

Mahavir Prasad Vs. State

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Court : Delhi

Decided On : May-29-2013

Judge : V.P.Vaish

Appellant : Mahavir Prasad

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRIMINAL APPEAL
No.1445 of 2012 Reserved on: Date of Decision: % MAHAVIR PRASAD Through:

20. h May

29. h May, 2013Appellant Mr.Ajay Verma, Advocate. versus STATE
.Respondent Through: Mr.Sanjay Lao, APP. CORAM: HONBLE MR. JUSTICE
SANJIV KHANNA HON'BLE MR. JUSTICE VED PRAKASH VAISH VED
PRAKASH VAISH, J.

The appellant Mahavir Prasad has been convicted under Section 302 of the Indian Penal Code, 1860 (IPC for short) for committing murder of his brother Vinod and Sections 25/27 of the Arms Act, 1959 (Arms Act for short). Vide order of sentence dated 6th April, 2011, he has been sentenced to undergo life imprisonment under Section 302 IPC and to pay fine of Rs.10,000/- , in default of which he has to undergo rigorous imprisonment for six months. He has also been sentenced to undergo rigorous imprisonment for three years under Section 25/27 of the Arms

Act and to pay fine of Rs.2,000/-, in default of which, he has to undergo rigorous imprisonment for three months.

2. The case of the prosecution rests on five witnesses- Shanti @ Santosh (PW-3) and Vinod (PW-7), wife and son of the appellant respectively and Rajeshwari (PW-1), Anil (PW-2) and Virender (PW4), neighbours. At this stage, we may record that the deceased Vinod was the brother of the appellant.

3. Shanti @ Santosh (PW-3) has deposed that the deceased was her brother-in-law and was residing with them as his wife had left him many years ago and he was in the business of poultry. The appellant was her husband and was not working anywhere at that time. The appellant was in the habit of taking liquor and quarrelling. On this account, there were frequent quarrels between the appellant and the deceased Vinod. In the year 1999, the appellant assaulted her with knife, while she was sleeping, but she survived. On the night of 4th June 2010, she along with appellant and the deceased took dinner and then she, deceased Vinod and two neighbours went to sleep on cots outside their house. At about 4.00/5.00 a.m., she heard the shrieks of the deceased Vinod, I have been killed and save me and the deceased had also stated that he has been stabbed by the appellant Mahavir Prasad. She saw that blood was oozing from the abdomen of deceased Vinod. The appellant was seen with the knife in his hand. The appellant ran away with the knife. Shanti (PW-3) has categorically stated that the deceased Vinod had told her that his brother Mahavir Prasad i.e. the appellant had stabbed him. Shanti (PW-3) raised alarm and her neighbour Virender (PW-4) came and made a call at number 100. PCR van came there and took Vinod to SGMH, where he was declared brought dead. Police recorded her statement Ex.PW3/A and thereupon the rukka was recorded and the FIR in question was registered.

4. Vinod (PW-7) has deposed that his father used to drink liquor and quarrel with his aged mother and other family members as he was not doing any work. He affirmed that the deceased Vinod was his uncle and the appellant used to quarrel with the deceased. All of them were residing together. At about 4.30/4.45 a.m., on 5th June, 2010, he was called by the tenant Anil who told him that the appellant had stabbed the deceased Vinod with a knife.

5. It is clear from the deposition of Vinod (PW-7) that he is not the eye-witness and had not seen the occurrence. However, it is clear from his deposition that the appellant used to drink and there used to be frequent quarrels between the appellant and the deceased Vinod. He has also deposed that the occurrence had taken place in the early morning hours of 5th June, 2010. In the cross-examination, he has accepted that he was residing in a separate house at a distance about 200/250 sq. yards. He denied the suggestion that the deceased was not his uncle. This brings us to the statement of the neighbours.

