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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 24th November, 2015

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Date of Decision: 8th December, 2015

+ CRL.L.P. 665/2015

THE STATE

..... Appellant

Through: Ms.Aashaa Tiwari, APP

versus

ARIF

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

R. K. GAUBA, J:

1. Feeling aggrieved by the result of the Sessions case No. 49/2011 arising out of report submitted under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) on conclusion of investigation into FIR No. 130/2010 under Section 302 read with 34 of Indian Penal Code, 1860 (IPC) of police station New Usmanpur, the State (Government of NCT of Delhi) has submitted this petition under Section 378 Cr.P.C. seeking leave to appeal. The challenge brought through the petition at hand is to the correctness of the judgment 16.02.2015 of the Additional Sessions Judge, North East, Delhi whereby the respondent herein was acquitted of the charge of he, along with three others (including a juvenile) in furtherance of their common intention, having committed the murder of one Ramesh Kumar @ Dada at about 7/7:15 PM on 21.04.2010 in the area of Yamuna Khadar in the vicinity of Khajuri red light within the jurisdiction of police station New Usmanpur.

2. The delay of 54 days in filing as well as delay of two days in refiling is condoned and the petition of leave to appeal is taken up for consideration.

3. The learned Additional Public Prosecutor for the State at the time of making submissions has taken us through the trial court record in entirety. It reveals that the FIR was registered on 24.04.2010 on the basis of *rukka* (Ex.PW-1/B) sent by ASI Satya Pal (PW-2). The matter under inquiry with PW-2 till that stage had arisen out of DD No. 11A (Ex.PW-2/A) recorded in the police station at 10:40 AM on 22.04.2010. It appears from these documents that a dead body had been found lying in a wooded area close to power station in the vicinity of Khajuri red light. The information appears to have been received by the local police through Police Control Room (PCR) on an input seemingly given by some public person. The source of this input was never identified.

4. Be that as it may, the initial inquiry under the cover of DD No. 11 A included inspection of the place by the crime team, taking of the photographs of the dead body, and the area around, besides seizure of certain exhibits including a pair of footwear (*chappal*) vide memo (Ex.PW-2/C), sample of blood lying near the dead body and what is important the seizure of two pieces of glass bottle bearing blood stains vide memo (Ex.PW-2/D). No effort was made to lift finger prints from these glass pieces. It is, however, clear that glass bottle pieces were also used in the assault as some such pieces would be recovered from the neck wound during autopsy.

5. The dead body was in due course identified as that of Ramesh Kumar @ Dada by Mahesh Kumar (PW-3), brother of the deceased on

23.04.2010. It was taken to mortuary of GTB Hospital, Shahdara where it was subjected to post-mortem examination at 11:45 PM on 23.04.2010 by Dr.Arvind Kumar (PW-14). The autopsy report (Ex. PW-14/A) proved by him shows that the external examination of the dead body had revealed that the deceased had suffered as many as 19 ante-mortem injuries, all incised wounds over several parts of the body including in the neck and abdominal area. During the autopsy, PW-14 recovered glass particles (pieces) from the neck muscles which alongwith viscera were handed over to the Investigating Officer (IO).

6. The dead body had been discovered at 10:40 AM on 22.04.2010. The circumstances narrated in the police proceedings leave no room for doubt that it was clear, from the very word go, that it was a case of culpable homicide. Yet, the move for registration of the FIR was taken only on 24.04.2010. There is no explanation whatsoever submitted in any of the documents forming part of the charge-sheet or proceedings at the trial for the inordinate delay in compliance with the mandate of the provisions contained in Section 154 Cr.P.C. wherein the officer-in-charge of the police station was duty bound to register forthwith the information about this cognizable offence. We record our disapproval over the apathetic manner in which the police seems to have handled this case at the initial stages. Such lapse would need introspection by the department to put in position a system of accountability.

7. The trial against the respondent based on the charge framed on 23.10.2010, was concluded by the learned Additional Sessions Judge. In the course of these proceedings, the prosecution examined, in all, sixteen witnesses. These include Satender Singh (PW-1), the brother of the deceased who had identified the dead body; ASI Satya Pal (PW-

2), who had conducted the preliminary inquiry; Mahesh Kumar (PW-3), younger brother of the deceased who had identified the dead body; Noor Mohd. (PW-4), the eye-witness; Constable Sheesh Pal Singh (PW-5), who was with PW-2 in the preliminary inquiry; Constable Pankaj Sharma (PW-6), who had participated in the investigation and is stated to be witness to the two arrests including that of the respondent; Constable Ashok Mishra (PW-7), who had taken the copies of the FIR to the concerned authorities in terms of Section 157(1) Cr.P.C.; Constable Rinku Nehra (PW-8), who took viscera to Forensic Sciences Laboratory (FSL) on 18th June, 2010; SI E.S.Yadav (PW-9), the in-charge of the crime team which inspected the place where the dead body was found; Constable Zile Singh (PW-10), the photographer forming part of the crime team who had taken photographs (Ex. PW-10/A-1 to PW-10/A-10); Constable Amit (PW-11), who had taken certain other exhibits to FSL on 28.06.2010; Inspector Mukesh Kumar Jain (PW-12), the draftsman who prepared the scaled site plan (Ex.PW-12/C) of the place of discovery of the dead body; the Metropolitan Magistrate (PW-13) who conducted the Test Identification proceedings (TIP) on 11.05.2010 in respect of two arrestees (including the respondent); Dr. Arvind Kumar (PW-14), the autopsy doctor; Head Constable Jagbir Singh (PW-15), the Malkhana Moharrar of the police station who proved the deposit of various exhibits and their submission to the FSL; and, Inspector K.P.Singh (PW-16), the IO.

