

Rafiq Vs. State

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Court : Delhi

Decided On : Jul-23-2015

Judge : R. K. Gauba

Appellant : Rafiq

Respondent : State

Advocate for Def. : Ms. Aashaa Tiwari

Advocate for Pet/Ap. : Mr. Pramod Kumar Dubey, Ms. Pinky Dubey, Mr. Shiv Chopra, Ms. Megha

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

07. 07.2015 Date of Decision:

23. 07.2015 % + CRL.A.No.1505/2013 RAFIQ Through: Appellant Mr. Pramod Kumar Dubey, Ms. Pinky Dubey, Mr. Shiv Chopra and Ms. Megha, Advs. versus STATE Through: Respondent Ms. Aashaa Tiwari, APP with Inps. Arun Dev PS Amar Colony CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE R. K. GAUBA R. K. GAUBA, J:

1. By the impugned judgment passed on 01.05.2012 by the Additional Sessions Judge, South-East-01 in sessions case No.51/2008, arising out of FIR No.67/08 of

Police Station Amar Colony (the police station, for short), the appellant was held guilty, as charged, for the offences under Sections 302 and 307 of Indian Penal Code, 1860 (IPC) on the gravamen of he having committed the murder of Sanjeev @ Mota @ Padha Likha (hereinafter referred to as the deceased) and having attempted to commit the murder of Munna Lal (the first informant of the case) on 26.02.2008 at about 10 PM beneath the Modi Flyover at Okhla. By subsequent order dated 15.5.2012, the learned trial court has sentenced the appellant to imprisonment for life with fine of 5,000/- for offence under Section 302 IPC and rigorous imprisonment for 10 years with fine of 5,000/- for offence under Section 307 IPC, also directing that in case of default in payment of fine, the appellant is to undergo further simple imprisonment for three months each on the two counts.

2. The finding of guilty has been returned by the learned trial court primarily believing the ocular evidence of the first informant Munna Lal (PW-1), presented as the solitary witness to the incident. Feeling aggrieved, the appellant has preferred the appeal at hand pleading innocence and claiming false implication. Per contra, the respondent-State contests the appeal submitting that the evidence of PW-1 Munna Lal has been correctly believed since it finds corroboration from the attendant circumstances.

3. On 26.02.2008, Police Control Room (PCR) staff noticed a person lying near Police Post Okhla, some time before 10.15 PM. This, when conveyed to the Police Station, was reduced into writing by Constable Kishan Singh (PW-8), the DD writer on duty vide DD No.22 (Ex.PW-8/A). The matter was entrusted to SI Rajender Singh (PW-14), who proceeded to the spot, stated to be close to the Police Post and found PW-1 Munna Lal lying in injured state. PW-14 took him to Trauma Centre of All India Institute of Medical Sciences (hereinafter referred to as the hospital) and got him admitted against Medico Legal Report (MLC) (Ex. PW-21/A) prepared by Dr. Abhishek Kumar, the Medical Officer on duty.

4. The MLC of PW-1 indicates that he had come to the hospital at 11.02 P.M. with history of assault, having been beaten with sticks. PW-1 was smelling of alcohol and himself disclosed to the medical officer about intake of alcohol. He had a clean lacerated wound on the forehead of the size 3x2 cms, an abrasion on left

cheek below the eye of size 3x3 cms, clean lacerated wound on the lower lip and also complained of tenderness of right lower chest. In the carbon copy of MLC (Ex.PW-21/A), prepared in the hand of Abhishek Kumar and proved in his absence by Dr. Sanjeev Bhoi (PW-21), a fifth injury has been added later to the effect that PW-1 had also suffered breakage of four front teeth. Presumably, on the basis of this last mentioned finding, the injuries suffered by PW-1 were later opined to be grievous in nature. The MLC indicates endorsement to the effect that PW-1 was not fit for statement, probably recorded around the time of his arrival in the hospital.

