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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 24.08.2011

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CRL.A. 433/2011, Crl. M. (Bail) 574/2011

RAJ KUMAR @ RAJESH PANDIT Appellant
Through : Ms. Anu Narula, Advocate.

Versus

STATE Respondent
Through : Sh. Pawan Sharma, PP along with Inspector Suraj Bhan.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE G. P. MITTAL

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The Appellant was convicted of having committed the offence punishable under Section 302, IPC. The prosecution alleged that on the night of the incident, i.e 12.07.2009, the Appellant murderously assaulted Karan Kumar, in a park near Rakabganj gurdwara. The injuries led to the latter's death. It was alleged that there were eyewitnesses who had testified to the incident. The prosecution relied on the deposition of PW-10, who stated that he heard a woman's cry, which led him to the spot; he saw the Appellant hitting the deceased with a brick. The Trial Court, after discussing the prosecution evidence, held that the Appellant was guilty of having committed the murder.

2. Learned counsel for the Appellant, during the hearing, relied on Para 45 of the

impugned judgment to say that the incident alleged by the prosecution was preceded by some other events which were not highlighted during the trial. It is also urged that the Appellant apparently did not receive appropriate legal advice which led to his not taking the proper pleas and disclosing the facts under Section 313, Cr.PC. Learned counsel argued that there is sufficient material on the record indicative of the fact that the attack which led to the death of the deceased Karan Kumar was preceded by some untoward incidents involving Appellant as well as his wife. Reliance was placed on the testimony of PW-10, who, in the cross-examination stated that the accused's wife – who was present at the time of the attack, mentioned accused had tried to flee away from the spot and that he volunteered as follows:

*“Wife of the accused was asking the accused to run away immediately.
No offence was committed by them while police was leveling
allegations against them.”*

3. It was submitted that the MLC of the Appellant's wife Kiran corroborated this. The police had apparently got her medical done on 23.09.2009 suspecting possible sexual assault. The document, Ex. PW-2/C disclosed some injuries on the finger of the said Kiran. Learned counsel submitted that having regard to these facts and the recent ruling of the Supreme Court in *Darshan Singh v. State of Punjab & Anr.* AIR 2010 SC 1212 where the Supreme Court observed that even if the plea of private defence is not specifically urged during the trial, the Court trying the offence is nevertheless bound to consider the materials in order to ascertain whether such a plea can be fairly made out. It was submitted that having regard to these conspectus of circumstances, the Court should invoke its power under Section 391, Cr. PC and examine additional evidence, to discern the truth and do complete justice, in the form of testimonies of relevant witnesses.

4. The learned APP pointed-out that the charge-sheet submitted to the Court did not withhold any facts and mentioned about the alleged assault. He further fairly stated that the statement of Kiran recorded during the proceedings at the initial stage could not be brought to the notice of the Court since she was not made a prosecution witness nor joined in the trial. Her statement is at page 110 of the Trial Court record.

5. At this stage, it would be relevant to notice the observations of the Trial Court in Para 45 which are as follows:

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It is true that prosecution has failed to prove motive of the accused to commit murder of the deceased but that aspect is not fatal to the case of the prosecution. Motive for doing a criminal act is generally a difficult area for prosecution. One can not normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Sometimes, motive is surrounded in the mystery and it is very difficult to prove. If, however, the evidence of the eye witness is credit worthy and can be believed, the question whether there is any motive or not becomes wholly irrelevant. Only in the disclosure statement of the accused, there is mention that deceased had tried to outrage modesty of his wife. Though there is no independent evidence on this aspect, possibility of the deceased to outrage modesty of the wife of the accused can't be ruled out, as there was no occasion for the deceased to remain present inside the park at odd hours alone particularly when he was found to have consumed liquor. Motive assumes greater significance only in circumstantial evidence.

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6. It is apparent from the above discussion that at the initial stage of the investigation – rather on the receipt of the FIR itself, the police was cognizant of the possible cause for the attack on the deceased. The investigation did proceed on those lines and Kiran, the Appellant’s wife was medically examined on the very next day (after the incident); injuries were found on her finger. PW-10, in the course of his deposition volunteered that the Appellant’s wife had stated that he (accused/Appellant) had committed no wrong. The charge-sheet did, in this case, also specifically mention, - besides recording the background of the Appellant (who is educated and was a native of Gwalior, had come-down to Delhi and was selling ice-creams in the vicinity of the spot of occurrence) that Kiran and he (the accused) had, during the inquiry, disclosed that the deceased kicked the Appellant and tried to outrage the modesty of his wife. However, this fact was not highlighted by the prosecution and Kiran was dropped during the trial, though she had been cited as a witness.

