

Mohd. Sadiq Vs. State of Delhi

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Court : Delhi

Decided On : Jan-09-2015

Judge : G. S. Sistani

Appellant : Mohd. Sadiq

Respondent : State of Delhi

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 315/1999
Judgment dated 9th January, 2015 % MOHD. SADIQ . APPELLANT Through : Mr.
Javed Ahmed, Advocate versus STATE OF DELHI .. RESPONDENT Through :
Ms. Jasbir Kaur, APP for the State with SI Yash Pal, PS - Chandani Mahal
CORAM: HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MS. JUSTICE
SANGITA DHINGRA SEHGAL

JUDGMENT

(ORAL) 1. Present appeal filed by the appellant under Section 374 of the Code of Criminal Procedure is directed against the judgment dated 15.05.1999 passed by learned Additional District and Sessions Judge, Delhi, by which the appellant has been directed to undergo life imprisonment with fine of Rs.25,000/- and in default of payment of fine Simple Imprisonment for two years for the offence punishable under Section 302 of the Indian Penal Code.

2. The case of the prosecution, as noticed by the learned Trial Court, is as under :

Prosecution case as per chargesheet disclosed that on 03.06.1996 vide DD No.2A, Ins./SHO Chanderkant had reached H. No.T-17, DDA Flats, Turkman Gate, Delhi with constable Jai Singh, constable Mangilal and constable Karambir where he found, SI Virender Singh, ASI Jit Singh and constable Achetanand; that there he met with Smt. Afsana wife of Arif, who made her statement to the police and in her statement she substantially stated that there was a quarrel between Sadiq accused in this court and her husband on the issue of accommodation, since Arif was living in a Balcony and Sadiq was living in a big room and all the family members mentioned in the statement were living in the flat; that on 2.6.95 at about 11.50 p.m. when Arif came to his house and immediately on his arrival, he asked Sadiq to live in that room, upon which quarrel had taken place between both of them and during the quarrel, Sadiq had taken a razer and had given a blow on his neck and as a result of razer blow on the neck he fell down outside the bath room and from his neck plenty of blood has come-out and at the spot he had expired; that this incident has been seen by her, her elder brother-in-law (Jeth) Umar Daraj, Mohd. Ilias, her mother-in-law Hasina Begum, who were present in the house and after apprehending the accused, he was handed over to the police; that on the basis of this statement rukka was prepared and the case was registered; that during the course of investigation photographs were taken, site plan was prepared at the instance of complainant, blood sample was lifted in a glass bottle from the blood lying near the dead body of deceased Mohd. Arif with the help of the cloth and same was sealed with the seal of CKT, earth control was also taken from the place near the dead body, where blood was not there, which was also sealed with the seal of CKT and were taken into police possession; that dead body was sent to JPN Hospital for post mortem; accused was arrested and he made his disclosure statement and on the basis of his disclosure statement, razer was recovered; sketch of the razer was prepared and thereafter razer was sealed in a cloth parcel with the seal of CKT and were seized vide seizure memo that accused was wearing blood stained lungi and T Shirt which were also taken into possession by preparing the sealed parcel with the seal of CKT and same was also seized; statement of the witnesses were recorded; post mortem report was procured; opinion regarding the cause of death has also been obtained from the Doctor concerned and blood, razer and clothes etc. recovered from the person of accused

as well as from the person of deceased were sent for CFSL office for examination and results were procured and after completion of the investigation, chargesheet was filed on 31.8.96 in the court of Ld. MM, Delhi and accused was sent for trial.

3. The prosecution has examined eighteen witnesses, two witnesses were examined by the defence. Statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure.

4. Mr. Javed Ahmed, learned counsel appearing for the appellant, submits that the judgment of the trial Court is contrary to law and facts and there is no legal evidence against the appellant justifying his conviction. It is also urged before this Court that the trial Court has completely lost track of the settled position of law, the trial Court has failed to consider that not a single eye witness has supported the case of the prosecution and in the absence of any evidence against the appellant the judgment and order of conviction is liable to be reversed. It is also contended that the circumstantial evidence in this case has not proved the guilt of the appellant. Counsel contends that even the recovery of the weapon of offence has not been proved by the statement of ASI Jeet Singh (PW-6). It is further submitted that the learned trial Court has failed to consider that the blood on the clothes of the appellant was on account of the fact that he had carried his brother to the hospital and thus this circumstance by itself cannot be held against the appellant. Counsel further submits that there is no motive which has been established which would justify the appellant killing his own brother.

