

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

2

+

CRL.A. 335/2002

CHANDER BHUSHAN

..... Appellant

Through:Mr. Parmod Kumar Dubey, Advocate
(*Amicus Curiae*) with Mr Nishaank Mattoo and
Mr. Saurabh Kumar, Advocates

Versus

STATE

..... Respondent

Through:Ms. Kusum Dhalla, APP for State

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

ORDER

%

01.03.2018

Dr. S. Muralidhar, J

1.This appeal is directed against the impugned judgment dated 24th January, 2002 passed by the learned Additional Sessions Judge (‘ASJ’), New Delhi in Sessions Case No.37/2001 arising out of the FIR No.480/1996 registered at Police Station (‘PS’) Dabri convicting the Appellant for the offence under Section 302 IPC and the order on sentence dated 31st January, 2002 sentencing the Appellant imprisonment for life with fine of Rs.100/-; and in default of payment of fine, to suffer further rigorous imprisonment (‘RI’) for one day.

2. At the outset, it requires to be noticed that there were two accused who were sent up for trial in the aforementioned FIR. Accused No.1 is Satish

Chand ('A-1'). The Appellant in this appeal is A-2. Further the charge that was framed against both the Appellants vide order dated 22nd January, 1999 was two-fold. The first charge was that they along with Shailender, Sattu and Vijay (co-conspirators) conspired on 15th August, 1996 to murder Hari Om ('deceased') by illegal means thereby committing an offence punishable under Section 120B of the Indian Penal Code ('IPC'). By the impugned judgment, the trial Court has acquitted both the accused of this offence.

3. The second charge was that on 15th August, 1996 at around 10.40 pm near House No.RZD-28, Gali No.2, Vijay Enclave, both A-1 and A-2 as part of the criminal conspiracy committed the murder of the deceased thus committing an offence punishable under Section 302 read with Section 120B IPC. As far as this charge is concerned, the trial Court vide the impugned judgment acquitted A-1 and therefore only A-2, the Appellant herein, has been convicted and that too only for the offence under Section 302 IPC.

4. Information was received at around 11.07 pm at PS Dabri on 15th August, 1996 that opposite RZ-71A, Vijay Enclave, "ek ladke ko chaku maar diya hai". This was reduced into writing as Ex.DD No.47-A at PS Dabri. Constable Suraj Pal (PW-7) along with Sub-Inspector Ganga Ram reached RZ-71A, Vijay Enclave, Dwarikapur and was told that the injured had been taken to the hospital. Thereafter, they reached the DDU Hospital where the Investigating Officer ('IO') recorded the statement of Kiran Kumar (PW-1) and after preparing the *rukka*, directed PW-7 to get the FIR registered.

5. The statement of PW-1 which possibly was recorded around midnight on

15th August, 1996 was to the effect that at around 10.40 pm he had gone to buy some vegetable dish at the hotel of Hari Om when he noticed that two boys came on a motorcycle and made Hari Om sit between them and took him away. The person on the pillion seat was Sattu and they proceeded towards the *ganda nala*. When they crossed about 50/60 yards, he heard the voice of the deceased say, “*bachao bachao maar diya*”. Then PW-1 and Raghunath (PW-12) ran after the motorcycle. When they went near the motorcycle, they noticed that the Appellant along with another person whom he could not recognize were pursuing the motorbike opposite the House No. RZ-D/28, they halted the motorbike at which point the Appellant pulled the deceased from the motorcycle and started stabbing him with a broken glass bottle. While PW-1 tried to grab the Appellant, PW-12 picked up the injured Hari Om, who was profusely bleeding. The Appellant then freed himself from the grip of PW-1 and ran away along with his associate inside Vijay Enclave. Even the two persons on the motorcycle ran away. They both i.e. PW-1 and PW-12 then hailed a three-wheeler scooter rickshaw (‘TSR’) and took the injured to the DDU Hospital and got him admitted.

6. The entire prosecution case rests on the eye witness testimony of Kiran Kumar (PW-1) and Raghunath (PW-12). Although PW-1 claimed to have accompanied the deceased to the hospital, the Medico Legal Certificate (‘MLC’) of the deceased (marked ‘DA’) shows only the name of ‘Raghunath son of Shri Chand’ as the person who brought the deceased to the hospital, the time being around 11.20 pm. The MLC shows that the deceased expired at around 11.40 pm. The injuries noted in the MLC are:

- (i) The cut incised wound “over right side over chest below nipple –

length approximately 3 inch in length. Bone exposed”: and

- (ii) Punctured wound over the left inguinal region (i.e. from where the leg starts) approximately 2 cm in diameter.

