SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Dwarka Prasad and Another Vs. State

Dwarka Prasad and Another Vs. State

SooperKanoon Citation : sooperkanoon.com/948616

Court : Delhi

Decided On : May-29-2012

Judge : Pradeep Nandrajog &Amp; Siddharth Mridul

Appeal No. : CRL.A. 247 OF 1999

Appellant : Dwarka Prasad and Another

Respondent : State

Judgement :

PRADEEP NANDRAJOG, J.

1. Criminal law was set into motion on June 05, 1996, at about 10.00 P.M. when, as alleged by the prosecution, two boys who were taking Subhash (“deceased”) in a TSR stopped at a PCR van stationed at Maujpur Chowk and informed HC Naresh Pal PW-15, the in-charge of the van that Subhash had been shot and requesting he be taken to a hospital. Accepting the request and while on the way to GTB Hospital, HC Naresh Pal transmitted the aforesaid information to Police Control Room, which in turn informed PS Seelampur, where the duty officer recorded DD No.55B Ex.PW-19/A, to the effect that a person has been shot at premises bearing Municipal No.G-62, H Block, Street No.3, Seelampur situated near Mauni Baba temple. The aforesaid DD entry was marked to SI Ram Avtar PW-19, for investigation who was already at GTB Hospital.

2. On receiving a copy of the aforesaid DD entry, SI Ram Avtar made enquiries and learnt that the deceased has been declared dead at about 10.45 P.M. as recorded in the MLC Ex.PW-17/A of the deceased which notes that the deceased was brought to the hospital at 10.45 P.M. in a PCR van by HC Naresh. He met Devender Pal PW-2, the brother of the deceased and Vishnu PW-1, an acquaintance of the deceased, at the hospital who informed him that the deceased has been shot dead by accused Sanjay and his father accused Dwarka Parshad. SI Ram Avtar recorded the statement Ex.PW-2/B of Devender Pal and made an endorsement Ex.PW-19/B thereon, and at around 12.20 A.M. forwarded the same to the police station through Ct.Jai Singh PW-14, for registration of an FIR and ASI Vishnu Dutt PW-12 registered FIR No.324/1996, Ex.PW-12/A at 12.50 A.M. for an offence punishable under Section 302 IPC.

3. In the statement Ex.PW-2/B, Devender Pal implicated Sanjay as the one who shot his brother, stating further that Sanjay's father Dwarka Prasad was accompanying Sanjay at the time of the incident and also disclosed a motive, being a few boys having quarreled with the wife of Dwarka Prasad and having assaulted her and for which Dwarka Prasad swore revenge. Qua Sanjay it was informed that he was released from jail a few days back.

4. After FIR was registered, SI Ram Avtar proceeded to the place of the incidence and lifted blood-stained earth and earth control from the spot as recorded in the memo Ex.PW- 1/A. He prepared the rough site plan Ex.PW-19/C and thereafter sent the body of the deceased to the mortuary for post-mortem and conducting investigation thereafter recorded the statement of Vishnu PW-1 and that of Daropti PW-4 during investigation. He recorded the statements of a few other persons on the issue of motive, i.e. Sunderlal PW- 5, Man Singh PW-8 and Devki Nandan PW-9.

5. Dr.S.K.Verma PW-18, conducted the post-mortem of the deceased and prepared the report Ex.PW-18/A recording therein that the death was the result of a projectile fired from a firearm at the chest of the deceased resulting in the right lung collapsing due to the injury causing death due to shock. He handed over a deformed bullet lodged in the subcutaneous tissue at the third intercostal space as

also a blood sample of the deceased on a piece of gauze to Ct.Rajneesh PW-6 as recorded in the memo Ex.PW-6/A.

6. Whereas Dwarka Prasad was apprehended on June 07, 1996 i.e. two days after the incident, Sanjay absconded and was apprehended only on November 06, 1996.

7. No recovery was made at the instance of the father and the son.

8. The blood sample of the deceased and blood stained earth lifted from the spot were sent to the Forensic Science Laboratory for serological examination and the report was that the blood group of the deceased was “AB”and that human blood of the same group was detected in the bloodstained earth.

9. Needless to state, the accused were sent for trial. Charge was framed against them for having committed the offences punishable under Sections 120-B IPC and 302 IPC.

10. At the trial, the prosecution examined 20 witnesses and suffice would it be to state the star-witnesses were Vishnu PW-1 and Devender Pal PW-2, who we have noted above is the brother of the deceased and were cited as eyewitnesses. Back up witnesses were Sunderlal PW-5, Man Singh PW-8, Devki Nandan PW-9 and the mother of the deceased Daropti PW-4, to prove the motive.

