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

Reserved on: 22nd February, 2018
Decided on: 8th March, 2018

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CRL.A. 122/2002

DINESH & ANR.

...Appellants

Through: Mr K.K. Manan, Senior Advocate with
Mr Ankush Narang, Ms Shivani Kant and
Ms.Bhavya Chauhan, Advocates.

Versus

STATE OF DELHI

.... Respondent

Through: Ms Kusum Dhalla, APP for State.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE I.S. MEHTA**

JUDGMENT

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Dr. S. Muralidhar, J.:

1. This appeal is directed against the impugned judgment dated 25th January, 2002 passed by the learned Additional Sessions Judge, New Delhi ('ASJ') in Sessions Case No.84/2000 arising out of the FIR No.935/1999 registered at Police Station ('PS') Hauz Khas convicting the two Appellants i.e. Dinesh (Accused No.1: A-1) and Hans Raj (A-3) for the offence under Section 302/34 of the Indian Penal Code ('IPC') and the order on sentence dated 1st February, 2002 whereby each of them were sentenced to undergo imprisonment for life with a fine of Rs.2000/- each; and in default of payment of fine, to undergo rigorous imprisonment ('RI') for three months.

2. At the outset, it must be mentioned that there were three accused sent up for trial i.e. the two Appellants, along with Raj Kumar ('A-2'), who too was convicted and sentenced likewise by the aforementioned judgment and order on sentence respectively. However, the present appeal is by A-1 and A-3.

3. The prosecution case began with information being received at PS Hauz Khas on 28th December, 1999 at 6.40 pm on intimation from the Police Control Room ('PCR') that near the Arya Samaj Mandir in Green Park, a person is lying unconscious. The said information was reduced to writing as a DD Entry which was entrusted to Head Constable ('HC') Shabir Ahmed (PW-11). On receiving the said information, PW-11 along with Constable ('Ct.') Jaswant Singh (not examined) proceeded to the spot and found that the injured person had already been removed to the Safdarjung Hospital. They then proceeded to the hospital and found that Sub Inspector P.N. Verma (PW-20) had already reached there.

4. It appears that at 7 pm, a call was made to PS Hauz Khas from the Duty Ct. at Safdarjung Hospital about Deepak ('deceased') a resident of Jhuggi No.124, Arya Samaj Mandir, Green Park having been brought to the hospital by his maternal uncle Sham Kumar (PW-7) and being declared as brought dead. This was reduced to writing as DD No.22A and entrusted to PW-20.

5. A third DD No.24A on the same date in the same PS, which was recorded at 8.10 pm, noted the death of the deceased and this was sent for registration of the FIR No.935/1999 under Section 302/34 IPC. There was a fourth DD No.25A in the same PS on 28th November, 1999 about a receipt of *tehrir*

sent by PW-20 at 6.50 pm for registration of this FIR. It notes that a crime team has been sent to the spot.

6. As far as the hospital is concerned, the Medico Legal Certificate ('MLC') of the deceased was prepared by one Dr. M.M. Yusuf Muzaffar who was working under Dr. Kapil Suri (PW-12). The MLC noted that patient had been brought dead by relatives. The injuries noted were an incised wound about 2 inch length on left parasternal region at 3rd and 4th rib level, a lacerated wound 1 inch in length on the scalp in the left parietal region and another lacerated wound 1 inch in length on scalp vortex. The body was then packed and sent to the mortuary for post-mortem examination.

7. Dr. Arbind Thergaonkar (PW-3) conducted the post-mortem on 29th December, 1999. Apart from noticing the aforementioned injuries, a stab wound in the chest was also noticed. Three other injuries being abrasions were also noticed. The cause of death was stated to be haemorrhagic shock consequent upon the stab wound in the chest "caused by double-edged sharp weapon like knife". The said injury was stated to be sufficient to cause death in the ordinary course of nature. The time since death was noticed as 22 hours prior to the examination.