5. Learned APP for the state contends that appellant was arrested at the spot of the incident. The weapon of offence was discovered on the pointing out of the appellant and at the time of the incident family members, which include three brothers, mother of the deceased and wife of the deceased, were present.

6. Learned APP further contends that simply because the material witnesses have turned hostile this by itself cannot be a ground in favour of the appellant as the circumstantial evidence in this case conclusively holds the appellant guilty for the offence of murdering his own real brother. Counsel further submits that as per the evidence on record four brothers, mother and wife of the deceased were residing in a DDA flat. The deceased and his wife were staying in the balcony while the

appellant was occupying a room which was the bone of contention between the two brothers. Learned APP further submits that although all the eye witnesses have turned hostile but they have not disputed their signatures on the memo of arrest, recovery memo and seizure memo which would establish the presence of the appellant at the spot of the incident. Learned APP also submits that the defence set up in the statement recorded under Section 313 of the Code of Criminal Procedure cannot be believed as no outsider entered the house, the weapon of offence was found in the house itself and no outsider would have the time to hide the weapon of offence after killing Arif when all the family members were present in the house.

7. At this stage, learned counsel for the appellant on instructions submits that the appellant does not wish to contest his conviction but submits that the case would fall under Section 304 Part-II as there was no planning or intention on the part of one brother to kill the other, the incident occurred at the spur of the moment on account of the altercations between the two brothers the appellant had no intention to cause death to his real brother. Counsel contends that having regard to the circumstances of this case the sentence of the appellant should be modified to the period undergone by him.

8. Learned APP for the State submits that having regard to the nature of the weapon used in the matter the period already undergone which is approximately three years would not be sufficient.

9. We have heard learned counsel for the parties and also carefully examined the evidence placed on record. In this case, on the basis of the statement made by the wife of the deceased that on 3.6.1996 a quarrel took place between the appellant and her deceased husband on the issue of accommodation since the deceased was living in a balcony while the appellant was living in a big room and in the midst of the quarrel the appellant had taken a razor and given a blow on the neck of the deceased in the presence of the brother-in-law and mother-in-law, a rukka was prepared and a case was registered.

10. In all eighteen witnesses were examined. Two witnesses were produced by the defence. We may notice that PW-4, wife of the deceased; PW-5, brother of the

deceased; PW-7, brother of the appellant; and PW-8, mother of the appellant turned hostile and they did not support the case of the prosecution.

11. It is settled law that such portion of the evidence of a hostile witness can be relied upon which is trustworthy and not as if the entire evidence of such a witness is to be negated completely. In *Radha Mohan Singh @ Lal Saheb & Ors. Vs. State of U.P.*, AIR 2006 SC951, it was held that:

It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. (See *Bhagwan Singh V. State of Haryana*, AIR 1976 SC202 *Rabinder Kumar Dey V. State of Orissa*, AIR 1977 SC170 *Syed Akbar V. State of Karnataka*, AIR 1979 SC1848 and *Khuji @ Surendra Tiwari V. State of Madhya Pradesh*, AIR 1991 SC1853.

17. In the case of *Jodhraj Singh V. State of Rajasthan* (JT20077) SC118 the Supreme Court has held that the Courts are entitled to rely upon part of the testimony of a witness, who has been permitted to be cross-examined by the prosecution. Relevant portion of the same reads as under:

11. The High Court took up all the appeals together for hearing. The only distinctive fact in the case involving the appellant was Pws 8 and 9 turned hostile, but the same, in our opinion, would not materially alter the prosecution case, as a conviction can even be based on the testimony of a single witness. The courts furthermore are entitled to rely upon a part of the testimony of a witness who has been permitted to be cross-examined by the prosecution.

12. In *State of U.P. Vs. Ramesh Prasad Misra and Another*, this Court opined:

7. The question is whether the first respondent was present at the time of death or was away in the village of DW1, his brother-in-law. It is rather most unfortunate that these witnesses, one of whom was an advocate, having given the statements about the fact within their special knowledge, under Section 161 recorded during

investigation, have resiled from correctness of the versions in the statements. They have not given any reason as to why the investigating officer could record statements contrary to what they had disclosed. It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. [See also Gurpreet Singh V. State of Haryana and Gagan Kanola & Anr. Vs. State of Punjab].

