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IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 89/2002

KISHAN LAL

..... Appellant

Through: Mr. Jayant K. Sud, Senior Advocate with
Mr. Ajay Verma, Ms. Vaishali Soni, Mr. Honey
Khanna, and Ms. Sanya Sud, Advocates.

versus

STATE GOVT. OF N.C.T. OF DELHI

..... Respondent

Through: Ms. Kusum Dhalla, APP

With

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CRL.A. 215/2002

KALU @ VIJAY PAL

..... Appellant

Through: Mr. Jayant K. Sud, Senior Advocate with
Mr. Ajay Verma, Ms. Vaishali Soni, Mr. Honey
Khanna, and Ms. Sanya Sud, Advocates.

versus

STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP

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CRL.A. 604/2003

RAJENDER @ RAJU @ GANJU

..... Appellant

Through: Mr. Sumeet Verma with Mr. Aman

Chaudhary, Advocates.

versus

THE STATE OF NCT OF DELHI Respondent
Through: Ms. Kusum Dhalla, APP

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

J U D G M E N T
01.02.2018

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Dr. S. Muralidhar, J.:

1. These three appeals are directed against the impugned judgment dated 25th January 2002 passed by the learned Additional Sessions Judge (ASJ), Karkardooma Courts, Delhi in Session Case No. 544 of 1994 arising out of FIR No. 78 of 1990 registered at Police Station (PS) Gokal Puri, Delhi.
2. Criminal Appeal No. 89 of 2002 is by Kishan Lal, [Accused No. 2 (A-2)] challenging his conviction by the aforementioned judgement for the offence punishable under Section 506 Part II of Indian Penal Code (IPC) and the order on sentence dated 31st January 2002 whereby for the said offence he was sentenced to undergo rigorous imprisonment (RI) for three years and a fine of Rs. 3,000 and in default to undergo RI for three months.
3. Criminal Appeal Nos. 215 of 2002 and 604 of 2003 are by Kalu @ Vijay Pal (A-3) and Rajender @ Raju @ Ganju (A-4) challenging their conviction by the aforementioned judgment for the offences under Section 302/34 and Section 323/34 IPC and the order on sentence dated 31st January 2002

whereby for the offences under Section 302/34 IPC they were sentenced to imprisonment for life and a fine of Rs. 1,000 each and in default of payment of fine, to undergo RI for two months each. For the offence under Section 323/34 IPC they were further sentenced to undergo RI for six months and a fine of Rs. 200 each and in default, to undergo simple imprisonment (SI) for 15 days each.

4. At the outset it requires to be mentioned that there were originally five accused in the case. A-1, Satish Kumar @ Satish, remained proclaimed offender (PO) throughout the trial and A-5, Ashok Kumar @ Ashok died during the pendency of the trial. Thus only three accused i.e. A-2 to A-4 faced trial.

The case of the prosecution

5. The deceased, Satish Chander Bhaskar, used to run a general merchant shop in the main market, Khajoori Khas. His younger brother, Mahender Nath Bhaskar (PW-2), was employed in the Ministry of Education.

6. On 7th April 1990 PW-2 and his colleague Raj Kumar (PW-18) were to attend a *jagran* at the house of their friend K.K. Mittal. It was a Saturday and therefore, both of them left 45 minutes earlier from their office. At around 5.45 pm they reached the shop of the deceased. At that time A-2 came to the shop with a *jhunjhuna* (a toy) and complaining that the deceased had given him a defective toy. The deceased denied the allegation and this resulted in exchange of abuses between A-2 and the deceased. A-2 then threw the toy into the shop, hurled abuses at the deceased and threatened that he would set the shop on fire by the evening. About 10-15 minutes

thereafter A-1 (the PO) who happened to be a brother-in-law of A-2 came to the shop accompanied by A-3 and A-4. PW-2 claimed that A-1 and A-4 were also noticed.

7. It is important to note that in the first statement made to the police which formed the *rukka* (Ex.PW-2/A), PW-2 named A-1, A-2 and A-4 and not A-3. He only stated that A-3 had come to the shop accompanied by A-4 and one other youth whom he could recognize if produced before him.

8. According to PW-2, A-1 and the other two dragged the deceased out of the shop stating that they wanted to teach him a lesson for insulting A-2, the brother-in-law of A-1. PW-2 and PW-18 tried to pacify the accused persons but in vain. While A-1 and A-3 dragged the deceased to a *chabutra* (raised platform), opposite the shop of Dr. Ramesh Chandel (PW 24) and threw him on the ground. A-1 then took out his knife and gave the deceased several stab blows on his back, head and chest. A-3 picked up a brick lying there and hurled it on the chest of the deceased as a result of which the deceased fell down and could not get up. PW-2 rushed towards the deceased but A-4 caught hold of him, threw him down on the other side and started giving blows as a result of which PW-2 sustained injuries under his left eye, on his lips and the back of the head. When PW-18 tried to catch hold of the culprits, they ran away waving the knife in the air.

