

Yunus Vs. the State

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Court : Delhi

Decided On : Apr-17-2014

Judge : V. K. Jain

Appellant : Yunus

Respondent : The State

Advocate for Def. : Mr. Feroz Khan Ghazi

Advocate for Pet/Ap. : Mr. Anupam Sharma

Judgement :

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

17. 04.2014 + YUNUS Through: CRL. A.1371of 2010 Appellant Mr. Anupam Sharma, Adv. versus THE STATE Through: Respondent Mr. Feroz Khan Ghazi, APP. CORAM: HON'BLE MR. JUSTICE V.K. JAIN].JUDGEMENT V.K. JAIN, J.

(Oral) On 6.1.2010 at about 10.15 pm, an information has been received that a boy had been stabbed in Gali No.10, Vishwas Nagar near graveyard. The information was recorded via DD No.36A and a copy of the said DD was given to HC Charan Dass for investigation. When the aforesaid police official reached Gali No.10, Vishwas Nagar, no eye witness was found present there. In the meanwhile, he received information that the injured Raju had been brought to Hedgewar

Hospital by his father Shri Shiv Prasad. Thereupon, the aforesaid police official reached Hedgewar Hospital, where the injured Raju was found admitted. In his statement to HC Charan Dass, injured Raju inter alia stated that on that date he, along with his father was returning to his house and when they reached Gali No.10 behind graveyard of Vishwas Nagar at about 10.15 pm, three boys caught hold of him and one of them put a knife on his neck, whereas the other boy removed his mobile phone from the pocket of his pant. On alarm was being raised by him and his father, one of the boys gave knife blow in his abdomen and thereafter all the three ran away from there. His mobile phone no.9910872310, however, fell on the spot. He further stated that the aforesaid boys were aged about 20-22 years and he could identify them if brought before him. An FIR under Section 394/34 of IPC was registered on the aforesaid statement. On 12.01.2010 at about 0030 hours Yunus, Pradip and Shahdat were arrested and the stolen mobile phone is alleged to have been recovered from the possession of Yunus. Shahdat and Pradip having been found to be juveniles, charge-sheet was filed only against the appellant - Yunus.

2. The appellant - Yunus was charged under Section 394 of IPC read with Section 397 thereof. He having pleaded not guilty to the charges, as many as 11 witnesses were examined by the prosecution. No witness, however, was examined in defence.

3. Mr. Shiv Prasad - father of the complainant came in the witness box as PW2 and inter alia stated that on 06.01.2010 at about 10.15 pm when he and his son Raju reached Gali No.10, behind graveyard, Vishwas Nagar, Shahdara, when Raju who was going ahead of him took a turn in the street, three boys caught hold of him. His son, however, raised alarm and grappled with those boys. He (the witness) also reached the spot. One of the boys put knife on his neck and threatened to kill in case he raised alarm. In the meanwhile, the other boy gave three stab injuries to his son in his abdomen and snatched his mobile phone No.9910872310. All the three culprits then fled away from the spot taking away the mobile of his son. He took his son to Hedgewar Hospital, where the statement of his son was recorded by the police. He identified the appellant - Yunus as the person who had stabbed his son and looted his mobile. He further stated that after

three days, he was called to the Police Station where he identified the accused. The witness also identified his mobile Ex.P-1.

4. The complainant - Raju came in the witness box as PW-4 and inter alia stated that on 6.1.2010, at about 10.15 PM, he was returning home alongwith his father, after performing duty in their factory. He was ahead of his father. The accused - Yunus was walking ahead of him, whereas his two associates were walking behind him (the witness). The accused put a knife on his neck whereas his associates caught hold of him. Yunus then asked him to handover whatever valuable he had. A scuffle then ensued between him and Yunus. When he raised alarm, his father also came there. Yunus stabbed him in the left side of the abdomen, as a result of which he fell down. The mobile phone, which he was carrying in the right side pocket of his pant, was taken away by the accused who thereafter ran away from the spot alongwith his associates. The witness identified Ex.P-1 as his mobile phone which was stolen during the commission of robbery.

5. PW-1 Dr. A. Saha examined the complainant in Hedgewar Hospital on 06.01.2010 and found that he had abrasions over left side neck and eviscerated bowel loop over the left interior abdomen (i.e. bowel loops lying outside the abdominal capacity), right hypochondrium over the left interior abdomen. PW-3 Shri Rakesh Kumar-III, Metropolitan Magistrate, inter alia stated that on 11.01.2010, the accused Yunus and his associates Pradeep were produced before him in muffled face. They, however, refused to join TIP despite warning given to them. PW6 - Inspector Sunil Kumar inter alia stated 08.01.2010, he received a secret information that the culprits involved in this case would assemble in Gali No.15, near liquor vend, Vishwas Nagar to commit some other crime. He, thereupon, reached the above-referred spot along with Constable Suresh and Constable Jawahar as well as the informer. The boys were apprehended on being pointed out by the informer and on their search, a mobile phone Ex.P-1 were recovered from the accused Yunus. The mobile phone was seized vide memo Ex.PW-10/C, after it had been duly sealed with the seal of SKB. PW-11 - Dr. Prabhat, inter alia, stated that he had performed surgery of the injured Raju. The opinion given by this doctor on the MLC Ex.PW-1/A appears at point B.

