

State Vs. Mohd. Iqbal

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Court : Delhi

Decided On : Sep-09-2013

Judge : G.P. Mittal

Appellant : State

Respondent : Mohd. Iqbal

Advocate for Pet/Ap. : Ms. Rajdipa Behura

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

9. h September, 2013 + CRL.L.P. 472/2013 STATE Through: Petitioner Ms. Rajdipa Behura, APP for the State. versus MOHD. IQBAL Respondent Through: Nemo. CORAM: HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MR. JUSTICE G.P. MITTAL

JUDGMENT

G. P. MITTAL J.

(ORAL) CRL.M.A. 13466/2013 & CRL.M.A. 13467/2013 (delay) 1. Crl.M.A.13466/2013 has been filed by the State seeking condonation of 70 days delay in filing the present petition for leave to appeal and Crl.M.A.13467/2013 has been filed by the State seeking condonation of 72 days delay in re-filing the present petition for leave to appeal.

2. Heard. For the reasons stated in the applications, present applications are allowed. Delay in filing and re-filing the petition for leave to appeal is condoned.

3. Applications stand disposed of. CRL.L.P. 472/2013 4. By this petition under Section 378 of the Code of Criminal Procedure, 1973 (the Code), the State seeks leave to appeal against the judgment dated 08.02.2013 passed by the learned Additional Sessions Judge (ASJ), (Central) Delhi in Sessions Case No.25/2010 whereby the respondent was acquitted of the charge under Section 302 of the Indian Penal Code, 1860 (IPC).

5. The case of the prosecution as unfolded by PW-3 (Mohd. Akbar), who is the star witness of the prosecution, is that on 20.03.2010 at about 1:30 P.M. he was returning home from the barber shop. When he reached the street near his house, he noticed respondent Mohd. Iqbal rushing out of their house holding a knife in his hand, chasing deceased Mohd. Akhtar uttering mai usko aaj chhodunga nahi. PW-3 also chased the respondent. Since the respondent was running very fast, PW-3 could not catch up with him. When he (PW-3) reached Shahganj Chowk, he saw the respondent catching hold of his deceased brother (Mohd. Akhtar) and repeatedly stabbing him with a knife. When he reached near the respondent, he found the deceased had fallen on the ground and the respondent was trying to cut the neck of the deceased. He pushed the respondent aside with force. The respondent escaped towards G.B. Road with the knife which he was holding in his hand. In the meanwhile, a policeman (Constable Bandhu Kumar PW-7) reached the spot. PW-3 with the help of PW-7 removed the deceased to LNJP hospital where Mohd. Akhtar was declared brought dead. The IO recorded the statement (Ex.PW-3/A) of Mohd. Akbar, made his endorsement (Ex.PW-29/A) on the same and on the basis of which the instant case was registered. During the course of investigation, the respondent was apprehended and a bloodstained knife was recovered in pursuance of the disclosure statement made by him. On completion of the investigation, the respondent was forwarded to the court for trial for an offence punishable under Section 302 IPC.

6. On the respondent pleading not guilty to the charge, prosecution examined 29 witnesses which included Mohd. Akbar PW-3, Pawan Kumar PW-8 and Mohd.

Salaman PW-15, who were projected as eyewitnesses to the alleged incident, Constable Bandhu Kumar PW-7 who had removed the deceased to the hospital, apart from the witnesses to the recovery of the mobile phone, bloodstains etc. from the spot and recovery of the knife at the instance of the respondent.

7. On appreciation of evidence, the learned ASJ disbelieved PWs 3, 8 and 15 to be eye-witnesses of the incident. He further disbelieved the recovery of the knife at respondents instance. He found the recovery of the mobile phone belonging to the respondent from the spot to be doubtful because of the calls having been received and made therefrom even after the incident. The learned ASJ thus reasoned that the prosecution case was not established against the respondent beyond the shadow of all reasonable doubts. He, therefore, acquitted the respondent giving him benefit of doubt.

