Ten Singh Vs. State

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Court : Delhi

Decided On : Jul-26-1995

Reported in : 1995IIIAD(Delhi)609; 1995CriLJ4129; 59(1995)DLT699; 1995(34)DRJ478

Judge : J.B. Goel and; P.K. Bahri, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 34 and 302

Appeal No. : Criminal Appeal No. 167 of 1990

Appellant : Ten Singh

Respondent : State

Advocate for Def. : H.S. Ahluwalia, Adv.

Advocate for Pet/Ap. : K.K. Luthra, Senior Counsel,; I.L. Kapoor and; Sidharth Lut

Judgement :

P.K. Bahri, J.

1. An Additional Sessions Judge, New Delhi, vide his judgment dated November 13, 1990, has convicted the appellant Ten Singh for an offence punishable under Section 302 of the Indian Penal Code and has acquitted his co-accused Bir Singh

on the charge under Section 302 read with Section 34 of the Indian Penal Code. Vide Subsequent order dated November 14, 1990, he has sentenced the appellant to undergo imprisonment for life and to pay a fine of Rs. 2,000/- and in default to further undergo rigorous imprisonment for six months for the offence punishable under Section 302 of the Indian Penal Code. Ten Singh has filed this appeal challenging his conviction and sentences.

2. The case of the prosecution is that deceased Mohd. Ishrafil was at the relevant time employed as a driver in a truck belonging to Vijay Kumar PW 7 whereas Makar Dhwaj PW 4, the only material witness in this case, who claims to be eye witness, was also working as a driver in a truck belonging to cousin of Vijay Kumar. Both of these persons were aged about 25 years at the time of occurrence. It is alleged that that both these friends and fellow drivers had on the night of February 10, 1988 come to see dance drama (Nautanki) near Virat Cinema in Dakshin Puri, New Dlehi. While both of them were standing in a queue for purchasing tickets for witnessing the said Nautanki that one person, who ultimately was identified as appellant, had come and tried to jump the queue which was objected to by deceased Ishrafil as he caught hold of the appellant from his collar and pushed him away which was resented by the appellant. However, nothing more happened and all of them then witnessed the Nautanki show and thereafter deceased and his friend Makar Dhwaj were proceeding towards the place where they had parked their trucks and at that moment Bir Singh, a companion of appellant, had started talking with Makar Dhwaj whereas appellant took out a knife and stabbed Ishrafil on his chest left side twice and also stabbed him once on his back and thereafter they threatened Makar Dhwaj and made their escape from the said place, Makar Dhwaj is stated to have then gone to the place of Vijay Kumar in Bhogal and informed him about the occurrence and was instructed by Vijay Kumar that in case injuries received by his driver were not very serious then he may be got treated from any private doctor and in case injuries were serious he should be taken to some good Government hospital. He had handed over Rs. 100/- to Makar Dhwaj for this purpose. Makar Dhwaj then came back to the place of occurrence and removed Ishrafil to All India Institute of Medical Sciences in his truck and got him admitted in the hospital.

3. The Medico Legal Certificate Ex.PA was prepared by the doctor in attendance in casualty in which it was recorded that an unknown patient aged about 25 years had been brought to the casualty with stab wound on the left anterior hemithorax, fourth intercostal space in the anterior axillary line, another stab wound 8th intercostal space in the part axillary line. It appears that he was brought to the hospital during the night intervening 10th February 1988 at 1.45 AM but due to some clerical mistake it was recorded in the MLC that he had been admitted at 1.45 PM on 11th February 1988 but nothing turns on this mistake made in recording the wrong timing in the MLC. Ishrafil has succumbed to his injuries at 3.55 AM during that night.

4. First message was sent by Dalbir Duty Constable present in that hospital to Police Post Dakshin Puri which was recorded at Seriall No. 37 at 1.55 a.m. on February 11, 1988, to the effect that an unknown person aged about 25 years, who had been injured in a quarrel at the back of Virat Cinema, had been brought to the hospital by Makar Dhwaj son of Nepai resident of Village Shitapati. Police Station Karande. Distt. Gazipur, copy of such Daily Diary entry Ex.PW 11/B was handed over to Head Constable Rajvir Singh who accompanied by Constable Satpal PW 1 proceeded to the hospital. Same Duty Constable Dalbir sent a second message to the same Police Post which was recorded at Daily Diary No. 41 at 4AM during the intervening night of 10th and 11th February 1988 to the effect that the said unknown person who had been admitted in the hospital in respect of which he had given the report recorded at Daily Diary No. 37 had since expired. SI Ramphal Singh, Investigating Officer of this case PW 11 accompanied by Constable Rishipal PW 13 reached the hospital and he obtained the MLC but he could not meet any eye witness at the hospital and he came to the place of occurrence which stood mentioned in Daily Diary report No. 37 but there also he could not trace out eye witness. He found certain blood lying on the ground. He prepared the rukka Ex.PW 11/C and on the basis of which the case was registered under Section 302 of the Indian Penal Code. Be that as it may, it was a blind murder. Neither the name of the deceased nor the name of any suspect or witness were known to the police. The rukka was sent at 6 AM. The FIR No. 26 of 1988 was registered at Police Station Ambedkar Nagar at 6.15 AM. The Investigating Officer had lifted that blood and blood stained earth from the ground near the said

