

(2010) 11 DEL CK 0001
In the Delhi High Court
Case No : Criminal A. 164 of 2001

Rakesh and Another

APPELLANT

Vs

State of N.C.T. of Delhi

RESPONDENT

Date of Decision : 18-11-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Evidence Act, 1872 — Section 67
Penal Code, 1860 (IPC) — Section 308, 34

Citation : (2011) 1 AD 352 : (2011) 1 JCC 49

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Saurabh Sharma and Rakesh Kumar, for the Appellant; Manoj Ohri, APP, for the Respondent

Judgement

Mukta Gupta, J.—This is an appeal against the judgment of conviction and sentence awarded to Appellants Rakesh S/o Phool Singh, and Krishan S/o Pooran Singh whereby they have been convicted for offence u/s 308/34 IPC and awarded sentence of Rigorous Imprisonment for two years.

2. Briefly the prosecution case is that on 27th July, 1997 at about 10:30 PM a quarrel took place between the aunt of injured Mahipal and Somkali, one neighbour in which he intervened. In the meantime, Satish son of his neighbour came, catching hold of him tore his banian and stated as to why he had intervened in the quarrel. Appellant Rakesh caught hold of Mahipal and Shri Kishan gave a lathi blow on his left shoulder. Appellant Rakesh picked up a stone and hit at his head as a result of which he became unconscious and was taken to the hospital. Statement of the injured was recorded in the hospital on the basis of which FIR u/s 308/34 IPC was lodged. On a charge-sheet being filed, the Appellants were charged for the aforementioned offences and after recording of the prosecution evidence and statement of the Appellants u/s 313 Code of Criminal Procedure impugned judgment was passed.

3. Learned Counsel for the Appellants challenging the conviction and order on sentence contends that there are contradictions in the testimony of the injured witness PW2 Mahipal as in his statement before the Court it is deposed that he was removed to the hospital by the police and then in the next sentence it is stated that police met him in the police station thus apparently he was not taken to the hospital by the police. The witnesses to the incident i.e. his Aunt, Somkali and Satish who were material witnesses have neither been cited as witnesses nor examined before the Court. PW-4 father of the injured was introduced as a witness after prosecution raised objection on scrutiny of the charge sheet and thereafter his statement was recorded after a period of nearly 1 year and 21/2 months. The testimony of PW4 cannot be relied upon because he had neither taken his injured son to the hospital nor was present at the spot or at the hospital as PW-5 SI Kapil Parashar has stated that when he went to the hospital and at the spot he found no eye witness. This shows that PW4 was not an eye witness to the incident. The testimony of PW6 Constable Dharmender is full of contradictions. Moreover, Ct. Pawan Kumar who is the attesting witness to the seizure memo, has not been examined as a witness. As per the defence the injured fell from the roof while he was drunk, that is why all his injuries are on the left side and this suggestion has been given to all the witnesses including the injured witness. The MLC has not been exhibited by the doctor but by the record clerk of the hospital PW-7 Davender Sharma and so the injuries on the complainant have not been proved. The weapons of the offence i.e. lathi and stone have not been recovered.

4. Learned APP on the other hand contends that the incident started at 10:30 PM and immediately thereafter the injured had been taken to the hospital as the MLC of the injured records the time of arrival of injured at 12:20 AM. Thereafter the statement of the injured was recorded at 2:10 AM when the doctor declared the injured fit for statement. On the basis of the statement so recorded, the FIR was registered. The testimony of the injured witness before the court is as per his statement in the Ruqqa. The Appellants have been named as accused at the first instance in the Ruqqa itself as both the Appellants being neighbours were known to the injured. The testimony of the injured witness is duly corroborated by the MLC.

As regards the injuries on the left side it is contended that the witness has categorically stated in his statement that injuries were inflicted on his left arm and thus there is no merit in the contention that the injuries on his person were because of fall on the left side. The defence of the Appellant is unacceptable as the injured was immediately taken to the hospital and the fact that he was smelling of alcohol was not recorded in the MLC. It is further contended that whatever contradictions are there in the testimony of PW-6 is for the reason that it was midnight and so in his version he got confused between AM and PM. Reliance is placed upon Rajesh Kumar @ Raju Vs. The State (Delhi Admn.), .

