

(2011) 10 DEL CK 0023
In the Delhi High Court
Case No : Criminal A. No. 706 of 2011

Vicky Kumar and Others

APPELLANT

Vs

State of Delhi and Others

RESPONDENT

Date of Decision : 17-10-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173, 193, 319, 372
Evidence Act, 1872 — Section 24, 25
Limitation Act, 1963 — Section 5
Penal Code, 1860 (IPC) — Section 302, 324

Citation : (2011) 10 DEL CK 0023

Hon'ble Judges : S. Ravindra Bhat, J;G.P. Mittal, J

Bench : Division Bench

Advocate : K.S. Singh, for the Appellant; Sanjay Lao, APP for the State, for the Respondent

Final Decision : Dismissed

Judgement

G. P. Mittal, J.

Crl. M.A.6678/2011 (exemption) in Crl. A.706/2011

Exemption allowed, subject to just exceptions.

Appellants are permitted to file certified copies of the annexures within six weeks.

Crl. M.A.6679/2011 (Under Section 5 of the Limitation Act) in Crl. A.706/2011

Issue notice.

Mr. Sanjay Lao, APP accepts notice on behalf of the State.

There is a delay of 42 days in filing the appeal. He has no objection to the condonation of delay. The delay is accordingly condoned for the reasons as mentioned in the application.

CRL.A. 706/2011

1. This Appeal is preferred by Vicky Kumar and his father Ved Prakash under proviso to Section 372 of the Code of Criminal Procedure (Cr.P.C.) by virtue of which the victim was given a right to file an Appeal against an order of acquittal or of a conviction for a lesser offence etc. The Appellants are aggrieved by the judgment of acquittal dated 03.02.2011 (in Sessions Case No.98/2009) whereby the Respondents Nos. 2 to 11 were acquitted of the charges for the offence punishable u/s 302/324 Indian Penal Code (IPC).

2. According to the Appellants, the cousin and the uncle of the deceased, the latter's parents died when he (the deceased) was very young. The Appellants grievance is that the case was not properly investigated by the SHO and other police officials. Therefore, several complaints (Annexure P-1 filed with the Appeal) were presented before the Lt. Governor of Delhi and other authorities. In the complaints it was represented that Respondents Hari Kishan Garg, Manoj Garg and Yashoda Nandan @ Nandi were responsible for getting the deceased assaulted as they were unhappy with the love affair between the deceased and one Ruchi, daughter of the Respondent Manoj Kumar Garg. It is alleged that in spite of sufficient evidence, the said three Respondents were not prosecuted and kept in column No.2 in the chargesheet (under Section 173 Cr.P.C.) filed in the Court and it was only during the course of trial that they were summoned by the Additional Sessions Judge. The issue of taking cognizance against the three Respondents was taken up before the Metropolitan Magistrate, who by his order dated 06.10.2006 declined to issue summons against them. That order was unsuccessfully challenged in Criminal Revision No.791/2006. When the case was committed to the Court of Session, an application u/s 193 Cr.P.C. preferred by the first Appellant was dismissed by the ASJ by order dated 21.08.2007. After recording the testimonies of PW-7 Ashok Kumar, PW-8 Sanjay, PW-11 Shyam Sunder and PW-12 Vicky Kumar and on an application u/s 319 Cr.P.C., the learned ASJ summoned the three Respondents by an order dated 04.02.2010. The newly added accused (i.e. the earlier said three Respondents) preferred to cross-examine PWs 7,8, 11 and 12 only. They were further examined and cross-examined. Before dwelling further on the merits of the grounds taken in the Appeal, it would be worthwhile to come to the facts which can be extracted from Paras 5 and 6 of the impugned judgment. These are:-

