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Rajesh @ Kalia Vs. State

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Court : Delhi

Decided On : Jul-15-2014

Judge : Mukta Gupta

Appellant : Rajesh @ Kalia

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of decision: July 15, 2014 + CRL.A.285/1998 RAJESH @ KALIA Represented by: ..... Appellant Ms.Sandhya Goswami and Mr.M.P.S.Tomar, Advocates. versus STATE Represented by: ..... Respondent Ms.Aashaa Tiwari, APP for the State with Inspector Arvind Paul, PS Pandav Nagar. CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J.

(ORAL) 1. By the present appeal the appellant challenges the judgement dated April 28, 1998 convicting him for offence under Sections 302/34 IPC and the order on sentence dated April 29, 1998 directing him to undergo imprisonment for life and to pay a fine of `5,000/-.

2. Two more were convicted with the appellant however, during the pendency of their appeal they took the plea of juvenility and on the basis thereof, Crl.A.No.286/1998 filed by them stands disposed of.

3. Learned counsel for the appellant contends that the presence of PW-1 at the time of alleged incident is doubtful. There are contradictions in the testimonies of PW-1 and PW-2 in regard to injury and other aspects. PW-2 is a relation and hence cannot be believed. No blood stained clothes of PW- 2 have been seized to prove that he witnessed the incident. PW-2 gave the statement to the police only at the hospital when he came to the mortuary after hearing the death of his nephew, as he had accompanied PW-4, the father of the deceased. The alleged recovery of weapon of offence was from a public place and hence cannot be attributed to the appellant. The recovery has been planted on the appellant as it was not made on the date of arrest of the appellant. Admittedly the knife was not in a working position and had no finger prints of the appellant or any blood. No public witness was joined with the alleged recovery. PW-5 Bir Singh has turned hostile. There are major contradictions in the statements of the witnesses of the crime team regarding the place of occurrence. PW-1 the complainant has also not supported the prosecution case. Thus the appellant be acquitted. In the alternative, since it was not a premeditated fight, the conviction of the appellant be altered to one under Section 304 IPC.

4. Learned APP for the State on the other hand has taken us through the evidence on record and states that there is no reason to disbelieve PW-1 and the other witnesses. Presence of PW-1 and PW-2 has been proved by PW-4, the father of the deceased, who took him to the hospital. There is recovery of weapon of offence from the appellant. PW-2 was associated with the recovery. In view of the nature of injuries, there is no illegality in the impugned judgment and the order on sentence. Hence, the appeal be dismissed.

5. We have heard learned counsel for the parties and perused the record.

6. The case of the prosecution hinges on the statements of PW-1 Sunil, the complainant and PW-2 Dharambir Singh, uncle of the deceased who are the eye witnesses. PW-1 is the maker of the FIR. PW-1 deposes that on July 23, 1993 he along with Dharambir, Bir Singh and Anil had gone to the house of Pappu, who hosted a party on the occasion of the birth of his son. After half an hour of taking meal, they started for their house. The appellant and the two others (held to be

juvenile and hereinafter named as K and M) were also at the party and followed them. At about 8.30 p.m. when they reached near the house of Khacheru, appellant called Anil. When Anil turned towards him, the appellant took out a knife and inflicted knife injuries on the person of Anil. The two others i.e. K and M were standing near the appellant. Anil cried that he had been stabbed and shouted for help. He along with Dharambir and Bir Singh went towards Anil. The appellant and the other two ran from the spot. Anil fell down on the spot. They removed Anil to his house. From the house his father and Dharmbir took him to the hospital where Anil died.

7. PW-2 Dharambir has also given the same version as PW-1. He however, stated that the appellant asked K and M to catch hold on which they caught hold of Anil and the appellant took out a knife from his pant and attacked the deceased. The deceased cried bachao bachao. He, Biru and Sunil went running to the spot but accused person ran away.

8. Learned counsel for the appellant has sought to assail the testimony of PW-1 on the ground that he has turned hostile however, it may be noted that the examination-in-chief of PW-1 was recorded on February 2, 1995 and adjournment was sought for the cross-examination of this witness by the learned defence counsel and when he was finally cross-examined on February 27, 1996 he did not support the prosecution case. In his crossexamination he stated that he came alone from Pappus house and none was with him. He went to his house directly and reached there at about 7.45 p.m. He however, further elaborated that at about 8.15 p.m. he heard the noise of a quarrel. When he reached the house of Khacheru, he saw Anil fallen down and there was crowd. No doubt, this witness has not supported the case of the prosecution in his cross-examination however, that does not efface the entire testimony of this witness and the same can be looked into to the extent it is corroborated. Further PW-2 Dharambir in his cross-examination has stood by his version in the examination-in-chief. As per both PW-2 and PW-4, PW-1 and PW-2 had brought Anil in injured condition to the house.