8. It is clear from the FIR registered on 24.04.2010 that till that stage the investigating police did not have a clue as to in what circumstances the offence had been committed or as to who was

responsible for the same. The report under Section 173 Cr.P.C. submitted in the court of Metropolitan Magistrate on 30.07.2010 stated that during the investigation, the Investigating Officer (IO) had come across two public persons who were found to be eye-witnesses to the occurrence, they being Noor Mohd son of Mohd. Yusuf and Mohd. Mosin son of Mohd. Irshad. According to the charge-sheet, and the evidence led at the trial, the IO, Inspector K.P.Singh (PW-16), came in contact with the said eye-witnesses on 25.04.2010. We may add that Mohd. Mohsin son of Mohd. Irshad was not produced at the trial. Repeated processes issued, including through the superior police officers to secure his presence did not bear fruit, the final position taken by the State being that the witness had left the last known address and was not traceable. Noor Mohd. son of Mohd. Yusuf, however, was examined (as PW-4), the entire case of the prosecution being dependant on his testimony.

9. According to the report of investigation, four persons including the respondent herein were involved in the crime. It shows that the full particulars or addresses of the two of the alleged accomplices could never be ascertained. It appears in absence of such information the investigating police has not followed up the matter in their regard. As two of the assailants could not be traced out or arrested, the charge-sheet sought the trial only of the respondent and one another. Mid-way the proceedings in the Court of Sessions, the other person who had been arrested, and brought to trial with the respondent, however, claimed that he was a juvenile within the meaning of expression defined in the Juvenile Justice (Care and Protection of Children) Act, 2000. The trial court conducted an inquiry into this plea and found the

claim to be correct. Thus, per the proceedings recorded on 17th November, 2011, the case of the prosecution against the said other person (hereinafter referred to as “the juvenile”) was delinked and made over to the Juvenile Justice Board for further proceedings in accordance with law.

10. It is clear that in absence of any other corroborative evidence linking the respondent with the crime, the prosecution rested its case solely on the eye-witness account of Noor Mohd. (PW-4). The witness did depose during his examination-in-chief affirming the prosecution case against the respondent. But, during cross-examination he wilted and backtracked. Though we have serious reservations as to the manner in which the recording of the evidence of this witness was handled in the trial court, given the overall facts and circumstances of the case, including the claim of the investigating police about how the availability of such witness was brought to light, and the sketchy description of the sequence of events coming in his statement under Section 161 Cr.P.C., as indeed in the court, and its variance from the autopsy report, we find it unsafe to place our implicit faith in the veracity of this witness. We must dilate on this more.

11. In the statement under Section 161 Cr.P.C. attributed to PW-4, he had been present in the wooded area (where the murder would take place) from 4:00 PM onwards, he being busy with the goats he had brought to the place for grazing. He had seen the deceased coming to the place, all alone, to sit near a electricity pole and for consuming liquor. According to him, four young persons, described by him as boys, had come to the place around 6:00 PM. From the manner he

gave their description to the IO, it is clear that those persons were not known to him from before. He was, thus, unable to give their names or other particulars. He nowhere stated that he had seen them in the vicinity in the past or in a particular area of the locality, neighbourhood or thereabouts. Besides the description of their clothes, heights or physique, the only pointed description relevant for the purposes of the case against the respondent was that he had a cut mark on his left cheek. Thus, reference to the person with cut mark on his left cheek, as appearing in his statement under Section 161 Cr.P.C., and in the court deposition may be construed, for the purpose of discussion, as reference made to the respondent. The other person to whom a specific role was attributed in the statement under Section 161 Cr.P.C. was described as one sporting long hair. We may mention that in the court testimony PW-4 clarified that the person with the long hair had not been brought to trial. Clearly, the said person would be an individual other than the respondent or the juvenile.

12. It is mentioned in the statement under Section 161 Cr.P.C. of PW-4 that the four persons who had come to the place at about 6:00 PM had also started consuming liquor and eventually started forcing the deceased into joining in the binge. When the deceased had got up to move away, the respondent caught hold of him from behind and forced him on the ground. At that stage, one of his accomplices (other than those brought to trial) had broken a glass bottle and handed over the same to the one sporting long hair (not arrested). Thereafter the deceased was overpowered and one with the long hair had stabbed the victim with the bottle in his neck causing bleeding injury. At that stage, the respondent had statedly threatened the witness (PW-4)

asking him to run away from the scene or else he (the respondent) would inflict injury with blade on his face. Noticeably, the act attributed to the respondent in the said statement was the initial one of he having dragged the victim on the ground, the assault involving stabbing with broken bottle on the neck having occurred later at the hands of one of the two individuals who were never arrested.

