Salamat Ali Vs. State

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Court : Delhi

Decided On : Mar-26-2010

Judge : Pradeep Nandrajog and; Suresh Kait, JJ.

Acts : Indian Penal Code (IPC) - Sections 201, 302 and 376; ;Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Crl. Appeal No. 242/2010

Appellant : Salamat Ali

Respondent : State

Advocate for Def. : M.N. Dudeja, Adv.

Advocate for Pet/Ap. : Ajay Verma,; Gaurav Bhattacharya and; Swati Gupta, Advs

Judgement :

Pradeep Nandrajog, J.

1. Vide impugned judgment and order dated 10.8.2009 the appellant has been convicted for the offence punishable under Section 302 IPC. The appellant has been acquitted of the charge for the offence punishable under Section 376 IPC and Section 201 IPC.

2. Briefly stated, the case of the prosecution is that deceased Sabina Khatoon, aged about 8 years, left her house at around 10:00 AM on 20.1.2006 and did not return home. Her dead body was noted by somebody near Ganda Nala, Madhav Setu on Naraina Road, information whereof was passed on at the local police station where the same was noted vide DD No. 7 at around 12:30 noon on 23.1.2006. Mohd.Mustafa, father of Sabina Khatoon, also received the information of the dead body of a young girl being found and accordingly he reached the spot. He made the statement Ex.PW-2/C to the police officer who had reached the spot, as per which Mohd. Mustafa told the investigating officer that his daughter Angoori was married to the appellant and was having a matrimonial dispute and therefore had returned to her parental home. Her son was with the appellant. He i.e. Mohd.Mustafa had sent Sabina Khatoon to the house of the appellant at around 9-9:30 AM on 20.1.2006 to fetch her nephew, but she never returned. Hence, he sent his son Chand PW-3, to the residence of the appellant and Chand returned and informed him that the appellant had told Chand that after scolding Sabina he had sent her back. That Chand further told him that the appellant did not permit Chand to look or peep inside his house.

3. Needless to state, the FIR was registered for the offence of murder. Since it was suspected that Sabina was raped offence punishable under Section 376 IPC was also included. Appellant was apprehended.

4. But before Mohd.Mustafa made the statement Ex.PW-2/C, on 20.1.2006 he had lodged a missing person's complaint Ex.PW-2/A, which reads as under:

DD No: 43 B dated 20.1.2006, PS Patel Nagar, Delhi.

Statement of Mohd. Mustafa S/o Mohd. Muslim, R/o A-532, Katputli Colony, Delhi: Information missing girl: Time 7:30 PM.

Aforesaid person came to police station in person and stated that his daughter Sabina Khatoon D/o Mohd.Mustafa, R/o A-532, Katputli Colony, Delhi aged 8 years, colour fair, height about 3 feet, round face, thin built and wearing a red salwar and a pink coloured kurti left at about 10:00 AM from the house. I have no suspicion on anybody. Search may kindly be made. Statement has been read over

and the same is correct.

5. After the appellant was apprehended, as claimed by the prosecution, he made a confessional-cum-disclosure statement admitting his guilt and got recovered a chappal from his house which chappal was identified in Court by the father of Sabina Khatoon as that of his daughter.

6. Needless to state, the evidence of the prosecution was Sabina Khatoon visiting the house of the appellant and going missing thereafter as also the recovery of the chappal of Sabina Khatoon from the house of the appellant.

7. Holding in para 30 of the impugned decision that he need not discuss the evidence of last seen for the reason the accused has admitted said fact, learned Trial Judge has proceeded to convict the appellant.

8. While admitting the appeal we had wondered as to wherefrom the learned Trial Judge noted in para 30 of the impugned decision that he need not discuss the evidence of last seen inasmuch as the accused has admitted said fact. No such admission was made by the appellant when he was examined under Section 313 Cr.P.C. Accordingly, we had directed that a letter of request be sent requiring the learned Trial Judge to inform this Court as to wherefrom said finding of fact has been noted by him.

