

Anwar @ Addha Vs. State

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Court : Delhi

Decided On : May-08-2013

Judge : Sanjiv Khanna

Appellant : Anwar @ Addha

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRIMINAL APPEAL No. 1372/2011 Reserved on:

28. h January, 2013 Date of Decision:

8. h May, 2013 % ANWAR @ ADDHA ThroughAppellant Mr. Javed Ahmed, Advocate. Versus STATE Through + Respondent Ms. Richa Kapoor, APP for the State. CRIMINAL APPEAL No. 1413/2011 TAHIR @ SAHIL ThroughAppellant Mr. Javed Ahmed, Advocate. Versus STATE Through Respondent Ms. Richa Kapoor, APP for the State. CORAM: HONBLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE SIDDHARTH MRIDUL SANJIV KHANNA, J.:

1. By a common impugned judgment dated 25th August, 2011, the two appellants have been convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC) for having committed murder of Amit Kumar Sundariyal and under Section 307 read with Section 34 IPC for attempted to kill the complainant Ramesh Chand Sundariyal (PW-1). The impugned judgment holds that the

prosecution has failed to prove charges under Sections 452/493/398 IPC beyond doubt. State has not preferred any appeal against acquittal of the appellants under the said sections. By order of sentence dated 5th September, 2011, the two appellants have been sentenced to life imprisonment for offence under Section 302/34 IPC and fine of Rs.5,000/- each. In default of payment of fine, they have to undergo Simple Imprisonment of 06 months each. The appellants have been sentenced to Rigorous Imprisonment of 7 years for the offence under Section 307/34 IPC and fine of Rs.2,000/- each. In default of payment of fine, they have to undergo Simple Imprisonment for 2 months each.

2. Homicidal death of Amit s/o Ramesh Chand Sundariyal (PW-1) is virtually undisputed and is proved beyond doubt from the testimony of PW-1, who was present with Amit in their medical store/shop at F3/4, Dayalpur Extension, Main Road, Karawal Nagar, Delhi at about 10.45 p.m. on 21st August, 2006. Amit was fired at by a person, who had tried to enter the shop. PW-1 has deposed that the shot had hit on the shoulder of Amit. PW-1 rushed towards the person, who had fired the shot, to overpower him. PW-1 was fired at and got injured when shot hit his right hand. Thereupon, Amit rushed to save him and at that time Amit was hit by another shot. The assailants fired another shot which touched PW-1s abdomen and then probably hit his son.

3. The injuries suffered by PW-1 and the deceased have been proved by Dr. Devender Kumar (PW-22), who had prepared the MLC (Ex.PW22/A) of PW-1 dated 28th August, 2006. MLC records that PW-1 had alleged history of gunshot injuries. On local examination, he found an entry wound on ventral and an exit wound on the medially near the right hand wrist. Abrasion on the epigastric region was also found. After examining the wound, one Dr. Sumit Chakravarti had recorded that as per the surgical record, the nature of injury was simple. Dr. R.P. Singh on 21st August, 2007 after examining the Xray had opined that the injury was grievous. The patient, i.e., PW-1 was admitted into the hospital as per the MLC.

4. Amit was examined by Dr. Ajay, who had prepared the MLC (Ex.PW22/B). Handwriting and signature of Dr. Ajay were identified by PW-22 as the said doctor

had left services of the hospital and his present whereabouts were not known. The said MLC (Ex.PW22/B) was prepared at 12.50 A.M. on 22nd August, 2006. Post mortem report (Ex.PW14/A) of Amit records that on external examination, two fire arm wounds were identified. Bullets were removed from the body and sealed. Post-mortem report (Ex. PW-14/A) records that injury No.1 was sufficient to cause death in ordinary course of nature. The post mortem report was proved by Dr. Meghali (PW-14), Department of Forensic Medicines, GTB Hospital. The said post mortem report was prepared by Dr. Barkha Gupta, who had left the services of the hospital and her present whereabouts were not known. PW-14 had identified the handwriting and signature of Dr. Barkha Gupta as she had seen her writing and signing. The cause of death was opined as shock due to hemorrhage pursuant to ante mortem injury to heart and liver caused by projectile from a firearm.

