

\$~5

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

+ **CRL.A. 682/2017 & CRL.M.(BAIL)137/2018**

ASHWANI KUMAR @ ANNU @ ANUWA ...Appellant
Through:Mr Hemant Singh and Ms Seema Singh,
Advocate

versus

THE STATE NCT OF DELHI ...Respondent
Through:Ms Radhika Kolluru, APP for the State
with SI Satish Kumar PS Ambedkar Nagar

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

J U D G M E N T
28.02.2018

%

Dr. S. Muralidhar, J.:

1.This is an appeal directed against the judgment 24th March 2017 passed by the learned Additional Session Judge-02, South District, Saket Courts, New Delhi in Session Case No. 115 of 2013 arising out of FIR No. 360 of 2013 registered at Police Station ('PS') Ambedkar Nagar convicting the Appellant for the offence under Sections 302/34 of the Indian Penal Code ('IPC') and the order on sentence dated 7th April 2017 whereby he was sentenced to undergo rigorous imprisonment ('RI') for life with a fine of Rs. 5,000; and in default of payment of fine, to further undergo three months' simple imprisonment ('SI').

2. The charge against the Appellant was that in furtherance of common

intention with his associate Rajan Babu and a juvenile Kumari Priya, he intentionally committed the murder of Nilofar, aged 17 years at around 8.30 pm on 6th August 2013 at her house in Dakshin Puri, New Delhi by a gunshot injury to her neck.

3. It must be noted that the Appellant-accused was charged with committing the offences both under Section 302/34 IPC as well as Section 4 read with Section 25 of the Arms Act, 1959. However by the impugned judgment, the trial Court acquitted the Appellant of the offence under Sections 4 and 25 of Arms Act.

4. The case of the prosecution as initially spoken to by Smt. Shahnaz (PW-2), mother of the deceased, was that on 6th August 2013 she found her daughter Nilofar sitting in a sad mood in the house when she returned from work at around 6.30 pm. When asked, the deceased told PW-2 that her friend, Priya had a quarrel with her and Priya had threatened to finish her off.

5. In the first statement given by PW-2 to the police at the hospital at around 11 pm on 6th August 2013, she stated that at around 8.30 pm Priya along with the present Appellant and one other boy came to their house, started quarrelling with the deceased, and then the Appellant told the deceased that he would not leave her alive that day. Following this, on the extortion of Priya, the Appellant is stated to have taken out a country-made pistol, pointed it at the neck of the deceased and then shot her. The Appellant along with Priya and the other associate are then stated to have run away.

According to the PW-2, Priya was overpowered by the public while she was running. PW-2 called the police at number 100. The police gypsy then arrived there and took the deceased to the Max Hospital. PW-2 claimed to have accompanied the deceased to the hospital.

6. As it transpired, the daughter of PW-2 expired four days thereafter on 10th August 2013. PW-2 even in her first statement to the police stated that she knew the Appellant and Priya as both resided in the same colony.

7. The case was therefore investigated on the basis of the aforementioned eye witness statement. The crime team was called to the spot on the intervening night of 6th/7th August 2013 and the rough site plan was prepared (Ex.PW14/A). One spent cartridge shell was found on the spot which was then seized. Blood from the spot and earth-control and the baniyan (vest) having blood stains were also seized.

8. The case of the prosecution is that although Priya was apprehended by the public on the date of the incident, i.e. 6th August 2013, she was handed back to her parents and was arrested only on the following day.

9. As far as the Appellant is concerned, it is stated that on the basis of some secret information, the police arrested him on 8th August 2013 from near the bus stop at Batra hospital. According to the police, the Appellant made a disclosure statement that he could get the weapon of offence recovered from the “roof of Khatta (garbage place) in front of Mahila Mandal near Virat Cinema”. The Appellant then led the police to the said *khatta* and got

recovered the pistol with one live cartridge from the roof of the *khatta*.

10. At the stage of framing of charge itself on 21st January, 2014 the co-accused, Rajan Babu was discharged as he was unable to be identified by the eye-witness, PW-2 in the Test Identification Parade ('TIP').

11. Learned APP is unable to inform the Court of the outcome of the trial against the third co-accused Kumari Priya, who was a juvenile at the time of the commission of offence. She was tried by the Juvenile Justice Board.

12. Turning to the case in hand, 20 witnesses were examined by the prosecution. In his statement under Section 313 of the Code of Criminal Procedure ('Cr PC'), the Appellant denied that the incident happened in the manner described by PW-2. He even denied the manner of his arrest and the recovery made pursuant to his disclosure of the weapon of the offence. In response to Question 12, regarding the disclosure and the recovery, he stated "I did not make any disclosure statement and my signatures were obtained on blank papers under force and coercion." He further stated "nothing was recovered from me or at my instance." He maintained that he had been falsely implicated.

