

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 273 of 2008

Reserved on: April 30, 2014

Decision on: May 12, 2014

JAI PRAKASH & ORS

..... Appellants

Through: Mr. N. Hariharan, Senior Advocate with
Mr. Rajat Bali, Ms. Smriti Sinha and
Ms. Vasundhara Nagrath, Advocates.

versus

STATE

..... Respondent

Through: Ms. Isha Khanna, APP.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

12.05.2014

1. This appeal is directed against the judgment dated 10th March 2008 passed by the learned Additional Sessions Judge (ASJ), New Delhi, convicting the Appellants of offences under Section 147 read with 149 Indian Penal Code (IPC), 308 read with 149 IPC, 325 read with 149 IPC and 427 read with 149 IPC and the order on sentence dated 12th March 2008 whereby, for the offence under Section 147 read with 149 IPC, each of the Appellants were sentenced to undergo one year rigorous imprisonment (RI) with fine of Rs. 500 and in default to undergo simple imprisonment (SI) for 2 months; for the offence under Section 308 read with 149 IPC, to undergo three years RI with fine of

Rs. 500 each and in default to undergo SI for two months and, for the offence under Section 325 read with 149 IPC, to undergo 2 years' RI with fine of Rs. 500 each and in default to undergo SI for 2 months and, for the offence under Section 427 read with 149 IPC, to undergo six months' SI. The sentences were directed to run concurrently.

2. The case of the prosecution is that on 9th February 1996 Sukhwinder Singh (PW3) after getting his truck (No. HR-10-5772), which was owned by his father, loaded with *badarpur* along with two labourers was moving towards Yusuf Sarai. Kali Charan (since absconding) was the driver of the truck. At around 2.30 a.m., the truck reached Adhchini Village. It is stated that bhangra dance was going on in the middle of road. When Kali Charan slowed down the truck, some persons boarded the truck from the driver's side as well as the conductor's side asking them to move the truck. Some persons came in a Maruti car and stopped their car in front of the truck and started assaulting Kali Charan by pulling him down. Some 10-15 persons also arrived at the spot. PW-3 was also beaten by them and the truck was set on afire. When the mob tried to throw PW-3 into the burning truck, some people intervened and they were saved. However, PW-3 was mercilessly beaten. It is state that Kali Charan was beaten to the extent that he was half dead. Thereafter, they put him in a *rehri* and threw him on a heap of rubbish. PW-3 and Kali Charan were moved to AIIMS Hospital.

3. Arising out of the above incident a DD (No. 5A) was noted after a call was made to the Police Control Room (PCR).

4. Thereafter, FIR No. 114 of 1996 was registered at Police Station Malviya Nagar. After completion of the investigation, a charge-sheet was filed against the five accused. Accused Nos. 1 to 4 were sons of Om Prakash. Jai Prakash (A-1) had in fact got married on that very date and the *barat* was returning from the wedding.

5. The charge-sheet alleged that all five persons had committed offences punishable under Section 307 IPC and accordingly the learned Metropolitan Magistrate (MM) committed the case to the Sessions Court. By an order dated 17th July 2002, the five accused were charged with the aforementioned offences under Sections 147, 308, 325 and 427 read with 149 IPC. The accused pleaded not guilty and claimed trial.

6. Arising out of the same incident, another DD No. 34A was noted pursuant to the information received from the PCR. DD No. 34A was entrusted to Assistant Sub Inspector (ASI) Ram Avtar (PW-10). PW-10 found that the truck had run over Ram Prakash, the eldest brother of A1 to A4 in the present case, killing him. An FIR No. 113 of 1996 was registered under Section 279/304 IPC. The trial arising out of the said case is stated to be pending. Further, although the two FIRs were registered arising from the same incident, the trial of the said FIR No. 113 of 996 was not joined with the trial that had arisen out of the FIR

No. 114 of 1996. By some coincidence the same PW10 was assigned FIR No. 114 of 1996 as well.

7. In the case arising out of FIR No. 114 of 1996, the prosecution examined twelve witnesses. PW1 (Jai Singh), was put forth as witness to the incident. However, he turned hostile and denied making any previous statement to the police. He was a taxi driver at the stand near the IIT Gate where the truck was burnt. PW2 Shakuntla was put forth as eye-witness. She stated that on 9th February 1996 at around 2 am or 3 am she was present at her house A-2, Village Adichini, New Delhi. She was stated to be a transporter. It is stated that she heard the noise and came out of her house and she noticed that a large crowd had collected at the workshop of Jai Prakash (A1) "in front of my house". She noticed that the baratis had returned from the marriage. She claimed to be having a cordless phone with her. She then stated:

"In the meanwhile, a truck came from the side of Mehrauli. I saw Ram Parkash boarding the truck from the driver side and the said Ram Parkash caught hold of the 'Daala' of the truck with his left hand, and he tried to drag out the driver of the truck with his right hand. All of a sudden the driver of the truck started running the truck with a speed in that process Ram Parkash fell down. Kali Charan was driving that truck and Sukhvinder s/o owner of the bus was sitting in the truck. After some time I saw that all the accused persons present in the court had brought Kali Charan and Sukhvinder from the truck, and

they started beating Sukhvinder and Kali Charan with fists and kicks. I called the police, Accused persons were saying to each other to bring petrol and set Sukhvinder Singh on fire. But the truck was not set on fire in my presence. After about ten minutes the police reached there. Police took the injured to the hospital, but I do not know as to what happened with the accused persons later, as the accused persons had already left the spot.”

