

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 07.09.2017
Judgment Pronounced on: 20.03.2018

CRL.A. 1306/2015

MOHD. ASHRAF

.....Appellant No.1

versus

STATE

..... Respondent

CRL.A. 16/2016

MOHD. MUSTAQ

..... Appellant No.2

versus

STATE

..... Respondent

Through: Ms. Harsh Prabhakar, Advocate
(DHCLSC), Mr. Aditya Vikram
and Mr. Anirudh Tanwar,
Advocates for Appellant No.1
Mr. Sumeet Verma, Advocate
(DHCLSC) for Appellant No.2
Ms. Rajni Gupta, APP for the
State with SHO/Inspector
Sanjeev Kumar, SI Rohit
Kumar, P.S. Jamia Nagar

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE NAJMI WAZIRI

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present criminal appeals instituted under the provisions of section 374 read with section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as '*CrPC*'), assail the judgment and order on sentence dated 28.09.2015 and 30.09.2015, respectively; rendered by the Ld. Additional Sessions Judge, Saket Court, New Delhi, in Sessions Case No.101/13, emanating from FIR No.450/13 (hereinafter referred to as the '*subject FIR*').

2. By way of the impugned judgment and order on sentence dated 28.09.2015 and 30.09.2015, respectively, Mohd. Ashraf (hereinafter referred to as '*Appellant No.1*') and Mohd. Mustaq (hereinafter referred to as '*Appellant No.2*') were sentenced to undergo rigorous imprisonment for life and pay a fine of Rs.2,000/- each, for the offence punishable under the provisions of section 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as '*IPC*'). In default of payment of fine, Appellant Nos.1 and 2 (hereinafter collectively referred to as the '*Appellants*') have been sentenced to undergo rigorous imprisonment for a further period of 3 months. Benefit of Section 428 CrPC has been granted to the Appellants.

3. The fulcrum of the case of the prosecution is that on 30.08.2013 around 10 P.M., the Appellants along with their co-accused, namely, Mohd. Faisal (declared P.O. vide order dated 16.05.2014), in furtherance of their common intention took Mohd. Chand (hereinafter referred to as the '*deceased*') to the fifth floor of the house bearing No.S-14/6 Joga Bai Extension, Jamia Nagar, Okhla, New Delhi (hereinafter referred to as the '*subject building*') and threw him down on the street (hereinafter referred to as the '*crime spot*') with the intention to kill him, and as a consequence of the injuries sustained due to the fall, the deceased died.

4. On 31.08.2013 at 1.55 A.M., information was received at Police Station Jamia Nagar, Delhi (hereinafter referred to as the '*police station*') from Safdarjung Hospital (hereinafter referred to as the '*hospital*') that the deceased was got admitted by his father, namely, Mohd. Kesar (PW-3), since the former had received certain injuries on account of falling from some height. The said information was recorded as DD No. 8A [Ex. PW-13/A] by Head Constable Raghuveer Prasad (PW-13).

5. On receipt of DD No.8A, Sub-Inspector Ombir Singh (PW-14), who was the first IO in the present case, along with Constable Bal Kishan (PW-4) went to the hospital around 2:15 A.M., where the deceased was found to be

admitted. The deceased was opined to be unfit for statement by the treating doctor. Thereafter, PW-14 proceeded to the crime spot and Constable Robin (PW-5) was deputed there, and he himself returned to the police station to inform the Station House Officer about the incident. Around 10:45 A.M. on the same day i.e. 31.08.2013, information was received at the police station from the hospital that the deceased had died. On the basis of the said information, Head Constable Prathvi Raj (PW-1) recorded DD No.25B [Ex.PW-1/B] and the same was entrusted to PW-14. Subsequent thereto, PW-14 along with PW-4 went to the hospital and recorded the statement of PW-3 [Ex.PW-3/A, also Ex.PW-14/A]. On the basis of the statement of PW-3, the subject FIR dated 31.08.2013 was registered [Ex.PW-1/A] and a copy thereof was handed over to Inspector G.S. Rawat (PW-16), the second IO in the present case. PW-16, *inter alia*, prepared the visual site plan at the instance of PW-3 [Ex. PW-16/A], picked up blood smeared earth as well as earth control from the crime spot [Ex.PW-5A].

6. In the post mortem report [Ex.PW-10/A], it was opined by the doctor that the deceased died due to shock as a result of ante mortem injury sustained to head, consequent upon blunt force/surface impact. It was further

opined that internal injury to abdominal structure was also caused by blunt force impact.

7. Appellant No.1 was arrested on 31.08.2013 [vide arrest memo Ex.PW-3/B]. On interrogation, Appellant No.1 admitted to his complicity in the commission of the underlying offence [Ex.PW-5/B]. His personal search was conducted vide memo Ex.PW-3/C.

8. Insofar as Appellant No.2 is concerned, he was initially absconding and subsequently surrendered before the court on 20.01.2014. He was arrested vide arrest memo Ex.PW-15/C, and his personal search was conducted [Ex.PW-15/D]. The disclosure statement of Appellant No.2 is Ex.PW-15/A and pointing out memo is Ex.PW-15/B.

9. Appellant No.1 in his statement under the provision of section 313 CrPC stated that he has been falsely implicated in the present case and Mehmood (PW-2), the child witness who purportedly witnessed the entire incident, identified him because he is residing in the same neighborhood and knows him very well. It was further stated by Appellant No.1 that he was called at the police station for the purpose of enquiry and was arrested there. Further, that there was a quarrel between him and mother of PW-2 sometime

back for throwing garbage. Appellant No.1 in support of its defence has produced Dr. Pratima (DW-1) and Pawan Kumar (DW-2) as witnesses.

