
(2013) 09 DEL CK 0162
In the Delhi High Court
Case No : Criminal Appeal No. 98 of 2009

Rakesh Kumar

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Evidence Act, 1872 — Section 134

Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (2013) 8 AD 386

Hon'ble Judges : V.P. Vaish, J; P.K. Bhasin, J

Bench : Division Bench

Advocate : Pawan Bahl, Amicus Curiae, for the Appellant; Sanjay Lao, APP, for the Respondent

Final Decision : Dismissed

Judgement

Ved Prakash Vaish, J.—The appellant challenges the judgment dated 30th November, 2007 and order on sentence dated 14th December 2007 passed by learned Additional Sessions Judge, Karkardooma Court, Delhi in Sessions case No. 72/07 arising out of FIR No. 554/04 u/s 302 of the Indian Penal Code ("IPC" for short), P.S. Pandav Nagar. The appellant has been convicted for the offence u/s 302 IPC for committing murder by causing death of Chhajjan on 20th October, 2004. The appellant has been sentenced to undergo imprisonment for life with fine of Rs. 500/- and in default of payment of fine to undergo simple imprisonment for a period of 15 days.

2. Succinctly stated, the case of the prosecution is that on 20th October, 2004, DD No. 16A was recorded at P.S. Pandav Nagar regarding a quarrel near Akshardham Temple, Delhi and it was handed over to HC Jagsaran. On receiving the said DD, HC Jagsaran along with Constable Devraj reached at Pushta Yamuna Khadar near Akshardham Temple and found the dead body of one Chhajjan (deceased) lying on a charpai. Thereafter DD No. 18A was recorded at P.S. Pandav Nagar and the same was handed over to SI Madan Meena for

investigation, who along with Constable Rameshwar Dyal, reached the spot and inspected the scene of crime. Some cauliflower leaves with blood stains, one pair of chappal and one blood stained "wooden seru" (wooden bamboo used in a cot) were found at the spot which were seized. Statement of eye-witness Shadre Alam @ Chhotu (PW-5) was recorded. Accused was arrested, site plan was prepared and post mortem on the dead body of the deceased was got done. After completion of investigation, charge-sheet was filed. The trial was conducted, leading finally to the passing of the impugned judgment and order on sentence.

3. Learned Amicus Curiae for the appellant contended that the trial Court has failed to appreciate the facts and circumstances of the case. The prosecution story is false, frivolous and concocted. The prosecution has neither brought forth the motive of the appellant to cause murder nor has anything come on record to show that there was any prior dispute or enmity between the appellant and the deceased. It is further contended that star witness of the prosecution namely, Shadre Alam (PW-5) who is the first eye-witness and has narrated the incident, could not have seen the appellant hit the deceased with a wooden seru as he was in his fields and cutting fodder in Yamuna Khadar in the field of jwar which is around 8-10 feet high and he could not have been in a position to look around while cutting jwar. Also while cutting crops from the bottom, a farmer has to sit and cut crop from the bottom near the ground and in such a situation, the possibility of his statement being fabricated cannot be ruled out. Shadre Alam (PW-5) has also not specified the location of the field of the appellant and also whether from the distance where he was working he could actually see the incident happening.

4. Learned Amicus Curiae for the appellant lastly contended that the prosecution has not brought forth the purpose of visit of the victim to the field of the appellant. Also Avtar Singh (PW-7) has not described his whereabouts at the time of incident.

5. On the other hand, learned APP for the State contended that the case of prosecution stands proved from testimony of Shadre Alam (PW-5) and Avtar Singh (PW-7), they both are eye-witnesses of the incident and were present at the spot. No motive was imputed to PW-7 in cross-examination to make false deposition against the appellant and also nothing has been brought on record to show that any prior dispute existed between these witnesses and the appellant, so that it can be said that they had falsely deposed against him. He further contended that the appellant has failed to give any explanation to the incriminating evidence against him, nor has he examined any witness in his defence to falsify the testimony of prosecution witnesses. It is lastly contended by learned APP for the State that the testimony of Shadre Alam (PW-5) stands corroborated with the testimony of Avtar Singh (PW-7). The contention that PW-5 could not have seen the appellant hit the deceased is without any merit and should be rejected.