8. Learned APP for the State argues that the trial court committed manifest error of law in disbelieving the testimonies of the three eye witnesses and the recovery of knife at respondents instance in pursuance of the disclosure statement made by him. While relying on *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* AIR 198.SC 753, the learned counsel argues that on seeing a gruesome incident, different witnesses behave differently and simply because PW-3s clothes were not stained with blood or that the same were not seized by the IO or that his name was not mentioned in the relevant column of MLC as the person who had brought the injured to the hospital, the learned ASJ ought not to have disbelieved PW-3 to be an eye witness. It is stated that PW-8 and PW-15 also supported the prosecution version with regard to the injuries inflicted by the respondent on the deceased. Constable Bandhu Kumar PW-7 also stated about the presence of PW-3 in the hospital. Thus, the three eyewitnesses (PWs-3, 8 and

15) ought to have been believed by the learned ASJ which was sufficient to bring home the respondents guilt. It is urged that in view of the overwhelming evidence adduced by the prosecution, the order of acquittal passed by the learned ASJ is liable to be reversed.

9. We have heard the learned APP for the State and have perused the impugned judgment and the testimonies of the material witnesses relied upon by the State.

10. In our view, the trial court has given valid and substantial reasons for disbelieving the alleged three eye witnesses as also the recovery of the mobile phone from the spot and the recovery of the knife in pursuance of the disclosure statement (Ex.PW-24/B) alleged to have been made by the respondent. We are unable to be persuaded by the learned APP to take a different view than the one taken by the learned ASJ.

The relevant reasoning of the trial court is extracted hereunder:

11. PW3 Mohd. Akbar is younger brother of the accused and Mohd. Akhtar (since deceased) was the youngest brother. According to PW3 Mohd. Akbar, on 20.03.2010 at about 1.30 pm he was returning home from a barber saloon. When he reached in the street, near his house, he saw the accused rushing out of the house holding a knife in his hand. The accused was uttering that he was not going to leave him (Mohd. Akhtar). On hearing these words, he (PW3) chased the accused. He could not catch hold of him (accused) but kept following him, because the accused was running very fast. On reaching Shah Ganj Crossing, he saw that accused had caught hold of Mohd. Akhtar and repeatedly stabbed him with the knife. Further according to the witness, when he reached near the accused, he found him trying to cut neck of Mohd. Akhtar, who had fallen on the road. He then pushed the accused on one side with force and the accused ran away. It is not case of the prosecution that any other family member of the accused was not present inside the house when PW3 Mohd. Akbar saw accused and the victim running out of the house. There is no evidence that any other family member also rushed out of the house. Had the accused come out of the house with a knife while chasing the younger brother, it is not believable that other family members would have remained behind. They would have also chased the accused so as to avoid any harm to Mohd. Akhtar. Since there is nothing on record to suggest that any other family member came out of the house or chased the accused so as to save the victim, it is difficult to believe the version of PW3 Mohd. Akbar that it is only he who came out of the house and chased the accused. Even otherwise on having seen the accused chasing his younger brother, with a knife in his hand, Mohd. Akhtar (sic Akbar) must have raised hue and cry attracting other persons of the area or in the street, but from the evidence led by the

prosecution, it appears as if no hue and cry was raised by Mohd. Akbar. Further reference has been made to the cross examination of PW3 Mohd. Akbar, where (sic where) he displayed ignorance on material aspects of the case and also improved upon his statement Ex PW3/A made before the police, while narrating the incident in Court, so on to contend that these omissions are improvements further go to suggest that PW3 Mohd. Akbar was not present on the given date, time and place. In his cross examination, PW3 displayed ignorance on various aspect. In this regard statement of the witness reads as under:

I do not remember if I had specifically mentioned in my statement that behaviour of the accused was bad or cruel towards my deceased brother. I do not remember whether I had told the police that accused used to force him to work him without any remuneration. I do not remember whether I told the police that when Akhtar was still in gali accused Iqbal started beating him. I do not remember whether I stated to the police that Akhtar saved himself and rushed inside the house. I do not remember whether I told to the police that Akhtar told us that Iqbal was beating him to extort money. I do not remember whether I stated to the police that when I reached near the accused he was trying to cut the neck of my brother with knife, who had fell on the road. I do not remember whether I told the police that I pushed the accused on one side with the force. I do not remember whether I stated to the police that one police man had come from nearby chowki, with whose help I took my injured brother to the hospital.

A perusal of his cross examination would reveal that he has improved upon material aspect. In this regard statement of the PW3 when reproduced reads as under:

I think I stated to the police that whenever accused used to beat the deceased, we all used to save the deceased from the accused. I stated to the police that accused in routine used to extort money from our deceased brother who was working independently in Sita Ram Bazar. I stated to the police that on 20.03.2010 at about 1.30 pm, I was returning home after getting my shave done from the shop. I stated to the police that when I reached in the gali near my house, I saw accused rushing out of the house.

