

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

**RESERVED ON: 12.03.2012
PRONOUNCED ON: 20.03.2012**

Crl. A.1273/2011, Crl. M. (Bail) 1793/2011

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SATENDER @ BALOO Appellant

Through: Sh. R.M. Tufail with Sh. Farooq
Chaudhary and Sh. Vishal Sehijpal, Advocates.

versus

STATE Respondent

Through: Ms. Richa Kapoor, APP, for the State.

**MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P. GARG**

MR. JUSTICE S.RAVINDRA BHAT

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1. The appellant was convicted for the offence of murder punishable under Section 302 IPC and sentenced to undergo imprisonment for life as well as to pay fine by the judgment of the learned Additional Sessions Judge dated 19.09.2011 in S.C. No. 196/2009. The order of sentence was passed on 24.09.2011. That judgment as well as the order of sentence are under appeal.

2. The prosecution case was that on 03.09.2005 at about 09.30 PM, in a vacant space in the Gali opposite the house of Umed Singh, at Harijan Mohalla, Village Naya Bans, Narela, the appellant hit one Shriram with a

Jelly (a three-pronged forked spade-like weapon), which led to Shriram's death. It was alleged that the crime was witnessed by PW-2, Rajbir and PW-3 Madan Singh. The incident was reported, according to the prosecution, at around 09.53 PM (proved by the PCR form, Ex. PW-13/M). The statement of the first informant – Madan Singh was recorded in the early hours of 04.09.2005 (Ex. PW-13/J) and a First Information Report (FIR) was registered at 12.40 PM (Ex. PW-13/K). The deceased's postmortem was conducted and the present appellant was arrested during the course of investigation. He was charged with committing the offence.

3. The appellant stated that he was not guilty, and claimed trial. In the course of the proceedings, the prosecution relied on the testimony of 13 prosecution witnesses. The accused/appellant also led evidence in the form of depositions of two defence witnesses. After considering all these, the Trial Court held that the appellant was guilty and sentenced him in the manner described earlier.

4. The prosecution case primarily depended on the eyewitness testimonies of PWs-2 & 3. Both had deposed during the trial, to having witnessed the appellant attacking the deceased Shriram from behind with a *Jelly* and fleeing the spot almost immediately. According to them, the incident took place at 09.40 PM.

5. Learned Counsel for the appellant submitted that the testimony of PW-2 is completely untrustworthy because he did not mention that Satender, the appellant was the individual who assaulted the deceased. Learned counsel highlighted the fact that in the cross-examination, PW-2 was confronted with his previous statement recorded during the investigation and he admitted that

he had not named the appellant as the deceased's attacker. It is also submitted that in the cross-examination, PW-2 admitted that some criminal cases were pending against him as well as PW-3 Madan Singh in P.S. Narela. Therefore, the counsel emphasized that as a result there was a strong possibility of PW-2 being a false witness who was not present at the spot and was sought to be planted as an eyewitness in the trial to falsely implicate the appellant.

6. Impeaching the credibility of PW-3, learned counsel submitted that the possibility of his being a witness also was highly unlikely. In this regard, it was submitted that both PWs-2 and 3 said that the body lay on the road the whole night. Learned counsel highlighted the fact that the testimony of PW-3 is untrustworthy, since he claimed that the distance from his house and that of PW-2 was 20 yards; both were chatting outside Rajbir's house. The scaled site plan (Ex. PW-7/A) reflected that PWs-2 and 3 lived in adjacent houses. According to the testimony of both the witnesses, the appellant allegedly attacked the deceased near Umed Singh's house which was shown in Point 'A' of the scaled map. Learned counsel stressed upon the fact that the site plan reveals that there was a bend in the road to the extent of more than 40 degrees, which rendered it highly improbable that an incident occurring near Umed Singh's house at "A" could have been witnessed by PWs-2 and 3 from point "P".

7. It was also submitted that the other evidence on the record was clearly to the effect that there was no light and that investigation had to be carried-on with the aid of a torch, expressly deposed to by PWs-11 and 12 in this regard.

