

Anil Kumar Yadav Vs. State

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Court : Delhi

Decided On : Mar-06-2014

Judge : S. Muralidhar

Appellant : Anil Kumar Yadav

Respondent : State

Advocate for Pet/Ap. : Mr. S.C. Maheshwari, Mr. Brij Mohan Bharti, Mr. Satish Kumar, Mr. M.P.S. Tomar, Mr. Parmod Kumar, Ms. Aashaa Tiwari

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 198 of 2008 ANIL KUMAR YADAV Appellant Through: Mr. S.C. Maheshwari, Senior Advocate with Mr. Brij Mohan Bharti, Mr. Satish Kumar, Mr. Jabar Singh, Mr. M.P.S. Tomar and Mr. Parmod Kumar, Advocates. versus STATE Respondent Through: Ms. Aashaa Tiwari, APP. With CRL.A. 243 of 2008 ANIL KUMAR PATHAK Appellant Through: Mr. S.C. Maheshwari, Senior Advocate with Mr. Brij Mohan Bharti, Mr. Satish Kumar, Mr. Jabar Singh, Mr. M.P.S. Tomar and Mr. Parmod Kumar, Advocates. versus STATE Respondent Through: Ms. Aashaa Tiwari, APP. and CRL.A. 477 of 2008 SHIV SAGAR Criminal Appeals Nos.198 of 2008, 243 of 2008, 477 of 2008 Appellant Page 1 of 14 Through: Mr. S.C. Maheshwari, Senior Advocate with Mr. Brij Mohan Bharti, Mr. Satish Kumar, Mr. Jabar Singh, Mr. M.P.S. Tomar and Mr. Parmod Kumar, Advocates. versus STATE Respondent Through: Ms. Aashaa Tiwari, APP. CORAM: JUSTICE S.

ORDER

0603.2014 1. These three appeals are directed against the common judgment dated 5th February 2008 passed by the learned Additional Sessions Judge, (ASJ), Rohini Courts, Delhi in Sessions Case No.295 of 2006 arising out of FIR No.64 of 2000 under Sections 379/328/411/203 IPC registered at P.S. Punjabi Bagh convicting the Appellants, Anil Kumar Yadav and Shiv Sagar of the offence punishable under Section 120B IPC read with Section 411 IPC. The Appellant, Anil Kumar Pathak had been convicted for the offence punishable Section 328/120B and 392/120B IPC. The appeals are also directed against the order on sentence dated 8th February 2008 whereby the Appellants, Anil Kumar Yadav and Shiv Sagar were sentenced to undergo six years rigorous imprisonment (RI) for the offence under Section 120 B IPC and fine of Rs. 5,000 each and in default, they would undergo simple imprisonment (SI) for a period of six months. As regards the offence under Section 411 read with Section 120B IPC, they were sentenced to undergo RI for a period of 3 years and fine of Rs. 10,000 each and in default they would undergo SI for a period of one year. The Appellant, Anil Kumar Pathak, was sentenced to undergo four years RI and Rs. 2,000 as fine and in default SI for two months for the offence under Section 328/120B IPC; six years RI and fine of Rs. 5,000 and in default SI for six months for the offence under Section 392/120B IPC and six years RI and fine of Rs. 5,000 and in default SI for six months for the offence under Section 120B IPC. The sentences were directed to run concurrently.

2. The case of the prosecution was that PW-2, Bhola, a driver, and his helper, Vishwa Nath Mukhia (PW-6) loaded 306 empty cylinders of Indane Gas in truck No.DLG-1205 from Amrit Gas Agency, Shahdara on 29th January 2000 and moved towards Tikri Kalan. According to PW-2, when the truck reached the Punjabi Bagh traffic crossing at around 5.30 pm four boys between 20-25 years of age sought a lift up to Ghevra Mod. They claimed they were employees of Poonam Gas Agency. When PW-2 reached near Mundka, two of the boys pulled back PW-2 and PW-6 and put a piece of cloth in their mouths. They had difficulty breathing and became unconscious. At about 2 am, when he gained

consciousness, PW-2 found himself near Shakurpur in his truck. He found that the loaded empty cylinders were missing. PW-2 suspected that the four boys had stolen the empty cylinders. PW-2 gave a statement which was recorded by Sub-Inspector (SI) Subhash Kumar and FIR No.64 of 2000 was registered on 30th January 2000.

