

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided On : 14.02.2012

+ **CRIMINAL APPEALS NOS.1179, 1250 AND 1506/2011**

CRL APPEAL-1179/2011, CRL.M.(BAIL) 1657/2011

BIJENDER @ VIJAY FAUJI

CRL.APPEAL- 1250/2011, CRL.M. (BAIL) 1756/2011

ANAND SINGH

CRL.APPEAL-1506/2011, CRL.M. (BAIL) 2141/2011

SUKHCHAIN @ BHURA

..... Appellants

versus

STATE

..... Respondent

Appearance: Mr. Ajayinder Sangwan, Advocate for appellants in
Crl. Appeal Nos.1179 & 1506/2011.

Mr. R.K. Singh, Advocate for appellant in Crl. Appeal No.1250/2011.

Mr. Sanjay Lao, APP on behalf of State in all the Appeals.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S. P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. In these three appeals the findings and the conviction handed down by the learned Additional Sessions Judge, in the judgment dated 04.08.2011 in SC No.136/2010 have been challenged. The appellants and the co-accused Anil Kumar were held guilty of offence punishable under Section 302/307/34 IPC and

sentenced to undergo imprisonment for life besides other sentences including fine. All substantive sentences were directed to operate concurrently.

2. The prosecution alleged that in an incident which took place during the night intervening 14/15.05.2007, the appellants severely beat up Parvez, PW-4 and others i.e. Najim and Karan Singh @ Billu. It was alleged that PW-4 used to work in truck No. HR-46C-6332 and that Billu and Najim (the deceased) were drivers on duty. That truck as well as another truck, (HR-46B-6332) were used to ferry goods to specific destinations. One of the appellants Sukhchain @ Bhura was the driver of the second vehicle HR-46B-6332 and the other driver was Gandhi i.e. the appellant Anand. All of them allegedly worked for Vijender Singh @ Fauji. It is alleged that the goods had been unloaded at some place in Andhra Pradesh, a few days before the incident. PW-4 stated that some money received after unloading the goods had been stolen. The accused Sukhchain and Anand suspected PW-4 and the deceased as those who had committed theft. It was alleged that all of them threatened PW-4 and the deceased. After the trucks returned to Delhi, Vijender Singh @ Fauji called PW-4 and Billu inside the office on the first floor. The other three accused were also present at that time. Fauji apparently enquired whether PW-4 had committed theft which he denied. It was alleged that similarly Billu and Najim were also questioned. PW-4 stated that all of them were “taken to task” and subsequently severely beaten with *dandas* in the office itself by the accused. Najim succumbed to the beating in the office; Billu was however alive but badly injured. PW-4 too was injured. The police was informed and the injured as well as the deceased were taken to the hospital. The next morning statement of complainant Billu as well as that of PW-4 and others were recorded by P.S. Samaipur Badli; this led to lodging of an FIR (No.417/2007 at 9.00 AM). The appellants and Anil Kumar were arrested during the investigation on 15-05-2007

and they were subsequently charged with committing the offences. They denied guilt and claimed trial.

3. The prosecution examined 26 witnesses to bring home the charges and also relied upon materials such as the MLC, post mortem report and other exhibits. After considering all these, the Trial Court by the impugned judgment held that the appellants along with co-accused Anil Kumar were guilty and sentenced them to undergo the terms of imprisonment described earlier in this judgment.

4. Counsel for the appellants urged that the Trial Court fell into error in concluding that the appellants were guilty. It was argued that the star witness i.e. PW-4 did not support the prosecution. Though in his initial examination-in-chief this witness mentioned about the attack upon the deceased and upon him by the accused, his story collapsed during the cross examination. Learned counsel highlighted that the witness resiled from his earlier testimony and he clearly deposed that his statement was recorded by the Police three or four times and also denied having signed on any statement. It was urged that PW-4 confirmed to the previous story to the extent that all the injured and the accused had gone with loaded trucks and returned from Andhra Pradesh on the day of incident and had parked the trucks somewhere at Azadpur Mandi. He deposed that Najim and Billu had consumed liquor in the truck in his presence after which they went towards nearby *jhuggis*. He saw 10-15 minutes later that there was some quarrel near the *jhuggis* and residents were armed with *lathis* and were beating drivers and conductors who came their way. Counsel highlighted that PW-4 clearly stated that the mob was beating Najim and Billu and when PW-4 tried to save them he too was beaten. It was argued that Najim and Billu went to the office building in order to save themselves from the attackers. Having regard to these facts and that the witness contradicted himself during the deposition it was unsafe for the Trial Court to base its findings on the testimony of this witness.

