

Surinder Kumar and ors. Vs. State

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Court : Delhi

Decided On : Dec-14-1989

Reported in : 42(1990)DLT1

Judge : Charanjit Talwar and; Malik Sarief-ud-Din, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; [Evidence Act, 1872](#) - Sections 27

Appeal No. : Criminal Appeal No. 94 of 1987

Appellant : Surinder Kumar and ors.

Respondent : State

Advocate for Pet/Ap. : F. Anthony,; B.G. Singh,; D.R. Sethi and;

Judgement :

Malik Sharief-ud-Din, J.

(1) The appellants herein together with one Suresh Kumar alias Bunti and Mukesh Kumar were found guilty of the offence under sections 302/34 Indian Penal Code . and were sentenced so undergo imprisonment for life. Surinder Kumar and Mukesh were also found guilty under section 27 of the Indian Arms Act and were further sentenced to undergo rigorous imprisonment for two years. The sentences were passed by an order dated 30th of March 1987 the date on which their order

of conviction was recorded. The date of incident is 25th of June 1984 at 11.20 P.M. The deceased is one Kaptan Singh who was the brother of Balraj Singh, prosecution witness.

(2) Stating briefly, the prosecution case is that Balraj Singh Public Witness Along with his brother Kaptan Singh deceased and on Dinesh and Prem were taking fruit juice near Shanti building on Mandoli road. While they were there Suresh one of the accused who is supposed to be known to Balraj and resides near old Sawheny factory, came to the juice shop to purchase fruits. Suresh is then said to have asked the shop-keeper to give fruits as they were required for Samey Pandit appellant. He sought priority over other customers. Prem one of the companions of the deceased objected and said that since they have come first they must get the preference. Suresh thereupon is stated to have defiantly told him "don't you know Samey Pandit'. Prem replied that Samey Pandit was not a God. There was exchange of hot words between Suresh and Balraj Singh and others and Suresh left the place thereafter remarking that he will teach them a lesson. Thereafter Prem is also stated to have left the place of incident. Within 5 to 7 minutes of this incident. accused Surinder and Samey came on motor cycle No. Den 2316 while the accused Mukesh and Suresh came on a scooter. Accused Suresh was carrying a bottle in his hand. After pointing out Balraj and his companions he is said to have exhorted to his accomplices that these are the persons and none of them should be allowed to escape. Accused Suresh thereafter hit the empty bottle on the ground and the broken pieces of glass are supposed to have hit on the left calf of Kaptan Singh. Accused Surinder and Samey are alleged to have taken out knives while Mukesh was holding a naked kirpan. Surinder accused thereafter is said to have given a knife blow on the right side of the abdomen of Kaptan Singh while Mukesh accused attacked with open kirpan but the blow was warded off by Kaptan Singh. At this stage, the deceased together with Balraj Singh and Dinesh ran towards their houses but all the four accused chased them and the accused Samey gave a knife blow on the left buttock of Kaptan Singh. The prosecution case is that at this some people arrived on the spot and on finding the people crowding Samey and Surinder accused escaped on their motor-cycle while Suresh and Mukesh accused ran away from the spot abandoning their scooter. Balraj and Dinesh are said to have removed the injured Kaplan Singh to general hospital,

Shahdara where within a short time after arrival he died.

(3) The prosecution case further is that Dr. B.K. Tandon of the aforesaid hospital prepared the M.L.C. Ex.PW6/A of Kaptan Singh who was declared dead at about 11.30 P.M. on the same night. Since the telephone of the hospital was out of order, constable Ram Pal Singh who was on duty in the said hospital sent information in writing marked Ex. Public Witness 9/A through constable Raj Kumar Public Witness . 15 who happened to be in the hospital for the medical examination of one person namely Chanan Lal. Ram Pal Singh head constable recorded the Dd entry. 20A at 12 A.M. at police station Shahdara and a copy thereof was handed over to Inspector M.S. Sapra, S.H.O. Police Station Shahdara who along with other police officials went to the hospital, and collected the M.L.C. of the deceased. They further found Balraj Singh', brother of the deceased present in the hospital and recorded his statement. After endorsing the statement it was sent through constable Jwala Prasad to the police station where the duty officer recorded the F.I.R. at 2.20 A.M. marked Ex. Public Witness 17/B.

