Kanhaiya Vs. State

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Court : Delhi

Decided On : Feb-24-2015

Judge : Sunita Gupta

Appellant : Kanhaiya

Respondent : State

Advocate for Pet/Ap. : Mr. Krishan Kumar

Judgement :

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

24. h February, 2015 + CRL.A. 1540/2013 & Crl.M.B.10109/2014 KANHAIYA Through: ..... Appellant Mr.K.Singhal and Mr.R.C.S.Bhadhauria, Advocates. versus STATE Through: + ... Respondent Mr.O.P.Saxena, Additional Public Prosecutor for the State. CRL.A. 1617/2013 DALIP @ BABBAN Through: ..... Appellant Mr.Krishan Kumar with Ms.Sunita Arora, Advs. versus STATE NCT OF DELHI Through: + ... Respondent Mr.O.P.Saxena, Additional Public Prosecutor for the State. CRL.A. 1071/2014 & Crl.M.B.10226/2014 SANJAY KUMAR @ ANU Through: ..... Appellant Mr.Chetan Lokur, Adv. versus STATE ..... Respondent Through: Mr.O.P.Saxena, Additional Public Prosecutor for the State. % CORAM: HONBLE MS. JUSTICE SUNITA GUPTA

JUDGMENT
: SUNITA GUPTA, J.

1. Vide this common judgment, I shall dispose off three criminal appeals bearing Crl.A.Nos. Crl.A.1540/2013, Crl.A.1617/2013 and 1071/14, filed by Kanhaiya, Dalip @ Babban and Sanjay Kumar @ Anu respectively, challenging the common judgment dated 21.10.2013 and order on sentence dated 31.0.2013 whereby they had been convicted u/s 304 IPC and sentenced to undergo R.I for 5 years and also directed to pay fine of Rs.10,000/- each in Sessions Case No.12/2013 arising out of FIR No.181/2010 u/s 302 /34 IPC, P.S. Naraina.

2. Prosecution case succinctly stated is as under:On 26.12.2010, Aslam, son of Mohsir had gone to the rehri of PW6 Mamta where she used to sell eggs. The accused persons also came to the rehri. Aslam was hearing songs on his mobile which was objected by the accused persons on which quarrel took place. Kanhaiya caught hold of Aslam while Dalip gave him fist blows and Sanjay hit him with a danda on his head. On alarm being raised by Kesh Mohd. all the three accused escaped along with danda. Aslam fell down. He was bleeding profusely from his nose, ear and mouth. Kesh Mohd removed him initially to Behl hospital from where he was directed to be taken to DDU hospital, as such he was removed to DDU hospital. PW11 Asrar Ahmad informed PCR from his mobile on which DD.No.29A, Ex. PW13/A was recorded. On receipt of information PW16 ASI Vijay Pal along with PW8 Ct.Mahipal reached the spot where neither the injured nor the assailants were found. Blood was found on the ground in front of shop no.Z-238. Thereafter on receiving DD.No.31A containing information that injured Aslam had been admitted in DDU hospital, he along with Ct. Pankaj reached DDU hospital where Aslam was found admitted in injured condition along with one of his relatives, namely Kesh Mohd. He recorded his statement Ex.PW3/A and got the case registered u/s 308 IPC. He returned back to the spot and lifted the blood sample, earth control and blood stained earth. Complainant Kesh Mohd. handed over his blood stained pant which was also seized. At the instance of the complainant, rough site plan was prepared. On 27.12.2010, information was received about death of Aslam in the hospital and, therefore, the investigation was taken over by SHO himself. On 28.12.2010, post mortem was got conducted on the dead body of the deceased.

3. It is further the case of prosecution that on 30.12.2012, on the basis of secret information, accused Dalip and Sanjay were arrested. Accused Sanjay made a disclosure statement Ex. PW15D and got the danda recovered. Accused Kanhaiya was arrested on 31.12.2010. During the course of investigation, the weapon of offence was produced before the Doctor and he gave his subsequent opinion that the injuries on the person of deceased were possible by the weapon of offence shown to him. After completing investigation, charge sheet was submitted against the accused persons for offence u/s 302/34 IPC. Charge for offence u/s 302/34 IPC was framed against the accused, to which they pleaded not guilty and claimed trial.

