

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.05.2020

+ **CRL. A. 714/2017**

UMESH AND ORS.

.....Appellants

Versus

STATE

.....Respondent

Advocates who appeared in this case:

For the Appellants : Mr Sharad Malhotra and Mr Shashank Vachher, Advocates.

For the Respondent : Ms Meenakshi Chauhan, APP for State.

JUDGMENT

VIBHU BAKHRU, J

1. The appellants have filed the present appeal, *inter alia*, impugning a judgment dated 08.05.2017 (hereafter ‘the impugned judgement’) passed by the learned ASJ, FTC, Shahdara, Karkardooma Courts, whereby the appellants were convicted for the offences punishable under Sections 304/34 of the Indian Penal Code, 1860 (IPC). By an order on sentence dated 27.05.2017, which is also impugned herein, the appellants were sentenced to undergo seven years of rigorous imprisonment along with a fine of ₹10,000/- each and in default of payment of fine, to undergo six months of simple imprisonment.

2. The appellants were found guilty of beating a boy named Deepak (hereafter also referred to as ‘the deceased’) and fatally injuring him.

The appellants contend that the impugned judgment is liable to be set aside as the testimony of the key witness (PW1) is not consistent with statement of the wife of the deceased. It is pointed out that PW-1 had testified that he had seen the deceased at about 03:00-03:30 am but the wife of the deceased (in her statement given to the police) had stated that he had left the house at 04:00 am. It is further contended that there is no evidence to establish that the deceased is the same boy who was allegedly beaten by the appellants. It is further contended that other residents of the Gandhi Kushth Ashram were not examined and therefore, the evidence available on record is insufficient to convict the appellants.

3. Briefly stated, the case of the prosecution is that on 27.06.2013 at about 06:15 a.m., a call was received at the police headquarters reporting that a person was lying unconscious at New Quarter, 444, Kodi Colony, Thairpur. The said person, who was identified as Deepak, was taken to GTB Hospital where was he declared as brought dead.

4. DD No. 6-A was recorded on 27.06.2013 at PS Nand Nagri pursuant to which, SI Nitin along with other staff went to Kodi Colony, Thairpur where they came to know that the injured had been removed to GTB Hospital by PCR. Upon reaching GTB Hospital, SI Nitin was informed that the injured person had been declared brought dead.

5. The post mortem of the body was, thereafter, conducted and fifty-one injuries were found on the body of the deceased. The cause of death was determined as haemorrhagic shock as a result of ante-mortem laceration of lung produced by blunt force.

6. On 20.07.2013, Sheikh Basruddin (the complainant) gave his statement in PS Nand Nagri. He stated that he was working as a security guard (*chowkidar*) at the Gandhi Kushth Ashram and had been doing so for the past nine months. On the intervening night of 26/27.06.2013 at about 03:30 a.m., he noticed a boy aged between twenty-five and thirty years, roaming in the said Ashram. Upon inquiries, the said boy stated that he had come to “take DJ” from one Pradeep. Being suspicious, the complainant rang the bell hanging inside the Ashram and thereafter, some of the residents of the Ashram and one Javed caught hold of the said boy while Umesh and Naresh searched him. The search yielded a mobile phone, purse and an ID card of Naresh. Thereafter, the appellants (Javed, Umesh and Naresh) beat the said boy mercilessly with fist blows, kicks and a rod (*laat, ghuso ve danda*). Resultantly, the boy was drenched in blood (*lahulohan*) and in this half dead (*adhmari*) condition, he was removed from the Ashram. The complainant stated that the appellants (accused) asked him to close the gate and he heard them say, “*saale chor ko aise hi peetna chahiye*”. Thereafter, he closed the gate. He saw the boy walking towards the main road and thereafter, in the morning, he went back to his house and slept. He stated that subsequently he came to know that the said boy, who was

named Deepak, was a resident of the new quarters at Kodi Colony, Tahirpur, Delhi. And, he had expired.

7. On the basis of the statement of the complainant and post-mortem report, *rukka* was prepared and thereafter, an FIR bearing no. 365/2013 under Sections 304/34 of the IPC was registered with PS Nand Nagri.

8. On 05.02.2014, the appellants were charged with the commission of the offences punishable under Sections 304/34 of the IPC. They pleaded not guilty and the matter was set down for trial. During the course of the trial, the prosecution examined thirteen witnesses and the defence examined two witnesses.

