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Court : Delhi

Decided On : May-15-2012

Judge : S. Ravindra Bhat & S.P. Garg

Appeal No. : CRL. A. 780 OF 2011

Appellant : Rajeev Kumar @ Rajeev Raj

Respondent : State

Judgement :

S.RAVINDRA BHAT

1.This appeal challenges the judgment dated 27.07.2009 in SC No. 318/2009/2004 whereby the Learned Additional Sessions Judge (Patiala house) convicted the appellant, Rajeev Kumar, for the offence of murder under Section 302, IPC. It also impugns the order of sentence dated 01.08.2009 awarded to the appellant, by which he was sentenced to undergo imprisonment for life.

2. The prosecution case was that on 01.07.2004, by DD No. 13A (Ex. PW-13/A) information was received by P.S. Ambedkar Nagar that someone had been stabbed at J-92 opposite the Church. SI Gajraj Singh, who was handed over the matter, went to the spot and recorded the statement of Sehnaz Bano, wife of the victim, Saleem. She stated that the accused used to treat and address her as his sister and he had been visiting their house for long.

He went to their house and told Saleem that there had been leakage of electricity from the board in his (Rajeev's) house, and that it was dangerous. Taking a screw driver and a pair of pliers, Saleem went with the accused. Thereafter, someone told her that there had been a quarrel involving Saleem and that he had been stabbed. She went to the spot and found her husband with blood around him. Her husband had caught hold of the accused, and told Shehnaz that Rajeev had stabbed him on account of some earlier quarrel. People collected there, and she took Saleem to AIIMS hospital but he was declared brought dead. Based on her statement, the intimation (rukka) was prepared, and the FIR was registered. The accused was taken into custody from the spot. After the registration of the case, site plan was prepared and the spot was photographed. Dried blood was collected from the spot. Upon disclosure statement made by the accused, the knife used in the stabbing was recovered from the diwan (bed) in his room.

3. On completion of investigation, a final report was filed before the Metropolitan Magistrate. The case was committed to trial before the Court of Sessions. The appellant was charged for committing the offence punishable under Section 302, IPC and Section 25 of the Indian Arms Act, 1959. He pleaded not guilty to both the charges, and claimed trial. During the trial, the prosecution examined 17 witnesses, besides other materials, such as the documentary evidence and reports of the forensic laboratory, the post mortem report, etc. The Trial Court, after considering the overall effect of the materials on record, convicted the accused for the offence of murder under section 302, IPC, and acquitted him of the offence under section 25, Indian Arms Act, 1959.

4. In the impugned judgment, the Trial Court held that the incriminating circumstances proved to convict the appellant were that he and the deceased had gone together to the former's house with the latter's pliers, screw driver and tester to check if there was electricity leakage, at the former's house. The court also believed the oral dying declarations made by the victim, the account of which was given by PW-3 Noor Hassan, and PW-7, Shehnaz. The recovery of the crime weapon, a kitchen knife, the deceased's

pliers, screw driver and tester and a few blood stained articles from the appellant's room upon his disclosure statement and at his instance were also held to have been proved.

5. Counsel for the appellant argued that no one would be present at the crime scene after having committed it. Counsel argued that the absurdity that the appellant allegedly stayed on at the scene of incident suggested that the he had been falsely implicated. Furthermore, he impeached the impugned judgment on the ground that even though prosecution's case was one of circumstantial evidence, it was still unable to prove the appellant's motive or prior planning behind the crime.

6. During the trial, PW-7, during her testimony, deposed that her children referred to the appellant as "mama" (maternal uncle), and the appellant used to refer to her as behen (sister) and Salim as jija (brother-in-law). Several witnesses testified that the younger son of the complainant, Harshu, who allegedly had accompanied Salim to the appellant's house, indicated to the police that "mama" (Rajeev) had stabbed his "papa". Assailing this allegation, it was urged by the appellant's counsel that since the child was then just 3 years old, there was strong apprehension that he may had been tutored. He further argued that the deposition of this scene by the witnesses is incredible because firstly, it is not clear why PW-15 Sanjay was present there, and secondly, the testimonies of witnesses are too consistent to be believed.

