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Sunil @ Shelly Etc. Vs. State

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Court : Delhi

Decided On : Nov-22-2013

Judge : G. S. Sistani

Appellant : Sunil @ Shelly Etc.

Respondent : State

Judgement :

$~ R-24 * IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 126/2005 Judgment dated 22nd November, 2013 % SUNIL @ SHELLY ETC. ..... Appellants Through: Ms.Rakhi Dubey, Adv. versus STATE Through: ..... Respondent Mr.Feroz Khan Ghazi, Adv. for State CORAM: HON'BLE MR. JUSTICE G.S.SISTANI G.S.SISTANI, J.

(ORAL) 1. Present appeal has been filed under Section 374 Cr.P.C. against the judgment of the trial court dated 17.1.2005, whereby the appellants were convicted under section 308 read with section 34 IPC and order on sentence dated 19.1.2005 by which appellants were awarded sentence of one year with fine of Rs.500/- each, and in default of payment of fine RI for one month.

2. As per the prosecution, on 28.5.2001 at about 10:30 pm a complaint was lodged by one Chander that appellants had beaten one Shri Krishan and his brother. On the basis of the complaint an FIR No.240/2001 under Sections 308/34 IPC was registered at P.S. Mukherjee Nagar, New Delhi. The case was committed for trial

on 25.2.2002; and charges were framed on the material placed before the court that Sunil, Ajay Kumar along with Mahender Kumar (juvenile) in furtherance of a common intention on 28.5.2001 at about 10:30 pm near Jhuggi Autumn Line within the jurisdiction of Mukherjee Nagar caused bodily injuries on the person of Shri Krishan with such intention and knowledge or under such circumstances that if they had thereby caused the death of Shri Krishan, they would be guilty of culpable homicide not amounting to murder and thereby committed an offence under section 308 read with section 34 IPC. The accused persons pleaded not guilty and claimed trial. The prosecution examined 10 witnesses, whereas defence has examined only one witness.

3. Counsel appearing for the appellant submits that the judgment of the trial court is against the law and facts, the witnesses produced by the prosecution are interested witnesses or the official witnesses and their testimonies are unreliable. It is also contended that there are material improvements in the statement of the witnesses and thus they cannot be believed. The trial court has overlooked the serious contradictions in the statements of the witnesses of the prosecution and thus prosecution has miserably failed to prove their case and the trial court has wrongly convicted the appellants.

4. The counsel contends that the recovery of the iron rod, based on the disclosure of the appellants is not beyond reasonable doubt and it is a clear case where the rod was planted by the police against the appellants. It is further contended that the entire story of the prosecution is false, fictitious and bogus and the appellants have been falsely implicated.

5. Counsel for the appellants contends that the testimony of the star witness of the prosecution i.e. PW-1, who is also victim in the case, is unreliable and full of contradictions and order of conviction could not have been passed on the testimony of PW-1. It is submitted that there are contradictions between the testimony of PW-1, who has testified that the occurrence took place at 9:30 pm. and he received injuries and regained consciousness only at 4:00 am in the hospital, and PW-2, who has deposed that the occurrence took place at about 10:30 p.m. and he saw Shri Kumar and Chander were being beaten with iron rod;

appellant, Sunil gave a sirsa blow on the head of Shri Krishan and he fell down and became unconscious. PW-3, Chander Kumar has stated that at 10:30 p.m. when he was sitting outside his house, three boys came to the said place including accused Shelly and one of the boys put his foot in the gutter as a result of which filth splashed into his house. The complainant asked the boys to walk properly as all the three boys were under the influence of liquor. Shelly challenged Kishan to put his foot into the gutter once or twice again, as a result of which filth again splashed into the jhuggi. There are serious contradictions in the statements of all three witnesses. One of the witnesses stated that when one of the appellants, Ajay put his leg in the nali, mud flew into the thali of PW1, whereas PW3 Chander Kumar stated that one of the boys put his leg in the gutter as a result of which filth splashed inside the house and when Kishan objected he again once or twice put his foot in the gutter intentionally.

