IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 19th November, 2014
Delivered on: 26th November, 2014

CRL.A. No. 664 of 2008

DEEPAK @ D.K. ..... Appellant

Through: Mr. R.N. Sharma, Advocate with Appellant in person.

versus

THE STATE (GOVT. OF NCT OF DELHI) ..... Respondent

Through: Ms. Isha Khanna, APP

WITH

CRL.A. No. 665 of 2008

KAPIL @ DAYAL ..... Appellant

Through: Mr. R.N. Sharma, Advocate with Appellant in person.

versus

THE STATE (GOVT. OF NCT OF DELHI) ..... Respondent

Through: Ms. Isha Khanna, APP.

AND

CRL.A. No. 806 of 2008

SURENDER @ JEETU ..... Appellant

Through: Mr. Mukul Sharma with Mr. Ramesh K. Sharma, Advocate with Appellant in person.

versus

THE STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through: Ms. Isha Khanna, APP

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
26.11.2014

1. These three appeals are directed against the impugned judgment dated 23rd July 2008 passed by the learned Additional Sessions Judge ('ÁSJ') in SC No.83 of 2006 holding the Appellants guilty of the offences under Section 304 Part-II/34 of the Indian Penal Code ('IPC') while acquitting them of the offence under Section 302/34 IPC, and the order on sentence dated 24th July 2008 whereby each of them was sentenced to undergo seven years rigorous imprisonment ('RI') with a fine of Rs.5,000 each and in default to undergo additional RI for three months for the aforementioned offence.

The case of the prosecution

2. The case of the prosecution is that Sunny (PW-2) son of Radhey Shyam (PW-1) was working as helper/scooter mechanic in the shop of his uncle Banwari Lal (PW-3A) at Roshnara Road, Delhi. PW-2 along with the deceased Deepak, son of PW-3A, and PW-3A used to sit at the said shop. According to PW-2 on 23rd May 2005 at around 11.30 am, he and his cousin Deepak (deceased) were working at the shop and washing the goods of the vehicles. According to PW-2 at that time Deepak, son of Ramesh Chand, Accused No.1 (A-1) [the Appellant in Criminal Appeal No.664 of 2008] came there and started talking with Deepak, the cousin of PW-2 in a 'joyful manner'. Along with A-1 were Surender @ Jeetu (A-2) [the Appellant in Crl.A.No.806/2008] and Kapil @ Dayal (A-3) [the Appellant in Crl. A. No.665 of 2008]. Deepak, the cousin of PW-2, was busy in work

so he asked A-1 to go away from there since he apprehended that if his father (PW-3A) came there he would scold them. According to PW-2, in the meantime A-1 pushed cousin Deepak and the latter objected. He then was caught hold by A-2 and A-3. A-1 then gave a cricket bat blow on the head of the cousin Deepak who fell down on the floor. Blood started oozing from his head. According to PW-2, both A-2 and A-3 exhorted A-1 to give the blow.

3. PW-2 took his cousin Deepak to Hindu Rao Hospital ('HRH') in a three wheeler scooter rickshaw. Sub Inspector Vijay Kumar (PW-18), who was the initial Investigating Officer ('IO'), stated that on 23rd May 2005 he was posted at Police Station ('PS') Sabzi Mandi on emergency duty. He received Daily Diary (DD) No.15-A (Ex. PW-20/E) which noted that Constable Ganga Ram had given information that in an auto repair shop near Ramayan Bhawan Temple at Roshnara Road there was a fracas going on and one injured boy was being taken to HRH. On receiving the said DD, PW-18 along with Constable Kiran Pal (PW-10) reached the HRH where he collected the MLC of the injured Deepak (Ex. PW4/A). The MLC showed that the injured was brought there at 12.10 pm, by PW-2 with the alleged history of physical assault. The remarks were "CLW (contused lacerated wound) over forehead approximate 3 inches in length". The injury was categorized as a blunt injury. There were two consecutive remarks one at 1.30 pm, and the other at 2.50 pm, that the patient was unfit for statement. Deepak was shifted to Sushruta Trauma Centre ('STC') at 3.25 pm on 23rd May 2005. He, however, died at around 11.30 am, on 26th May 2005 as per the death summary (Ex.PW-8/A) issued by the STC. The post mortem report (Ex.PW-7/A) prepared by Dr. Kulbhushan Goel (PW-7) gave the cause of death "brain compression as a result of cerebral injury caused by some hard blunt flat object, diverted upon left side of head". Injury No. 2

