
(2012) 04 DEL CK 0189

In the Delhi High Court

Case No : Criminal Appeal 200 of 2012 and Criminal M. (Bail) 333 of 2012

Zile Singh and ANR

APPELLANT

Vs

State of Delhi

RESPONDENT

Date of Decision : 09-04-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 24, 302, 307

Citation : (2012) 04 DEL CK 0189

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

Bench : Division Bench

Advocate : K.B. Andley, with Mr. M.L. Yadav, for the Appellant; Sanjay Lao, APP for the State, for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice S. Ravindra Bhat

1. In this appeal, the correctness of the judgment and order of the Additional Sessions Judge dated 21-01-2012 in SC. No. 64/2010 convicting the present appellants, Zile Singh and Shahid, for the offences punishable under Sections 307/302/24 IPC has been questioned. The appellants were convicted of the offences and were sentenced to undergo imprisonment for life; they were also sentenced to undergo other prison terms; besides they were directed to pay fine. All the sentences were to operate concurrently. The prosecution allegations in brief, are that one Rahim who later succumbed to knife injuries-and his brother PW-3 Bilal were attacked grievously by the present appellants as well as other co-accused, Deepak, and Channo. It was alleged that the police received information on 19-05-2010, after 10:30 PM, upon which the PCR vehicle reached the spot, at H.No. 63, Gali No. 6, opposite Railway line, rickshaw garage Jawalae Nagar. It was alleged that the PCR van went to the spot with PW-17 and others. The injured were taken to the hospital i.e. the Dr Hedgewar Memorial hospital. The prosecution alleged that PW-3 Bilal made a statement to the police which

formed the basis of the first information report i.e. 101/2010 dated 19-05-2010. According to the statement i.e. PW-13/A, one Sonu used to live near the witnesses' house. On the day of the incident, the witness was at home. Around 10:30 PM at night, he heard some commotion outside upon which he went out. A large crowd had gathered there. There was darkness all-around; he claimed that someone caused injury to his right finger as well as the back of his palm and shoulder. He thereafter lost consciousness. In the statement he mentioned that Zile Singh used to visit the house of Sonu and that two weeks ago there was a quarrel between his brother and Shahid with regard to some money transaction. On 19-05-2010 i.e. date of the incident the two appellants, along with Chanoo and Deepak went to the house of the deceased. Zile Singh allegedly said "Pakro salon ko. Aj Zinda Bach ke na jayen" ("Catch hold of them and see that they do not return alive"). PW-3 is also alleged to have said that thereafter Chunnu caught hold of him and his brother was caught hold of by Deepak. Zile inflicted knife injuries on Rahim and Shahid attacked him with his knife. Rahim sustained serious knife injuries on the stomach, head and legs.

2. The accused were arrested on different dates. After conclusion of the investigation, they were charged with committing the offences for which they ultimately stood trial. They denied guilt and claimed the trial. In the course of the proceedings before the Trial Court, the prosecution relied on the testimonies of 19 witnesses besides other materials such as exhibits, medical reports and the postmortem report of Rahim. On an overall consideration of all these materials, the Trial Court concluded that the appellants' guilt had been established. However the involvement of the other two accused was held not to have been proved beyond reasonable doubt; they were accordingly acquitted

3. Counsel for the appellants argues that the impugned judgment is unsustainable in law. It is pointed out that PW-3 Bilal the injured eyewitness did not support the prosecution story at all. Even though he is alleged to have mentioned the names of the assailants, on the fateful day (which ultimately led to the death of Rahim his brother as well as the injuries upon himself), he could not identify any of the accused in the court during the trial. Furthermore he denied having recorded the statements which were attributed to him, in the course of the investigation by the police. Thus being a hostile witness, the Trial Court could not have placed any reliance on his testimony, much less adopted the course of accepting what was stated by him in the statement u/s 161 Cr. PC, even though he did not support any of it during the deposition in the court. Learned senior counsel strenuously argued that the Trial Court misdirected itself in proceeding on the assumption that some parts of the testimony of PW-3 were favorable to the prosecution. On a complete reading of the deposition of this witness, argued counsel, there was no part of the testimony which could be said to support the prosecution. Emphasizing that PW-3 did not identify any accused and the sum and substance of his deposition was regarding injuries received during darkness and his inability to have seen anything on account of the injuries due to which he lost consciousness, the question of applying any principles culled

out from Supreme Court judgments or judgments of this court, in the event as witness turned hostile, could not have arisen at all.