6. It is thus contended that there are contradictions in the evidence of PW-1, 2 and 3. It is further submitted that despite the fact that the quarrel took place in a public place not a single independent witness was examined and thus the testimonies of the interested witnesses and official witnesses cannot be relied upon. It is submitted that PW-4, Savitri, who was also an eye-witness did not properly identify the appellants which fact was overlooked by the trial court. It has also been contended before the court that even PW-9, Dr. Sanjay Tomar, who examined the injured, Sri Krishan gave a finding that there were only 2 injuries, one clean lacerated wound over the head, around 4 cm long and the second one around 2 cm long. The injuries were opined to be simple in nature, caused by a blunt object. It is submitted that in view of the opinion of the doctor, the injuries could not have been caused by the iron rod, as in case the iron rod was used, it would have caused fracture over the body of the injured whereas injuries were simple.

7. Counsel for the State submits that the contradictions sought to be pointed out by counsel for the appellants are not material contradictions, they do not touch the core issue and merely because there is a contradiction with regard to the time of the incident, that by itself cannot be a ground for rejecting the testimony of PW-1. Counsel further submits that the contradictions which are pointed out are minor and would in fact show that the witnesses were natural witnesses and the

narration was natural and thus there is no fault in their testimonies.

8. Mr.Ghazi, counsel for the State further contends that the description of the incident as testified by PW-1 is fully corroborated by the depositions of PW-2 and PW-4, who were neighbours and PW-3, who is the brother of the victim and who also suffered injuries in the incident. Counsel for the State submits that the FIR was registered against the appellants on the basis of a statement made by the brother of the victim, who was also a victim in the FIR, and who had specifically named the appellants in his statement.

9. I have heard counsel for the parties and considered their rival submissions. To appreciate the rival contentions of the parties, it is deemed appropriate to record the entire evidence of PW-1, who is the star witness:

PW-1, Shri Kishan About a year back, I along with my brother Chander for having dinner at our house, there is a nalli outside the house in the street. Ajay accused came and put his leg inside the Nalli as a result of which the dirt (mud) fell in our thali in which we were having food, we objected and in the meantime Ajay and Sunil both started quarrelling with us. Sunil was under influence of liquor. Sunil brought a saria from his house and gave me a blow with saria on my head as a result of which I started bleeding. Chander also tried to save me, he was also injured. He was also beaten by Sunil and Ajay. Mohinder (being tried in Children court) was also the associate of the two accused present in court. He had also quarrelled and did Marpeet with us. I can identify the saria if shown to me. (At this stage sealed parcel with the seal of BKA is opened) Saria is Ext. P.1 which is the same which was used by accused Sunil present in court in hitting me. xxxx by Sh.Ayub Ahmed Qureshi for both accused. In my jhuggi only three persons were having food at that time i.e. myself, Chander and Jaggu. It is wrong to suggest that the neighbours were having food in my jhuggi. It was about 9/9-30 PM when I was having my food. The dirt fell in my thalli. The nalli is about at a distance of 1/1 mtr. Where I was having my food. I told the accused persons that I am having food and then they should see, on which they went away and them came again. When I was having food, the accused persons and others were standing in the gali. I did not tell anyone of them as to who is going in bad manner. I did not tell the police in my