6. We have heard learned Amicus Curiae for the appellant and learned APP for the State and gone through the material on record.

7. At the outset, it would be important to reproduce the testimony of the eye-witnesses Shadre Alam (PW-5) and Avtar Singh (PW-7). Shadre Alam (PW-5) has in his testimony stated that on 19th October, 2004 at about 11.00 a.m., he was cutting fodder in Yamuna Khadar near the temple near power house. The appellant was also working in a nearby field along with other person. The deceased (Chhajjan) had gone to the field where appellant Rakesh Kumar was working and there the appellant hit the head of the Chhajjan from the back with seru (the wooden bamboo used in a cot). One another person had also seen the appellant hitting the deceased who was working with him. After receiving the seru blow, Chhajjan fell down in the fields, they both reached near him in the fields where he was lying in injured condition. They lifted him and put him on the cot for taking him to the hospital, however, he died near the Pushta. Number of persons had gathered at the spot, the appellant was apprehended there, lastly, was handed over to the police. He stated that he was unaware as to why the appellant had beaten the deceased and also that he had never seen the appellant and the deceased in a quarrel earlier. In his cross-examination conducted on 5th October, 2006, he has admitted that from the place where he was working, the other places were not visible. The appellant was not visible from the place where he was sitting and working in his fields due to height of "jwar". On hearing his name from the other eye-witness from the fields where appellant was working, he rushed to that fields where he saw that the deceased had fallen on the ground and the appellant was standing with a seru in his hand. He further stated that he reached there in seconds. The other eye-witness was already present there and 2-3 other persons were also present who snatched seru from the appellant. He volunteered that the appellant even tried to hit them with seru. Further in his cross-examination dated 7th November, 2011, he reiterated that he reached the place of occurrence after hearing the noise from the distance of half a kilometer and nothing was visible from the place where he was standing. The said witness was re-examined on that day wherein he stated that the appellant was working in the fields along with other person. Appellant (Rakesh Kumar) hit Chhajjan with seru on his head from the behind. However, he stated that he had not seen the appellant while hitting on the head of the deceased. The person whose name was probably Avtar immediately reached the spot and caught hold of seru from the hand of the appellant. He also stated that he has given his statement to the effect that the appellant had hit Chhajjan with seru as per the version told to him by the said Avtar.

8. Avtar (PW-7) in his testimony stated, that on 20th October, 2004 around 11.00 a.m., he was doing job in the fields. On that day, he had returned from the mandi after selling vegetables and was present at the house. Rakesh Kumar and Chhajjan were doing labour work in the fields of Kartar. Both started quarrelling and abusing each other. Chhajjan sat near brah (drain). In the meantime, Rakesh Kumar came towards his jhuggi and brought a charpai seru (wooden

danda) thereafter the appellant uttered "Tu Mera Baap banana chah rah hai" and he hit wooden danda on the head of the Chhajjan. Chhajjan asked him as to why he was beating him, he once again hit the wooden danda on the head of the Chhajjan. When he was hitting the third blow of danda, he along with Shadre Alam tried to save him from the appellant. At that time, they apprehended the appellant, 2-3 other persons came there and the appellant was tied with the rope. All persons made Chhajjan lie on the cot. He was brought to Pushta however, when they were in the process of taking him to the hospital, he died. In his cross-examination, he stated that he was sitting outside his jhuggi at the time of incident. The distance between the place of incident and his jhuggi was 10 steps. He denied the suggestion that he was not present at the jhuggi on the date of incident. He further stated that Chhajjan was doing the work in the fields but the quarrel took place later on. The fields where Chhajjan was working was at a distance of 15-20 yards from his jhuggi. Shadre Alam (PW-5) was working in his fields at a distance of about 40-50 yards away from the place of incident. He further stated that he could have seen Shadre Alam cutting fodder. He denied the suggestion that Rakesh Kumar (appellant) was also doing work in jwar field and that he was not visible from his jhuggi. He further stated that at the time of incident, he, Shadre Alam, his brother and parents reached the spot. Shadre Alam put the deceased on the cot but he did not help him in putting the deceased on the cot.