9. The neighbouring shopkeepers then gathered there including Satya Bhushan Bhaskar, ((PW-13) cousin of the deceased. With the help of PW-18, PW-13 took the deceased to Hindu Rao Hospital in a three wheeler

scooter. After a short while the deceased succumbed to the injuries.

Medical evidence

10. The post-mortem of the deceased was performed by Dr. L.T. Ramani (PW-3). The following injuries were noticed on the body:

1. Incised wound 1.5 x 0.3 cm x skin deep on the left zygoma region.
2. An incised wound 2.5 x 0.5 cm on the left front of chest near sterna border. Medial end was acutely cut.
3. Incised wound 2 x 0.5 cm on the left nipple medial end acutely cut.
4. Incised stab wound 2.2 x 1 cm on the left hypochondrium region of the abdomen lower end was more acutely cut.
5. Incised wound 2.5 x 0.8 cm skin deep on the umbilical region of abdomen, lower end was acutely cut.
6. Incised wound 3.2 x 1 cm on the left lumbar area of abdomen. Both ends appeared equalled.
7. Incised wound 1.3 x 0.5 cm x skin deep on the left side vest.
8. Two incised wounds 4 cm & 2.5 cm long, placed 3 cm apart on the lower thirds of left forearm. Both wounds were communicating with each other. Distal ends were acutely cut.
9. Incised around 2.5 x 1 cm on the lower thoracic spine back, the left end of wound was swelling into a linear abrasion 2 cm long.”

11. It was opined that all injuries were ante-mortem, caused by a sharp edged weapon. Injury Nos. 2 to 4 were individually sufficient in the ordinary course of nature to cause death.

12. Significantly in the cross-examination of PW-3 on behalf of A-3, Rajender @ Raju he confirmed that “it is correct that there was no injury on

the body which could be attributed to blunt object like brick or stone.”

13. The MLC of PW-2 (Ex.PW-10/B) showed that his injuries were simple. There was an abrasion below the left eye, swelling and abrasion on both the lips, abrasion on the back.

Investigation

14. On the basis of the statement of PW-2, an FIR was registered. For some reason, the crime team was not called to the spot till 3 am. It has come in the evidence of Sub Inspector (SI) Ram Kishan (PW-15) that the crime team reached the spot only at 3.30 am on 8th April 1990. PW-15 in his cross-examination stated that “It is correct that till then the names of the assailants was not known, nor the names of the eye-witnesses were known at that time.”

15. It is stated that on 10th April 1990 at the instance of PW-2, the toy (*jhunjhuna*) which was thrown by A-2, was got recovered from the shop of the deceased. On 14th April 1990 A-4 surrendered and he was taken into custody. On 15th April 1990 A-2 was arrested and he then led the police to A-3.

16. On the completion of investigation, a charge sheet was filed. By an order dated 20th July 1992 charges under Section 302 read with Section 34 and Section 323 read with Section 34 IPC were framed against A-3 (Rajender @ Raju), A-4 (Kalu @ Vijay Pal Singh) and A-1 (Satish Kumar @ Satish) who was absconding. On the same date, a separate charge was framed against A-2 (Kishan Lal) for the offence under Section 506 Part II IPC.

The trial

17. The prosecution examined 31 witnesses. In his statement under Section 313 Cr PC A-3 (Rajender @ Raju) denied the circumstances and claimed to be falsely implicated. A-4 (Kalu @ Vijay Pal Singh) too claimed that he was falsely implicated. He stated that “the police was visiting my house even at odd hours and as such I have surrendered before the Court.”

18. A-2 (Kishan Lal) also claimed to have been falsely implicated. He claimed that he was lifted from his house along with his wife on 17th April 1990 as a result of which one of his relatives had sent telegram to the DCP on 11th and 16th April 1990. A-2 tried proving this by examining Raj Singh Bahot (DW-1), an official of the telegraph office, Urmila (DW-2) his wife and Ramesh Tomar (DW-3) his relative.

Impugned judgment of the trial Court

19. In the impugned judgment dated 25th January 2002 the trial Court came to the following conclusions:

(i) It was proved that a quarrel took place between the deceased and A-2 in the presence of PW-2 and PW-18 during which the A-2 threatened to burn the shop of the deceased and also gave personal threats. This set the tone for the next event in which the deceased lost his life.

