

Budhan Khan vs.state

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Court : Delhi

Decided On : Nov-20-2018

Appellant : Budhan Khan

Respondent : State

Judgement :

§~R-11 * + % IN THE HIGH COURT OF DELHI AT NEW DELHI CRL. A. 684/2017 Judgment reserved on 31st October, 2018 Judgment pronounced on 20th, November, 2018Appellant BUDHAN KHAN Through : Mr. Sumeet Verma and Ms. Preeti Jakhar, Advocates. Versus STATERespondent Inspector Nar Singh, Police Station - Kanjhawala. Through: Ms. Radhika Kolluru, APP for the State with CORAM: HON'BLE MR. JUSTICE SIDDHARTH MRIDUL HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL SANGITA DHINGRA SEHGAL, J.

1. The present appeal under Section 374 (2) of Code of Criminal Procedure (hereinafter referred to as 'Cr.PC') challenges the judgment and order on sentence dated 30.03.2017 and 03.04.2017 respectively passed by the Additional Sessions Judge, Fast Track Court, North West District, Rohini, Delhi in Sessions Case No.51705/2016, FIR No.620/2014, under Section 302 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 25/27/

of Arms Act registered at Police Station - Kanjhawala whereby the appellant was convicted and sentenced for life imprisonment for the offence punishable under Section 302 IPC with fine of Rs.25,000/- and in default of payment of fine to further undergo simple imprisonment for a period of six CRL.A. 684/2017 Page 1 of 15

months. The appellant was also sentenced to undergo imprisonment for two years for the offence punishable under Section 25 of Arms Act with fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment for a period of three months. The appellant was further sentenced to undergo imprisonment for two years for the offence punishable under Section 27 of Arms Act with fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment for a period of three months. It was further directed that all the sentences would run concurrently.

2. The fulcrum of the case of the prosecution is that the appellant murdered his wife Mamta on 13.08.2014 and the said act was allegedly witnessed by their son Master Sabesh.

3. On 13.08.2014 at about 3:51 a.m., a telephone call was received from a female caller informing the Police Control Room that her mother had been shot dead by her father. The police came into action and PW13 SI Sunil Dagar along with Constable Sandeep reached the spot i.e. C-72, Meer Vihar, Delhi and found a dead body of Mamta, wife of the appellant. Crime Team was summoned, who photographed the spot. The appellant was arrested, who did not deny that Mamta was his wife.

4. The appellant was charged with offences under Sections 302 of IPC and Sections 25/27/

of Arms Act. The appellant pleaded not guilty and claimed to be tried. To bring home the guilt of the appellant, the prosecution relied upon oral testimonies of 24 witnesses including one eye witness being PW-9. CRL.A. 684/2017 Page 2 of 15

5. In his statement recorded under Section 313 Cr.PC, the appellant claimed that he was not involved in the alleged incident but admitted that there was a quarrel between him and Mamta and he was not residing with her for the past few months. The appellant examined three witnesses in his defence.

6. After analysing the testimonies of the witnesses, the Trial Court had held the appellant guilty of the charged offences and sentenced him as stated in para 1 above.

7. Mr. Sumeet Verma, learned counsel appearing on behalf of the appellant urged that the appellant had been falsely implicated in the present case; that the testimony of PW-9 Sabesh, who is a child witness, is full of contradictions and therefore not worthy of reliance; that the presence of PW-9 Sabesh is highly doubtful as he used to live with his Nani; that there were disputes between the appellant and the deceased regarding fixing of marriage of Reena, daughter of the deceased who was about 16 years of age, to a middle aged person and thus, the appellant and the deceased were not living together; that Reena, daughter of the deceased had not supported the case of the prosecution; that there is no explanation as to why the blood stained clothes of the child witness were not sent to FSL for examination; that weapon of offence i.e. Desi Katta has been planted upon the appellant; that the ear-rings and pajeb of deceased were also planted upon the appellant to falsely implicate him in the matter; that PW18, witness of the alleged recovery of ear-rings and pajeb of the deceased did not CRL.A. 684/2017 Page 3 of 15 support the case of the prosecution, which circumstance casts serious doubt on the recovery of the ear-rings and pajeb; that the prosecution failed to bring forward as to how and in what manner the appellant got access to the room when the same was bolted from inside.