5. It was next urged that the second piece of evidence which persuaded the Trial Court to return the finding of guilt was the so called dying declaration by deceased Billu, produced as Ex. PW-11/B. Learned counsel submitted that no credence could be given to this dying declaration since even according to the prosecution it was made to a member of Police Force. Learned counsel for the appellants submitted that the said dying declaration was not witnessed by anyone and that the doctor who is alleged to have examined the deceased, did not depose in the proceedings before the Trial Court. Counsel highlighted the fact that the injured Billu though in a critical condition survived for 10 hours before his death and if necessary the police could have recorded his statement before a Doctor. The absence of any doctor, contended learned counsel rendered the said dying declaration fatal and should not have been believed by the trial court in convicting the appellants.

6. It was urged that even though the incident is alleged to have occurred at 12.30 AM during the night intervening 14/15th May, 2007 the FIR was in fact lodged at 9.00 AM on 15.05.2007. Learned counsel argued that the earliest document i.e. MLC revealed that the police had taken the injured and the deceased to the hospital at 03.20 AM. Despite this and the availability of the materials no steps were taken to lodge the First Information Report early, which strongly pointed to manipulation and possible false implication.

7. Learned counsel for the appellants took serious exception to the impugned judgment in so far as it preferred the testimony of PW-4 only to the extent of his examination-in-chief and discarded the cross-examination. Counsel emphasized that this witness could not have been relied upon since he conceded that the police had recorded three separate statements and that he had signed on blank papers. During cross-examination it was also elicited that the police reached the place of occurrence much earlier than was stated during the trial and at their insistence, the

appellants were named and implicated as the perpetrators of the crime. Although under certain circumstances it is possible for the Court to accept only a portion of the testimony of an eye witness, that should be resorted to in rare and exceptional cases. The present case, submitted counsel, did not disclose any unique or special features which justified the Court in accepting the version of PW-4 in examination-in-chief and discarding the version given during the cross-examination.

8. It was argued that the prosecution story regarding recoveries allegedly made in this case, and put against the accused, were entirely unbelievable, and the Trial Court correctly disregarded them. The impugned judgment, however, fell into error in not taking into consideration that this, like the delay in the recording of the FIR, and the fabrication of the dying declaration, rendered the prosecution story unbelievable.

9. Learned counsel for the appellants submitted alternatively that even if the prosecution was assumed to have proved all the allegations, at best the facts proved showed that the accused could have harbored the intention to commit a crime under Section 304 Part II IPC and not under Section 302. Elaborating on this aspect, it was urged that the 4th exception and the concerned Explanation to Section 300 IPC together with the surrounding circumstances of this case showed that the accused did not have the intention of killing or committing murder but on the other hand got carried away by the heat of the moment and started beating the deceased as well as PW-4. The medical report too corroborated this aspect because the doctor who deposed during the proceedings stated that death was not the result of any single injury but caused by the cumulative effect of all the blows given to the deceased. Even the nature of injuries were such that no single blow was so deadly or serious as to cause death. Therefore, it was urged that even if it were held that the prosecution had proved all the facts as alleged, the conviction had to be altered to one under Section 304 Part II IPC.

10. The learned APP argued that the impugned judgment does not disclose any error or compelling reason for this court to interfere with the Trial Court's findings. It was pointed out that PW-1, in the examination in chief had clearly corroborated the prosecution version. The same day, i.e. 20-3-2008, the Court recorded in its order sheet that the IO had mentioned that some material witness had been extended threats, and that he had been *gheraoed* outside the court by some unknown persons. Counsel for two accused wanted adjournment, to cross examine the witness; the request was refused. On that day, the counsel for two accused refused to cross examine PW-4; the court waited for quite some time, and ultimately due to non-cooperation from the counsel, adjourned the proceedings. Only counsel for the accused Anand cross examined PW-4 that day. This cross examination was important, because PW-4 stuck to his version, given in the examination in chief recorded during the course of the day. The witness was next cross examined on 20-04-2009, by which time the accused were able to prevail on the witness; in cross examination, he was made to say that the beatings given to the deceased, were not by the accused, but by some mob from a nearby *jhuggi*.