which was "stitched wound 3.5cm long transversally placed over right frontal region just right to midline" was stated to have been caused by "blunt force impact". In the opinion it was categorically stated "head injury is sufficient to cause death in ordinary course of nature".

The investigation

4. It appears that initially FIR No. 147 of 2005 was registered under Section 307/34 IPC on 23rd May 2005 and after the death of Deepak the offence was changed to Section 302 IPC.

5. At the HRH itself PW-18 recorded the statement of PW-2 (Ex. PW2/A). PW-18 then prepared the *rukka* and sent it with PW-10 for registration of the case. Thereafter PW-18 along with PW-10 and PW-2 reached STC. The medical examination of PW-2 was also got conducted there. Thereafter, PW-2 and PW-10 accompanied PW-18 to the shop. A private photographer was called and the photographs of the spot (Ex.PW-18/1 to PW-18/3) were taken. The blood stains from the showcase and the floor were lifted and preserved.

6. PW-18 states that the search for the accused persons was conducted on 24th and 25th May 2005. On 29th May 2005, PW-18 and Constable Narender (PW-5) joined the Station House Officer (SHO) Safdar Ali (PW-20) in searching for the accused. When they reached Roshanara Road, one secret informant met PW-20 and told him that A-2 (Surender @ Jeetu) was sitting in the Roshanara Bagh. At the instance of the secret informant at around 11.30 am, the aforementioned police team apprehended A-2 from Roshanara Bagh. According to PW-20 he directed A-2 to keep his face muffled for the purpose of the Test Identification Parade ('TIP'). A-2 was arrested vide arrest memo (Ex. PW5/A) and a personal search was

undertaken (PW-5/B). According to PW-20, A-2 led the police to the shop where the crime took place, and on his pointing out a memo was drawn up at his instance (Ex.PW18/C). He made a disclosure statement (Ex.PW5/C).

7. A-2 was produced before the learned Metropolitan Magistrate ('MM') Ms. Archana Sinha (PW-19). The proceedings of the TIP conducted on 2nd June 2005 (Ex.PW-19/B) shows that A-2 did not raise any objection to participating in the TIP. During the TIP, which was conducted by following the procedure, PW-2 correctly identified A-2.

8. On 31st May 2005, A-1 surrendered in the Court of Mr. Ajay Goel, learned MM (PW-14). He was arrested and interrogated. A one-day police custody remand of A-1 was granted by the learned MM. He was first taken to HRH for medical check-up and then to the police lock up. On the following day, i.e., 1st June 2005, A-1 went to the spot with the policemen where he identified the place of occurrence. Thereafter, A-1 led the police to the railway quarters behind Roshanara Road where there was one *jhuggi* of his *bua* (aunt). From the garbage behind the *jhuggi* he got recovered one cricket bat of 81cm length. It was sealed in a white cloth with a seal of SA.

9. The cricket bat was then forwarded by the SHO to the doctor (PW-7) under a covering letter dated 28th June 2005 (Ex.PW-20/I). On the reverse of the said letter PW-7 gave his opinion that the injuries mentioned in the post mortem report prepared by him "are possible by this weapon (object) or similar such type of another object" (Ex.PW-7/B).

