

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

Reserved on: 30.07.2015
Date of Decision: 25.08.2015

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+ **CRL.A. 645/2014**

MADHU

..... Appellant

Through Mr. K K Malhotra and Mr. Y P
Singh Ahluwali, Advs.

versus

STATE & OTHERS

..... Respondents

Through Ms. Aashaa Tiwari, APP with SI
Vivek, PS Gokulpuri
Mr. Malkhan Singh and Mr. Vineet
Kumar, Advs. for R-2
Mr. Ashok Kumar Tiwari and Mr.
Sudesh Kumar, Advs. for R-3 & 4
with R-3 & 4 in person

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R. K. GAUBA

R. K. GAUBA, J:

1. On the basis of reports under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.), submitted on conclusion of investigation into FIR No.347/2002 of police station Gokalpuri, under sections 302/120B of Indian Penal Code (IPC), Sunil Kumar Raghav (respondent No.2), Shehzad (respondent No.3) and Vinod (respondent No.4) were put on trial in sessions case No.94/2012 in the court of Additional Sessions Judge, the

gravamen of the charge being that they having entered into a criminal conspiracy, in pursuance of the object thereof, had committed murder of Akhilesh Kumar Raghav (hereinafter referred to variously as “the victim” or “the deceased”) at about 10.30 PM on 13.09.2002 near water tank, Gali No.3, Rama Garden, Karawal Nagar, Delhi within the jurisdiction of the police station Gokalpuri (hereinafter referred to as “the police station”).

2. The trial concluded with the judgment dated 21.12.2013 holding that the prosecution evidence did not inspire confidence and, thus, acquitting the said three respondents giving them benefit of doubt. Madhu, wife of the victim/deceased feeling aggrieved, has come up in the criminal appeal assailing the view taken by the learned trial Judge, contending that sufficient evidence had been adduced bringing home the guilt of the three persons who had been accused and prosecuted. The State entered appearance through Additional Public Prosecutor on 26.05.2014. Notices were issued by order dated 26.05.2014 to the three said respondents (hereinafter referred to as “the accused persons”) calling upon them to show cause as to why the appeal be not admitted.

3. We have heard arguments of the counsel on all sides on the point of admission. We have perused the record carefully.

4. It will be of advantage to note the background facts in the chronology of events that came to light. But before we do so, it is pertinent to note the close relationship of the persons involved, excluding accused No.2 Shehzad.

5. The deceased Akhilesh Kumar Raghav, aged 38 years, was resident of House No.A-70, Gali No.3, Rama Garden, Karawal Nagar, Delhi. His family included his wife Madhu (PW-5). Accused No.1 Sunil Kumar Raghav (A-1) is married to Mithilesh @ Pavitra, daughter of the uncle of

PW-5. Thus, the deceased and A-1 were related to each other as co-brothers. Accused No.3 Vinod Kumar (A-3) is nephew of A-1 and was living with him in the same house described as A-207, Gali No.3, Rama Garden, Karawal Nagar, Delhi, in close vicinity of the house of A-1. Ashok Kumar (PW-10) is brother of Madhu (PW-5). Concededly, he is not an ordinary resident of the same household. He is stated to have come to live with the deceased and PW-5, in their house, for the purposes of treatment of his leg, which had been fractured due to an accident. Reference also came to be made during the investigation to Sanjay son of Dhani Ram resident of Kasturi Sadan, Mukhia Market, Karawal Nagar, Delhi. Sanjay is the husband of the sister of the deceased.

6. Reference has come in the evidence (and there was no effort made to dispute it) to the effect that A-1 and deceased were working for gain together as property dealers and on account of some dispute regarding a particular property in the same area, differences had arisen resulting in both falling apart, with the deceased having even lodged a complaint with the police alleging cheating. A-1 statedly had also made certain complaints to the police expressing apprehension of threat to his life from the deceased. But, no concrete proof in such regard was adduced.