Evidence

9. Sheikh Basruddin, the complainant, deposed as PW-1. He stated that in the year 2013, he used to work as a *chowkidar* at the Gandhi Kushth Ashram at Tahirpur. On the intervening night of 26/27.06.2013 at about 03-03:30 a.m., he noticed a boy moving around in the said Ashram in a suspicious manner. Upon making enquiries, the boy stated that he had come to take DJ from Pradeep. On being suspicious, PW-1 rang the bell, which is installed in the Ashram. On hearing the alarm some residents gathered there. The three accused (Naresh, Javed and Umesh – all identified by PW-1 in open court) were also present and they searched the said boy. They recovered a purse, mobile phone and

the voter identity card of Naresh from his possession. Thereafter, all the three accused started to beat the said boy mercilessly due to which he started to bleed profusely (*lahulohan*). He was pushed out of the said Ashram and PW-1 was asked to lock the gate. PW-1 stated that the accused had said “*choro ko aise hi marna chahiye*”. After being removed from the Ashram, the injured person walked away slowly and with difficulty. PW-1 testified that the next morning, he was called to the colony temple where the *Pradhan* of the colony (namely, Omprakash) told him that the boy who was beaten up was a resident of the Kodhi Colony and had expired. He told PW-1 to remain quiet and not tell the police anything. PW-1 stated that he remained mum and when the police came to the colony that day, he did not tell them anything. However, since he was feeling guilty, he went to the police station on 20.07.2013 where his statement was recorded. At this time, he came to know that that the name of the deceased was Deepak. During his examination, a sealed *pullanda* bearing the seal of AGK was produced and opened from which, a stick (*danda*) was brought out and shown to PW-1. However, PW-1 denied that it was the same *danda* that was used by the accused to beat the victim. He further stated that the same was not recovered in his presence.

10. In his cross-examination by the learned substitute PP for the state, PW-1 affirmed that his statement under Section 164 of the CrPC was recorded on 23.07.2013 and not 22.07.2013. He denied that the accused Umesh was arrested on PW-1 pointing him out on 23.07.2013. He denied that the arrest and personal search memos bore his signatures.

He denied having accompanied the police to the spot of the incident or that the police had prepared the site plan at his instance.

11. In his cross-examination by the counsel for the accused, he stated that the distance between where the deceased was found standing and between the bell is about forty-fifty paces and he had taken the deceased with him to the bell. After the quarrel had broken out, he went to the house of the *pradhan* and came back to the spot with him within ten minutes by that time, twenty-thirty persons had gathered at the spot. He affirmed that the accused had beaten the deceased in his presence. PW-1 affirmed having himself seen the voter ID card, purse and mobile phone recovered from the deceased and asserted that other persons had witnessed the same as well. The father-in-law of the accused Naresh was suffering from a tumor and ten-fifteen of his relatives were staying in his house, besides his family. He denied the suggestion that the voter ID card, purse and mobile phone were not stolen by the deceased. He stated that on 27.07.2013, the police called him to the temple situated in the Ashram where they obtained his signatures on a blank paper. After the arrest of the accused, he was called to the PS and his signatures were obtained on four-five written sheets but he did not know their content.

12. Ct Amir Singh, PS Nand Nagri, deposed as PW-4. He stated that on 01.10.2013, one Sheikh Basruddin (the complainant – PW-1) gave him and SI Kapil secret information. Thereafter, they went to Gandhi

Kushth Ashram Kodi Colony, Delhi where the complainant pointed out a house stating that the accused Javed was present inside it and he had beaten the deceased. On the next day (02.10.2013) at about 08:00 a.m., accused Javed led PW-4 and SI Kapil to Gandhi Park, Gandhi Kushth Ashram where, at his instance, one *danda* measuring four feet in length was recovered. The same was sealed in a *pullanda* and was seized vide seizure memo exhibited as Ex.PW-1/E. In his cross-examination, he could not recall whether any person from the public was asked to join the investigation. He affirmed that no effort was made by the IO to recover the said *danda* on 01.10.2013. Further, he stated that Javed's house was situated at a distance of 250-300 yards from the spot from where the *danda* was recovered.

13. Dr Sushma, Medical Officer, GTB Hospital, deposed as PW-5. She identified the writing and signatures of Dr Gaurav on the MLC, since he was not working at the said hospital and his whereabouts were not known.

14. Dr Ashish Kumar, Senior Resident, VMMC and Safdarjung Hospital, deposed as PW-8. He stated that on 27.06.2013, he was posted as Junior Resident at UCMS, GTB Hospital. At around 02:05 p.m., he conducted the post mortem on the dead body of Deepak s/o Jogender. The deceased was aged about thirty years. He found fifty-one injuries on the body of the deceased. He had mistakenly omitted serial no. 22 and thus, it would appear that there were fifty-two injuries on the body

of the deceased. He opined that the cause of death was “Hemorrhagic Shock” as a result of ante-mortem laceration of lung caused by blunt force impact. He stated that injuries nos. 45 and 46, which were on the right-upper side of the deceased’s back, were sufficient to cause death in the ordinary course of nature both independently and collectively. In his cross-examination, he stated that there was no blood or skin on the *danda* when he examined the same.

