Delhi High Court
Tinku Ram vs State on 14 September, 2011
Author: S.Ravindra Bhat

* IN THE HIGH COURT OF DELHI, AT NEW DELHI

Date of Reserve : 01
Date of Decision : 1

\+ CRL.APPEAL No.841/2011 & CRL.M.(Bail) 1200/2011

TINKU RAM ..... APPELLANT

Through: Mr. S.B. Dandapani,Advocate

Versus

STATE ......RESPONDENT

Through: Mr.Sanjay Lao, APP for the State CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE G. P. MITTAL

1. Whether reporters of local papers may be allowed to see the Order? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Order should be reported in the Digest? Yes

Mr. Justice S. Ravindra Bhat
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1. The Appellant, Tinku Ram impugns a judgment and order dated 14.12.2010 in S.C. No. 127/2010 by which he was convicted for the offences punishable under Section 302/324 IPC. For the offence under Section 302 IPC, he was sentenced to undergo Life Imprisonment and for the offence under Section 324 IPC, the Appellant was sentenced to undergo Rigorous Imprisonment for one year.

2. The prosecution case is that on 10.06.2002, at about 10:55 PM on receipt of DD No. 31 Ex.PW-2/A, SI Parveen Kumar (PW-18) along with Constable Madan Kumar (PW-9) went to Laxmi Vihar, Prem Nagar-III where they were informed that the injured was taken to Sanjay Gandhi Memorial Hospital. PW-9 remained at the spot while PW-18 along with Constable Shamsher (PW-10) reached the hospital; they received the MLC of the deceased in which he was Crl.A.No.841/2011 Page 1 declared brought dead. PW-18 met Sadan Kumar Mehto (PW-7, eye-witness) who led to the arrest of the Appellant Tinku Ram. PW-7 informed PW-18 that the Appellant had suspected that Rajesh (the deceased) had an illicit relation with his wife Basmati Devi; on this issue the Appellant and deceased had a quarrel due to which the deceased moved out of Tinku Ram's house and started residing with him (PW-7).

3. On that night (10.06.2002) at about 10:20 PM, when PW-7 and the deceased were watching TV, the Appellant came and started abusing the deceased. He was holding a knife in his right hand and tried to hit the deceased; the latter moved away; PW-7 tried to snatch the knife from the Appellant but was unable to do so and in the process injured his hand. The Appellant chased the deceased with the knife in his hand and after about 15-20 paces caught hold of him and gave him a knife blow on the back, on the right side, of the deceased. The Appellant ran with the knife towards the field but was caught by PW-7 and Raj Kumar (a neighbour); by that time the Appellant had already thrown away the knife in the field. The deceased was taken to Sanjay Gandhi Memorial Hospital in a rickshaw. A police jeep came to the spot and took the Appellant and Sadan Kumar (PW-7) to the hospital where the deceased was admitted. On the basis of the statement made by PW-7 to PW-18 an FIR bearing no. 694/2002 was registered with P.S. Sultanpuri. The Appellant made a disclosure statement and on his pointing out Ex.PW-7/D, the knife was recovered.

4. Charges were framed against the Appellant under Sections 302/324 IPC and under Section 25/54/59 of the Arms Act. The Appellant pleaded not guilty and claimed trial. The prosecution, to prove its case, examined 22 witnesses and relied upon several exhibits. After considering all these, the Trial Court convicted the Appellant, as noticed earlier, and sentenced him to imprisonment for various terms.