8. In her cross-examination, it transpired that she was aware of some previous litigation involving the father and brothers of the accused. She was confronted with the improvements made by her in her deposition by drawing her attention to the statements made by her under Section 161 CrPC. She stated that she did not see any other person trying to hold the truck driver other than Ram Prakash. She stated “Truck did not halt at the place where deceased Ram Prakash was trying to board the truck, however, it was slowed down very much”. She further stated that the “truck was not at a high speed after Ram Prakash fell down but speed may be 30 to 40 K.M. at that time”.

9. As regards the other eye-witness, Surinder, (PW4), she stated as under:

“The house of Surinder is far away from the office of Surinder, and it takes about five minutes to reach there, from the house to the office. The office of Surinder remains open even upto 10 to

11 pm which is on the main road. It is correct that his house is in the village.”

10. Finally, she admitted in her cross-examination that her house was far away from the gate of the house of the accused persons which could be approached from Sarvodaya Enclave. She denied that she was deposing falsely because of previous enmity with the accused persons.

11. This witness is supposed to have clearly stated that after Ram Prakash fell down, she saw “that all the accused persons present in the court had brought Kali Charan and Sukhvinder from the truck, and they started beating Sukhvinder and Kali Charan with fists and kicks”. However, she did not individually identify each of the accused in the Court although she was deposing more than 7 ½ years after the incident. She also did not attribute any individual roles to each of the accused for their alleged assault on PW3 and Kali Charan. Another factor to be noticed is that according to her there was a noise even before the incident happened. She is supposed to have actually seen two persons burning the truck from the driver’s side and then him falling down.

12. The next important witness of the prosecution is Surender Kumar Sharma (PW4). He is also resident of Village Adhchini. He stated that around 3.00 am he heard some noise coming and some ladies were singing. He got up and came down in front of his shop and saw

“some persons beating two other persons with fists and kicks”. He then heard Rishi Parkash who he had identified in the Court “saying that they put the truck on fire”. He then stated that while Jai Prakash (A-1), Hari Prakash (A-2), Ved Prakash (A-3) were beating PW3 and Kali Charan with kicks and fists, some public persons were trying to save them. He heard the accused saying that the boys should be thrown in the garbage and later put them on fire.

13. In his cross-examination, PW4 admitted that A-1 to A-4 were his cousins and were running a workshop at the side of his shop. He stated he did not see Suresh (A-5), brother-in-law of A-1, present at the spot. He stated that A-5 was a resident of Gurgaon. He further stated that his house No. 6A was about 50-60 meters from the main road and House No. 100 was on the main road. The house of the accused was by the side of his house. He admitted that there were many houses between his House No. 6A and Mehrauli Road, and that Mehrauli Road is not visible from house No. 6A and that his family lives in both House Nos. 6A and 100. There was a shop in House No. 6A. He stated that the quarrel was taking place in House No. 100 “and when I came down, I saw the quarrel in front of house No. 100”. He claimed that the truck was burning at a distance of 250 to 300 yds from his shop. He was confronted with his being a witness in the proceedings under Section 107/150 CrPC in respect of Rohtash (husband of PW2) and one where he himself was an accused in the said case, which was lodged by Om Prakash (father of the accused persons, i.e., A-1 to A-5). He also claimed not to remember the case

arising out of the FIR No. 146 of 1996 of P.S. Malviya Nagar under Sections 147 and 148 IPC in which the accused persons were acquitted and in which he was the Complainant. He denied that there was an old enmity between the accused persons and him.

14. PW5 (Pawan Razak) was a labourer who is supposed to have been travelling in the truck. He, however, did not support the prosecution. He too stated that the truck was stopped by a Maruti car. He claimed to have run away from the spot when he saw PW3 and Kali Charan being beaten. He declined to identify the accused persons in the Court.