8. Meanwhile on 28th December 1999, a crime team had reached the spot. By this time, Inspector Data Ram (PW-21) had taken over the investigation of the case and proceeded to the spot after first having dispatched HC Shabir Ahmed and Ct. Jaswant to the mortuary to protect the body of the deceased. Ct. Girdhar Singh (PW-13) took five photographs on the spot on the directions of PW-21. PW-21 after reaching the spot prepared a rough site

plan on the pointing out of Kishore Kumar (PW-2) on whose statement the *rukka* had already been prepared by PW-20 and sent for registration of the FIR.

9. According to PW-21, when he came back to the spot, he came along with Kishore Kumar (PW-2), PW-20 and Sham Kumar (PW-7), the uncle of the deceased. PW-21 also lifted the earth control and bloodstained earth from the spot, sealed it with a seal and handed over the same to PW-2. He then went to Safdarjung Enclave and met Abhijit Basu (PW-5) who worked as a manager in Cable Network, Paces Cable owned by Ashok Aggarwal (PW-4) and in whose office A-1, A-2 and A-3 used to work. He found the addresses of the three accused from PW-5 and then began to search for them but they were not at home. According to PW-21, the three accused surrendered in the Court on 30th December, 1999. An attempt was made to recover the weapon of offence but that was not successful. A scaled site plan was prepared by Inspector Devender Singh in his office (PW-10) on 10th February, 2000 after he had visited the place of the occurrence on 24th January 2000 at the request of PW-21.

10. A charge-sheet was filed against the three accused and by order dated 5th August, 2000, charges were framed against three of them for committing the offence punishable under Section 302/34 IPC.

11. The case of the prosecution, as spelt out in the charge-sheet, is that Kishore Kumar (PW-2) had earlier been working with the Cable Operator and the deceased was living in the same *jhuggi* camp as PW-2. On 28th December 1999 at 6 pm A-1, A-2 and A-3 were abusing and beating the

deceased near the pole at the *jhuggi* near the Arya Samaj Mandir, Green Park. PW-2 had gone to ease himself and was returning to his *jhuggi* when he noticed the three accused abusing and slapping the deceased. When he made enquiries about the same, four to five persons bounced on PW-2 and someone gave a fist blow on his eye and face. PW-2 tried to run, fell down and after getting up noticed that A-2 was holding the deceased and A-3 exhorted that the deceased must be eliminated. A-1 took out a knife and gave knife blows on the chest and head of the deceased. PW-1 noticed that the deceased fell down as he was running away from the spot. Thereafter PW-2 went to the house of the deceased where he found no one and coming back to the spot, he learnt that the deceased had already been removed to the hospital by his mother (PW-1) and maternal uncle (PW-7). He then went to the hospital where he gave the statement to the police.

12. PW-2 was the star witness of the prosecution. The trial Court has based its conviction of the Appellants essentially on his evidence. Therefore, his evidence requires to be carefully scrutinized.

13. While in his examination-in-chief he maintained the above version as given by him to the police, in his cross-examination he admitted that he was working with the Cable Operator Ashok Aggarwal (PW-4) for almost two-two and a half years till about two-three months prior to December 1999. He admitted as correct that some time prior to Deepawali in 1999, cable wires had been disrupted and cut and PW-4 had then questioned PW-2 and also had a quarrel with him. PW-4 had reported the matter to the police blaming PW-2, who was granted bail by the police. PW-2 also admitted that “in order

to reach the place of incident, a taxi or car would have to come taking round.” He admitted that the place of incident was not a deserted place, that people were passing from there. There was a (police) beat booth inside the market. He denied the suggestion that he had falsely implicated A-1 because of previous enmity since A-1 had not helped him out in the criminal case lodged by PW-4 against him. He also admitted that PW-4 had lodged a separate case against PW-2 in which a knife had been recovered from PW-2.

14. In his cross-examination on behalf of counsel for A-2, PW-2 stated that he had taken only two-three minutes to reach the house of the deceased after the incident, but he somehow did not encounter Shobha (PW-1), the mother of the deceased and Sham Kumar (PW-7), uncle of the deceased both of whom took the deceased to the hospital soon after and must have reached the spot relatively quickly. He tried to explain that “I had rushed towards my house from the other side as told by me as *patri*.” As far as A-2 is concerned, PW-2 admitted that A-2 was employed by PW-4 after PW-2 left the service. In his cross-examination by learned counsel for A-3, PW-2 admitted that “Hansraj (A-3) was introduced to me about 25 days prior to the incident but I do not exactly remember.” PW-2 claimed that he did not exactly remember if he had told the police on the day of the incident that A-3 and the other two accused were working with PW-4. He denied the suggestion that he had cut the cable wires of PW-4 at the instance of a different, rival cable operator called Meena Cable Operation and that he has falsely implicated A-3 so that the work of PW-4 got closed.