7. The power of the High Court to record evidence and examine additional materials is found in Section 391 of the Cr.PC which reads as follows:

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391. Appellate Court may take further evidence or direct it to be taken.

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

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8. In *Rajeswar Prosad Misra v. State of West Bengal*, (1966) 1 SCR 178 while dealing with the jurisdiction of the Court in taking additional evidence, the Supreme Court commented as follows:

"Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if it was possible) to list here. We do not propose to do what the Legislature has refrained from doing, namely, to control discretion of the appellate Court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial."

Likewise, in *State of West Bengal v. Tulsidas Mundhra*, (1963) 2 SCJ 204 at 207, it was observed that:

"It would be noticed that this section confers on criminal courts very wide powers. It is no doubt for the Court to consider whether its power under this section should be exercised or not. But if it is satisfied that the evidence of any person not examined or further evidence of any person already examined is essential to the just decision of the case, it is its duty to take such evidence."

Subsequently, the duty of the court, to seek the truth, and arrive at a just decision, was underscored, in the judgment reported as *Jamatraj Kewalji Govani v. State of Maharashtra*, (1967) 3 SCR 415, in the following words:

"It is difficult to limit the power under our Code to cases which involve something arising ex-improviso which no human ingenuity could foresee, in the course of the defence. Our Code does not make this a condition of the exercise of the power and it is not right to embark on judicial legislation. Cases that go far are of course not quite right. Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides ... It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the Court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the Court is right in thinking that the new evidence is needed by it for a just decision of the case. If the Court has acted without the requirements of a just decision, the action is open to criticism but if the Court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

9. We are of the opinion that the object of the criminal proceeding is to arrive at the truth. Each of the witness associated with this process, the police, the prosecution and the Court have distinct roles to play. The police and the prosecution are expected to collect evidence and present them fairly before the Court, to aid in the ascertainment of the truth. The prosecutor's role is vital in this regard. It has been commented upon by several judgments, including by the Supreme Court in *State of Bihar v. Ram Naresh Pandey*, AIR 1957 SC 389 as follows:-

"..... it is right to remember that the Public Prosecutor (though an executive officer as stated by the Privy Council in Faqir Singh v. King Emperor, (1938) 65 IA 388, 395 : (AIR 1938 PC 266) is, in a larger sense, also an officer of the Court and that he is bound to assist the Court is entitled to have the benefit of the fair exercise of his function. It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are classified as cognizance offences) is on the executive authorities. Once information of the commission of any such offence reaches the constituted

authorities, the investigation including collection of the requisite evidence, and the prosecution for the offence with reference to such evidence, are the functions of the executive. But the Magistrate also has his allotted functions in course of these stages."..... In all these matters he exercises discretionary functions in respect of which the initiative is that of the executive but the responsibility is his."

The matter was put in proper perspective in *Hitendra Vishnu Thakur v State of Maharashtra* (AIR 1994 SC 2623) as follows:

*"A public prosecutor is an important officer of the State Government and is appointed, by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He **is an independent statutory authority. The public prosecutor** is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency..."*

10. The prosecutor is not a mouthpiece of the police; he has to actively aid the Court in the process to arrive at the truth. While in a case like this, the apparent reality might well be that the Appellant is the person found at the spot, the prosecutor's role or indeed that of the Court does not end on proof of that fact alone. All the attendant circumstances to that reality, have to be explained to give meaningful content to provisions of the Indian Penal Code (which both provide punishment as well as defences to accused charged with having committed crimes). Unfortunately in this case, the role of the prosecution has not been fair. It is not sufficient for the prosecutor to merely present the charge-sheet and concur with the framing of charges. He also has to examine whether the witnesses cited by the police or the statement recorded do disclose other facts. The prosecution's omission, in this case has led to a piquant situation where the Trial Court was constrained to notice that the Appellant could possibly have been instrumental in attacking the deceased under somewhat compelling circumstances.

11. Having regard to the settled law, pertaining to the appreciation of statements recorded during the course of investigation by the police, by virtue of Sections 161 and 162, we are of the opinion that this is an appropriate case where the additional evidence has to be recorded. The Inquiry Officer (IO), Inspector Suraj Bhan, who had deposed as PW-21 is present in Court. We are of the opinion that in the first instance,

his further evidence has to be recorded. Accordingly, exercising its powers under Section 391, the Court would proceed to record his statement today. Counsel for parties do not object to this course of action.

**S. RAVINDRA BHAT
(JUDGE)**

**G. P. MITTAL
(JUDGE)**

**AUGUST 24, 2011
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