11. Vishnu PW-1 deposed favourably to the prosecution when he entered the witness box on September 03, 1997 and stated that he was at a juice shop when the deceased and his brother Devender Pal came to him with a request to effect a compromise between them and Dwarka Prasad with respect to Dwarka Prasad’s wife being humiliated by Pahari boys and while they were talking Sanjay and his father Dwarka Prasad reached the juice shop and Sanjay fired a shot at the deceased and at that Sanjay and Dwarka Prasad fled. He and Devender removed Subhash to GTB Hospital in a TSR and on the way at Maujpur Chowk saw a PCR and upon request being made the PCR van took the deceased to the hospital. But, during cross-examination on September 11, 1997 he turned turtle and resiled from his examination-in- chief stating that what he stated during examination-in-chief

was tutored by the police. He stated that on June 05, 1996 i.e. the day of the incident, he saw the deceased lying on the ground when he happened to reach the juice shop and he gave information of said fact to Devender whom he brought to the place of occurrence and thereafter he and Devender removed the deceased in a PCR van to the hospital. On being cross-examined by the learned APP, he stood by what he deposed to on September 11, 1997 and denied having seen Sanjay fire a shot at the deceased.

12. Devender Pal PW-2, deposed on similar lines as the contents of his statement Ex.PW-2/A.

13. Daropti PW-4, the mother of the deceased, deposed that on the day of the incident somebody came to their house and informed that her son had been murdered by Sanjay, whereupon she and her elder son Devender reached the place of occurrence and learnt that her son had been removed to the hospital. She and Devender reached the hospital where she found her son dead. She deposed of a past incident of Dwarka Prasad's wife being humiliated and he seeking revenge.

14. Sunder Lal PW-5, Man Singh PW-8 and Devki Nandan PW-9, resiled from their statements made under Section 161 Cr.P.C. i.e. discounted the theory of any motive.

15. HC Naresh Pal PW-15, deposed that on June 05, 1996 at about 10.00 P.M. he was in a PCR van when 2 boys whose names he could not recollect, who were travelling in a TSR stopped the van near Maujpur Chowk. At that time said 2 boys were carrying the deceased who was in an injured condition. Thereafter he accompanied by said 2 boys removed the deceased to GTB hospital in the van.

16. As regards the police officers, they deposed facts pertaining to the investigation and relevant would it be to note proved Sanjay absconding till he was arrested on November 06, 1996.

17. Denying being involved in the offence, the accused led defence evidence and examined one Tilak Ram Sharma DW- 1, whose testimony is of not much

relevance and hence we eschew reference thereto.

18. Vide impugned judgment dated March 24, 1999 the learned Trial Court has convicted the accused of the charges framed against them. In reaching the conclusion the learned Trial Court has held that:- (i) the testimony of Dropati PW-4 that she along with her son Devender Pal PW-2 were present in their house when some people came there and informed them that the deceased has been shot dead by accused Sanjay raises a serious doubt on the claim of Devender Pal PW-2 that he was present at the place of occurrence when Sanjay fired a shot at the deceased; (ii) the negation of the claim of Devender Pal PW-2 that he had seen accused Sanjay fire a shot at the deceased does not dent the case set up by the prosecution in view of the testimony of Vishnu PW-1, in his examination-in-chief; (iii) the somersault by Vishnu in his cross-examination does not altogether wash away his testimony during examination-in-chief in view of the law laid down by the Supreme Court in the decision reported as Khujji @ Surendra Tiwari v Sate of M.P. AIR 1991 SC 1853; (iv) the testimony of Vishnu PW-1, Devender Pal PW-2 and Dropati PW-4, notwithstanding other witnesses turning hostile, established Dwarka Prasad holding a grudge against deceased Subhash and thus there was a motive for the crime.

19. We highlight that the learned Trial Judge has not used appellant Sanjay absconding as incriminating evidence.

20. Three submissions were advanced by the learned counsel for the appellants at the hearing of the appeal. They are:-

A. While appreciating ocular evidence the courts have to keep in mind that witnesses can be classified into 3 categories; namely, (i) wholly reliable; (ii) wholly unreliable; and (iii) neither wholly reliable nor wholly unreliable, and that while appreciating evidence of witnesses falling in third category the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. In the instant case, Vishnu DW-1 is neither wholly reliable nor wholly unreliable witness inasmuch as he claimed in his examination-in-chief that he had seen accused Sanjay fire a shot at the deceased but took a complete somersault when cross-examined by denying having seen

accused Sanjay fire a shot at the deceased. In such circumstances, the learned Trial Court committed an illegality in accepting the claim made by him in his examination-in-chief on its face value without looking for any corroboration for the same.

B. That the learned Trial Court committed an illegality in attaching due importance to the fact that the accused persons had a motive to commit murder of the deceased for the motive is a double-edged weapon. Whereas motive can lead to commission of crime at the same time it can also lead to false implication of adversaries.