5. As far as the occurrence at the shop in question on the date and time as mentioned by PW-1 is concerned, the same has to be accepted in view of the testimony of PW-1, which gets corroborated from statement of Constable Sanjeev (PW-2), who had taken the photographs (Ex.PW2/A1 to A9). Negatives (Ex.PW2/B1 to B10) of the photographs were also proved by PW-2.

6. Inspector Dinesh Kumar (PW-15) has stated that on 21-22 August, 2006, he was posted in the Mobile Crime Team, North-East District and he along with PW-2 had reached the spot and prepared the crime scene report Ex.PW15/A. Similarly, ASI Rajinder Singh (PW-5) has deposed that DD No.28/A (Ex.PW5/A) was assigned to him on 21st August, 2006 for action and he along with Constable Indresh reached the shop in question. In the meantime, Inspector B.P. Sharma (PW-27) along with SI Satender Tomar (PW-12) and other staff had also reached there. Injured were taken to the hospital in CATS ambulance and MLC of PW-1 and Amit were collected. PW-1 was declared fit for statement and his statement (Ex.PW1/A) was recorded and the FIR was registered in police station Khajuri Khas. The spot was photographed and two used cartridges, two misfired cartridges and one lead of cartridge were recovered from the spot and sealed and taken into possession vide memo Ex.PW5/B. One used cartridge of 0.315 bore was found lying near Jodha Ram Street. Blood, earth control sample and earth stained with blood were lifted from the spot and were seized vide memos

Ex.PW5/C, D and E.

7. DD Entry No.28/A (Ex.PW1/A) was recorded by SI Ramannand Yadav (PW-8), the duty officer at about 11.17 p.m. He has mentioned that PW-5 and Constable Indresh were assigned the duty to go to the spot. Inspector B.P. Sharma (PW-27), the Investigating Officer has deposed that on receipt of DD No.28/A, he along with SI Satender Tomar and other police officials had reached the spot on 21st August, 2006. By that time PW-1 and Amit had been shifted to the hospital in a CATS ambulance. He proceeded to GTB Hospital and acquired MLCs of Amit and PW-1. PW-27 recorded statement (Ex.PW1/A) of PW-1 and obtained his thumb impression as his right hand was injured. He prepared rukka and handed it over to Constable Indresh for registration of FIR. He lifted earth control, blood sample and blood laden earth from the spot and seized them vide memo Ex.PW5/C to 5/E. Two fired cartridges, two unfired cartridges, one fired cartridge of .315 bore and one bullet lead were recovered. Site plan (Ex.PW27/D) was prepared by Ramesh Chand.

8. The main and core issue raised in the present appeals pertains to involvement of the two appellants and whether they are the perpetrators, who had caused the injuries resulting in the gunshot wounds, which led to death of Amit and injuries to PW-1.

9. Inspector B.P. Sharma (PW-27) has deposed that on 3rd January, 2007 DD No.54-B was received from police station Gokalpuri about apprehension of Shakil @ Kalia and the disclosure statement made by him about his involvement in the present case. Shakil was also tried as a co-accused in the present case, but he died during the pendency of the trial. PW-27 interrogated Shakil after obtaining permission of the Court and formally arrested him in the present case vide memo Ex.PW27/H. Shakil made a disclosure statement Ex.PW27/H-2. PW27 prepared a challan and the present appellants i.e. Anwar and Tahir were placed in column No.2 of the charge sheet, since proceedings for declaring them as proclaimed offenders were pending against them. On 9th May, 2007, DD No.60-B (Mark P-27/A) was received in police station Khajuir Khas from Inspector S.K. Giri, Special Cell, Lodhi Colony that appellant Anwar had been arrested. Anwar thereafter was

formally arrested in the present case vide memo Ex.PW27/J after obtaining permission from the Court. Anwar's disclosure statement Ex.PW27/J-1 was recorded. Thereafter, he was remanded to judicial custody and remained in muffled face throughout. Request for Test Identification Parade (TIP) was made and TIP proceedings were conducted on 17th May, 2007. We shall refer to the TIP proceedings separately. Search of the house of Anwar at 650, Gali No.1, Mohalla Char Diwari, Islamabad, PS Lisari Gate, Meerut was conducted vide memo Ex.PW16/A. PW-27 further deposed that proceedings under Section 82/83 Cr.P.C. were initiated against Tahir. On 21st July, 2007, DD No.37-A was lodged in police station Khajuri Khas by SI Shiv Kumar from Special Cell, Lodhi Road about apprehension of Tahir and that he would be produced in Tis Hazari Court. Tahir was formally arrested after taking permission of the Court vide memo Ex.PW11/A. He made a disclosure statement Ex.PW11/B. An application for conducting TIP of Tahir was moved, but he refused to participate in the said proceedings. Tahir remained in muffled face till then. On 4th August, 2007 house of Tahir located at H.No.195, Gali No.1, Mohalla Kidwai Nagar, PS Lisari Gate, Meerut was searched vide memo Ex.PW20/B, but nothing incriminating was recovered.

