

Saleem @ Baniya Vs. State

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Court : Delhi

Decided On : Jul-15-2014

Judge : Mukta Gupta

Appellant : Saleem @ Baniya

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of decision: July 15, 2014 + CRL.A.591/1999 SALEEM @ BANIYA Represented by: Appellant Mr.Krishan Kumar and Ms. Sunita Arora, Advocates. versus STATE Represented by: Respondent Mr.Vinod Diwakar, APP for the State with SI Vivek Sharma, PS Gokalpuri, Delhi. CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J.

1. Vide judgment dated September 29, 1999 the appellant has been convicted for offence punishable under Section 302 IPC and 27 Arms Act. The order on sentence dated September 30, 1999 directs appellant to undergo life imprisonment and to pay a fine of `5,000/- for the offence under Section 302 IPC and rigorous imprisonment for a period of two years and a fine of `1,000/- for the offence under Section 27 Arms Act. During the pendency of the present appeal, the sentence of the appellant was suspended however, he failed to appear at the time of the hearing and thus non-bailable warrants were issued. The appellant is now in custody since May 4, 2014.

2. Learned counsel for the appellant assailing the judgment contends that the prosecution has failed to prove the motive, the witness from whose house knife was allegedly recovered was not made a witness to the recovery memo Ex. PW-12/D, PW-11 who deposed that she saw the appellant throwing a knife did not know the appellant prior to the investigation and thus the prosecution ought to have got conducted the test identification parade. Further no test identification parade of the knife allegedly recovered was got conducted. No blood stained clothes of the appellant were recovered nor was any finger print found on the alleged knife. There are material improvements and contradictions in the statement of the witnesses including the Investigating Officer. PW-4 has contradicted his version. Though it is the case of the prosecution that shops were open at the time of alleged incident no shopkeeper has been examined as a witness. Despite number of shops and hotels being near the place of alleged incident, only PW-4 could hear the hue and cry of the deceased. It is stated that HC Subhash took the deceased to the hospital but he has not been examined in the court. There is contradiction in the statement of PW-10 from his version in the FIR and the deposition before the court. In the site plan, the house of PW-4 has not been shown and the same shows only shops and vacant plots. The prosecution having not proved its case beyond reasonable doubt, the appellant be acquitted of the charges.

3. Learned APP for the State has taken us through the evidence on record. It is stated that the prosecution has based its case on the statement of the eye witnesses and thus non-proving of motive is irrelevant. There is no contradiction in the testimonies of the witnesses. Blood stained weapon of offence i.e. knife was recovered immediately after the incident. PW-8 has also opined that the injury on the deceased could be caused by the weapon of offence Ex.P1. The shirt of the deceased contained corresponding cut marks. Injuries have been inflicted on vital parts of the body. Hence the appeal be dismissed.

4. We have heard learned counsel for the parties and perused the record. The prosecution case unfolds on the statement of PW-10 Ram Dass, father of the deceased who got his statement Ex.PW-10/B recorded, on the basis of which FIR No.249/1998 under Section 302 IPC was registered at PS Gokalpuri. Ram Dass in

his testimony deposed that on April 18, 1998 at about 10/11 a.m. he was going alone to purchase some goods from Gali No.3, Shri Ram Colony. While he was standing at the shop he heard a noise Ramu ko maar diya, Ramu ko maar diya. Ramu @ Yash Pal was his son. He saw Ramu running at the Bada Chowk near the place where he was standing at a distance of 18-19 paces from him. Ramu had already received a stab injury. He also saw the appellant running after Ramu towards Bada Chowk. His other son Mahender also reached near Bada Chowk and told him Papa, Yash Pal ko Maar Diya. He also saw blood on the hands of his son Mahender. Due to stab injury already received by Yash Pal he fell down at Bada Chowk. When Yash Pal fell down at Bada Chowk, he saw Salim stabbing Yash Pal. His son had died on the spot when the police reached at the spot. Thereafter police took his son along with him to the hospital. Doctor declared him brought dead. He further deposed about the recovery of the blood stained knife from the house of one Peter. He also deposed that the site plan was prepared at his instance.

5. PW-17 Mahender Singh, is son of PW-10 and brother of the deceased. He stated that on 18th in the 4th month of the last year he, his father and brother Ramu left the house together at about 9.00 a.m. Since he had to inquire about his private service, he went to the house of his friend. After leaving the house of his friend Israr while he was returning in the gali, he saw appellant Salim with a Chhuri at Chhota Chowk near a hotel. His clothes were blood stained and there was noise Shor Mach Raha Tha Ramu Ko Salim Ne Maar Diya. He saw his brother lying on the ground in a pool of blood. He came to the place where his brother was lying and met his father near the Chowk. He along with a friend lifted his brother from the ground and placed him near an egg shop. Thereafter police vehicle came and took his brother to the hospital. His father went with the brother in the same vehicle. Since this witness did not support the prosecution case in its entirety the learned APP was granted permission to cross-examine this witness wherein he stood by what he had stated in his examination-in-chief.

