

Babu Khan Vs. State

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Court : Delhi

Decided On : Sep-04-2013

Judge : Mukta Gupta

Appellant : Babu Khan

Respondent : State

Advocate for Def. : Mr. Manoj Ohri

Advocate for Pet/Ap. : Mr. R.N. Mittal, Mr. Ankit Goel, Mr. Manoj Kumar

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. No. 151/2003
Reserved on:

20. h May, 2013 Decided on:

4. h September, 2013 % BABU KHAN Through: Appellant Mr. R.N. Mittal, Sr. Adv. with Mr. Ankit Goel, Mr. Manoj Kumar, Adv. with Appellant in person. versus STATE Through: Respondent Mr. Manoj Ohri, APP for State. Coram: HON'BLE MS. JUSTICE MUKTA GUPTA 1 By this appeal the Appellant challenges the judgment dated 28th January, 2003 convicting him for offence punishable under Section 25 Arms Act and the order on sentence dated 27th February, 2003 directing him to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs. 200/- and in default of payment of fine to further

undergo simple imprisonment for 15 days.

2. Learned counsel for the Appellant contends that allegedly the disclosure was made in the other case on 7th November, 1991, however the recovery was made on 9th November, 1991. As per the disclosure the weapon of offence had been given to another person who was a resident of Noida, however the recovery was made from the back side of the house from beneath the debris. The recovery is not pursuant to the disclosure made and thus the recovery cannot be believed. PW3 Mohd. Yasin has not supported the prosecution case. Constable Suraj Prakash has also turned hostile. Thus it cannot be said that the testimony of the investigating officer is corroborated by Constable Suraj Prakash who has admitted the prosecution case in cross-examination by the learned APP. The sanction to prosecute has not been proved properly as the sanctioning authority did not appear in the witness box. The Appellant is thus entitled to the benefit of doubt or in the alternative the sentence may be reduced on the period less than one year for the reasons to be recorded, as the present case is a very old case of the year 1991 and the Appellant has already faced agony of trial and appeal for 22 years.

3. Learned APP on the other hand contends that the discrepancy in the disclosure statement of the Appellant has not been put to the investigating officer PW7 S.I. Kishan Swaroop who has proved the recoveries. The Appellant was taken in Police custody on 8th November, 1991 and on 9th November, 1991 at his instance the recovery was made, thus the same cannot be doubted. PW2 the expert has proved that the weapon of offence recovered from the Appellant was fire arm as defined under the Arms Act. PW5 Constable Suraj Prakash has supported the prosecution case to this extent and thus the case of the prosecution is not based only on the statement of the investigating officer.

4. Heard learned counsel for the parties. FIR No. 573/1991 under Section 25 Arms Act was registered at PS Malviya Nagar as a sequel to FIR No. 570/1991 under Section 307/148 IPC and 27 Arms Act. The abovementioned FIR was registered on the statement of PW7 S.I. Kishan Kumar who stated that on 7th November, 1991 while posted as ASI at PS Malviya Nagar he received DD No. 11A, on reaching house No. K-33, Khirki Extension, Malviya Nagar, he found Atique and

Zamil on the spot and he apprehended them. Thereafter he went to the hospital and found injured Meharban Ali admitted there on whose statement FIR No. 570/1991 was registered. On 8th November, 1991 he arrested Appellant Babu Khan and Akbar Ali and their personal search was taken vide memo Ex. PE and PP. On interrogation Appellant Babu Khan made a disclosure vide memo Ex. PG. The Appellant was taken on Police remand for one day and on 9th November, 1991 he got recovered one dessi katta, two live cartridges and one empty cartridge. He prepared the sketch of the katta, live cartridges and empty cartridge vide Ex. PX4. The katta and the cartridges were kept in separate pullanda and seized vide memo Ex. PW3/A. Statements of the witnesses were recorded and on the basis of this recovery FIR No. 573/1991 under Section 25 of Arms Act was registered.

5. The public witness PW3 Mohd. Yasin did not support the prosecution case. The other witness to the recovery Constable Suraj Prakash in his examination-in-chief did not state anything about the recovery of katta and the cartridges from the Appellant. However, on cross-examination by the learned APP he admitted that one katta, two live cartridges and one empty cartridge were recovered on the pointing of the Appellant and were seized vide memo Ex. PW3/A. Thus, it has to be seen that in the absence of corroboration of the testimony of PW7 by the recovery witnesses whether conviction can be safely based merely on the testimony of PW7 S.I. Kishan Kumar. Learned counsel for the Appellant has relied upon the disclosure statement of the Appellant that in the disclosure statement different version was given. It may be noted that a disclosure statement is not admissible in evidence and only that portion of the statement which leads to the discovery of a fact can be looked into. Thus, the learned counsel for the Appellant wants to place reliance on an inadmissible piece of evidence which is impermissible in law. Suffice it is to say that even if an accused says that he can point out towards the weapon of offence and leads to the place from where the recovery is made, the portion of the statement which leads to the recovery of weapon of offence is admissible in evidence. Thus, the remaining portion which is sought to be relied upon by the learned counsel for the Appellant is inadmissible in evidence and cannot be looked into.

6. No doubt, the version of PW7 is not supported by the other prosecution witnesses, however there is no inherent improbability or contradiction in the statement of PW7. The version of PW7 is further corroborated by the expert opinion Ex.PX whereby the katta was described the recovery to be of 12 bore country made pistol, 12 bore fired cartridge and two 12 bore live cartridges. They were opined to be fire arm and ammunitions as defined under the Arms Act and were live. The fired cartridge case was opined to have been fired from 12 bore country made pistol recovered from the Appellant.

7. Learned counsel for the Appellant has stated that the sanctioning authority has not appeared in the witness box and instead PW1 who was working as the staff officer of the then DCP of the South District has appeared in the witness box. It may be noted that when the sanction order was exhibited vide Ex.PX, no objection to the document being exhibited was made by the defence rather PW1 has not even been cross-examined. Further Ex.PX demonstrates consideration of material facts and thus cannot be said to be suffering from non-application of mind. In view of the aforesaid discussion, I find no infirmity in the impugned judgment dated 28 th January, 2003 convicting the Appellant for offence under Section 25 Arms Act.

8. As regards the quantum of sentence, the Appellant has been awarded rigorous imprisonment for a period of two years. The incident is of the year 1991 and nearly 22 years have since passed by during which the Appellant has faced the ordeal of trial and appeal. The fine amount has already been deposited. In view thereof, I deem it fit to modify the sentence to the minimum prescribed. The order on sentence dated 27 th February, 2003 is hereby modified to the extent that the Appellant is directed to undergo rigorous imprisonment for a period of one year. Appeal is disposed of accordingly. (MUKTA GUPTA) JUDGE SEPTEMBER 04 2013 ga