4. In order to substantiate its case, prosecution in all examined 20 witnesses. The case of accused persons was one of denial simplicitor. They pleaded their innocence. After scrutinising the evidence adduced by the prosecution, the learned Trial Court convicted the appellants u/s 304/34 IPC and sentenced as mentioned hereinabove.

5. Feeling dissatisfied and aggrieved, separate appeals have been preferred by the convicts.

6. Assailing the findings of the learned Trial Court, it was submitted by Mr. Krishan Kumar, learned counsel for appellant Dilip@ Babban that the prosecution case hinges upon the testimony of PW3 Kesh Mohd.and PW6 Mamta. However, there are material contradictions in the testimony of the witnesses. Moreover, there was serious dispute regarding the identity of the accused. However, no Test Identification Parade of any of the accused was got conducted. The Trial Court also observed that even regarding the identity of the accused, two views were forthcoming. Having observed so, the Trial Court fell in error in convicting the accused persons, as such accused were entitled to benefit of doubt. According to prosecution, accused Sanjay got recovered the weapon of offence. However, recovery of weapon of offence has not been believed by the learned Trial Court.

7. Sh. K.K.Singhal, learned counsel representing the appellant Kanhaiya submitted that the factum of homicidal death of Aslam is not disputed by them. However, the crucial question is who is the perpetrator of the crime. Learned Trial

Court did not believe the recovery of weapon of offence at the instance of accused Sanjay. Even PW3 was not believed to be an eye witness of the incident and PW6 was not reliable, yet the conviction was based on a suggestion given by counsel for the accused. But that itself cannot form the basis of conviction. FIR was lodged after three hours of the incident and in fact it was ante timed as copy of the same was sent to the Metropolitan Magistrate after seven days. Alternatively, it was submitted that the appellant was 21 years of age at the time of incident; his antecedents are clean; he remained in jail for a period of two years, as such in case his conviction is upheld, then he may be released on the period already undergone.

8. Mr. Chetan Lokur, Advocate representing accused Sanjay submitted that prosecution case qua this accused was two fold: (i) Recovery of weapon of offence at his instance which has rightly been disbelieved by the learned Trial Court. (ii) Eye witness account of the incident: PW3 has not been believed to be eye witness whereas PW6 is not a reliable witness. No conviction could have been based on the basis of any suggestion given by counsel for the accused as the prosecution had to stand on its own legs, as such it was submitted that the impugned judgment deserves to be set aside.

9. As against this, learned Additional Public Prosecutor for the State supported the reasoning given by the learned Trial Court for convicting the appellants and submitted that no interference is warranted and as such the appeals are liable to be dismissed.

10. I have closely examined the evidence as also the original records of the matter and am convinced that the prosecution has not been able to establish the guilt of appellants beyond reasonable doubt and learned Trial Court erred in convicting the accused persons due to the following reasons:There can be no dispute that deceased Aslam had died homicidal death. The question is whether the prosecution has been able to connect the appellants with the crime. To substantiate its case, prosecution has examined PW3 Kesh Mohd. and PW6 Mamta alleged to be eye witnesses to the incident.

11. PW3 Kesh Mohd is the cousin brother of deceased Aslam. FIR was registered on the basis of statement Ex.PW3A given by this witness to the police official wherein he stated that Aslam used to reside with him. On the fateful day, at about 9 p.m, his wife told him that some ration had to be brought from the market, as such he made a telephone call to Aslam enquiring about his whereabouts. Aslam informed him that he was present at the egg rehri and was getting omlett prepared. He told him that he was coming over there. As soon as he came out of his jhuggi, he saw many persons running and were saying that some quarrel was taking place. He reached the spot and saw accused Sanjay giving danda blow on the head of his brother Aslam. Kanhaiya caught hold of him while Dalip was giving fist blows. When he raised alarm, they ran away along with the danda. Aslam fell down. He was bleeding profusely from his nose, ears and mouth. He immediately removed him to Behl hospital in the car of some neighbour where he was advised to take him to some big hospital, as such he took him to DDU hospital and got him admitted there. He was informed by the egg seller Mamta that Aslam was listening songs on his mobile phone which was objected by Sanjay, Dilip and Kanhaiya. Thereafter all four started abusing each other and gave merciless beatings to Aslam. All the three boys were known to him from before. He prayed for action against them. However, when he appeared in the witness box in cross examination, he deposed that none of the accused were known to him before the date of incident. However, he went on stating that he had seen them before the incident as they used to reside in his neighbourhood. The claim of this witness as being an eye witness to the incident has rightly not been believed by the learned Trial Court by observing as under:

28. The claim of PW3 that he had witnessed the incident, is doubtful considering the fact that in his cross examination the said witness has admitted that he did not know any of the accused before the date of incident, but had seen them, as they reside in his neighbourhood. From the same, it is clear that the complainant (PW3) was not aware of the names of the accused persons, prior to the incident. Once he was not knowing the names of the accused persons prior to the incident, then how the complainant (PW3) named the accused persons in his complaint Ex. PW3/A (on the basis of which FIR was registered) regarding incident, given to the police, is beyond comprehension. The prosecution has not given any explanation for the

same. It is also not the case of the prosecution that the complainant came to know about the names of the accused persons, after ascertaining the same from the persons present at the spot or from eggs seller (PW6). This when seen coupled with the fact that it was suggested on behalf of the learned Additional PP for State to PW6-Manta, the other eye witness (who was selling eggs on cart), when she admitted that the brother of the deceased had reached the spot, later on. Thus, a suggestion was given to the said material prosecution witness, on behalf of the State that the brother (PW3) of the deceased was not present at the spot, at the time of incident and had reached later on and, thus, had not witnessed the incident, which is contrary to the case of the prosecution. Also, in his cross-examination by learned counsel for accused persons, the said witness had deposed that the brother of the deceased reached the spot about 5 minutes after the quarrel between the deceased and the accused persons. From the same also, it stands established that the brother of the deceased i.e. PW3 (complainant) reached the spot after the incident and had not witnessed the incident and it seems that he has exaggerated in his testimony regarding having witnessed the incident and appears to be an interested witness, as he is admittedly a relative of the deceased and, hence, might be interested in conviction of the accused persons. However, from his testimony and the testimony of other material prosecution witnesses, including the doctor, who prepared the MLC of injured Aslam (since deceased) and his (PW3) blood stained pant which was stained with the blood of deceased, it is clear that he reached spot immediately after the incident and took the injured to the hospital.

12. The other witness of the prosecution is PW6 Mamta in front of whose rehri the incident allegedly took place. She is the solitary eye witness of the incident. It is a settled proposition of law of evidence that it is not the number of witnesses that matters but it is the substance. It is also not necessary to examine a large number of witnesses if the prosecution can bring home the guilt of the accused even with a limited number of witnesses. In the case of Lallu Manjhi and Anr. v. State of Jharkhand (2003) 2 SCC401 Supreme Court had classified the oral testimony of the witnesses into three categories: a. Wholly reliable; b. Wholly unreliable; and c. Neither wholly reliable nor wholly unreliable.

12. In the third category of witnesses, the Court has to be cautious and see if the statement of such witness is corroborated, either by the other witnesses or by other documentary or expert evidence. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eye-witness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty. Reference in this regard can be made to the cases of Joseph v. State of Kerala (2003) 1 SCC465 Tika Ram v. State of Madhya Pradesh (2007) 15 SCC760and Govindaraju@ Govinda v. State (2012) 4 SCC722 13. Reverting to the case in hand, this witness has deposed that three persons by the name of Sanjay, Dilip and Kanhaiya had come to take eggs from her cart. Deceased also came there and handed over his mobile phone to the three persons for listening songs. Thereafter, he started quarrelling with the aforesaid three persons. Initially deceased started beating them and thereafter those three persons gave beatings to him. She could not say whether the deceased was beaten by fists or by any weapon. She could not identify the accused persons and could not say whether any of those persons were present in the Court at the time of her deposition. As such, after seeking permission of the Court, this witness was cross examined by learned Additional Public Prosecutor for the State and in cross examination she admitted that the deceased was listening songs on his mobile phone and three persons, namely Sanjay, Dalip and Kanhaiya asked him to switch off the phone. When the deceased refused to switch off the mobile phone, the three persons started abusing him and gave beatings to him. However she denied the suggestion that accused Kanhaiya caught hold of the deceased and started beating him with fists and kicks. She also denied that accused Sanjay hit the deceased on his head by a piece of wood lying nearby. She admitted that brother