10. Head Constable Vijay Singh (PW-3) has deposed about arrest of Shakil on 29th December, 2006. He deposed that from Shakil a country made pistol and one live cartridge were recovered. Constable Rajender Kumar (PW-18) has stated that on 22nd May, 2007, he along with the Investigating Officer PW-27 and Constable Jeet Pal had gone to Karkardooma Courts for obtaining remand of appellant Anwar, who was produced in the said Court. The request for remand was allowed. Head Constable Narender Singh (PW-20) deposed that on 3rd August, 2007 he joined investigation of the case along with Constable Abdul Sattar and Inspector B.P. Sharma (PW-27) and they had gone to the Karkardooma Courts and appellant was taken on police remand for two days i.e. till 5th August, 2007. Search was carried out at the house of Tahir, but nothing incriminating was recovered. Tahir had disclosed that he had thrown the weapon of offence i.e. revolver in the Hindon river, but the weapon was not recovered. Similar statement has been made by Constable Hans Raj (PW-21), who was a member of the police team, which had searched the house of appellant Anwar. Anwar had stated that he had thrown the weapon of offence in the Hindon River, but the same could not be

recovered. At this stage, we simply record that in view of Section 27 of the Evidence Act, the deposition of the said witness and the statement made by Anwar and Tahir regarding throwing away of weapon of offence and failure to recover the same is inadmissible and no judicial notice of the same can be taken.

11. Sup Inspector Shiv Kumar from Special Cell, Lodhi Road, who appeared as PW-26, has deposed that on 8th May, 2007 they had gone to Meerut as appellant Anwar was wanted in this case. Anwar was arrested from Eastern Court Road near the bridge of nala from Meerut at 11 a.m. He made a disclosure statement Ex.PW26/A. On 21st July, 2007, the other appellant Tahir carrying a reward of Rs.10,000/- was also arrested near Garh Bus Stand, Sorab Gate, Meerut. His disclosure statement was recorded vide Ex. PW-26/H. The arrival entry was made in PS Special Cell (Entry No. 10, Ex. PW-26/J). Appellants were produced before the Duty M.M. The said witness, in his crossexamination has stated that they left for Meerut at about 7.30/8.00 A.M. and reached there at about 10.00 A.M. Till 3.30 -4.00 P.M., they searched for the appellant Tahir. He has accepted the appellant Tahir was not taken to the local PS but denied that the appellants signatures were taken on blank paper. The appellant was apprehended on the road on foot and he had not tried to run away.

12. At this stage, it is pertinent to clarify the admissibility of the conduct of Shakil to the extent permitted and allowed under Section 8 of the Evidence Act. In State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 60.it has been clarified that:

205. Before proceeding further, we may advert to Section 8 of the Evidence Act. Section 8 insofar as it is relevant for our purpose makes the conduct of an accused person relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. It could be either a previous or subsequent conduct. There are two Explanations to the section, which explain the ambit of the word conduct. They are: Explanation 1.The word conduct in this section does not include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act. Explanation 2.When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects

such conduct, is relevant. The conduct, in order to be admissible, must be such that it has close nexus with a fact in issue or relevant fact. Explanation 1 makes it clear that the mere statements as distinguished from acts do not constitute conduct unless those statements accompany and explain acts other than statements. Such statements accompanying the acts are considered to be evidence of res gestae. Two illustrations appended to Section 8 deserve special mention: (f) The question is, whether A robbed B. The facts that, after B was robbed, C said in A's presence the police are coming to look for the man who robbed B, and that immediately afterwards A ran away, are relevant. 13.*** (i) A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