Virat Cinema and converted the same into sealed parcels vide recovery memos Ex.PW 1/A & PW 1/B which were signed by Constable Satyapal Singh as witness. He prepared the sketch Ex.PW 1/D and got the said place photographed from PW 6, the police photographer Head Constable Harbhajan Singh, the photographs being Exs.PW 6/1 & PW 6/2.

5. PW 3 Mohd. Ashrul identified the dead body as of Mohd. Ishrafil on February 12, 1988. He made the identification during the inquest proceeding as per his statement Ex.PW 3/A and deceased was his nephew and he received the dead body after post-mortem vide Ex.PW 3/B. The inquest proceedings were also held by the Investigation Officer on February 12, 1988 and he prepared the inquest papers and had sent the dead body for post-mortem vide application Ex.PW 11/F. The post-mortem was performed on the dead body and the post-mortem report Ex.PB was taken into evidence without examining the doctor as both the accused facing the trial at that time had made a statement that this MLC as well as post-mortem report may be taken in evidence without examining the doctors. The post-mortem doctor had opined that the death has occurred due to haemorrhage and shock as a result of stab injuries and the injury on the chest was sufficient of cause death in the ordinary course of nature.

6. According to the prosecution, statement of Makar Dhwaj, the only eye witnesses of the occurrence, was recorded on February 13, 1988 and thereafter on February 20, 1988, both the appellant and his companion Bir Singh were arrested and both of them were interrogated and appellant Ten Singh is stated to have made a disclosure statement and got recovered the blood stained pant from house No. 36, Dakshin Puri, which was converted into sealed parcel and taken into possession vide memo Ex.PW 2/C. Ex.PW 2/B is the disclosure statement of Ten Singh. It appeared that the Additional Sessions Judge had exhibited the whole of the disclosure statements of Ten Singh as well as of Bir Singh without keeping in view the provisions of law that only that portion of the disclosure statement of the accused made to the police while in custody is admissible which leads to recovery of any material fact. The Additional Sessions Judge was ill-advised in accepting whole of the confessional statements of appellant and Bir Singh by exhibiting the said documents in entirety.

7. Both the appellants and his companion after arrest were produced before the Magistrate on February 21, 1988, Along with an application seeking remand to judicial custody. It was mentioned in the application that accused were being produced in muffled faces but the order of the learned Magistrate who granted judicial remand on Ex.PW 11/DA shows that both the accused had been produced by the investigating Officer SI Ramphal Singh in un muffled faces and the case diary was not produced at the time the accused were produced but at about 6 PM the Investigating Officer had produced that case diary which comprised of only six pages which had been initialled by the learned Magistrate. This fact would assume importance when we deal with the prosecution case in detail.

8. The case property was deposited in Police Station and thereafter was got sent to CFSL, again belatedly by the Investigating Officer on March 16, 1988 and CFSL reports Ex.PW 11/F and PW 11/G were received to show that human blood of group B was found on the blood stained earth lifted from the spot as well on the pant and shirt of the deceased and also on the pant allegedly recovered at the instance of the appellant.

9. The Investigating Officer had also moved an application for getting Test Identification Parade and on February 25, 1988, the Magistrate Sh. R. K. Gauba had gone to Jail for holding Test Identification Parade but the appellant and his co-accused had refused to participate in any Test Identification Parade mentioning that they had been already shown to the witnesses in the police lock up. The appellant and his co-accused were charged for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code but they had pleaded not guilty to the charge.