5. It is the version of PW-14 that on the next day (27.02.2008) he had enquired from the hospital but learnt that PW-1 had left the hospital. It is not clear from record as to when PW-1 had actually left the hospital. No formal report about the action taken on DD No.22 is shown to have been logged by PW-14 in any police records at any stage.

6. On 27.2.2008, at noon time (12:00 hours), information was received in Police Post Srinivaspuri from PCR that a dead body was lying under the Modi Mill flyover with bleeding noticed in the head region. The said information was logged by Constable Sarika Kumari (PW-2), the DD writer of the concerned Police Post vide DD No.12 (Ex. PW-2/A) and the matter was marked to SI Gajraj Singh (PW-19) who, accompanied by Constable Satbir Singh (PW-18), set out for the place. It is stated that Inspector (later ACP) Mahavir Singh (PW-20), in-charge of Police Post Srinivaspuri of the Police Station also reached the place in due course.

7. It is the version of PW-19, supported by PW-18, and endorsed by PW- 20 (the Investigating Officer) that on arrival at the place in question they had found dead body of a male person aged about 28 years lying under the Modi Flyover. It may be mentioned here that the dead body was identified in due course as that of Sanjeev @ Mota @ Padha Likha, son of Mool Chand (PW3) and brother of Pramod Kumar (PW-12), the latter two witnesses residents of Village Madanpur Khader, a locality not very far from the place in question. They had come to the police for the purpose of joining the mortem examination on 01.3.2008), they having learnt about the death from the hue and cry notice that had been published

by the IO, inasmuch as full particulars (parentage and address) of the deceased were not immediately ascertainable.

8. It has been the case of the prosecution that while the Investigating Officer (IO) was conducting the investigation at the place where the dead body had been discovered (apparently, the scene of crime) in the afternoon of 27.08.2008, PW-1 Munna Lal had come there and identified the deceased person to be Sanjeev @ Mota. The second alias used by the deceased Sanjeev i.e. Padha Likha would surface in his subsequent statement under Section 161 of Code of Criminal Procedure (Cr.P.C).

9. PW-1 Munna Lal had then claimed before the IO to be an eye witness to the incident stating, inter alia, that he had suffered the injuries (with which he had been taken to the hospital on the previous day) in the same occurrence. His statement (Ex.PW-1/A) was recorded by the IO and, with endorsement (Ex. PW-20/C) thereupon, rukka is stated to have been sent at 2.45 P.M. on 27.2.2008 for registration of FIR for investigation into offences under Sections 302 and 307 IPC. The FIR (Ex. PW-7/B) was statedly registered in the Police Station on its basis at 15:05 hours on 27.2.2008.

10. According to the FIR, PW-1, the deceased and the appellant had been frequent visitors to a liquor vend in front of Okhla Station near Godrej Bhawan, close to the scene of crime. PW-1 described himself as a scavenger living on rent in Harkesh Nagar. He described Sanjeev @ Mota (the deceased) as an individual, who would sleep under the Modi Flyover and both of them being in the habit of consuming liquor after collecting money. In his narration, the appellant is projected as another similarly placed person.

11. The material on record clearly shows that the first informant PW-1 Munna Lal, the appellant, as indeed the deceased, have been conducting themselves as vagabonds moving around in the area and were addicted to liquor. The deceased, in particular, was passing his life as an alcoholic, sleeping in seclusion under a flyover. Though PW-1 claims to have a house, taken on rent, his habits were not dissimilar, as he would, almost in routine, give company to the deceased at the liquor vend and would even opt to sleep with him, disconnected from the society in

isolation under the flyover.

12. According to PW-1, in his version in the FIR, on 26.2.2008 at about 5.30 P.M. when all the three (the deceased, the appellant and PW-1) were at the liquor vend, a quarrel had erupted between appellant on one hand and both of them on the other. In the said quarrel, the deceased had caused an injury with blade on the left cheek of the appellant. The appellant had gone away giving implied threats. PW-1 and the deceased after consuming liquor, followed by dinner, had come to the place under Modi Flyover around 8 P.M. and had gone to sleep for the night, sharing the same bedding.