10. Insofar as Appellant No.2 is concerned, it has been stated by him in his statement under the provision of section 313 CrPC that he has been falsely implicated in the present case and PW-2 identified him because he was residing in the same locality as him. It was further stated by Appellant No.2 that he did not abscond and was residing at his permanent address i.e. at his native place, and when he came to know about the present case, pursuant to coming back to Delhi, he surrendered before the court.

Submissions

11. Learned counsel appearing on behalf of the Appellants would firstly urge that the prosecution in support of its case has not examined any independent witness and, therefore, an adverse inference is liable to drawn against them.

12. Learned counsel would then assail the credibility of the testimony of PW-2 on the following grounds:

- i. PW-2 has not identified Appellant No.1 in court.

- ii. PW-2 is a pliable witness, inasmuch as, he is a child and in his cross-examination has admitted to the effect that he was tutored to depose against the Appellants.
- iii. It could not have been possible for PW-2 to identify the perpetrators, since there was no streetlight at the crime spot and it was dark and raining when the incident happened.
- iv. Deposition of PW-2 with respect to the aspect where the body of the deceased was found lying is contrary to the point marked in the scaled site plan [Ex.PW-12/A].
- v. Furthermore, there are material contradictions in PW-2's testimony vis-à-vis his statement under sections 161 and 164 CrPC.

In order to buttress this submission reliance would be placed on the decisions of the Hon'ble Supreme Court in ***Radhey Shyam v. State of Rajasthan*** reported as (2014) 5 SCC 389, and ***Lallu Manjhi v. State of Jharkand*** reported as JT 2003 (1) SC 1.

13. To create a dent in the case of the prosecution, learned counsel would invite our attention to the fact that PW-3 in his statement to the police [Ex.PW/3A] has not named PW-2 as an eye-witness or that someone

witnessed the Appellants commit the underlying offence, and has merely stated that he suspects the involvement of the Appellants. Further, that the subject FIR was registered on the statement of PW-3 and not of PW-2, who would have been a more appropriate witness, since he purportedly witnessed the incident.

14. Learned counsel would then submit that since PW-3, a witness to the arrest memo of Appellant No.1 [Ex.PW-3/B], has denied during his deposition in court that latter was arrested before him, the arrest of Appellant No.1 is shrouded with suspicion.

15. It would then be submitted that there is no evidence available on record to conclusively establish that the Appellants had thrown the deceased off the subject building.

16. Per contra, learned Additional Public Prosecutor (APP) appearing on behalf of the State, whilst supporting the impugned judgment in its entirety, would urge that the findings of the Ld. Trial Court require no interference. It would be urged that the material on record conclusively establishes the guilt of the Appellants beyond reasonable doubt.

17. It would further be submitted by learned APP that since shortly before the incident, the Appellants were last seen with the deceased near the crime

spot, and no explanation has been forthcoming therefrom with respect to the sequence of events leading to the fatal fall; it is evident that the Appellants murdered the deceased.

18. We have heard the learned counsel appearing on behalf of the parties and perused the case record.

Independent witness

19. In the present case, the prosecution had examined 18 witnesses in support of its case. The case of the prosecution rests primarily on the testimonies of PW-2 and PW-3, cousin brother and father of the deceased, respectively.

20. On the subject whether these witnesses are independent; or because of their relationship with the deceased they are to be treated as interested witnesses and their testimonies to be discarded unless corroborated by independent public witnesses, it would be just and proper to refer to the decision of the Hon'ble Supreme Court in ***Ashok Kumar Chaudhary v. State of Bihar*** reported as (2008) 12 SCC 173, wherein it was observed as follows:

“ 6. Mr P.N. Lekhi, learned Senior Counsel appearing for the appellants has assailed the convictions on a number of grounds. Firstly, it is submitted that the incident having taken place at a public place in the evening, the prosecution ought to have examined some independent witnesses. Having failed to do so, the

evidence of PW 4 and PW 5 should be discarded as being closely related to the victim, Ajay Kumar, they were “highly interested” and prone to falsely implicate the appellants, particularly when PW 4 was also involved in civil and criminal litigation with one of the appellants herein.

7. We are not impressed with the argument. Though it is true that the incident having taken place near the market around 6 p.m. on 17-7-1988, the prosecution should have attempted to secure public witnesses who had witnessed the incident, but at the same time one cannot lose sight of the ground realities that the members of the public are generally insensitive and reluctant to come forward to report and depose about the crime even though it is committed in their presence. In our opinion, even otherwise it will be erroneous to lay down as a rule of universal application that non-examination of a public witness by itself gives rise to an adverse inference against the prosecution or that the testimony of a relative of the victim, which is otherwise creditworthy, cannot be relied upon unless corroborated by public witnesses.

8. Insofar as the question of creditworthiness of the evidence of relatives of the victim is concerned, it is well settled that though the court has to scrutinise such evidence with greater care and caution but such evidence cannot be discarded on the sole ground of their interest in the prosecution. The relationship per se does not affect the credibility of a witness. Merely because a witness happens to be a relative of the victim of the crime, he/she cannot be characterised as an “interested” witness. It is trite that the term “interested” postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive.

9. In *Dalip Singh v. State of Punjab* [AIR 1953 SC 364 : 1954 SCR 145] this Court had the occasion to deal with the question as to whether a relative is per se an “interested” witness. Dispelling the general impression that relatives were not independent witnesses, speaking for the Court, Vivian Bose, J., observed thus: (AIR p. 366, para 26)

“26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.”

