

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 23.05.2012

DECIDED ON: 30.05.2012

+ **CRL.A. 1058/2011 & Crl. M. (Bail) 1492/2011**
OM PRAKASH @ BABLU Appellant
Through: Sh. Sumeet Verma, Advocate.

+ **CRL.A. 1071/2011 & Crl. M. (Bail) 1508/2011**
ARJUN SINGH @ ARJUN Appellant
Through: Sh. Sumeet Verma, Advocate.

+ **CRL.A. 1072/2011 & Crl. M. (Bail) 1509/2011**
RAMJANE @ RAJA Appellant
Through: Ms. Anita Abraham, Advocate.

+ **CRL.A. 1073/2011 & Crl. M. (Bail) 1510/2011**
SHAHROUKH @ HASHIM Appellant
Through: Sh. Sumer Kumar Sethi, Advocate.

versus

THE STATE (NCT OF DELHI) Respondent
Through: Mr. Sanjay Lao, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

%

1. The present appeals are directed against the judgment dated 21.05.2011 of the learned Additional Sessions Judge, in SC No. 70/2010 convicting the appellants for the offences punishable under Sections-

302/323/34, IPC as well as the order dated 30.05.2011 sentencing them to undergo life imprisonment along with fine.

2. The prosecution's case is that on 26.08.2005 in the early morning around 8/8:15-AM, Police Station Connaught Place received information (DD. 4A, Ex. PW-1/A) about a dead body lying in a pool of blood in front of Gurdwara Bangla Saheb, in front of the *bijlighar* (electric substation). This intimation was given over to PW-19 K.K. Mishra, who reached the spot, with some policemen. The police team found that the body lying in a pool of blood had several injuries. Some articles were also found. The deceased was later identified as Balwinder Singh @ Jassa, a history sheeter (Bad Character "BC") of the area. Further inquiries revealed that Shahrukh, Munna, Bablu and Arjun used to sleep in the *bijlighar* compound and that they had absconded that day. PW-19, the IO, made an endorsement, Ex.PW-19A and later, on the basis of that endorsement, the FIR was registered in the case. The investigation was done by PW-23, Inspector Bijender Singh. The crime team went to the spot; the place of occurrence was photographed. The report of the crime team was produced during the trial as Ex. PW-16/A. It was alleged that apart from the articles seized from the crime spot, blood lying near the area, and earth, was seized. The body was sent for post mortem examination. After conclusion of that procedure, the post mortem report was collected; the report of the forensic laboratory was also later collected. It was alleged that all the accused were arrested on 29-8-2005. After the arrest of the accused, a charge-sheet was initially filed under Section-304 read with 323/34, IPC. The Trial Court after considering the materials on record framed charges under Sections-302/323/34, IPC. The accused pleaded not

guilty and claimed trial. After due consideration of the material on record, in the form of testimonies of 28 prosecution witnesses, and the material exhibits, the Trial Court concluded that the prosecution had established the guilt of the accused for the offences they were charged with beyond reasonable doubt and handed down the impugned judgment and order.

3. The Trial Court relied mainly on the depositions of PW-2 and PW-3. It was held that the testimony of PW-2 established that the appellants had attacked the deceased, after taking liquor and that the deceased was in the habit of quarrelling with people of the neighborhood. It was also held that the cause of death, as determined by the post mortem report, corroborated the testimony of PW-2, which in turn received support from PW-3. In view of these and the recovery of articles made during investigation the prosecution established its allegations against the appellants beyond reasonable doubt.

4. It is urged by the appellants' counsel that the impugned judgment is unsustainable in law. He submitted that the prosecution mainstay, which found favour with the Trial Court were the two eye witnesses' testimonies. According to counsel, the testimonies could not have been blindly relied upon. Learned counsel submitted that the testimony of PW-2 was unreliable. He claimed that the appellants had attacked the deceased; yet, despite being a watchman, he took no steps to save the deceased from the attack. Further, he claims to have seen the body of the deceased at 4 AM, but did nothing about it. As far as PW-3's testimony is concerned, learned counsel argued that she did not witness the incident. Moreover she said that the deceased used to routinely be involved in fights and brawls, and therefore, went back

to sleep. Counsel submitted that PW-3's testimony was hearsay and could not have been relied on by the Trial Court.

5. Learned counsel submitted that PW-2 was an unreliable witness, because he did not support the prosecution story in entirety. It was argued that the witness mentioned an entirely different date. His deposition also revealed that he had mentioned about the identity of three witnesses, but did not mention about Shahrukh. He had not identified him, and mentioned his name as Hashim. The witness was not even aware of the name of the colony; there was no proof that he in fact worked there. In cross examination he clearly stated that he saw the dead body on the intervening night of 25/26th August itself. If that were the position, his conduct was highly unnatural and the Trial Court should not have placed blind reliance on it.