7. It was also submitted that the Trial Court failed to appreciate that the child may be referring to his mother PW--7 as "mama". Moreover, it was argued that the part of the testimonies of PW-6, PW-7, PW- 15 and PW-17 is hearsay evidence and cannot be relied upon.

8. As regards recovery of the knife, counsel contended that since no blood or finger prints were found on or lifted from the knife, the appellant cannot be connected to the knife, and thus the alleged recovery must not be treated as an incriminating piece of evidence against him. Furthermore, the testimony of PW-3 Noor Jahan was also questioned by the appellant's

counsel. PW-3, a fruit seller is deposed to have heard a shout saying “Bachao Rajeev ne mujhe chako maar diya”. He further claimed to have seen from the road the appellant and the injured Salim holding a child up at the second floor of the building in which the appellant’s house is situated. On this point, learned counsel for the appellant contended that there was a tree, shown in the scaled site map as Ex. PW-11/A, which obstructed PW-3’s view of the second floor from the place he claimed he had been standing at, at the relevant time. To further challenge the testimony of this witness, learned Counsel pointed out that while during his examination in chief, PW-3 stated that he did not leave his rehri (cart), in his cross examination he changed his statement stating that he came back to his rehri. Besides this, counsel urged that the absence of the spot on the site plan without scale (Ex.PW-17/A) from where PW-3 allegedly saw the accused and deceased on the second floor also casts doubt on the prosecution story.

9. Lastly, counsel argued that absence of blood stains on the appellant’s clothes is also an exonerating circumstance. Similarly, the difference in the number of stab wounds said to have been suffered by the deceased, according to the MLC Report Ex. PW-14/A and the Post Mortem Report Ex. PW-2/A is a suspicious and discrepant circumstance completely overlooked by the Trial Court.

10. It was also submitted that not conducting a test identification parade for PW-3 Noor Jahan was fatal to the prosecution case. It was also argued that PW-7 Shehnaz was not the wife of the deceased, her real name is Sujata and that she was married to some other person earlier. In the alternative, it was argued that the alleged weapon used was merely a kitchen knife, and since no motive had been attributed to the appellant, the conviction, if at all, should not be under section 302, IPC but should be under section 304, IPC.

11. Learned APP for the State, on the other hand, argued that the Trial Court’s reasoning was sound and did not call for interference. He contended that the prosecution had proved its case beyond reasonable doubt. He emphasized on the account given by PW-3 and PW-7 of the dying

declaration made by the deceased. Furthermore, he contended that the medical evidence supported the prosecution case. The knife was recovered at the instance of the appellant. Blood was also found on various articles in his room viz. wall and iron scrapings, one bed sheet (Ex.PW-2), lihaf (Ex. PW-3). The FSL (Forensic Laboratory) Report Ex.PX stated that the blood found on these articles, and on the gauze piece (which was collected from the spot) both belonged to group "B".

12. Moreover, learned APP relied on the fact that the appellant had taken Salim to his house, and that the accused, in his Section-313, Cr.PC statement did not deny being on the road, where public persons had gathered, to contend that the prosecution had established a complete chain of circumstances which pointed to only the guilt of the appellant.

Analysis and Findings

13. The first intimation of the crime was received by the police on phone and recorded as DD No. 13A (Ex.PW-13A). The case was given to PW-17 Gajraj Singh, the Investigating Officer (IO) of the case. He and PW-8 Ct. Manjeet Singh went to the spot. They testified that a crowd had gathered where injured Salim was lying. They further deposed that members of the public gathered there had caught hold of the appellant. When the police reached the spot, first they sent the deceased to the hospital, and then caught the appellant. The MLC report states the time of Salim's arrival as 4:06 PM. It further states under the heading of "injuries" that the injured was allegedly stabbed by a known person. This is in conformity with the prosecution story about the time of the crime, as deposed by PW-3, PW-7, PW-8 and PW-17.