4. It was urged that the Trial Court fell into grave error in trying to use the testimony of PW-17 who was not an eyewitness, to fill in the lacunae created in the prosecution story on account of PW-3's refusal to confirm the statement attributed to him, u/s 161 Cr. PC. It was submitted that PW-17, the police constable reached the spot after the attack. Even though he deposed that PW-3 and the injured were taken by him to the hospital, he actually improved upon the statement recorded during the investigation. Learned counsel emphasized that the Trial Court concluded that this witness had in fact been told by the deceased Rahim as was PW-3 about the sequence of events which led to the attack, and revealed the identity of the accused. Learned counsel emphasized again that when PW-3 the alleged eyewitness himself did not support the prosecution story and did not even mention about PW-17 or his being told by Rahim about the names of the attackers, there was no question of accepting the testimony of PW-17, and treating Rahim's statement to him as a dying declaration, which ultimately turned out to be the sole basis for the conviction of the appellants.

5. It was argued further that PW-5, wife of the deceased also did not support the prosecution story. She flatly denied any knowledge about the attackers or the identity of the appellants being the culprits involved in the crime. It was argued that when in a case like the present, two witnesses, relied upon by the prosecution contradict each other, the court cannot conclude that the allegations were proved by wholly ignoring the hostile witnesses testimony. In this case, submitted learned senior counsel the Trial Court strangely treated the statement recorded by PW-3, in the course of investigation - despite prohibition an embargo enacted by law, on the specious reasoning that it was corroborated by the testimony of PW-17 and the injuries on the body of PW-3. This just was not possible since both the witnesses contradicted each other and there was no method of verifying which of the two versions was correct. In such a situation the only course that the Trial Court should have reasonably and legitimately adopted was to acquit the accused since there was no other incriminating material presented against them.

6. It was lastly argued that the Trial Court on an overall appreciation of the same evidence concluded that the other two co-accused's guilt had not been proved. The Trial Court in fact held that their involvement too had not been established by the prosecution. Learned counsel here submitted that the same logic ought to have prevailed in the case of the present appellants. In not following the same reasoning and depriving the appellants of their entitlement to be treated as innocent till proved beyond reasonable doubt, the Trial Court fell into error.

7. The learned APP argued that even though PW-3 did not support the prosecution version, there could be no doubt as to the identity of the attackers. She emphasized that the police reached the spot soon after - almost immediately after the incident. The injured, including PW-3 Bilal were taken to the hospital.

When the PCR took the injured to the hospital, the deceased Rahim narrated the events, and clearly mentioned about the identity of the assailants. This was heard by PW-17; his version is consistent with what was recorded during investigation. It was emphasized that the quality of evidence, and not the number of witnesses, is important. If the witnesses on behalf of the prosecution were taken in its terms, PW-3 in fact corroborated what was heard by PW-17, which he deposed to. The APP also submitted that the reason for the attack, was the inability of the deceased to pay the amounts demanded by the accused.

8. It was submitted that the approach of the Trial Court in accepting only the version which seemed most plausible, and was free from doubt, and eschewing the other inconsistent evidence of PW-3 was sound and proper. Counsel relied on the findings in this regard, and argued that the witness had in fact been issued with notice for perjury. The Court, in proceeding to accept only those portions of PW-3's testimony, to the extent, they supported the other evidence implicating the accused, was just and proper; it was consistent with settled law in that regard.