8. Refuting the arguments of learned counsel for the appellant, Ms.Radhika, learned APP for the State contended that the prosecution has been able to establish the crime beyond all reasonable doubt; that the prosecution has also been able to establish the presence of PW-9, the eye-witness of the occurrence, at the spot at the time of commission of offence; that though the PW-18, witness of recovery of weapon of offence, failed to support the case of the prosecution, yet the testimony of PW-9, the child witness is sufficient to convict the appellant; that the prosecution has also been able to establish the motive behind the crime namely that the appellant was furious as the deceased had illicit relations with some men.

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

10. The case of the prosecution primarily rests upon the testimony of PW-9 Sabesh, who is a child witness. The law is well settled that the sole testimony of

child witness can be relied upon along with other circumstances and corroborative evidence to convict the accused. There is no doubt about the settled proposition of law that the evidence of child witness is required to be scrutinised and approached with great caution. CRL.A. 684/2017 Page 4 of 15 11. In State of Rajasthan versus Chandgi Ram and others reported in 2014 Cri.L.J.

4571 (Supreme Court), the Hon'ble Apex Court has observed that :

"12. Similarly, we find absolutely no discrepancy in the version of Vikram (PW-15), who was even younger than Kumari Sarita (PW-3) in age at the time of the occurrence but yet his version before the Court as recorded by the trial Court disclosed that he was only speaking the truth and he was able to give the required details as regards the manner in which the occurrence took place, the involvement of the

... RESPONDENTS

-accused and the weapons which they used in that process and the ultimate killing of his father at the instance of the

... RESPONDENTS

-accused.

13. In this context, it is relevant to rely on a decision of this Court reported in State of Madhya Pradesh v. Ramesh and another : (2011) 4 SCC786 wherein it laid down as to how the evidence of a child witness should be assessed. Paragraphs 7, 11 and 14 which are relevant for our purpose, are as under:

7. In Rameshwar v. State of Rajasthan this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that (AIR p. 55, para

7) every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise. The Court further held as under: (AIR p. 56,

para 11). CRL.A. 684/2017 Page 5 of 15 that the opinion

"11. ...it is desirable that Judges and Magistrates should always record their child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate."

11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him [pic]. and even if no such questions had been put, it may be gathered from his evidence as fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross- examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. (Vide Himmat Sukhadeo Wahurwagh v. State of Maharashtra.) to whether he 14. In view of the above, the law on the issue can be summarised to the effect that the CRL.A. 684/2017 Page 6 of 15 deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

(Emphasis added)

12. In the case of Yogesh Singh Vs. Mahabeer Singh and others reported in AIR 2016 SC5160 it has been held that:

22. It is well-settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See Prakash Vs. State of M.P., (1992) 4 SCC225 Baby Kandayanathi Vs. State of Kerala, :

1993. Supp (3) SCC667 Raja Ram Yadav Vs. State of Bihar, (1996) 9 SCC287 Dattu Ramrao Sakhare Vs. State of Maharashtra, (1997) 5 SCC341 State of U.P. Vs. Ashok Dixit & Anr., (2000) 3 SCC70 Suryanarayana Vs. State of Karnataka, (2001) 9 SCC129.

23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him CRL.A. 684/2017 Page 7 of 15 29. and thus a child witness is an easy prey to tutoring. [Vide Panchhi Vs. State of U.P., (1998) 7 SCC177. xxxxxx law that in is well settled It the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission.

13. Returning to the facts of the present case, PW-9 Sabesh, the minor son of the deceased witnessed the incident, and categorically testified that the appellant had shot dead his mother, in the following words :-

"At that time, I was residing at Meer Vihar along with my mother Mamta and my sister Reena. I and my mother were sleeping in the jhuggi. Reena was in another rented jhuggi with her sister Pinki. The door of the jhuggi was bolted from inside. Accused present in court i.e. Budhan Khan came at about 3:00 or 3:30 a.m. He opened the bolt from outside by putting his hand through a hole of the door. He was having one katta. He fired with the same but that first shot did not hit my mother. My mother then tried to snatch katta from him. There was a scuffle between both of them. Accused then pushed my mother and he then again fired my mother and he then again fired my mother which hit her on her head on the left side near temple region. Accused also told me not to reveal his name to anyone. My mother used to work at the factory of one Jogi and accused asked me to take his name instead. He then switched off the light of the room and went to the roof of our jhuggi and from there, he jumped and went from there. He had also removed wearing ear-tops and Payal from the body of my mother and took those along. I then went to the other jhuggi where Reena and Pinki were sleeping. I told them about the incident. Police was also informed. Police also came at the spot. xxxxxxxx 14. PW-9 Sabesh was cross examined at length. During cross examination he stated that :