(4) Before proceeding further we may point out that the prosecution had examined Public Witness .1 Dinesh Kumar, Public Witness .2 Kishan Lal, Public Witness .3 Prem Sagar Public Witness .5 Balraj Singh as eye witnesses to the incident but the first three of them were cross- examined by the prosecution as they did not subscribe to the prosecution story and deposed that they did not know anything about the incident. The prosecution case, therefore, entirely rests on the testimony of Balraj Singh Public Witness brother of the deceased. We may notice that the police officer who investigated this case had seized one scooter from near the alleged place of the incident but till date it not shown as to whom this scooter belonged to and where it has gone. All that the court is told it that is was given on superdarinama.

(5) Suresh Kumar accused was arrested on 26th June 1984. His Pant and Tea-shirt were seized and it is alleged that his shirt was found blood stained. The accused Surinder Kumar and Mukesh Kumar were arrested under the Arms Act by Police Station Link Road, District Ghaziabad and were lodged in the district Jail Meerut as under-trial prisoners under the Indian Arms Act. On 17th of July 1984

the Police Station Shahdara procured warrants from the court of A.C.M.M. Shahdara for the production of these two accused and both these two accused were there after brought from the district Jail Meerut to Central Jail, Tihar under the custody of two police constables of U.P. accompanied by Inspector M.S. Sapra and S.I. Laxman Dass of police station Shahdara. They were thereafter produced before the A.C.M.M. Shahdara on 20th of July 1980 and were arrested in the present case on that date. The police thereafter procured three days police custody remand. On 22nd of July 1984 it is stated that Mukesh accused made a disclosure statement pursuant to which he got, recovered a kirpan Ex. P-2 from inside a Talab in Siri Ram Nagar This was duly sealed and secured. The accused Surinder is also said to have made a disclosure statement pursuant to which he got recovered a churri Ex. P-1 from a particular place near the railway line of Siri Ram Nagar, Delhi.

(6) We may at once state that the only prosecution witness Balraj Singh has deposed in favor of the prosecution case and broadly he has corroborated the case of the prosecution in all material details as unfolded by him in the F.I.R. Ex. Public Witness 17/B. There is need, therefore, for us to reproduce his statement. All that can be said is that he does support the prosecution case.

(7) There is no need for us to reproduce the testimony of the autopsy surgeon Dr. L.T. Ramani as neither the injuries sustained by the deceased nor the cause of the death is in dispute. Suffice is to say that injury No 1 according to the opinion of the autopsy surgeon, was sufficient to cause death in the ordinary course of nature. The autopsy surgeon had noticed 5 injuries, out of which four were incised wounds. The first one was on the abdomen, the second one was on the left buttock, third one was on the left leg lower portion, fourth one was also on the left leg while the fifth one was a triangular abrasion on the left arm. According to the doctor, all injuries except injury No. 5 were possible by the weapon Ex. P-1 seized in the case while injury No. 5 was possible by the weapon Ex. P-2 seized in the case. According to the doctor, injuries No. 3 and 4 are not possible with the broken glass pieces of the bottle. The doctor also noticed 3 or 4 cuts on the kachha Ex. P-4 of the deceased.

(8) We may also notice that in their defense the accused persons have also examined four witnesses, namely, S.K. Rastogi (D.W.1), a clerk attached to the court of A.C.M.M. Shahdara who deposed on the basis of the record maintained in the court that the F.I.R. in this case was received at the residence of the Magistrate Shri S.L. Khanna on 26th of June 1984 at 12.30 p.m. D.W. 2 Suresh Kumar is one of the convicts who has appeared as his own witness. According to him, the F.I.R. in this case was recorded on 26th of June 1984 after S.I. Laxman Dass had a full deliberation with Siri Chand, father of the deceased. He has further stated that when the room in which he was kept in the police station was vacated for enabling him to change his clothes he removed the draft copy of the F.I.R. which was prepared by Laxman Dass from his file and handed it over for safe custody to his father who had brought clothes for him. Shri Ram Kumar Aggarwal D.W.3 is the father of the accused Suresh who also deposed that he went to the Police Station with the clothes for his son where he was handed over this document. Shri V.K. Sakhuja (D.W.4) is the hand-writing expert who had deposed that the expression 'allowed' written on this document tallies with the specimen signatures of Inspector Sapra.