5. The charge sheet brings out that on 20.11.2005 at about 11 PM DD No.34 was lodged with PP Ahata Kidara, PS Sadar Bazar Ex.PW-17/A on information by ASI Balbir Singh (Retd.) PCR Van Sugar-55 through wireless that "one man has been stabbed in Gali Barna Pahari Dhiraj R/o 4051 who was being taken to hospital, and there was an apprehension of disturbance of public peace and tranquility and request was made for sending police party". The investigation was marked to ASI Ajmer Singh (PW-17) who along with Constable Ajay Kumar (PW-18) reached the spot at Gali Barna where in the meantime Inspector V.S. Malik, Addl. SHO (PW-31) also reached with Reserved Police Force and staff SI Amar Singh, ASI Prem Dutt, Ct. Mohan Singh, Ct. Dhanpal; that some people were found present near Jai Durga Mandir and there was blood splattered at

three places near the slope of Jai Durga Mandir; about 50-60 steps away near shop no.3796 of M/s. P.R.Steal and about 95-100 steps near Pathwari Mandir shown at point A, B,C and D in the site plan Ex.PW-31/B; that no one present was able to give any detail about the said incident and therefore staff was deputed at the spot to preserve the place of occurrence and Inspector V.S. Malik along with ASI Ajmer Singh, Ct. Ajay Kumar reached Bara Hindu Rao hospital; in the meanwhile DD no.36 had been lodged at 12:30 PM at PP Ahata Kidara within the jurisdiction of PS Sadar Bazar Ex.PW17/B to the effect "that the man who was earlier reported to have been stabbed and taken to Bara Hindu Rao had been declared brought dead by the doctor at Bara Hindu Rao Hospital". The MLC of deceased Lalit Kumar @ Jojo S/o Ramesh Chand was obtained which revealed that at about 11:05 PM on 20.11.2005 he had been declared dead and there were six injuries and the nature of injuries were incised inflicted with some sharp edge weapons. The blood stained shirt of the deceased sealed in a parcel sealed with the seal of HRH was taken into custody vide memo Ex.PW21/A; PW-31 Inspector V.S. Malik made inquiries from ASI Balbir Singh Incharge of PCR Van that brought the injured to the hospital but he informed that the deceased had not been able to give him any information regarding the incident. Anyhow the rukka Ex.PW-31/A was written and Ct. Ajay Kumar (PW-18) was sent to lodge the present FIR which was lodged at 1:10 AM (night) on 21.09.2005 Ex.PW-3/A.

6. During the course of investigation, the Mobile Crime Team was called at the spot, photographs were taken, blood samples and earth control were taken into custody which were sealed with the seal of VSR and deposited in the Malkhana. The dead body was sent for postmortem and statement of witnesses u/s. 161 Cr.P.C. were recorded. The prosecution case is that during this time on 20.11.2005 at about 11:40 PM DD No.37 was also lodged at PP Ahata Kidara on an information from Lady Harding Hospital communicated by Duty Officer that one boy Anil S/o Hari Kishan R/o 2284/2 Bagichi Ragunath, Sadar Bazar had been admitted in an injured condition by his friend Vicky. On the said information relayed to PW-31 Inspector V.S. Malik, he along with SI Rakesh Kumar, Ct. Ravinder Kumar reached Lady Harding Hospital where MLC of injured Anil was obtained which communicated that he had been given incised injury on his left thigh with a sharp object. The statement of Krishan @ Vicky who was present thereat Ex.PW-27/B was recorded. The gist of which is as follows:

about 15-16 days back near Diwali Lalit @ Jojo had taken his mobile phone and he had not returning the same despite repeated requests and demands; that Lalit @ Jojo was stronger than him and therefore it was difficult to manage overpower him and, therefore, he discussed the matter with his friends Anil Kumar, Raja and Karan who assured him that they would talk to Lalit @ Jojo to see that his mobile phone is returned; that on 20.11.2005 at about 10:30 pm he along with Anil, Raja and Karan met Lalit @ Joji in Gali Barna and Lalit @ Jojo was requested to return the mobile phone which infuriated Lalit @ Jojo and he started slapping him besides giving fist blows and on that Anil, Raja and Karan intervened in the melee and there was a free fight; that he was terrified and ran

away towards Gali Barna, Nala road and after sometime he saw Anil in blood come out of Gali and screaming for help and he also saw Raja and Karan coming towards him; Anil told him that he had been stabbed by Lalit @ Jojo therefore he along with Raja and Karan brought Anil to Lady Harding Hospital.