"It is correct that at that time, my brother and sisters were not living with us. It is correct that Budhan Khan was not living with us for last 6-7 months before the date of incident. xxxxxxxx Jogi used to come to our jhuggi in the absence of Budhan Khan. He never came at our house in the night hours. He used to come in the day hours to meet my mother in our absence. It is correct that there used to be quarrel between my mother and Budhan Khan regarding Jogi's visit to my mother in our absence. It is correct that Budhan Khan had left the house six months ago because of increased quarrels between my mother and Budhan Khan. During the aforesaid period of six months, neither my mother went to the house of accused nor he came to our jhuggi and he did not take care of our well being. CRL.A. 684/2017 Page 9 of 15 xxxxxxxxxx My Nani's house is around 500 meters away from our jhuggi. I tried to wake up Meena and here family, who were there in adjacent jhuggi, but nobody came out. xxxxxxxxxx Reena is aged around 13-14 years as on date. It is correct that Budhan Khan did not want such marriage as Reena was of minor age which led to quarrel between accused and my mother. "

No suggestion was given to this witness that he was a tutored witness.

15. PW2 Asha Devi, mother of the deceased deposed that at about 4:00 A.M., she heard the voice of Pinki and Reena; and came to know that Sabesh had come over; and thereafter heard the voices of weeping; and when she went to the house of her daughter Mamta, she found her lying dead in a pool of blood.

16. The testimony of PW-18 Reena also needs to be considered. She deposed that "My mother was living alone at C-62 Meer Vihar. My mother had turned out accused from her house already. I do not know the reason behind their matrimonial discord. Savesh also used to reside with me at my Nani's house. Savesh is my real brother."

She admitted her signatures on seizure memo PW18/B of pajeb and ear rings and identified one pair of silver pajeb and one pair of gold ear rings as Ex.P3 and P4 respectively, which were gifted to her mother by the appellant.

17. It is clear from the testimony of PW2 Asha Devi (Nani of PW9) that PW9 Sabesh was not sleeping in her house on the fateful night but had come from the house of her daughter to inform them that his mother had been murdered by the appellant. It is also clear that PW9 was sleeping with his mother at the time of incident. As far as testimony CRL.A. 684/2017 Page 10 of 15 of PW18 Reena is concerned, it has emerged from the record that the appellant was having repeated altercations with the deceased for getting Reena married to a middle aged man. Even though the testimony of PW9 was not supported by the testimony of PW18, the testimony of PW9 aspires confidence and remains unshattered and creditworthy as he stood the test of cross examination and answered all the questions unequivocally and consistently.

18. From a conjoint perusal of the testimonies of prosecution witnesses, it is established on record that, undoubtedly on the fateful night, PW9 was sleeping with his mother and was not sleeping at the house of his Nani i.e. PW2 Asha Devi; and to his horror a quarrel took place between the deceased and the appellant and finally the appellant shot the deceased. PW9 in his statement under Section 161 Cr.PC stated to the police that when he woke up at about 3:00 - 3:30 A.M, the

appellant hit him on his left ear. The presence of PW9 further finds support from his MLC Ex.PW4/A which suggest that "abrasion on left side of mandible".

19. The prosecution has further been able to establish that the death was caused by a firearm injury and proved the Post Mortem Report Ex.PW5/A of the deceased which clearly states that "the death was due to shock associated with damage for head and chest structures under injury Nos. 1, 2 and 3 which was fresh and antemortem at the time of death and was sufficient to cause death in ordinary course of nature consequent to firearm injury."

CRL.A. 684/2017 Page 11 of 15 20. As per the case of the prosecution, the alleged weapon used in the offence was got recovered at the instance of appellant in the presence of an independent witness being PW1 Tauqir Ahmad, who was residing opposite to the plot where the weapon of offence was got recovered. PW1 identified his signatures on seizure memo of the gun i.e. Ex.PW1/A and specifically deposed that "Accused Budhan Khan had taken out the said katta by digging the earth and from a pit. It was wrapped in a panni and there were four cartridges also which were recovered from the pit."