15. SI Kapil Khokhar deposed as PW-10. He stated that on 16.09.2013, he received the case file of the present case for investigation. One of the accused (Umesh) was already in custody and two more were required to be arrested. On 28.09.2013, accused Naresh surrendered before the court and was thereafter, arrested vide seizure memo—Ex. PW-10/A. On 01.10.2013, on the basis of information provided by the complainant, the accused Javed was arrested from his house vide arrest memo—Ex. PW-1/C. On 02.10.2013, a *danda* was recovered from a corner of Gandhi Park inside Gandhi Kushth Ashram at the instance of Javed. In his cross-examination, PW-10 stated that no one except him was present at the time when the accused Naresh pointed out the place of occurrence and the complainant was only present when the pointing out memo was being made. He denied that the signatures of the complainant were obtained on the pointing out memo. He denied having called public persons to join the investigation.

16. SI Nitin, PS Nand Nagri, deposed as PW-11. He stated that on 27.06.2013, he was on emergency duty at PS Nand Nagri, when he received DD No. 6A (Ex. PW-11/A) after which, he along with other staff, went to Kodi Colony, Tahirpur, Delhi. There, he came to know that the injured person had already been moved to GTB Hospital by the PCR personnel. At the hospital, he was informed that the injured was brought dead. Thereafter, he came back to the spot and recorded the statements of the deceased's wife, mother and father. He also conducted the post mortem of the deceased. On 20.07.2013, Sheikh Basruddin (the complainant) came to the PS and stated that he is an eye-witness of the incident and gave his statement. He went with the complainant to the spot and prepared the site plan (Ex. PW-11/E) at the complainant's instance. Thereafter, he recorded the complainant's statement under Section 161 of the CrPC. Upon inquiries, he could not find the accused in the vicinity. In his cross-examination by the learned APP, he affirmed that the deceased was identified by his parents (Joginder and Subhasha) vide dead body identification memo (Ex. PW-11/F and Ex. PW-11/G).

17. In his cross-examination, PW-11 stated that a call at 100 number was received on 27.06.2013 and no eye witness came to the PS before 19.07.2013. He stated that the house of the accused Umesh is situated opposite to the place of the incident and the same is visible from his house. He denied having made inquiries from the *Pradhan* of the area but did so from other persons. He denied having recorded the complainant's statement at the PS. He stated that after receipt of DD No. 6A, he reached Vikas Samiti, Kodi Colony at about 06:00 am. One

Nazrool informed him that a person who was lying in an unconscious state had been shifted to GTB Hospital by the PCR. The complainant came to the PS on 20.07.2013 at about 10:00-11:00 am and it took approximately two hours to record his statement. He stated that the residents of the Ashram did not reveal anything when he inquired from them regarding the incident.

18. In their statements under Section 313 of the CrPC, all three accused denied all questions put to them and stated that they had been falsely implicated in the case by the complainant because they had made complaints against him to police officials regarding his misdeeds.

19. Omprakash, the then President (*Pradhan*) of the Gandhi Leprosy Ashram Samiti, deposed as DW-1. He stated that he would close the door of the said colony at about 11:00 pm. He stated that no security guard was deployed and the members of the aforesaid Samiti guard the colony. He stated that no one by the name of Bashiruddin was employed as a *chowkidar* with the Samiti. In his cross-examination by the learned APP, he denied having given a complaint against Bashiruddin. He stated that Bashiruddin was a resident of the Ashram and would abuse its residents after consuming liquor. DW-1 stated that the complainant was unemployed. He stated that the accused were the children of persons afflicted with leprosy (*kusht rogies*) and that he sympathized with them. He did not wish that the accused or any other person should go to jail.

20. Mohd Usman, Member – Masjid Committee, Gandhi Kushth Ashram, Tahirpur, Delhi, deposed as DW-2. He stated that the complainant and his uncle (*mama*) were residents of the said Ashram and would abuse its residents after consuming liquor. He stated that on 21.03.2011, the complainant had pulled the daughter of one Sh Abdul Rehman by her hand, after consuming liquor. And, he had complained against the complainant to the Hon'ble Lieutenant Governor of Delhi (marked as Ex. DW/X). He stated that the complainant had also torn the clothes of the wife of one Sh Toshiappa and a complaint was also made in this regard (Ex. DW2/X1). The same bears the signature of the accused Naresh on its rear side. He stated that accused Javed is his son and that the complainant had deposed against the said accused due to animosity between them. He stated that the deceased was not killed and he was residing with a strange lady, who was not his wife, at Sewa Samiti B, Kushth Ashram by hiding himself. In his cross-examination, he affirmed that he had not made the complaint marked as Ex. DW2/X. No complaint was filed before a court of law regarding the incident mentioned therein. He affirmed that no action was taken by the police pursuant to the complaint marked Ex. DW2/X1. He denied being an eye-witness to the murder of the deceased.