10. In *Masalti v. State of U.P.* [AIR 1965 SC 202 : (1964) 8 SCR 133] a four-Judge Bench of this Court had observed that though the evidence of an interested or partisan witness has to be weighed by the court very carefully but it would be unreasonable to contend that evidence given by a witness should be discarded only on the ground that it is evidence of a partisan or interested witness. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. (Also see *Guli Chand v. State of Rajasthan* [(1974) 3 SCC 698 : 1974 SCC (Cri) 222] and *State of Punjab v. Jagir Singh* [(1974) 3 SCC 277 : 1973 SCC (Cri) 886] .)

11. To the same effect is the decision in *Rizan v. State of Chhattisgarh* [(2003) 2 SCC 661 : 2003 SCC (Cri) 664] , wherein this Court has observed that relationship is not a factor to affect credibility of a witness. It is more often than not a relation would not conceal the actual culprit and make allegations against the innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

12. Very recently in *Namdeo v. State of Maharashtra* [(2007) 14 SCC 150 : 2007 AIR SCW 1835] , one of us (C.K. Thakker, J.) has said that a close relative cannot be characterised as an

“interested” witness. He is a natural witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the “sole” testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.”

(Emphasis supplied)

21. There is no evidence on record to give rise to the apprehension that PW-2 and PW-3 had any animus towards the Appellants. Furthermore, there is also no conclusive evidence on record to prove that PW-2 and PW-3 had some oblique motive towards falsely implicating the Appellants. Although, it is true that Appellant No.1 by way of his statement under the provision of section 313 CrPC and cross-examination of PW-2, has made an attempt to cast a doubt that he has been falsely implicated, since in the past there have been instances of bickering/quarrel between him and the family members of the deceased; but that proposition even if considered to be true is, in our view, too insignificant a factor and a common affair in any neighborhood, for one person to falsely implicate another for the grave offence of murder.

22. Even otherwise, the graphic details of the incident given by PW-2 and PW-3, negate the argument advanced on behalf of the Appellants that they were not independent witnesses.

Child witness

23. Before dealing with the creditworthiness of the evidence of PW-2, we would like to deal with the preliminary objection that Appellant No.1 was not identified by PW-2 in court.

24. It is an admitted position that Appellant No.1 and PW-2 were residing in the same locality at the time of the incident and were acquainted to each other. A bare perusal of the testimony of PW-2 would show that Appellant No.1 has been specifically named and referred to by him as one of the perpetrators. During cross-examination, it was never disputed by counsel for Appellant No.1 that the 'Ashraf' referred to by PW-2 in his testimony was some other person and not his client. Furthermore, it would be vital to note that Appellant No.1 in his statement under section 313 CrPC has admitted that PW-2 identified him in court.

25. Therefore, in our considered view, this defect of there being no specific recording by the trial Judge in the testimony of PW-2, to the effect, that Appellant No.1 was identified by the former in court, appears to be an inadvertent error and can be overlooked in the interest of justice; although, not as a matter of practice and the trial courts should be wary towards these vital aspects while recording testimonies.

26. A Division Bench of this Court in *Babu v. State* reported as 201 (2013) DLT 418, after considering several decisions of the Hon'ble Supreme Court, succinctly laid down the legal position with respect to the credibility of a child witness as follows:

“ 13. In view of the legal proposition enunciated above, a child witness is a competent witness provided statement of such witness is reliable and truthful. A conviction can be based on the sole testimony of a child witness. The only precaution, which the Court should bear in mind while assessing evidence of a child witness is that witness must be a reliable one and his demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule of practice that in every case evidence of such a witness be corroborated by other evidence before a conviction could be allowed to stand, but as a rule of prudence, court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record.”

(Emphasis supplied)

27. However, at the same time it shall be kept in mind that determination of the question whether a child witness has sufficient intelligence rests primarily with the trial Judge, inasmuch as, only he has the advantage of noticing his manners, apparent possession or lack of intelligence. Needless to state, the trial Judge also has the liberty to resort to any examination, which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. However, a higher Court may interfere with the determination of the trial Judge if it is apparent from the

record that the conclusion was erroneous. [Ref: *Ratansinh Dalsukhbhai Nayak v. State of Gujarat* reported as (2004) 1 SCC 64]

28. The testimony of PW-2, the child witness who was residing along with PW-3 and the deceased in the *jhuggi* opposite the subject building (hereinafter referred to as the '*jhuggi*'), was first recorded on 22.04.2014. He was thirteen years old at that time. It was then deposed by PW-2 that on the fateful night, when he was returning from a shop after purchasing a bottle of water, he saw the deceased standing before the subject building with Appellant No.1 and two *kabariwalas*. Appellant No.1 and one other *kabariwala* had caught hold the deceased, whereas, the other *kabariwala* was standing behind the deceased, and they were taking him on "*some upper floor through stairs*". Thereafter, PW-2 proceeded to the *jhuggi*. After having his meal, PW-2 came out to wash his hands and saw Appellant No.1 and the other two *kabariwalas* throw the deceased from the subject building. Pursuant to the deceased falling down, PW-2 went up to the former and noticed that blood was gushing out from his head. PW-2 further deposed that he disclosed all of this to his mother and to other persons. PW-2's brother, father and some other persons gathered at the crime spot and took the deceased to the hospital. Further, it was deposed that police came to him at

night, however, he was not interrogated. Although, he showed to the police the place where the incident took place. On being cross-examined, PW-2 deposed that the deceased was thrown from the subject building around 9:00 P.M. It was further deposed by PW-2 that he used to stay on the ground floor of the *jhuggi* and the same was two minutes away from the subject building. There was no house between the said two houses. Appellant No.1 further deposed that it was not dark at the crime spot at that time, inasmuch as, there was a streetlight present. It was further deposed by PW-2 that he immediately did not inform his family members that he saw the Appellants and the third co-accused caught hold of the deceased, since they used to take him like that everyday. It was also denied by PW-2 that the deceased jumped from the subject building.