(9) We have given our anxious consideration to the contentions urged by Mr. Anthony. Mr. Bawa and Mr. Sethi, learned counsel for the appellants. It was contended by the learned counsel for the appellants that in fact, the first information report was not recorded at the time and in the manner as stated by the prosecution. The prosecution case is that after Kaptan Singh was brought to the hospital by his brother Balraj Singh and after he died on his arrival in the hospital it was Ram Pal Singh, duty constable who sent a written information Ex. Public Witness 9/A to the police station through constable Ram Kumar Public Witness .15 on the basis of which Dd entry 20A was recorded at 12.15 A.M. Pursuant to this information Inspector M.S. Sapra came to the hospital where he obtained the M.L.C. of the deceased and recorded the statement of Balraj Singh which was endorsed through constable Jwala Prasad and sent to the police station at 2 A.M. on the basis of which F.I.R. was recorded by Ram Singh Public Witness .17 at 2.20 A.M.

(10) Learned counsel for the appellants contend that, in fact, the circumstances of the case are ample evidence of the fact that it was not so. and that the first information report came to be recorded somewhere in the morning of next day and that it was done after S.I. Laxman Dass and Siri Chand father of the deceased thoroughly deliberated and prepared a draft of the statement of Balraj Singh marked Ex.PW Da and it was only thereafter that the F.I.R. was recorded and till then even Balraj Singh was not aware about the details of the incident. According to the testimony of Balraj Singh pW his father Siri Chand was no duty at Airport and he came to the hospital somewhere at 1.30 or 2 A.M. and thereafter his statement was recorded by the Inspector M.S. Sapra whereas according to the testimony of Siri Chand he reached the General Hospital at about 3 A.M. or 4 A.M. Balraj Singh has deposed that his statement was recorded by the police only after the arrival of his father, Siri Chand father of the deceased had been sent for by Balraj Singh Public Witness and he had deputed two of his neighbours Mahinder Singh Parwana and Staya Prakash for this purpose. Siri Chand who has also been examined as a prosecution witness has clearly stated that he reached hospital between 3 and 4 A.M. In our view Siri Chand who was posted at Airport and had to come from Airport to the hospital after receiving the information must be having a better understanding of the time at which he left the Airport and reached Shahdara hospital. It is clearly stated by Balraj Singh Public Witness that his statement was recorded after the arrival of his father, though he has stated that his father had arrived in the hospital somewhere between 1.30 and 2 A.M. In our view, this is so stated by Balraj Singh Public Witness because his statement was purported to have been dispatched from the hospital at 2 A.M. We may note that the F.I.R. was received by the Magistrate at 12.30 P.M. on 26th of June 1984. The prosecution evidence is that it was dispatched from the police station at 5 A.M. But entire prosecution evidence is silent about the time at which it was delivered to the Illaqa Magistrate. This fact by itself goes to show that in fact the F.I.R. was not dispatched to the Magistrate as stated by the prosecution at 5 A.M. and that also goes to show that it was not in existence till late on the morning of 26th of June 1984. We may notice that Balraj Singh Pw if he were really an eye witness to the incident would not have failed to disclose the names of the assailants if not to the doctor at least to the duty constable Ram Pal Singh Public Witness who have in