10. On 19th June 2005 it came to the notice of PW-20 that A-3 (Kapil) was already in the custody of the Operation Cell, North-West District, Delhi. A-3 was then formally arrested by SI Rakesh Kumar (PW-17) and an application was made for conducting his TIP. On 21st June 2005 when A-3

was produced before the learned MM for TIP, he declined to participate. The TIP proceedings (Ex.PW-20/H) prepared by Ajay Goel, MM (PW-14) notes that A-3 stated that he did not want to join the TIP "as the witness and his family members knows me very well and I have been shown to them".

11. According to PW-20 on 24th June 2005 he filed an application and was granted one day police custody of A-3. A-3 is stated to have led them to the place of occurrence in the presence of PW-2. According to PW-20, A-3 was identified by PW-2 at the PS.

Statements of the accused under Section 313 Cr PC

12. The three accused were charged for the offence under Section 304/34 IPC. Twenty prosecution witnesses were examined. In their statements under Section 313 Cr PC, the three accused denied the evidence against them. It was stated by A-1 that the statement of PW-2 was manipulated and even the FIR was ante timed. He claimed that his signatures on PW-18/D, E and F were actually taken on blank papers from him under duress. He claimed to have been shown to the witnesses while in police custody. He claimed that no recovery had taken place at his instance and that the bat (Ex. PW-1) had been planted with ulterior motives. He stated that he was not taken anywhere from the police lockup.

13. As far as A-2 was concerned, he too denied the evidence against him. He claimed to have refused to participate in the TIP since he had already been shown to the witnesses in the police station and for conducting the TIP. He claimed that the case has been fabricated with *mala fide* motives. He claimed that he was not muffled with the face and that he was shown to the witnesses.

14. In his statement under Section 313 Cr PC, A-3 (Kapil) denied the

evidence and stated that "I was not at all present at the spot". He also stated that his signatures were obtained on blank papers and converted into the disclosure statement and that he declined to participate in the TIP because he was already shown to the witnesses while in police custody. He denied making disclosure statement and leading the police to the case.

The judgment of the trial Court

15. The trial Court concluded that although several discrepancies had emerged in the cross-examination of PW-2, the material part of his deposition was not demolished. It was consistent with his previous statement (PW-2/A). He had correctly identified A-2 in the TIP proceedings. He had also identified the cricket bat used in the commission of offence which was recovered on pointing out by A-1. There was no reason why PW-2 would falsely implicate the Appellants in the absence of any earlier enmity between them. The trial Court held that the non-examination of independent witnesses would be not fatal to the case of the prosecution.

16. The trial Court acknowledged that there were certain lapses on the part of the IO by not joining independent witnesses in the arrest and recovery proceedings or not preparing any seizure memo of blood stained clothes of PW-2 and by not examining his elder brother Sharvan whom PW-2 is said to have called after the incident, as a witness. It was held that "mere lapse on the part of the IO cannot be treated as fatal for the case of the prosecution specifically when the depositions of other witnesses are found trustworthy and reliable".

17. The dock identification of three accused by PW-2 was said to be sufficient to fix their identity. The trial Court rejected the plea of the

accused that they could not be said to share a common intention. The trial Court observed that although some discrepancies had occurred in the cross-examination of PW-2 they were not fatal to the case of the prosecution. The trial Court acquitted the Appellants of the offence under Section 302/34 IPC while convicting them for the offence under Section 304 Part-II/34 IPC.

Analysis of the evidence of the complainant

18. This Court has heard the submissions of Mr. R.N. Sharma, learned counsel appearing for A-1 and A-3, Mr. Mukul Sharma, learned counsel appearing for A-2 and Ms. Isha Khanna, learned counsel for the State.

19. The Court has been taken through the trial Court record in detail. The crucial part of the case of the prosecution was fixing the identity of the three assailants who entered the shop. The star witness of the prosecution is no doubt PW-2. His first statement to the police (Ex. PW2/A) assumes some importance since it was referred to by the learned counsel for the Appellants to point out the inconsistencies and improvements made by PW-2 while deposing in the Court.