On the said statement FIR No.377/05 u/s. 302 IPC Ex.PW-3/A was lodged and the blood stained shirt, pant and banyan of accused Anil were also seized and later when accused Anil was interrogated, he revealed that at the time of the incident were present his friends Krishan, Raja and Karan, Pradeep @ Dhera, Vicky, Vicky @ Kana and in the quarrel Lalit @ Jojo was stabbed.

3. In order to establish its case, the prosecution examined 31 witnesses.

4. Postmortem report Ex.PW-4/A brings out that the deceased Lalit sustained six stab injuries caused by a sharp edged weapon. PW-4 Dr. C.B. Dabas opined that the death was caused by hemorrhage and shock consequent to the injuries. Injury No.6, individually and collectively (with other injuries) was sufficient to cause death in the ordinary course of nature. PW-4 opined that the injury No.1 could be possibly caused by the weapon produced by the IO, sketch of which Ex.PW-4/C was prepared by him at the time of rendering the opinion. PW-4 was not subjected to cross-examination. Thus, the death of Lalit being homicidal, is not in dispute.

5. Out of the 31 witnesses examined by the prosecution, PWs 7,8,11 and 12 are crucial for disposal of this appeal as they are alleged to have witnessed the incident or reached the spot immediately after the incident.

6. On closure of the prosecution evidence Kishan @ Vicky (R-2), Anil (R-3), Hari Kishan Garg (R-9), Manoj Garg (R-10) and Yashoda Nandan (R-11) herein, were examined u/s 313 Cr.P.C. Respondent Hari Kishan Garg denied the prosecution allegation and took the plea that he was a Mandal President of BJP and Ved Prakash, who was the relative of the prosecution witnesses wanted to contest for the post of area Counselor. Since Ved Prakash and his family members / relatives had criminal backgrounds, he did not support his candidature. They nursed a grudge against his nephew Manoj Garg and him. They were, therefore, falsely implicated in the case. Same plea was taken by the Respondent Manoj Garg. Respondent Yashoda Nandan too denied the prosecution allegations. He alleged that he was implicated in the case falsely. There were 6-7 civil and criminal cases between him and the family of Ved Prakash. He was innocent, and was falsely implicated in the case. The Respondents Vicky and Anil too denied the prosecution allegations and pleaded false implication. Examination u/s 313 of the rest of the accused i.e. Vikas @ Kali, Krishna @ Raja, Karan Dayal, was dispensed with as there was no incriminating evidence which could be put to them in the witnesses' statements.

7. By the impugned judgment, the Trial Court acquitted the Respondents Kishan @ Vicky, Anil, Hari Kishan Garg, Manoj Garg and Yashoda Nanda holding that there were contradictions, discrepancies and improvements in the testimonies of

the witnesses making them unreliable and unworthy of credence. They were, therefore, acquitted of the charges framed against them. The rest of the Respondents (except Pradeep @ Dheru (juvenile) and Vicky @ Kane (PO)) were also acquitted on the ground that there was no evidence against them.

8. It is true that there was no evidence, not even a whisper how Respondent Nos. 4, 6 to 8 (Vikas @ Kali, Krishna @ Raja, Karan Dayal and Vicky @ Kane) were involved in the commission of the offence. No evidence was pointed out which could implicate them in the commission of the offence either directly or indirectly. Thus, the acquittal of Respondent Nos. 4 to 8 cannot be faulted with.