11. The learned APP argued that there is, in law, nothing which debars the court from looking into a dying declaration made to a police officer, by the victim of a crime. Such dying declarations have the same evidentiary value, and would be subjected to the same tests of reliability and credibility, as are used in those cases where the victim makes such statements to others. The law does not have any stereotypes, either about the making or form of the dying declaration, or the class of individuals or officials who can evidence it. The dying declaration clearly implicated the appellants and the co-accused, and was corroborated in all material particulars by PW-4, and the Trial Court did not err in relying on it.

12. The learned APP urged that the evidence of PW-4 cannot be discarded merely because he did not entirely support the prosecution. He relied on the

decision reported as *Khuji Vs. State of Madhya Pradesh* AIR 1991 SC 1853 to say that the Court would appraise the credibility or trustworthiness of the statement of witnesses made before it, on an overall consideration of the evidence, and would not be swayed by the fact that the witness did not support the prosecution version in entirety. The relevant extract of the said decision, relied on, for this purpose, reads as follows:

"6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof."

13. The judicial record reveals that in this case, the earliest intimation about the incident was received by the police, at around 03:25 AM early morning of 15-05-2007. PW-4 was taken to the hospital at 03:20 AM, by PW-15, who deposed about it. The MLC of Parvez was recorded as Ex. PW-8/A. Similarly, Najim, who had died by then, was taken to the hospital at 04:00 AM; even Karan @ Billu, who was then alive, was taken to the hospital by 04:00 AM. This is evidenced by their MLCs, Ex. PW-12/A and PW-8/B. PW-24 deposed about the circumstances under which the two, Najim and Billu were taken to hospital; apparently he was patrolling the area in the PCR VAN, when he noticed a crowd. He learnt about the incident, and by then the CATs ambulance had reached there. He took one of the injured in the PCR van to the hospital, and the ambulance took the other person to the hospital. The FIR in the case was recorded at 9:00 AM. Facially, the sequence suggests that there is some delay in the recording of the FIR. However, a careful reading of the testimonies of PW-4 and PW-26 would reveal that the former was seriously injured; his statement was recorded later. On the other hand, when apparently Billu was in a position to record his statement, PW-26 took it down; that formed the basis for the FIR. Apart from this feature, we also notice that the

magistrate was given the special report, of the incident, and he made a noting on the copy of the FIR (Ex. PW-7/A) at 10:00 AM. PW-4 has further deposed that he was hospitalized for about two days, after the incident. Having regard to all these facts, this court is of opinion that the Appellant's argument about delay in recording the FIR being fatal to its case, is unmerited.

14. We next consider the most important evidence, in the form of ocular testimony of PW-4. He, like the accused, and the deceased, was employed by Vijender @ Fauji. The two trucks owned by the latter, according to the witness had gone out of Delhi, to somewhere in Andhra Pradesh. When the goods were unloaded, and the amount was collected, a theft of some money took place. Sukhchain and Anand suspected PW-4 and the deceased as the persons responsible for the theft. Though the deceased and PW-4 denied any role, the accused threatened them. All of them started their return journey. When the witness and the deceased returned to Delhi, Vijender @ Fauji called them to his office. The accused were also present. The three of them, i.e PW-4 and the two deceased, were again accused of having stolen money. They denied guilt. At that stage, Fauji and the other accused started beating them. Najim collapsed and died. Billu and PW-4 were injured. The police reached the spot, and took them to the hospital.

15. This court notices that although PW-4 contradicted his statement in cross examination, that was more than a year later. Curiously, he was cross examined on behalf of one of the accused the same day, in 2008. He did not resile from the statement made in examination in chief. Another interesting feature is that the witness also confirmed that the statement of Billu was recorded by the police. Furthermore, the record also discloses that though counsel for Anil and Fauji sought adjournment, (which was refused), they chose not TO cross examine the witness on 20-3-2008. The court deferred cross examination on their behalf. Even on the adjourned date of hearing, the cross examination of the witness could not be

undertaken. Ultimately, cross examination was conducted on 24-07-2009. This time, PW-4 changed his version, and stated that some *Jhuggi* dwellers had attacked the deceased, as well as Fauji.

