

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved On :25.01.2012

Decided On :03.02.2012

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**CRL.A. No. 1117 /2011, CrI.M.(Bail) 1579/2011 &
CrI.M.A.10682/2011**

MANOJ SHUKLA @ PREM

..... Appellant

Through : Mr. Bhupesh Narula, Advocate

Versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through : Mr. Sanjay Lao, APP for the State

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S. P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. By this judgment, the Court would be disposing of an appeal directed against the judgment and order of learned Additional Sessions Judge dated 27.01.2011 in SC No.58/2010 by which the Appellant Manoj Shukla was convicted for committing the offence punishable under Section 302 IPC.

2. According to the prosecution, intimation was received by way of DD-2A (marked as Ex. PW3/A) on 12.02.2006 at 8.28 AM that the body of an unknown person - who looked like a labourer- was lying near shop No.1496 Gali No.5, Wazir Nagar, Kotla Mubarakpur. PW-22, I.O. and HC Bhim Singh (PW-5) reached the spot and took charge of the body as well as the

blood stained earth and stone-like lump of cement which lay near the body. One Sarla Gupta claimed to be the employer of the deceased- he was identified as Suresh Kumar, her driver. On the basis of this information the FIR (Ex. Pw-16/A) was lodged. According to the police, 5 or 6 members of the public were at the spot; however no statement was recorded. The body was sent for post-mortem examination. It was alleged that PW-8, Jairam Pandey later reached the Police Station and his statement under Section 161 Cr.P.C. was recorded. The police also recorded the statement of one Shyam Kishore; both these individuals claimed to have witnessed the incident which led to the death of Suresh Kumar. They both implicated the present appellant for the crime. The appellant was arrested on 19.07.2006 near the Delhi-U.P. border. After conclusion of investigation, he was charged with committing the offence. He entered the plea of not guilty and claimed trial.

3. The prosecution relied on the testimonies of 22 witnesses to prove the allegations against the appellant. It also placed on record other materials such as the FSL reports, post mortem report and seizure memos pertaining to the recovery of articles from the accused as well as from the crime scene. Upon an overall consideration of these materials and testimonies of witnesses the Trial Court convicted the appellant and sentenced him in the manner described earlier.

4. Mr. Bhupesh Narula, learned counsel for the appellant appearing on behalf of the Delhi High Court Legal Services Committee submitted that the prosecution story cannot be believed. It was urged that the testimony of PW-7 regarding the presence of the appellant is unreliable, because of various reasons. He merely claimed to have been present when the accused and PW-8 were drinking earlier in the evening of 11.02.2006 at 7.00 PM. When he later left the premises, the accused, the deceased and PW-8 were

there. More crucially the statement of this witness was not recorded immediately or within reasonable time despite the fact that PW-8 had mentioned him. His statement under Section 161 Cr.P.C. was recorded 15-20 days after the incident, as admitted by PW-7 in the cross-examination.

5. Learned counsel next urged that the only testimony which held weight with the Trial Court was that of the alleged eye witness PW-8, who corroborated having drunk with the deceased and the appellant as well as PW-7 earlier. However, PW-8 also claimed that the appellant had quarreled around 8.00 PM on 11.02.2006 with the deceased, and that the deceased was heavily drunk. He also deposed that quarrel was resolved and all of them later slept. The counsel emphasized that PW-8 claimed to have heard an explosion (dhamaka) around 1.00 AM and seen the appellant fleeing from the spot. This formed the basis of the trial court's judgment convicting the appellant. Mr. Narula submitted that the testimony of PW-8 cannot be believed at all. He submitted that according to post-mortem report, the death possibly occurred one and a half days before the commencement of the proceeding (i.e. 36 hours before 11.00 AM on 13.02.2006). So reckoned, death occurred around 11.00 PM of 11.02.2006, contrary to the prosecution story.

6. Learned counsel also urged that PW-8 admitted in the cross-examination that apart from him, deceased; and the appellant, two others (i.e. Harish and Bengali) present at the spot, also consumed liquor and slept in the premises that night. However, the Police made no effort to corroborate PW-8's version with the testimonies of those individuals; they were not even asked to join in the proceedings. Furthermore, urged counsel, that the testimony of PW-8 is also unreliable because his conduct was suspicious and unnatural. Having allegedly witnessed the immediate

aftermath of an attack and also seen the deceased bleeding profusely from the head, he made no effort either to raise an alarm or even to go to the rescue of the injured. Counsel submitted that PW-8 admitted that he alerted the shop keeper at 5.00 or 6.00 AM which meant that this witness went back to sleep for another four hours. Furthermore the testimony of PW-8 was undermined by the fact that the earliest intimation supposedly received by the Police was at 8.30 AM and when they reached the spot no eye witness including PW-8 was present. Counsel also argued that the deceased's employer Sarla Gupta did not join the investigation. On the contrary PW-8's evidence was in fact contradicted by PW-6, the shop owner who deposed having received information about the dead body lying outside his shop on the morning of 12.02.2006, at the pavement and having passed on the information to the Police.