6. It was next urged by the learned counsel for the appellants that there is also doubt whether the police had registered the FIR when they said they did, because there are several internal indications which reveal that introducing the names of the appellants was a clear afterthought. It was submitted, in this regard that the FIR and the *rukka* named the accused, without the police having recorded the statement of PW-2. It was highlighted that the witness himself, importantly stated in his deposition that his statement was recorded by the police 3-4 days after the murder of Jassa, the deceased. Furthermore, neither the death report, nor the brief facts mentioned who had killed the deceased. Having regard to all these facts, the police story about recording of *rukka*, implicating the accused, was highly improbable. Counsel further submitted that the *rukka* recorded at 10:30 AM on 26-8-2005 mentioned the appellants only as those who used to frequent

the spot and sometimes sleep there. In the circumstances, what was first a suspicion was then manipulated to falsely implicate them.

7. Without prejudice to his other submissions that even if the prosecution's story were to be believed and the Trial Court's findings on the facts were to be sustained, the conviction under Section-302, IPC, in the present case, was not justified. It was urged that the evidence revealed that even though there were several injuries on the deceased, there were only few serious ones. The deceased was in a drunken condition; the evidence also pointed to his frequently quarrelling with others, and also that he was a bad character. It was submitted that all indications were that of a brawl by a drunken man, led to a fight which resulted in his being attacked. Counsel urged that in the case of such proven facts, the Court ought to have taken recourse to the exceptions under Section-300 IPC, and concluded that the appellants were guilty, if at all, for the offence punishable under Section-304, Part-I, IPC, since at best, what was proved, was the infliction of the injury which could have caused death in the ordinary course of nature. It was further emphasized that the evidence nowhere suggested that the accused had gone to the spot armed and prepared to launch a murderous attack on the deceased, or were acting in aid and furtherance of a conspiracy to kill the deceased.

8. Learned counsel pressed into service the decision of the Supreme Court reported as *Kalegura Padma Rao and Anr. v. State of Andhra Pradesh*, (2007) 12 SCC 48; *Gurdev Raj v. State of Punjab*, (2007) 13 SCC 380 and *Kandaswamy v. State of Tamil Nadu*, (2008) 11 SCC 97. It was submitted that in all these cases, the injuries inflicted by the accused were

far graver in nature as compared to the proven facts of this case despite which the Supreme Court, on an application of the previously settled principles, altered the conviction from one under Section-302, IPC to Section-304 Part-I, IPC.

9. Learned APP urged that the appeals have no merit and have to be rejected. It was submitted that the testimonies of the eye witnesses i.e. PW-2 and 3 cannot be discarded as they were natural and unmotivated. Learned counsel further argued that the testimony of PW-2 has to be given due weight. The mere fact that there was some confusion in the mind of the witness did not mean that his testimony suffered from any serious infirmity. It was argued that the appellants had not cross-examined the witness or PW-3 to bring out any motive for false implication. Counsel urged that even otherwise where ocular testimonies exist as to the nature of the offence, motive is of no significance. It was also submitted that there were a large number of injuries, and the accused's fleeing from the spot, their abscondance and their subsequent arrest, had not been explained by them; their conduct thus, clearly implicated them and corroborated the prosecution story.

10. Reacting to the appellants' arguments with regard to the recoveries, it was urged that discrepancies between the testimonies of PW-2 and PW-3 only show that the prosecution had not falsely implicated any of the accused. Even if the recoveries were to be doubted, the depositions of the eye witnesses i.e. were sufficient to incriminate the accused. Having regard to these circumstances and the fact that the appellants had inflicted blows on the vital parts of the body with dangerous weapons, submitted the learned

counsel, the conviction recorded by the Trial Court as well as the sentence were, in the circumstances of the case, justified. According to the learned APP, the judgment does not call for any interference. Learned counsel also submitted that the broken glass contained the finger prints of the accused, which established beyond a reasonable doubt that they were present at the time of attack.

11. We have considered the submissions as well as the materials on record; we have also carefully gone through the original records of the Trial Court, summoned by this court, for hearing the present Appeal.

12. The FIR in the case (Ex.PW-1/B) was registered at 10:30 AM on the basis of the *rukka* (Ex. PW-19/A). It is important to notice that though the FIR named the present appellants, it omitted mention of any witnesses, particularly, of PW-2, the vital eyewitness. In this background, it is necessary to closely scrutinize what was said by that witness. In the examination in chief, the witness (PW-2) did not mention when the police examined him. He merely stated about having informed PW-4, Bijender, the President of the Resident Welfare Association. The latter (PW-4) confirmed to having revealed to the police about the identity of Jassa. However, he stated that he was not told or was not aware about the identity of the assailants. This fact is very significant, because PW-2, in his cross examination admitted that the police recoded his statement 3-4 days after the incident. It would have been reasonable to assume that this was the result of confusion in the mind of the witness, as regards the date, since it is usual for the trial to take place after a lapse of time. For once, however, the record bears out the testimony of the witness; his statement under Section 161 was

indeed recorded on 29th August, 2005. This is corroborated by the statement itself, which is part of the record, and was produced as Ex. PW-12/B. That clearly bears out the date when the witness's statement was recorded, as 29-8-2005. Another aspect which has to be kept in mind is there is a discrepancy between the statements of the police witnesses itself. PW-19, K.K. Mishra did not say anything about the statement of any witness being recorded on 26th August, 2005, whereas PW-23 does so. He even says that the statement of Prakash (PW-2) was recorded at the spot. However, no such statement is on the record; in fact that contradicts PW-2's statement that his statement was recorded for the first time 3-4 days after the incident; it also contradicts Ex.PW-12/B.