8. The appellant's counsel argued that if in fact PWs-2 and 3 had observed the incident as claimed by them, they would have ensured removal of the dead body. Their testimonies as well as those of other police witnesses pointed to the body lying on the road for 8 hours after the attack on the deceased was seen. In these circumstances, there was every possibility of a blind murder and the appellant being falsely implicated. Learned counsel also submitted that if PW-3 had in fact witnessed the incident, his natural reaction would have been not to spare any effort in taking the deceased Shriram, his brother, to the hospital immediately or at the earliest available opportunity. The absence of an MLC and the testimonies of the witnesses reveal that the body lay unattended till 06.00 AM in the morning. There was no formal examination by a doctor, stating that Satender had clinically died when he is supposed to have, as observed by the police at 10.15 AM, after they reached there.

9. The conduct of both the eyewitnesses in not taking steps to remove the deceased or giving medical attention was highly unnatural and ruled-out the possibility of their having observed the crime. It was also urged that PW-3 was an alleged witness to the recovery of *Jelly*; however, he resiled from that statement and claimed that he was not a party to the recovery. Learned counsel submitted that PW-11 deposed that there was no proper facility of street light at the spot and that the *Gali* was dark. The police, according to him, had torches which were used. PW-12, submitted counsel, admitted that the spot of occurrence was at a distance of 35 metres from the house of PWs-2 and 3. He crucially admitted that anyone standing near Rajbir's

house or Madan Singh's house could not see the individuals standing at the spot of occurrence.

10. The learned APP argued that the testimonies of PWs-2 and 3 are credible and the Trial Court did not commit any error in convicting the appellant. It was argued that the question of false implication had to be ruled-out in this case since the crime was reported very early, i.e. at 09.53 PM and the statement of informant was recorded just after 12.00 midnight on 04.09.2005. The FIR was registered at 12.40 AM on that day. The appellant's complicity in the crime and the manner in which he attacked were clearly deposed to by both eyewitnesses whose credibility could not be impeached during their cross-examination. So far as the insufficiency of light and other facts are concerned, learned APP argued that since all the persons concerned, i.e. the deceased, the appellant and the witnesses were residents of the same village, the question of mistaken identity would not arise.

11. It was submitted that there was no doubt that Shriram died as a result of the attack almost instantaneously. Hence, the appellant could not take advantage of the fact that the body was taken later to the hospital for the postmortem. Similarly, the use of torch or the angle at which the incident occurred, in relation to the spot where PWs-2 and 3 were chatting with each other, are inconsequential details which could not shake the prosecution's basic story.

Analysis and Findings

12. According to both PWs-2 and 3, the attack on the deceased Shriram took place around 09.40 PM on 03.09.2005. The earliest account of this is undoubtedly in the PCR intimation which was recorded at 09.53 PM (Ex. PW-13/M). The testimonies of PWs-11, 12, 2 and 3 reveal that the police reached the spot at 10.15 PM. The prosecution version after this becomes strange. There is no doubt that PW-3 was the deceased's brother. If such were the case and the police had in fact reached the spot immediately after the attack, there is no explanation why Shriram was not rushed to the hospital as would have been the normal course of conduct. The appellant's argument on this aspect is strong and powerful. If indeed there were two witnesses who saw the incident, and one of them was related to the deceased as a brother, it is highly unlikely as well as unnatural that the relative would let things be and not insist that the body be taken to the hospital for either medical treatment or at least confirmation of death. There is absolutely no explanation forthcoming on the part of the prosecution in this regard. In fact, the evidence of PW-3 reveals that the body continued to lie for almost 9 hours, i.e. till 06.00 AM in the morning.

13. The second aspect which the Court has to take into consideration is the testimonies of PWs-2 and 3. Both claimed to be eyewitnesses to the incident. While great weightage is attached to ocular evidence, at the same time, the Courts always test the depositions on the touchstone of credibility. One criterion which the Court unfailingly apply is the test of consistency. PW-2, during the investigation, did not name the appellant as the one responsible for the crime. This was in spite of the fact that his statement was recorded much later. Therefore, there is a great probability of his version

being suspect; the possibility of his introduction by the prosecution to strengthen its case appears to be strong and cannot be ruled-out.

14. As far as PW-3 is concerned, the prosecution version is that the statement was recorded at around 12.00 PM on 04.09.2005. Facially his deposition appears to completely support the prosecution and seemingly does not leave any room for doubt. However, this testimony has to be carefully scrutinized having regard to the fact that he is a brother of the deceased.