15. What is significant as far as the evidence of PW4 is concerned is that he makes no mention of the fact that Ram Prakash was run over by the truck and was killed. What is further strange is that in the site plan drawn in the FIR No. 114 of 1996 in which PW10 was the IO, there is no indication that the truck had run over Ram Prakash and had come to halt near the IIT Gate. This site plan in FIR No. 114 of 1996 (Ex PW-10/E) does not also indicate the house of PWs 2 and 4 and the distance of their houses from the spot when the truck came into a halt. Strangely the site plan in FIR No. 113 of 1996 has also been placed on record although not exhibited. This site plan clearly shows the point at which the truck hit Ram Prakash, the second point near the IIT Gate where his body was found and the third point further ahead near the IIT Gate where the truck was found halted. It is not understood as to why there can be two site plans arising out of the same incident, i.e.,

one showing where the dead body of Ram Prakash was lying and another not even mentioning this fact.

16. The other person who was the star witness of the prosecution is PW3 (Sukhvinder Singh), the injured eye-witness. Strangely, he too does not mention the fact that the truck run over Ram Prakash and killed him. As regards identifying the accused, he too was unable to identify each of the accused. What is significant is that there was no test identification parade (TIP) conducted for PW-3 so as to enable him to identify the accused. Therefore, he was actually identifying them for the first time in Court on 15th September 2003, i.e., more than 7 ½ years of the incident.

17. Mr. Hariharan referred to the decision of the Supreme Court in *Sheo Shankar Singh v. State of Jharkhand (2011) 3 SCC 654* to emphasize the importance of consistent positions of two eye-witnesses for the trial Court to believe credibility of the prosecution case. He further referred to the same decision to emphasize the necessity of holding the TIP and submitted that, while it is not mandatory that a TIP should be held in each case, as observed in *Malkhansingh v. State of M.P. (2003) 5 SCC 746*, it is usually considered “a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings.” While failure to hold a TIP would not make the evidence of identification in Court inadmissible, it has been

emphasized that “these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of evidence on record before pronouncing upon the acceptability or rejection of such identification.” [see *Pramod Mandal v. State of Bihar* (2004) 13 SCC 150]

18. There is yet another troubling aspect in the matter as regards the inconsistent versions of the so-called eye witnesses, PW-3 and PW-4. As already pointed out, neither PW-3 nor PW-4, talk of the truck having run over Ram Parkash. PW-10 SI Ram Avtar confirmed that “it is correct that when I reached at the spot lot of baratis were still at the accident spot and the deceased was one of the barati.” Strangely PW-2 who was supposed to be an eye- witness, in her examination-in-chief, did not talk of Ram Parkash actually being run over. She only stated that Ram Parkash caught hold of the ‘Daala’ of the truck with his left hand, and he tried to drag out the driver of the truck with his right hand. She further stated that all of a sudden the driver of the truck increased the speed of the truck, and, in that process, Ram Parkash fell down. This is a clear improvement of her statement (Ex.PW-2/DA) where she did not state the above fact, which she was subsequently confronted with in her cross-examination. PW-2 did not talk of the truck being set on fire whereas PW-3 did. PW-2 did not mention about the presence of PW-4. She made it improbable that PW-4 Surender Kumar Sharma was present there as his house is far away from his office and since, according to her, it would take about five minutes to reach his office. It is for the ASI to actually indicate

where the house of PW-2 and PW-3 was situated on the site plan. It must be remembered that the time of the incident was between 2.00 and 3.00 am. The credibility of their version would be decided on the possibility of their being identified. What is also unexplained is the role of PW-10 himself. While he prepared two site plans, one for the FIR No. 113 of 1996 and the separate one for this case arising out of FIR No. 114 of 1996, he has not explained why in the site plan prepared for the present case the fact of Ram Parkash being run over by the truck and the position of a dead body of Ram Parkash, which are two critical factors, are not mentioned. According to PW-4, "ASI Ram Avtar came to me at about 7.30 am for recording my statement." However, the ASI himself stated that "I came back to Adchini again and searched for eye-witnesses but none met me there". When the trial Court repeatedly asked him to clarify this aspect, he gave the following answer:

"It is correct that incident of accident as well as to beating of driver etc., had taken place at the same time and it was witnessed by lot of baratis who were available at the spot when I was there investigating the accident. By my saying that no eye-witness met me at the spot and in hospital I mean that no one was ready to tell me about the incident at that time. I recorded statements later on."