16. In the decision, reported as *Khujji v. State of M.P.* (1991) 3 SCC 627 the Supreme Court held that:

"The evidence of P.W. - 3 Kishan Lal and P.W. 4 Ramesh came to be rejected by the trial court because they were declared hostile to the prosecution by the learned Public Prosecutor as they refused to identify the appellant and his companions in the dock as the assailants of the deceased. But counsel for the State is right when he submits that the evidence of a witness, declared hostile, is not wholly effaced from the record and that part of the evidence which is otherwise acceptable can be acted upon. It seems to be well settled by the decisions of this Court - Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389 : (AIR 1976 SC 202); Rabindra Kumar Dey v. State of Orissa (1976) 4 SCC 233 : (AIR 1977 SC 170); and Syad Akbar v. State of Karnataka (1980) 1 SCC 30 : (AIR 1979 SC 1848) - that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

Much earlier, in the decision reported as *Raj Singh Vs. The State of Haryana* AIR 1971 SC 2505 the Supreme Court had observed that:

"..... It is now well settled that in each case the Court has to appraise the evidence to see to what extent it is worthy of acceptance and merely because in one respect the court considers it unsafe to rely on the testimony of a witness it does not necessarily follow as a matter of law that it must be discarded in all other respects as well..... The court has to sift the evidence with care in each case and on full consideration of all the relevant material circumstances to come to a decision which part of the testimony of the witness to accept and which to reject."

17. The first two MLCs clearly prove that the police acted on the intimation received, and removed the injured in the early hours of the morning of 15-05-2007. The injured witness, PW-4 was in a serious condition, and apparently his statement was recorded later, during the day. He clearly implicated all the accused. Though he resiled from the earlier statement recorded during the examination in chief, he withstood cross examination and did not budge from the version recorded during investigation. The order sheet also discloses that some kind of threat was held out against PW-4 in 2008, when his statement was recorded first. The accused ultimately completed his cross examination on 24-07-2009, i.e nearly one and a half years after the recording of the examination in chief. Though the court cannot surmise what was the cause for this *volte face*, the reasons are not hard to seek. The witness was either won over by inducements, or was threatened. Yet, the consistency as far as his statement to the police, on the one hand, and his examination in chief, and even the consistency of his version, during his first cross examination on 20-03-2008, makes him reliable, rather than his later deposition. For these reasons, we are opinion that the Trial Court did not err in relying that statement, and in refusing to discard his testimony altogether. Its reliance on *Khujji* was, in the circumstances of this case, justified.

18. As regards the reliance placed by the Trial Court on the dying declaration recorded by a policeman, we notice that there is no bar. The only caveat is that courts exercise caution and discretion in relying on it, without any other corroborative material. In this respect, the following observations in *Dalip Singh and Others Vs. State of Punjab* (1979) 4 SCC 332 are instructive:

"8. We may also add that although a dying declaration recorded by a police officer during the course of investigation is admissible under Section 32 of the Indian Evidence Act in view of the exception provided in sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is

better to leave such dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a magistrate or by a doctor. As observed by this Court in Munnu Raja V. State of M.P. the practice of the Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encouraged. We do not mean to suggest that such dying declarations are always untrustworthy, but what we want to emphasize is that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.”

A similar chord was struck in *Betal Singh v. State of M.P.*, (1996) 4 SCC 203 where it was held that:

“In Munnu Raja v. State of M.P (AIR 1976 SC 2199) this Court has struck a note of caution that the investigating officers, who are naturally interested in the success of the investigation, ought to be discouraged in recording the dying declarations, during the course of investigation. However, in Dalip Singh v. State of Punjab² this Court noticed the above observation and pointed out that it is not meant to suggest that such dying declarations are always untrustworthy. Their Lordships observed: (SCC p. 335, para 8)

“We do not mean to suggest that such dying declarations are always untrustworthy, but what we want to emphasize is that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.”

19. The law about re-appreciation by the High Court in appeals in criminal matters is well settled. Although the appellate court has an obligation to re-assess the entire evidence, and, if there are two views possible, to adopt that which favours the accused, at the same time, its powers are not untrammelled. If the Trial Court’s approach or understanding does not betray any mis-appreciation of law or evidence led during the proceedings, the High Court would defer to that judgment, and refrain from substituting its findings. Applying those standards, we are of the

opinion that the Trial Court was justified in holding that the facts alleged were proved before it by the prosecution.