5. Counsel for the Appellant submitted that he was falsely implicated in this case. In the statement under section 313 Cr.P.C, the Appellant stated that there was a quarrel in front of his house between deceased, Sadan Kumar and Raj Kumar and that the police falsely implicated him after taking him away from his house. He stated that he was bed ridden as advised by a doctor from Avantika Hospital. The counsel urged that Dr. R.K.Middha (DW-1) had advised bed rest to the Appellant and therefore it would not have been possible for him to chase the deceased and stab him. DW-1, Dr. Middha deposed that the Appellant had been advised to take bed rest and in Crl.A.No.841/2011 Page 2 her opinion Ex.DW-1/1 and Ex.DW-1/2 the Appellant could not do hard work during that period. The Appellant was suffering from TB in the right lungs. Therefore, submitted the counsel that the Appellant had been falsely implicated in this case. It was argued that the Trial Court ought to have given due weight to this evidence, since it had not been contradicted in material particulars, and was worthy of credence. Elaborating, learned counsel submitted that as long as the defence was able to prove a reasonable defence, based on preponderance of probabilities, the Court is bound to give the accused the benefit of doubt, and acquit him.

6. Counsel for the Appellant further urged that the prosecution did not examine Raj Kumar, the person who took the deceased to the hospital. Furthermore, PW-5 did not support the prosecution case regarding the recovery of the knife. PW-5 deposed that nothing was recovered at the instance of the Appellant. In his cross-examination he states that, "It is incorrect to suggest that the accused led the police party and one knife was recovered at the instance of accused.....I cannot identify the knife as same has not been recovered in my presence."

It was further submitted that the testimony of PW-7 could not be relied upon as the Appellant was not given an opportunity to cross-examine him. If the testimony of PW-7 is discarded, the only incriminating evidence against the Appellant would be the knife. However recovery of the knife itself

is doubtful as PW-5 did not support the prosecution. It was urged that the guilt of the Appellant was not proved beyond doubt and therefore he should be acquitted.

7. The Learned APP urged that the testimony of PW-7 pointed unerringly towards the guilt of the Appellant. Furthermore, the weapon of offence i.e. the knife was recovered on his pointing out pursuant to the disclosure statement, and PW-7 is a witness to the recovery. The FSL report Ex.PW-22/A states that blood of human origin was found on the weapon of offence and PW-12 Dr. Sameer Pandit, who conducted the post mortem deposed that the injuries on the body of the deceased could have been caused by the knife Ex.P-1. It was further submitted that the Appellant was apprehended at the spot itself and therefore the possibility of his false implication in this case could be ruled out. The testimony of PW-7, an eye-witness to the incident as well as an injured witness, clearly points to the guilt of the Appellant.

8. The prosecution story is primarily based on the ocular testimony of PW-7 Sadan Kumar (complainant), an eye-witness to the incident. He deposed that on 10.06.2002, the deceased was Crl.A.No.841/2011 Page 3 residing with him in Laxmi Nagar, Prem Vihar but earlier he used to reside with the Appellant. The deceased and Appellant had a quarrel as the latter suspected that the deceased had an affair with his (the Appellant's) wife. The Appellant asked the deceased to move out of the house after which he started residing with PW-7. He further deposed that on 10.06.2002 he and the deceased after returning from work and cooking dinner were watching T.V. when the Appellant went to their residence and started abusing the deceased. He asked the deceased to come out of the house. PW-7 along with the deceased went outside; the Appellant was holding a knife in his right hand which he kept behind his back. PW-7 testified that the Appellant attacked the deceased with the knife. This resulted in an injury to PW-7's his right hand. PW-7 tried to snatch the knife from the Appellant but was unable to do so and in the process received an injury upon his left hand. PW-7 further stated that the deceased, to save himself, started running but the Appellant caught hold of him after 10/15 paces and attacked him on the back; the deceased received injuries and fell down. The Appellant ran towards the fields and threw the knife somewhere in the field; he was apprehended by 3/4 residents of the locality. He further deposed that police officials reached the spot and took him and the deceased to the hospital where the deceased was declared to be brought dead. He stated that his statement Ex.PW-7/A was recorded by the police and that the public persons produced the Appellant before the police officials. He further stated that the knife Ex. P-1 was recovered from the field by the police and he identified the same. PW-7 in his cross-examination admits that Raj Kumar took the deceased to the hospital in a rickshaw. He admitted that the police officials took him (PW-7) and the Appellant to the hospital and that from there they came back to the spot. He admitted that on the pointing out of the Appellant the knife was recovered. He also admitted that the Appellant made a disclosure statement.