On 04.12.2014, PW-2 was re-called for examination. On that date Appellant No.2 was identified by PW-2 as one of the two *kabariwalas* involved in the commission of the underlying offence. Further, PW-2 identified his statement under the provision of section 164 CrPC, after it was shown to him. Thereafter, during the course of cross-examination by the counsel for the Appellants, PW-2 deposed that “*On earlier occasion my father and police official accompanied me to the court. It is true that I gave*

*statement before the court as was tutored by that police official and by my father ”. It was further deposed by PW-2 that “It is true that I did not see any of accused throwing deceased Mohd. Chand from that building”. PW-2 even denied of any streetlight being present between the *jhuggi* and the subject building, or before the subject building. Further, it was deposed by him that it was raining at the time the incident took place.*

29. In order to appreciate the evidence of PW-2 fully, it would also be relevant to refer to the testimony of PW-3 in relation to the sequence of events that transpired on the fateful night. PW-3 has deposed that on 30.08.2013 between 9-10 P.M., he went to the shop of Appellant No.1, which is in front of his house, to purchase gutkha. Appellant No.1 told PW-3 that his friend was likely to beat the deceased but he saved him. The deceased used to sit and drink with one tea vendor, namely, Javed (PW-11) and there was some quarrel between the two of them. Upon returning home, PW-3 had his meal with the deceased. Thereafter, Appellant No.2 called the deceased outside and the latter left with him. After about half and hour it started raining, and when PW-3 was urinating outside he heard a thud near the gate. PW-3 thought that the gate had fallen and when he went outside towards that place, he found the deceased lying on the ground. At the same

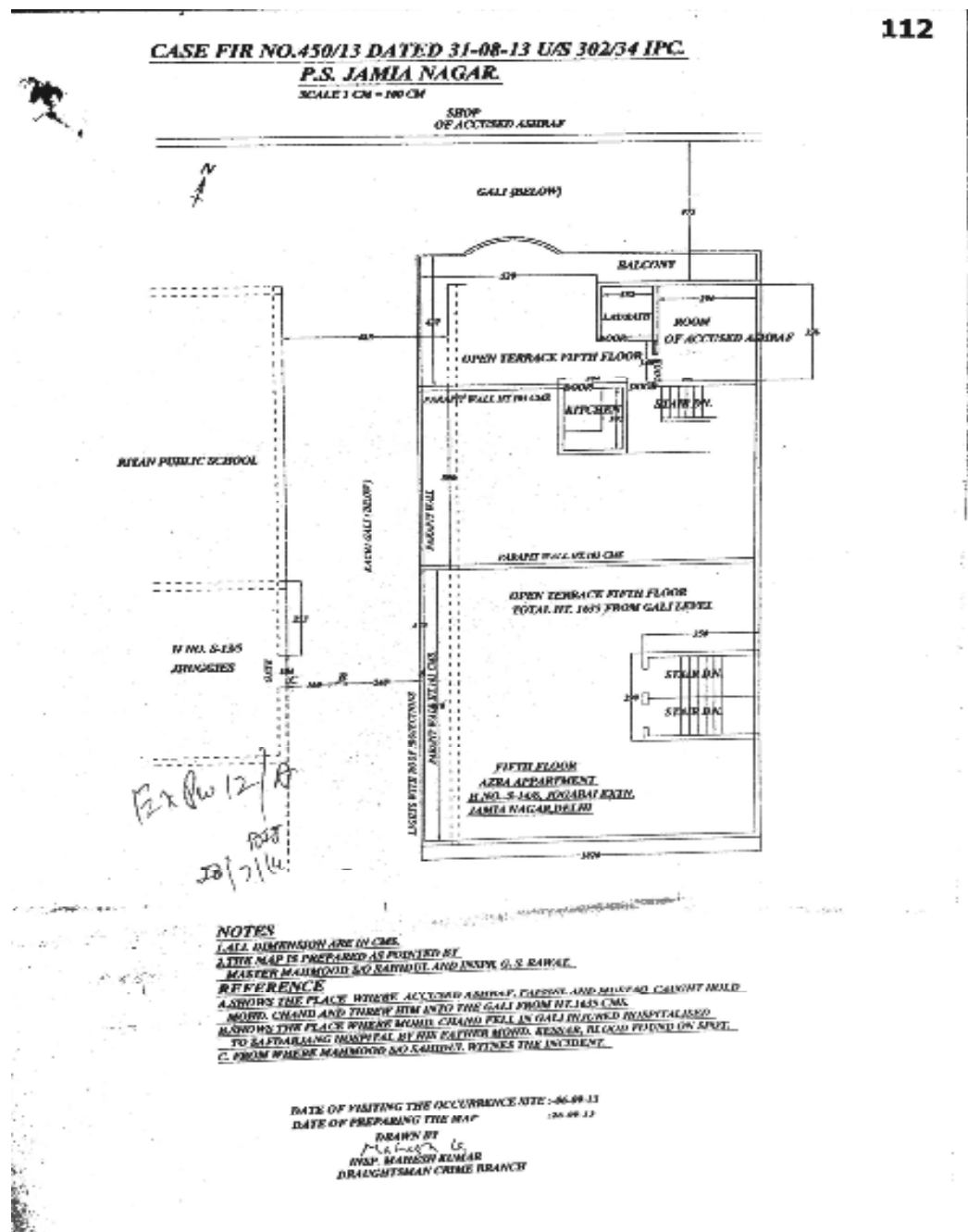
time PW-3 heard PW-2 crying “*Chand gira Chand gira*”. Thereafter, PW-3 along with his other sons took the deceased to the hospital. During the course of cross-examination on 23.05.2014, PW-3 deposed that “*It is true that when he fell down there was dark at the spot. It is true that I saw none between Md. Chand and the place where I was standing when I saw him having fallen there*”. Further, PW-3 deposed that he didn’t see anyone pushing the deceased off the subject building.