14. PW-7 Shehnaz (complainant and wife of the victim Salim), during her testimony, stated that Salim and the Appellant had gone to the appellant's room together to check the electricity board. She stated that sometime after that a neighbour came and told her that her husband had been stabbed. Hearing that, she went running downstairs to her husband who was all covered in blood. She stated that her husband had been holding onto the appellant's arm; he told her that Rajeev had stabbed him and then fell down.

She thereafter, with the help of the police, took Salim to AIIMS hospital in a TSR (three-wheeler scooter rickshaw). The FIR (Ex.PW-12/A) also describes the facts implicating the appellant. This description of the facts also finds mention in the FIR where the appellant was named. She further identified the appellant in the court as the one who had gone to their house, and who was present at the spot, from where her injured husband was removed to the hospital.

15. It may be argued that since the record of the first intimation, which was made over phone, does not name the appellant, the testimony of PW-7 is untrustworthy. In that regard, it must be noted that PW-7 Shehnaz, during her testimony, stated that when she reached her stabbed husband, she got extremely frightened. She stated that she did not know who called the police. It is likely that some member of the public who was around at that time informed the police through PCR. This provides a reason why the appellant's name was not mentioned in DD No. 13A, and does not hamper the credibility of PW-7's testimony.

16. Moreover, as regards the dying declaration that PW-7 claimed to have witnessed, the witness deposed that at the hospital Salim pointed at the appellant, who was present there along with the police, to say he had stabbed Salim. However, the police witnesses, PW-8 and PW-17, did not corroborate this. It may also be noted that on the contrary, they stated having been told by the doctor that Salim was unfit to give a statement. Due to these inconsistencies, this dying declaration was held not to have been proved by the Trial Court. We agree with this inference. Thus, on an overall evaluation of PW-7's testimony, this Court is inclined to believe the witnesses' testimony. The defence, by way of cross-examination, was unable to highlight any reason why the witness would have deposed falsely. Thus, the above part of her testimony is held to have been proved against the appellant.

17. In her Section 161, Cr. PC statement, PW-7 had stated that the appellant and deceased had gone together to the former's house to check his

electricity board. During the trial, however, she stated an additional fact that her younger son Harsu had also gone with them to the appellant's room. In this regard, it is noticeable that PW-8 had not said anything about the presence of the child at the spot in his testimony. PW-17, on the other hand, made contradictory statements about the presence of the child at the spot. During his examination in chief, he stated that PW-7 Salim's wife had accompanied him to the hospital. In the cross examination, he stated that she went alone with Salim to the hospital. However, in the very next statement he stated that the child was with PW-7. He denied the suggestion that the child was not present at the spot. As far as PW-3's version on this point is concerned, he stated that he saw the appellant and the deceased, on the second floor, with the deceased injured and having a child in his arms. However, he stated nothing about the presence of the child at the spot on the road/street where the crowd had gathered around the deceased, and where PW-7 had come.

18. It is conceivable that, upon seeing her husband stabbed, PW-7 forgot to tell the police that her child had also accompanied the husband to the appellant's house. However, during her testimony, she categorically stated the fact about her child having accompanied the deceased to the appellant's room. She did not retract from this during her cross-examination. The corroboration given by PW-3 and 17's testimony gives further credibility to the assertion of PW-7. We are thus of the opinion that the child did in fact accompany his father, the deceased to the appellant's house. The child's testimony about the incident would thus have been of significance. However, the child, who was just three years old at the time of the incident, was not examined during the trial, which began in January 2005.