A comparison of this statement Ex PW3/A made before the police, with the statement made in Court, would reveal that PW3 Mohd. Akhtar (sic Akbar) has improved upon these material aspects of the prosecution version. It is case of prosecution that on 18.03.2010, during the night, Mohd. Akhtar was severely beaten by the accused when the former did not pay him money; that on that night all of them saved Mohd. Akhtar from the accused but the accused extended threat that he would kill Mohd. Akhtar in case he fail to (sic pay) money every week. In his statement made in Court, when the witness was cross examined, PW3 Mohd. Akhtar stated that he had told the police that two days before the date of incident Akhtar had returned home at about 01.30 am in the night after work as he used to make video films marriages and that Iqbal threatened that if Akhtar will not work for him, he will kill him. In his statement made in Court, it does not find mention that other family members were present at the house on the night of 18.03.2010 or that they have saved Mohd. Akhtar from the accused or that accused has extended threat to kill Mohd. Akhtar in case he failed to pay him money every week. This goes to show that even in this regard PW Mohd. Akbar has not made statement in consonance with statement Ex PW3/A made before the police.

12. During investigation no person from the neighbouring house was associated in the evidence to lend corroboration to the prosecution version that any one of them had heard any cry being raised by PW3 Mohd. Akbar or any other family member or to have seen accused chasing the victim. In this regard, when there is not corroboration from any other person, it is difficult to rely on the sole statement of PW3 Mohd. Akbar that he saw accused coming out of the house with knife and chasing the victim. According to PW3 Mohd. Akbar, one policeman came from a nearby chowki and helped him in removal of his brother to LNJP Hospital. But a perusal of MLC Ex PW9/A would reveal that there is no mention in the relevant column meant for name of the relative or friend of the injured, accompanying injured at the time he was brought LNJP Hospital. There is only the name of Ct. Bandhu. Had Mohd. Akbar PW3 accompanied Ct. Bandhu and Mohd. Akhtar to LNJP Hospital, his name must have been recorded by the doctor in the relevant column. Furthermore, the alleged history, as recorded in MLC Ex PW9/A was provided by Ct. Bandhu. Doctor nowhere mentioned that any alleged history was

provided by any person by the name of Mohd. Akbar. As per alleged history, it was a case of physical assault at Shah Ganj crossing. There is no mention in the alleged history that it was a case of assault by brother on the person of other brother., When we advert to the statement of PW7 Ct. Bandhu, it becomes clear that he was informed by many persons that one person was stabbing another at Shah Ganj Crossing and thereupon he reached the said crossing and found Mohd. Akbar (sic Akhtar) lying in pool of blood. The witness nowhere stated that Mohd. Akbar met him at the place where said injured was lying. Had Mohd. Akhtar (sic Akbar) been present there, Ct. Bandhu must have specifically stated about presence of Mohd. Akbar there. Had Mohd. Akbar accompanied Ct. Bandhu to the hospital, he would not have omitted to state about the same. But there is nothing in the statement of PW7 that Mohd. Akbar accompanied from spot to the hospital. Ct. Bandhu simply stated about recording of statement of Mohd. Akbar by Inspector Jarnail Singh at the hospital. During investigation, IO did not seize any blood stained clothes of PW Mohd. Akbar to substantiate prosecution version regarding his presence at the given date, time and place or that he had accompanied to the hospital. As rightly pointed out by learned defence counsel there is contradiction in the statements of PW3 about conveyance used in removal of Mohd. Akhtar to the hospital. According to PW3 Mohd. Akbar, injured was taken to hospital in a cycle rickshaw. Contrary to it is statement of PW7 Ct. Bandhu who stated in his cross examination that within a minute or two a TSR was arranged and the injured was removed to hospital. Recovery of mobile phone from the spot 13 . It is case of prosecution that one mobile phone no.9213880289 i.e. of the accused, was found lying near an electric pole, at the scene of crime and the same was seized by recovery memo Ex.PW3/B by Inspector Jarnail Singh in presence of Mohd. Akhtar (sic Akbar) SI Brijesh Mishra, HC Mahesh Tyagi. While appearing in court as PW3 Mohd. Akbar deposed that two mobile phones were recovered by the police from the spot. He specifically stated that one mobile phone was of the accused and other was of the deceased. But surprisingly police officers have nowhere whispered about recovery of another phone i.e. of the deceased from the same place. Electronic Evidence 14 . Prosecution has examined PW5 M.N. Vijayanand to prove that mobile phone connection no.9213880289 was in the name of the accused and also to prove call details Ex.PW5/C. As per the