30. In our view, it would also be necessary to refer to the testimonies of PW-12 and PW-14 in order to determine whether the testimony of PW-2 is credible or not.

During the course of cross-examination, PW-14 deposed that streetlight was present at the crime spot when he went there on 31.08.2013 around 4:00 A.M. from the hospital. It was further deposed by him that electric pole/streetlight was at a distance of about 30 feet from the place where the victim had fallen.

Insofar as PW-12 is concerned, he has deposed during his cross-examination that he did not notice any pole of streetlight near the crime spot. The scaled site plan [Ex.PW-12/A] prepared by him on 06.09.2013 also does not mention of any streetlight. However, in the scaled site plan there is

mention of 'lights with roof projections' installed on the subject building, and no suggestion was put to PW-12 against this circumstance. For the sake of convenience, the scaled site plan [Ex.PW-12/A] is also reproduced hereinbelow:



31. The Trial Court whilst holding the testimony of PW-2 to be credible and rendering a finding of conviction thereupon, observed as follows:

"39. In the case of Khujji @ Surendra Tiwari Vs. State of M.P, AIR 1991 Supreme Court 1853, Hon'ble Apex Court examined the evidentiary value of a hostile witness and held that the evidence of a witness, declared hostile, is not wholly effaced from record and that part of evidence, which is otherwise acceptable can be acted upon. Hon'ble Apex Court relying upon its previous decisions in Bhagwan Singh Vs. State of Haryana, (1976) 2 SCR 921, Rabinder Kumar Dey Vs. State of Orrisa (1976) 4 SCC and Sayed Akbar Vs. State of Karnataka (1980) 1 SCR 95 held that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version found to be dependable on a careful scrutiny thereof.

40. It is well settled that the testimony of a child witness has to be evaluated and scrutinized very carefully before basing conviction on the basis of his sole testimony. In the present case, PW-2 Mehmood fully supported the case of the prosecution, when examined and cross examined on 2.04.2014. However, when he was cross examined on 04.12.2014, he retracted from his earlier version and told different story. PW-2 Mehmood has correctly identified accused Ashraf when examined and cross examined on 22.04.2014 as the person, who threw Mohd. Chand from the roof of fourth floor of the building. Even, on 04.12.2014, in his examination in chief, the witness identified accused Mustaq as the person, among the kabariwalas, who had thrown deceased Chand Mohd. From roof of the building. Thus, the identification of both the accused as the persons, who threw deceased Chand Mohd. from the building has been proved beyond all shadow of reasonable doubt.

41. It was held in Khujji @ Surendra Tiwari's case (Supra) that when witness identifying the accused in his

examination in chief, and he makes contradictory statement in his cross examination, his testimony in examination in chief cannot be discarded.

42. In the present case, PW-2 Mehmood correctly identified both the accused as the persons, who were involved in throwing Mohd. Chand from roof of the building. His cross examination conducted on 04.12.2014, wherein he denied the identity of the accused persons as the persons, who threw Chand. Mohd from the building does not efface or wash off his testimony which recorded on 22.04.2014 as further examination and cross examination of PW-2 was conducted after a period of six months, therefore, the witness appears to have been won over by the accused persons. The testimony of PW-2 Mehmood cannot be totally discarded and disbelieved only on account of the fact that he did not support the prosecution case, when cross examined on 04.12.2014 regarding the identity of accused persons.

43. Prior to recording of testimony of PW-2 Mehmood in the court on 22.04.2014, his statement was recorded before the Magistrate u/s 164 Cr.PC, wherein he had fully supported the case of the prosecution. PW-18 Shri Pawan Kumar, learned MM, who recorded statement of PW-2 Mehmood u/s 164 CrPC stated that before recording statement of PW-2 Mehmood, he had asked some questions from him to verify that he was of mature understanding and was deposing voluntarily. He further stated that after being satisfied that the witness was in free state of mind and was deposing voluntarily, he proceeded to record the statement of Mehmood which is Ex PW2/A.

43. The testimony of PW-2 Mehmood finds corroboration in the testimony of PW-3 Keshar, who deposed that when he went outside for urination, he heard a thud near his gate. He thought that their gate had fallen, however, when he saw outside that place, he found that his son was lying on the ground. At the same time, he heard that his other son Mehmood was crying "Chand gira, Chand gira". PW-3 Mohd. Keshar alongwith his other sons took

Mohd. Chand to Safdarjung hospital in a TSR, where he subsequently died."

32. The testimony of PW-2 was recorded on two dates i.e. 22.04.2014 and 04.12.2014; and since PW-2 was a minor, his testimony was recorded after putting certain questions to him to ensure that he was sufficiently mature and not tutored. On 22.04.2014, PW-2 supported the case of the prosecution in its entirety, despite being cross-examined extensively. However, on 04.12.2014, after identifying Appellants No.2 as one of the *kabariwala*; during the cross-examination he abandoned the case of the prosecution and deposed that his earlier account before the court was a result of tutoring by the police officials and his father.