9. As far as case against the Respondent Nos. 2 and 3 (Kishan @ Vicky and Anil) and Respondent Nos. 8 to 11 (Vicky @ Kane, Hari Kishan Garg, Manoj Garg, Yashoda Nandan) goes as stated earlier, the prosecution examined PW-7 Ashok Kumar, PW-8 Sanjay, PW-11 Shyam Sunder and PW-12 Vicky Kumar.

10. PW-7 Ashok Kumar deposed that on 20.11.2005 at about 10:30 PM he went out of the gali (street) to purchase biri and cigarette. One Shyam Sunder met and informed him that some people had gathered in gali Barna near Lassiwalla shop and his Nephew Lalit was involved in a quarrel. He deposed to reaching the place of occurrence and finding his nephew Lalit, lying on the road in a pool of blood. Upon inquiry as to what had happened, Lalit told him that Yashoda Nandan @ Nandi, Hari Kishan Garg and Manoj Garg had stabbed him with a knife as he was involved with Manoj Garg's daughter Ruchi. His nephew, Sanjay also reached there and made a call to number 100. But PCR van did not reach there and Sanjay himself went and brought the PCR van from Bara Tuti Chowk and removed Lalit to the hospital. After medical examination, Lalit was declared dead by the doctor. In cross-examination PW-7 deposed that he had told the police (in his statement u/s 161 Cr.P.C.) that the deceased had informed him that Hari Kishan Garg, Manoj Garg and Yashoda Nandan had stabbed him. The witness was confronted with his previous statement where this fact was not so recorded. The witness was then confronted with the material omission, as in the previous statement, the witness deposed that Brahmchari (the witness volunteered that Yashoda Nanda @ Nandi was also known as Brahmchari) along with 2/3 boys had stabbed him. The witness admitted that there were several civil and criminal cases pending between Yashoda Nandan and the members of their family. He also admitted that there were some dispute between Hari Kishan Garg and the deceased but he was not aware about the details. It is important to note that there were material improvements / omissions in the statement made in the Court from his previous statement recorded u/s 161 Cr.P.C. If the assault was carried out by Hari Kishan Garg and Manoj Garg, their names would have been disclosed by this witness. It is well settled that the witness who makes material improvements in his deposition in the Court is unreliable.

11. In *Namdeo Daulata Dhayagude and Others Vs. State of Maharashtra*, the Supreme Court did not find it safe to rely on the testimony of a witness as there were material contradictions on vital points, between his deposition before the

court and his statement before the police.

12. PW-8 Sanjay deposed that on 20.11.2005 at 10:00/10:15 PM when he was on the second floor of the house he was called by someone from the gali and informed that his cousin Lalit was killed by someone. So, this witness was not an eye witness of the incident. In cross-examination, he could not give the names of the person who informed him about the incident. He contradicted PW-7 as the latter had deposed that he had called Sanjay. Moreover, PW-8's statement u/s 161 Cr.P.C. was recorded only on 10.12.2005 much after the occurrence. In any case, PWs 7 and 8's testimonies did not advance the prosecution case, firstly, they did not see the incident and, secondly, they were not reliable, mentioned earlier.

13. PWs 11 and 12's testimonies were also found to be contradictory to each other and unreliable. The Trial Court held that PW-12 Vicky Kumar too was not reliable as he did not raise any alarm nor call his relatives for help though the deceased was his close relative. The Trial Court reasoned in Para 21 and 22 as under:-

21. The said version of the incident is not fully corroborated by PW-11 Shyam Sunder. PW-11 Shyam Sunder was examined in chief on 03.07.2009 before summoning u/s. 319 Cr.P.C. and later on 04.05.2010 and "examination in chief" is ditto without any variation. The version of the incident as given by PW-11 is that he was in search of his cows and moved up to the corner of Gali Barna when he heard someone shouting "BACHAO BACHAO" (help) and he saw accused Hari Kishan had caught hold of both hands of Lalit and accused Manoj who was nephew of accused Hari Kishan gave a Lalkara "MARO SALEY KO AAJ YAH BACHNA NAHI CHAHIYA" (kill the rascal, don't spare him) and that Yashodananda took out a big knife and stabbed in the abdomen of Lalit.