prosecution version, occurrence took place on 20.03.2010 at about 1.35 p.m. but PW5 has admitted in his cross examination that as per call detail record on 20.03.2010 four incoming calls were received on his mobile phone at 2.10, 3.49, 4.13 and 5.34 and the last outgoing call made from his mobile phone was at 6.22 p.m. It has rightly been contended that in case this mobile phone is alleged to have been found lying at the spot soon after the occurrence but it remains unexplained as to how conversation could take place by way of four incoming calls: and one outgoing call depicting after the occurrence. The last four incoming calls were made from 9311899168, 9871858349, 9911887592, 9811155938. There is nothing on record to suggest that any such caller was associated in the investigation or enquired to know as to who had made calls on this mobile phone. The last outgoing call made from this mobile phone was made at phone no.9250131777. No such person having this mobile phone connection no.9250131777 was associated in the investigation to inquire from him or her as to who had made this outgoing call to him at about 5.34 p.m. When prosecution has failed to establish as to who made last four incoming calls and who received the same and as to who made the last outgoing calls and who received the same, the prosecution version that accused was present on the given date, time and place of occurrence with this mobile phone connection becomes doubtful. PW8 15. As per prosecution version, PW8 Pawan Kumar who runs a scooter repair work in shop No.3804, Shah Ganj, Ajmeri Gate, Delhi also witnessed the accused and Mohd. Akhtar (since deceased) coming from the side of Shah Ganj while running and then stabbing Mohd. Akhtar with knife. According to this witness, their brother Mohd. Akbar was also seen rushing to save Mohd. Akhtar but by then accused had already stabbed Mohd. Akhtar and ran away with knife. Learned defence counsel has pointed out that this witness did not make any phone call although there a telephone connection his shop. He also did not try to save Mohd. Akhtar. Attention has also been made to the statement of PW8 Pawan Kumar where he admitted to have not stated to the police that he had seen Mohd. Akbar rushing after Iqbal and Mohd. Akhtar. Learned defence counsel has contended that PW8 Pawan Kumar has made improvements on material aspects of the case which create doubt in the prosecution version that he witnessed to the occurrence. Learned defence counsel has rightly pointed out improvements in the statement of

PW8 on the aforesaid three aspects i.e. he knew the accused and the deceased and that they used to come to his shop for scooter repair; that he had seen accused and deceased coming while running from Shah Ganj side and on the point that he had seen Mohd. Akbar rushing after Iqbal and Mohd. Akhtar, the reason being that these facts were not stated by him before the police. As a result, it cannot be said that Pawan Kumar knew the three brothers or that he saw accused and deceased coming while running from the side of Shah Ganj side or that he saw Akbar rushing after them. Even if it be assumed for the sake of arguments that it depends upon each individual as to how he or she reacts in a given situation and PW8 Pawan Kumar did not rang up the police from his landline phone or tried to save Akhtar, he could go to the police lateron and tell about the occurrence and at least help in removal of injured from the spot to the hospital after the assailant had run away. Since he did not take any such step, it becomes difficult to believe what he has narrated before this Court claiming himself to be an eye witness There is nothing in his statement to suggest as to who told the police that he had witnessed the occurrence. This further creates doubt that PW8 Pawan Kumar saw the accused inflicting injuries on the person of Mohd. Akhtar. PW15 16. It is case of the prosecution that PW15 Salman, also witnessed the accused giving injuries on the person of his brother Mohd. Akhtar with knife and Mohd. Akbar reaching there and giving push to accused or that whereupon accused ran away. Learned defence counsel has pointed out that according to PW15 he was having a mobile phone but he did not make any call to the police, which remained there for about a hour to tell about the facts witnessed by him, or tried to save the injured. That he did not tell the police about arrival of Mohd. Akbar to save Mohd. Akhtar or that Mohd. Akbar had pushed accused Iqbal, which creates doubt regarding his presence on the given date, time and place. Another contention raised by learned defence is that from the cross Examination of PW 15.it would transpire that he has nowhere explained as to how he knew the three brothers i.e. accused, deceased and PW Mohd. Akbar and that having regard to this fact, no reliance should be placed on his testimony when he named all three brothers in his statement. According to PW15 Mohd. Salman, on 20.03.2010, at about 1.15 2pm, while present in his street, he heard noise emanating from the side of Shah Ganj Crossing. On reaching Shah Ganj crossing, he saw Iqbal accused inflicting