10. The Additional Sessions Judge gave the benefit of doubt to accused Bir Singh and has acquitted him but had brought home the offence to the appellant on the testimony of PW 4 Makar Dhwaj whom he found to be a truthful witness. The learned counsel for the appellant Shri K. K. Luthra has vehemently argued that it was a blind murder and investigations in the present case have not been fair and the appellant and his companion were just picked up being the bad characters of the area and this murder was implanted on them. He has urged that perusal of the

statement of Makar Dhwaj would show that he was not a keen eye witness as he came to disappear after getting admitted his friend in the hospital in a serious condition on learning about his death and did not become available to the police for pretty long period and gave the statement when he met the police for the first time on March 3, 1988. He has pointed out that if Makar Dhwaj was to be believed and if some importance is to be given to the testimony of Vijay Kumar, it would become clear that Makar Dhwaj was available to the police even on February 11, 1988, but for reasons known only to the Investigating Officer he had not recorded his statement promptly. He has also urged that material witness Dalbir Singh, Duty Constable working in the hospital has not been at all cited as a witness by the prosecution because he could have been the best person to tell us whether Makar Dhwaj had claimed to be eye witness or not when he had brought the injured to the hospital. He has urged that it is strange that he would allow an eye witness to just slip away even before the arrival of the Investigating Officer. He has also urged that it is also surprising that in the MLC the doctor has not recorded as to who had got injured admitted in the hospital. He has also urged that Makar Dhwaj PW 4 was not earlier known to the appellant or his co-accused and did not know their names and he had identified the said culprits for the first in court. He has urged that the investigation was not fair inasmuch as the investigating Officer after arresting the appellant and Bir Singh did not ask them to keep their faces muffled and had proceeded to take them to different places for effecting alleged recoveries. He has urged that there was ample opportunity for the appellant and Bir Singh to be seen by any witness during that period before they were produced before the Magistrate and that too in un muffled faces. He has argued that in such circumstances the appellant and his co-accused were justified in declining to participate in any test identification parade. He has also argued that Makar Dhwaj had mentioned that one labourer Ramesh had accompanied him in the truck for taking the injured to the hospital and he had also borrowed a cot from a person living nearby but neither Ramesh nor that person have been examined by the police to establish the link evidence and the police had also not cared to take into possession the truck and the cot and the cloth in which the injured was wrapped which could have established to link evidence to show that Makar Dhwaj had taken the injured to the hospital. He had made reference to certain judgments, to

which we will refer later on, in support of his contentions.

11. On the other hand, the counsel for the State has argued that PW 4, the driver, is a truthful witness and the Additional Sessions Judge was right in placing implicit faith in the testimony of the said witness because the said witness had no animus against the appellant or his co-accused and he had seen the appellant and his co-accused quite closely on the day of occurrence, so he could positively identify the appellant and his co-accused as the said culprits. He has argued that mere some lapses in investigation taking place should not make the statement of Makar Dhwaj as unreliable. He has also argued that recovery of blood stained pant at the instance of appellant gives due corroboration to the testimony of Makar Dhwaj that it was the appellant who stabbed fatally Ishrafil.

12. According to the Investigating Officer, he had recorded the statement of PW 4 Makar Dhwaj on February 13, 1988, before effecting the arrest of the accused. Accused were stated to have been arrested on February 20, 1988. However, when they were produced before the Metropolitan Magistrate for obtaining their judicial remand the case diary was not produced by the Investigating Officer initially but later on at about 6 PM the Investigating Officer produced the case diary and the learned Metropolitan Magistrate had wisely taken care to put his initials on the existing pages of the case diary which comprised of only six pages. We have perused the case diary and we find that the case diary had been written only for the days 11th and 12th February 1988. So it is evident that no case diary had been written from February 13, 1988, onwards till the accused were produced before the Metropolitan Magistrate. If that is so, it would mean that the Investigating Officer had manufactured the case diary after arresting the accused. It is true that accused have not been able to satisfactorily lead any evidence or bring on record any material to show positively that they were arrested prior to February 20, 1988 and they were shown to the witness Makar Dhwaj before being produced before the Metropolitan Magistrate. The fact remains that they were produced before the Metropolitan Magistrate and the Magistrate had found them in un muffled faces. It is not possible to give credence to the testimony of PW 11 that accused must have themselves uncovered their faces while appearing before the Metropolitan Magistrate. If that is so, the Investigating Officer should have told the

Metropolitan Magistrate that it be recorded that accused have uncovered their faces while appearing before the Magistrate. The Investigating Officer would like us to believe that he himself had not come with the accused for taking their remand whereas in the order it is clearly mentioned that it was the Investigating Officer who produced the said accused before the Magistrate. It is also significant to mention that in the personal search memos of the accused prepared soon after the arrest of the accused it was not mentioned that accused have been asked to keep their faces muffled as they were to be subjected to test identification parade. The Investigating Officer in his testimony does not say that he kept the accused in muffled faces while he took them for effecting the recovery of the pant in question.