21. The weapon used in the offence, live bullets and empty cartridges were sent to FSL for examination. Though the experts failed to give any conclusive opinion on the bullet recovered from the body of the deceased and opined that "No opinion can be given whether exhibit 8mm/.315" bullets marked 'EB1" and 'EB2 have been fired through exhibit country made pistol marked 'F1' or not due to insufficient data available on them", but it cannot lead us to brush aside the ocular testimony of the incident.

22. In a recent case, the Apex Court in Himanshu Mohan Rai vs. State of Uttar Pradesh and Another reported in (2017) 4 SCC161 has rejected a contention in this behalf by observing that if the eye-witness is absolutely acceptable then such evidence could be accepted even if there is some contradiction in the medical or ballistic reports. Relevant paragraphs 21, 22, 23 and 24 are reproduced below:

"21. Apparently the police recovered a licensed gun from the accused Imran Afreen while he was CRL.A. 684/2017 Page 12 of 15 boarding a train and the

ballistic report showed that the licensed gun was not used for the killing. This means that the Police did not recover the actual weapon used for the killing and the accused had ample time to dispose off the weapon. It is however not possible to reject the credible ocular evidence of the eyewitness who witnessed the shooting and who are found to be truthful. It is possible that the prosecution may not recover the actual weapon in some cases. However, this cannot have the effect of discrediting reliable ocular testimony as we have here that the accused shot and killed the deceased, particularly when the lead bullets have been recovered and are found belonging to a commonly used 7.65 m.m. caliber i.e. .32 bore weapon. In *Anvaruddin vs. Shakoor* : (1990) 3 SCC266 this Court considered the effect of obscure and oscillating evidence of the ballistic expert. The Court observed that:

22.

23.

"1. In this nebulous state of the evidence of the ballistic expert we are of the view that the High Court was wholly wrong in doubting the direct evidence of the three eye-witnesses on this ground. Where the expert evidence is obscure and oscillating, it is not proper to doubt the direct testimony of the eye-witnesses on such uncertain evidence. In such a situation unless the evidence of the eye-witnesses is shaken by some glaring infirmities, it would not be proper to doubt the correctness of their statements...."

to discredit 24. In the case of *Brijpal Singh vs. State of M.P.*: (2003) 11 SCC219 this Court observed that there was reliable ocular evidence of the accused having shot the deceased. However, the ballistic expert as in this case reported that though both the guns CRL.A. 684/2017 Page 13 of 15 if the oral evidence was not that normally, is absolutely acceptable, were found to have been discharged recently, the empty cartridges that were seized from the spot did not match the rifle that was recovered. This Court observed the eyewitness's evidence then such evidence could be accepted even if there is some contradiction in the medical or ballistics reports. However, found acceptable in this case. In contrast, we find the oral evidence in the present case, particularly that of P.W. 1, to be completely acceptable and truthful. There is no iota of evidence on record which would

suggest any motive on his part to falsely implicate the accused. We might add that there is no evidence as argued by the learned counsel the police conspired to frame the accused who was a congress leader and had protested against police high handedness."

for the respondent, that 23. To conclude, from the testimony of PW-9 Sabesh, it is clear that there was a quarrel between the appellant and the deceased in his presence and he saw the appellant firing at the deceased. The presence of PW-9 Sabesh at the spot is undeniably established by the prosecution witnesses and the material witnesses corroborate the version of PW-9 Sabesh. It is further clear from the record that the deceased, mother of PW-9 Sabesh died of gun shot. The testimony of PW-9 is natural, credible, clear unambiguous and unrebutted, leading us to a firm view that the prosecution has been able to prove its case beyond reasonable doubt. Hence, we do not find any cogent reason to interfere in the decision rendered by the Trial Court. Accordingly, the appeal is dismissed. CRL.A. 684/2017 Page 14 of 15 24. Trial Court Record be sent back along with a copy of this order. SANGITA DHINGRA SEHGAL, J.

SIDDHARTH MRIDUL, J.

NOVEMBER20h, 2018 gr CRL.A. 684/2017 Page 15 of 15

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