20. The above observations are however not dispositive of these appeals. The nature of the injuries and the surrounding circumstances in this case, compel to consider what indeed was the offence that the Appellants committed – whether it was murder, and therefore punishable under Section 302 IPC, or was it culpable homicide, punishable under the provisions of Section 304 IPC.

21. Section 300 IPC, the defining provision in such cases, ordains that all culpable homicide shall be deemed to be murder, except in the enumerated circumstances. In this case, the appellants had relied on Exception IV, and stated that the attack on the deceased and the injured witness, was consequent to unrestrained fury, as a result of their denial in the theft of money, owed to Fauji. To invoke Exception IV to Section 300 IPC, the accused has to show that (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. In this case, we notice that though there were several *lathi* blows; the medical evidence, in the form of the doctor's deposition stated that death was not the result of any single injury but caused by the cumulative effect of all the blows given to the deceased. The nature of injuries were such that no single blow was so deadly or serious as to cause death. Furthermore, the accused should not have taken undue advantage of his or their situation. Here, the attack was not pre-meditated; the accusations leveled against the deceased escalated to violence, during which by all accounts, the accused were overcome by the passion of the moment. The injuries to the deceased and the eyewitness were caused by lathi blows.

22. The explanation to Exception IV (*supra*) clarifies that the cause of quarrel is not relevant nor is it relevant as to who offered the provocation or started the

assault. What is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger and must not have taken any undue advantage or acted in a cruel manner. This was underlined in *Surinder Kumar vs. Union Territory, Chandigarh*, (1989) 2 SCC 217, where the Supreme Court observed that:

"where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly."

In *Subran v State of Kerala* 1993 (3) SCC 32, there were 38 injuries, mostly abrasions, on the body of the deceased. The court held that in the case where the prosecution could not establish the specific acts of the accused, in respect of injuries which were fatal, a conviction for the lesser offence was in order. Recently, in *Yomeshbhai Pranshankar Bhatt v. State of Gujarat*, (2011) 6 SCC 312, modifying a conviction under Section 302, the Supreme Court held that:

"In the instant case, it is clear that the appellant had no premeditation to kill the deceased or cause any bodily harm or injury to the deceased. Everything has happened on the spur of the moment. The appellant must have lost self-control on some provocative utterances of the deceased. These possibilities cannot be ruled out, having regard to the evidence of PW 1. However, the fact that kerosene was sprinkled on the deceased by the appellant possibly cannot be disputed, in view of the concurrent finding by both the courts and having regard to the materials on record.

30. But whether the case falls under Section 300 clause Thirdly, is very doubtful. Having regard to the facts and circumstances of the case and in the light of defence of the deceased, this Court holds that the case falls under Section 304 Part II and the appellant has already suffered imprisonment for 11 years 2 months. In that view of the matter, this Court holds that the sentence which has already been undergone by the appellant is more than sufficient under Section 304 Part II. However, the sentence of fine is set aside."

23. Having regard to the above legal principles, and the factual conspectus in this case, we are of the opinion that the conviction under Section 302 IPC requires to be altered to one under Section 304, Part I, in respect of the present appellants. Although the facts alleged against the co-accused Anil are identical, we clarify that since he is not before this court in appeal, nothing stated in this judgment shall preclude his contentions; it is open to him to independently challenge the findings of the Trial Court, if so advised, by preferring his appeal.

24. So far as sentence is concerned, we are of the opinion that the facts of this case reveal that the appellants, belaboured the hapless deceased and the eyewitness on suspicion of their having committed theft. Having regard to the position occupied by the appellant Vijender @ Fauji, i.e as their employer, and the roles played by the other appellants, in the peculiar circumstances, we are of the opinion that this aspect has to be duly taken note of in the sentence awarded. The sentence of imprisonment for life awarded by the Trial Court is, therefore, altered, and instead, the appellants are hereby sentenced to undergo RI for 10 years. The other sentences imposed by the Trial Court are left undisturbed; all sentences shall operate concurrently.

25. The Appeals have to succeed in part, to the extent indicated above, and are allowed in such terms.

(S.RAVINDRA BHAT)
JUDGE

February 14, 2012

(S.P. GARG)
JUDGE