13. The question about when a particular witness's statement is recorded during the investigation would not ordinarily agitate a criminal court. However, it must be remembered that the burden which lies on the prosecution, of proving the case against the accused beyond reasonable doubt, is a heavy and unchanging one. Courts have often reminded the necessity of registering a first information report (FIR) on the basis of the intimation received, at the earliest point of time, to avoid the charge of manipulation and rule out the possibility of false implication (Ref *Thanedar Singh v. State of M.P.*, (2002) 1 SCC 487). The kingpin of the prosecution allegations is the eyewitness testimony of PW-2. The FIR no doubt mentions the name of the accused; but what is stated is that they used to sleep in the vicinity of the crime scene, and were not found at the time, i.e. 10:30 AM on 26-8-2005. The FIR does not mention about PW-2. The statement of PW-23 (who deposed that PW-2's statement was recorded at the spot itself) does not

find corroboration in the *rukka*. Moreover, PW-2 contradicts it, by saying that his statement was recorded after 3 days. This latter aspect finds corroboration in Ex. PW-12/B, the Section 161 statement, which was recorded on 29th August, 2005. The question then is how, in the absence of any proof of PW-2 being questioned, (and in the absence of PW-4's knowledge about the identity of the assailants on 26th August, 2005), their names could be mentioned as suspects. There is no explanation why PW-2's statement was recorded after 3 days. This, in the mind of the Court, gives a fatal blow to the prosecution story.

14. The question of delay in recording the statements of witnesses to a crime, has to be considered in the context of the facts of each given case. Thus, in *Ganesh Bhawan Patel v State of Maharastra* 1978 (4) SCC 371, it was held that:

“All the infirmities and flaws pointed out by the trial Court assumed importance, when considered in the light of the all-pervading circumstance that there was inordinate delay in recording Ravji's statement (on the basis of which the "F.I.R." was registered) and further delay in recording the statements of Welji, Pramila and Kuvarbai. This circumstance, looming large in the back-ground, inevitably leads to the conclusion, that the prosecution story was conceived and constructed after a good deal of deliberation and delay in a shady setting, highly redolent of doubt and suspicion.

48. This all-vitiating circumstance, we say so with great respect, could not be, and has not been, effectively dispelled by the High Court, except by a blind acceptance of the Ipse Dixit of Sub-Inspector Patil, on this point, in preference to the testimony of Ravji (PW 1) who was, according to the Prosecution, the Prime-mover of the gear...”

This aspect had been emphasized earlier by the Supreme Court, in the judgment reported as *Phoolchand v State of Rajasthan* 1976 (4) SCC 405. The prosecution's inability – and even contradiction with – the testimony of PW-2 that his statement was recorded 3 days later, therefore, raises more questions than are apparent from the record. If he is right, and PW-4 did not know the identity of the accused, the involvement of the appellants was only on a surmise. No evidence is relied on to say that PW-2 was not available, or that there was some other evidence showing how the accused were implicated in the *rukka*.

15. This court is conscious of the fact that a conviction can be based on the eyewitness testimony of a single individual. However, the consistent standard which the court applies is the test of credibility. Therefore, the nature of evidence which can result in a conviction is not quantitative, but qualitative. If one witness can convince the court that she (or he) had witnessed the commission of the crime by the accused, that can result in conviction. However, if the evidence is unconvincing, and the Court does not trust the testimony, the only result is an acquittal. This Court recollects the decision in *Ashish Batham v. State of M.P.*, (2002) 7 SCC 317 :

“8. Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by the heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver

the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between “may be true” and “must be true” and this basic and golden rule only helps to maintain the vital distinction between “conjectures” and “sure conclusions” to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.”

16. Having regard to the above discussion, and taking into consideration the overall conspectus of facts as emerging from the evidence on the record, this Court is of opinion that the conviction of the appellants cannot be sustained. The impugned judgment, is, therefore, set aside. The appellants shall be released forthwith, unless required in any other case. The Criminal Appeals 1058/2011; 1071/2011; 1072/2011 & 1073/2011 are consequently allowed.

S. RAVINDRA BHAT
(JUDGE)

S.P.GARG
(JUDGE)

MAY 30, 2012