6. Rajeshwari (PW-1) and Anil (PW-2) were the tenants residing in the same house where Shanti (PW-3), the appellant and the deceased were residing. They deposed that they were sleeping on cots in front of the house of the landlord. In early morning, they heard noise and woke up. At that time, they saw that somebody had stabbed deceased Vinod and he had stated that his brother Mahavir had stabbed him.

7. Two aspects have been highlighted by the counsel for the appellant while referring to the deposition of Rajeshwari (PW-1) and Anil (PW-2). Firstly, it is submitted that both of them have stated that deceased Vinod and the appellant Mahavir did not quarrel with each other. Secondly, Anil (PW-2) has stated that the deceased Vinod was unconscious when he reached near him. Accordingly, it is submitted that Anil (PW-2) had not heard the deceased Vinod stating that he was injured by his brother/appellant Mahavir. In view of the above statement, the depositions of Rajeshwari (PW-1) and Shanti (PW-3) becomes debatable and doubtful. The depositions of PW-1, PW-2 and PW-3 are therefore, clearly hearsay.

8. We have considered the two contentions but do not find any merit in the same. PW-1 and PW-2 were the tenants and they may not be aware of the quarrels or differences between the appellant and the Vinod (deceased). But the said fact is clearly deposed by Shanti (PW3) and Vinod (PW-7), wife and son of the appellant. We do not think there is any reason or ground for them to make a false accusation to the said effect. The site plan Ex.PW23/A (unscaled site plan) and Ex.PW11/A (scaled site plan) clearly indicate the location of the two cots where Rajeshwari (PW-1) and Anil (PW-2) were sleeping, which was on the other side of the 20 feet

street. The deceased Vinod and Shanti (PW-3) were sleeping on the same street in front of their house. The distance between the place where PW 1 and PW 2 and the deceased and PW-3 were sleeping was about 395 c.m., as per the scaled site plan Ex.PW11/A. Shanti (PW-3) as stated by her was the first one to notice and know that deceased Vinod had been stabbed, as she was sleeping on the cot, next to the cot of deceased Vinod. She has clearly deposed that when she got up, she saw that appellant was present and he had a knife in his hand. The appellant ran away. The blood was oozing from the abdomen of the deceased Vinod, who informed her that his brother appellant Mahavir had stabbed him. She raised an alarm. Rajeshwari (PW-1) has clearly stated that deceased Vinod had stated that his brother had stabbed him and in her cross-examination denied the suggestion that on that night Vinod was unconscious and was not in a position to speak. Anil (PW-2) had also stated that in his presence deceased Vinod had stated his brother Mahavir had stabbed him. In the cross-examination, he has deposed that the deceased was unconscious when he went near him. This statement cannot be read so as to belie the statement of Anil (PW-2) that he never heard the deceased stating that he was stabbed by his brother or that the deceased became unconscious immediately upon injuries, when PW-3 himself has testified that he heard the deceased naming his brother as the one who had stabbed him. This statement has to be read in the context that the deceased became unconscious but after he had named his brother as the perpetrator of this crime. As stated above that the cots of PW-1 and PW-2 were at a distance of 395 cm from the cot where the deceased Vinod was sleeping. It was possible for PW-2 to have heard the deceased after waking up from the cot itself. By the time PW-2 came near the deceased Vinod, the later had become unconscious. We accept the assertion of PW-2 that he had heard the deceased. PW 1 Rajeshwari has been more categorical in her court statement.