19. This is also inconsistent with PW-2 stating that she was one of the persons who called the police. She claimed to have reached at the spot at the time when Ram Prakash had fallen down from the truck while

trying to pull down the truck driver. She stated that “it is correct that Inspector Ajit Singh had visited me in connection with this case. He asked me to sign some papers and at this asking I signed the same.” The investigation in the present case, therefore, leaves much to be desired. It is not clear as to where exactly the beatings to PW-3 and Kali Charan took place. According to PW-2 the “truck did not halt at the place where deceased Ram Parkash was trying to board the truck.” It obviously did not happen in front of the house of PW-2 and PW-4. The position of the truck’s halt in front of their houses makes it impossible for them to have seen the beating of PW-3 and Kalicharan. Yet, PW-4 stated that “the quarrel was taken place in house No. 100 and when I came down I saw the quarrel in front of house No. 100.” This location is not indicated at all in the site plan prepared by PW-10. A further factor is that PW-10 was also entrusted with the investigation of FIR No. 113 of 1996. He stated that “on 9th February 1996 I was after midnight of 8th I was already in Adichini attending a call of accident. While I was still in Adichini I was handed over a copy of DD No. 34A (Ex.PW6/B)”. In that case, the incident took place in his presence since the beating of PW-3 and Kalicharan, according to PW-2 and PW-4 had happened between 2.00 and 3.00 am. The Court therefore, finds that there are too many unexplained factors. Added to this, as per the MLC of Kalicharan (Ex.PW-7/B) none of the injuries are in the nature of grievous injury. It appears that Kalicharan was also discharged on the same day. In another matter he is an absconder, therefore, he could not be produced as a witness. It must be remembered that according to PW-3, Kalicharan was also

almost half dead. This is not borne out by the MLC. Of course it is a fact that PW-3 had been hospitalized till 22nd February 1996. As far as MLC (Ex.PW-7/A) is concerned, one of the injuries on the mouth was found to be a 'bleeding present jaw fracture.' The doctor (Dr. Chander Kant) who prepared the MLC was not examined. Therefore, this question remained unexplained. There is no X-ray on record as to whether there was a fracture in the jaw.

20. As regards the *alibi* of Rishi Prakash and Ved Prakash, PW-11 (Ajit Singh), ACP (CAW) North East, in his evidence, stated as under:

"I also interrogated one doctor Nagar who told me that accused Rishi Prakash and Ved Prakash had come to him at his house/clinic asking him to visit at Village Adchini, Aurvindo Marg where the accident had occurred to medical examined their brother Ram Prakash, the doctor told me that he had visited the place of accident at Adchini and found the injured Ram Prakash was dead."

21. The above evidence probablize the version of the accused and in particular Ram Prakash and Ved Prakash in their statement under Section 313 Cr.PC wherein they stated that "We were not even present near the place of this incident. How a bride groom or his family members can participate in these types of incidents."

22. Another aspect of the matter is the Maruti car which is supposed to have been parked in front of the truck. While PW-2 does not mention any Maruti car PW-3 states that “some of the persons came in a Maruti car and came in front of the truck, stop it and started assaulting the driver of the truck with fists and kicks and pulled him down.” Neither was the Maruti car recovered nor were its whereabouts ascertained. Clearly, none of the accused emerged from the Maruti car even according to PW-3. PW-10, who was already at the spot investigating the accident case arising out of DD No. 5A (which was incidentally not produced), also does not mention any Maruti car having been found in front of the truck.

23. The Court accordingly finds that there are two common incidents with inconsistent narrations by the prosecution witnesses. In particular, the eye-witness testimonies cannot be reconciled.

24. Turning to the impugned judgment of the trial Court, the focus appears to be on whether PW-2 and PW-4 were partisan witnesses. There are two hostile witnesses, PW-1 and PW-5, both of whom have mentioned that the truck was parked. However, both have turned hostile as regards the accused being involved in giving beatings to PW-3 and Kalicharan. As regards the beatings to PW-3 and Kalicharan, the evidence on record is that of PW-2, PW-3, PW-4 and PW-10. What the trial Court appears to have missed is that neither

PW-2 nor PW-4 identified the five accused individually in the Court and have not described the role of each of the accused. This appears to have been totally missed by the trial Court. Also, what was completely missed was the failure to hold TIP proceedings to enable PW-3 to identify the accused. The trial Court also does not appear to have noticed the anomaly and did not try the present case together with FIR No. 113 of 1996 as both arose out of the same incident. In this case, PW-4 states that his statement was recorded by the police at around 7.30 am, though it contradicts the fact that the *rukka* was not sent on statement more than one and half hour, i.e., 8.30 am without mentioning the statement of any other witnesses. This probablizes the fact that PW-3 was not even present at the spot to witness the statement. In the above circumstances, the failure to hold TIP proceedings to enable PW-3 to identify the five accused and to rely on his identification, for the first time in Court nearly seven months, after the incident was unexplainable.

25. In the circumstances, the Court is unable to concur with the view expressed by the trial Court that all the accused persons along with other members of the unlawful assembly who had gathered there gave beatings to Kali Charan and PW-3 cannot be said to have proved beyond reasonable doubt. Consequently, this Court gives the Appellants the benefit of doubt and acquits them of the offences with which they have been charged.

26. Accordingly, the impugned judgment of the learned trial Court dated 10th March 2008 and the order on sentence dated 12th March 2008 are hereby set aside.

27. The appeal is allowed in the above terms.

S. MURALIDHAR, J.

MAY 12, 2014

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