13. Moreover, while recording a judgment of conviction, the court may consider a part of the deposition of a witness who had been permitted to be cross-examined by prosecution having regard to the fact situation obtaining in the said case. How the evidence adduced before it shall be appreciated by the Court would depend on the facts and circumstances of each case.

14. It is trite that only because a witness, for one reason or the other, has, to some extent, resiled from his earlier statement by itself may not be sufficient to discard the prosecution case in its entirety. The courts even in such a situation are not powerless. Keeping in view the materials on record, it is permissible for a court of law to rely upon a part of the testimony of the witness who has been declared hostile.

12. In her evidence, PW-4, Smt.Afsana Begum, has admitted that she was present at the spot of the incident. PW-4 has also admitted that the document, Exhibit PW-4/A, bears her signatures at point A but she claimed to be an illiterate and she was made to sign blank sheets of paper. PW-5 has also admitted his signatures on Exhibit PW-5/A to Exhibit PW5/E. Similarly, PW-7, Mohd. Ajam, brother of the deceased, has also not supported the case of the prosecution but admitted his signatures on the seizure memos, Exhibits PW-5/A and 5/B, respectively.

13. Learned trial court has analysed the evidence of all the witnesses in the judgment. The evidence of PW-4, Smt.Afsana Begum, clearly establishes that her husband used to reside at F-17, DDA Flats, Turkman Gate, Delhi, along with his family members, which included his brothers and mother. She proved that on the midnight of 2/3rd June, 1996, she and her husband were present in the house

along with other family members. She has also admitted her signatures in Urdu on the complaint, Exhibit PW-4/A, but denied the text.

14. As per the statement of PW-4, Smt.Afsana Begum, on the fateful night at around 11.50 p.m., she and her mother-in-law, her son and husband were present in their house. Her husband went outside and after 10 or 15 minutes she heard a noise from the bathroom. She saw her husband lying outside the bathroom and bleeding from his throat. This statement would clearly establish that her husband died in the house where the deceased and all other family members including the appellant were present. Evidence on record also proves that the dead body was found lying outside the bathroom and the photographs duly exhibited also proved the same. The traces of blood also establish the place of incident, as no blood marks were found at any other place and, thus, it leaves no room for doubt that the deceased was not killed outside the house.

15. We may also notice that the appellant was arrested from the spot of the incident and the personal search memo has been duly witnessed by PW-6 (ASI Jeet Singh), PW-10 (S.I. Virender Singh) and PW-5 (Umar Daraj). We may also notice that the Investigating Officer had lifted the blood stained earth, clothes of the appellant and the recovery of the weapon was carried out. It may also be noticed that recovery of weapon of offence has witnessed by PW-5 (Umar Daraj, PW-10 (S.I. Virndner Singh), PW-6 (ASI Jeet Singh) and PW-7 (Mohammad Azam); and the seizure memo with respect to clothes has been witnessed by PW-10 (S.I. Virndner Singh), PW-6 (ASI Jeet Singh) and PW-5 (Umar Daraj). PW-6, ASI Jeet Singh, has deposed that at the time the appellant was arrested he was wearing a lungi and a T-shirt, which had blood stains. The clothes were seized by the Police vide memo, Exhibit PW-5/F. These clothes were identified as lungi, Exhibit P-1, and the T-shirt as Exhibit P-2.

16. In the testimony of PW-5 (Umar Daraz) brother of the appellant and deceased admitted his signatures on Ex.PW-5/A to PW-5/G, but denied that these documents were read over to him before he signed the same. PW-7 (Mohammad Azam) has also admitted his signatures on the seizure memo Ex.PW-5/A & B.

17. During cross examination, the factum of arrest of the appellant and the seizure of clothes have not been contradicted by any suggestion. It is also proved that the parcel containing the lungi and T-shirt were sent for chemical analysis to CFSL. CFSL report, Exhibit PW-18/E, shows that the lungi and T-shirt had human blood group A and the samples lifted by the police from the place near the dead body for chemical analysis were also compared, which proved that the blood stains on the clothes of the appellant at the time of his arrest also contain human blood group A, which was also found on the blood stained cotton, blood stained cemented material earth sample, which was lifted by the Police.