(ii) According to PW-2, A-2 returned 10-15 minutes later along with A-1, A-3 and A-4. However, PW-18 did not mention A-2 returning but only that A-1, A-3 and A-4 came to the shop. Barring this aberration, none of the

witnesses stated anything about A-2 being involved in the second incident in which the deceased was murdered.

(iii) The contention of the accused that the FIR was delayed or ante-timed or manipulated, was rejected. The formal FIR was registered at 9.25 pm after the statement of PW-2 was recorded by the Investigating Officer (IO), Inspector/SHO Satyavrat (PW-30) at the hospital at around 8.15 pm.

(iv) The ocular evidence to the effect that A-3 (Rajender @ Raju) hurled a brick on the chest of the deceased may not have been corroborated by the medical evidence. However, it was possible that the external injuries that may have been caused were covered by the incised wounds caused by the knife.

(v) Both the eye-witnesses (PW-2 and PW-18) stood the test of cross-examination 'by and large'. There was sufficient explanation for the delayed medical examination of PW-2. The failure by PW-2 to mention to the doctor as to who had assaulted the deceased was satisfactorily explained since the doctor did not enquire from him.

(vi) Non-seizure of the blood stained clothes of PWs 2 and 18 was not fatal to the reliability of their testimonies. The identification of the accused by PW-2 and PW-18 in the Court was reliable and therefore, the failure to conduct the test identification parade (TIP) was not fatal to the case of the prosecution.

(vii) The other supporting witnesses have corroborated particularly the

version of the two eye-witnesses. The hostile witnesses, i.e., Sohan Singh (PW-16) and Dr. Ramesh Chandel (PW-24) did not dilute the case of the prosecution.

(viii) The recovery of the articles at the instance of the arrested accused also corroborated the version of the eye-witnesses.

(ix) The common intention was developed by the accused a few minutes after the quarrel took place between the deceased and A-2. All of them challenged the deceased to come out of the shop, dragged him out of the shop and took him to the *chabutra* (platform) where A-1 stabbed the deceased repeatedly with a knife and A-3 (Raju) hurled a brick on the deceased. When PW-2 tried to rush towards the deceased, he was stopped by A-4 and was assaulted. Both A-3 and A-4 saw the deceased was being attacked by A-1 with knife. In spite of this, A-3 hurled a brick on the deceased. A-4 stopped and assaulted PW-2 thus preventing him from saving his brother (the deceased). Hence both A-3 and A-4 were liable for the murder of the deceased under Section 302 read with Section 34 IPC.

(x) The defence evidence did not cause any dent in the prosecution case.

20. This Court has heard the submissions of Mr. Jayant K. Sud, learned Senior counsel appearing for A-2 and A-4, Mr. Sumeet Verma and Mr. Aman Chaudhary, learned counsel for A-1 and Ms. Kusum Dhalla, learned APP for the State.

Analysis and reasons

21. The Court has with the assistance of the learned counsel for the parties carefully perused the entire evidence. PW2 being the brother of the deceased is an interested witness. His testimony is, therefore, required to be carefully scrutinized. PW18 is the other eye-witness to the incident.

22. While the presence of A4 at the scene along with A1, as spoken to consistently by both PWs 2 and 18 is not in doubt, the presence of A3 i.e. Raju @ Rajinder is not so clearly or consistently spoken about by PWs 2 and 18. Further, in his first statement to the police at around 9 PW2 did not name A3. He did name A1 and A4. He mentioned A1 being accompanied by one youth but did not name him.

23. The other aspect of the matter is that both PWs 2 and 18 are also not consistent regarding the presence of A2 (Kishan Lal) on the second occasion when the deceased was murdered. While both PWs 2 and 18 consistently speak of A2 coming around 5.30 pm to the shop of the deceased, having a quarrel with him over the toy sold by the deceased and threatening him as he left, PW18 does not mention that A2 came back after 10/15 minutes along with the other co-accused. Thus, on this important aspect, PW2 and PW18 differ. The trial Court has accepted that A2 was not present the second time when A1, A3 and A4 came back to the shop.

24. The version of PWs 2 and 18 about A3 having hurled a brick lying at the spot on the deceased also differs on a material aspect. While PW2 states that A3 first hurled a brick on the deceased after which he fell down and

thereafter A1 attacked him with a knife several times on his chest, back, etc., PW18 states that the hurling of the brick by A3 on the deceased was after the deceased had been stabbed several times by A1. Given the number of knife injuries on the body of the deceased, it is likely that the deceased was already knocked to the ground i.e. even before the brick was hurled.