9. The statement of the said witnesses also gets corroborated from the statement made by Virender (PW-4) who has stated that he was sleeping in his house at about 5/5.15 a.m. on 5th June 2010, when he heard cries of Shanti (PW-3). He came out of the house and he saw that Vinod was lying on a cot with stab injuries in his abdomen. Shanti (PW-3) then told him that Vinod was stabbed by her husband i.e. the appellant Mahavir. He made a telephone call at number 100 and

PCR van came and took Vinod to the hospital. The Police Control Room form (Ex.PW16/A) records that a telephone call was made at 5.24 a.m. on 5th June, 2010 stating that one person while he was sleeping had been stabbed with knife. Thereafter the PCR van reached the spot and they had informed the control room that one Vinod had been stabbed by his brother Mahavir. There was a quarrel after drinking liquor at night. It is therefore, clear that the name of the appellant Mahavir as the perpetrator of the crime was mentioned immediately after the occurrence as recorded in Ex.PW16/A. The name of the appellant is also recorded and mentioned in the statement of PW-3 (Ex.PW3/A) which became a rukka and lead to the registration of the FIR in question Ex.PW8/A, which was recorded at about 8.45 a.m. The statement was recorded at 8.30 a.m., i.e. immediately after the occurrence.

10. In these circumstances, we are inclined to accept the statements of PW-1 and PW-2 that they had heard deceased Vinod stating that he has been stabbed by the appellant. The statement made by Vinod to Shanti @ Santosh, Rajeshwari (PW-1) and Anil (PW-2) would be called as dying declaration in law.

11. The Supreme Court in M. Sarvana @ K.D. Saravana vs. State of Karnataka, 2012 Cri. L.J.

3877 referred to the judgment in Laxman vs. State of Maharashtra, (2002) 6 SCC 71. and has observed as under: 3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in

its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

12. Learned counsel for the appellant has submitted that the testimony of Shanti (PW-3) is debatable. It is submitted that there is no evidence with regard to the alleged past occurrence of 1999. Our attention is drawn to the cross-examination of PW-3 to the effect that deceased Vinod used to work as a Pimp and PW-2 used

to operate a brothel house. The said questions were no doubt asked and answered but the said submission do not merit acceptance. These are mere allegations without any substance. The deceased, PW-1, PW-2 and PW-3 were sleeping on the street outside. There is no reason or cause that Shanti (PW-3) who had continued to live and reside with the appellant even after the incident of the year 1999, to falsely depose and implicate her husband. PW-3 in her cross-examination has stated that she got married to the appellant 40 years back. The deceased was her younger brother-in-law. Rajeshwari (PW-1) and Anil (PW-2) who was sleeping on the cot in the same street at a distance of 395 cms. have also deposed that the deceased Vinod had stated that appellant had stabbed him.

13. Another contention raised by the appellant was that the place where the appellant was sleeping is not indicated in the two site plans Ex.PW11/A and Ex.PW23/A. The said contention is correct but this does not exonerate the appellant and does not merit his acquittal. Shanti (PW-3) has stated that the appellant was sleeping in a STD cum Chicken shop which was situated at a distance of 100 yards from the place where they were sleeping. The said assertion was made in response to questioning in the cross-examination and remained unchallenged. Possibly, Inspector Gajendra Kumar (PW-23) and SI Manohar Lal (PW-11) did not inquire and asked PW-3 to specify the location where the appellant was sleeping. The ocular testimonies of PW-1, PW-2 and PW-3 are clear, cogent and categorical and cannot be rejected or ignored for this reason.

14. The appellant in his statement under Section 313 of the Cr.P.C. has not indicated or stated where he was sleeping at the time of the occurrence or he was at a different location or with somebody else. In response to most of the questions, the appellant has stated that it was incorrect or he did not know. In the end, he has alleged that his wife PW-3 used to run a brothel house with the help of deceased Vinod who was not his brother and was acting as a Pimp. This averment that the deceased Vinod was not his brother has to be rejected in view of the deposition made by Shanti (PW-3) and Vinod (PW-7). In the cross-examination of PW-3 and PW-7, no such question was put and it was not suggested that the Vinod was not the brother of the appellant Mahavir. Shanti (PW-3) has deposed that Vinod used to stay in their house and his wife had left him several years back. Vinod had

taken dinner with them. Rajeshwari (PW-1) and Anil (PW-2) have stated that Vinod was brother-in-law of Shanti (PW-3). They were not crossexamined on the said statement made by them in the examination-in-chief. Even in the PCR form, it is recorded and mentioned that the appellant had stabbed his brother Vinod and had absconded.