206. We have already noticed the distinction highlighted in Prakash Chand case[(1979) 3 SCC 9.:

1979. SCC (Cri) 656 : AIR 197.SC 400.between the conduct of an accused which is admissible under Section 8 and the statement made to a police officer in the course of an investigation which is hit by Section 162 Cr PC. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where stolen articles or weapons used in the commission of the offence were hidden, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct, falls within the purview of Section 27, as pointed out in Prakash Chand case [(1979) 3 SCC 9.:

1979. SCC (Cri) 656 : AIR 197.SC 400.. In Om Prakash case [H.P. Admn. v. Om Prakash, (1972) 1 SCC 24.:

1972. SCC (Cri) 88 : AIR 197.SC 975.this Court held that: (SCC p. 262, para

14) [E]ven apart from the admissibility of the information under Section 27, the evidence of the investigating officer and the panchas that the accused had taken them to PW 1.(from whom he purchased the weapon) and pointed him out and as

corroborated by PW 1.himself would be admissible under Section 8 of the Evidence Act as conduct of the accused. It was on the basis of the leads given by Shakil that the two appellants herein were apprehended and arrested for involvement in the present case. However, this does not prove or establish a case against them. It provides link and continuation to the police investigation which resulted in the arrest of the two appellants.

13. Ramesh Chander Sundariyal (PW-1) is the eyewitness in the present case whose son Amit Sundariyal was killed in the incident. He has provided a detailed account of the incident and has deposed that on 21st August, 2006, at about 10.45 P.M., the appellant Tahir, whom he identified in the court, tried to enter the shop. PW-1s son Amit, who was standing near the counter, tried to resist his attempt. Seeing this, PW-1 moved closer to the counter. The appellant Tahir, in the meanwhile, took out a revolver from his pants. Some other associate of the appellant Tahir fired a shot which hit Amits shoulder. PW-1 tried to overpower the appellant Tahir, who shot him on his right hand. The said shot made an exit wound. At that point, Amit rushed to save PW-1 and was shot by Tahir. Amit fell down. The appellant-Tahir fired another shot, which crossed PW-1s abdomen and probably hit his son. In total five bullets were fired, three had hit his son Amir and two bullets injured PW-1. PW-1 has stated that there were two other associated with Tahir, one was standing across the road and one associate, whom he identified to be the appellant Anwar, was standing in the middle of the road to stop the traffic so that none could intervene. The appellant has stated that the third offender had fired one shot on Amit and he could identify his face, if shown to him. The appellants fled from the shop. People in the vicinity shifted PW-1 and his son Amit to Mavi Hospital. Amit was shifted first to a police gypsy and then to an ambulance before they reached GTB Hospital, Shahdara. At the hospital, Amit was declared dead. Police complaint was lodged at 2.00-2.30 A.M. and his statement Ex. PW-1/A was recorded. He identified the dead body (Ex. PW-1/B). Thereafter, in January, 2007 he was taken to Central Jail for identification of Shakil. In May, 2007 he went there again for identification of Anwar. PW-1 has deposed that he had read the name of Shakil and Anwar, in the newspaper, after they were arrested. The appellant Tahir was not shown to him for identification and PW-1 saw him for the first time, in the Court. In the expatiated cross-examination it

has come about that PW-1 was 6- 7 feet away from his son, when the incident occurred at around 10.45 P.M. PW-1 had telephoned the PCR and handed over the receiver to one person named Chopra, who had reached there on hearing the bullet shots. There was some grappling between the appellant Tahir and Amit. Tahir had pushed and abused Amit, on which Amit came out of the counter and was in front of the shop. The appellant retreated to a distance of 5-6 feet at that time. When shot was fired, PW-1 rushed to overpower Tahir while raising the alarm. His son Amit too raised an alarm and people gathered. The appellant-Anwar standing on the road was at a distance of 10-15 feet and another accused was standing across the road at a distance of 40-45 feet. The appellants were standing there to assess the situation. One of the offenders was wearing white pant and T-shirt but he did not remember whether he had informed this fact to the police. His blood stained clothes were not seized. There was blood inside the shop because PW1 had gone there to take the money out of the drawer. Amit had fallen near the drain. No other statement was recorded in his presence. He has denied that 4-5 days after the incident, the appellant Tahir was shown by the police in Karkardooma Court. He has also denied the photo of the appellant Anwar was shown to him. Regarding TIP of the appellant Anwar, PW-1 agreed that the appellant Anwar had a beard but stated that he could have grown a beard after the incident. He has averred that there were others in the lineup, during TIP, who had a beard or were wearing cap. He has stated that it was incorrect that the appellants name was not printed in the newspaper but he could not recollect which newspaper he had read this in. He was also told by the police regarding the arrest of the appellants, apart from the newspaper report. With regards to the appellant Anwar, he has stated that the appellant was standing at a distance of 15 steps from his position and PW-1 had sustained an injury from his revolver. He has stated that shots were fired by a revolver and country made pistol but he could not give details regarding the make of the said weapon and how many shots were fired by each pistol. At the time of the incident, the appellants had not covered their faces.