13. It may be added here that from the scene of crime, the IO had seized, amongst others, mattress (Ex. P-2) and a quilt (Ex.P-1) with blood stains thereon. Noticeably, this bedding was lying at a little distance from the place where the dead body was found.

14. In the FIR, PW-1 told the IO that at about 10 P.M. he had woken up upon being hit on his face suddenly with a stone only to find the appellant standing over as the assailant. PW-1 stated that while moving away from the place he had seen the appellant picking up another stone and hitting at Sanjeev @ Mota. He has stated that had rushed to the Police Post but had fallen down on the way and was taken to the hospital. He explained that he had returned to the scene of incident after medical treatment.

15. During the course of investigation, no other eye-witness could be found. The appellant was arrested on 28.02.2008 at 3.15 P.M. from Paras Cinema compound in Nehru Place, New Delhi vide formal arrest memo (Ex. PW-1/C) after personal search (Ex.PW-1/D) in the presence of PW-1 Munna Lal, and others. He was taken for medical examination to the hospital on 29.2.2008 at 2.50 P.M. when MLC (Ex. PW-5/A) was recorded by Dr. Sunai M, as proved in his absence by Dr. Ashish Jain (PW-5).

16. The MLC (PW-5/A) shows that the appellant had been brought for medical examination to the department forensic medicine with specific reference to the FIR of the present case. The examining Medical Officer found an incised wound of 3.2

x 4.1 cm on left side of cheek of the appellant. The wound was curved shape with narrowing downwards, with pale yellowish to brown scabbing covering it. The injury was tender to touch and would bleed. In the opinion of the Medical Officer, this incised wound had been caused by a sharp weapon and was about three days old. Noticeably, the arrest memo prepared a day earlier does not mention this wound.

17. After the identity of the deceased had been duly confirmed by his close relatives, the dead body which had been preserved temporarily was subjected to post-mortem examination on 01.03.2008 in the mortuary of AIIMS by Dr. Sushil Sharma (PW-6). The autopsy doctor found the following ante mortem injuries : (1) A lacerated wound 13x10 cm bone deep, associated with subscalp haematoma over right parietal region of scalp situated 6 cm above from right mastoid tip, 5 cm right from midline and 8 cm above and out from right eye brow lateral end. (2) A laceration 3x1 cm and bone deep at midline at scalp situated 22 cm above and left from right mastoid tip, associated with haematoma. (3) A laceration 1x1 cm and bone deep 3 cm post to right mastoid tip and 20 cm below and right midline associated with haematoma. (4) An abrasion 17x10 cm reddish brown in colour at right scapular region of back. (5) An abrasion 15x6 cm at right shoulder tip. (6) An abrasion 8x2 cm at outer aspect of upper third forearm and right side. (7) Multiple abrasion variable in size 4x2 cm at outer and front aspect of right leg. (8) Fracture of upper two incisor teeth associated with haematoma. (9) A laceration 4x2 cm whole thickness of skin at middle aspect of lower lip. (10) A laceration 4x2 cm and bone deep at lateral end of left eye brow. (11) A laceration 1x1 cm and bone deep at middle of forehead. Skull : Fracture of middle cranial fossa 10 cm associated with haematoma. Diffuse subdural haemorrhage and intracerebral haemorrhage at right parietal area of brain.

18. In the opinion of the autopsy doctor, the injury No.1 noted above was likely to cause death in ordinary course of nature and the death had occurred due to cranio-cerebral damage consequent upon blunt force impact.

19. The viscera and blood sample were preserved during the autopsy and eventually passed on to Forensic Science Laboratory (FSL) with other exhibits for

examination. The report dated 29.8.2008 of FSL shows viscera was found to contain Ethyl Alcohol to the extent of 59.6 mg/100 ml of blood.

20. The IO had seized from the scene of crime, amongst others, two pieces of stones (Ex.P-6 and P-7), one weighing 8 kg and the other concrete slab weighing 15 kg. Both these articles noticeably had traces of blood stains and pieces of hair. These objects were examined by the autopsy doctor and, as per his opinion (Ex.PW-6/B), the ante mortem injuries suffered by the deceased could possibly have been caused with their use.