of the deceased reached the spot later on. She denied that two days after the incident, police had brought Sanjay and Dalip to the spot and they pointed out the place of incident to the police. Thereafter, she changed her statement by stating that the accused were the three persons who had come to her rehri on the date of incident and had quarrelled with the deceased. However, she denied that the three accused persons had beaten the deceased or deceased died on account of beatings given by the accused persons. She further admitted that when the deceased gave beatings to Kanhaiya, Kanhaiya left the spot immediately.

14. A perusal of testimony of this witness goes to show that the very genesis of the incident which resulted in the unfortunate death of Aslam is doubtful. At one stage she stated that the deceased gave his mobile phone to three persons who had come to her rehri for listening songs and thereafter he started abusing them and also gave them beatings. In turn, the three persons gave him beatings. However, at another stage she stated that deceased was listening songs on his mobile phone which was objected by the three persons and they asked him to switch off the mobile phone, to which the deceased refused. Thereafter the three persons gave him beatings.

15. Not only that, her testimony regarding the identity of the accused persons is not consistent as at one stage she could not identify any of the accused by stating that she did not know them. However, in cross examination by learned APP for the State, although she admitted that the accused persons came to her rehri on the date of incident and had quarrelled with the deceased but she denied that the three accused persons gave beatings to the deceased as a result of which the deceased died. She also denied the role assigned to each of the accused by the prosecution. In view of the shaky testimony of the sole eye witness to the incident, the identity of the accused being the assailant of the crime becomes doubtful.

16. Moreover, although the complainant in his initial statement Ex.PW3/A to the police stated that the three persons were known to him from earlier, however, it is pertinent to note that even in this statement, he did not give the parentage or the address of the accused persons to pinpoint their identity. In his deposition before the Court, he deposed that accused were not known to him from earlier. However,

he went on stating that they used to reside in the neighbourhood. In this scenario, identification of the accused was imperative. Even if it is assumed that in view of the earlier statement given by the complainant that accused were known to him from before, therefore, identification of accused by this witness was not necessary. Even then identification of the accused by Mamta was mandatory. Admittedly no Test Identification Parade of any of the accused was arranged by the investigating officer of the case.

17. PW14 HC Samundar Singh, PW15SI Sandeep and PW16ASI Vijay Pal have deposed that after the arrest of accused Sanjay and Dalip, they took the police party to the spot, pointed out the place of incident and at that time PW6 Mamta identified all the accused. However, PW6 Mamta denied that two days after the incident, police had brought Sanjay and Dalip to the spot and they had pointed out the place of incident to the police. That being so, their identification by this witness at the spot does not arise. In any case, Kanhaiya was arrested later on and it is not the case of prosecution that he was identified by PW6 Mamta. In this scenario when none of the accused were known to PW6 Mamta from before, it was incumbent upon the investigating officer to have arranged Test Identification Parade of the accused persons. The omission on the part of the prosecution to arrange such identification proceedings and identification of the accused for the first time in the Court cast a doubt on the prosecution case. In fact PW3 Kesh Mohd. is not an eye witness of the incident and testimony of PW6 at best is confined to the fact that the accused persons had come to her rehri and had quarrelled with the deceased. But she denied that the accused gave any beatings to the deceased which resulted in his death. Under the circumstances, the evidence coming on record does not prove beyond reasonable doubt that the accused were the perpetrators of the crime.

18. The other piece of evidence relied upon by the prosecution is recovery of weapon of offence at the instance of accused Sanjay. Different versions are forthcoming in this regard. PW3 Kesh Mohd. in his examination-in Chief deposed that the danda was seized from the spot. However, he could not identify the danda when shown to him. In cross examination, he stated that the danda was taken away by the accused.