9. A perusal of the testimony of both these witnesses would show that the deceased was hit by the appellant with a wooden seru on his head, as a result of which he had fallen down on the ground and when he was being taken to the hospital, he had passed away near Pushta. Avtar (PW-7) has fully supported the case of prosecution as an eyewitness of the incident and Shadre Alam (PW-5) has corroborated in his testimony that he had seen that the deceased was hit by the appellant on his head. However, in his first cross-examination dated 5th October, 2006, he has stated that the appellant was not visible from the place where he was sitting and working and also that on hearing his name from other eye-witness from the fields where the appellant was working, he rushed and saw that the deceased had fallen on ground and the appellant was standing with seru in his hand. Also, in his reexamination dated 7th November, 2007 by learned APP for the State, he stated that he had not seen the appellant while hitting on the head of the deceased and that he was told by Avtar (PW-7) that the appellant had hit the deceased. Although the said witness has not been declared hostile, there are certain discrepancies in his statement made in cross-examination. Even that be so, his testimony cannot be discarded as a whole, as per the judgment of the Supreme Court in Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, In the said case, it was observed as under:-

6..... It seems to be well settled by the decisions of this Court that-Bhagwan Singh Vs. The State of Haryana, , Shri Rabindra Kumar Dey Vs. State of Orissa, and Syad Akbar Vs. State of Karnataka, the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat

him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.....

10. Moreover, the testimony of Shadre Alam (PW-5) is corroborated in material parts with the testimony of Avtar (PW-7) with respect to the deceased lying in the field and the appellant being present on the place of incident with seru in his hand from where he was apprehended.

11. Even if we do not treat Shadre Alam (PW-5) as an eye-witness to the said incident, the sole testimony of Avtar (PW-7) corroborated in material parts as stated above would be sufficient to base the conviction of the appellant. We observe that Section 134 of the Indian Evidence Act, 1872 does not lay down any particular number of witnesses to prove a fact. The evidence has to be weighed and not counted. The Supreme Court in Kunju @ Balachandran Vs. State of Tamil Nadu, observed as under:-

11. 8. In Vadivelu Thevar Vs. The State of Madras, this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly, neither wholly reliable nor wholly unreliable. In the case of the first two categories this Court said that they pose little difficulty but in the case of the third category of witnesses, corroboration would be required. The relevant portion is quoted as under: (AIR p. 619, paras 11-12)

"11. ... Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way--it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses."

9. Vadivelu Thevar Vs. The State of Madras, was referred to with approval in

Jagdish Prasad and others Vs. State of Madhya Pradesh, This Court held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). But, if there are doubts about the testimony the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise.

12. The homicidal death of the deceased is not disputed. Moreover, the same is proved by Dr. Vinay Kumar Singh (PW-3) who conducted post mortem on the body of the deceased. He has deposed that on 21.10.2004 at about 12.30 p.m., he conducted the post mortem of Chhajjan, S/o. Ramji Lal with the alleged history of assault with wooden seru. On external examination, he found following injuries on his body:-

Injury no. 1-lacerated wound of 10 x 3 cms, margins irregular, obliquely placed over right fronto parietal region, bone deep.

Injury no. 2-lacerated wound, 11 x 2 cms in size, margins irregular, vertically placed over left fronto parietal region, bone deep.

Injury no. 3-bruise, 13x4 cms in size, present over left temporal region, obliquely placed.

Injury no. 4-bruise, 3 x 1.5 cms in size present over tip of the left shoulder.

Injury no. 5-lacerated wound, of 5 x 3 cms in size, bone deep present over left shin 4 cms below knee joint irregular in shape.

13. Further, cause of death has been opined as cranio cerebral damage consecutive (sic) upon blunt force impact to the head, all injuries were antemortem in nature and recent in duration.

14. Dr. Vinay Kumar Singh (PW-3) stated in the post mortem report that time since death is 22-28 hours. As per his report, death took place around 12.00 p.m. on 20.10.2004 whereas as per the version of eye-witnesses, incident took place around 11.00 a.m. on 20.10.2004. In view of above contradiction, learned counsel for the appellant concedes that there is a variation of 1-2 hours between the time of incident and time since death. However, we observe that this variation is natural variation and the time since death given by the doctor is only approximate and not exact. If there is a contradiction between ocular evidence and medical evidence, then the ocular evidence is to be believed by the Court. In this regard, reliance can be placed upon Mangu Khan and Others Vs. State of Rajasthan, wherein it was held that "on Forensic Medicine to show the time within which rigor mortis develops all over the body also has no factual basis. It

depends on various factors such as constitution of the deceased, season of the year, the temperature in the region and the conditions under which the body has been preserved".