14. Regarding injured witnesses, in *Abdul Sayeed v. State of Madhya Pradesh*, (2010) 10 SCC 25.it has been held that:

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness. In *State of UP. V. Kishan Chand*, [(2004) 7 SCC 62.a similar view has been reiterated that:

10. ... The testimony of an injured witness has its own relevance and efficacy. The fact that the witnesses sustained injuries at the time and place of occurrence lends support to their testimony that the witnesses were present during the occurrence. Merely because PW-1 is the father of the deceased is no ground to discard his evidence. It is a settled law that if the evidence of the witnesses, who are related, is credible and cogent, and just because they are related to the deceased would not negate their testimony. In *Arjun Mahato v. State of Bihar*, (2008) 15 SCC 60.it was reiterated that:

13. Merely because the eyewitnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. It is clear from the MLC (Ex. PW-22/A) that PW-1 had sustained bullet injuries from the alleged incident and his presence is established. He has narrated and recollected the entire incident and no major discrepancies are to be found in his statement. There is nothing in his cross-examination which casts a doubt on his credibility and truthfulness including the

identification of the appellants. In view of this, we are inclined to accept his testimony regarding the incident and identification of the appellants as the perpetrators.

15. The counsels for the appellants contend that identification of the appellants by PW-1 should not be relied upon. The counsel for the appellant Anwar has alleged that PW-1 had already seen his face in the newspaper photograph. Further the TIP was conducted nearly nine months after the incident and thus has to be doubted. We find no force in this contention. Appellant Anwar was identified by PW-1 in the TIP (Ex. PW- 24/2) conducted on 17th May, 2007. He was brought in muffled face and shown with ten other persons. It would be wrong to presume that the newspaper photograph was of uncovered face, without any proof been produced before us. The photographs of apprehended accused persons being produced in court complexes do get published but on many occasions they are shown in a muffled face. PW1 has been truthful, when he accepted that he had seen a photograph. However, it was not suggested to him that Anwar's face was visible and he had identified Anwar because of the photograph. Inspector B.P. Sharma (PW-27) has stated that the appellant-Anwar had throughout remained in muffled face. PW-1, in his cross-examination, has averred that during the TIP of the appellant Anwar, there were other persons who also had beard and wore caps. With regard to the delay in TIP, it is the case of the prosecution that the appellant Anwar were arrested only on 9 th May, 2007. Within ten days, the TIP was conducted, i.e. on 17th May 2007 but importantly the application was moved on 11th May, 2007. In such a scenario, the plea of belated TIP cannot be accepted. With regards to Appellant Tahir, in his Section 313 Cr.PC statement, he has alleged that he was shown to PW-1. He had refused to join the TIP, stating that his face had already been shown by the police to the witness (Ex. PW 25/B). Regarding when, where and how he was shown to PW-1, Tahir remains elusive. PW-1 had clearly identified him in the Court. In *Malkhansingh v. State of M.P.* [(2003) 5 SCC 74.:

2003. SCC (Cri) 1247] : (SCC pp. 751-52, para

7) it has been observed:

7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.

16. In *Mullagiri Vajram v. State of A.P.* [1993 Supp (2) SCC 19.:

1993. SCC (Cri) 496] it was held that though the accused was seen by the witness in custody, any infirmity in TIP will not affect the outcome of the case, since the depositions of the witnesses in court were reliable and could sustain a conviction. The photo identification and TIP are only aides in the investigation and does not form substantive evidence. The substantive evidence is the evidence in the court on oath.

17. In view of this position, the conviction and the sentence of the appellants Anwar and Tahir are maintained. The appeals are dismissed. (SANJIV KHANNA) JUDGE (SIDDHARTH MRIDUL) JUDGE MAY 28th, 2013 NA/VKR

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