3. According to the prosecution, pursuant to the investigations, Shiv Sagar, Accused No.3 (A-3) and Anil Kumar Pathak, Accused No.2 (A-2) were arrested on 9th February 2000. On the basis of their disclosure statements, 306 empty cylinders were recovered from Gulabi Bagh gas agency, Kanjhawala Road, Delhi. The stock registers of the said godown were also seized. Subsequently, Prabhu Kumar, Accused No.4 (A-4) and Anil Kumar Yadav, Accused No.1 (A-1) were also arrested. Out of the seized cylinders, 300 gas cylinders were released on superdaari and the remaining 6 were kept in the malkhana for identification. The Investigating Officer (IO) could not trace out the co-accused Vijay and Tillu and they were never arrested.

4. A challan was filed on 24th May 2000 against all the four accused. At the time of filing of the challan, A-1 was in custody and other three co-accused, A-2, A-3 and A-4, were released on bail. Charges were framed on 22nd September 2003 under Section 120B IPC against A-1, A-2 and A-3 stating that A-2 had committed robbery along with co-accused Vijay, Tillu and A-4 of the truck in question containing 306 empty gas cylinders thereby committing an offence punishable under Section 120B IPC. A-1 and A-3 were additionally charged under Section 411 IPC stating that empty gas cylinders were recovered from Gulabi Bagh gas godown of which A-1 was the owner and A-3 was the godown keeper. Further, A-2 and A-4 were separately charged under Section 328 read with Sections 34 and 392 IPC read with Section 34 IPC.

5. PW-1, Balbir Singh, was the owner of the truck in question. He stated that on 30th January 2000 at about 7 am, he had received a call that 306 empty gas cylinders loaded in the truck had been stolen and the truck was parked at Shakurpur near Britannia Chowk.

6. As far as PW-2 Bhola was concerned, he was examined initially on 22nd April 2004. He stated that he had reached Punjabi Bagh traffic light at about 5 am and four persons, claiming to be the staff of Poonam Gas Agency, sought for a lift up to Ghevra Mod. PW-2 further stated that when he reached Mundka Village near the school, he was made to inhale something after which he became unconscious. After gaining consciousness, he found himself in the truck park near Jaipur Golden. He identified A-2 and A-4 as the persons who entered the truck in question along with two other boys. He identified A-3 as the employee of the godown of Gulabi Bagh from where the gas cylinders were recovered. He also identified A-1 present in the Court as the owner of the said godown.

7. PW-2 was cross-examined on 25th April 2005. He now claimed that on the earlier date he was drunk and, therefore, he could not identify anyone. He stated that he otherwise knew A-4 but could not identify any of the four boys who boarded the truck on the date of the occurrence. PW-2 stated that when he regained consciousness at about 12 pm, he was in the police station. He did not know how he reached the police station.

8. In his cross-examination by learned counsel for A-3, PW-2 stated that the police had shown the four boys and that he could not identify the four boys. The police did not take him to the place from where the gas cylinders were loaded in the truck. PW-2 further stated that the truck was parked at P.S. Punjabi Bagh when he regained consciousness. After about 12 days, the police took him to the Poonam Gas godown where 2-4 boys met the police. He claimed to be sitting in a Maruti outside the ground when the police officer went inside and effected the recovery of the gas cylinders. PW-2 admitted that he was not taken by the police for TIP of any of the accused as he himself was retained in the lock up for 12 days.

9. In his cross-examination by learned counsel for A-2, PW-2 stated that he was confined by the police for 10-12 days. His statement was recorded by the police but he did not know what the contents were. On the date of his statement in the Court, he was made to read his statement to the police. The police had also disclosed to him the name of the accused. He stated that I know all the accused by name and by face today. I could not identify the accused by names if not

disclosed by the police.

10. PW-2 was further cross-examined on 22nd January 2007. He stated that, on the request of the IO, on 22nd April 2004 he identified the accused persons in Court. He further stated that the accused persons were not arrested in his presence. At that stage, the learned Additional Public Prosecutor (APP), with permission, re-examined PW-2 who now stated that he was speaking the truth and that he had spoken the truth on 22nd April 2004 as well.