15. In another case Solanki Chimanbhai Ukabhai Vs. State of Gujarat, it was held by the Supreme Court that

13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.

16. In the instant case, as per the post mortem report, the autopsy was started at 12.30 p.m. and was concluded at 2.00 p.m. The time since death was opined as 22-28 hours. As per the report, time of death must be 12"O clock whereas actual time of incident which was reported is 11"O clock on 20th October, 2004. Although, there is a variation of one hour approximately but it is not a material variation which can be fatal to the case of prosecution in view of the above discussion.

17. Perusal of the post mortem report (Ex. PW3/A) shows that injuries No. 1, 2 and 3 were caused by a blunt object and that too on a vital part of the body i.e. head, and were sufficient to cause death in the ordinary course of nature.

18. Moreover, the weapon of offence i.e. seru was recovered from the spot and was sent to Department of Forensic Medicine and Toxicology, where Dr. Vinay Kumar Singh (PW-3) after examination of the weapon, opined that "seru" was a blunt object having blood stains at one end and mud stains on the other. Further, he opined that injuries described in post mortem report are possible with this weapon and he proved the report in this regard as Ex. PW3/B.

19. In the instant case, the intention to cause bodily injury is made out from the testimonies of the witnesses namely, Shadre Alam (PW-5) and Avtar (PW-7) and its sufficiency to cause death in ordinary course of nature is proved by the post mortem report.

20. Also, the contention of the appellant that the distance between the place of incident and the place where Shadre Alam (PW-5) was present was 500 meters and he would not have seen or heard about the incident from such a distance is devoid of any merit in the light of site plan (Ex. PW12/A). The site plan clearly indicates the distance between PW-5 (described as "e" and the incident described as `a") was 50 meters and not 500 meters from where it is possible to clearly see the incident and hear the voice.

21. Last but not least, learned Amicus Curiae for the appellant contended that even if we believe that the appellant had caused the death of the deceased, however, in the circumstances of the case his case is still covered by Fourth Exception to Section 300 IPC and therefore, he should be convicted not u/s 302 IPC rather u/s 304 IPC. Here it is important to note that to avail the benefit of Exception IV to Section 300 IPC, the defence is required to probalise that the offence was committed without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The Exception is based upon the principle that in the absence of pre-meditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally any man of sober urges would not resort to. Sudden fight though not defined under the Act, implies mutual provocation. It has been held by Courts that a fight is not per se palliating circumstances and only unpremeditated fight as such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this Exception.

22. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily be depend upon the true facts of each case. For the application of Exception IV, it is not sufficient to show that there was a sudden quarrel and there was no pre-meditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner.

23. In the instant case, concededly no evidence was lead to show that there was sudden quarrel between the deceased and the appellant. But even if we believe that as there was no previous enmity between them, it could be a sudden quarrel, then also it can be clearly observed that the appellant had acted in cruel manner and took undue advantage as deceased was not found in possession of any weapon and moreover, the appellant had hit the deceased not once, but thrice and that too on the head, which is a vital part of the body. This shows that appellant had the intention of causing death of the appellant which is out of the purview of Exception IV to Section 300 IPC, also the onus was on the appellant to prove that his case fell within this exception by adducing evidence to this effect instead of a mere statement which he has failed to discharge. Therefore, the matter rests u/s 302 IPC only. According to the rule laid down in *Virsa Singh Vs. The State of Punjab*, even if the intention of the accused was limited to the infliction of a bodily injury or injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence could be murder. On that score also, the proper conviction will be u/s 302 IPC. In view of the aforesaid discussion, the appeal fails, deserves to be dismissed and the same is hereby dismissed. The judgment dated 30th

November, 2007 and the order on sentence dated 14th November, 2007 are upheld.