5. I have heard learned Counsel for the parties. In this case the incident is of

27.07.1997 at about 10:30 PM. As per the MLC the injured had been taken to the hospital by Ct. Inder Singh of the PCR and the MLC records the time of arrival of injured as 12:20 AM. The doctor had declared the injured fit for statement at 2:10 AM whereafter the statement of the injured was recorded and ruqqa was sent.

Though, I am in agreement with the learned Counsel for the Appellant that the testimony of PW-4 father of the injured does not inspire confidence as though he claims to be the eye-witness, however, he neither accompanied his son to the hospital nor was available at the spot or in the hospital when the police officer wanted to record the statement of an eye-witness. Moreover, his statement u/s 161 Code of Criminal Procedure has been recorded highly belated and there is no explanation forthcoming in this regard in the prosecution case. However, in the present case the testimony of the injured Mahipal itself is sufficient to convict the Appellant as the same is unblemished and inspires confidence. He has categorically stated in his statement that the Appellant No. 1 Rakesh caught hold of him and Appellant No. 2 gave a lathi blow at his left shoulder. Thereafter, Rakesh picked up a stone and hit on his head. Nothing has been elicited in the extensive cross-examination of this witness. The contradiction sought to be pointed out that on the one hand PW-2 states that the police removed him to the hospital whereas on the other hand he states that police met him at the hospital is incorrect as reading the testimony of the witness sequentially shows that the PCR removed him to the hospital which fact is even recorded in the MLC and thereafter the Investigating Officer met him in the hospital when his statement was recorded. This entire sequence is also corroborated by the observations in the MLC Ex. PW7/A and the statement of the Investigating Officer which proves that he was removed to the hospital by Ct. Inder Singh of the PCR and thereafter the IO met him and recorded his statement Ex. PW-2/A. In the cross-examination nothing could be elicited to find out any contradiction or improvement in the statement of this witness. The defence taken by the Appellants also appears to be unfounded as the MLC does not observe any smell of alcohol. In *Akhtar and Others Vs. State of Uttaranchal*, their Lordships" held that credence to the testimony of injured eyewitness is to be given since his presence at the scene of crime is seldom doubtful. The report reads as under:

18. In *Krishan v. State of Haryana* (2206) 12 SCC 459 this Court has taken the view that if the prosecution case is supported by two injured eyewitnesses and if their (injured eyewitnesses) testimony is consistent before the police and the court and corroborated by the medical evidence, their testimony cannot be discarded.

Similarly, in *Surender Singh Vs. State of Haryana*, this Court has opined that:

9. The testimony of an injured witness has its own relevancy and efficacy. The fact that the witness is injured at the time and in the same occurrence, lends support to the testimony that the witness was present during occurrence and he saw the happening with his own eyes.

This Court has taken the view in State of Madhya Pradesh Vs. Mansingh and Others, that:

9. The evidence of injured witnesses has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

6. The plea of learned Counsel for the Appellant that since the MLC has not been exhibited by the doctor but by the record clerk of the hospital and thus the injuries are not proved, must also fail. As per Section 67 of the Indian Evidence Act, a document can be proved by either by the author of the document or anybody else who can identify his hand writing.

7. I find no infirmity in the impugned judgment to the extent of convicting the Appellants of the offence charged. The Appellants with a common intention caused injuries to the accused including injury on the vital part. On the quantum of sentence as per the nominal roll Appellant Rakesh has undergone seven days and as per the learned Counsel for the Appellants Kishan has undergone 30 days. While awarding sentence, several relevant factors have to be weighed and balanced including the factor whether the right to speedy trial has been denied. Too lenient as well as too harsh a sentence loses its efficacy. One does not deter and the other may frustrate thereby making the offender a hardened criminal. Keeping in view the fact that the offence is of the year 1997, was committed on the spur of the moment and the injuries were opined to be simple, it would be appropriate if the sentence is reduced to RI for one year.

8. Accordingly, the appeal is disposed of upholding the judgment of conviction of the Appellants u/s 308/34 IPC however reducing the sentence to Rigorous Imprisonment for one year.