20. In his statement to the police (Ex.PW2/A) PW-2 states that around 11.30 am, when he and the deceased Deepak were in the shop, one person who had studied with them i.e., A-1 along with 2 or three friends reached there. Initially he was making fun of PW-2 and the deceased but thereafter he started picking up the things kept in the shop to which the deceased Deepak objected. Thereupon, A-1 and his friends (those were not named in PW-2/A) started quarrelling with the deceased Deepak and when PW-2 tried to interfere he was pushed to one side. After this the two friends of A-1 caught hold of the deceased Deepak, and A-1 with the intention of

killing the deceased hit him on the head forcefully with a bat. The deceased Deepak immediately fell down and blood started oozing from his forehead. PW-2 stated that the two friends who accompanied A-1 could be 18-19 years old and he could identify them if they were produced before him.

21. When examined in the Court, PW-2 not only named A-2 and A-3 but also identified them in the Court correctly by their names and faces. One important improvement that he made in the statement in Court is that "then Jeetu said to give blow on the head of Deepak and Kapil uttered that "*Aur maar saley ko*". Further, although in his examination-in-chief PW-2 stated that the police reached HRH at around 3 or 3.30 pm and his statement (Ex.PW2/A) was recorded by them at that time, in his cross-examination he repeatedly stated that his statement was recorded at the trauma centre.

22. In his examination-in-chief PW-2 stated that while he was working in his uncle's shop a few days after the incident, A-3 was brought to the shop by the police in a gypsy and that he was pointing out the place of occurrence and that PW-2 signed the pointing out memo (PW-2/C). In his cross-examination PW-2 states "I was called in the police station when the accused Kapil was arrested on 19.6.05 and I was asked to identify him by the police and I identified him. My statement was recorded by the police on that day".

23. In his cross-examination PW-2 stated that he never met A-1 prior to the incident but volunteered that A-1 was a student in his school which he (PW-2) had left two years ago when he was in the 8th class. In his cross-examination that was on the same day of examination-in-chief i.e., 8th November 2005 PW-2 stated that "after cutting jokes with my deceased brother Deepak, accused Deepak went away and then after 10-15 minutes

later he came along with other two accused present in the court today". This clearly he did not state in his previous statement (Ex.PW2/A). He further maintained this when he stated in his cross-examination "When the accused Deepak came first time he was not having bat in his hand. When he came second time he came with bat. I have stated this thing to the police."

24. In his cross-examination, PW-2 stated: "Accused Kapil and Jeetu @ Surender were not known to me earlier prior to this case incident. I did not tell the whole description of the accused persons to the police but I only disclosed that out of three one was bald and one was thin and long.". However, in his statement (Ex.PW-2/A) he had not given such description to the police. According to PW-2, "When I lifted my brother to take him to the hospital my clothes were also smeared with blood". He claimed that "My blood smeared clothes were taken by the police". He further stated that "After incident the accused persons ran away after boarding in a bus but I do not know the bus number and its route". These facts were not stated to the police by him in his previous statement (Ex.PW-2/A).

25. In his cross-examination PW-2 stated that after the incident he called his elder brother Sravan on telephone and narrated to him the entire incident. PW-2 further claimed that when the deceased Deepak was shifted to the trauma centre from HRH, Sravan accompanied him to trauma centre. PW-2 described the clothes that he was wearing to be a yellow colour shirt and brown colour pant. He admitted that he himself had made no complaint to the police. He did not raise any alarm when the deceased Deepak was being attacked. PW-2 further disclosed that prior to the incident he knew the name of only A-1 and that "his name was disclosed by me to my brother Sravan that he had caused injury with bat to my deceased brother Deepak." PW-2 claimed that at the time he gave statement to the police he did not know the

parentage and address of A-1. However, Ex.PW2/A does record the address of A-1. According to PW-2 it is the police who gave him that details but he was not sure whether it was at the PS. He denied the suggestion that A-2 was shown to him at the PS prior to the TIP. In his cross-examination on 9th May 2006 at the instance of the counsel for A-2 he admitted that after incident he had "immediately felt astonished".