7. On 13.09.2002, at about 10.30 PM, the deceased suffered a gun-shot injury. Information was received in the police station through Police Control Room (PCR) about the firing incident near TB Hospital, Gali No.3, near Tripal Factory, Rama Garden, Karawal Nagar, which was logged vide DD No.73-B (Ex.PW-2/A) at 10.45 PM. The matter was entrusted to Sub-Inspector Kailash Chand Yadav (PW-25) who, accompanied by constable Sher Singh (PW-2), went to the place of reported firing. He found blood spilled in the area of Gali No.3 and learnt

that the victim had been taken to GTB Hospital (hereinafter referred to as “the hospital”). He then proceeded to the hospital where he found the victim admitted for treatment against medico legal report (MLC) (Ex.PW-15/A) recorded at 11 PM on the same day. As per the MLC, the victim had been brought to the hospital by his brother-in-law Sanjay with the history of gunshot injury. The general condition of the victim was poor, pulse was not palpable and blood pressure not recordable. The examining medical officer Dr. G L Arora (PW-15), who had recorded the MLC found two injuries, one the gunshot injury (entry wound) of the size of 1.5 cm x 1.5 cm, its margins circular and inverted, with blackening present around the entry wound, covering the area of 3 cm x 3 cm on the left side of the back in the lower one third part and, the second, the exit wound with everted margins present on the intercostals space on the left side 3 cm above the left nipple where there was no blackening present. The medical officer noted that the sounds of breathing were diminished on the left side of the chest. The patient was referred to senior resident (surgery) with necessary advice as to the course of treatment/management.

8. PW-25 recorded the statement (Ex.PW-25/A) of the victim in treatment room No.46 of the hospital and made an endorsement (Ex. PW-25/B) sending it to the police station, through PW-2 Constable Sher Singh, for registration of FIR under Section 307 IPC. The *rukka* thus sent at 0015 hours on 14.09.2002 resulted in FIR (Ex.PW-1/A) being registered by ASI Brahm Singh at 0040 hours on 14.09.2002.

9. According to the version of the victim in the FIR, thus registered, he had been fired at, and injured, at the aforementioned place when he was on way home from his work-place, Shere Punjab Hotel at B-16, Mukhiya Market, Karawal Nagar, which he had shut down for the night at 10:20

PM. According to him, the assailant was a male aged about 30 years of the height of 5 ft 8 inches, dark complexion, lean body and longish face, who was wearing a black check shirt and dry faded jeans. The victim stated that the appellant had come suddenly and had first passed by in front and then fired at him from behind. After the firing, the assailant had fled away from the scene. It is clear that the victim did not know the assailant from before by name or any other description.

10. The Investigating Officer (IO) carried out the necessary preliminary investigation including by visiting the scene of crime, collecting evidence in the nature of blood stained earth, converted into parcel from the place, getting the place photographed and preparing the site plan.

11. The record of police investigation shows that on the night of 13/14.09.2002 Sanjay (brother-in-law of the victim) made a statement before the investigating officer under Section 161 Cr.P.C. to the effect that he was also present in the house of the victim on the night in question and that, on hearing the sound of firing, he had come out and found his relative (Akhilesh Kumar) lying in the street. He, accompanied by PW-5 Madhu and PW-10 Ashok Kumar had rushed him in a three wheeler scooter (TSR) to the hospital and after the statement of the victim had been recorded, he had accompanied the Investigating Officer to the scene of incident where the site plan had been prepared at his instance. He claimed in the statement that, on the way to the hospital, the victim had told him that the assailant was a person named Shehzad (referring to accused no.2), who was a criminal, and that the attack had been brought about at the instance of Sunil Kumar Raghav (A-1) due to enmity. Sanjay, the brother-in-law of the victim further told the IO in the said statement that he had been asked

by the victim that the involvement of Sunil Kumar was not to be disclosed since he apprehended retaliation from the assailant.

12. On 15.09.2002, PW-5 Madhu and PW-10 Ashok Kumar also made similar statements under Section 161 Cr.P.C. before the IO, attributing knowledge about the involvement of A-1 (Sunil Kumar Raghav) and A-2 (Shehzad) to the information received from the victim on the way to the hospital. In their respective statements under Section 161 Cr.P.C., PW-5 and PW-10 spoke at length about the close relationship and business connection leading to enmity between the victim and A-1. The statement under Section 161 Cr.P.C. of PW-10 Ashok Kumar has been referred during the trial as Ex.PW-10/DA.

