

Himanshu @ Chintu vs State Of Nct Of Delhi on 4 January, 2011

Bench: R.M. Lodha, Aftab Alam

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 560 OF 2010

Himanshu @ Chintu

...Appellant

Versus

State of NCT of Delhi

...Respondent

WITH

CRIMINAL APPEAL NO. 561 OF 2010

JUDGEMENT

R.M. LODHA, J.

These two appeals, by special leave, are directed against the judgment of the High Court of Delhi whereby the Division Bench of that Court affirmed the judgment of the Additional Sessions Judge, Delhi. The Additional Sessions Judge convicted the appellants for the offence punishable under Section 302 read with Section 34 IPC and sentenced them to suffer imprisonment for life.

2. On July 8, 2006, Dharam Pal (PW-3)--Head Constable--was on duty at Police Control Room in Police Headquarters from 8.00 p.m. to 8.00 a.m. At about 9.34 p.m., a telephonic message was received in the control room from telephone No. 9210325051 that a person had been shot at A- 450, Shastri Nagar. The said telephonic message was reduced to writing in the PCR Form (Exhibit PW-3/A) and communicated to the Police Station, Sarai Rohilla. Subhash Chand (PW-24), Sub-Inspector, on receiving the said communication (DD No. 31/A), left immediately for the place of incident with Head Constable Vijay Pal (PW-19). PW-24 and PW-19 reached the spot in front of Ahuja Clinic, 'A' Block, Shastri Nagar within 15 minutes of the receipt of the communication.

3. Raju (PW-11) was present at the spot. PW-24 recorded his statement (Exhibit PW-11/A) which took about 10 minutes. From there, PW-24 and PW-19 rushed to Hindu Rao Hospital where they came to know that Murari was brought dead. PW-24 collected the MLC (Exhibit PW-30/A); made endorsement on Exhibit PW 11/A and handed it over to PW-19 for taking the same to the Police

Station for registration of the case. Based on Exhibit PW 11/A, the first information report (FIR) was registered at Police Station, Sarai Rohilla at 2350 hours.

4. Inspector V.S. Rana (PW-35), on the registration of FIR, commenced investigation. He reached the spot, got the photographs taken; seized the blood and bloodstained soil and also prepared the site plan.

5. On the next day, i.e., July 9, 2006 at about 12.00 noon the postmortem on the dead body of Murari was conducted by Dr. C.B. Dabas (PW-5) at Hindu Rao Hospital, Delhi. In the postmortem report (Exhibit PW-5/A), he recorded the following external injury on the person of the deceased:

"One Fire arm entry wound, round in shape, measuring 2.2x 2.2 cm & surrounded by a collar of Abrasion in area of 3x3 cm, located over left side, lateral aspect of Chest, 19 cm outer to midline and 12.0 cm outer to - below left NIPPLE and 120 cm above (L) heel. The wound is surrounded by Singeing, blackening and tattooing."

The track of Injury No. 1 has been noticed in the postmortem report as under :

"Injury No. 1 has entered the chest cavity after piercing through (L) chest wall, and then perforated through (L) pleura, Lower Lobe of (L) lung and pericardium, and then through and through walls of left Ventricle and then (R) Ventricle, then crossed the midline and perforated through and through middle lobe of (R) lung and (R) pleura and entered the chest wall from inside and exited through 5th inter costal space, fracturing the 6th rib of chest cage and then travelled under the skin and ended in subcutaneous tissues of "post axillary fold where one "copper coated lead tipped bullet is found -

lodged. It is removed and preserved. The direction of fire being from Left to Right and upwards."

The aforementioned injury on the body of the deceased was found to be ante-mortem and recent. In the opinion of PW-5, Murari died due to haemorrhage and shock consequent to Injury No. 1 which was sufficient to cause death in the ordinary course of nature.

6. On July 9, 2006, PW-35 and PW-24 along with PW- 11 proceeded in search of the accused persons. Himanshu @ Chintu (A-2) was apprehended on that day itself. A-2's disclosure statement was recorded on July 10, 2006 vide Exhibit 24/B. Sunil Nayak @ Fundi (A-1) was arrested on July 15, 2006. Ramesh @ Dudhiya (A-4) was arrested on July 26, 2006. Shesh Bahadur Pandey (A-3) was arrested on October 16, 2006. On the basis of his disclosure statement, the Katta (weapon of offence) was recovered. Sunil Kumar (A-5) surrendered in the Court on November 9, 2006 and on that day itself, he was arrested.