15. Whilst relatives of the victim of a crime are not *per se* disqualified from deposing during the trial, the Courts nevertheless, having regard to the circumstances of each case apply a certain degree of care. During the trial, what has emerged is that both PWs-2 and 3 had a criminal record. Their cross-examination also reveals that the deceased too had a criminal past and certain cases were pending against him. Whereas the possibility of PW-2 being drafted in to support or strengthen the prosecution case cannot be ruled-out, PW-3's testimony requires careful scrutiny because he would (in the eventuality of PW-2's evidence being ruled-out) become the sole eyewitness.

16. The correct approach which the Court should adopt in considering testimonies of relatives' victims of a crime was set-out by the Supreme Court in its decision reported as *Darya Singh v. State of Punjab* AIR 1965 SC 328. It was held that the mere circumstance that a person is interested in the victim as a relative or otherwise cannot lead to the inference that he would be hostile to the accused. At the same time, a close relative of the victim known to share his hostility to the assailant would lead the Court to

carefully scrutinize the evidence. Similar observations were made in *Harbans Kaur v. State* 2005 (9) SCC 195.

17. The application of the above rule would mean that at the first blush, PW-3's testimony cannot be excluded. He was consistent with the version recorded by the police during investigation. However, as noticed earlier, there are certain objective and surrounding circumstances which caution the Court into not basing its findings entirely on such evidence. One of them was indicated earlier, i.e. the un-naturalness in allowing the body to be kept outside for more than 8 hours. The second aspect which throws-up a significant doubt as to the credibility of PW-2 is the testimonies of PWs-11 and 12. Both deposed that upon reaching there, they could not discern any light and the investigations had to be carried-on in torch light. PW-11 stated that the distance from where eyewitnesses saw the incident was 35 metres or about 110 feet from the place of occurrence. If this is the correct position, having regard to the fact that it was late night and there is no mention about sufficiency of light, the possibility of PWs-2 and 3 observing the incident becomes remote. If one, also, takes into account the circumstance that the scaled-site plan (Ex. PW-7A) reflects a steep curve or bend in the road, which would hamper vision from the spot where the eyewitnesses sat, thus ruling-out the possibility of PWs-2 or 3 being in a position to observe the spot where the crime occurred, the entire testimony of PW-3 becomes implausible. This in fact was corroborated by PW-12 who stated that the spot of occurrence could not be seen from where PW-3 was chatting with PW-2. The evidence also indicates that both PWs-2 and 3 mentioned about Shriram being attacked on his abdomen. The testimony of the doctor and the

Postmortem Report, however, speak another story. The death was a result of a blow caused by a three-pointed weapon in the armpit of the deceased Shriram (Ex. PW-9/A and the testimony of PW-9). PW-3, the deceased's brother did not support the recovery of the concerned *Jelly* and had to be cross-examined by the prosecution with the permission of the Court. Despite a leading question being put, he stated that the *Jelly* was not recovered in his presence and that some *Jelly* was shown to him in the police station. He clearly denied the suggestion of having witnessed the recovery of *Jelly* at the instance of the appellant from his house. He also denied having signed the memo for the recovery of *Jelly*, Ex. PW-3/C.

18. From the above discussion, what can be seen is that the presence of PW-2 as an eyewitness is highly suspect. Similarly, the possibility of PW-3 being a witness to the incident cannot be accepted at face value, having regard to the other surrounding circumstances, such as his failure to support the prosecution regarding the recovery of the *Jelly*; the evidence emerging on the record about the distance between the place of occurrence and the spot where PWs-2 and 3 allegedly were chatting; the prevailing darkness in the area – objectively supported by PWs-11 and 12, who also mentioned that torches were needed to carry-on the investigation work. The prosecution's complete failure to explain why the body lay-out in the open for more than 8 hours, till around 06.00 AM, only adds mystery to the suspicion that the appellant was somehow sought to be roped in. The natural conduct would have impelled PW-3 to ensure that his brother was rushed to the hospital and not that the body should lie out in the cold for more than 8 hours. The last intriguing aspect is the apparent motiveless nature of the crime. This court is

aware of the legal position that where ocular testimony is forthcoming, proof of motive is secondary; however the facts of this case have thrown up too many question marks about the credibility of the prosecution version. Therefore, proof of motive would have, to an extent, clarified the matter. There is, however no evidence in that regard too.

19. Having regard to the above discussion, this Court is of the opinion that the conviction and sentence imposed on the appellant were unsound; the impugned judgment is, therefore, set-aside. CrI.A. 1273/2011 accordingly succeeds and is allowed. The appellant is directed to be released forthwith unless required in connection with any other offence.

Order dasti.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

MARCH 20, 2012