

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

RESERVED ON : January 21, 2014

DECIDED ON : April 16, 2014

+ CRL.A. 1047/2012

NARESH KUMAR Appellant

Through : Mr.Harish Khanna, Advocate.

versus

STATE Respondent

Through : Mr.Lovkesh Sawhney, APP.

CORAM:

MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 18.08.12 in Sessions Case No.159/11 arising out of FIR No.516/07 registered at Police Station Prashant Vihar by which the appellant-Naresh Kumar was held guilty under Section 304(1)/34 IPC. By an order dated 30.08.2012, he was sentenced to undergo RI for ten years with fine ₹5,000/-.

2. The prosecution case, as projected in the charge-sheet, was that on 24.07.2007, Daily Diary (DD) No.23B (Ex.PW-14/A) was recorded at 9.37 a.m. at police station, Prashant Vihar on getting information from mobile number 9958386072 about an individual being mercilessly beaten near Metro Station, Sector-9, Rohini. The

investigation was assigned to HC Bharat Lal who with Ct.Mahabir Singh went to the spot. They came to know that the victim had already been taken to BSA hospital. Since the spot of occurrence was within the jurisdiction of Police Post, Rohini, necessary intimation was given to the concerned police officers there. ASI Prem Singh, on receipt of call vide DD No.13 at 11.45 a.m. went to the spot along with Ct.Virender from that police post. After reaching at BSA hospital, he collected the MLC of injured Nand Lal Thakur and met HC Bharat Lal and Ct.Mahabir Singh. The injured was 'unfit' to make statement. At 12.30 p.m. when Nand Lal Thakur regained consciousness, ASI Prem Singh recorded his statement (Ex.PW-22/A) and lodged First Information Report by making endorsement over it under Sections 308/341/506/34 IPC. In the statement, Nand Lal Thakur disclosed that at about 9.25 a.m. when he was going to Rohini courts on foot after getting down from a bus and reached in District Park, Sector 14, Rohini, he was stopped by four/five individuals; two of them were armed with baseball bat and wooden danda; and they inflicted injuries to him. They asked him to withdraw the case filed against them or else they would kill him. He identified Naresh Kumar r/o Budh Vihar, as one of the assailants and claimed to identify the others also. Further investigation was taken over by SI K.P.Tomar. On the basis

of secret information, Naresh was apprehended near gate No.2, Japanese Park, Rohini in the evening same day and at his instance Parveen his associate in the crime, was arrested who recovered a baseball bat from the bushes. On the night intervening 28/29.07.07, Nand Lal Thakur succumbed to the injuries in the hospital and DD No.9A (Ex.PW-28/B) was recorded. Post-mortem examination on the body was conducted and Section 302 IPC was added. During investigation, statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted against Naresh and Praveen. Ram Niwas and Rakesh were kept in column No.2 in the charge-sheet. Without taking cognizance against Ram Niwas and Rakesh, the learned Metropolitan Magistrate committed the case to the Court of Sessions. Naresh Kumar and Praveen were duly charged and brought to trial. The prosecution examined 28 witnesses to establish their guilt. In 313 statements, they denied their complicity in the crime and claimed false implication. They did not examine any witness in defence. On appreciation of the evidence and after considering the rival contentions of the parties, the trial court by the impugned judgment held the appellant-Naresh Kumar guilty for committing the offence mentioned previously. It is pertinent to note that the Praveen was acquitted of the charges. The

State did not prefer any appeal to challenge his acquittal and conviction of the appellant-Naresh Kumar under Section 304 (1)/34 IPC instead of 302 IPC.

3. I have heard the learned counsel for the parties and have examined the record. Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective. PW-1 (Sunil Kumar), the informant, did not support the prosecution regarding identity of the appellant and was not declared 'hostile' by the prosecution. Dying declaration recorded by the Investigating Officer is highly suspect and doubtful. The victim was 'unfit' to make statement as he never regained consciousness after the occurrence. No permission from the concerned doctor before recording the dying declaration was obtained and it is mystery who had declared the victim 'fit for statement' at 12.30 p.m. that day in the absence of any certificate/endorsement of the examining doctor. Since the condition of the patient was critical, his family members got him discharged against medical advice and shifted him to Jaipur Golden hospital. The family members of the victim accused the Investigating Officer for not recording his statement correctly and lodged a complaint in that regard. Inordinate delay in recording PW-8 (Durga Devi)'s statement under Section 161 Cr.P.C. remained unexplained. The appellant, who is a

resident of Rithala Village never resided or carried out any business at Budh Vihar and it was a case of mistaken identity. Co-accused (Praveen) was acquitted on the same set of evidence though crime weapon was alleged to have been recovered at his instance. The appellant had no motive to inflict injuries to the victim. Learned Additional Public urged that the judgment is based upon fair appraisal of the evidence. The Investigating Officer had no ulterior motive to fabricate or manipulate the statement (Ex.PW-22/A) of the deceased-Nand Lal Thakur.