7. PW-35 took all necessary steps towards investigation and after collecting the necessary materials and on completion of the investigation the charge sheet was filed. On October 16, 2006, the Metropolitan Magistrate, Delhi committed the accused to the Court of Sessions for trial.

8. The accused were tried in the Court of Additional Sessions Judge, Delhi. The prosecution examined 35 witnesses and also got exhibited the various documents. The trial judge recorded the statement of the accused under Section 313 Cr.P.C. The accused denied their role in the crime and examined two witnesses, namely, S.C. Kalra (DW-1) and Atul Katiyar (DW-2) in their defence.

9. The Additional Sessions Judge, Delhi after hearing the parties and on the basis of the evidence on record vide her Judgment dated September 30, 2008 held A-1, A-2, A-3 and A-4 guilty of the offence under Section 302 read with Section 34 IPC and sentenced them to suffer imprisonment for life and a fine of Rs. 5000/- each with a default stipulation. A-4 was convicted for the offence punishable under Section 27 of the Arms Act, 1959 as well. He was sentenced to rigorous imprisonment for three years and a fine of Rs. 2000/- with a default stipulation on that count. No offence against A-5 was proved beyond reasonable doubt and he was acquitted.

10. A-1, A-2, A-3 and A-4 filed four separate appeals before the High Court of Delhi. These four appeals were heard together by the Division Bench and vide judgment dated May 25, 2009, the appeals preferred by A-1, A-2 and A-3 were dismissed. Insofar as appeal of A-4 was concerned, the Division Bench maintained his conviction and sentence under Section 302/34, IPC but as regards his conviction under Section 27 of the Arms Act, 1959, it was altered to the offence under Section 25 of the Arms Act, 1959. He was sentenced to suffer rigorous imprisonment for three years and a fine in the sum of Rs. 2000/- with a default stipulation for that offence.

11. The present appeals are by A-2 and A-3.

Mr. K.T.S. Tulsi, learned senior counsel for A-2 pointed out the discrepancy in the prosecution case about the telephonic message received in the Police Control Room. He referred to the evidence of PW-11 wherein he stated that he gave communication to the police from STD booth and the evidence of PW-3 who deposed that the telephonic message was received in the control room from Telephone No. 9210325051. Learned senior counsel argued that in the telephonic message, the names of the accused were not given. He vehemently contended that although the telephonic message was received at about 9.34 p.m., the FIR was registered after about two hours and this time was used by the prosecution to falsely implicate the accused because of their previous enmity. Mr. K.T.S. Tulsi argued that all the three eye-witnesses Rohit (PW-7), Sukhwinder @ Monty (PW-8) and PW-11 were declared hostile and, therefore, their evidence could not have formed the basis for the conviction of A-2. Even otherwise he submitted that evidence of PW-7, PW-8 and PW-11 was full of contradictions and material omissions and that their evidence was wholly unreliable. Learned senior counsel pointed out that PW-11 in his deposition stated that the deceased had gone without eating food but the postmortem report and the evidence of PW-5 indicated that deceased had taken meals about 1 = hours to 2 = hours before his death. Mr. K.T.S. Tulsi also submitted that PW-7, PW-8 and PW-11 were interested witnesses inasmuch as PW-7 and PW-8 were friends of the deceased and PW-11 was his younger brother and it is not safe to rely on their testimony. He, thus, submitted that the High Court erred in affirming the conviction of the accused under Section 302 read with Section 34 IPC.

12. Learned counsel for A-3 adopted the arguments of Mr. K.T.S. Tulsi and additionally submitted that PW-7 and PW- 8 have not specifically identified A-3 and the evidence of PW- 11 was not trustworthy. He submitted that the evidence let in by the prosecution was not sufficient to establish the guilt of A-3 for the offence punishable under Section 302 read with Section 34 beyond any reasonable doubt.

13. Mr. A. Mariaputtam, learned senior counsel for the respondent supported the judgment of the High Court. He refuted the submission of Mr. K.T.S. Tulsi that the F.I.R. was lodged belatedly i.e. two hours after the occurrence of the incident and that the said time was used to falsely implicate the accused. He contended that evidence of PW-7, PW-8 and PW- 11 - although they were cross examined by the public prosecutor - could be relied upon to the extent that supported the prosecution case. In this regard, he relied upon decision of this Court in the case of Rajendra and Anr. vs. State of Uttar Pradesh¹. Learned senior counsel would contend that appreciation of the evidence by the High Court and the trial court was proper and the concurrent view of the two courts does not call for any interference by this Court.

14. It must be immediately stated that the evidence of PW-5 and the postmortem report leave no manner of doubt that the death of Murari was homicidal.

