

Rajesh @ Kalia Vs. the State

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Court : Delhi

Decided On : Aug-14-2013

Judge : Sanjiv Khanna

Appellant : Rajesh @ Kalia

Respondent : The State

Advocate for Pet/Ap. : Mr. Sanjay Lao

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI CRIMINAL APPEAL No.43 of 2013 Reserved on :

8. h May, 2013 Date of Decision:

14. h August, 2013 % RAJESH @ KALIA Through: Versus THE STATEAppellant Ms. Anu Narula, Advocate. Respondent Through: Mr. Sanjay Lao, Addl. Public Prosecutor. CORAM: HONBLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE VED PRAKASH VAISH SANJIV KHANNA, J.: Rajesh @ Kalia by this appeal has challenged his conviction under Section 302 of the Indian Penal Code, 1860 (IPC) for murder of Head Constable S.K. Jha vide judgment dated 26th March, 2011, arising out of FIR No.335/2007, Police Station Adarsh Nagar. By order on sentence dated 28th March, 2011, he has been sentenced to imprisonment for life with the direction that he must undergo actual sentence of 30 years and grant of remission will not be considered before the said period. Fine of

Rs.2,000/- has also been imposed, and in default of payment of fine, he has to undergo simple imprisonment of one year.

2. Counsel for the appellant has submitted that the impugned judgment does not take notice of the contradictions in the statement of the two eye witnesses, namely, Asha Devi (PW-6) and Sai Dass (PW1). Our attention is drawn to the statement of Satinder Mishra (PW-2), brother-in-law of the deceased, and Monu Kumar Jha (PW-9), son of the deceased, to point out that there is difference in timings of the events and other related discrepancies, in their depositions. Delay in recording of Section 161 Cr.P.C. statements of both Asha Devi (PW6) and Sai Dass (PW1) is highlighted and it is submitted that the FIR was belatedly sent to the concerned Magistrate. It is further submitted that the medical records of Base Hospital, Delhi Cantt. contradict the oral depositions of Satinder Mishra (PW2) and Monu Kumar Jha (PW9) as well as that of Asha Devi (PW6) and Sai Dass (PW1). In view of this, the appellants counsel argues, the prosecution case is shaky and does not meet the standard of proof of beyond doubt and prove that the appellant was the perpetrator of the alleged crime.

3. The prosecution primarily relies on the testimonies of certain witnesses who it is stated happened to be present there at the time of occurrence. As per the prosecution version, Sai Dass (PW1), who was the owner of a Dhaba at Azadpur Sabzi Mandi, and Asha Devi (PW6), who worked at a STD booth, were eye witnesses to the occurrence in which the appellant Rajesh @ Kalia had given a danda blow on the head of the deceased. PW-1 has deposed that he was running Balwant ka Dhaba at Azadpur Sabzi Mandi and, though 1st July, 2007 was a Sunday, he was at the Dhaba for cleaning. The deceased, HC S.K. Jha was sitting inside the STD booth, situated on the right side of the dhaba, to make a call. The appellant came and attacked him on the back of his head with a danda. In order to save himself, S.K. Jha came running to PW-1s dhaba. This incident occurred at about 2.30 P.M. or 2.45 P.M. After 10-15 minutes, the appellant again came back armed with a danda. He exhorted that S.K. Jha should come out and he would kill him; usko bahar nikalo mein usko jaan se maarunga. PW1 informed the police post. He saw that there was a missed call on the mobile phone of S.K. Jha which was lying at the dhaba. He called back and apprised Satinder (PW-2), brother-in-