13. In Pramod Kumar v. State : 40(1990)DLT289 , a Division Bench of this Court had found on facts that accused after arrest was taken out for recovery of weapon of offence while he was kept in un muffled face, it was held that the evidence of identification by its very nature is a weak type of evidence and it is, thereforee, all the more necessary that the prosecution should affirmatively prove that there was no possibility of accused being shown to anybody and it is for the prosecution to rule out the possibility of accused being shown to anyone before the test identification parade as the accused would not know if he has been seen by the eye-witnesses. It was observed that where before the test identification being carried out accused was taken out for recovery of alleged weapon of offence, the identification of the accused thereafter in test identification parade would not be sufficient to hold that he is the same accused. In the said case also the witnesses did not know the accused prior to the date of occurrence and it was incumbent on the prosecution to have subjected the eye-witness to proper test identification parade of the culprits.

14. Similarly in the present case admittedly, the appellant and Bir Singh were not known to Makar Dhwaj PW 4 prior to the occurrence and the occurrence had taken place during the night and thus, it was absolutely necessary that proper safeguards ought to have been taken by the Investigating Officer that after arrest of the suspects they ought to have been kept in muffled faces from the time of the arrest till they were to be put up for test identification parade. The Investigating Officer had taken around the appellant for effecting recovery of the pant without

showing that he had observed these precautions of keeping the appellant and his companion in muffled faces.

15. The apex Court in the case of Kanan Singh v. State of Kerala, : 1979 CriLJ919 , has held that where a witness identifies an accused, who is not known to him, in the court for the first time his evidence is absolutely valueless unless there has been a previous test identification parade to test his powers of observation.

16. Coming to the testimony of PW 4, he has deposed that soon after the occurrence after contacting PW 7 Vijay Kumar, he and one Ramesh took the injured to the hospital and he remained in hospital till the injured was declared dead and he was not feeling well and slept on a bench and thereafter he had left the hospital. According to him, he had not come into touch with the police till March 3, 1988. He has categorically admitted, that he has not made any statement to the police prior to March 3, 1988. On the other hand, Vijay Kumar had deposed that on February 11, 1988, itself he had informed the relations of the deceased and he Along with relations as well as Makar Dhwaj had come to the Police Station but this fact is not admitted by the Investigating Officer who claims that he had recorded the statement of Vijay Kumar as well as Makar Dhwaj only on February 13, 1988. In case if we believe the Investigating Officer that he had been able to find out the name of Vijay Kumar as owner of the truck on whose truck the deceased was employed as driver on February 12, 1988, then there is no reason why on that very day he did not record the statement of Vijay Kumar and also of Makar Dhwaj. Makar Dhwaj has not gone away to any place so that he could not be available to the police. Makar Dhwaj is also employed with the cousin of Vijay Kumar as a driver of the truck. So, Vijay Kumar was very much aware even on the night of occurrence that Makar Dhwaj was an eye witness but surprisingly Vijay Kumar had not taken any keen interest in the fate of his driver or in getting in touch with the police so that Makar Dhwaj's statement could be recorded by the police promptly.

17. As already discussed above, the Investigating Officer had not carried out the fair investigation inasmuch as he did not take any proper steps for keeping the accused in muffled faces so that the fair test identification parade could take place.

We have no reason to doubt that it is Makar Dhwaj who had taken the injured to the hospital because in the daily diary report No. 37 which is the first report given to the Police Post by the Duty Constable it is clearly mentioned that it is Makar Dhwaj who had brought the said injured. It appears that the Duty Constable, who has not been examined as witness in this case and reasons for his non-examination have not been disclosed would have been the best person to throw light as to what happened after Makar Dhwaj brought the injured to the hospital and how it is that Makar Dhwaj had not revealed the name of the injured whom he very well knew and how it came to be recorded in the MLC that only an unknown person in injured condition had been brought and why the person who had brought the injured in the hospital has not given his name to the doctor. However, despite these lapses occurring in the prosecution case the fact remains that name of Makar Dhwaj as the person who brought the injured to the hospital came to be recorded in the daily diary No. 37 which can hardly be fabricated. So, we have come to the conclusion that Makar Dhwaj did take the injured to the hospital. It was not necessary in our view, to have taken into possession the truck in which the injured was taken to the hospital. Non-examination of Ramesh or the person who had allegedly given the cot on which the injured was laid when he was taken to the hospital are not, in our opinion, material witnesses and non-examination of them, in our view, would not adversely affect the veracity of the prosecution case to the limited question that it was Makar Dhwaj who got the injured admitted in the hospital on that night.