9. Learned counsel for the appellant has sought to highlight the version of PW-2 in his cross-examination where he stated that he had made the statement to the

police when he had gone to take the dead body of Anil on that day after hearing of death of his nephew. He came to JPN Hospital during inquest proceedings. Merely because he stated in inquest proceedings about the death of his nephew and identified the body would not belie his otherwise credible version of the incident. PW-2 is a local resident and associated with the arrest, personal search, disclosure and recovery of weapon at the instance of the appellant. Despite lengthy cross-examination, nothing material has been elicited from him. The appellant has challenged the recovery of weapon of offence at his instance being from a public place. Though the place from where the knife was recovered was a pathway however, it was kept concealed in a heap of bricks adjoining the wall of a school. Though the weapon of offence is not connected to the injuries caused from the testimony of PW-11 Dr. Basant Lal Sirohiwal, who conducted the post-mortem of the deceased as no opinion was sought from him however, PW-2 has identified the weapon of offence recovered at the instance of the appellant having been used by the appellant to cause injuries.

10. In view of the testimony of PW-2 and the part testimony of PW-1 which is corroborated by the injuries, place of occurrence and also the version of PW-4, the prosecution has been able to prove that the appellant caused two stab injuries to the deceased Anil. This takes us to the vexed question as to whether the present case would be one under Section 302 IPC or Section 304 IPC. Even as per the prosecution case, there is no previous enmity and the incident happened all of a sudden. Though PW-1 and PW-2 were along with the deceased however, their version conceals the fact as to how the quarrel between the deceased and the appellant started and on what issue.

11. In (1990) 3 SCC190Vijayee Singh & Ors. vs. State of U.P. the Supreme Court held that the accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or rely on the prosecution case itself or, as stated above, he can indirectly introduce such circumstances by way of cross-examination and also rely on the probabilities and the other circumstances.

12. In (2002) 1 SCC71Kashiram & Ors. vs. State of M.P. following Vijayee Singh (supra) the Court noted that even in a case where the burden of proof is on the accused to prove the plea though not introduced by any of the modes i.e. cross-examination of prosecution witnesses or in the statement of the accused persons recorded under Section 313 Cr.P.C. or by adducing defence evidence, can still be considered by the court relying on the probabilities and the circumstances of the case. It was held:

24. The High Court was also not right in criticising and discarding availability of plea of self defence to the accused persons on the ground that the plea was not specifically taken by the accused in their statements under Section 313 Cr PC and because the accused Prabhu did not enter in the witness box. Though Section 105 of the Evidence Act enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of selfdefence can be taken by introducing such plea in the crossexamination of prosecution witnesses or in the statement of the accused persons recorded under Section 313 Cr PC or by adducing defence evidence. And, even if the plea is not introduced in any one of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case as held by this Court in Vijayee Singh case. It is basic criminal jurisprudence that an accused cannot be compelled to be examined as a witness and no adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness box.

13. As noted above, the prosecution neither attributes any pre-meditation nor the genesis of the quarrel. No doubt, in a case of eye-witness account, the prosecution is not required to prove the motive. However, the absence of the genesis of the quarrel can lead to the only inference that the offence committed by the appellant was not pre-meditated and was as a result of sudden fight. The knife used for the commission of the offence was an ordinarily available kitchen knife with length of blade being 6 inches. Though one injury has been caused on the right side of the chest the other is on the thigh, which is not a vital part. In view of

this position, the offence falls in the Exception 4 to Section 300 IPC i.e. culpable homicide not amounting to murder.

14. Considering the evidence on record, the conviction of the appellant is altered to one under Section 304 Part-I IPC.

15. As per the nominal roll the appellant has already undergone more than 7 years of imprisonment. Thus, we deem it fit to modify the sentence of the appellant to the period already undergone. The appellant is on bail. His bail bond and surety bond are discharged.

16. Appeal is disposed of accordingly. Trial Court Record be sent back. (MUKTA GUPTA) JUDGE (PRADEEP NANDRAJOG) JUDGE JULY15 2014 vn

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