that event conveyed that information to the police station when he sent a written information from the hospital. We fail to understand as to why Balraj Singh the brother of the deceased had to wait for his father for making the statement. It is true that Balraj Singh was the person who removed deceased to the hospital but that by itself does not fetch proof of the fact that Balraj Singh was an eye witness to the incident. In *Jagir Singh v. State (Delhi Administration)* : 1975 CriLJ1009 the Supreme Court has observed that while considering the evidence of an eye witness the question that naturally arises for consideration would be as to when the eye witness first disclosed the names of the assailants. The Supreme Court further observed that it is the duty of an experienced police constable to enquire as to who the assailants were and get the names of the assailants if the eye witness knows it. In the present case, also when we turn to the testimony of Balraj and Ram Pal duty constable it is clear that the names of the assailants were neither disclosed by Balraj Singh nor has head constable Ram Pal enquired while sending a written report to the police station as to who the assailants were. It is in this context that the fact of Balraj Singh waiting to make a statement till his father Siri Chand arrives assumes importance and creates suspicion that the F.I.R. was not recorded at the time as alleged. It is further in this context that the defense evidence has to be appreciated.

(11) Suresh accused who has appeared as his own witness has taken a great risk and he has deposed in detail as to how he came into the possession of the document Ex. Public Witness 21/DA which, according to him, is an exact copy of the F.I.R. purported to be the statement of Balraj Singh. He has deposed that this document was written by S.I. Laxman Das after deliberating with Siri Chand, father of the deceased, and that when he was alone in the room changing clothes he took it out from the case diary of the investigating officer handed it over for custody to his father who had come to the police station with clothes. Laxman Das S.I. in his testimony has admitted that this document is in his hand and that he prepared it as a copy and had kept it in the case diary. He has not, however, spelt out as to who had asked for the copy and for whom he had prepared it. The Inspector Mr. Sapra who is also an investigating officer in the case is at to make court believe that the expression 'allowed' and the signature M.S. Sapra at the end of this document marked 'A' is not in his hand writing this is belied by the testimony of

V.K. Sakhuja (D.W.4) hand-writing and finger print expert who has made a detailed statement as to how he examined the disputed writings with the admitted specimen writings of Inspector M.S. Sapra and he found similarity between the two. From the testimony of the hand writing expert it would appear that he is very experienced hand writing expert also has examined a large number of documents and appeared in thousands of cases as witness. Some allowance is to be given to him with such vast experience at his back and his testimony cannot be just brushed aside indeed, it is an opinion but then opinions have to be appreciated in the light of the knowledge and experience of the person giving such opinion. Admitted, the document is scribed by Laxman Das and there is absolutely no doubt in the fact that this has come from the proper source and it cannot now be denied that Suresh accused while testifying in defense is speaking a lie. This court has to accept his testimony that it was taken out by Suresh accused from the file of the investigating officer and handed over to his father. In view of the fact that Balraj Singh waited for his father to make a statement, the contention of the learned counsel for the appellants is weighty and cannot be brushed aside off-hand. The fact that Inspector Sapra in his own and under his own signatures had written the word 'allowed' at the end of this document it is clear that this is a document which apparently has been prepared before the registration of the F.I.R. and in consultation with Siri Chand and is endorsed by Inspector Sapra. In all probability by writing the word 'allowed' he meant approved. If that view is correct then it is obvious that the document came into existence after due deliberations and because of that the need to get it approved by Inspector Sapra as well. That explains the delay in sending the F.I.R. to the Magistrate and that naturally leads the conclusion that Balraj Singh had not seen the incident and the F.I.R. was prepared in consultation with Siri Chand, father of the deceased.

(12) We may notice Siri Chand Public Witness had also introduced a motive for the commission of this crime. Inasmuch as he states that accused Samey and Muna had asked his son Kaptan Singh not to appear as a prosecution witness in case F.I.R. No. 503/82 police station Shahdara under sections 392 and 394 Indian Penal Code . He, however admits that these accused persons were not involved in that case but the persons involved in that case were the associates of the accused. Siri Chand has, however, not been able to state as to how and in what

manner the accused involved in this case were associated with the appellants. This clearly goes to show that there has been an attempt on the part of Siri Chand Public Witness to make an improvement. Balraj Public Witness who is his son has nowhere stated in the F.I.R. that the accused had any motive. It is possible that when Siri Chand was examined it was thought necessary to introduce motive as well.

