being a possibility of mistaken identify, the appellant was entitled to the benefit of doubt. Eye witnesses turning hostile is not an uncommon phenomenon, especially considering that appellant, deceased and the eye witnesses were all young boys in their teens, known to each other. The tendency to be kind towards a friend who is alive stems out of thinking that deceased is no more, why loose an existing friend. Be that as it may, what is significant is that factum of the incident is admitted by all these witnesses. They admit the presence of the deceased and his sustaining injuries. They deny seeing the appellant stabbing the deceased. Sunil Kumar PW-1 also admits taking deceased to the Police Station and then to the Hospital. P.Ws 2-3 also admitted their presence in the park and playing with the deceased. These witnesses have been duly confronted with their statements recorded by the police u/s 161 Cr.P.C. Considering that the factum of the incident in which deceased was injured was not denied even by these witnesses, the testimony of eye witness Niranjana Singh becomes crucial. PW-4 has fully corroborated the prosecution version. Mr. Andley's submission that he was not a chance witness but a planted witness does not impress us. Niranjana Singh had been cross-examined at length on his presence in the park. He gave full particulars regarding his refrigerator repair, particulars of shop and payment made. The plea as to why Niranjana Singh chose a place for repair which was located far away from his place of residence, is without merit as choice of repair shop like many others, stems out of faith in a particular repair shop and consideration of distance is not the determining factor.

18. Niranjana Singh has remained unshaken in his testimony. There is nothing unnatural about his waiting in the park when the shop is just outside the park. Moreover. There was no suggestion put to discredit the witness by even suggesting that he was an interested witness or was deposing at the behest of the prosecution. It is also significant that he has not been a police witness or a witness in any other case and there is no relationship with the deceased. Testimony of Niranjana Singh PW-4 is, Therefore, fully credible. The deceased being taken to the Police Station first and not to the hospital is no doubt unusual. However, possibly it may have been on account of perception that the condition of the deceased was not that serious considering that he had attempted to even chase the appellant.

19. Learned Addl. Sessions Judge was, Therefore, fully justified in relying upon the testimony of PW-4 and acting thereupon along with D.D Entry No. 8A, Exhibit PW 15/A being the statement of deceased, wherein appellant had been named as assailant.

20. The plea of appellant not being "Raj Kumar" in the light of the evidence on record, deserves to be rejected and is wholly devoid of merit. So is the position regarding Investigating Officer falsely implicating the appellant on account of appellant's father not obliging him with drawing a chit in the chit fund run by him. The allegation is devoid of material particulars.

21. Mr. Andley submits that statement of the deceased as recorded by the Sub Inspector on 4th April, 1988 and DD Entry No. 8A on 3rd April, 1988 could not be regarded as dying declaration. It is urged that there was no certification by the Doctor regarding deceased being in composed and fit state to make a statement. As far as statement recorded in DD Entry No. 8A, Exhibit PW 15/A is concerned, the deceased accompanied by his playmate Sunil Kumar had himself gone to the police station and recorded his statement and only after recording of the statement, he was taken to the hospital. This was a clear indication that deceased was well oriented. It has not been anyone's case that deceased was not well oriented at the time of recording of DD Entry. No such suggestion had even been put to any of the witnesses. DD Entry No. 8A being the first information of the offence. FIR is generally not a substantive piece of evidence but is used for corroborating or contradicting the maker or to show that implication of an accused, named in the FIR is not an afterthought. Statement made by the deceased to the Sub Inspector u/s 161 Cr.P.C on 4th April, 1988 as also statement recorded in DD Entry No. 8A, as discussed above, would be relevant u/s 32(1) and Sections 6 and 8 of the Indian Evidence Act as being connected to the facts being part of the same transaction and also relevant to the conduct of the person accused of an offence u/s 8 of the Indian Evidence Act. Reference in this connection may be made to Kulamani Sandha Vs. State of Orissa, and Damodarprasad Chandrikaprasad and Others Vs. State of Maharashtra, . We hold that the statement in DD Entry No. 8A and statement recorded on 4th April, 1988 are relevant and admissible. Credibility to be assigned thereto is a matter of appreciation thereof.

22. Coming to the procedural and other lapses pointed out, this was a case initially registered u/s 307 IPC. Special report is sent in cases u/s 302 IPC and thus not sending of the special report or delay in sending the FIR cannot be fatal to the prosecution case. Moreover in the present case in view of recording of DD entry No. 8A and the other evidence and attendant circumstances, no inference regarding FIR being doctored or fabricated is warranted. Regarding the recovery of knife not being in pursuance to the disclosure statement u/s 27, it can be said with confidence considering the postmortem report giving the cause of death as a result of injuries from a sharp edged weapon and the other ocular evidence including the statement of deceased, prosecution has established its case beyond any reasonable doubt.