15. The question here is how far can PW-2 said to be a reliable witness?

PW-2 is supposed to have, upon seeing the incident, first run back to the house of the deceased to inform someone there about the incident. This Court has perused the rough site plan (PW-21/A). The *jhuggi* cluster where the deceased and PW-2 lived, abutted abating the main road on which Kamal Cinema stood in the Safdarjung Enclave area. It is next to the Arya Samaj Mandir on the road leading to Green Park. The alphabets mentioned in the rough site plan are as under:

- (i) 'A' shows the place where PW-2 is supposed to have seen the deceased having a conversation with the three accused, and when he noticed them beat him and push him. This is on the main road itself in front of Y-24 of Green Park.
- (ii) 'B' shows as the place where on the wall of the school PW-2 was easing himself and from where he is supposed to have first seen the deceased talking to the accused.
- (iii) 'C' also shows a spot from where PW-2 saw the accused speak with and then beat the deceased.
- (iv) 'D' shows as the place where he saw three accused catching hold of the deceased and attacking him with a knife
- (v) 'E' is the point where PW-2 tried to intervene and 'F' where he turned back to see the accused stab the deceased. The electric poles have been shown as L1, L2 and L3 and B1 the spot where the blood stains were found. The 14 poles on the road had also been indicated.

16. The Court has also perused the scaled site plan (PW-10/A) which more or less matches the rough site plan. 'E' is a point where PW-2 is supposed to have seen the dispute between the accused and the deceased and 'C' being

the point where he started. 'I' is shown as the place from where PW-2 "again witnessed stabbing".

17. What is evident from both the rough site plan and its scaled version is that if after witnessing the stabbing, PW-2 was returning towards the *jhuggi* cluster to inform the relatives of the deceased, there is no way that he would not have encountered PW-1, the mother of the deceased and PW-7, uncle of the deceased, both of whom were rushing to the spot. In other words, the shortest route PW-2 could have taken to reach the house of the deceased was the main road and there they would have certainly crossed each other. The fact that neither PW-2 talks about meeting PWs 1 and 7 and equally nor do PWs 1 and 7 talk about his presence either at the spot or the hospital raises serious doubts about the presence of PW-2 at the spot and his testifying that he has actually witnessed the crime.

18. PW-1 in her deposition states that at around 6.15 pm on 29th December 1999 the deceased had left the house. After some time her brother (PW-7) came to her *jhuggi* and asked about the deceased. She told him that he had gone out to ease himself. When PW-7 told her that "a boy looking like Deepak was lying outside," and described the shirt that the boy was wearing, PW-1 rushed out from the house. She encountered the large crowd that had gathered outside and found the deceased. She tried to lift him but could not. Then she called PW-7 and she and PW-7 together took the deceased to the hospital in a taxi where he was declared as brought dead. PW-1 does not say anything about meeting PW-2 at the hospital.

19. Turning now to PW-7, uncle of the deceased, he states that around 6-6.30 pm his nephew Pardeep (not examined) informed him that some persons were beating the deceased. He left the clothes he was washing at the time and went to the taxi stand. He noticed that PW-1 and Naresh (not examined) were placing the deceased in a taxi. He too therefore sat in the taxi with PW-1 and went to the Safdarjung Hospital where the deceased was declared as brought dead.

20. In his cross-examination by the learned counsel for A-1, PW-7 stated that his statement had been recorded on the date of incident at around 8 pm. After the doctor declared the deceased as brought dead he and PW-1 immediately returned. Strangely, PW-7 stated that “blood did not fall on my clothes or Shobha’s clothes from body of Deepak nor it fell inside taxi.” He further stated that “my statement was recorded by Sh. Verma, and only one statement was recorded, and by the time my statement was recorded I was not aware of the assailants or the witnesses.” In other words, he does not admit to the presence of PW-2 in the hospital at all.