law of S.K. Jha, on the mobile of the deceased and asked him to come and take S.K. Jha to the hospital. Four family members of S.K. Jha came and took him in a TSR to the hospital. PW1 has affirmed that he had informed S.K. Jha's family regarding the appellant attacking SK Jha with a danda. In the cross-examination, he has accepted that his statement was recorded on 4th July, 2007. He has also accepted that two servants were also present in the Dhaba, at the time of occurrence. He was confronted with his statement (Ex.PW1/DA) recorded under Section 161 Cr.P.C. wherein he had not mentioned that the appellant came back after 10-15 minutes and exhorted that he would kill SK Jha. Lastly, he has deposed that family members of the deceased had arrived at the Dhaba at around 3.00/4.00 P.M. This portion of the statement, as noticed below, is incorrect and is not acceptable, keeping in view the statements made by Satinder Mishra (PW2) or Monu Kumar Jha (PW9). The possible reasons for and effect/consequence of this statement shall be dealt with subsequently.

4. Asha Devi (PW6) has deposed on identical lines as PW-1, that on 1st July, 2007 which was a Sunday, she was working at the STD booth. The appellant Rajesh @ Kalia was sitting on a platform lying in front of her STD booth. Deceased HC S.K. Jha, who was posted in the Police Post Mandi, came there and made inquiries from the appellant who was known to be involved in theft cases. HC S.K. Jha questioned him as to why he was sitting there. The appellant was asked to give personal search, since on an earlier occasion one knife had been recovered from him. This resulted in a quarrel and abuses were exchanged. S.K. Jha asked the appellant Rajesh @ Kalia to accompany him to the Police Post but he refused. S.K. Jha came inside the PCO booth to make a phone call to the Police Post. At that time, the appellant lifted a danda from the dhaba and hit S.K. Jha on his head. S.K. Jha fell down and the appellant ran towards the dhaba, in order to lift another danda, stating that today I would finish you, I shall see how you will take me to the police chowki. The appellant tried to give another danda blow to S.K. Jha but a truck driver, who was present there, prevented him from doing so. S.K. Jha went inside the dhaba to save himself. Later on PW-6 came to know that S.K. Jha had expired because of the injury/wound. She has identified the site plan (Ex. PW-5/A), which was prepared at her instance. She also identified the danda which was marked Ex.P1. In the cross-examination she has accepted that she did not know

the name of the truck driver who had caught hold of the appellant.

5. Satinder Mishra (PW2), brother-in-law of the deceased, was working as a Constable ITBP, but has stated that he was in Delhi on 1st July, 2007. He has deposed that S.K. Jha had gone on duty on 1st July, 2007 at 9 a.m. and PW-2 had spoken to him on the mobile phone at around 4.30 P.M. At that time, S.K. Jha told him that he would come back within an hour or two. Since S.K. Jha did not return, PW-2 made another call on his mobile phone. This time, he spoke to Sai Dass (PW1), owner of the dhaba, who informed him about the quarrel between the deceased and another person. Thereafter, he along with his nephew Monu, reached the Dhaba at Azadpur Sabzi Mandi where he was informed that Rajesh @ Kalia, a vagabond, had hit his brother-in-law S.K. Jha with a danda, on his head. S.K. Jha was lying unconscious. PW-2 took him to the Army Base Hospital in a TSR. On the basis of his statement (Ex.PW2/A), FIR (Ex. PW-7/A) was registered. He has accepted that due to nervousness (in Ex.PW2/A) he had mentioned about iron rod, but in fact Rajesh had hit a danda on the head of the deceased. After post mortem report (Ex. PW-3/A) dead body of S.K. Jha was handed over to him. In the cross-examination, he has deposed that he had reached the Dhaba at about 8.30 P.M., but has voluntarily stated that, at that time, owner of the dhaba was present.

6. Monu Kumar Jha (PW9), son of the deceased, has stated that at about 4.30 p.m., Satinder Mishra (PW2) had made a call to his father who had told PW-2 that he would return within one hour. Second call made, after about after an hour, was picked by Sai Dass (PW1), who then informed him about the quarrel. Thereupon PW9, along with PW2, reached the spot and found that his father was lying unconscious. They were informed that Rajesh, who used to roam around in the area, had given a danda blow to his father. No external injury was visible. PW-9 removed his father to the Base Hospital and informed his mother. There is nothing further in his cross-examination that should be taken notice of.