9. It has been often said by Courts in India that in order to convict an accused for an offence, the prosecution may rely on the testimony of even a solitary eyewitness. The test which the courts always apply is of trustworthiness and credibility, and not how many witnesses depose to the fact. This was stated in Shivaji Sahabrao Bobade and Anr. vs. State of Maharashtra (1973) 2 SCC 793 (three-Judge Bench) where was held that:

> "Even if the case against the accused hangs on the evidence of a single eye-witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man, although as a rule of prudence courts call for corroboration. It is a platitude to say that Crl.A.No.841/2011 Page 4 witnesses have to be weighed and not counted since quality matters more than quantity in human affairs."

Now, the testimony of PW-7, an eyewitness, and an injured one, to boot, has to be seen from the above standpoint. The Appellant's grievance is that he was not subjected to cross examination, and that the other eyewitness, Raj Kumar was not even examined. Further, it was submitted that PW-5, the witness to the recovery of knife, turned hostile. While it is true that PW-7 could not be cross examined - a condition that is inflexible as a rule, and seldom departed from - we cannot help noticing (after examining the Trial Court records) that the case was adjourned after his examination in chief was recorded. Thereafter, despite repeated summons being issued, the witness was not present; the police was unable to enforce his attendance. As far as Raj Kumar's testimony goes, we notice from the Trial Court records that he too could not be traced, despite repeated attempts by the prosecution.

10. The question which arises is what then is the correct position regarding the deposition of PW-7. We are conscious that Section 138 of the Evidence Act, 1872 mandates that to constitute evidence, the testimony of each witness has to be subjected to cross examination. The provision seemingly admits of no exception; yet courts have recognized them in exceptional situations. "Sarkar on Evidence" at page 2170, states that:

> "The evidence of a witness who could not be subjected to cross-examination due to his death before he could be cross-examined, is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of case. [Food Inspector v. James N.T., 1998 Cri LJ 3494, 3497 (Ker)]. If the examination is substantially complete and the witness is prevented by death, sickness or other causes (mentioned in s
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> 33) from finishing his testimony, it ought not to be rejected entirely. But if not so far advanced as to be substantially complete, it must be rejected [Diwan v. R, A 1933 L 561]. Deposition of a witness whose cross-examination became impossible can be treated as evidence and the court should carefully see whether there are indications that by a completed cross-examination the testimony was likely to be seriously shaken or his good faith to be successfully impeached [Horil v. Rajab, A 1936 P 34]. In a divorce case, the cross-examination of a witness for the wife who is the uncle of the husband was interrupted to enable the witness to effect a compromise. No compromise was effected. The witness did not turn up thereafter. The husband did not take steps to compel the witness to appear for further cross-examination. The reading of the evidence of this witness cannot be objected, on the ground that the cross-examination is not completed [R v. S, A 1984 (NOC) 145 All"

In Horilal v. State of U.P., 1970 [2] SCJ 223, it was held that where a witness died after his evidence was recorded by the committing Magistrate and his deposition was admitted at the Crl.A.No.841/2011 Page 5 session trial, the question of whether the evidence of the investigation officer that it was learnt that the witness had died was sufficient proof of the death was left open by the Supreme Court. Much earlier, in Maharaja of Kolhapur V. Sundaram Ayyar, AIR 1925 Mad 497 the Madras High Court held that:

> "I do not think that the evidence can be rejected as inadmissible, though it is clear that evidence untested by cross-examination on a question like the present can have little value. I need only refer to Tahlor on Evidence, Section 1469 : DAVIES v. OTTY [(1865) 35 Beav. 208 = 5 N.R. 391 = 34 L.J.Ch. 252)], ELIAS v. GRIFFITH [(1877) 46 L.J.Ch.
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> 806)], MAN GOBINDA CHOWDHURI v. SHAHINDIA CHANDRA CHOWDHURI [(1908) 35 Cal. 28)] and DHANU RAM MAHTO v. MURLI MAHTO [(1909) 36 Cal. 566= 13 C.W.N. 525 = 1 I.C. 366 = 11 C.L.J. 150]. There is nothing in the Evidence Act which renders such evidence inadmissible. In ROSI v. PILLAMMA [(1910) 20 M.L.J. 400 = 7 M.L.T. 41 = 5 I.C. 512 = 11 Cr. L.J. 145] it was pointed out that the evidence was admissible though the learned Judges were of opinion that it should not be acted upon. I think the correct rule is that the evidence is admissible but that the weight to be attached to such evidence should depend upon the circumstances of each case and that, though in some cases the Court may act upon it, if there is other evidence on record, its probative value may be very small and may even be disregarded."

Thus, the law insists that to accept the testimony of every witness who deposes in court, she (or he) should be cross examined. However, if it is shown that the witness, after deposing in examination in chief, could not present himself or herself for cross examination, the Court has to probe further the reasons for absence of such a witness. It cannot, in a stereotypical manner, reject the deposition; if the reasons point to the unavailability of the witness for genuine reasons, beyond the prosecution's control, such as death, serious illness or the witness becoming untraceable, the deposition recorded during examination in chief can be read, provided it is complete, and the Court is satisfied that there are no elements in that deposition, or the record, which can shake the testimony. The Court has to therefore, adopt a cautious approach, either way.

11. Applying the above test, we are of the opinion that PW-7 supported the prosecution in all material particulars. He also appears to have corroborated the statement recorded by him previously. This aspect is crucial, especially in this case, since PW-5 resiled from his previous, Section 161 Cr. PC statement, at the stage of the examination in chief itself. We also notice that PW-7 was an injured witness, whose version was corroborated by documentary evidence, in the form of MLC, placed on record by the police. As stated by us earlier, the witness could not be Crl.A.No.841/2011 Page 6 presented in Court, despite issuance of summons, and repeated attempts by the prosecution, just as in the case of Raj Kumar. Further, we also observe that there was hardly any time gap between the incident, the shifting of the injured to the hospital, his death and recording of PW-7's initial statement. The Appellant was in fact nabbed after the attack; a factor

which itself weighs heavily against him. All the events mentioned in PW-7's deposition are substantially corroborated by the timing of the FIR, the time when his statement was recorded, etc, as to hardly leave any scope for maneuvering or false implication.

12. As far as the Appellant's submission about the improbability - nay impossibility of his being the attacker, on account of his being an invalid, suffering from TB is concerned, we notice that the medical evidence in the form of testimony of DW-1 nowhere states that the Appellant could not have run the distance that he did, according to PW-7, to nab the deceased, and attack him. While the Court has to give both the prosecution and defence evidence equal weight, in either case, the same test of probability and credence is applicable. Here, the doctor's general nature of evidence and his silence about the physical capacity of the Appellant (i.e inability to have attacked the deceased) cannot be used to displace the prosecution story. Further, we are of the opinion that even if the recovery of the knife could not be corroborated by an independent witness, PW-5, the credibility and weight of the ocular testimony was sufficient to attach criminal responsibility on the Appellant, for the murder of the deceased.

13. In view of the above discussion, we are of the opinion that this Court, as an Appellate Court, would not be justified in interfering with the findings and conviction handed down by the Trial Court; we see no reasonable grounds to differ with them. For these reasons, the Appeal has to fail; it is accordingly dismissed.

S. RAVINDRA BHAT (JUDGE) G.P.MITTAL (JUDGE) September 14, 2011 Crl.A.No.841/2011 Page 7