13. In his chief-examination, PW-1 deposed that after victim had been forced down on the ground by the respondent it was he (the respondent) who had broken the bottle whereupon his associate (the one sporting long hair) had inflicted the injury with the broken bottle on the neck of the victim. It is plain and vivid that this sequence is materially variant from what was projected in the statement under Section 161 Cr.P.C.

14. PW-4, during his cross-examination, made a somersault and disowned the claim of he having been an eye-witness to the occurrence stating that he had given the evidence under pressure, and on the basis of tutoring, by the police. It was brought out during cross-examination that the witness had been earning his livelihood as a hawker (fruit vendor). He conceded the suggestion of the defence that he had been under the patronage of local police who would take illegal gratification for allowing him to do his business. We take the suggestion, and the admission on the part of the witness, with a pinch of salt. What, however, stands out in the admission made by him during cross-examination, is the fact that he had not seen the assailants at the time of injuries being inflicted on the person of the victim.

15. The trial court record reveals that Noor Mohd. (PW-4) was called in and partly examined on 28.04.2011. Further examination was deferred on that day for want of time. His examination was continued and conducted, more than 3½ months thereafter, on 18.08.2011. The only two questions asked by the public prosecutor on that day related to his ability to identify the assailants. This, to us, was wholly unnecessary as the identification of the persons standing trial by this witness had been established on the previous date. Be that as it may, after only four short questions pertaining to his employment, education and the errand of the fateful day, the cross-examination was deferred as the defence counsel was pleading “some personal grounds”. The witness thereafter appeared on 10.04.2012 and 18.05.2012. But, on both occasions he was sent away without further cross-examination for reasons of the defence counsel. He was further cross-examined partly on 16.07.2012 (after an interval of almost 11 months) but again the exercise remained inconclusive. Finally, on 21.09.2012 again with a gap of more than two months, the cross-examination was concluded and the witness discharged.

16. It is clear that the sole eye-witness (PW-4), who had been more or less supportive of the prosecution case on the previous dates made an about turn and turned hostile on 21.09.2012. The manner in which the trial court has conducted the proceedings leaves much to be desired. The dictum of Section 309 Cr.P.C. requiring the proceedings in a criminal trial to be “continued from day-to-day until all the witnesses in attendance have been examined”, of which this court has reminded the trial courts about in various pronouncements, seems to have been once again flouted and breached. We get the impression

that the proceedings were kept hanging fire at the convenience of the defence counsel – indeed, not a happy state of affairs. For all we know, pressure or other considerations may have been brought to bear on the witness (PW-4), during the protracted proceedings, to make him undergo a change of heart.

17. But, in the overall facts and circumstances of the case at hand, we are not inclined to accept the submission on behalf of the State that the deposition of PW-4 at the stage of his cross-examination (recorded on 21.09.2012) be ignored as falsehood or his statement during chief-examination (on 28.04.2011) be adopted as the one containing the whole truth. We are hesitant to take recourse to this approach in the case at hand for the reason we are not wholly satisfied about the circumstances in which the availability of the eye-witness account, through the mouth-piece of this witness (PW-4), statedly had come to the notice of the IO (PW-16). There is indeed significant disconnect. PW-4, apparently a chance witness, suddenly surfaced after about 3 days of the occurrence and had narrated facts already known, and also professed as to involvement of four persons.

18. In the course of his testimony, the IO vaguely stated that it was in the course of inquiry from the local vendors, labourers etc., that he came across PW-4 and the other eye-witness (not produced) on 25.04.2010. As observed earlier, in the statement under Section 161 Cr.P.C. of PW-4, there was no indication of he (the witness) having earlier been acquainted with any of the four assailants. Thus, he could not conceivably be the person leading the IO to the perpetrators of the crime. The narration in the charge-sheet shows that the appellant or

the juvenile were not arrested at the instance of either of the alleged witnesses. Instead, it claimed that the arrests were effected at the instance of a secret informer.

19. Aside from the above serious discrepancies, what stands out in stark contrast to the oral account of the events (given in chief-examination) of PW-4 is the autopsy report showing extensive stab injuries having been inflicted all over the body of the victim which included “cut throat injury produced by sharp edged weapon”. During cross-examination, the autopsy doctor clarified that all the said injuries had been produced by a “single edged weapon”. A piece of glass (from a broken bottle) with which PW-4 is stated to have seen the victim being wounded in the neck obviously cannot be described as a “single edged weapon”. This renders the word of PW-4, to the extent he sought to confirm the prosecution case in his examination-in-chief, a suspect and of doubtful veracity.

20. Consequently, we find that there is no error in the view taken by the trial Court in the impugned judgment. Thus, we decline leave to appeal against the order of acquittal. The petition is dismissed.

**R. K. GAUBA
(JUDGE)**

**SANJIV KHANNA
(JUDGE)**

DECEMBER 08,2015/mr