11. The next important witness was PW-6, Vishwanath Mukhiya, the helper. He was first examined on 13th September 2004. He stated that three persons entered the truck when the truck stopped at the Punjabi Bagh traffic light. One of them had a bottle with white colour liquid. They informed PWs 2 and 6 that they were working in the gas agency at Gulabi Bagh. He stated that when the truck reached near Nangloi, one of three persons pulled him to the back seat after holding his collar and another took out a pistol and showed it to PW-2 and also pulled him to the back seat. One of the three persons then took control of the steering wheel. PW-6 claimed that he was given one slap and made to lie in the truck. PW-2 was also beaten up by the three persons. He claimed to have pretended to be unconscious and thereafter the accused drove the truck to the side of the bypass from Peera Garhi. The three persons took the truck to some unknown godown where all the empty cylinders were unloaded. PW-6 identified A-2 and A-3 as the persons who were present in the truck but could not identify the other two accused.

12. The cross-examination of PW-6 took place on 25th April 2005. He stated that he had remained in P.S. for eight days and that at the time of occurrence it was dark in the evening. During his stay at the P.S., he was made to sign 6-7 papers. He further stated that after the occurrence, he had seen the accused A-2 and A-3 for the first time in Court. He identified them on that day at the instance of the IO. He was threatened to identify them as the accused otherwise he would be behind bars. He admitted as correct that he could identify A-2 and A3 only because their identities were disclosed to him by the IO. He admitted that in his previous statement he had not mentioned the names of the accused.

13. Upon re-examination by the learned APP, PW-6 maintained that he identified the two accused in his examination-in-chief at the instance of the IO and he could not disclose it to the Court due to the fear of the IO. He was put a suggestion that in between he had been bribed and therefore, he was resiling from his previous statement. He was again further cross-examined at the instance of learned counsel for A-1 on 8th January 2007. He again stated that he was called to the P.S. to identify the accused persons under some confusion and that they were not the real culprits.

14. It is, therefore, seen that two important witnesses of the occurrence, i.e., PW-2 and PW-6 failed to support the case of the prosecution. The learned trial Court was obviously faced with a dilemma as the two key prosecution witnesses turned hostile. The learned trial Court referred to the decision of the Supreme Court in *Khujji v. State of M.P.* AIR 1991 SC1859 followed by the Division Bench of this Court in *Abdul Mura Salin v. State* 123 (2005) DLT73(DB), to conclude that where the cross-examination of witness took place after a considerable delay, such examination can be totally ignored. According to the learned trial Court, the Supreme Court in *Khujji v. State of M.P.* stated that when cross-examination has been conducted after a gap, deposition in chief examination can be relied.

15. The Court has carefully examined the decision in *Khujji v. State of M.P.* The case there was that the deceased and his companion PW4 therein hired a rickshaw to go to the dispensary of one Dr. Mukherjee. PW-3 was the rickshaw puller. While he was passing through Suji Mohalla near Panchsheel Talkies, the accused and his companions surrounded the rickshaw and launched an attack on the deceased and his companion. Although PW-4 and the deceased jumped out of the rickshaw and ran in different directions, they were chased by the assailants who formed themselves into two groups. PW-4 was fortunate enough to escape with not too serious an injury. However, his companion Gulab received stab wounds to which he succumbed. Among the eye witnesses, PW-4 was declared hostile as he could not identify the accused. PW-3 too turned hostile. The third eye-witness, PW-1, however supported the prosecution case in his examination-in-chief, but in his cross-examination he expressed some doubt regarding the identity of the accused, Khujji and the co-accused Guddu stating that he had seen

their backs only. The learned trial Court refused to place reliance on the testimony of the third eye witness and convicted the Appellant under Section 302 IPC but the High Court ignored the evidence of PW-3 and PW-4 and relied on the evidence of PW-1 to conclude that his evidence clearly established the presence of the Appellant as one of the assailants. The High Court noted that the examination-in-chief of PW-1 took place on 16th November 1976 whereas his cross-examination commenced on 15th December 1976, i.e., after a month. During which period he appeared to have been won over or had succumbed to threat. The Supreme Court again analysed the evidence and held that the time, place and manner of the occurrence was also consistently spoken of by PW-3 and PW-4. The Supreme Court stated that it was satisfied, on a reading of the entire evidence, that PW1s statement in the crossexamination, on the question of identity of the Appellant and his companion, was a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. Therefore, the Supreme Court concluded that he had ample opportunity to identify the assailants and that his presence at the scene of occurrence was not unnatural. Thus, it is clear that the Supreme Court in the above case did not lay down, as a principle of law, that because of a long gap in the crossexamination, the statements in the cross-examination could be totally ignored, as erroneously understood by the learned trial Court in the present case.