18. Even if we believe that Makar Dhwaj had witnessed the occurrence, still in the present case it would not be safe to place implicit faith in his testimony regarding the identity of the culprits who inflicted the fatal injuries to the deceased. After all Makar Dhwaj did not know the culprits. He had allegedly given only physical features of the culprits in his statement to the police. We presume so because he has categorically admitted in court that he did not know the culprits earlier. If that it so, the holding of a test identification parade in a fair manner was a must. We find that Investigating Officer in that connection has not acted fairly. The Investigating Officer has deposed that he came to arrest the culprits on the pointing out by his Constable who just expressed the view that perhaps they may be involved in this case. It is not that the Investigating Officer had arrested the appellant and his

companion on the basis of any identity being furnished to him by any evidence collected by him. So, it is evident that the Investigating Officer on his own without there being any material with him picked up the appellant and his companion and thereafter had required Makar Dhwaj to name them as culprits in this case. Once we have come to the conclusion that the Investigating Officer had committed grave error in not keeping the safeguards in view for keeping the culprits in muffled faces before putting them for test identification parade an irresistible conclusion can be reached that in fact, eyewitness must have been shown the culprits before they were put up for test identification parade and they were right in declining to participate in any test identification parade.

19. The learned counsel for the State has contended that the recovery of the blood stained pant at the instance of the appellant should lead this court to hold that the appellant was the person who had murdered the deceased. It is to be noticed here that no public person has been joined by the Investigating Officer before interrogating the appellant and even at the time of effecting recovery of the tainted pant. The Investigating Officer has deposed that the house from which the pant was recovered was locked but he does not say who had opened the lock of the said house. At one place he had deposed that some ladies were present in that house. If ladies were present in that house, how he could have deposed that the house was locked. If the Investigating Officer meant that one of the rooms in that house stood locked from which the appellant allegedly produced the pant in question then while taking the personal search of the appellant at the time of his arrest and before interrogating the appellant a key ought to have been recovered from the appellant with which the lock of the room could have been opened where this pant was lying but the personal search memo of the appellant shows that no such key was found to be recovered from his person. So, it remains unexplained as to how the appellant entered the locked room and brought out the pant in question. Moreover, the pant is stated to have been converted into sealed parcel but the seal was not given to any independent person but was handed over to the companion constable. It has also come out that the case property as well as the sealed parcel containing the pant came to be sent to the CFSL belatedly. No Explanationn has been given by the Investigating Officer as to how there took place this unusual delay in sending the case property to the CFSL.

20. In Santa Singh v. State of Punjab, : 1976 CriLJ1875 , there was inordinate delay in sending the sealed parcels for expert opinion and besides there were other suspicious features in that case and the Supreme Court held that such suspicious features throw doubt on the bonafides of the investigation.

21. It has been contended on behalf of the State that Makar Dhwaj had no animus against the appellant and no sound reason had been given by the appellant as to why Makar Dhwaj would have named the appellant as the culprit in court. It is difficult for the appellant to know the reasons for his false implication. Mere fact that appellant has not been able to give any sound reason for his false implication does not mean that the court is to believe the prosecution case against him even if there has occurred serious doubt about the identity of the appellant being the culprit.

22. The Supreme Court in Shankarlal Gyarasilal Dixit v. State of Maharashtra, : 1981 CriLJ325 , while dealing with such a point observed as follows :

'Our judgment will raise a legitimate query : If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stores out of strong suspicions. In the instant case, the dead body of a tender girl, raped and throttled, was found in the appellant's house and, instinctively, everyone drew the inference that the appellant must have committed the crime. No one would pause to consider why the appellant would throw the dead body in his own house, why would he continue to sleep a few feet away from it and whether his house was not easily accessible to all and sundry, as shown by the resourceful Shrinarayan Sharma. No one would even care to consider why the appellant's name was not mentioned to the police until quite late. These are questions for the Court to consider.'

23. In view of the above discussion, we conclude that the appellant in the present case deserves to be given benefit of doubt in view of the serious lapses occurring in the evidence led by the prosecution.

24. We, hence, allow the appeal and set aside the judgment and order of the Additional Sessions Judge and acquit the appellant of the charges. The appellant is on bail. His bail bond is discharged and he need not new surrender.

25. Appeal allowed.