7. The learned APP urged that the findings of the trial court should not be interfered with. Counsel argued that the appellant used to work as Constable in the BSF and had been convicted for the murder of two constables in an incident which took place on 20.12.1999. His conviction was recorded on 14.07.2000 and he was sentenced to undergo life imprisonment in a duly constituted proceeding, which was confirmed by the Inspector General of BSF on 12.10.2000. Consequently he was serving his sentence in Central Jail, Reva (M.P.); he was released on parole on 05.05.2003 for three weeks. However, he failed to surrender and went on to commit this murder for which he stood trial in the present case. Learned APP emphasized that the appellant did not deny the previous conviction and sentence or even the fact that he had over-stayed his parole and had not undergone the entirety of the previous sentence.

8. It was argued that the testimony of PW-8 clinched the prosecution allegations against the present appellant. The witness was clear that he, the appellant and the deceased were together when a quarrel took place between the latter two over some trivial matter. Although that was resolved, and all the three went to bed, the witness was woken up with a loud sound and he saw the appellant running away from the spot. He simultaneously saw the deceased in a seriously injured condition and bleeding profusely from the head. This testimony was sufficient for the court to conclude that the appellant was guilty. The prosecution corroborated this testimony with the seizure of articles such as a piece of concrete which was used to injure and the pieces of earth control etc. Counsel submitted that there was absolutely no delay in recording the information; intimation was received at about 8.20 AM, the FIR was lodged and the statement of PW-8 too was recorded on the same day. In view of these facts, there was no question of appellant being falsely implicated by the police.

9. Learned counsel urged that the appellant owed an explanation as to why he was missing from the spot for almost six months till his arrest on 19.07.2006. Equally his statement under Section 313 Cr.P.C. admitted to the conviction and sentence of imprisonment for life awarded in the previous incident and as well as the fact that he had jumped parole. In these circumstances, the Trial Court was justified in concluding that the appellant was guilty as charged and awarded the sentence of imprisonment for life.

10. From the above discussion, it is apparent that the most crucial evidence in this case is the testimony of PW-8. The material parts of his depositions are extracted below :

“In the month of February, but I do not remember the exact date and year. I along with Shyam Kishore, accused Manoj @ Prem and Suresh (deceased) had taken the drink at shop no. 1496, Kotla Mubarakpur. Shyam Kishore took his liquor. We all took out liquor and drink. A quarrel had taken place between accused (present in court today) and deceased on using a blanket at about 08.00 PM. We intervened into the matter after that we slept. At about 12.00/02.00 AM, again said at 01.00 AM, I heard a noise of Dhamaka. I woke up immediately and I saw accused Manoj Shukla was running from there but he could not be apprehended. I went to the deceased and saw that blood was oozing out from his head. One stone was lying upon the deceased. In the morning the shopkeeper called at Police Station. Police officials reached the spot and took away the dead body of deceased. I had identified the accused present in court today in Police Station Kotla Mubarakpur. I had shown to the police the place of incident.”

In the cross-examination, the witness stated *inter alia* as follows:

“On 11.02.2006, two other persons namely Harish and Bengali also had taken drink with us. We were five persons in numbers. The dispute had taken place between the deceased and the accused. Deceased was under influence of heavy liquor XXXXXX and (not legible) he was not in position to walk. Six persons were sleeping in the night. We used to sleep on the dala of tempo. We were sleeping on the floor of aforesaid shop. Suresh was sleeping with a karvat. The stone was lying upon him. I had not called the police. After the incident, I immediately made the other persons to awake who were sleeping there and all the persons awaken and gathered. At about 5.00/06.00 AM the shopkeeper called the police and till the time I remained at the spot.....”

11. We notice that even though PW-8 had mentioned the presence of the deceased, himself and the appellant on 11-02-2006, yet in cross examination, he admitted that two others were also present; all the five went to bed. It is also an admitted fact that the deceased was highly drunk. Apparently a quarrel had taken place between the Appellant and the deceased, at about