19. The prosecution, however, sought to get admitted the child's alleged version through the testimony of a few other witnesses, namely PW-7, PW-13 Ct. Dharampal Singh (who accompanied PW-17 to the complainant's house), PW-15 Sanjay (complainant's then neighbour) and PW-17, who were present when the police went to the complainant's house to inquire from the child. The Trial Court rejected that part of their testimonies (as being

hearsay and thus inadmissible) where they gave an account of what the child claimed he had seen at the appellant's house. We have no doubt about the correctness of view taken by the Learned Trial Court on this point. The res gestae exception to the hearsay rule is also not applicable here since they made these inquiries from the child three days after the incident. Thus, the testimonies of PW-7 Shehnaz, PW--13 Ct. Dharampal Singh, PW--15 Sanjay (complainant's then neighbour) and PW-17 Gajraj Singh are to be rejected, and not relied upon to the extent they describe the child's account of the incident.

20. PW-3 deposed to have heard a scream "Bachao Rajeev ne mujhe chako maar diya". Hearing this, he looked in the direction of the voice and saw the appellant and the deceased at the second floor on the building in which the appellant's room was located. He claimed to have seen them from the road below where he had parked his rehri near the tree which is in front of the "chappal wali dukan". The photographs clicked by PW-1 depict a tree at the side of a footwear shop (having a name starting with Joshi) run by Tara Chappal Traders. The scaled site plan also depicts a tree near the place from where PW3 claimed to have seen them. However, the scaled site plan does not specify the distance between the spot and the room from where PW-3 saw the deceased and the appellant with a child. PW-8, in his cross examination stated that this tree is in front of the house of the appellant, and is taller than it. However, from the site plan, it is not clear whether or not the tree is in front of the said house. During his cross examination, he denied the suggestion that the house of the accused is not visible from the road. He also denied the suggestion that the tree is next to the railing on the appellant's house, or that from down below, appellant's house is not visible.

21. There appears no inconsistency in the evidence as regards as the fact of PW-3 having heard the cry of the deceased, and having seen them together in the appellant's house on the second floor. He also identified the appellant in court as being the uninjured person he saw that day on the second floor. His deposition on this point is corroborated by the account given by PW-8 and PW-17, and also from the photographs and the scaled site plan (Ex-PW11/A). We thus do not find any reason to disbelieve this part of the

testimony of PW-3. It is held proved, and is an incriminating circumstance against the appellant.

22. As regards the rest of the incriminating deposition of PW-3, the witness initially also stated that he went to the spot where the deceased was lying. He stated that the wife of the injured person came to him (Salim) and asked him as to what had happened, upon which the injured person stated that Rajeev had stabbed him. PW-3 stated that upon hearing this, the wife (PW-7) started saying that Rajeev took the injured home, and then stabbed him. During PW-3's cross examination, he recanted from this statement and stated that he did not know whether the injured person had told his wife about Rajeev stabbing him, as he (PW-3) had come back to his cart by then. PW-3's presence at the spot, close enough so that he could have heard what the injured Salim told his wife, does not find corroboration from the testimony of PW-7. PW-3's testimony also does not describe that the injured Salim had been holding onto the appellant before he collapsed. Thus, in this light and also keeping in view that he recanted from his statement, it would be unsafe to conclude that he heard the deceased telling his wife that Rajeev had stabbed him.

23. It was argued that the not conducting Test Identification Parade (TIP) on PW-3 casts doubt on his identification of the appellant in court, especially in the light of PW-3 admitting that he did not know the appellant, and had never seen him before the day of the incident. It may be noted, however, that the appellant was arrested from the spot itself. Even though there is doubt about PW-3 being a witness to the dying declaration made by the deceased to his wife, there is no doubt that PW-3 was present at or around the spot. Since the appellant was arrested from the spot itself, where PW-3 was also present, we consider it inconsequential that a test identification parade was not conducted. The following observations in *Rajesh Govind Jagesha Vs. State of Maharashtra AIR 2000 SC 160* are, in the context, apposite:

“The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the

court regarding his involvement. Such a parade may not be necessary in a case where the accused person is arrested on the spot immediately after the occurrence....On the other hand, in the present case, though the Appellant has been identified before the Court by the prosecution witnesses, the complaint as filed, does indicate the presence of the Appellant on the scene of the offence, coupled with the fact that the Appellant was accosted on the spot and handed over to the police. The complaint also indicates that the Appellant disclosed his name and address as well as details about the other two accused who remained absconding. In such a case, as rightly contended by the learned A.P.P., the question of holding identification parade does not arise.”