(13) It would appear that Siri Chand in his statement has stated that several neighbourers had told him that his son had been murdered by the appellants. But he has not been able to state as to who those neighbourers are and why he did not produce them as witnesses before the police. This also clearly goes to show that the F.I.R. was prepared at the instance of Siri Chand and that accounts for the fact that Balraj had not even told his father as to who the assailants of deceased were. In the light of the above facts it is clear to us that the testimony of Balraj cannot be relied upon. Indeed conviction can be based on the testimony of a Single witness depending upon the quality of the evidence but then it must be of sterling quality. We are therefore not in agreement with the views of trial court that Balraj Pw was an eye witness and he had seen the incident himself.

(14) We may state that in a case based on eye witnesses not much will turn up on the recoveries of the weapons of offence. If the eye witness's account is trustworthy and reliable then even in the absence of recovery of weapons a conviction can be based. But then we must take up the contention of the learned counsel for the appellants for consideration that even the recoveries of alleged weapons of offence Exts. P-1 and Ex. P-2 in this case are tainted and the result of dishonest investigation. We have already pointed out as to how these recoveries are alleged to have been made pursuant to the disclosure statements of the accused. We may notice that the police took the custody of the accused from the court on 20th of July 1984 but the disclosures were only recorded on 22nd of July 1984, that is, after keeping them in custody for 3 days. In *Jodhu and others v. State and others* 5 1967 DLT 68 this court has observed that the 'recovery made after the accused has remained in police custody for a long period is generally viewed with suspicion and is attributed to use of third degree methods or even planting by the police'. We respectfully agree with this view. It is not

understandable as to why the accused if they had to disclose anything on their own and voluntarily did not do it on the day when they were taken by the police into the custody from the court for this purpose. Instead of doing so, they kept them in the lock up for two days and it was only on third day they are stated to have made the disclosure statement which resulted in the discovery of the alleged weapons of offence. Strangely, even though the prosecution case is that one of the weapons was having blood stains it was never sent to the laboratory for examination.

(15) The next limit of the arguments advanced by the learned counsel for the appellants is that on 17th of July 1984 pursuant to a warrant obtained from the court of the learned A.C.M.M. Shahdara, Surinder and Mukesh accused were brought to Delhi. They were in judicial custody at Meerut Jail and the order was that they should be sent in muffled faces to Central Jail Tihar, Admitted case of the prosecution as evidenced by Laxman Das is that they had to be identified it was for that reason that they were brought in muffled faces. Thereafter neither any request was made for any identification parade nor was any identification parade conducted. That being the prosecution case the names of these two accused at least could not have figured in the F.I.R. and the least that could be said was that their dock identification is of no consequence. It is true that Inspector Sapra whose statement was recorded last of all tried to wriggle out of this position by stating that no identification parade had to be done but that cannot be believed as his own witness S.I. Laxman Das has clearly stated that the identification parade was to be carried out and it was for that reason that they were brought in muffled faces. Instead of asking for a test identification parade the evidence of the prosecution reveals that they were brought from Meerut Jail to the Police Station first and it was only thereafter that they were taken to the Tihar Jail. This was done in all probability to show them to the witnesses as they had earlier been named in the F.I.R. Their identification, therefore, is rendered suspect. The accused can only show that there was a possibility of their having been seen by the witnesses and in this case they have sufficiently established this fact. In view of the fact that these two accused persons had to be identified also, the F.I.R. becomes a suspect because in that event it was not possible to describe them in the F.I.R.

(16) In *Badri v. State of Rajasthan* : 1976 CriLJ496 it has been held :

'If a witness who is the only witness against the accused to prove a serious charge of murder can modulate his evidence to suit a particular prosecution theory for the purpose of securing a conviction, such a witness cannot be considered as a reliable person and no conviction could be based on his sole testimony.'