7. MLC (Ex.PW4/A) of S.K. Jha at Base Hospital, Delhi Cantonment was recorded on 2nd July, 2007. The time of admission as mentioned therein is 1.00 A.M. on 2nd July, 2007. It records the name of the relative as Smt. Bimla Devi, wife of S.K.

Jha. However, in the column brought by PW9s name was mentioned. S.K. Jha was an ex-serviceman and it appears that was the reason why he was admitted to the said hospital. MLC and Medical file/treatment papers (Ex. 4/A and 4/B) were proved by Col. C.M. Trivedi (PW4). PW-4 has deposed that MLC was prepared by Bijoy Kumar Jha, whose whereabouts were not known. As per the medical treatment records, the deceased expired on 3rd July, 2007 at 21.30 hours. An operation was also performed in the hospital. His post mortem, however, was conducted by Dr. K. Goel, BJRM Hospital, Jhangirpuri, who had appeared as PW-3. We shall refer to his statement subsequently.

8. There are discrepancies about the time as to when Satinder Mishra (PW2) and Monu Kumar Jha (PW9) had reached the spot and deposition of Sai Dass (PW1) regarding their arrival/reaching at the spot. Further, PW2 and PW9 have claimed that from the spot itself S.K. Jha was shifted to the hospital, but the time of admission, as mentioned in the hospital records, is 1.00 A.M. on 2nd July, 2007. Both PW2 and PW9 have deposed that PW2 had made a telephone call to S.K. Jha at about 4.30 p.m., thereafter second call was made after about 1-2 hours and they reached the spot at 8.30 p.m. Sai Dass (PW1), in the cross-examination, has stated that family members of the deceased had arrived at the dhaba at about 3-4 p.m. There is clear discrepancy in the witnesses statement, regarding the same. Surprisingly, the prosecution has not brought on record the call details of the deceaseds mobile. This is a serious lapse on behalf of the prosecution and we do not know why the call details were not produced. These discrepancies leave a gap in the prosecution case. No attempt has been made to explain what had really transpired or happened by way of reexamination of the witness. The plausible explanation is that PW1s deposition was being recorded in November, 2010, after a gap of nearly three years, and human memory cannot be precise after so many years. We would rely upon and accept the testimonies of PW2 and PW9 on the question of time. They have been categorical about the first call at 4:30 pm and the second call after 1 or 2 hours. On the first occasion PW2 had spoken with the deceased. This aspect has been discussed in subsequent paragraphs also. Further, it is discernible from the statement of PW2 and PW9 is that, though S.K. Jha was unconscious, they did not see any external head injury. It is apparent that the family members of the deceased did not realize the seriousness of the injury,

when they reached the spot, as there was no external wound. The fact that no external injury could be seen has been affirmed by PW9. Thus the time gap between 8.30 p.m., when PW-6 and PW-9 reached the spot, and when the deceased was taken to hospital can be explained since the family members probably never understood the life threatening nature of the suffered injury. The primary question before us is whether we should disbelieve the statement of PW1 and PW6 and their deposition as to the actual occurrence, on this basis. In the next few paragraphs we shall examine the said aspect.

9. It is obvious that the deceaseds family members were informed and came to know about the occurrence on the same day. Satinder Mishra (PW2) and Monu Kumar Jha (PW9) have averred that they had spoken to Sai Dass (PW1), who had apprised them that it was the appellant who had given a danda blow. PW1 has affirmed the said fact and has stated that he had also spoken to Satinder, brother-in-law of S.K. Jha.