21. PW-7 admitted “I know Kishore Kumar who is a neighbour. Kishore Kumar was not seen by me in the hospital. Police from the local PS had not reached in the hospital when I was there with the dead body. It is incorrect to say that I had not taken deceased Deepak to the hospital. Police had recorded my statement on the spot.” The omission by PW-7 to mention the presence of PW-2 is significant.

22. There is no other independent witness to speak of the presence of PW-2 at the hospital. For that, one has to turn to the deposition of Sub Inspector

P.N. Verma (PW-20). It is seen in the statement of PW-20 that Kishore met him at the hospital and PW-20 recorded his statement. PW-20 claims to have returned to the spot along with PW-2 and PW-7. In the cross-examination of PW-20 by counsel for A-3, he stated as under:

“Kishore and Shyam Kumar met me near dead body but Shobha did not meet me near dead body. They were already there. I recorded the statement of Kishore Kumar in presence of Shyam Kumar. Shobha had met me in the when I had finished writing statement of Kishore. Kishore was having simple injuries. I did not ask him to undergo medical examination.”

23. Clearly there is a contradiction here since neither PW-1 nor PW-7 make any mention of the presence of PW-2 at the hospital or at the spot.

24. Turning now to the Investigating Officer (IO) (PW-21), he also states that after he took over the investigation, he “along with Kishore, SI P.N. Verma and Shyam Kumar went to the spot.....” If that were true, then PW-7 would not say that he did not meet PW-2.

25. The Court is not satisfied that PW-2 is speaking the entire truth, and can be a reliable witness. Added to the above inconsistencies is the fact that the MLC of PW-2 was not conducted immediately. Significantly, according to the police, PW-2 was medically examined at 1.30 am on 29th December 1999 whereas in the MLC of PW-2 (Ex.PW-19/A) found in the trial Court record, all the columns viz., date and hours of arrival; number and date of police docket number and name of Constable, date of admission, date of discharge and date and hour of report sent to the police, are left blank. PW-2 was examined by Dr. Amit Srivastava, CMO. While this doctor was himself

not examined, his colleague Dr. Anurag Srivastava (PW-19) identified his writing. PW-19 admitted that the time of preparation of MLC the date etc. was left blank. If indeed PW-2 was an injured witness, why his MLC was delayed for so long is not understood.

26. The contention of the accused that PW-2 himself was at the receiving end of a criminal complaint filed by PW-4 and was, therefore, at the mercy of the police, is not entirely without substance. Why the *rukka* was not prepared on the statement of PW-7 who was present at the hospital and had also brought the deceased there is not explained. There are suggestions put to PW-2 and PW-4 in their cross-examination which bring out the defence about PW-2 being suspected by PW-4 for the criminal act of cutting the cable wires for which he was facing a separate FIR. All this points to the testimony of PW2 not being entirely reliable.

27. The trial Court appears to have believed the evidence of PW-2 and it was prepared to overlook the glaring inconsistencies in his testimony. Particularly, the failure by PW-1 and PW-7 to mention the presence of PW-2 at the hospital was a significant aspect which has been overlooked by the trial Court. Suspicion however strong cannot take the place of proof.

28. If the evidence of PW-2 is not taken into account, the other material placed on record does not explain the crime and in particular the motive therefor. If it were to be treated as a case of circumstantial evidence, even then the prosecution has miserably failed to establish every link in the chain of circumstances.

29. In the considered view of the Court, it cannot be said that in the present case the prosecution has been able to prove the guilt of both the Appellants for the offence under Section 302/34 IPC beyond reasonable doubt. Both the Appellants are entitled to the benefit of doubt and are accordingly acquitted of the offences.

30. The impugned judgment dated 25th January 2002 of the trial Court and the order on sentence dated 1st February 2002 are hereby set aside. The bail bonds and surety bonds furnished by the Appellants are discharged. They will comply with the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

31. The appeal is accordingly allowed, with no orders as to costs. The trial Court record be returned together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 08, 2018

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