injuries on the person of his brother Akhtar, their brother Akbar also came there to rescue Akhtar. A perusal of cross examination of PW15 would reveal that he nowhere stated to have made any statement before the police. On the other hand, he clearly stated that he had not informed the police about the facts seen by him. He did not make any call to the police or even tried to save the injured. Admittedly, the witness was having a mobile phone with him. Even if the explanation furnished by him that he got scared as the accused was having a knife is accepted for the sake of arguments, he could easily make a phone call after the accused had run away from the spot, but there is no explanation for his having not gone to the police station or nearby police post or to have called the police on phone to inform them about the occurrence. According to PW15 Mohd. Salman, PW Akbar had given a push to the accused and thereafter the accused had run away. However, it is significant to note that PW Pawan Kumar nowhere stated to have witnessed or stated that PW Akbar had pushed the accused or that thereafter the accused had run away. Rather according to PW8 by the time Akbar tried to save Akhtar, Iqbal had stabbed Akhtar and run away. As noticed above, PW8 Pawan Kumar has improved upon his statement on the point of Akbar having been seen rushing after the accused and the deceased. As rightly pointed out by Id. defence counsel, when PW15 has denied to have stated before the police that he was on visiting terms with the deceased but this fact finds recorded in his statement made before the police, same creates doubt if he ever made any such statement before the police or he was associated in the investigation.

11. A perusal of Constable Bandhu Kumars (PW-7) statement shows that he with the help of persons of public had removed the deceased to LNJP hospital. He testified that SI Jaswant Singh, Constable Abdul Karim and brother of the deceased also reached the hospital. It is, therefore, evident that Mohd. Akbar (PW-3) did not accompany the deceased to the hospital. Thus, apart from the fact that PW-3s clothes were not stained with blood and that his name was not mentioned in the MLC as the person who had brought the deceased to the hospital. PW-7 categorically stated that the brother of the deceased along with two police officials had subsequently reached the hospital. He nowhere stated that Mohd. Akbar met him at the place of the incident.

12. Thus, PW-3 could not have been an eye witness to the incident. Similarly, with regard to PW-8 and PW-15, apart from the fact that they did not help PW-7 in removing the deceased to the hospital, the trial court noticed various improvements and omissions in their testimony in the court as against their statements under Section 161 Cr.P.C. recorded by the IO. Moreover, if PW-8 and PW-15 say that PW-3 Mohd. Akbar (the deceased's brother) was an eye witness to the incident, which we have already disbelieved, this would negate the presence of PWs-8 and PW-15 on the spot at the time of the incident.

13. As noticed by the learned ASJ, PW-15 did possess a mobile phone but he did not make any call to the police and nor did he tell the police about the incident which remained at the spot for about one hour. Thus, the trial court rightly disbelieved the presence of the three witnesses at the time of the incident.

14. As far as the recovery of the knife is concerned, the trial court disbelieved the same as the same was not done in the presence of any independent witness and it was improbable that the respondent would have concealed the knife over the roof of a toilet after putting it in a polythene bag. Otherwise also, mere recovery of a knife stained with human blood without there being any proof of presence of the blood group of the deceased by itself would be of no consequence in view of the judgment of the Privy Council in *Pulukuri Kottaya & Ors. v. The King Emperor* AIR 194.PC 67.

15. The law with regard to the grant of leave is well settled by a catena of judgments. Leave to Appeal can be granted only where it is shown that the conclusions arrived at by the Trial Court are perverse or there is misapplication of law or any legal principle. The High Court cannot entertain a petition merely because another view is possible or that another view is more plausible. In *Arulvelu and Anr. vs. State represented by the Public Prosecutor and Anr.*, 2009 (10) SCC 206. while referring with approval the earlier judgment in *Ghurey Lal vs. State of Uttar Pradesh*, (2008) 10 SCC 450. the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an Appeal against acquittal. The principles are:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

6. Careful scrutiny of all these judgments lead to the definite conclusion that the appellant court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate courts view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law.

16. We have already stated above that the appreciation of evidence by the trial court is in consonance with the settled legal principles. Even if two views are possible, it is not permissible for this court to interfere in the order of acquittal.

17. The leave petition, therefore, has to fail; the same is accordingly dismissed.
(G.P. MITTAL) JUDGE (G.S. SISTANI) JUDGE SEPTEMBER 09 2013 vk