Reasons and Conclusion

21. It is apparent from the above that the case of the prosecution rests mainly on the testimony of the complainant (Sheikh Bashiruddin) who

deposed as PW-1. He claimed that he was an eye witness to the incident and had testified in some detail as to the manner in which the appellants had beaten the deceased. His description of the incident does indicate that a boy had been beaten mercilessly. He had stated that the boy was drenched in blood. The post mortem of the deceased also indicated that there were fifty-one injuries on his body. Dr Ashish Kumar, who deposed as PW-8 had stated that in his opinion, the cause of death was hemorrhagic shock as a result of ante-mortem laceration of lung produced by blunt force impact.

22. Given the aforesaid testimony, there would be sufficient evidence to convict the appellants provided it is established that the deceased was the same person who was allegedly beaten by the appellants on the intervening night of 26/27.06.2013. However, here the case of the prosecution falters as there is no evidence whatsoever, which establishes that the deceased was the same person who was beaten by the appellants on the intervening night of 26/27.06.2013. The complainant (PW-1) was neither shown the body nor the photograph of the deceased. There is also no evidence to suggest that PW-1 had any personal knowledge that the deceased was the same person who was beaten by the appellants on the night of 26/27.06.2013. He could not have possibly known, as a matter of fact, that the deceased was the same person who was beaten by the appellants as he had neither seen the body of the deceased nor the photograph of the deceased. This is a fatal flaw in the case set up by the prosecution.

23. PW-1 had deposed that on 27.06.2013 (that is, on the next date

of the incident), he was called by the *Pradhan* of the colony (Om Prakash), who had informed him that the boy who was beaten by the residents of the Kodhi Colony had expired. According to PW-1, his information, that the deceased was a same boy that was beaten by the appellants, was based on the information provided by Om Prakash. Other than Om Prakash informing the complainant that the boy, who was beaten by the appellants had expired, there is no material to link the deceased with the incident that had allegedly occurred in the Ashram on the intervening night of 26/27.06.2013. However, PW-1's testimony was not supported by Om Prakash, who testified as a witness for the defense (DW-1). He deposed that there was no *chowkidar* employed at the colony and the members of the *samiti* guard the colony. He deposed that no incident happened in the colony and no person by the name of Bashiruddin was employed as a *chowkidar*. In his cross-examination, he stated that Bashiruddin used to consume liquor and used to abuse the residents of the colony. He stated that they had asked him several times to not do so. In view of the testimony of Om Prakash (DW-1), the prosecution's case that the deceased was a same boy who was allegedly beaten by the appellants, remains un-established.

24. Apart from the above, it is also material to note that that there is a considerable delay on the part of the complainant in giving his statement. The statement of the complainant was recorded on 20.07.2013, which was more than three weeks after the date of the alleged incident. The explanation provided by PW-1 for keeping quiet for almost three weeks, does not inspire any confidence. According to

him, he did not report the incident because he was told not to do so by the *Pradhan* (Om Prakash). However, despite the said instructions, the complainant did report the incident to the police. Thus, there is no credible explanation why he did not do so immediately thereafter and waited for almost three weeks to do so. This delay coupled with the evidence of the defense witnesses which indicates that relationship between PW-1 and the family of the appellants is not cordial, also raises certain doubts regarding the testimony of PW-1.

25. Since the prosecution's case rests almost entirely on the testimony of PW-1, this Court is unable to accept that the prosecution has established its case beyond any reasonable doubt.

26. Apart from the above, it is also relevant to note that the *danda*, which was allegedly recovered at the instance of the accused (Javed-Appellant No. 2) – which, according to the prosecution, was a weapon used to beat the deceased – was not identified as the weapon allegedly used by the appellants. The said *danda* was produced and shown to PW-1 and he stated in unequivocal terms that said *danda* was not the one that was used by the appellants to beat the deceased. PW-8 had also testified in his cross-examination that the said *danda* was shown to him and the same did not have any residue of blood or other material, which could establish that the same had been used to beat the deceased. Thus, the prosecution also failed to establish that the deceased was beaten by the said *danda*.

27. In view of the above, this Court is of the view that the prosecution

has failed to establish, beyond reasonable doubt, that the appellants had committed the offence for which they have been convicted. Although there is strong suspicion that the appellants were involved in inflicting the injuries on the deceased, which ultimately proved to be fatal; the said suspicion falls short of the standard of proof required to be met by the prosecution.

28. In view of the above, the appeal is allowed and the impugned judgment dated 08.05.2017 and the impugned order on sentence dated 27.05.2017, are set aside. The appellants are acquitted of the offences for which they were charged and convicted.

29. The appellants shall be released forthwith, if they are not required in any other case.

MAY 13, 2020
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VIBHU BAKHRU, J

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