13. As mentioned earlier, the victim had been brought to the hospital by his brother-in-law Sanjay. Since the general condition of the victim was poor, in as much as the pulse not palpable and blood-pressure was not even recordable, it has to be assumed that the history of the injury suffered would have been ascertained by the examining medical officer from the person accompanying i.e. Sanjay. Noticeably, the history only mentioned that it was a gun-shot wound suffered. It would not indicate even remotely as to who was responsible for the same.

14. The doctors under whose medical care the victim remained have not been examined. The record of treatment has not been gathered or brought before the court. It is only the death summary (Ex.PW26/A) prepared by Dr. Jaideep which gives some indication as to when the death occurred and the cause leading thereto. The document proved by Dr. Naveen Sharma (PW6), in absence of Dr. Jaideep who is no longer available, shows the victim died at 09:00 PM on 18.09.2002 due to cardiac arrest, assumably

due to left lung laceration and septicemia resulting from gun-shot injury that had been suffered 5 days before i.e. on 13.09.2002.

15. The death was reported to the police at 11:20 PM on 18.09.2002, as per the death report (Ex.PW25/D) prepared by the IO. PW5 revealed during her cross-examination that the victim had been operated upon at about 04:00 AM (apparently on 13.09.2002) and till such surgery he had been conscious. After the operation, per PW5, the victim regained consciousness during the day which would be 14.09.2002. It is clear from the material on record that the condition of the victim thereafter started deteriorating and he eventually succumbed to the gun-shot wound on 18.09.2002. During the entire period of treatment in the hospital, till death, no statement of the victim beyond, or other than, what had been made by him initially (vide Ex.PW25/A), came to be recorded.

16. According to the report U/s 173 Cr.P.C. dated 06.01.2003, the involvement of A-1 Sunil Kumar Raghav and A-2 Shehzad had been brought to light on the basis of information shared by the victim with his wife Madhu (PW5), brother of the wife Ashok Kumar (PW10) and husband of the sister of the deceased Sanjay. The victim, as per version of these witnesses, was wary of disclosing these facts to the police since he was afraid of the said two persons (A-1 & A-2). Nonetheless, according to the investigation report, Sanjay had shared information with the investigation officer through his statement under Section 161 Cr.P.C. recorded on the night on 13/14.09.2002, and PW5 and PW10 followed through their respective statements to similar effect under Section 161 Cr.P.C on 15.09.2002.

17. The investigation, however, brought out that A-1 Sunil Kumar Raghav had been in Judicial Custody since 11.09.2002 in case FIR

No.144/2002 U/s 420/468/471 IPC of P.S. Gokalpuri. Evidence has been led to prove the facts that A-1 Sunil Kumar Raghav was wanted in the aforementioned case of cheating of P.S. Gokalpuri and had been arrested in that context and sent to judicial custody on 11.09.2002. It has been the case of the prosecution that A-1 Sunil Kumar Raghav had planned the attack on the victim to be carried out by A-2 Shehzad with the aid and assistance of his relative A-3 Vinod Kumar Raghav (nephew of A-1) and in order to show a disconnect he had himself surrendered to custody in the Gokalpuri case on 11.09.2002. The prosecution made an attempt to build this theory primarily on the basis of disclosure attributed to A-1 Sunil Kumar Raghav, made after he had been formally arrested with the approval of the concerned criminal court, upon being brought from jail for such purposes on production warrant. In absence of any other material, we cannot assume such facts to be correct for the simple reason the disclosure to the police in its custody is inadmissible, being in teeth of the provisions contained in Section 24 and 26 of the Indian Evidence Act.

18. The first report of investigation U/s 173 Cr.P.C. was filed on 06.01.2003 seeking the trial only against A-1 Sunil Kumar Raghav, in as much as the other two accused at that stage were not traceable. This report mainly relied on the evidence of PW5 Madhu and PW10 Ashok Kumar and Sanjay, brother-in-law, through which it expected to prove the dying declarations of the victim as to who was responsible for the fatal attack on him. The said report, *inter-alia*, also referred to the use of three mobile phone numbers, one bearing no.9811029676, second bearing no.9810675812 and the third bearing no.2173002. A-1 Sunil Kumar Raghav is alleged to have disclosed that he had given the first mentioned mobile phone for use on or about the date of the planned attack to A-2

Shehzad and the second one to A-3 Vinod Kumar Raghav who was to assist the former. The third mobile phone statedly belonged to A-1 Sunil Kumar Raghav himself. The prosecution relied upon the call detail records of the aforementioned mobile numbers indicating contact between three accused persons. In our considered view, the evidence in such nature is hazy and does not show any clear nexus between three accused persons, not the least of such kind as could show complicity in the deadly attack carried out on the night of 13.09.2002.