16. The judgment of the Division Bench in Abdul Murasalin v. State also does not base its decision entirely on the evidence of the hostile witness as regards the identity of the accused. In para 20, it was noticed that there are other factors too which clearly establish their identity and which connect them with the crime.

17. On the other hand in the present case, two crucial witnesses were the driver and the helper, i.e, PW-2 and PW-6 of the truck respectively. Both of them have unmistakeably stated that they were themselves detained in the police custody for 8-10 days, possibly because the police suspected their involvement. Moreover, they stated that there was no TIP conducted. They ended up identifying the accused in the Court for the first time more than four years after the date of occurrence. Both of them stated that they identified the accused only at the instance of the IO. In a case of robbery, where the accused are total strangers to the victims, the failure by the prosecution to conduct a TIP at the first available

opportunity to fix the identity of the accused is a major lapse. It throws considerable doubt on the purported identification of the accused by the witnesses for the first time in Court after a gap of four years.

18. Even going by the examination-in-chief of these witnesses, PW-2 and PW-6, numerous material contradictions can be noticed. While PW-2 stated that four boys took a lift in the truck, PW-6 stated that there were three boys. PW-2 did not mention anything about the accused threatening them with a pistol or beating them whereas PW-6 stated that one of them took a pistol and that the accused beat up PW2. Even as regards the time of the incident, in the FIR it was mentioned as around 5.30 pm whereas PW-2 stated it to be 5 am. The examination-in-chief of neither PW-2 nor PW-6 can, therefore, said to be reliable or trustworthy. This is independent of the fact that in their cross-examination, they resiled from the statements previously made by them to the police. Both have stated that they were able to identify the accused only at the instance of the IO.

19. The learned trial Court, while concluding that the robbery of 306 empty cylinders was committed by the accused, has placed reliance entirely on the aforementioned unreliable and untrustworthy depositions of PW-2 and PW-6. The trial Court simply ignored the fact that they had turned hostile in their cross-examination. In the considered view of the Court, the learned trial Court has committed a serious error in adopting the said approach.

20. Another serious lapse on the part of the prosecution was its failure to fix the identity of the properties allegedly stolen. These were the 306 empty gas cylinders. The IO admitted in his cross-examination that fake serial numbers of the empty gas cylinders loaded on to the truck from the godown of Amar Gas Agency had been provided by PW-1. There was, therefore, no means of verifying whether the gas cylinders found in the gas agency owned by A-2 were the same that were loaded on to the truck. This evidence was critical in order to prove that the empty gas cylinders loaded on the truck from the godown of Amar Gas Agency were stolen and stored at the godown of the Gulabi Bagh gas agency owned by A-1. With this evidence not forthcoming, the crime could not be said to be proved.

21. The accused on their part produced as their witness, DW-1, an official of the Indian Oil Corporation Ltd. (IOC). DW-1 deposed that in respect of the 306 gas cylinders lifted by the police from the godown of A-1, a debit note was issued in favour of A-1 by the IOC. This meant that the 306 gas cylinders were legitimately supplied by IOC to A-1. This completely belied the case of the prosecution that these were the 306 empty cylinders stolen from the truck. The learned trial Court has simply chosen to reject the entire deposition of DW-1 only because he did not produce any authority letter authorizing him to depose in the Court. This was a flawed approach of the learned trial Court particularly considering that the identity of gas cylinders purportedly stolen by the accused was in fact not established by the prosecution. Consequently, this Court is unable to uphold the finding of the learned trial Court that the 306 empty gas cylinders were stolen by the accused by entering into a conspiracy.

22. This Court finds that the learned trial Court based its conclusions on an erroneous analysis of the evidence. The prosecution miserably failed to prove the case against the Appellants beyond all reasonable doubt. Accordingly, the impugned judgment dated 5th February 2008 and the order on sentence dated 8th February 2008 passed by the learned trial Court are hereby set aside. The Appellants are acquitted of the offences with which they were charged and tried.

23. The appeals are allowed in the above terms. The case property i.e. the six empty gas cylinders be returned to the Appellants forthwith in accordance with law. S. MURALIDHAR, J.

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