6. PW-4 Om Prakash @ Bhure an auto rickshaw driver, staying in the same vicinity deposed that on April 18, 1998 he was present at his house for the purpose of getting white wash done. He had given the contract for white washing

of the house to Ramu @ Yash Pal, the deceased. At about 9.00 a.m. he had gone to call Ramu @ Yash Pal from his house. Thereafter at about 11.15 a.m. he heard a noise outside his house. On hearing the noise he came out and saw at some distance from his house some altercation was going on between Salim and Ramu @ Yash Pal and they were scuffling with each other. Father and younger brother of Ramu were also standing there. In the meantime, Salim, present in court whom he knew earlier being a neighbour took out a knife from beneath his shirt and gave a knife blow to Ramu as a result of which Ramu fell on the ground. He took pieces of bricks from the ground and started chasing Salim, who started running from the spot after giving knife blows. Salim threatened him to return back or else he would kill him. So he stopped chasing him. After sometime Ramu fell down on the ground. Salim succeeded in escaping.

7. Two more witnesses are relevant to be noted, that is, PW-5 Rajender and PW-11 Smt.Zahida. PW-5 Rajender has stated that on April 18, 1998 he had come out of his house at about 11.00 a.m. for purchasing bidi machis. At that time he saw Salim @ Baniya, the Appellant coming while running from the Gali No.2 and he was having knife in his right hand. He went towards the house in Gali No.3 where he saw a woman. Appellant went up to the gate of that house and thereafter he threw the knife in the open plot where gunny bags were lying. After throwing that knife he ran away. PW11 Smt.Zahida stated that she was a tenant in the house of her brother-in-law Peter paying `200/- as rent per month. Her sister along with her husband and family was also staying in the said house. She was uneducated and thus did not know the date. She was standing with her child in her lap when the appellant came running to their house. He had a chhuri in his hand. The appellant threw the chhuri near the gunny bags and ran away. Due to panic she went to call the neighbours.

8. An analysis of the testimonies of PW-4, PW-10 and PW-17 show that they are not the witnesses of the first stab injury caused to the deceased however, they witnessed the appellant running after the deceased and thereafter finally stabbing him at Bada Chowk. Their version is corroborated by the post-mortem report which notices seven incised wounds to the deceased on the vital parts of the body. As per the post-mortem report Ex.PW-8/A the cause of death was due to shock as a

result of haemorrhage caused by multiple injuries which were caused by sharp edged cutting/stabbing weapon-single edged. The injuries were ante-mortem, consistence in duration with history given. It was also opined that the injuries 1, 6 and 5, wrongly mentioned as 7 were sufficient to cause death in the ordinary course of nature either collectively or independently. The injuries on the deceased were incised stab wounds on the upper inner front of left forearm, two incised wounds on the left side of the neck, incised wound over upper middle front of left side chest, incised stab wound on the upper outer front of left side chest. This injury went obliquely inwards backwards and entered the left ventricle of heart by making a cut of 1.5 cms. Sixth and seventh injuries were incised wounds on the left side abdomen and posterior axillary fold of left side axilla respectively.

9. Thus, the nature of multiple injuries on the deceased explain and corroborate the version of the witnesses who were natural witnesses living nearby the place of occurrence. The testimony of PW-4 being an eye-witness is sought to be challenged on the ground that in his examination-in-chief he has stated that he saw father of Ramu (Ram Dass) and his younger brother, whose name he did not recollect now, were also standing there. However, in his cross-examination he stated that he had not seen the brother of Ramu standing there. The presence of younger brother of Ramu i.e. PW-17 is fortified by the fact that his hands were blood stained, as is deposed by PW10. Though there is some embellishment in the testimony of PW-4 to the extent he says that he saw a scuffle between the appellant and deceased, however such minor embellishments in the testimony of the witness would not amount to a contradiction and are in the nature of aberrations. The testimony of PW-4 is further assailed on the ground that he stated that the shop of Ashok was opened and there were other shops also which were opened; however PW-5 has stated that the market was closed at that time and the hotel was also closed. It is the case of the PW-5 that at 11.00 AM he had gone for purchasing Bidi/machis and, thus, he could have done so only if the shops were opened. Merely saying that the market was closed and the hotel was also found closed does not mean that all the shops were closed. It is common knowledge that shops in the market start opening post 10 O'clock and thus the statement of PW-4 is not discredited on this ground. Further, even PW-5 stated that he made a phone call from the shop of Ashok Parchun-wala which would

show that some shops were actually open. Non examination of Ashok, the shop owner, does not dent the prosecution case as he was not a relevant witness unless he had witnessed the incident.

10. It is well-settled that the Court has to sift the same and separate the grain from the chaff. The Honble Supreme Court in (2011) 6 SCC288 Brahm Swaroop and Anr. Vs. State of Uttar Pradesh observed as under:

32. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution's case, may not prompt the Court to reject the evidence in its entirety. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions."

Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. (See: State of U.P. v. M.K. Anthony: AIR 1985 SC48 and State of Rajasthan v. Om Prakash: AIR 2007 SC2257 State v. Saravanan and Anr.: AIR 2009 SC152 and Prithu @ Prithi Chand and Anr. v. State of Himachal Pradesh: (2009) 11 SCC588.

11. Learned counsel for the appellant also states that besides the abovementioned witnesses no other witnesses have been examined, though the alleged incident took place in an area where there are number of shops and according to the case of prosecution they were also open. In the present case, the prosecution examined as many as 3 eye-witnesses. There is no need for the prosecution to have added to the number of the witnesses as it is the quality of the evidence which is material

and not the quantity. Moreover, even if the shops were opened it is not necessary that each of the witnesses would have seen the entire incidents, as the deceased was given a chase by the appellant and given multiple stabs.

12. Further, non cross-examination of H.C.Subhash is also not fatal to the prosecution case. Ram Dass in his testimony stated that Police came in 100 number van and the injured was taken in the gypsy by the Police along with him to the hospital. Thus, Ram Dass who accompanied the deceased to the hospital has been examined and even if H.C. Subhash has not been examined it is immaterial. The discrepancy in the statement of PW-10 in the FIR where he stated that he and his sons were near the place of incident whereas in his deposition he stated that he went alone has been explained by PW-17 his son Mahender who stated that initially all three of them came out of their house; however thereafter they separated for their work as Mahender had to go to find out a job for himself and when he came back from the house of Israr, he saw the incident in the Gali and his father standing at the chowk. The incident took place from Chhota chowk towards Bada chowk where finally the deceased fell down and he was again stabbed.

13. The site plan is assailed on the ground that it does not show the Gali or the residence of PW-4. The site plan was prepared at the instance of PW10 Ram Dass and his presence is shown in the same. Merely because the site plan does not show the presence of other eye-witnesses, their testimony cannot be discredited. Not only the incident has been witnessed by 3 eyewitnesses, however soon after the incident two witnesses i.e. PW-5 and PW11 have seen the appellant drop the knife in a place near the Gattar where all around gunny bags were lying. The cross-examination of PW-5 would show that the stress on the cross-examination was in relation to the alleged incident of stabbing and the location of PW-5. PW-5 has clarified that he had not witnessed the stabbing, however he witnessed the appellant running from Gali No.2 with a knife in his right hand to Gali No.3 where he went inside a house and thereafter he threw that knife in the open plot where gunny bags were lying and ran away from there.

14. PW-11 Zahida has also deposed on the same lines. Testimony of PW- 11 Zahida is sought to be assailed on the ground that she did not know the appellant prior to that date and so Test Identification Parade ought to have been conducted. PW-11 in her cross-examination has stated that on the same day she informed father of Ramu i.e. PW-10 about the weapon of offence having been disposed of in her presence and later she came to know that the Police had recovered the weapon of offence. Thus, the same day the name of the appellant was revealed to her and hence no TIP was required to be conducted.

15. The version of PW-5 and PW-11 is further corroborated by the fact that on the same day the Police recovered the weapon of offence vide Ex.PW-12/C which was blood stained. The knife was stained with human blood of B group origin which tallied with that of the deceased. The postmortem doctor has opined vide Ex.8/B that the possibility of injuries present over the body of the deceased being caused by the said weapon cannot be ruled out. The doctor also noted that the said weapon Chhuri/ knife was blood stained. Nothing material has been elicited in the cross-examination of this witness and on material points i.e. injuries and the opinion rendered his testimony has gone unchallenged. Since the case of the prosecution is based on the depositions of eye-witnesses, even if the prosecution has not proved the motive behind the crime, the same would not affect the prosecution case.

16. Soon after the incident, FIR No.249/1998 was registered by PW-7 H.C. Bal Kishan vide Ex.PW-7/A at 2.30 PM. The FIR contained the name of the appellant herein though he was arrested much later on April 30, 1998. There is no cross-examination of PW-7 that either the FIR was ante-dated or ante-timed.

17. Considering the evidence on record in the form of eye-witnesses and witnesses who saw the appellant immediately after the incident disposing of the blood stained weapon of offence, recovery of the weapon of offence and the opinion of the post mortem doctor PW-8, we are of the considered opinion that the prosecution has proved its case beyond reasonable doubt. We are also unable to agree with the contention of the learned counsel for the appellant that the present case falls under Section 304 IPC, in view of the number and nature of injuries and

the parts of the body of deceased where the same have been inflicted. Consequently, the appeal is dismissed.

18. TCR be sent back. The appellant who is in custody would undergo the remaining sentence. The appellant be informed through Superintendent Tihar Jail. (MUKTA GUPTA) JUDGE (PRADEEP NANDRAJOG) JUDGE JULY15 2014 vn/ga

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