22. There is nothing in evidence of PW-11 Shyam Sunder that accused Kishan @ Vicky A-1 and accused Anil A-2 played any role in the stabbing or inflicting injuries upon the deceased Lalit @ jojo. What also bears in my mind is that if the evidence of PW-11 and PW-12 is believed that incident of quarrel happened at one place near PR Steels at Gali Barna, and if that is so, it is not explained how come there was blood at four different places mark A,B,C and D in the site plan Ex.PW-31/B. There is apparent contradiction on this issue as between the evidence of PW-11 Shyam Sunder and PW-12 Vicky Kumar. PW-7 and PW-8 too have not ascribed any role to A-1 and A-2. The statement of A-1 Ex.PW-27/B made to the police in the hospital, referred above, is not admissible in evidence u/s. 24 and 25 of the Indian Evidence Act. Reference here can be made to the decision by the Apex Court in the case of Aghnoo Nagesia Vs. State of Bihar, . Mere fact that A-2 was admitted in hospital with a sharp incised wound on his leg too cannot by itself prove nothing.

14. The Trial Court rightly disbelieved PWs 11 and 12 as no explanation was given by them how blood was found at four different places i.e. on mark A,B,C

and D in the site plan Ex.PW-31/B when the incident took place near PR Steels at Gali Barna.

15. It is important to note that Respondent No.3 Anil sustained a knife blow injury on his hip and was removed to Lady Harding Hospital and was medically examined. On the statement of Respondent No.2 Kishan @ Vicky, FIR No.377/2005 was recorded in the PS Bara Hindu Rao. He stated that the cause of incident was due to the snatching of his mobile phone by the deceased about 15-16 days prior to the incident. He stated in his statement Ex.PW-22/B that his mobile phone was not returned despite repeated requests and demands. Since the deceased was stronger than him, he requested his friends Anil, Raja and Karan, who assured him to take up the matter with the deceased for return of his mobile phone. He stated that on 20.11.2005 at 10:30 PM, he requested the deceased to return his mobile phone which infuriated him and he started giving him slaps and fist blows. Anil, Raja and Karan intervened resulting in a free fight. He was frightened and ran towards gali Barna near nala and after sometime noticed Anil coming out of the gali screaming for help and Anil told him that he had been stabbed by Lalit (the deceased).

16. A knife was allegedly got recovered by Pradeep (facing trial before the Juvenile Justice Board). In view of the contradictions and improvements pointed out above, as also noticed by the Trial Court, it would be difficult to say as to how the incident took place, who was armed and who caused injuries. The presence of the Respondents Hari Kishan Garg, Manoj Garg and Yashoda Nandan at the spot during the incident was doubtful; even in the complaint lodged by Jagdish Chand with Lieutenant Governor of Delhi (father of PW-8 Sanjay) he mentioned that the attack on Lalit (the deceased) was engineered by Hari Kishan, Manoj Garg and Yashoda Nandan through some hired killers. There is every possibility that the Appellants suspected the involvement of Hari Kishan, Manoj Garg and Yashoda Nandan @ Nandi because of Lalit's alleged affair with Manoj Garg's daughter Ruchi. There is no evidence on record to establish any criminal conspiracy between the Respondents or to show that there was any previous concert to kill the deceased. It is doubtful that the Respondents Kishan and Anil participated in the actual attack. They were entitled to be given the benefit of doubt.

17. The Trial Court's reasoning acquitting the Respondents is sound and justified. We do not find any substantial or compelling reason to interfere in the order of acquittal passed by the Trial Court. The Appeal is dismissed being without any merit.

18. Appeal stands disposed of in the above terms.