19. A-2 Shehzad came to be arrested in case FIR Nos. 702/2003 and 703/2003 of P.S. Loni, Ghaziabad, Uttar Pradesh on 02.06.2003. The allegations in FIR No.703/2003 concerned an offence under Section 25 Arms Act in as much as A-2 had been allegedly found in possession of a countrymade revolver .315 bore with two live cartridges. The other FIR concerned offence under Section 307 IPC on the allegations that the said accused had used the said firearm against the police officials who had asked him to stop for inquiry. It may be added here that a joint trial, *inter-alia*, of the criminal case arises out of the said two FIRs reported in judgment dated 31.03.2005 (Ex.PW29/DA) of Additional Sessions Judge Court No.2, Ghaziabad, acquitting A-2 Shehzad.

20. Be that as it may, when the arrest of A-2 Shehzad came to the knowledge of Delhi Police, on the request of the investigating officer A-2 Shehzad was produced in the court of concerned Metropolitan Magistrate on 20.10.2003 and formally arrested in the case at hand. When interrogated, he allegedly gave disclosure that the firearm which had been recovered from his possession by the Uttar Pradesh police leading to the prosecution in the case of P.S. Loni under Arms Act, was the weapon which has been used by him in the attack on the victim on 13.09.2002,

which was the subject matter of the trial leading to the judgment impugned before us. It is stated by the prosecution that the said weapon could not be transferred from Uttar Pradesh for purpose of further investigation of case at hand in Delhi.

21. We need not go into the justifiability or otherwise of the failure of the investigating officer in procuring such firearm from the concerned agencies in Uttar Pradesh for further investigation of the case of murder registered in Delhi. The fact remains that as a result of the firing with the gun, the victim had suffered two injuries, one entry wound and other exit wound. The bullet which had actually hit the deceased was never found. Even if the weapon recovered by Uttar Pradesh police had been seized, in absence of any further material, its use in the murderous attack on the victim here could not have been confirmed.

22. Supplementary chargesheet was filed in the case on 15.01.2004 against A-1 Sunil Kumar Raghav and A-2 Shehzad, still showing A-3 Vinod Kumar Raghav as a proclaimed offender. A-3 Vinod Kumar Raghav came to be arrested on 28.01.2004. According to the testimony of Inspector Pawan Kumar (PW29), A-3 Vinod Kuamr Raghav was arrested with a button-actuated knife in his possession and he led to recovery of mobile phone with SIM no.9810675812 from the house of his father-in-law. The knife has nothing to do with the case at hand. We have already expressed our views with regard to the mobile phone. Thus, nothing substantial could be brought on record in support of the case of the prosecution after the said event.

23. In the face of above nature of evidence, the prosecution relied wholly upon the dying declarations made by the victim before his wife

(PW5) Madhu, brother-in-law Ashok (PW10) and the husband of his sister Sanjay.

24. The fact that death of Akhilesh Kumar Raghav on 18.09.2002 as a result of gun-shot injury suffered on 13.09.2002 was a case of murder is proved beyond pale of all doubts. The evidence of PW5 (Madhu) and PW10 (Ashok Kumar) coupled with the MLC (Ex.PW15/A), the death summary (Ex.PW26/A) and the post-mortem report (Ex.PW3/A) bring home this fact. But, the crucial question is as to whether the evidence about dying declaration is trustworthy so as to establish the role of any of three accused in the crime. The learned trial court answered this question in the negative. On careful appraisal of the evidence on record, we are not inclined to take a view to the contrary.