(17) We have already pointed out as to how the F.I.R. in this case was registered somewhere on the next morning of the date of the incident and that too after due deliberations between Siri Chand, father of the deceased and the S.I. Laxman Das who prepared the draft of the F.I.R. and got it approved by Inspector M.S. Sapra. Siri Chand obviously has not been told the names of the assailants by Balraj, the only eye witness as according to Siri Chand even he came to know about it from certain neighbours whom he did not produce before the police. Going by the account of Siri Chand, it seems to us, that it were those neighbours who would in that event be the real eye witnesses. Why they have been suppressed is not known. Strangely, even when Mahinder Singh Parwana and Satya Prakash came to the hospital and were sent by Balraj to Airport to fetch his father Siri Chand, Balraj Pw does not disclose the facts of the case to them nor have Mahinder Parwana and Satya Prakash said anything to Siri Chand as to the manner in which, according to Balraj, the incident took place. It is the stand of Balraj that he did briefly narrate the story to these two persons but this was never his stand when his statement under section 161 Cr.P.C. was recorded. Obviously, this is an improvement. From the testimony of Balraj it would appear that he did not know as to where Surinder Kumar and Mukesh accused were living which clearly shows that these persons were not known to him and that was why the prosecution had earlier taken the stand that a test identification parade is to be carried out. According to Balraj one Ram Niwas, Satya Prakash and Murari Lal, his neighbours, had come to his house when the deceased and his friends rushed to their house from the alleged place of incident but strangely he had not disclosed before them that the offence was committed by the accused. All these facts taken together clearly go to show that Balraj Public Witness has modulated his evidence to suit the prosecution theory which Siri Chand, father of the deceased, had manipulated somewhere in the morning hours of the day following the date of the incident and, therefore, he cannot be trusted to be a reliable witness. The fact that he has not disclosed the details of the incident to any one whom he contacted

before the arrival of his father from the Airport together with the fact that the mandatory provisions of law that the F.I.R. is to be sent to the concerned Magistrate forthwith has not been complied with and it was only at 12.30 P.M. on 26th of June 1984 that it was placed before the Magistrate clearly support the theory urged by the learned counsel for the appellants that till that time the facts about the incident were not known and Balraj who had taken his brother deceased Kaptan Singh to hospital was not in the picture at all excepting to the extent that he after finding the deceased injured at the door steps he took him to the hospital. On the facts and circumstances of this case the maximum that can be said is that Balraj took his deceased brother to hospital but in the light of the facts and circumstances of this case it can never be said that he was an eye witness to the incident. In fact, he has modulated his evidence to the theory propounded by the prosecution after deliberating with Siri Chand, father of the deceased, who himself is a police officer and the F.I.R. was only registered after the draft was approved by Shri Sapra, Inspector, S.H.O. of the police station. We are certain that the word 'allowed' written on this document Ex. Public Witness 21/DA has been written by Mr. Sapra himself. The expression used is 'allowed' and is signed by Mr. Sapra probably meaning thereby that he is approving of the draft. One fails to understand where was the necessity of preparing a draft and getting it approved by Mr. Sapra, if the F.I.R. had to be registered on the statement of Balraj which the court is told was recorded in the hospital. In our view, therefore, it appears that Balraj was unaware as to how the incident took place and he made no statement before Inspector Sapra at the hospital as is alleged by the prosecution. Even the Mlc in this case states that the deceased was stabbed by someone. Balraj Public Witness asserts that he told the doctor about the facts of the incident. We are unable to appreciate this stand. If he had really told the doctor the names of the persons who had indulged in this incident we find no reason for the doctor not to record it in the M.L.C. and substitute it by the words 'stabbed by some one'. The court further is told that there was a blood stain on the clothes of Suresh accused. This also, to our mind, is not understandable as it is nobody's case that Suresh was having a knife or he had attacked the deceased. All that is stated about Suresh is that he threw a bottle splinters of which had hit the deceased. How then he got blood stains on his clothes is not explained by the prosecution. Considering

the fact that Suresh was arrested on 26th of June 1984 it was unlikely that he would continue to wear blood stained clothes which he had got at the time of the incident.

(18) On the basis of the observations we have made and on the facts and circumstances of this case we are of the view that no reliance can be placed on the testimony of Balraj, the only eye witness and the incident seems to have taken place in a manner different than the one suggested by the prosecution and was not witnessed by Balraj PW. In the view we are taking of the matter, we allow the appeal, set aside the conviction and acquit the accused.

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