9. It can be discerned from the above discussion that the stabbing incident took place after 10-30 PM, outside PW-3 Bilal's house. The prosecution story is that Rahim used to frequent the vicinity, and sometimes call on one Sonu. It was alleged that some time before the date of the incident, Rahim was involved in a quarrel with the accused, over return of some amount allegedly borrowed by him. In PW-13/A, the statement of PW-3 Bilal, Zile Singh and the co-accused Shahid were named. This witness was injured. However, in his testimony before the court, which is material for the purposes of the trial, the witness did not name anyone; he did not identify the accused, or the appellants, and merely stated that upon hearing a commotion he went outside, and was attacked on his finger, back of the palm, and in the back. He also mentioned that his brother was stabbed. According to the witness, there was no light, and before he could identify anyone, he lost consciousness. The question is, whether this witness said anything at all which incriminated or tended to implicate the accused, or any of them. The prosecution had sought to rely on Ex. PW-13/A, the statement of PW-3 recorded during investigation, and sought corroboration from PW-17. In this connection, it would be useful to recollect the norm which binds the courts while examining the testimony of hostile witnesses. This was summarized in Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, as follows:

It seems to be well settled by the decisions of this Court Bhagwan Singh Vs. The State of Haryana, Shri Rabindra Kumar Dey Vs. State of Orissa, and Syad Akbar Vs. State of Karnataka, that 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.

A similar view was voiced by the Supreme Court in Radha Mohan Singh @ Lal

Saheb and Others Vs. State of U.P., . What is apparent from the above extract is that the entirety of a hostile witnesses' testimony cannot be discarded; if there is something which assists the prosecution, it can be relied on. However, the rulings nowhere subscribe to the proposition - in our opinion a startling one-that if an eyewitness resiles from his previous statement completely, nevertheless, his statement recorded during the investigation, u/s 161 Cr. PC can be looked into if some elements are externally corroborated by another witness, who may not be an eyewitness. In this case, it is nobody's argument that PW-17 was an eyewitness. He went to the spot, to rescue the injured, and helped take them to the hospital. He deposed that Rahim mentioned the identity of the assailants. That has been used by the impugned judgment as a dying declaration, at one level, and also as corroborative of Ex. PW-13/A. The latter course, in our opinion, is in clear error of law. The burden cast on the prosecution to prove an accused's guilt beyond reasonable doubt is a constant and unvarying one; only the onus shifts when certain kinds of facts are proved (beyond reasonable doubt). The Trial Court appears to have adopted a "relay race" kind of an approach to the evidence in this case, by holding that even though PW-3 did not depose in the prosecution's favour, during trial, his statement u/s 161 could be seen, since PW-17 corroborated that Rahim and PW-3 were injured, and there was medical evidence to show that both were injured. This court is of the view that there is no evidence on the record which justifies the adoption of the approach indicated in Khujji vis-?-vis PW-3's evidence. We are also conscious of the fact that this witness himself was injured, and he lost his brother. Even the deceased's wife expressed ignorance about the identity of the assailants. In these circumstances, the Trial Court, in our opinion fell into grave error in taking into consideration PW-13/A.

10. The other evidence relied upon to record the Appellants' conviction, was the deposition of PW-17. Whilst there is no rule that prohibits a Court from accepting the testimony of a policeman who might have heard a dying declaration, it is always prudent to scrutinize such testimony and see if it finds corroboration from other materials adduced during trial. This witness stated that Rahim told him about the identity of the assailants; he mentioned all the accused. However, this witness was confronted in the cross examination; with the previous statement, Ex. PW-17/A which was silent on this aspect and had not stated the names of all the accused. Clearly, this aspect was overlooked by the Trial Court. Besides, this witness never claimed to be an eyewitness; therefore, the prosecution's effort in seeking to corroborate or support an eyewitness' Section 161 Cr. PC statement (PW-13/A by PW-3) could not have arisen. Even more importantly when two prosecution witnesses contradicted each other about the identity of the accused, and the one alleged to be an eyewitness disclaimed any knowledge, and refused to identify the accused, there was no credible material to proverbially sift the "grain from the chaff" so to say, and conclude which of the two versions was accurate and truthful. This court, therefore, is of the opinion that the impugned judgment could not have relied on the testimony of PW-17 in the manner it did,

and hold that the appellants were guilty as charged. In view of the above discussion, the appeal is entitled to succeed; the impugned judgment and order of conviction and sentence are hereby set aside. The appellants shall be set at liberty forthwith, unless required in any other case. The Appeal is accordingly allowed.