4. Undisputedly, victim-Nand Lal Thakur suffered a homicidal death. Medical evidence is clear on this point. PW-3 (Dr.Bhawna Jain) medically examined the patient on 24.07.2007 by MLC (Ex.PW-3/A). Various injuries on different body parts of the patient were described therein. PW-4 (Dr.K.Goel) conducted post-mortem examination on 29.07.2007. Following external injuries were found on the body:-

- (i) Diffuse coalesced bruises all over right arm, right elbow and upper two third of right forearm with ill define rail-road patterns over outer aspect of arm and at places over forearm, blueish-greenish in colour.
- (ii) Diffuse bruises all over medial aspect of left arm in area 8' X 3' inches.
- (iii) Diffuse coalesced rail-road patterns bruises in area 20 X 14 cm over right side back of chest.

- (iv) Diffuse bruises with rail road patterns 10 X 8 cm area over right side chest between right nipple and axilla.
- (v) Coalesced rail-road patterns bruises 12 X 7 cm area over right knee placed antero-lateral aspect.
- (vi) Surgical stitch wound 11 cm long over back of right forearm. On exploration there was fracture of right ulna bone which was fixed with nails and plate.
- (vii) Partly stitched laceration 5 cm long with diffuse bruising in area 15 X 12 cm around with ill defined rail-road patterns over upper middle front of right leg.
- (viii) Coalesced rail-road patterns bruises in area of 14 X 9 cm over front and lateral aspects left knee.
- (ix) Coalesced bruises with rail-road patterns scattered all over back of left thigh, left knee and left leg.
- (x) Surgical stitched wound about 13 cm long over middle front of left leg and 8 cm long over upper front of left leg. On exploration fracture of left tibia was found fixed with nails and plate.

In his opinion, all the injuries were ante-mortem in nature caused by hard blunt forced impacts. Cause of death was asphyxia (ARDS) as a result of net sequele of long bone fractures. Time of death was ascertained as 08.10 p.m. on 28.07.07. On 27.09.07, he examined the crime weapon i.e. baseball bat and was of the opinion that the injuries with rail-road patterns mentioned in the post-mortem report were possible with the said baseball bat or similar type of such bat. The victim was hale

and hearty before the incident. Various injuries of different dimension inflicted to him on his body proved fatal and he expired after five days. Apparently, it was a case of culpable homicide.

5. Crucial testimony is that of PW-22 (Prem Singh, the then ASI) who recorded the dying declaration of the deceased on 24.07.2007 at BSA hospital. He deposed that on 24.07.2007, on receipt of Daily Dairy 13 (Ex.PW-21/A) at around 11.45 a.m. he and Ct. Virender went to BSA hospital and obtained the MLC of injured Nand Lal Thakur who was unfit to make statement. He (SI Prem Singh) waited in the hospital and at about 12.30 p.m. when the victim was declared 'fit for statement' by the doctor, he recorded his statement (Ex.PW-22/A). He lodged First Information Report by making endorsement from point 'C' to 'C' on Ex.PW-22/A. A broken danda (Ex.P-1) handed over to him in the hospital was seized vide seizure memo (Ex.PW-12/A). In the cross-examination, he disclosed that he reached the hospital at about 12/12.15 p.m. and did not meet any family member of the injured there at that time. Apparently, the testimony of the witness regarding recording of the dying declaration of the victim remained unchallenged in the cross-examination. Nothing was suggested if the victim was not in a fit state of mind to make statement.

Genuineness and authenticity of the statement (Ex.PW-22/A) recorded by

him was not questioned in the cross-examination. No ulterior motive was assigned to him to fabricate or manufacture a false declaration. The statement (Ex.PW22/A) was taken for the purpose of registering the case in a routine manner. After death, the same was treated as dying declaration. PW-17 (Ct.Virender Singh), who accompanied him to the hospital, also corroborated his version in its entirety. He also deposed that at about 12.30 or 12.40 p.m., the victim was declared 'fit for statement' by the doctor and the Investigating Officer recorded his statement. Rukka was handed over to him and he lodged First Information Report with the Duty Officer. In the cross-examination, the statement made by the victim as recorded by the Investigating Officer was not challenged. PW-15 (Ct.Charan Singh), Computer Operator, at PS Prashant Vihar, at about 2.05 p.m. recorded FIR (Ex.PW-15/A) after getting rukka. He was not cross-examined. From the statements of these witnesses, no sound reasons exist to infer that the victim did not make statement (Ex.PW-22/A) to the Investigating Officer Prem Singh (PW-22). Initially, the FIR lodged on the day of incident itself was for the commission of offence under Section 308/341/506/34 IPC. When the victim succumbed to the injuries on 29.07.2007, Section 302 IPC was added. The name of the appellant emerged in the statement (Ex.PW-22/A) on 24.07.2007 itself