6. In his statement under Section 313 Cr.P.C., the appellant Yunus denied the allegations against him and claimed to be innocent. He stated that he was picked by the police on 09.10.2010 from Bhikam Singh Colony as he was running his vegetable cart there and was falsely implicated in this case.

7. Vide impugned judgment dated 13.10.2010, the appellant - Yunus was convicted under Section 394/397 of IPC and vide impugned Order on Sentence dated 18.10.2010, he was sentenced to undergo RI for seven years and to pay a fine of Rs 500/- or to undergo SI for three months in default. Being aggrieved from his conviction and sentence awarded to him, the appellant is before this Court by way of this appeal.

8. The case of the prosecution against the appellant is based primarily on: i. identification by PW2 Shri Shiv Prasad and PW4 Raju, and ii. recovery of the stolen mobile phone from the appellant Yunus. In his cross-examination PW2 - Shri Shiv Prasad categorically stated that he was called to the police station in the morning of 9.1.2010 where the accused was shown to him. He further stated that the IO had told him that the mobile phone was recovered from those boys. It clearly shows that the appellant - Yunus was apprehended on 9.1.2010, as claimed by him in his statement under Section 313 of Cr.P.C. and not on 10.01.2010. Even if it is presumed that with the passage of time PW2 was not able to recall the correct date on which he was called to the police station, the fact remains that the person from whom the mobile phone was recovered was shown to him in the police station either on 9.1.2010 or on 10.1.2010. The appellant Yunus refused to join TIP before PW3 Shri Rakesh Kumar, Metropolitan Magistrate on 12.01.2010. Since the appellant - Yunus had already been shown to the material witnesses, before he was produced in the Court, he was justified in refusing to join TIP and no adverse inference can be drawn against him on account of his refusal to join TIP.

9. Though identification of the accused for the first time in the court is a legally admissible evidence, the court in the absence of special facts and circumstances of a case would normally insist on corroboration of identification for the first time during trial. Such corroboration can be either by way of a prior identification in a

judicial TIP or recovery of the stolen property from the accused or in some other legally admissible manner. In the present case, since the appellant was shown to the witnesses in the police station, either on 9.1.2010 or on 10.1.2010, he was justified in refusing to join TIP, since his participation in the TIP would have been meaningless once he had been shown to the witnesses in the police station. Moreover, it has come in the deposition of the complainant Raju that there was no light on the spot and there was no moonlight at that time. The entire incident, according to the witness, lasted only 2-3 minutes. In these circumstances it would be really difficult for the witness to identify the assailants. Identification for the first time during trial in these circumstances would not be sufficient to establish his identity.

10. Coming to the alleged recovery of the mobile phone of the complainant from the appellant, I find that in the FIR no IMEI number of the stolen mobile phone was given. When the complainant came in the witness box he did not tell the court what was the IMEI number of the mobile phone which was stolen from his possession on 6.1.2010. His father Shri Shiv Prasad also did not tell the court what the IMEI number of mobile of his son was. No invoice of purchase of mobile phone was seized during the investigation. Though a photocopy of call detail records of mobile No.9910872310 is available on the judicial file, the said document has not been proved during the course of trial. No witness from the concerned service provider was examined to prove the IMEI number of mobile No.9910872310.

11. It has come in the judgement of the trial court that the mobile phone Ex.P1 was requisitioned in the court to verify its mobile number and it was found that the mobile number matched with the IMEI number noted in the seizure memo Ex.PW10/C. The aforesaid exercise proves only this much that the IMEI number of the mobile phone which the police produced in the court was 352180034378103 and that could be phone, which was recovered from Yunus. However, there is no evidence to prove that the above-referred IMEI number related to mobile phone No.9910872310. Also there is no evidence to prove that SIM card No.9910872310 was being used in the instrument bearing IMEI No.352180034378103 on 6.1.2010. In these circumstances it cannot be said, with a fair amount of certainty, that the

mobile phone alleged to have been recovered from the appellant was the same phone which was stolen from the possession of the complainant on 6.1.2010. It would also be pertinent to note here that according to PW2 Shri Shiv Prasad, when he was called to the police station on 9.1.2010, the mobile phone recovered by the police was shown to him. He claimed that the mobile phone had been kept in the drawer of the room of the IO and it was not thereafter sealed in his presence. The deposition of the aforesaid witness clearly shows that either the mobile phone alleged to have been seized by the police, was not sealed or the said seal was removed and the mobile phone was taken out before it was shown to PW2 in the police station. Either way the benefit of doubt must necessarily go to the accused.

12. For the reasons stated hereinabove, the appellant - Yunus is given benefit of doubt and is hereby acquitted. The appeal stands disposed of accordingly. One copy of this order be sent to the concerned Jail Superintendent for information and necessary action. LCR be sent back along with a copy of this order. APRIL172014
V.K. JAIN, J.

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