C. That the firearm allegedly used by accused Sanjay to murder the deceased has not been recovered in the present case and the failure of the investigative agency to recover the weapon of offence is fatal to the case of the prosecution.

21. From the factual narrative noted hereinabove, it is apparent that the case of the prosecution against the accused persons rests upon the eye-witness account given by Devender Pal PW-2 and Vishnu PW-1, and the circumstance that the accused persons had a motive to murder the deceased.

22. In view of the testimony of Dropati PW-4, the mother of deceased and Devender Pal, that she and Devender Pal were in their house when somebody came and informed that her son Subhash has been shot by Sanjay, the learned Trial Judge has rightly disbelieved Devender Pal's claim of being an eye-witness. The question then would be, should Vishnu PW-1, who has later on turned hostile, be believed when he claims to be an eye-witness during examination-in-chief.Now, in his examination-in-chief he has claimed that when he was at the juice shop, the deceased and Devender Pal walked up to him and while they were talking, Sanjay and his father Dwarka Prasad came and Sanjay shot the deceased. In view of the fact that Dropati had categorically claimed that she and Devender Pal were in their house when they got the news of Subhash being shot, it is apparent that Vishnu's version in examination-in-chief has to be considered with a pinch of salt.

23. The learned Trial Judge has sought sustenance from the observations of the Supreme Court in Khujji's case (supra). Let us visit the facts of Khujji's case. The

case set out by the prosecution against Khujji was that he and his companions had murdered the deceased and that 3 persons; namely, Komal Chand PW-1, Kishan Lal PW-3 and Ramesh PW-4, had seen him attack the deceased. During investigation, the said 3 witnesses had made statements that they had seen Khujji attack the deceased. However while deposing in Court Kishan Lal PW-3 and Ramesh PW-4, did not support the case of the prosecution regarding the identity of Khujji as the assailant. Though Komal Chand PW- 1, identified Khujji as the assailant during examination-in-chief, but resiled from the same during cross-examination which was conducted about 1 month after the examination-in- chief. The trial court rejected the testimony of Kishan Lal and Ramesh in its entirety. The learned Trial Judge also rejected the testimony of Komal Chand on the ground that he was a chance witness, but convicted Khujji on the basis of other incriminating evidence against him. In an appeal filed by Khujji, dismissing the same and notwithstanding the fact that Komal Chand took a somersault vis--vis his cross-examination, the High Court relied upon the examination-in-chief to sustain Khujji's conviction. In doing so, the High Court held:- (i) there was evidence on record to suggest that Komal Chand had been won over or succumbed to the threats extended to him by Khujji in the interregnum period between the recording of his examination-in-chief and cross-examination, inasmuch as Kishan Lal had deposed that he was severely beaten on the night previous to his appearance in the court as a witness; and (ii) there was "intrinsic"material in the examination-in-chief of Komal Chand to establish that Khujji was the assailant. Khujji challenged the legality of the judgment of the High Court before the Supreme Court. As regards the testimony of Kishan Lal and Ramesh, the Supreme Court noted that the said witnesses had supported the case of the prosecution as regards the time, place and manner of the incident and had deviated from the same as regards the identity of the assailant. It was held by the Supreme Court that in view of the legal position that the testimony of a witness, declared hostile, is not wholly effaced from the record and that the part of his testimony which is otherwise acceptable can be acted upon, the trial court committed an illegality in rejecting the testimony of Ramesh and Kishan Lal in its entirety and ought to have relied upon the same insofar they supported the case of the prosecution with respect to the time and place of the incident as also the manner of assault. As regards the deposition of

Komal Chand it was held by the Supreme Court that the High Court had rightly placed reliance on the statements made by Komal Chand in his examination-in-chief, particularly when the explanation given by him for wriggling out of the said statement was flimsy.

24. It is significant to note that in Khujji's case (supra) notwithstanding the somersault taken by the witness during cross-examination, the Supreme Court placed reliance upon the statement given by the said witness in his examination-in-chief in view of the facts:- (i) there was evidence on record to suggest that the witness had been won over or succumbed to the threats in the interregnum period between the recording of the examination-in-chief and cross-examination; (ii) there was "intrinsic"material in the examination-in-chief of the witness to establish that the statement given by the witness in his examination-chief was true; and (iii) the explanation given by the witness to wriggle out of the statement given by him in his examination-in-chief was flimsy.

25. Before proceeding further, we note the decision of the Supreme Court reported as Suraj Mal v Delhi Administration AIR 1979 SC 1408, wherein it was held that where witnesses make inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in absence of special circumstances no conviction can be based on the evidence of such witnesses.