statement that I told as to who were going in bad manner. (Confronted with portion A to A of Ext.PW.1/DA, where it is so recorded). I did not come out from my jhuggi when the dirt fell in my thalli. I told this to my Bhabhi. I knew only Mohinder but did not know Ajay & Sunil before. Ajay had put his feet in the nalli. I had seen him. There was dark in the gali but the bulb was on in the jhuggi. The bulb was on the gate of my jhuggi. I was pecify my bhabhi and my brother. I cannot say if Ajay put his foot in the nalli deliberately or with the intention to enraged me. At that time Ajay was alone. Ajay went away thereafter. Then three persons came after about 1 mins. to my jhuggi. Sunil came in an angry mood and challenged us exhorting that Tun Hamara Kaya Bigar Loge and put his leg in the nalli. Mohinder also abused us. My bhabhi and my brother Chander also heard the abuses given to me. My Bhabhi and my brother tried to pecify me only. xxxxxxxx by Sh.Ayub Ahed Qureshi counsel for both accused. It is correct to suggest that at the time when I was eating food all accused were going in the gali. It is correct to suggest that innocently the foot of accused Ajay went into the naali and so the dirt fell on me. When I came out of jhuggi I saw Ajay, Mahender and Sunil. I know their names form before. I did not stated the name of Ajay in my statement u/s.161 Cr.P.C. to the police because I did not know his name at that that. When I saw Ajay, Mahender and Sunil, they were not saying anything. The abuses were given at about 9:30 P.M. After abusing Ajay, Mahender started beating. At that time my bhabhi was standing near the door and my brother was having food. Myself and my bhabhi both raised hue and cry. It is correct that I asked the accused not to abuse, in the presence of my Bhabhi and brother. My bhabhi and brother also asked the accused not to abuse. One or two other persons of accused side also came there. Their names are Pandit and Ram Kumar but they were friends of accused persons. Firstly I was given beatings by Ajay and Mohinder. Sunil came subsequently. I was given beating trice. My two other brothers received simple injuries. They were also taken to hospital. I came into conscious in the hospital on the next day at 4.00 A.M. When I came to conscious my bhabhi was sitting my side and my brother was standing on the gate. I came from the hospital without taking any proper discharge. I gave my statement to the police prior to my going to the hospital. It is correct that I gave statement to the police that I became unconscious on receiving the injury. I was taken to PS by my Bhabhi at that I was

in conscious condition. I know Mohinder 4/5 months prior to the incident. I have no relation with accused Mohinder nor I have any friendship with him. Mohinder attempted to assault me earlier also. H used to abuse after consuming liquor. It is incorrect to suggest that I have involved the accused falsely in the matter. Accused Ajay and Sunil were not known to me prior to incident. It is incorrect to suggest that I have deposed falsely.

10. It may be noticed that PW-3, who is the brother of PW-1 has also deposed on the same lines as the testimony of his brother on all material aspects i.e. the date of the incident that the incident took place at night (although PW-1 has described the time of incident as 9:00 and 9:30 p.m. whereas PW-3 has mentioned the time as 10:30 p.m), the number of boys involved in the incident, the cause of incident, and the manner of assault. The evidence of PW-1 and PW-3 are also corroborated by the evidence of PW-2, who is the neighbour; PW-2 has also identified the appellants and the manner in which PW-1 was assaulted. PW-4, who is also one of the neighbours has also testified that there were three persons; she identified that out of the three persons, two were present in court and also testified with respect to the manner in which the victims was assaulted.

11. Reading of the evidence of PW-1 to 4, leaves no room for doubt that on 28.5.2001 between 9:00 p.m. and 10:30 pm., three boys, who were duly identified by the aforesaid witnesses, assaulted PW-1 and PW-3. The injuries caused on the body of PW-1, are corroborated by MLC, Ex.PW9/A. The presence of these three boys also stands duly established by the clear cut evidence of PW-1 to 4 and the aforesaid witnesses have identified the appellants in the court as well.

12. It may also be noticed that the appellants were named by the victim in the FIR and at the very first opportunity available. The submissions made by the counsel for the appellants that there are contradictions in the evidence of the witnesses, is without any force. The contradictions which have been pointed out are minor in nature; they do not touch the core issue; and reading of the evidence of all the four witnesses as a whole would show that the contradictions pointed out are not material. It has been repeatedly held by the Apex Court that minor contradictions which do not go to the root of the matter and do not touch the core issue would not

affect the case of the prosecution. In the case of Shaymal Ghosh v. State of West Bengal, reported at (2012) 7 SCC646 the Apex Court has held that every variation may not be enough to adversely affect the case of the prosecution and the Court must ascertain whether the variations are material and would affect the case substantially.