9. A response has been received from the learned Trial Judge informing that since witnesses of the prosecution who deposed that Sabina Khatoon had gone to the house of the appellant were not cross-examined on said point, in his opinion, the appellant admitted said fact.

10. For the benefit of the learned Trial Judge we would only like to pen down that an admission is something which is expressly admitted in no uncertain language by the person against whom the admission is pressed into aid. Not cross-examining a witness with reference to a statement made by the witness has not to be treated as an admission but as a case of not controverting the testimony of a witness and thereby justifying the acceptance of the statement by the Court.

11. Be that as it may, reverting to the evidence led at the trial, we note that the witnesses of the prosecution who had deposed to the fact that Sabina Khatoon was sent to the house of the appellant in the morning of 20.1.2006 and what transpired there are Mohd.Mustafa PW-2, Chand PW-3, Angoori PW-4 and Mohd.Kalamat PW-13.

12. Mohd. Mustafa PW-2 has deposed that his elder daughter Angoori was married to the appellant and was residing with the appellant at some distance from his house in same colony. That Angoori came to her parental house about 15-20 days prior to the date of the incident because of some altercation with her mother-in-law and had left behind her elder son aged about one year with the appellant. On 20.1.2006 at about 9:00 or 9:30 AM he sent Sabina to the house of the appellant. She did not return. He sent his son Chand to the house of the appellant, who on returning back told him that the appellant told Chand that after scolding Sabina he had sent her back. He deposed that he lodged the missing person's complaint Ex.PW-2/A and that on 23.1.2006 he learnt that the dead body of a female child was lying near Ganda Nala, Naraina Road, Madhav Setu and on reaching the spot he identified the dead body of his daughter. Police reached there and recorded his statement Ex.PW-2/C. He further deposed that the disclosure statement Ex.PW-2/H of the accused was made in his presence and that the police recovered the pair of chappal Ex.P-2 from the Tant of the house belonging to the appellant, which was seized vide memo Ex.PW-2/I.

13. The cross-examination of the witness is as under:

My brother Sabnam had gone to identify dead body of Sabina. I sent my daughter Sabina to bring back son of Angoori as Sabina used to frequently visit the in-law's house of Angoori. I did not sent Angoori because she had come to me after having altercation with her in laws. I did not approach the parents of accused as to why he had sent back Sabina after scolding. After I got information from my son Chand about Sabina, I started searching her in the neighbourhood. I also enquired from accused about Sabina who told me that she had already left, however, I did not enquire from the neighbours of accused.

14. Chand PW-3 deposed in harmony with his father regarding his visit to the house of the appellant and being informed that Sabina had been scolded and sent back when she went to the house of the appellant.

15. The cross-examination of Chand reads as under:

I did not enquire from the neighbours of the accused about Sabina. I did not enquire from the parents of the accused about my sister Sabina.

16. Angoori PW-4 deposed same facts as were deposed by her father. Her cross-examination reads as under:

The question with regard to solemnization of marriage is disallowed as the couple is already having two kids.

I had no altercation with my father in law. The quarrel took place on petty matrimonial chore. I did not complain the matter to my father in law. Without telling anything to anybody I proceeded to my parent's house. During my stay with my father accused had come to me to take me back, but I did not go. I sent my sister Sabina to take back my son because she used to frequently visit my in-laws's house. My sister Sabina some time used my chappal, but on the day of incident, she was wearing her own chappal. I had also identified dead body of Sabina. I did not notice any finger marks of accused Salamat on the body of Sabina.

17. Mohd.Kalamat PW-13 simply deposed that about 2 years ago at about 9/9:30 AM Sabina, the sister-in-law of the appellant has come to his house to take back son of Angoori and that the accused refused Sabina to take with her the son of Angoori.

18. The cross-examination of Mohd.Kalamat PW-13 is as under:

I am handicap. It is correct that since I am disabled I got terrified and made statement to the police. Sabina who had come to our house had gone away safely and that I had seen her going from our house. Sabina had not left behind any chappal. Accused Salamat was also pressurized by the police. It is wrong that Angoori was at home at that time. My brother had been falsely implicated in the

present case.