13. The Appellant examined Lady Constable Renu as DW-1. She brought with her the CCR form which showed that the first call was made to the PCR by PW-2 at 20:51:16 hours. The information recorded was "*meri beti ko kisi ne goli maar di hai bahut khoon beh raha hai*". The name of the assailant was not mentioned in the PCR form.

14. During the trial, PW-2 was first examined in chief on 3rd February, 2014. She maintained in the examination-in-chief what she had disclosed to the police in the first instance on the night of 6th August 2013, on the basis of which the *rukka* was prepared and the FIR was registered. However, on that date, her further examination-in-chief was deferred “for identification of clothes of the deceased and items lifted from the spot.”

15. For reasons that are not clear, the examination-in-chief was continued more than a year and 5 months thereafter on 6th July, 2015. On that date, PW-2 identified the clothes of the deceased and some other articles lifted from the spot by the police on 6th August, 2013 itself. The cross-examination was deferred to the immediate following day i.e. 7th July, 2015. In her cross-examination, PW-2 stated that she returned from her duty at 7.30 pm on 6th August, 2013. She spoke specifically about her son Ashu (PW-10) as under:

“My son Ashu is also working in some Guest House, however, I do not remember its name and place. He used to went for his job at about 07.00 A.M. and returned to house at about 08.00 P.M. My son Ashu came to the house after the incident had taken place. He came to the house on the information passed on to him by his friends. When he came at the house, there was crowd.

16. As regards her own presence in the house, she stated as under:

“On the day of incident, firstly I came to my house. It is myself who informed the police on 100 number for the first time about the incident, I do not remember whether I had furnished all the details qua the incident such as, as to who fired upon my daughter etc. in my call at 100 number. The incident took place in my presence in the first floor. The persons in the first floor were not visible to me as I was in

the bathroom, which was too in the first floor. Priya was apprehended by the public persons in the alley which was behind my house. I came to know about the incident only when Priya was apprehended by the public persons as there was noise, however, prior to that I heard gunshot fire. My daughter Nilophar was taken to the hospital by my son Ashu and police personnel. I reached the hospital thereafter, however, I do not remember the exact time. It is correct that I had not met with my daughter on the day of incident i.e. after the incident (vol. I met with her on the next day when I visited the hospital).”

17. The above statement was a contradiction of what she had earlier stated to the police about her being an eye-witness to the incident when the Appellant is stated to have pulled out a gun and fired on the deceased. PW-2 now took the plea that she was in the bathroom; therefore the persons who had entered the house were not visible to her; and that she came to know about the incident only when Priya was apprehended by the public persons as there was noise. In other words, PW-2 was now denying that she was an eye witness to the incident.

18. This prompted the learned APP to re-examine PW-2 with the permission of the Court. Although PW-2 stated then that it was correct that whatever she knew about the incident she had stated to the police and thereafter had affixed her signature, when cross-examined by the learned counsel for the accused, she stated “my statement Ex. PW2/A was not read over to me by the police. I do not know the contents of the same.”

19. PW-2 denied the suggestion put to her by APP that she had been won over by the relatives of the Appellant who were present in the Court under

threat and coercion. She maintained “I had deposed falsely in the Court on 3rd February, 2014. I am well aware that telling lies is an offence.” She again stated in her re-examination by the APP as under:

“I knew accused Ashwani as he and his family members were our neighbour when we were residing at Dakshinpuri. I also know the accused Ashwani as Anuwa only.”

20. It must be noted that after her initial examination-in-chief on 3rd February, 2014 and prior to her deferred examination-in-chief on 6th July, 2015, Ashu (PW-10), (the brother of the deceased), had already been examined. He was first examined in-chief on 15th July, 2014. He began his examination-in-chief as if he too was an eye witness to the incident. He stated that at 8.30 pm, on 6th August, 2013, he was present in the house having returned from his duty at 6.00 pm and the Appellant accompanied by Priya and another associate came there. He then stated that "Priya abused my sister and accused Anuwa took out a pistol from his belt of worn pants and fired at my sister and fired at my sister. The bullet hit my sister on her neck." But without any gap, he immediately added “the incident of firing did not take place in my presence. I had only seen the accused persons while they were going out from my house. I came to my house on hearing the gunshot. I had seen country made pistol in the hand of accused Anuwa when he was descending the staircase of our house.”

21. Again since PW-10 resiled from his previous statement to the police, with the permission of the Court, the APP proceeded to cross-examine him. PW-10 then denied that he was an eye witness to the incident in which Priya slapped the deceased during the quarrel in the house or that Kumari Priya

had exhorted the Appellant to finish the deceased following which the Appellant had fired on the neck of his sister. He virtually denied his entire previous statement to the police i.e. Ex. PW10/A. Much later on 23rd March, 2016, pursuant to an application under Section 311 Cr PC, PW-10 was again recalled for his cross-examination by counsel for the accused. He now maintained that he had left his office on the date of the incident at 9.30 pm and without even going to his house, he had directly gone to the Max Hospital. PW-10 further claimed that the police had not recorded his statement at the hospital and also that “I only may saw my sister in the hospital where she was already admitted.”