21. The autopsy doctor was also called upon by the IO to give opinion as to the possible use of the two stones vis--vis the injuries suffered by PW-1, as noticed in his MLC (Ex. PW-21/A). CrI.A.No.1505/2013 observing that the injuries of PW-1 Munna Lal could also have been inflicted with the said material objects having been used as weapons of offence.

22. It has been the case of the prosecution that, after his arrest, at the instance of the appellant, his blood stained shirt (Ex.P-5) and trousers (Ex.P4) had also been seized. Earlier, the blood stained shirt of the deceased (Ex.P3) lying at the scene of crime had also been taken in police possession. All these articles along with shirt of PW-1 Munna Lal (also Ex.P-3) were sent to FSL. On the basis of the sample of blood of the deceased, preserved during autopsy, the FSL, as per report dated 11.2.2010 of biology division found it to be of group O. Blood stains of human origin were found on the shirt of the appellant but the blood group could not be detected. On the other hand, the blood stains on the shirt found at the scene of crime were found to be of group B. It is same blood group as of PW-1. Though the mattress and quilt also bore blood stains of human origin, they could not be matched with the blood group of any of the three individuals involved in the case, as the sample would evince no reaction.

23. Against the above backdrop, the prosecution rested its case solely on the testimony of PW-1 Munna Lal. Though this witness has been believed by the learned trial judge to return finding of guilty, on careful scrutiny of the material on record we, however, are not able to persuade ourselves to place our intrinsic trust in the veracity of PW-1. We set out our reasons for this hereinafter.

24. Admittedly, the appellant had suffered an injury with a sharp object sometime on 26.2.2008. But, this injury was inflicted concededly in an incident that had occurred earlier in the evening at about 6 P.M. at a liquor vend. The appellant has not made any attempt to conceal this injury. He admitted in his statement under Section 313 Cr.P.C. that when he was arrested this injury was noticed and his shirt, stained with blood, was also seized.

25. Going by the version of PW-1, he and the deceased only had come to rest for the night under the Flyover, which was usually the place where the deceased would sleep. consumed liquor. Admittedly, both PW-1 and the deceased had As noticed earlier, the FSL report indicates that the consumption of liquor by the deceased was of a large quantity. Going by the MLC of PW-1 and the admitted position of he being a habitual alcoholic. PW-1, however, was not truthful when he spoke that he and the deceased had taken food after consumption of liquor and before going to sleep. The postmortem report does not talk of undigested or partially digested food having been found in the intestines of the dead body. Certainly, PW-1 and the deceased were together after drinks which they had consumed.

26. It is primarily the conduct of PW-1, who could also have been the perpetrator, which renders him a witness not wholly reliable. As noted earlier, he was found lying in injured state by PW-14. When taken to the hospital he gave the history of having been beaten, he described the weapon of offence used as sticks. Apparently, the injuries found suffered by him could not have been caused only with sticks. It is not understood why he was withholding the truth. He was unfit for statement at the time of his admission in the hospital but chose to go away on his own without waiting for the police to enquire. It is not explained by him in any manner as to why he did not stay back in the hospital, his version about discharge in the morning not being supported by any material.

27. As per PW-1, after he had come out of the hospital on the next date, he had come back to the spot where police was already present and accordingly he had narrated the incident to the concerned officials. Going by this version, PW-1 was conscious throughout of the fact that his acquaintance (the deceased) had also

been injured by the same assailant in the same incident. But there is no explanation forthcoming from his testimony as to why he had not informed either the Medical Officer, who recorded his MLC, or PW-14, who had taken him to the hospital, that besides him there was another person, who had been at the receiving end in the assault and might need attention.