24. The recovery of the crime weapon, a kitchen knife at the instance of the appellant was another incriminating circumstance held to be proved by the Learned ASJ. It is alleged that after returning from the hospital, PW-8 and PW-17 went with the appellant to his room from where the recoveries were made. They both deposed that at the instance of the appellant, a knife was recovered from the wooden box of the diwan (bed) in the appellant's tenanted room vide seizure memo Ex.PW-8/D. Subsequent opinion was taken from PW-2 Dr. Sanjay Lalwani (who prepared the post-mortem report) who deposed that the injury suffered by the deceased could have been inflicted using the said knife.

25. During their examination, while PW-8 stated that the appellant's room was already open, PW-17 deposed that the room door had been locked. PW-17 further stated that both the key and the lock were there on the door. He in fact made contradictory statements, saying that the key was subsequently handed over to the house owner, and also that he kept the key with himself. Even PW-11 Mahesh Kumar, who prepared the scaled site plan, stated in his cross examination that the door of the appellant's room was locked, and was opened by the IO. He however stated that he did not know whether or not the IO had the key.

26. Blood stained articles were also seized from the appellant's room viz. blood stained bed-sheet, iron scrapping with blood, screw driver, tester and plas. Blood was lifted in a gauze piece. The FSL Report revealed that the blood found on these articles, and on the gauze piece was human blood, and it belonged to group B.

27. The police also recovered tester, pliers and the screwdriver from the room near the electricity board. It is their case that these were the same tester, pliers and the screwdriver which Salim took along when he went with the appellant to his room. The photograph (Ex.PW1/7) shows these lying near an electricity board. It may be noted that PW-7 was not asked during trial to identify the said tester, pliers and the screwdriver. According to her testimony, the deceased also had taken a tape to the appellant's room. However, PW-17 and PW-8 deposed that no tape was found from the scene. In our opinion, the recovery of the blood stained articles and the crime weapon have been proved against the appellant. The discrepancy about the door being locked or not, though seemingly important, does not, according to us, vitiate the recovery.

28. In this case, though PW-7 and PW-3 are not eyewitnesses to the actual crime, their observations of the acts and incidents are a part of the transaction itself, known as res gestae, which, under Section 6 of the Evidence Act, is admissible and can be considered as incriminating. The said provision reads as follows:

“Section 6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

1. Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.”

This aspect was highlighted in the ruling reported as Guntela Vijayavardhana Rao v State of Andhra Pradesh 1996 (6) SCC 241, where it was observed that:

“15. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter..”

The depositions of PW-7 and PW-3 are integrally connected with events that were inseparable from the attack itself. They overlap the time frame within which the deceased was attacked, and was either heard or seen by either

witness; the accused too was seen. Thus, these statements, which are otherwise credible, and trustworthy, are admissible. They clearly point to the culpability of the appellant in this case.

29. The proximity of the time of the attack, from the time of arrest of the accused, the short duration within which the MLC was recorded, and the statement of PW-7, all rule out the possibility of false implication. So far as motive is concerned, normally motive assumes significance in cases based on circumstantial evidence. Here, the circumstances show that there were at least two *res gestae* witnesses who observed the events which occurred immediately after the attack, and formed part of the same transaction. Though the prosecution has not led any strong evidence to prove motive, something may be gauged by the fact that in cross examination of PW-7, on behalf of the accused, suggestions were put to her, to the effect that she was not the deceased's wife, and that the accused was aware of it, being acquainted with her brother. By itself this line of questioning may not amount to much; at the same time, it gives a clue about what was in the mind of the accused. Nevertheless, the court is of opinion that no motive could be proved; it was, in any case not an important factor in the present case.

30. In view of the above reasoning, it is held that the prosecution had proved the appellant's guilt beyond reasonable doubt. This court does not discern any infirmity in the impugned judgment. The appeal, being devoid of merits, is consequently dismissed.

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