26. Since PW-2 was the star witness and also happened to be an interested witness as he was related to the deceased Deepak, his evidence was required to be scrutinized extremely carefully. It has been thus repeatedly urged by the learned counsel for the Appellants that from the answers given by him in his cross-examination it appeared that PW-2 was not present at the spot at all. They urged that an adverse inference had to be drawn against the prosecution for not producing the blood smeared clothes of PW-2 and sending them for forensic examination. The delay in registering the FIR was also urged by them as being fatal to the case of the prosecution. It was repeatedly urged that PW-2 was an unreliable and untrustworthy witness and there was no independent corroboration of his testimony in its material particulars.

27. A comparison of the statement made by PW-2 to the police in the first instance (Ex. PW2/A) with his evidence in Court reveals that he was consistent as regards the presence of A-1; the fact of A-1 being accompanied by his two friends; the fact of two friends holding the deceased while A-1 struck him with a bat. Although, PW-2 might not have known the complete details of A-1's parentage, it is clear that he knew A-1 from his school days. In other words, A-1 was not a stranger.

28. The description given by PW-2 as to how the crime occurred in both his

statements made him to the police (Ex.PW2/A) and in Court stands corroborated by the medical evidence. There was a cut wound on the forehead from which the deceased was bleeding and it is this injury which ultimately caused his death. The evidence of PW-2 fully supports the case of the prosecution that it was a homicidal death on account of the blunt force impact of an object such as a bat on the forehead.

29. There is some contradiction in the statement made by PW-2 and in his deposition in Court. In Court PW-2 deposed that A-1 first came alone, had a conversation with the deceased, then went away and returned, whereas this was not mentioned in his statement to the police. However, this does not affect the credibility of PW-2 as regards the presence of A-1 at the spot or the role played by him.

30. As regards the failure to examine Sravan and the failure to produce the blood stained clothes of PW-2, the Court would consider these to be serious lapses on the part of the IO. The Court notes that PW-18 in his cross-examination states "I cannot assign any reason for not seizing the blood stained clothes of the complainant Sunny". While the production of the stained clothes of PW-2 would certainly have confirmed the presence of PW-2, it does not retract from his consistent version both in Ex.PW2/A as well as in Court as to the incident that took place in his presence. He was a young boy of 18 years at the time of the incident. It is possible that he was in a state of shock himself and had not been able to gather himself to immediately report the incident to the police. Clearly he was anxious about saving his cousin's life. This would explain why there was some delay in registering the FIR. DD-15A does confirm the time of incident as around 12.15 pm, which is more or less the same time as indicated by PW-2. That the incident did take place in the auto repair shop is corroborated by the

blood scattered on the wall as well as floor of the shop.

31. The Court is therefore satisfied as regards the presence of A-1 and his role in the homicidal death of the deceased Deepak, the prosecution has been able to prove its case beyond reasonable doubt.

The role of A-2

32. On the role of A-2 Surrender @ Jeetu, the Court finds that although he was not named by PW-2 in his statement to the police, it has been consistently maintained by PW-2 in his cross-examination that he could not name the two other friends of A-1 since he did not know them earlier. However, as far as A-2 is concerned, PW-2 correctly identified him during the TIP. The evidence of PW-19 shows that when she conducted the TIP, A-2 raised no objection about him being already shown to the witnesses in the PS or elsewhere. A desperate attempt was made by A-2 to discredit the TIP at the time of the recording of his statement under Section 313 Cr PC. However, this cannot be accepted since at the earliest available opportunity A-2 raised no objection whatsoever. The TIP proceedings lends sufficient assurance to Court that there was no procedural irregularity committed in conducting the TIP proceedings and that PW-2 correctly identified A-2 in those proceedings.