and he was arrested that day at around 08.30 p.m. At no stage the appellant suspected the authenticity of the statement (Ex.PW-22/A) recorded by the Investigating Officer. MLC (Ex.PW-3/A) records the arrival time of the patient at BSA hospital as 10.30 a.m. At 10.40 a.m., the victim was 'unfit for statement'. The MLC contains another endorsement 'fit for statement' at 12.30 p.m.. Dr.Bhawna Jain (PW-3) who medically examined the victim with the alleged history of assault by 'some people' proved MLC (Ex.PW-3/A). In the cross-examination, she revealed that the patient was under proper treatment in the hospital and left against medical advice. She was not questioned as to when the victim came to senses and how and in what manner endorsement 'fit for statement' appeared on MLC (Ex.PW-3/A) at 12.30 p.m. Nothing was suggested to her if the patient remained unconscious or was unfit to make statement till his discharge from the hospital by relatives, PW-3 (Dr.Bhawna Jain) had no motive/reason to furnish a false certificate. PW-2 (Madhu Thakur), victim's daughter, and PW-8 (Durga Devi), deceased's wife, have also deposed that the Investigating Officer recorded the statement of victim in the hospital. Their grievance was that it was not recorded correctly and the Investigating Officer left the name of some of the assailants.

Statement (Ex.PW-22/A) contains signature of the victim. The appellant did not challenge that it were not victim's signature.

6. On scanning the statement (Ex.PW-22/A), it reveals that Nand Lal Thakur gave detailed account of the incident and stated that on 24.07.2007 at around 09.25 a.m. when he was going on foot to Rohini Court (where he was a Reader in the court of Sh.Vijay Shankar, MM) after alighting from the bus through District Park, Sector 14, he was surrounded and obstructed by four/five boys. Two of them caught hold of him and the other two who were armed with baseball and wooden danda gave beatings to him. They threatened him to kill in case he did not withdraw the case. He identified Naresh r/o Budh Vihar doing cable business/job as one of the assailants with whom he was acquainted prior to the occurrence. He claimed to identify his associates. Obviously, Naresh r/o Budh Vihar, was named as one of the assailants who inflicted injuries to the victim. The victim gave sufficient description to fix Naresh's identity and informed that he was involved in the cable business. His identity was never questioned or challenged during trial in the cross-examination of the Investigating Officer or family members of the victim. It has come on record that Ram Niwas who was one of the suspects, shown in column No.2, was facing trial in a rape case. The appellant-

Naresh is his nephew and was associated with him in his cable business. PW-2 (Madhu Thakur), victim's daughter, admitted that Naresh used to reside at village Rithala. Specific suggestion was put to her that Naresh was falsely implicated because she had personal enmity with Ram Niwas with whom Naresh was working. PW-8 (Durga Devi), deceased's wife, disclosed that Ram Niwas cable operator in the locality where she was residing, was known to her and he was an accused in a rape case in which her daughter was a prosecutrix. She admitted that Naresh was Ram Niwas's nephew. She disclosed that she knew Naresh as he was also working with Ram Niwas in operating cable network. It is relevant to note that Budh Vihar and Rithala are located nearby. The appellant's plea that it was a case of mistaken identity has no force at all and deserves outright rejection.

7. In the dying declaration, the victim disclosed that the crime weapon was a baseball bat. This finds corroboration in the testimonies of informant PW-1 (Sunil Kumar) and PW-11 (Virender Singh Mann). On 24.07.2007, PW-1 (Sunil Kumar) present at the District Park noticed that two or three persons were giving beatings to an individual with a baseball bat. He made call at 100 from his mobile No.9958386072. He deposed that after some time, PCR van came and he pointed out the place where

the victim was given beatings. He also showed them the broken danda of the base ball. In the cross-examination, he informed that the PCR van came to the spot within 10/15 minutes. PCR official summoned the ambulance. The victim was unable to speak at that time. The two pieces of base ball bat were taken by PCR officials.