33. In relation to the issue whether the testimony of PW-2 can be relied upon in such a circumstance, in our view, the Ld. Trial Court has rightly placed reliance upon the decision of the Hon'ble Supreme Court in ***Khuji v. State of M.P.*** reported as (1991) 3 SCC 627, wherein it was observed as follows:

“7. That brings us to the evidence of PW 1 Komal Chand. Komal Chand's evidence was not accepted by the trial court on the ground that he was not a natural witness and was only a chance witness. PW 1 explained his presence by stating that he had gone to the market to purchase vegetables and while he was returning therefrom on foot with his cycle in hand he heard a commotion and saw the incident from a short distance. Being a resident of

Suji Mohalla, the place of occurrence was clearly in the vicinity thereof and, therefore, his presence at the market place could not be considered to be unnatural. It is not unnatural for working people to purchase vegetables at that hour and, therefore, his explanation regarding his presence cannot be ruled out as false. The sketch map prepared by PW 11 Gaiser Prasad shows that he had seen the incident from a short distance of hardly 22 feet although PW 1 says he saw it from the square. Since the incident occurred at a public place with a lamppost nearby, the possibility of his having identified the assailants could not be ruled out. The examination-in-chief of this witness was recorded on November 16, 1976 when he identified all the assailants by name. He stated that he knew the six accused persons in court and they were the persons who had surrounded the rickshaw and launched an assault on PW 4 and the deceased Gulab. Of them Gopal struck PW 4 with a chain. He also stated that the appellant Khujji and his companions Gudda and Parsu were armed with knives and when Khujji tried to assault PW 4 with a knife, Gopal shouted 'Khujji that man is not Gulab'. Thereupon Khujji and his companions ran after the deceased Gulab, overtook him and the appellant, Parsu and Gudda assaulted Gulab with their weapons. Gudda struck Gulab from the front on his chest, Parsu stabbed him on the side of the stomach while Ram Kishan and Gopal held him and the appellant attacked him from behind with a knife whereupon Gulab staggered shouting 'save save' and fell in front of the house of advocate Chintaman Sahu. Thereafter all the six persons ran away. His cross-examination commenced on December 15, 1978. In his cross-examination he stated that the appellant Khujji and Gudda had their backs towards him and hence he could not see their faces while he could identify the remaining four persons. He stated that he had inferred that the other two persons were the appellant and Gudda. On the basis of this statement Mr Lalit submitted that the evidence regarding the identity of the appellant is rendered highly doubtful and it would be hazardous to convict the appellant solely on the basis of identification by such a wavering witness. The High Court came to the conclusion and, in our opinion rightly, that during the one month period that elapsed since the recording of his examination-in-chief something transpired which made him shift his evidence on the question of identity to help the

appellant. We are satisfied on a reading of his entire evidence that his statement in cross-examination on the question of identity of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. Since the incident occurred at a public place, it is reasonable to infer that the street lights illuminated the place sufficiently to enable this witness to identify the assailants. We have, therefore, no hesitation in concluding that he had ample opportunity to identify the assailants of Gulab, his presence at the scene of occurrence is not unnatural nor is his statement that he had come to purchase vegetables unacceptable. We do not find any material contradictions in his evidence to doubt his testimony. He is a totally independent witness who had no cause to give false evidence against the appellant and his companions. We are, therefore, not impressed by the reasons which weighed with the trial court for rejecting his evidence. We agree with the High Court that his evidence is acceptable regarding the time, place and manner of the incident as well as the identity of the assailants.”

(Emphasis supplied)

34. Having considered the evidence on record and in light of the decision in *Khujji* (*supra*), we are of the view that the conduct of PW-2 in abandoning the case of the prosecution during cross-examination on 04.12.2014, is a clear attempt to wriggle out of his earlier graphic deposition of the sequence of events leading to the incident and identification of the Appellants as the perpetrators. This conclusion of ours is based on the following evidence on record:

- i. Presence of PW-2 at the crime spot

It is not disputed that PW-2 was residing at the *jhuggi*, which was located right across the subject building. The presence of PW-2 at the *jhuggi* at time of the incident is also not disputed. No suggestion was put to PW-2 that on the fateful night he did not go outside to wash his hands after having his meal. Presence of PW-2 at the crime spot is further corroborated by the testimony of PW-3, who deposed that pursuant to the thud noise when he went towards the gate of the *jhuggi*, he heard PW-2 crying out “Chand gira Chand gira”. Thereby, establishing that PW-2 was already present at the crime spot when PW-3 arrived there.

ii. Sufficient illumination

PW-14 has categorically deposed that on the fateful night around 4:00 A.M. when he went to the crime spot there was a streetlight present. However, the scaled site plan [Ex.PW-12/A] prepared by PW-12 does not mention of any streetlight. The site plan was prepared by him on 06.09.2013 i.e. six days after the incident. He has not stated the time when he went to the crime spot to prepare the same, however, is presumed to

have gone during the daytime, since six days after the incident there could not have been any urgency to draw one during the nighttime. Therefore, possibility of his attention being drawn to the streetlight during daytime, when there would have otherwise been ample light, is rather bleak. This presumption is further fortified by the cross-examination of PW-12 itself, who has not denied of there being a streetlight and has only deposed that he did not notice one.