23. The crucial question to be determined in the present case is whether this would be a case falling u/s 302 or it would within Section 304 Part I or Part II IPC. Appellant claims that none of the eye witnesses have supported the prosecution case of there being a quarrel after which appellant had left promising to return and settle score. Appellant, allegedly thereafter, returned and stabbed the deceased. It is correct that PW-4 has not deposed with regard to quarrel while PW 1 to 3 had turned hostile and their testimony is bereft of it. The only evidence of there having been a quarrel and the appellant having left promising to return to settle scores is in the statement allegedly recorded u/s 161 Cr.P.C on

4th April, 2005 by the Sub Inspector. Barring this statement, reference to the earlier altercation and the appellant having left and returned for stabbing the deceased, there is no other evidence. As noted earlier, there is uncertainty and doubt with regard to medical condition of the deceased at home or in the hospital on 4th April, 1988 or being admitted to the hospital. It is significant that in the very first statement recorded immediately after the incident when the deceased had been taken to the police station, DD entry No. 8A was to the following effect:-

"RAJKUMAR NE MERI HOCKEY LE RAKHEE THI. US NE MERE KO GALI DI. PHIR MERA KO CHAKOO NUMA CHIZ MARI JO MERE PAIT PAR LAGI JISE SE KHOON NIKALNE LAGA AUR MAI THANE AA GAYA."

Translation of which is as under:-

"Rajkumar who had borrowed my hockey first abused me and then struck me with a weapon like a knife which hit me on my stomach because of which I started bleeding and have come to the police station."

24. It appears highly improbable that deceased would not have reported or recorded that appellant had quarreled with him over non-return of hockey stick and threatened to settle scores with him and returned to stab him. Rather, it would appear that the said version is recorded in DD entry is the plausible one that there was an altercation for non return of hockey stick resulting in a sudden quarrel at the spur of moment, appellant abused and stabbed the deceased. This would thus bring the case within Exception 4 to Section 302 IPC and make it culpable homicide not amounting to murder punishable u/s 304 IPC.

25. Moreover this was a case of single blow given by the deceased. Reference may usefully be invited to the judgment reported in Gurain Singh v. State of Punjab 1994 S C C(Cri) 1399. The appellant in the cited case was the brother of the deceased. The deceased went inside her cattle shed to find out whether there was any leakage; wife of the accused also came there and some quarrel took place between them. The deceased refused to accede to the request that the water that was being discharged should be stopped. The appellant on hearing the quarrel came there with a kulhari and gave blow on the head of the deceased. He gave another blow with the blunt side on the leg. The occurrence was duly witnessed by an eye witnesses and there was a dying declaration. The court held that based on the dying declaration and other circumstantial evidence amply establish the guilt of the appellant but the case may not amount to one of murder. High Court however considering the medical evidence confirmed the conviction u/s 302 IPC. The Supreme Court held as under:-

"The prosecution case is that the accused came there suddenly when his wife and the deceased were quarreling; he inflicted injury on the head and then the deceased was taken to the Primary Health Centre. It appears that she was not given necessary treatment. On the other hand, she was taken back to her house and thereafter, she was not treated for the injury at all. The injury appears to

have become septic and resulted in her death. However, the fact remains that the accused inflicted single injury on the head as a result of which the deceased died after seven days of the occurrence due to some intervening circumstances. The offence committed by him would be one of culpable homicide as alleged; it may be attributed to him that by such an act he was likely to cause the death. Accordingly, we set aside the conviction of the appellant u/s 302 and the sentence to undergone imprisonment for life. Instead, we convict him u/s 304 Part-II Indian Penal Code and sentence him to undergo rigorous imprisonment for seven years. The accused who, who is on bail, shall serve out the remaining part of the sentence."

26. The above cited case has several similarities with the case in hand. The present case as held by us appears to be a case of a sudden quarrel. It was also a case of single blow. Further, in the present case the deceased did not either take or receive the recommended adequate treatment.

27. Considering the medical evidence on record that the injury was sufficient in the ordinary course of nature to cause death, we hold the case to be falling u/s 304 Part-I IPC. We, accordingly, set aside the conviction u/s 302 IPC. On the question of quantum of sentence, considering that the treatment of the deceased left much to be desired and the circumstances of the appellant of this being his solitary offence and his family circumstances where he subsequently got married and has grown up son and daughter and had undergone two and half years of sentence already, we sentence the appellant to a term of 8 years and to pay a fine of Rs. 10,000/- or, in default to further undergo simple imprisonment for 10 months. Benefit of sentence undergone and remission u/s 428 Cr.P.C would be applicable. Bail bond of the appellant be cancelled. He be taken in custody and sent to prison to complete the remaining term.

Appeal stands partly allowed in above term.