28. The return to, or presence at, the scene of crime, of PW-1, till about 3.40 P.M. of 27.2.2008 is rendered highly suspect by the report (Ex. PW-4/A) of SI Nafe Singh (PW-4), in-charge of the crime team, South District which had reached the spot and inspected the crime scene at the instance of the IO, this at a stage when the latter with other staff of the local police were engaged in preliminary investigation pursuant to the discovery of the dead body in the wake of DD No.12 (Ex. PW-2/A). Crucially, in this report the crime team head (PW-4) described the dead body to be of an unidentified male aged about 30 years. He suggested the further course of action to the IO to the following effect :

(1) Body be sent for autopsy (2) Identity of the deceased be ascertained (3) Person with whom the deceased was last seen be traced and examined (4) Exhibits be sent to CFSL for experts opinion.

29. The document shows that the inspection had commenced at 3 P.M. and concluded at 3.40 P.M. If we take this report to be accurate, it renders the rukka (Ex. PW-20/C) sent by the IO from the spot to the Police Station at 2.45 P.M. untrue. If the name of the deceased had been identified by PW-1 by such time, there was no occasion for the crime team, also present there immediately after registration of FIR, to be describing the deceased as unidentified male. If PW-1 had come forward as witness to the occurrence, there was no occasion either for calling upon the IO to ascertain the identity, not only of the deceased but also of the person with whom he had been last seen. Having regard to the chronology of events, the version of PW-1 Munna Lal was already available and, according to it, the deceased was lastly in his company, both sleeping together under the same quilt.

30. The fact remains that though PW-1 claims to have seen his acquaintance (the deceased) being assaulted with a heavy stone in the night of 26.2.008, and though

he had come in contact with the police, albeit for the purpose of treatment of his own injuries, he did not reveal the incident to anyone till the afternoon of 27.2.2008 by when the dead body had been found. There is nothing to corroborate his story about the presence of the appellant at the scene of crime. The injury suffered by the appellant allegedly at the hands of the deceased pertains to an incident that had occurred earlier in the evening. This earlier incident would not affirm or reassure us about his presence at the time of fatal assault on the person of the deceased later in the night. It would not explain the first assault on PW-1 and then failure of PW-1 to state the said facts and name the culprit to PW-14 or the doctors.

31. The opinion of the autopsy doctor as to the possible use of the two pieces of stones gathered as evidence from the scene of crime by the IO, by itself cannot incriminate the appellant for the simple reason, the blood stains, or for that matter the pieces of hair, found on the said material objects have not been connected in any manner with him.

32. Though it was suggested to PW-1 during his cross-examination that he and the deceased had fought amongst themselves to inflict injuries to each other and which suggestion was denied, against the backdrop of above noted circumstances, we are not inclined to place our faith in his word. There has been delay in attributing the incident to the appellant. The reasons for delay have not been explained.

33. We could have had better assurance as to the time of registration of the FIR if clear endorsement about the delivery of the special report under Section 157 of Cr.P.C. by the Metropolitan Magistrate were available. As pointed out by the learned counsel for the appellant there are two copies of the FIR each purportedly bearing endorsement initialled by the Metropolitan Magistrate, one of 28.02.2008 and the other of 29.02.2008. The latter denotes it was made at residence. Presumably, the other copy was received in the Court. Unfortunately, however, both endorsements do not indicate the time at which the same were seen by the judicial officer. We are unable to even decipher the name of the Magistrate from his illegible initials.

34. We may observe that putting of illegible initials on such important proceedings is improper and in the teeth of instructions to the contrary issued from time to time. We would also add that omission to mention the time of receipt of the special report reflects casual approach.

35. It would be appropriate that the Sessions Judges of all the eleven Sessions Divisions of Delhi should issue fresh instructions to the judicial officers on both the above aspects for strict compliance.

36. Doubts as to the extent of truthfulness in the testimony of PW-1 Munna Lal persist. He being the sole witness to the prosecution case, benefit of doubt must deservedly be extended to the appellant.

37. In the result, the appeal is allowed. The impugned judgment and order on sentence are set aside. The appellant stands acquitted. He be released forthwith from custody unless required to be detained in any other case, in accordance with law. (R. K. GAUBA) Judge (SANJIV KHANNA) Judge JULY23 2015/vld/mr

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