Even otherwise, in our view, the 'lights with roof projections' installed on the subject building would have been a sufficient source of illumination for PW-2 to identify the Appellants; *a fortiori* it is an admitted position that he was acquainted to the Appellants beforehand and it was not as if an unfamiliar face was noticed by him for the first time so as to lead to a difficulty in identifying them.

iii. Height

As per the scaled site plan [Ex.PW-12/A], the height of the terrace of the subject building from the street level is 1635 cms. Therefore, the distance was not significant and, in our

view, any person with an average eyesight could have easily identified the perpetrators, despite the fact that it was night time and dark, as well as, raining.

iv. No explanation

When PW-2 was cross-examined on 22.04.2014, after putting certain questions to him to ensure that he was not tutored, he deposed towards the incident in a coherent manner and supported the case of the prosecution. It was never mentioned by him then that he was tutored. Therefore, for him to abruptly depose on 04.12.2014 i.e. after almost eight months from the former date, that his earlier account was a result of tutoring by the police officials and his father and he doesn't know who threw the deceased off the subject building, is rather unusual and suspicious.

35. In view of the foregoing, it cannot be disputed that there was sufficient opportunity for PW-2 to identify the perpetrators, and after initially identifying Appellants as two of the three of them, his deposition to the effect that he did not see either of the Appellants throwing the deceased or that he was tutored to depose against the Appellants; was a result of certain

suspicious developments during the intervening period of eight months that caused PW-2 to blindly follow the lead of the counsel for the Appellants during cross-examination on 04.12.2014, by agreeing to every suggestion put to him.

36. Consequently, we concur with the finding of the Trial Court that the deposition of PW-2 cannot be effaced because of his deposition in cross-examination on 04.12.2014. The testimony of PW-2 can be safely relied upon in relation to the time, place and manner of the incident, as well as, the identity of the perpetrators; *de hors* his deposition during cross-examination on 04.12.2014.

37. The argument that, the testimony of PW-2 is liable to be rejected on the ground that it is contrary to the scaled site plan [Ex.PW-12/A] in relation to the aspect where the body of the deceased was found lying, is, in our view, specious and liable to be rejected.

38. PW-2 has deposed that “*there are two stairs leading to roof of that building and Mohd. Chand was dropped in between these two stairs*”. As per the scaled site plan [Ex.PW-12/A], the facade and the depth of the subject building are 910 cms and 1020 cms, respectively; the dimensions of the staircase are 290 cms by 350 cms i.e. the side parallel and perpendicular to

the façade of the subject building, respectively. Consequently, the staircase of the subject building was at a mere distance of 650 cms from the street, where the body of the deceased was found lying. A visual examination of the scaled site plan would also reveal that the body of the deceased was found lying just above the center point of the side of the staircase parallel to the façade of the subject building.

39. Therefore, when PW-2 on 22.04.2014 voluntarily deposed in court that the deceased was dropped between these two staircases, in our view, the staircase was taken by him as a yardstick to point towards the exact location of the body of the deceased; *a fortiori* the scaled site plan [Ex.PW-12/A], on the basis of which this purported discrepancy is sought to be made out and which records that the body of the deceased was lying on the street, was prepared on the pointing out of PW-2 itself.

40. Counsel appearing on behalf of the Appellants has also sought to point out certain contradictions/improvements in the testimony of PW-2 vis-à-vis his statements under sections 161 and 164 CrPC. However, the same need not be looked into, since during cross-examination no question was put to PW-2 in relation to the said purported contradictions/improvements, in order to enable him to offer an explanation.

41. Before parting with this issue pertaining to the credibility of PW-2, we would also like to observe that it is not disputed that there were other family members as well who were present in the *jhuggi* at the time of the incident. Therefore, to say that the family members along with the police officials conspired to falsely implicate the Appellants, by planting a minor child as an eye-witness and not any other adult family member present in the *jhuggi* at the time of the incident, is a rather strange proposition, and does not hold water.

FIR

42. Information regarding the death of the deceased was received at the police station from the hospital at 10:45 A.M. Pursuant to receiving information, PW-14 proceeded to the hospital and PW-3 met him there. The statement of PW-3 [Ex.PW-3/A] was recorded by PW14, and after making endorsement thereupon, the same was sent for registration of the subject FIR, which eventually came to be registered at 12:25 A.M.

43. Needless to state that a FIR is required to be registered by the police at the first instance on any information disclosing commission of a cognizable offence, and the police is not required to look for the best available evidence before registering the same. In the present case, pursuant to receiving

information regarding the death of the deceased at 10:45 A.M., the subject FIR was registered by the police at 12:25 A.M., on the first available evidence disclosing commission of a cognizable offence i.e. the statement of PW-3. Therefore, the argument advanced on behalf of the Appellants that the police officials should have not registered the subject FIR on the statement of PW-3 but on that of PW-2, because he was an eye-witness to the incident and the best available evidence, deserves to be rejected.

44. Insofar as the credibility of the case of the prosecution is sought to be assailed on the ground that the subject FIR does not mention PW-2 as an eye-witness; it would firstly be relevant to note that a FIR is only a verbatim summary of the prosecution case and all the intrinsic details in relation to the incident need not be mentioned therein, since it is not supposed to be an encyclopedia of the occurrence [*Ref: Baldev Singh v. State of Punjab* reported as (1995) 6 SCC 593].

45. PW-3 was an illiterate person, who must have been in a disturbed state of mind after losing his son. Therefore, merely because the name of PW-2 was not mentioned as an eye-witness in his statement to the police [Ex.PW-3/A], which formed the basis of the registration of the subject FIR, no adverse inference can be drawn against the prosecution.

Arrest of Appellant No.1

46. As per the arrest memo Ex.PW-3/A, Appellant No.1 was arrested from the subject building and PW-3 was a witness to the arrest. However, PW-3 during his deposition in court, whilst admitting to have signed the arrest memo, has denied that Appellant No.1 was arrested before him and, further, denied knowledge of the contents of the arrest memo, as he was an illiterate. In this behalf, PW-3 was even declared hostile and cross-examined, however, to no avail.