13. The submission of counsel for the appellants is that the evidence of PW-1 and PW-3 cannot be relied upon, as they are the interested witnesses as also without any force. Counsel for the State submits that both these witnesses are victims to the incident and their testimonies cannot be discarded, their testimonies are duly supported by the testimonies of two independent witnesses being PW-2 and PW-4, who have also testified on the lines of the evidence of the victims.

14. It would be worthwhile to reproduce herein the observations of this Court in Crl.A.No.470/2003, Harish Vs. The State, reported at 2008 (147) DLT608 2008 (2) AD (Delhi) 405 particularly paragraphs 41 and 42, where the law laid down by the Apex Court with regard to admissibility of testimony of partisan/interested witness has been relied upon:

41. It has been consistently held by the Apex Court that Courts must be cautious and careful while weighing such evidence given by witnesses who are partisan or interested, but such evidence should not be mechanically discarded. It will be useful to refer to the judgment of Masalte Vs. State of Uttar Pradesh, reported at AIR1965 Supreme Court 202, relevant portion of which is reproduced below:

14. Mr.Sawhney has then argued that where witnesses giving evidence in a murder trial like the present are shown to belong to the faction of victims, their evidence should not be accepted, because they are prone to involve falsely members of the rival faction out of enmity and partisan feeling. There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded

only on the ground that it is evidence of partisan or interested witnesses; Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to, failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

42. Similar view has also been expressed in the case of State of Punjab Vs. Karnail Singh, reported at AIR2003 Supreme Court 3613:8. We may also observe that the ground that the witnesses being close relatives and consequently being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh and others v. The State of Punjab (AIR 1953 SC364 in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J.

it was observed:

We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - Rajasthan', (AIR 1952 SC54at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.

9. Again in Masalti and others v. The State of U.P. (AIR 1965 SC202 this Court observed : (pp. 209-210 para 14):

But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or

interested witnesses..... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

10. To the same effect is the decision in State of Punjab v. Jagbir Singh, (AIR 1973 SC2407 and Lehna v. State of Haryana, (2002 (3) SCC76. As observed by this Court in State of Rajasthan V. Smt. Kalki and another, (AIR 1981 SC1390, normal discrepancies in evidence are those who are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however, honest and truthful a witness may be. Material discrepancies are those who are not normal, and not expected of a normal person. Courts have to lable the category to which a discrepancy may be categorized. While normal discrepancies do so. These aspects were highlighted in Krishna Mochi and others v. State of Bihar etc. (JT2002(4) SC186.

15. Therefore, the evidence of interested witness can also be relied upon to record finding of conviction, provided their evidence is reliable, trustworthy and inspires confidence.

16. In this case the testimonies of the injured PW-1 and PW-3 inspire confidence, their evidence is corroborated by the evidence of two independent witnesses, the factum of injury stands established by the MLC and moreover the injury was caused on the vital part of the body, thus it cannot be said that the injury was simple in nature.

17. In the light of the above discussion, I find that there is no merit in the appeal and the same is dismissed.

18. At this stage Ms.Rakhi Dubey prays that the sentence may be reduced from one year keeping in view the young age of the appellants and the fact that they have no criminal record in the past and further that they belong to the poor section of the society and are sole breadwinners of their family. Accordingly, taking into

consideration the age of the appellants, they have no criminal record in the past and further that they belong to the poor section of the society and are sole breadwinners of their family, the period of sentence is reduced from one year to six months. Appellants shall surrender by 15.12.2013. G.S.SISTANI, J NOVEMBER ssn CRL.A. No.126/2005

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