15. The MLC (Ex.PW19/A) was recorded on 5th June, 2010 at 6.10 a.m. It mentions that the patient i.e. Vinod was declared brought dead. It also records that the deceased Vinod was son of Dal Chand. The appellant herein is also son of Dal Chand and the said fact is parenthesis of appellant as mentioned in the charge-sheet, charges framed and statement under Section 313 Cr.P.C., the arrest memo and in the memo of parties filed in the present appeal. It is, therefore, clear that we have rightly rejected the contention of counsel for the appellant that the deceased Vinod was not his brother.

16. Appellant was arrested vide arrest memo Ex.PW13/A on 5 th June, 2010 at 7.45 p.m. CrI.A. No.1445/2012 He made purported disclosure statement Page 11 of 14 Ex.PW23/D and on the basis of the disclosure, a knife was recovered from the terrace of abandoned room which is shown at point F in the scaled site plan (Ex.PW11/A). The knife seized was sent to FSL. The FSL report (Ex.PW23/G) however, records that blood could not be detected on the knife. Learned counsel for the appellant, in these circumstances, has submitted that the alleged knife recovered may not be a weapon of offence. To this extent, we are inclined to accept that the FSL report does not show or establish that the knife in question was the weapon of offence. However, there is ample and credible evidence that the deceased was stabbed. We have referred to the ocular statements of PW 1,2,3 and 7 above.

17. The post mortem report (Ex.PW20/A) records the following external injuries on the body of the deceased:1. Stab wound 4.2 c.m. x 1.7 c.m. present on inner front of right upper abdomen. 3 c.m. Outer to midline point. 37 c.m. Below upper end of manubrium sternum. The wound is obliquely placed with inner and obtuse and outer end acute and the margins contused. The wound is directed backward perforating the wall of small bowl through the front wall of right kidney upto the

paranchyma of upper part of right kidney about 14 c.m. deep.

2. Stab wound 5.7 c.m. x 2.3 c.m. x 15 c.m. deep present on the left side of upper abdomen 13 c.m. outer to the midline point and 40 c.m. below upper end of sternum. The wound is horizontally placed with inner and acute end outer and obtuse and greater omentum coming out of the wound. The wound is directed backward and from left to the mid line upto the lumbar vertebra on left side.

18. The cause of death was opined as haemorrhage and shock consequent to penetrating injuries to the abdomen caused by sharp stabbing weapon. All injuries were ante mortem and fresh in duration. The aforesaid post mortem report clearly shows that the knife or a sharp edged weapon was used. There cannot be any doubt in view of the depositions made by Shanti (PW-3) on what she saw and what was stated by deceased Vinod. Rajeshwari (PW-1) and Anil (PW-2) have also deposed on similar lines and stated that deceased Vinod while implicating the appellant Mahavir as the perpetrator had stated that he was stabbed with the knife.

19. So far as the offence under Section 25 and 27 of the Arms Act is concerned, it is suffice to mention that a knife is allegedly recovered from roof of a house in Gaurav Nagar near the house of the appellant, after the disclosure statement of the appellant. The roof was an open roof. The knife was not recovered from the house of appellant. As per the FSL report Ex.PW23/G, no blood was found on the said knife. The prosecution has not been able to establish the ingredients of Section 25 and 27 of the Arms Act.

20. In these circumstances, we uphold the conviction of the appellant under Section 302 IPC and maintain the sentence awarded to him i.e. life imprisonment and fine of Rs.10,000/-; and in default thereof to undergo simple imprisonment of three months. However, we acquit the appellant from the charge under Sections 25 and 27 of the Arms Act.

21. The appeal is disposed of. (VED PRAKASH VAISH) JUDGE (SANJIV KHANNA) JUDGE May 29, 2013 gm