47. But to say that as a consequence thereof, PW-3's evidence is liable to be rejected in *toto*, would be a wrong statement of law; and the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. [Ref: ***Khujji*** (*supra*)]

Last seen theory

48. In relation to the issue whether the deceased was last seen with the Appellants before the underlying incident and the last seen theory will come into play or not, it would firstly be relevant to refer to the decision of the Hon'ble Supreme Court in ***State of U.P. v. Satish*** reported as (2005) 3 SCC 114, wherein it was observed as follows:

“ 22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so

small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW 2.”

(Emphasis supplied)

49. We shall also refer to the decision of the Hon’ble Supreme Court in *Ramreddy Rajesh Khanna Reddy v. State of A.P.* reported as (2006) 10 SCC 172, wherein it was observed as follows:

“ 27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration.”

(Emphasis supplied)

50. Our attention has also been invited by the learned APP to the following evidence, in support his assertion that the deceased was last seen with the Appellants before the incident:

i. Testimony of PW-2

PW-2 has deposed that on the fateful night around 9:00 P.M., when he was returning to the *jhuggi* after buying a water bottle, he saw Appellant No.1 and two other *kabariwalas* (one of whom was identified by him in court as Appellant No.2) along with the deceased before the subject building. The Appellants and the other *kabariwala* had caught hold of the deceased and they were taking him on “*some upper floor through stairs*”. In response to the suggestion put to PW-2 in his cross-examination that why didn’t he immediately mention about this incident to his family members, PW-2 deposed that “*as Chand used to go there alongwith accused everyday I did not tell said fact to my family members immediately*”.

ii. Testimony of PW-3

PW-3 has deposed that on the fateful night around 9-10 P.M., after buying *guthkha*, he came back home and had meal with the deceased. Subsequent thereto, Appellant No.2 came outside their *jhuggi* and called out for the deceased; pursuant to which the latter went outside with him. No suggestion was put to PW-3 in his cross-examination in relation to the said aspect.

iii. Testimony of PW-7

PW-7 turned hostile during his examination-in-chief and permission was granted to the APP to cross-examine him. The Trial Court after considering the testimony of PW-7 came to the conclusion that he has not supported the case of the prosecution at all. However, we do not agree with the finding of the Trial Court in this behalf, inasmuch as, it is a settled law that testimony of a hostile witness cannot be rejected in its entirety and can be relied upon to the extent it is found to be dependable on a careful scrutiny thereof.

In our view, the testimony of PW-7 is reliable in relation to the aspect that on the fateful night, before the underlying incident, he saw the Appellants as well as the other *kabariwala* together with the deceased. He also denied the suggestion put to him in his cross-examination that he never saw them together. The time when he saw them together was first deposed as 9:30 P.M., and then during cross-examination as 10:00 P.M.

51. As per the aforesaid evidence, on the fateful night the deceased was spotted with the Appellants somewhere between 9-10 P.M. The discrepancy

of around one hour, with respect to the exact time when the Appellants and the deceased were last seen together can be ignored as being minor in nature, since the testimonies of the aforesaid witnesses were recorded almost six months after the incident. [**Ref: State of U.P. v. Naresh** reported as (2011) 4 SCC 324]. As per the post-mortem report [Ex.PW-10/A], the deceased was admitted to the hospital around 10:45 P.M. Therefore, the complete chain of sequence of events, beginning from the deceased being spotted with the Appellants; to being thrown off the subject building; to finally being taken to the hospital, transpired within a mere time period of somewhere between one to one hour and forty five minutes.

52. In the given facts and circumstances of the present case, in our view, this time period is small enough to draw an inference that Appellants were involved in the commission of the underlying offence. Consequently, the onus would be on the Appellants to explain how the deceased died, in order to negate such an inference [**Ref: Shyamlal Ghosh (supra)**]. However, the Appellants have failed to render any explanation, let alone a plausible one, thereby, providing an additional link in the chain of circumstances, so as to make it complete.

53. Before parting, we would also like to observe that although an attempt was made to prove that the deceased was depressed/disturbed on account of the circumstance that he was not employed and family members of the girl he was in love with were not willing to get her married to him, and, resultantly, he even tried to commit suicide by consuming poison and had a tendency to commit suicide; the same would not be of much assistance to the Appellants, since, in view of the foregoing discussion, it has been proved beyond reasonable doubt that the Appellants were involved in the commission of the underlying offence. Furthermore, DW-1 and DW-2 have admitted that they were not present near the crime spot when the incident transpired; and their testimony does not in any manner rebut the evidence on record against the Appellants, but only indicates towards the deceased having a tendency to commit suicide.

Conclusion

54. To conclude, PW-2 is a credible witness and there was no reason for him to falsely implicate the Appellants. For the reasons stated hereinbefore, his testimony can be safely relied upon in relation to the time, place and manner of the incident, as well as, the identity of the perpetrators; *de hors* his deposition during cross-examination on 04.12.2014. The guilt of the

Appellants is further fortified by the fact that they were last seen with the deceased moments before the incident.

55. In view of the foregoing, there appears to be no circumstance that warrants an interference of this Court with the findings of the Ld. Trial Court, save and except, the limited finding that the testimony of PW-7 did not support the case of the prosecution at all.

56. Consequently, the conviction of the Appellants as recorded in the impugned judgment, as well as, the sentence awarded to them by way of the order on sentence are upheld.

57. The present appeals are accordingly dismissed.

58. No order as to costs.

59. Copy of the judgment be supplied to the Appellants through the Superintendent, Central Jail, Tihar and also be sent for updation of the records.

SIDDHARTH MRIDUL, J.

NAJMI WAZIRI, J.

MARCH 20, 2018

ap/mk