33. The presence of A-2 can be said to have already been proved beyond reasonable doubt. That he was holding the deceased when A-1 hit him with a bat is also consistently spoken to by PW-2 both in his statement to the police as well as in his deposition to the Court. On this material aspect he was not shaken during his cross-examination.

The role of A-3

34. Now turning to the role of A-3, one factor which requires to be noticed is that he was arrested nearly twenty days after the incident and he had already been arrested by the special cell in some other case. He was taken for the TIP on 19th June 2005 where he declined to participate on the ground that he was already shown to the witnesses.

35. The above stand of A-3 appears to be justified since it has emerged in the cross-examination of PW-2 that after his refusal to participate in the TIP, A-3 was brought to the PS and PW-2 was taken there and was asked to identify him. This completely demolishes the case of the prosecution that dock identification by PW-2 of A-3 constitutes sufficient proof of his presence at the scene of crime. The Court is of the considered view that once A-3 was shown to PW-2 in the PS, any subsequent identification of A-3 by PW-2 in the Court would be of no value. PW-2 is clear in his evidence that he did not know A-3 from before. Therefore, it was important that there should have been no intervention by the police in showing A-3 to PW-2 in the PS prior to TIP. This was a serious lapse on the part of the IO.

36. Therefore the Court is not prepared to concur with the view expressed by the trial Court that the evidence against A-3 proves his guilt beyond reasonable doubt. The presence of A-3 has not been established successfully by the prosecution. He ought to be given the benefit of doubt.

37. The result is that the Court concurs with the conclusion reached by the trial Court regarding the presence, role and the guilt of A-1 and A-2. However, A-3 is granted the benefit of doubt and is acquitted of the offence under Section 304/34 IPC.

Nature of the offence

38. As regards the nature of offence, from the description of the offence by PW-2 in his cross-examination in Court it appears that the attack by A-1 and A-2 on the deceased was on the spur of the moment when something went wrong in the conversation they were having. It appears to be a single blow given on the head, of course with a great force which resulted in serious head injuries that caused death of the deceased Deepak. The Court therefore concurs with the opinion of the trial Court that the offence under Section 304 Part-II IPC is made out against A-1 and A-2.

Quantum of sentence

39. As regards the quantum of sentence, the Court is of the view that neither A-1 nor A-2 have any previous criminal record. They were relatively young at the time of the commission of offence. Consequently, the sentence of seven years' rigorous imprisonment appears to be on the harsh side. The nominal roll of A-1 Deepak shows that he has undergone three years eight months and five days of imprisonment as on 10th February 2009 and his sentence was suspended by an order of 17th March 2009. As far as A-2 is concerned his sentence was suspended on 17th July 2009 and by that time he appears to have undergone approximately one year and eight months of imprisonment, as per the nominal roll furnished to the Court. During his term in jail, A-2 is shown to have pursued a BA Pass course.

40. In the circumstances, the sentence awarded to A-1 and A-2 for the offence under Section 304 Part II IPC is reduced to four years RI each with a fine amount of Rs.5,000 each and in default to undergo RI for three months.

Conclusion

41. Accordingly, Crl.A.No.664/2008 and Crl.A.No.806/2008 are disposed of and Crl.A.No.665/2008 (by A-3) is allowed in the above terms and he is acquitted of the offence under Section 304 Part II IPC. The bail bond of A-1 and A-2 shall stand cancelled and they are directed to surrender forthwith to serve out the remaining sentence. The bail bond and the surety bond of A-3 shall continue for a period of three months in terms of Section 437A Cr PC.

42. A certified copy of this order along with trial Court record be sent to the trial Court for taking further steps.

S. MURALIDHAR, J.

NOVEMBER 26, 2014
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