18. The argument of learned counsel for the appellant that the blood was found on the clothes of the appellant, as he had taken his brother to the hospital, is without any force as the injured was taken to the hospital by the Police and not by any of his brothers. There is also no evidence on record nor any suggestion was given to the fact that the deceased was taken to the hospital by the appellant. Even otherwise, it is the stand of the appellant in the statement made under Section 313 of the Code of Criminal Procedure that he was not present at the time of the incident and he reached after the Police had arrived. Based on the evidence on record; the fact that the appellant was present at the spot of the incident and was arrested from the spot of the incident as per the evidence of PW-6 (ASI Jeet Singh), PW-10 (S.I. Virender Singh) and PW-5 (Umar Daraj), who have witnessed the personal search memo. The disclosure statement on the basis of which the weapon of offence was recovered from underneath the Takhat lying in the store; the scientific evidence, which proved that the blood was found on the clothes of the appellant, we are of the view that the appellant has been rightly held guilty.

19. Counsel for the appellant without prejudice to his earlier submissions argued that assuming the story of the prosecution is proved the appellant could not have been convicted for the offence punishable under Section 302 IPC. It is submitted that the incident took place on the spur of the moment and as a result of the quarrel between the two brothers.

20. It would be useful to refer to the observations of the Supreme Court in the case of Surinder Kumar Vs. Union Territory, Chandigarh AIR 1989 SC1094 wherein the

court has dealt with in somewhat similar facts - during the heated arguments and abuses, injuries were inflicted with the help of knife - :

To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly. Taking an overall view of the incident we are inclined to think that the appellant was entitled to the benefit of the exception relied upon. The High Court refused to grant him that benefit on the ground that he had acted in a cruel manner but we do not think that merely because three injuries were caused to the deceased it could be said that he had acted in a cruel and unusual manner. Under these circumstances, we think it proper to convict the accused under Section 304, Part I, IPC and direct him to suffer rigorous imprisonment for 7 years.

21. Counsel for the appellant has submitted that the present case falls under Section 304 Part-II IPC as the incident took place on the spur of the moment and the same was not pre planned and thus the conviction be altered to part-II of the Section 304 IPC.

22. In the case of Jagtar Singh vs State of Punjab (1983) 2 SCC342 it was held:

The question is whether in the circumstance in which the appellant gave a blow with a knife on the chest, he could be said to have intended to cause death or he could be imputed the intention to cause that particular injury which has proved fatal?. The circumstances in which the incident occurred would clearly negative any suggestion of premeditation. It was in a sudden quarrel to some extent provoked by the deceased, that the appellant gave one blow with a knife. We

cannot confidently say that the appellant intended to cause that particular injury which is shown to have caused death. There was no pre-meditation. There was no malice. The meeting was a chance meeting. The cause of quarrel though trivial was just sudden and in this background the appellant, a very young man gave one blow. He could not be imputed with the intention to cause death or the intention to cause that particular injury which has proved fatal. Neither para 1 nor para 3 of Section 300 would be attracted. We are fortified in this view by the decision of this Court in Jagrup Singh v. State of Haryana. It was subsequently followed in Randhir Singh @ Dhire v. State of Punjab and Kulwant Rai v. State of Punjab. Following the ratio of the aforementioned decisions, we are of the opinion that the appellant could not be convicted for having committed murder of the deceased Narinder Singh. His conviction for an offence under Section 302 IPC and sentence of imprisonment for life are liable to be set aside.

23. We are conscious of the fact in the present case the appellant had used a razor and given a blow on the neck of his brother, but we may also notice that the razor was used only once and the fight was sudden and not preplanned. Accordingly, we find force in the submission of learned counsel for the appellant that the incident occurred on the heat of the moment on account of the shortage of accommodation in the DDA flat where three brothers were residing along with their family. It cannot be said that the murder was pre-planned or pre-meditated. The incident took place on the heat of the moment and it cannot be said that the appellant had any intention to actually murder his own real brother.

24. Having regard to the above discussion, we are of the opinion that the appeal succeeds in part. The appellants conviction under Section 302 IPC is therefore, altered to Section 304 Part-II IPC; consequently, the sentence is modified from life imprisonment to six years.

25. We are informed that the appellant has served the sentence for more than three years. The appellant shall surrender within a period of two weeks from today to enable him to serve the remaining period of sentence.

26. Appeal stands disposed of in above terms. G.S.SISTANI, J SANGITA DHINGRA SEHGAL, J JANUARY09 2015 .. ssn