10. In the hospital records (Ex.PW4/B) it is mentioned that the deceased had gone for duty, but did not return back. On this, the relatives had gone to the place of the duty, at around 1630 hours on 1st July, 2007, and found him unconscious there. Nearby people gave history of beating by some thieves on S.K Jhas head while he was trying to catch them. At another page dated 2nd July, 2007 at 12 noon, it is recorded that the deceased, was found in coma, at Azadpur Sabzi Mandi on 1st July, 2007 at 20.30 hours. Thus, there is contradiction in facts given and recorded immediately upon admission of the patient to the hospital authorities. This supports the view that the deceased was not taken to the hospital directly from the place of the occurrence but subsequently, since it is unclear from Ex. PW4/B whether the relatives had reached the spot at 4.30 p.m. or 10.30 p.m. on 1 st July, 2007. What we do know is that the deceased was taken to the hospital only at 1 a.m. at night on 2nd July, 2007.

11. The FIR (Ex. PW-7/A) in question was recorded on the statement of Satinder Mishra (PW-2). FIR was recorded on 2nd July, 2007 at 11.15 hours, initially under Section 308 IPC. The said FIR specifically mentions the name of Rajesh @ Kalia and it also states that PW2 came to know about the occurrence after speaking to

PW-1 on telephone. The FIR (Ex.PW7/A) is corroborated by the DD Entry 8A, which was recorded at 11.15 hours on 2nd July, 2007. The FIR was received by the Metropolitan Magistrate at 10 a.m. on 3rd July, 2007. Deceased, as noticed above, had expired on 3rd July, 2007 at 21.30 hours i.e. after the FIR was registered and even copy was received by the Magistrate. Subsequently Section 302 IPC was added.

12. In view of the aforesaid position, it is clear to us that PW-2 had certainly got in touch with Sai Dass (PW1) and PW1 had also named the appellant as the perpetrator. We do not think that the appellant can take much advantage and benefit of the time gap or the discrepancies in view of the said factual position. The difference in time gap could also be because of the fact that PW2 and PW9 have tried to justify and explain the reason why the deceased was taken to hospital at 1 a.m. at night and not immediately after they found him unconscious at the place of occurrence. It is obvious that PW1, PW2, PW7 and the wife of the deceased never realized the seriousness of the injury or that internal injury had been caused. This also may be an indication that the blow given by the appellant was not with great force.

13. Sai Dass (PW1) has mentioned about the events that occurred at the STD booth. Asha Devi (PW2), who was working at the STD booth, has narrated the incident in detail and that eventually the deceased had entered the dhaba, in order to save himself. In these circumstances, we accept the prosecution version and uphold the judgment of the trial court to the extent that the appellant was the perpetrator, who had hit the deceased with a danda on his head. The contention of the appellant that the statements of PW1 and PW6 were recorded belatedly on 4th July, 2007, though the occurrence had taken place on 1st July, 2007, means that their testimonies should be discarded, has to be rejected. This was a lapse on part of the investigating agency and they should have recorded the statements since the name of PW1 was specifically mentioned in the FIR (Ex.PW7/A). Similarly, the fact that statement of the truck driver, who intervened in the fight, could not be recorded is understandable since he was merely a passerby who would have probably stopped at the dhaba for a meal, and it would have been difficult to track him subsequently.

14. The next important and relevant issue is whether the appellant has been rightly convicted under Section 302 IPC or should the conviction be converted under Section 304, Part-I or Part-II.

15. The post mortem was conducted by Dr. K. Goel (PW3) who has deposed that two injuries were found on the body of the deceased. The first injury was the surgical wound and it was about 12 inches long. The second injury was a vertical bruise of 2.5 inches 1.5 inches over upper middle part of occipital area, redish colour with bluish tinsel. The bruise showed coalition with faint rail road pattern. On internal examination, he found massive sub-scalp bruising over occipital region around injury No.2 and left fronto-parieto temporal regions around craniotomy area. PW3 had fissure fracture occipital wound middle part extending transversely towards right temporal bone about 9-10 cm long. Left side craniotomy performed in hospital with excision of bone piece of size 4.5 inches 2.5 inches from left fronto-parieto-temporal regions with tears in meninges. Massive SAH was present over temporal lobes. Brain oedema was present. Bilateral uncal herniation was also present. PW3 has further opined that craniocerebral injury was sufficient to cause death in ordinary course of nature. He has stated that the said injury would have been caused by the danda Ex.P1.