19. PW12 HC Amar Singh, PW14 HC Samundar Singh, PW15 SI Sandeep, PW16 ASI Vijay Pal and PW20 Inspector Rakesh are the police officials who have deposed that pursuant to the disclosure statement made by accused Sanjay, danda was recovered. However, different versions are forthcoming in their testimony regarding the place from where recovery allegedly took place. According to PW12 HC Amar Singh, accused Sanjay got recovered the rod from near the place of incident. However, he could not identify the rod which was allegedly recovered at the instance of this accused. According to PW14 HC Samundar Singh, accused Sanjay got recovered danda from a gali of Y Block, Loha Mandi, Naraina whereas according to PW15 SI Sandeep, recovery was effected from Nanak Pura railway station where danda was lying on the ground. However, according to PW16 ASI Vijay Pal and PW20 Inspector Rakesh, recovery was effected at the instance of Sanjay from near railway track Y Block, Loha Mandi, Naraina. Under the circumstances, different versions are forthcoming regarding the place from where the weapon of offence is alleged to have been recovered. Admittedly there is no independent witness to the recovery. No blood stains was found on the wooden danda. Moreover, the recovery was not believed rightly by the learned Trial Court as the same was effected from an open place.

20. Learned counsel for the appellant relied upon Mani v. State of Tamil Nadu in Crl.A.443/2006 decided on 08.01.2008 where the recovery was effected from the open ground, though under the bush after more than 10 days of the incident, as such, it was observed that such discovery would be without any credence and the discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon such a recovery. Once the discovery fails, there would be literally nothing which would support the prosecution case.

21. Substantially similar view was taken in Heeralal v. State Govt. of NCT in Crl.A.No.979/2012 and it was further observed that despite the opinion of the post mortem doctor that the injury to the deceased was possible by the said iron rod, the same cannot be held discriminately against the accused in view of the recovery being from an open and accessible place.

22. The learned Trial Court neither believed the recovery of weapon of offence at the instance of accused Sanjay nor the identification of accused by PW6 Mamta. It was further observed that there was also discrepancy as to what was the genesis of the incident and whether the accused persons were the aggressors. However, from a suggestion given by learned counsel for accused that it was the deceased who had beaten up the accused Kanhaiya, the learned Trial Court observed that from this suggestion, the identity of all the three accused persons as the one who had committed the offence in question stands established. While so observing, the learned Trial Court fell in error as the cardinal principle of criminal jurisprudence is that the onus is squarely upon the prosecution to prove its case beyond reasonable doubt. A mere suggestion given by the accused person during cross examination of the witness is not sufficient to arrive at a conclusion that it were the accused persons who were the assailants.

23. The present case is not based on circumstantial evidence but is based on eye witness account of the incident. The solitary eye witness was PW6 Mamta and this witness has been changing her stand time and again. Initially she did not identify any of the accused. In cross examination by learned APP, although she identified the accused persons with whom a quarrel had taken place with the deceased but even at that time she was categorical in stating that the accused persons did not administer any beatings to the deceased and the deceased did not die due to any beatings given by them. This witness nowhere speaks of giving any danda blow by any of the accused on the head of the deceased.

24. Under the circumstances, the prosecution case remained in the realm of suspicion. However, it is settled law that suspicion, howsoever, grave, cannot take the place of proof. The burden of proof is always on the prosecution to establish its case beyond reasonable doubt and an accused is presumed to be innocent till his guilt is established to the hilt. In view of the fact that PW3 Kesh Mohd. is not an eye witness of the incident, testimony of PW6 Mamta is not wholly reliable, recovery of weapon of offence at the instance of accused Sanjay is not proved, therefore, merely on the basis of suggestion given by learned counsel for accused during the cross examination, the accused could not have been convicted for the offence alleged against them.

25. That being so, the impugned judgment and order on sentence cannot be sustained and is accordingly set aside. All the appeals are allowed. The appellants are acquitted of the offence alleged against them. They be set at liberty, if not wanted in any other case. Pending applications, if any, stand disposed off. Trial Court record be sent back along with the copy of the judgment. Copy of the judgment be also sent to Superintendent Jail for information and necessary action. (SUNITA GUPTA) JUDGE FEBRUARY24 2015 as