25. As mentioned earlier, the first version about the dying declaration came on the record of the police in the form of statement under Section 161 Cr.P.C. of Sanjay, the husband of the sister of the victim. The statement to such effect is attributed to him as made on the night of 13/14.09.2002. This would be almost on the close heels of the registration of the FIR on the basis of *rukka* (Ex.PW25/B) sent from the hospital by SI Kailash Chand Yadav (PW25), fifteen minutes past midnight of the night intervening 13/14.09.2002. Sanjay was the only person whose presence in the company of the victim at the time of arrival in the hospital is well documented. The MLC (Ex.PW15/A) recorded this fact contemporaneously. In the given fact-situation, he would have been person present with the victim, near the hospital bed, when his statement (Ex.PW1/B) was recorded by PW25. If the version about dying declaration in the TSR on the way to the hospital is to be believed, and if Sanjay, in spite of caution to the contrary given by the victim was inclined

to share the information with the police (which he would be inclined to do if he had indeed made the statement U/s 161 Cr.P.C. attributed to him), he would have protested even while the victim was making the statement (Ex.PW25/A). Be that as it may, even if we were to assume that Sanjay had kept quiet respecting the then views of the victim against revelation of the identity of the assailant (or his accomplice), the fact remains that the reliance on the testimony of Sanjay was abandoned by the prosecution even during the trial. On the application moved at the instance of PW5 Madhu (the appellant before us), the said witness was dropped by the prosecution, avowedly for the reason he had been won over.

26. It has been the claim of Madhu (PW5) and Ashok (PW10) that they had also travelled in the TSR with the victim and Sanjay from the scene of crime to the hospital and this is how they are also privy to what was disclosed by the victim as to the identity of the assailant and his accomplice en-route. PW5 and PW10 did stand by the said version in the trial. But, having perused their statements, we find it highly unsafe to rely on their word for reasons set out hereinafter.

27. Going by the observations recorded in the MLC, the condition of the victim was critical. His statement (Ex.PW25/A) reveals he was not even aware as to who had brought him to the hospital. TSR is a small vehicle which can carry maximum of three adult persons at a time. Even if we were to assume that a fourth adult person could somehow manage to fit in, it would not have been possible in the case at hand for the reason the victim would have not been in a position to sit. He had suffered gun-shot injury and concededly (Ex.PW5/A) was unconscious. PW10 himself was moving around with a fractured leg and his presence would make such journey even more difficult to endure.

28. PW5 and PW10 claimed that on the way to the hospital, the victim had disclosed the involvement of A-2 as the assailant and A-1 being the mastermind. At the same time, he had asked his three relatives not to tell this to any one, since he was fearful that A-2 would also kill his children. If the victim was indeed labouring under such fears at that point of time, it is unpalatable that he would disclose this fact even to his three relatives, that too in the presence of the TSR driver, a total stranger. What makes the word of PW5 and PW10 in such regard highly doubtful is their claim that victim had also told them that though A-1 had organized this crime through A-2, but he (A-1) had already got himself confined in Tihar Jail. There is no material available to show as to how the victim could have been aware of the surrender by A-1 in the cheating case of P.S. Gokalpuri on 11.09.2002. The statement U/s 161 Cr.P.C of these witnesses do not contain even a whisper of such assertion about A-1 being in jail, that too by design, prior to the time of the attack.

29. In our opinion, material improvements made by PW5 and PW10 over their respective original versions in the statements U/s 161 Cr.P.C on the above score makes their testimonies highly suspect.

30. The version of PW5, PW10 and Sanjay had come to the knowledge of the investigating officer by 15.09.2002. The victim died on 18.09.2002. There is nothing on record to indicate that any effort was made to examine the victim in the light of such information to have his first hand account on the subject. In absence of such material, there is no reason why the version of the victim in his statement (Ex.PW25/A) should be discarded. Thus, the said statement (Ex.PW25/A) is the only piece of evidence which can be treated as the dying declaration. By the said account, the victim was

totally ignorant as to the identity of his assailant or those for whom, or with whose aid, he may have been acting in the manner he did.

31. In the foregoing facts and circumstances, in our judgment, the learned trial judge has rightly refused to accept the evidence of PW5 Madhu and PW10 Ashok in the nature of dying declarations. In the absence of any other incriminating evidence, the prosecution was bound to fail. Thus, the impugned judgment of the trial court acquitting the respondent nos.2 to 4 cannot be faulted.

32. The criminal appeal under Section 372 Cr.P.C. is found unmerited and consequently dismissed.

(R. K. GAUBA)
Judge

(SANJIV KHANNA)
Judge

AUGUST 25, 2015/ML/ss