16. Recovery of the said danda is attributed to the disclosure statement (Ex.PW12/I) made by the appellant. The appellant was arrested on 6th July, 2007 after a gap of about five days from the occurrence. We are well aware that dandas are easily available and can be procured from anywhere. There was no need and necessity for the appellant to keep the said danda with him, even after 5 days of the occurrence, or that the danda should be available at/nearby the crime spot. As per Asha Devi (PW6), the appellant had hit from one danda and then had gone to lift another danda from PW-1s dhaba. Therefore, we are inclined to disregard and disbelieve the recovery of weapon of offence. However, this does not mean that danda blow was not given. It is clearly discernible from the statement of PW2, PW6 and the FIR is that quarrel had taken place and a danda blow was given.

17. It was a known fact that the appellant used to roam in the area and had probably been questioned by the deceased, on more than one occasion. The

appellant, in his statement under Section 313 Cr.P.C., has stated that PW1 has a dhaba at Azadpur Sabzi Mandi, but has denied that the deceased had ever made inquiries from him. The important question before us is whether the appellant wanted to and had the requisite intention to cause the said injury and whether the said intention is covered within the four corners of Section 302 IPC or the case would fall under Section 304, Part-I or Part-II. There have been cases where the accused has been convicted under Section 302 IPC when injury was caused on the head i.e. the vital part of the body. We notice that PW3 has mentioned that craniocerebral injury was sufficient to cause death in ordinary course of nature. However, there is one aspect which we want to highlight. Interestingly, the post mortem report (Ex. PW7/A) refers injury No.2, an external injury, whereas the hospital medical treatment records (Ex.PW4/B) does not mention or record any external injury whatsoever. Ex.PW4/B refers to closed head injury. The deceased was subsequently operated on 2nd July, 2007 and expired, as noticed above, in the hospital on 3rd July, 2007 at 21.30 hours. It is discernible that neither the deceased nor the relatives of the deceased thought that injury in question was serious. It is not a case where the deceased and the appellant had previous ill-will or enmity or that the appellant had pre-meditated and procured the weapon of offence, in order to commit the crime. In fact, dandas are easily available everywhere, specially, in a place like Azadpur Sabzi Mandi and was picked at the spot by the appellant. It is obvious that the appellant did not have the intention to cause death. PW1 and PW6 have made reference to the utterances made by the appellant at the time of the occurrence, but we feel that those should not be given undue importance as this would be a reflection of exaggeration and statements attributed, have to be read with caution. There was certainly a quarrel, which is even noticed and mentioned in the FIR. The whole thing happened at the spur of the moment in the heat of passion as a result of a sudden fight. There was no intension to cause death. The injury caused was not treated and regarded as serious or life threatening by the relatives of the deceased or even by PW1 and PW6. The deceased was taken to the hospital many hours after of the blow. Deceased had not got in touch with the police or had not even reported the incident. The injury or blow was one and it is not a case of multiple or repeated blows. In view of this, we feel that the case will be covered by Exception IV to

Section 300 IPC.

18. We convert the conviction of the appellant from under Section 302 IPC to Section 304, Part-I. As per the nominal roll, it appears that the appellant has already undergone the sentence for over six years. The sentence awarded is reduced to the period undergone. The appellant will be released forthwith unless he is required to be detained in any other case in accordance with law. The appeal is accordingly disposed of. (SANJIV KHANNA) JUDGE (VED PRAKASH VAISH) JUDGE August 14th , 2013 NA

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