15. We see no merit in the submission of Mr. K.T.S. Tulsi, learned senior counsel for A-2 that the FIR was registered belatedly and this time was used to falsely implicate the accused because of their previous enmity. It transpires clearly from the evidence of PW-3 that the telephonic message was received in the control room at 9.34 p.m. on July 8, 2006. The said communication was noted down in exhibit PW-3/A and communicated to the Police Station, Sarai Rohilla. On receiving the communication DD No. 31/A, PW-24 and PW-19 (2009) 13 SCC 480 immediately left for the place of incident and reached the spot within 15 minutes. On reaching the place of incident, PW-24 recorded the statement of PW-11 which took about 10 minutes. After recording the statement of PW-11, PW-24 and PW-19 left for Hindu Rao Hospital where the victim had been taken and there PW-24 came to know that victim was brought dead. PW-24 then collected the MLC from the hospital, made endorsement on the statement (Exhibit PW-11/A) and sent PW- 19 to the Police Station for registration of the FIR. The FIR was then registered on the basis of Exhibit PW-11/A at the Police Station Sarai Rohilla at 2350 hours. The sequence of facts narrated above does not lead to an inference that there was delay in the registration of FIR or it lacked spontaneity. As a matter of fact, in Exhibit PW-11/A, which was recorded within 20-25 minutes of the receipt of the communication of the incident, the details of the incident were narrated and the specific names of A-2 and A-3 figured with A-1 and A-4. It cannot, therefore, be said that the time of two hours was used to falsely implicate the accused due to their previous enmity.

16. PW-7 is one of the eye-witnesses. He deposed that on July 8, 2006 at about 9 - 9.30 p.m., he was returning back from Bharat Nagar Mandir and he saw Murari and PW-8 coming from the opposite direction. He stopped his bike and all the three started chatting. At that time, A-2 came on his bullet motorcycle with one person; entered into an argument with Murari and threatened Murari that he would kill him and went away. PW-7 then asked Murari as to what had happened and when Murari was about to tell him; PW-11 (younger brother of the deceased) came there and told Murari that

their mother was calling him. A-2 then came back with 5-7 boys on 4-5 motor cycles. A-2 pointed towards Murari and claimed "yeh tha". One of these boys got down from motorcycle and shot at Murari. Then he, PW-11 and PW-8 brought an auto rickshaw. PW-8 and he took Murari in that auto rickshaw and asked PW-11 to inform his parents regarding the incident. They took Murari to Parmarth Hospital where he was given first aid and then Murari was taken in a PCR van to Hindu Rao Hospital. The police reached Hindu Rao Hospital. Since complete facts were not deposed by him, the public prosecutor after obtaining the permission of the court put leading questions to him. The defence also cross-examined PW-7 at quite some length. As regards the role of A-2 in the crime, the deposition of PW-7 is categorical and specific.

17. PW-8 in his deposition stated that on July 8, 2006 A-2 came on the motor-cycle at 9.20 p.m. with one person and threatened Murari. After about 5-10 minutes, A-2 came again with his associates and pointed towards Murari. One of the boys accompanying A-2 took out revolver and fired shot at Murari but he declined to identify the boy who fired the shot and the other boys who accompanied A-2. He was declared hostile by the prosecution and was cross-examined. He was also cross examined at quite some length by the defence.

18. PW-11 is the younger brother of the deceased. In his deposition, he stated that on July 8, 2006 at about 9.15 to 9.20 p.m., he along with his brother Murari, PW-7 and PW-8 was standing in front of Ahuja Clinic. A-2 along with one person came on motorcycle and threatened his brother, "Murari Mai Tujhe Zinda Nahi Chhodunga" and left. A-2 came again after 5- 10 minutes with A-1, A-3, A-4 and A-5. A-2 then pointed towards his brother and told to A-4, "yeh hai Murari". A-1 and A- 3 said, "Maar saale ko goli". A-4 then took out a Katta from the right pocket of his trouser and put that on the left side of the chest of his brother and fired. The accused then ran away from the spot. He further deposed that PW-7 and PW-8 took Murari to the hospital in a three wheeler; he informed the police that his brother had been shot at and he also received a phone call from PW-7 or PW-8 telling him that they had taken his brother to Parmarth Hospital first and then to Hindu Rao Hospital. Since complete facts were not deposed by PW-11, the court permitted the public prosecutor to put leading questions to him. The defence extensively cross-examined PW-11.