19. Suffice would it be to state that learned Counsel for the appellant has just not cross-examined the father of the deceased i.e. PW-2 with respect to his statement Ex.PW-2/A which was made at 7:30 PM on 20.1.2006. No questions have been put to the witness as to the facts recorded in his statement that he did not suspect anybody. The witness has not been cross-examined with reference to his subsequent statements that his daughter had gone to the house of the appellant at around 9:30 in the morning and after his scolding was sent back. He has not been cross-examined with respect to said fact not being told by him to the police at the first instance. Similarly, Chand has not been cross-examined with respect to what he has deposed against appellant in respect of Sabina Khatoon, sister of Chand going to the house of the appellant. Similarly, the other two witnesses have also not been subjected to any meaningful cross-examination.

20. None can belittle the right of every accused to be fairly and adequately represented in a criminal trial, especially where capital sentence is involved. Counsels play an important role in the resolution of issues in an adversarial system. Every accused has a right to meet the case of the prosecution on even terms.

21. In the decision reported as : 1978 (3) SCC 544 Madhav Hayawadanrao Hoskot v. State of Maharashtra, the observations of the US Supreme Court in Ramindo Hamlin's case were cited with approval, which epitomize the quintessence of this processual facet:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of

counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

22. Needless to state, at a criminal trial involving a serious offence, the counsel for the defence has a duty to bring such skill and knowledge so as to make a trial a reliable adversarial testing process. In Turner v. Duncan, the US 9th Circuit Court of Appeals held that where no discernible defence strategy emerged at the trial, the trial could not be relied as having produced a just result.

23. We need not note various decisions of the Supreme Court save and except a few which have highlighted that it is the duty of even the Court to ensure that an accused is represented with diligence and competence by the defence counsel and where the defence falls below the acceptable standards at a criminal trial, it would amount to denial of counsel's assistance. A few would do. 1981 (1) SCC 286 Kishore Chand v. State of H.P., : 1983 (3) SCC 307 Ranjan Dwivedi v. Union of India and : 1980 (1) SCC 108 Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar.

24. No doubt, counsel's assistance and performance at a trial has to be highly deferential but as observed by the US Supreme Court in the decision reported as Strickland v. Washington 466 US 668 (1984), with regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional efforts, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A Court hearing an

ineffectiveness claim must consider the totality of the evidence before the Jury or the Judge.

25. Tested on the anvil of law aforesaid, a mere perusal of the cross-examination conducted in the instant case brings out the hopelessness of the trial and highlights the ineffectiveness, inefficiency and low standards achieved by the learned defence counsel. The witnesses of the prosecution have just not been cross-examined with reference to their testimony and the available material on record. The witnesses of the prosecution have just not been cross-examined with reference to Ex.PW-2/A.

26. We are left with no option but to declare that the instant trial has not been a fair trial to the appellant and the blame has to be principally on the shoulders of his counsel, with the learned Trial Judge partly sharing the blame for the reason he did not just bothered to ensure that the defence raises the standard to meet the requirements of a fair adversarial trial.

27. Accordingly, we dispose of the appeal by setting aside the impugned judgment and order dated 10.8.2009 convicting the appellant for the offence punishable under Section 302 IPC. Accordingly, we also set aside the order on sentence dated 18.8.2009.

28. We restore the trial before the learned Trial Judge. We direct that PW-2, PW-3, PW-4 and PW-13 alone would be re-summoned for cross-examination.

29. The learned Trial Judge would ensure that an effective counsel through Legal Aid is made available to the appellant.

30. Needless to state, the appellant would be re-examined under Section 313 Cr.P.C. with reference to the incriminating circumstances brought out against him and would be given another opportunity to produce defence witnesses.

31. At the remanded stage the trial would be expedited and would be completed within three months of the date of receipt of the present decision.

32. TCR be returned forthwith.

33. Copy of this decision be given dasti to learned counsel for the appellant as well as the State under the signatures of the Court Master today itself.