7. The Investigating Officer ('IO') i.e. SI Ganga Ram expired even before the trial could commence and, therefore, was not examined. On 1st September, 1996, the Appellant surrendered. On 17th August, 1996, Satish ('A-1') was arrested.

8. There were no recoveries at the instance of the Appellant obviously because, as spoken to by PW-7, the broken bottle was taken by the IO from the spot to the hospital without preparing any memo. For some reason, the broken bottle was again brought back from the hospital and shown as seized from the spot. It has come in the evidence of Naresh Mehta (PW-4), a photographer, that on 16th August, 1996, he was called to the spot by the SHO of PS Dabri. He states that at the spot a broken bottle was lying there. However, none of the photographs placed on record show any broken bottle. In his cross-examination PW-4 states "I cannot say if the broken bottle seen by me today is the same broken bottle. It is also wrong to suggest that Ex.P1 is the same broken bottle which was seized in my presence from the spot."

9. After the charge-sheet was filed and charges were framed against A-1 and A-2, as indicated hereinbefore, 15 witnesses were examined by the prosecution. As far as the present Appellant is concerned, in his statement under Section 313 of the Code of Criminal Procedure ('Cr PC'), he denied the eye witness testimony and other circumstances put to him. He stated that the police had taken signatures on blank papers and that he was innocent and

belonging to a very poor family. He pointed out that PW-1 was facing trial in more than 15 criminal cases. He claimed that PW-1 had asked the Appellant to install a phone as he was working for Bharti Telecommunication Company ('BTC'). Since he declined to do so, PW-1 had falsely implicated him.

10. The trial Court proceeded to convict the Appellant for the offence under Section 302 IPC essentially on the basis of the eye-witness accounts of the PWs 1 and 12.

11. The striking feature of this case is that although the case was projected by the prosecution as a criminal conspiracy between A-1 and A-2 along with three others, viz., Shailender, Sattu and Vijay, the said three persons were never proceeded against by the prosecution. This has not been explained by the prosecution at all.

12. The second feature is that the very same evidence which has been relied upon to convict the Appellant, has been disbelieved by the trial Court as far as co-accused A1 is concerned. The trial Court has also acquitted both accused, including the Appellant, for the offence under Section 120B IPC. In other words, the trial Court has disbelieved the prosecution story regarding a conspiracy having been hatched by A-1 and A-2 along with three others to eliminate the deceased.

13. PW-1 stated that he was present at the hotel of the deceased to get some vegetables packed when he noticed that two boys arrived there and took Hari Om on their motorcycle. At the time there was no altercation between

the boys and the deceased. The Appellant was sitting about 50-60 yards away. After hearing the noise of '*bachao bachao*' PW-1 and PW-12 are supposed to have run after the motorbike and when they reached near the motorbike, PW-1 supposedly noticed the Appellant pulling down the deceased from the bike and then attacking him with a broken bottle.

14. It requires to be noticed that there is no crime team report on record. A rough site plan was drawn up. It shows the direction in which the motorcycle went up i.e. bending around a turn in a *gali* (lane). There is no indication of the house mentioned in DD No.47-A opposite RZ-71A, Vijay Enclave, Dwarka. Further, there are two alphabets indicated in the rough site plan – 'A' is the place where some blood is found and 'B' is the place where the motorcycle had stopped and presumably where the deceased was attacked. This other spot 'A' where the blood was found is not explained in the narration of these witnesses i.e. PWs 1 and 12. Strangely, the rough site plan also does not indicate the exact locations of PWs 1 and 12 i.e. from the spot from where they noticed the deceased being attacked.

15. It was argued before this Court by learned counsel for the Appellant, which was also the point urged before the trial Court, that neither PW-1 nor PW-12 could be said to be the eye witnesses to the occurrence. Both these witnesses state that they took the deceased to the hospital in a TSR. PW-1 goes to the extent of saying that his shirt and trousers, even his shoes and socks were drenched with the blood of the deceased. PW-12 states that they used a cloth to staunch the bleeding of the deceased. Yet, the clothes of neither PW-1 nor PW-12 were seized by the police. The TSR was not

located. Therefore, very important pieces of evidence were not gathered by the police.