19. The evidence of PW-7, PW-8 and PW-11 was thoroughly examined and analysed by the trial court. As regards their deposition, the trial court observed thus:

"There is no reason to disbelieve the statement of PW-11 Raju, who is a truthful witness as discussed above I am of the opinion that even presence of PW-7 and PW-8 at the spot cannot be denied. They have testified about the incident in detail. They have only not deposed with respect to the identity of the accused persons namely Shesh Bahadur Pandey, Sunil @ Fundi and Ramesh @ Dudhiya, but have otherwise given the detailed factum of their having been present at the spot and having taken the injured to the hospital. These facts are not disputed on record. There is an explanation on record as to why witness Rohit (PW-7) did not identify the accused persons in the court. Though the witness had given their names (of accused) in the statement before the police u/Sec. 161 Cr.P.C., but had turned hostile in respect of their identity in the court as it has been shown on record that witness had been

threatened not to dispose (sic) in this case against the accused persons. The said writ petitions filed by PW-7 Rohit and his father in the Hon'ble High Court of Delhi are Ex. PW-7/A and Ex. PW-7/B. Accused Himanshu has been identified by all the three witnesses i.e. PW- 7, PW-8 and PW-11 in the Court. It is also seen that though PW-7 was partly hostile in respect to the identify (sic) of the accused persons, he had given his statement in detail with respect to the incident as it took place. It is seen that the prosecution had placed on record the certified copy of the writ petition filed by Rohit and his father before the Hon'ble High Court of Delhi, wherein he had alleged the threats of the members of the family of the accused persons to Rohit and his family, which seems a plausible reason for the witness to have not identified the accused persons in the Court though he had named them earlier. It is seen that in material particulars, the witness had supported the case of the prosecution and there was sufficient reasons for him for not identifying the accused persons now in the Court. Further that all the three eye witnesses had identified accused Himanshu and the role played by him. Further PW-11 Raju had identified all the accused persons and had mentioned in detail the role played by each of them and there was no reason to disbelieve this witness merely because he was related to the deceased. Further the weapon of offence had been recovered from nala at the instance of accused Ramesh @ Dudhiya. The motive was also there for the accused persons to have committed this offence inasmuch as witness have stated that Murari had said that Chintoo used to tease his girl friend on which an altercation had taken place between them in the evening. It is seen that all these witnesses have corroborated this fact of Himanshu coming there first to say that he would not spare Murari now."

The trial court concluded its opinion as follows :

"I am, thus, of the opinion that despite lengthy cross-examination of the witness and various points put forth during arguments, Ld. Counsel for the accused has not been able to extract any material point or contradictions or bring home any point, which could be considered as fatal to the case of the prosecution. Accordingly, I hold that on 08.07.2006 at about 09.30 p.m. in front of Ahuja Clinic, Khurana Tent Wali Gali, A-Block, Shastri Nagar, Delhi that accused Ramesh @ Dudhiya, Himanshu, Sunil @ Fundi, and Shesh Bahadur Pandey have committed murder of Murari by firing gunshot in furtherance to their common intention and thus, committed an offence punishable u/Sec. 302/34 IPC."

20. The testimony of PW-7, PW-8 and PW-11 has also been examined by the Division Bench of the High Court at great length. The Division Bench was alive to the situation that PW-8 was declared hostile and PW-7 and PW-11 were subjected to leading questions by the public prosecutor. The Division Bench took into consideration the discrepancies, omissions and contradictions pointed out by the counsel for the accused and on careful consideration of their evidence held that the presence of these three witnesses at the time and place of occurrence was not doubtful and the evidence of PW- 11 was corroborated by PW-7 and PW-8 with regard to the manner in which the crime was committed. The Division Bench opined as follows :

"PW-7 and PW-8 have categorically deposed that before he was shot at, Himanshu had come to the spot on a motorcycle with another boy and had threatened Murari with death and that after 5-10 minutes, Himanshu returned with 5-7 boys on motorcycles and said "yeh hai murari". Even PW- 11 has so deposed. There can be only two circumstances under which PW-11 could have testified to said fact. The first was that either PW- 7 or PW-8 or both told him said facts or he saw the same himself. We find no suggestions have been given to PW-7 and PW-8 that they were the ones who told said facts to PW-11. No suggestion has been given to PW-11 that said facts were told to him by either PW-7 and PW-8. Thus, prima facie, said facts deposed to by PW-11 have to be accepted as his narratives which he saw with his eyes."