26. We now turn to the facts of the present case.

27. Vishnu PW-1, claimed in his examination-in-chief that he and Devender Pal were present at the place of occurrence at the time of the incident. We have already held that the presence of Devender Pal at the place of occurrence at the time of the incident is negated by the testimony of Devender Pal's mother, Dropati, PW-4. In said circumstance, it becomes necessary to pose the question: Can the statement of Vishnu in his examination-in-chief that he and Devender Pal were present at the place of occurrence at the time of the incident be held as trustworthy?

28. Supreme Court was also faced with a similar situation in the decision reported as Ishwar Singh v State of UP AIR 1976 SC 2423. In said case, 4 persons claimed to have witnessed the incident at which the deceased was murdered. The presence of one witness at the place of occurrence at the time of the incident was held to be doubtful by the High Court but the High Court went on to rely upon the testimony of the other 3 witnesses, to return a finding of guilt. It was held by the Supreme Court that the High Court committed an error in placing reliance upon the testimony of said 3 witnesses when they had deposed that they along with the person whose presence at the place of occurrence at the time of the incident was held to be doubtful by the Court had witnessed the incident. The relevant observations contained in the said decision are being noted herein under:-

“6. The High Court accepted the evidence of prosecution witnesses who claim to have seen the incident except the testimony of Jait Singh (P.W.7). Jait Singh and Ram Rikh (P.W.6) both claim to have seen the assault together from Ram Rikh’s house and both have said that they hurried to the place of occurrence. The High Court thought that Jait Singh’s presence at the time of the incident was doubtful and excluded his testimony from consideration. If Jait Singh was not a truthful witness, we do not see how Ram Rikh (P.W.6) and other two witnesses examined, Mahabir (P.W.1) and Satyabir (P.W.2), could be relied on, because they have also said that Jait Singh was present at the place of occurrence.”

(Emphasis Supplied)

29. Thus, since Devender Pal’s presence at the place of the occurrence stands negated, it defeats the creditworthiness of Vishnu’s claim during examination-in-chief that he saw the incident when the deceased and Devender Pal walked up to him together becomes highly suspect, and in any case required Vishnu’s testimony during examination-in-chief to be corroborated with some other evidence, and we find none.

30. The learned Trial Judge, in our opinion has applied Khujji’s case without carefully analyzing the law declared therein.

31. We are thus left with the evidence of a motive and qua accused Sanjay of absconding. As regards motive, it would be doubtful whether an alleged instance where Dwarka Prasad's wife was humiliated 1 years prior to the date of the incident would be sufficient motive, and in any case motive for a crime is always weak evidence by itself. As regards Sanjay absconding, inasmuch as criminals flee from justice, even innocent persons flee fearing false arrest. Further, the twin evidence of a motive and Sanjay fleeing would not complete the chain of circumstances wherefrom it can be said that the finger of accusation points towards the guilt of Sanjay and rules out the innocence.

32. As regards Dwarka Prasad, as also Sanjay, there is no evidence that the two conspired. Further, as regards Dwarka Prasad, even as per the examination-in-chief of Vishnu PW-1, he simply states that Dwarka Prasad and Sanjay walked up and that Sanjay fired the shot upon which both fled. He attributes no exhortation to Dwarka Prasad.

33. The argument of learned counsel for the appellants that the fire arm used to fire the projectile on the deceased not being recovered is a fact favourable to the appellants is neither here nor there for the reason the case of the prosecution, if it were to otherwise stand, is not dented if the weapon of offence is not recovered.

34. As regards the submission advanced by learned counsel for the State that the testimony of H.C.Naresh Pal, PW-15 establishes that two boys were removing Subhash to the hospital in a TSR and on the way they met him on seeing the PCR requested for help establishes the testimony of Vishnu PW-1 as deposed to by him during examination-in-chief and the fact that Subhash was in the TSR would establish that Vishnu had seen the crime take place and thus notwithstanding Vishnu turning hostile when he was cross-examined, requires Vishnu's deposition during examination-in-chief to be believed, is noted by us and rejected for the reason the testimony of Daropti PW-4 establishes that when she was in the house with Devender Pal somebody came to their house and informed her son being murdered and thus she and Devender Pal reached the place where her son was shot. Undisputably, her house is in the same locality where the crime took place and she and Devender Pal rushed to the place of crime. Being a young man,

presumably Devender Pal reached first and met Vishnu and thereupon both removed Subhash to the hospital in a TSR and on the way met H.C.Naresh Pal. It is quite possible, as deposed to by Vishnu when he was cross-examined that even he reached the place of the incident after Subhash had been shot. It does happen in a crowded locality that news pertaining to an untoward incident spreads like fire and thereby attracting the inquisitive people in the locality, as we usually see in India, to the place where the untoward incident took place.

35. The appeal is allowed. Impugned judgment dated March 24, 1999 is set aside. Appellants are acquitted of the charge framed against them. The bail bond(s) and the surety bonds furnished by them are discharged.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com