PW-11 (Virender Singh Mann) posted at CATS Ambulance station, Mangol Puri deposed that at about 09.50 a.m., on receipt of PCR call, he along with Ajay Kumar Sharma went to the spot. The victim was in a delirious condition; was not in a position to disclose anything and had injuries on his hands, legs. He was admitted vide MLC No.3832 CR No.61504 in BSA hospital. His personal belongings were handed over to the duty constable. Form (Ex.PW-11/A) was filled. Local police met him in the hospital and he pointed out the place where the injured was found lying. In the cross-examination, he disclosed that he had handed over the base ball bat to the duty constable. PW-12 (ASI Vijay Kumar) duty constable in BSA hospital, also corroborated his version and stated that Incharge of CATS Ambulance, Mr.V.K.Maan had admitted Nand Lal Thakur in the hospital. Base ball/danda on which a label of RBK (Dhoni) smash was affixed, was produced by him stating that it was found lying

near the injured at the spot. This bat (Ex.P-1) was handed over subsequently to ASI Prem Singh.

8. Appellant's conviction is primarily based upon the dying declaration recorded by the Investigating Officer. It is a settled proposition of law that dying declaration can be made a basis of conviction. There can be no dispute that for basing the conviction on the dying declaration, it must pass all the tests of voluntariness, the fit condition of mind of the maker of the dying declaration and the witness not being influenced by any other factors and truthfulness of the declaration (*Laxman vs.State of Maharashtra* 2002 (6) SCC 710). In the instant case, there is nothing on record to show that the statement (Ex.PW-22/A) was the result of any tutoring or prompting or a product of imagination. There was no material on record to suspect that the Investigating Officer had any animus against the appellant or was in any way interested in fabricating the dying declaration. The deceased fully possessed the power to understand the implication of his statement and the same was made without any exterior influence or ulterior motive. The victim was fair enough not to name the other assailants though he had specific grudge against Ram Niwas and the trial court despite his name shown in column No.2 in the charge-sheet, did not initiate any

proceedings against him. Even Praveen who faced trial with the appellant, was not named by the victim and was acquitted of the charge. The deceased was hale and hearty prior to the incident and was on his way to attend his duty. He had direct confrontation with the assailants during day time for sufficient duration and had reasonable and clear opportunity to observe and identify them. Since the appellant was acquainted with him prior to the incident, the victim was able to name him in his dying declaration. The other assailants who were not known to him and perhaps were hired goons could not be identified and named by him in his statement.

9. The prosecution has adduced evidence that Ram Niwas, appellant's uncle, was facing criminal proceedings in a rape case where deceased's daughter, was a prosecutrix. PW-24 (ASI Sajjan Singh) disclosed that case vide FIR No.895/2005 under Sections 365/376/506/34 IPC registered at Police Station Sultan Puri was pending before the court where the next date of hearing was 21.09.2011. PW-8 (Smt.Durga Devi) clearly deposed that her husband was murdered because of the enmity due to rape case of her daughter in which Ram Niwas etc. were the accused. She and her husband were also implicated in case FIR No.502/2006 (Ex.PW-9/A) registered at PS Rohini lodged by Rekha

(Krishan Pal @ Babloo's wife) against them. The appellant being Ram Niwas's close relative had motive to inflict injuries and criminally intimidate the victim to withdraw the said criminal case lodged against his uncle.

10. PW-1 (Sunil Kumar) was the informant to the police. In his statement under Section 161 Cr.P.C., he did not claim to recognize the assailants. He did not give broad features/description of the assailants while making call from his mobile at 100. DD No.23B recorded on the basis of information conveyed by him even does not record the number of assailants. When PW-11 (Virender Singh Maan) went to the spot, he did not find him there. Only PCR officials were found at the spot. PW-1 claimed that he left the spot between 09.30-9.45 a.m. He did not stay to record his statement and to inform the police about the number of assailants and their broad features. Only in the cross-examination, he disclosed that he could identify the assailants and the accused facing trial before the court were not the assailants. Since this witness was not relied on as an eye-witness, his statement in the cross-examination that the accused persons were not the assailants has little value. Acquittal of co-accused Praveen is inconsequential. Praveen was acquitted for lack of evidence and his name did not find mention in the dying declaration. The

prosecution was able to establish appellant's guilt by leading cogent and clinching evidence. The impugned judgment is based upon fair appreciation of the evidence and needs no interference. Since an old man was mercilessly beaten and multiple injuries were inflicted on his body without any fault of his, the sentence awarded to the appellant cannot be termed unreasonable or excessive.

11. In the light of the above discussion, the appeal is dismissed as unmerited. The conviction and sentence awarded by the trial court are sustained. Trial court record be sent back forthwith along with the copy of this order.

(S.P.GARG)
JUDGE

April 16, 2014/sa