21. We are in agreement with the consideration of the prosecution evidence by the High Court. In the case of Ram Babu v. State of Uttar Pradesh², this Court speaking through one of us (R.M. Lodha, J.) reiterated the position consistently (2010) 5 SCC 63 stated by this Court that ordinarily this Court does not enter into an elaborate examination of the evidence in a case where the High Court has concurred with the findings of fact recorded by the trial court. As a matter of fact, there is no justification for departure from that rule in the present case. However, we have carefully considered the prosecution evidence and, particularly, the testimony of PW-7, PW-8 and PW-11 who were presented as eye-witnesses. In our view, the conclusions recorded by the trial court and confirmed by the High Court concerning A-2 and A-3 cannot be said to suffer from any factual or legal error or that such conclusions could not reasonably be arrived at by those courts. The presence of PW- 11 at the scene of occurrence is not at all doubtful. The fact that his statement, PW-11/A was taken down by PW-24 at the place of occurrence within 20-25 minutes of the incident is clearly established. Although the defence has been able to point out certain discrepancies and omissions in his deposition, but, in our opinion, such discrepancies and omissions are only minor and not very material and in any case do not shake his trustworthiness. It is true that the public prosecutor also put leading questions to him but that does not obliterate his evidence from the record. His deposition that he informed the Police Control Room from STD booth whereas PW-3 stated that the information about the incident was received from the mobile phone No. 9210325051 hardly affects the material part of his evidence concerning the crime and the involvement of A- 2 and A-3. Yet another discrepancy in the evidence of PW-11 pointed out by the learned senior counsel for A-2 that the deceased had not taken dinner whereas the evidence of PW-5 and the post-mortem report suggested that the deceased had taken some eatables about 1= to 2= hours prior to his death is no discrepancy at all. What PW-11 has deposed is that the meals were under preparation by his mother when the deceased had left home. This does not rule out the possibility of the deceased having taken something earlier. In our view, the evidence of PW-11 clearly nails A-2 and A-3 for the murder of Murari. He is a truthful witness and can be safely relied upon. His evidence is corroborated insofar as A-2 is concerned by the other eye-witnesses PW-7 and PW-8. His evidence also gets corroborated from the evidence of PW-5 and PW-24. The complicity of A-3 is also established by the evidence of PW-11 which is duly corroborated by medical and other evidence although PW-7 and PW-8 have not specifically named him. We agree with the concurrent finding of the High Court and the trial court that the prosecution evidence is sufficient to bring home the guilt of A-3 as well beyond any reasonable doubt.

22. In *Prithi v. State of Haryana*³ decided recently, one of us (R.M. Lodha, J.) noticed the legal position with regard to a hostile witness in the light of Section 154 of the Evidence Act, 1872 and few decisions of this Court as under :-

"25. Section 154 of the Evidence Act, 1872 enables the court in its discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Some High Courts had earlier taken the view that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. However this view has not found acceptance in later decisions. As a matter of fact, the decisions of this Court are to the contrary. In *Khujji @ Surendra Tiwari v. State of M.P.* [(1991) 3 SCC 627], a three-Judge Bench of this Court relying upon earlier decisions of this Court in *Bhagwan Singh v. State of Haryana* [(1976) 1 SCC 389], *Sri Rabindra Kumar Dey v. State of Orissa* [(1976) 4 SCC 233] and *Syad Akbar v. State of Karnataka* [(1980) 1 SCC 30] reiterated the legal position that: (*Khujji case*, SCC p. 635, para 6) (2010) 8 SCC 536 "6. ... 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 witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof."

26. In *Koli Lakhmanbhai Chanabhai v. State of Gujarat* [(1999) 8 SCC 624], this Court again reiterated that testimony of a hostile witness is useful to the extent to which it supports the prosecution case. It is worth noticing that in *Bhagwan Singh* this Court held that when a witness is declared hostile and cross-examined with the permission of the court, his evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence.

27. The submission of the learned Senior Counsel for the appellant that the testimony of PW 6 should be either accepted as it is or rejected in its entirety, thus, cannot be accepted in view of the settled legal position as noticed above."

23. The aforesaid legal position leaves no manner of doubt that the evidence of a hostile witness remains the admissible evidence and it is open to the court to rely upon the dependable part of that evidence which is found to be acceptable and duly corroborated by some other reliable evidence available on record. The High Court and the trial court, thus, cannot be said to have erred in acting on the evidence of PW-11 which was duly corroborated by the other reliable evidence on record. We find no flaw in the judgment of the High Court affirming the conviction of A-2 and A-3 under Section 302 read with Section 34 IPC.

24. Both the appeals are, accordingly, dismissed.

..... J.

(Aftab Alam) J.

(R.M. Lodha) NEW DELHI, JANUARY 4, 2011