25. Further, the medical evidence does not support the versions of PWs 2 and 18 that A3 was seen hurling a brick at the chest of the deceased. Although the trial Court has sought to explain that the injury caused to the deceased due to hurling of the brick might be covered by the incised wounds caused by the knife, no such explanation has been offered by PW3 himself who conducted the post-mortem. The trial Court cannot possibly perform the task of a medical expert by offering its own explanation. This is so because PW3 was categorical that no injury which can be caused by the brick was found on the body of the deceased.

26. The Court is, therefore, not in agreement with the trial Court that the medical evidence corroborates the ocular evidence. It contradicts it in a material aspect. It raises doubts whether at all A3 hurled a brick lying at the spot on the deceased.

27. Nevertheless, the Court is satisfied that the presence of both A1 and A3 at the spot has been established by the evidence of PWs 2 and 18.

28. The next question is whether it could be said that A3 and A4 shared a common intention to kill A1 ? Both PWs 2 and 18 state that after the

deceased fell on the *chabutra* (platform), A1 took out the knife from the *dub* of his pant. It was therefore clear that the knife was not visible to anyone till then. More importantly, it is not known whether A3 and A4 also knew that A1 was carrying a knife.

29. The evidence of PWs 2 and 18 proves that A2 extended threats to the deceased when the deceased denied supplying A2 with a defective toy. While A1 did say that he would teach the deceased a lesson, it is not clear whether his intention was to kill the deceased and whether such intention was shared by his two other co-accused.

30. After the exchange of abuses with the deceased at around 5.30 pm, A2 returned and probably conveyed to his own brother-in-law (A1) that he had been humiliated by the deceased for which revenge had to be taken. Whether this was to be in the form of a killing is highly doubtful particular when A1 came to the shop in the company of A3 and A4, with only A1 was carrying a knife. Neither A3 nor A4 carried any weapon. A3 and A4 were unarmed. The possibility, therefore, is that A3 and A4 were not privy to any plan that A-1 may have had to inflict knife blows on the deceased. PWs 2 and 18 did say that it is only after the deceased fell to the ground on the *chabutra* that A1 pulled out a knife from the right side of his pant. Therefore, when A1, A3 and A4 came to the shop of the deceased with A2 therefore being unarmed, they could be attributed a common intention to teach the deceased a lesson but not to kill him.

31. For the applicability of Section 34 IPC, it is important for the

prosecution to show that the three accused i.e. A1, A3 and A4 shared a common intention to either kill the deceased or to cause him such injuries as were likely to result in his death. On the facts of the present case, that important element has not been proved by the prosecution.

32. In *Ajay Sharma v State of Rajasthan (1993) SCC (Crl.) 74*, the Supreme Court pointed out that the main assailant is supposed to have attacked the deceased with a Kirpan, which he hid under a stocking. The Supreme Court accepted the plea of the co-accused that he might have not known that the main accused was having such a kirpan. The instigation was only to strike the deceased and not to kill him. In that view of the matter, the Court sets aside the conviction of the Appellant in that case under Section 302 read with Section 34 IPC.

33. In the present case, the prosecution has not shown that A3 and A4 had in fact shared a common intention with A1 to kill the deceased. The benefit of doubt in that regard ought to be given to the two accused i.e. A3 and A4.

34. As far as A2 is concerned, he has been convicted by the trial Court, and in the view of this Court rightly, for the offence under Section 506-II IPC. The depositions of both PWs 2 and 18 are clear, cogent and consistent and are sufficient to bring home the guilt of A2 for the said offence.

Conclusion

35. The result of the above discussion is as follows:

- (i) The conviction of the Appellant Kishan Lal (A2) for the offence

under Section 506-II IPC is hereby confirmed.

- (ii) The conviction of A3 and A4 for the offence under Section 302 IPC read with Section 34 IPC and Section 323 read with Section 34 IPC is hereby set aside. Consequently, the order on sentence qua A3 and A4 for the aforementioned offences is also hereby set aside.
- (iii) As regards the sentence of A2 (Kishan Lal) for the offence under Section 506-II IPC, given that nearly 28 years that have elapsed since the commission of the crime and this appeal itself has been pending for 16 years, the Court modifies the sentence awarded to A2 (Kishan Lal) for the offence under Section 506-II IPC and confines it to the period already undergone, with no alternation in the fine amount and the default sentence.

36. The appeals are disposed of in the above terms. A3 and A4 i.e. Rajinder Singh and Vijay Pal Singh @ Kallu will fulfil the requirements of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. The surety bonds and bail bonds furnished by the three Appellants are hereby discharged. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J

I.S. MEHTA, J

FEBRUARY 01, 2018/Rm