08:00 PM that night, over a blanket; but the witness stated that the quarrel had been resolved, and all those in the room, went to sleep. He next mentioned about hearing an explosion. Now, this part of the testimony is curious, because the prosecution did not allege any incident that could have resulted in a loud bang or explosion like noise, in the dead of the night. Even if one assumes that this is not of any consequence, the conduct of PW-8, who saw the Appellant fleeing the spot, is most unnatural. He admitted to going back to sleep, after seeing the Appellant running away, and after having seen the deceased bleeding profusely. Similarly he does not mention the reaction of any of the other two; they too had slept with the Appellant, PW-8 and the deceased. The next statement is that the shopkeeper was informed at 5:00 or 6:00 AM on the morning of 12-02-2006. However, the shopkeeper, PW-6 deposed having been told by someone over telephone that a dead body was lying outside his shop, and then having informed the police. This is corroborated by the earliest DD entry, which is at 08.28 AM. PW-8 is silent about what he did after informing the police; he is equally reticent about what the other two (Bangali and Harish) did. According to the IO, PW-22, no one was at the spot, when he reached there. This conduct, i.e. having witnessed the Appellant fleeing the spot, going back to sleep, and delaying informing the police – and most importantly, not taking any steps to provide medical assistance of any kind to the deceased, who was profusely bleeding – raises more questions than clarifies the situation. It is inconceivable for someone who witnesses an accused fleeing the spot, leaving in his wake, a person in a seriously injured condition, to remain unaffected; he would certainly not go back to sleep. That PW-8 claims to have done so, even though he knew the deceased, and had a few hours before the incident, shared dinner and a few drinks with him, renders the

whole deposition, beyond the realms of probability. If one adds to these, the circumstance, that the prosecution made no attempt to involve the other two – Harish and Bengali, either in the investigation, or the trial, the prosecution story is rendered unbelievable. Even the external evidence, in the form of the DD entry, as well as the testimony of PW-6, contradict the deposition of PW-8 about the time when the police was informed; this is not a minor contradiction, because PW-6 clearly stated that he informed the police immediately after receiving information that a dead body lay outside his shop that morning.

12. There is also some merit in the Appellant's submission that the time of death alleged against him, is not borne out by the post-mortem report. According to PW-8, the sound of a loud bang was heard at around 12:00 AM or 1:00 AM, in the night intervening 11-12/2/2006. The post mortem examination and report however fixed the time of death at around 11:00 PM of 11-02-2006. Ordinarily, this discrepancy would not have been material; however, in view of the circumstances surrounding the deposition of PW-8 and the strong possibility of his not actually witnessing the incident, this time difference too had to be explained satisfactorily by the prosecution. No effort was, however, made in that regard.

13. Although a court trying a criminal charge has to assess the material before it, and it is not safe to rely on the quantity of evidence, since what matters is the quality or credibility, yet, the prosecution version in relying on the testimony of a witness who claims to have witnessed an incident, or the crime, has to be critically examined. Thus, assessment of the testimony for the purpose of weighing its credibility is not confined to satisfying that the witness was merely consistent in his testimony; it extends to a critical examination of the entire probability of the facts deposed to, as well as the

conduct of the witness himself. If any of these reveal suspicious or improbable circumstances, the court may be justified in rejecting his testimony altogether (*State of Orissa vs. Brahmananda* – AIR 1976 SC 2488; *Harbans Lal vs. State of Punjab* 1996 SCC (Cri) 312; *Joseph vs. State of Kerala* 2003 SCC (Cri) 356; *Badam Singh vs. State of M.P.* AIR 2004 SC 26). In the present case, the conduct of PW-8 was suspect; it was highly unnatural to say the least. Furthermore, the materials relied on by the prosecution during the trial did not lend corroboration to his deposition. He was, in this court's opinion, an unreliable witness, on whose deposition, the Appellant could not have been convicted.

14. This court is of the opinion that the Appellant's explanation why he jumped parole while undergoing sentence in a previous case, is unacceptable. His explanation given under Section 313 too cannot be believed. However, neither these circumstances, nor the fact that he was missing for nearly six months, can be factors amounting to proof of his guilt beyond reasonable doubt. In this context, the Supreme Court observed, - on the circumstance that an accused had absconded, or evaded arrest, that such a fact is *ipso facto* weak, and cannot be given too much importance- in *Matru @ Girish Chandra v. The State of U.P.* [AIR 1971 SC 1050] holding that:

'The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which

must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.'

A similar view has been reiterated in *Rahman v. State of U.P.* [AIR 1972 SC 110]; and *State of M.P. v. Paltan Mallah & Ors.* [AIR 2005 SC 733]. Therefore, the Appellant's absconding arrest or evading the police or even his having jumped parole, cannot be considered as circumstances adverse to him. His previous conviction (since there is no doubt about it, as he admitted it, in the course of his statement under Section 313, Cr. PC) would certainly mean that he would have to serve the remainder of that sentence, unless it is reversed in a manner known to law.

15. For the foregoing reasons, the Appeal has to succeed. Judgment and order dated 27.01.2011 of learned Additional Sessions Judge are set aside. Since the Appellant has to serve the remainder of his sentence in connection with another crime, the Jail Superintendent shall ascertain the necessary facts, and ensure that he is transferred to the concerned jail, where he shall undergo the remainder of the sentence awarded to him. The Appeal is disposed of in these terms. All pending applications also stand disposed of.

(S.RAVINDRA BHAT)
JUDGE

3rd February, 2012

(S.P. GARG)
JUDGE