16. Secondly, in the MLC of the deceased that was drawn up in the hospital, the name of PW-1 was not mentioned although it is on his statement that the *rukka* was prepared. Therefore, his presence at the hospital is doubtful. Thirdly, the name of the person who brought the deceased to the hospital is noted as 'Raghunath son of Shri Chand', whereas PW-12's father's name is actually Sunder Singh. Raghunath was working at the hotel of Hari Om for only six days prior to the incident. How he could have named all the visitors to the hotel including Shailender, Sattu and Vijay as well as the Appellant is not known.

17. PW-12 also does not corroborate PW-1 on one important aspect. According to PW-12, the Appellant was sitting in the hotel of Hari Om and eating wherein the two boys came on a motorcycle and took Hari Om away by making him sit between them. That is not what PW-1 has said. According to him the Appellant was at a distance of 50-60 yards and he saw the Appellant chase the motorcycle.

18. The prosecution has failed to explain why the Appellant would want to kill the deceased. The story put forth by the prosecution, through PW-12, is that A-1 who was running a hotel opposite the hotel of Hari Om, had had a quarrel with Hari Om on that day a few hours before the incident in which they came to blows and A-1 had left threatening Hari Om. However, there is no link between A-1 and A-2. Also, the police had also not explored the exact role of those who were on the motorcycle, viz., Shailender, Sattu and

the third person Vijay.

19. The manner in which the police has also gone about a vital link and an important piece of evidence, viz., the broken bottle which was supposed to have been used to kill the deceased, is most unsatisfactory. No chance prints were lifted from this bottle which would have connected the Appellant to the crime. Also, it is not as if the Appellant had a broken bottle in his hand. In what manner he broke the bottle and then use it inflict injuries on the deceased is not explained. The other portion of the bottle was never recovered. Even the broken bottle found on the spot was needlessly taken by the IO to the hospital and then brought back to the spot and shown as recovered from the spot. The recovery of this broken bottle therefore completely loses sanctity.

20. In the first intimation to the police, as recorded in DD No.7-A, it is only stated that somebody has been stabbed with a knife and not with a broken bottle. Be that as it may, in his first statement to the police PW-1 does not state that the broken bottle was a 'Thumbs up' bottle. It cannot, therefore, be said that the weapon of offence has been proved by the prosecution.

21. Even the medical evidence raises grave doubts. As already noticed, in the MLC, the chest injury is shown to be on the right side of the chest. However, in the post-mortem, this injury is shown on the left side. This was the cut and incised wound. The second injury was mentioned in the MLC as a "punctured wound" over the left inguinal region (the beginning of the leg). In the post-mortem conducted by Dr. A.K. Barua (PW-3) the injury noted is "one incised like wound on the left groin size 1.3 cm x 1.2 cm with the

inverted margins”. The second injury was opined to have been caused by some “rough object”. It was this second injury which was held to be individually sufficient to cause death in ordinary course of nature. This fatal injury, which is not explained, was not by the broken bottle, which in any event was not shown to this doctor (PW3) to confirm if the fatal injury, or even for that matter the chest injury, could have been caused by this bottle.

22. Therefore, it will not be safe to hold that the medical evidence corroborates the eye witness testimony and therefore proves the case of the prosecution. There are too many unanswered questions which make the testimonies of PWs 1 and 12 unreliable and not entirely truthful. It is also not safe to make a conclusion about the guilt of the Appellant based on such eye witness testimony which is not corroborated by the medical evidence.

23. Even the forensic evidence does not corroborate the eye witness testimony. The earth-control and the blood-soaked soil when tested gave no reaction whatsoever. The trial Court disregarded the discrepancies in the medical evidence as not being material. However, the medical evidence seriously contradicts the eye witness testimony in material particulars and this cannot be termed as minor discrepancy. The failure to seize the bloodstained clothes of both eye witnesses was a major lapse on the part of the investigation as was the manner of handling the broken bottle, which was perhaps the most incriminating piece of evidence in this case. Added to this is the fact that the IO expired and therefore was not available during the trial.

24. For all of the aforementioned reasons, the Court is not satisfied that the

prosecution has been able to prove the case against the Appellant beyond all reasonable doubts. He is, therefore, entitled to the benefit of doubt.

25. The Appellant is accordingly acquitted for the offence under Section 302 IPC. The impugned judgment and order on sentence of the trial Court are hereby set aside. The bail bond and surety bond furnished by the Appellant are hereby discharged. He will comply with the requirement of Section 437-A Cr PC to the satisfaction of the trial Court at the earliest. The trial Court record be returned along with a certified copy of this judgment.

26. The appeal is allowed in the above terms.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 01, 2018
rd