22. The entire case of the prosecution hinged on these two witnesses i.e. PW-2, the mother of the deceased and PW-10, the brother of the deceased. As can be seen, PW-10 has turned out to be totally unreliable. This is made worse by the fact that in the MLC of the deceased (Ex.PW7/A), he stated that she was brought to the hospital by PW-10 at 9.30 pm. Another contradiction emerges in the cross-examination of PW-2 when she states that PW-10 had returned home soon after the incident and that when he came home there was a crowd.

23. The Court is of the considered view, therefore, that no reliance whatsoever can be placed on the testimony of PW-10 and he has to be treated as an unreliable and untruthful witness.

24. Turning now to PW-2, as already noticed, she resiled from the previous statement made by her to the police in her cross-examination by the counsel

for the accused on 7th July, 2015. However, the trial Court was not prepared to treat her as a hostile witness on the ground that on reading her testimony as a whole, it was seen that there was no confrontation by the counsel for the accused on the aspect of PW-2 being a witness to the quarrel that took place prior to the firing and to the presence of three persons including the Appellant in the house prior to the firing and the quarrel. Therefore, according to the trial Court, “this part of deposition of PW2 in cross-examination hardly displaces the incident as narrated by PW2 in her examination-in-chief on overall reading of the testimony duly corroborated through her statement (Ex.PW2/A) recorded by the police.”

25. In the first place, the previous statement to the police cannot be treated as evidence by the prosecution. There is only a very limited purpose for which her previous statement can be used and this is spelt out clearly under Section 162 Cr PC. Secondly, the trial Court appears to be desperate to salvage in some portion of the evidence of PW-2 which can confirm the presence of the Appellant in the house on the day of the incident.

26. What has been missed by the trial Court is the settled legal position that an eye witness testimony, and in this case an interested eye witness being a close relative of the deceased, must be consistent, truthful and reliable. In the considered view of the Court, PW-2 fails on all these three counts. It might be possible that because of the long gap between her examination-in-chief i.e. 3rd February, 2014 and her cross-examination on 7th July, 2015, she may have been won over by the accused but that cannot somehow render her testimony as being truthful and reliable. The fact remains that by resiling

from her previous testimony by way of examination-in-chief, PW-2 has rendered herself an unreliable witness. It was urged by the learned APP that having seen and heard the quarrel between her daughter and the three persons including the Appellant, it was highly improbable that PW-2 would stay in the bathroom and therefore this part of her testimony in her cross-examination must be completely discarded.

27. But then, the evidence of PW-2 would have to be read as a whole. Upon reading the entire evidence, the Court does not get the impression that PW-2 is speaking the entire truth. Even accounting for the fact that there was a long gap between her examination-in-chief and her cross-examination, it would be unsafe for the Court to proceed to draw an inference regarding the guilt of the Appellant based solely on the testimony of such an unreliable witness.

28. The Court will have to, in such circumstances, where the eye witness testimony is on shaky grounds, look for other corroborating material if at all some portion of the eye witness can be salvaged.

29. The corroborating evidence put forth is in the recovery of the weapon of offence upon a disclosure made by the Appellant after his arrest. Unfortunately for the prosecution, the FSL report (Ex. PW28/A) is unable to confirm that the pistol that was recovered was the same weapon that was used to fire the gun shot on the neck of the deceased. While the bullet that passed through her neck and exited from the upper portion of her back was unable to be recovered, what was available with the police was the used

cartridge found at the spot. This cartridge did not match the weapon purportedly recovered at the instance of the Appellant. Further there were no chance prints available on the pistol which could be lifted and matched with the finger prints of the Appellant. In other words, the weapon recovered by the police could not be linked to the Appellant.

30. No other public witness has been examined to confirm the presence of the Appellant at the spot on the date of incident. With PW-10 turning out to be a wholly unreliable witness, the entire case of the prosecution was made dependent on the testimony of PW-2 who, for reasons already discussed, proved to be an unreliable and untrustworthy witness.

31. The Court is, therefore, unable to appreciate how the trial Court could have proceeded to return a finding of guilt on the basis of such shaky evidence which does not conclusively prove the guilt of the accused for the offence under Section 302/34 IPC. The trial Court has failed to appreciate that suspicion can never take place of proof. There must be some credible evidence put forth by the prosecution which can assure the Court about the guilt of the accused. Unfortunately, that is not present in this case.

32. Consequently, the Appellant is entitled to the benefit of doubt and is accordingly acquitted of the offence under Section 302/34 IPC. The impugned judgment of the trial Court and the impugned order on sentence are hereby set aside.

33. The Appellant be released forthwith, unless wanted in some other case.

He will comply with the requirements of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. The trial Court record, together with a certified copy of this judgment, be sent back forthwith.

34. A certified copy of this judgment be also sent to the Superintendent, Tihar Jail at the earliest.

35. The appeal is allowed in the above terms. Pending application is also disposed of.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 28, 2018

sk