(2006) 09 DEL CK 0048

Delhi High Court

Case No: Criminal Appeal No. 886 of 2001

Amjad Khan		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Sept. 29, 2006

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 428
- Penal Code, 1860 (IPC) - Section 302

Citation: (2007) 93 DRJ 99

Hon'ble Judges: R.S. Sodhi, J; P.K. Bhasin, J

Bench: Division Bench

Advocate: N.S. Dalal, for the Appellant; Ravinder Chadha, APP and Jagdish Prasad, for the Respondent

Judgement

R.S. Sodhi, J.
Criminal Appeal No. 886 of 2001 challenges the order dated 17.10.2001 of the Additional Sessions Judge in Sessions Case No. 69/1999 whereby the learned Judge held the appellant guilty u/s 302 IPC and further vide his order dated 18.10.2001 sentenced the appellant to imprisonment for life with a fine of Rs. 5,000/- and in default simple imprisonment for 3 months. The appellant was also given the benefit of Section 428 Cr.P.C.

2. Brief facts of the case, as have been noted by the learned Additional Sessions Judge, are as follows:

On 2nd April, 1999 at about 11.20 a.m. Duty Constable Manoj Kumar posted at Hindu Rao Hospital informed P.S. Shalimar Bagh that one Ismail aged about 38 years, resident of 577, Haidarpur, Delhi had been "brought dead" in the hospital by one Jenab W/o Shabbir Khan R/o 677, Haidarpur, Delhi. DD No. 16-A was recorded on this information and was entrusted to SI Inder Lal for investigation. SI Inder Lal along with Const. Rajbir

Singh went to H.R.Hospital where he obtained MLC in respect of Ismail who bad been declared "brought dead" at 10.20 a.m. with the alleged history of fight. In the meantime Inspt. Joginder Kumar, Addl. SHO Shalimar Bagh had also reached H.R.Hospital. The MLC was handed over to him. One Israr met Inspt. Joginder Kumar and made a statement (Ex.PW 1/A) which when translated into English will inter alia read as under:

I am residing with my family in House No. 518-B, Gali No. 4, Haidarpur, Delhi. I am an electrician by profession. I know Sabbir Khan R/o H.No. 677, Gali No. 8, Haiderpur for the last ten years and I am on visiting terms with him. On 1.4.1999 it was the marriage of Shakir @ Lallu, the younger son of Shabbir. A number of functions were being organised on the occasion of the marriage for the last several days. On 30.3.99 at about 12.00 a.m. there was a programme of dance and music at the house of Shabbir and the deck was playing music. People present were dancing and it had gone into quite late in the night. Shabbir Khan told Ismail to stop the music so that people may have their food etc. and then get up early in the morning. On this Ismail who is also on visiting terms with the family for the last 7/8 years switched off the deck. Amjad the middle son of Shabbir Khan got annoyed at this and started abusing Ismail. He also gave him beating and stated that he had earlier also warned him not to interfere in their household affairs and not to visit their house or else he would stab him. The people present there intervened and separated them. Ismail was sent to his house. Today i.e. 2.4.99it was"-the day of Dauta Walima; Ismail had also come; preparations were going on for the function. Ismail was fixing a motor in the tap outside the house. He asked Amjad to get an empty cylinder filled up .On this Amjad stated, "TU BAHAN CHOD KON HOTA HAI MUGHE KAAM BATANE WALA, ABHI TERE KO BATATA HUN" On seeing Amjad enraged I came forward and offered to get the cylinder filled up and asked them not to quarrel. I took a sum of Rs. 300/- from the mother of Amjad for the purpose of filling of cylinder. Amjad entered his house in an enraged condition and came out with a knife in his right hand. With his left hand he caught hold of Ismail from his neck and with his right hand he gave blows on his person. One of the blows fell on the left side of his chest whereas the other fell on the chest below ribs. Ismail fell down on receiving these injuries. Amjad ran away towards the railway line along with the knife. I along with the mother of Amjad and his elder brother Jamil removed Ismail to H.R. Hospital in a TSR where the doctor after examining him declared him to be dead. Amjad had committed the murder of Ismail intentionally with knife. Legal action be taken against him. The incident had taken place at 9.30 a.m. My statement is correct.

Sd/-

Israr.

Inspt. Joginder Kumar made an endorsement (Ex.PW 23/A) on the above statement of Israr and sent Const. Sagarmal to the police station for registration of a case. FIR No. 241/99 u/s 302 IPC was thus registered at P.S. Shalimar Bagh. Inspt. Joginder Kumar lifted blood sample from the spot and took it into his possession. He conducted inquest

proceedings and got a postmortem performed on the dead body: After postmortem he handed over the dead body to the father of the deceased. On 8.4.99 he arrested accused Amjad in this case after he had surrendered in the court of a Metropolitan Magistrate. The accused made a disclosure statement Ex.PW 18/A. On 9.4.99 the accused led the police party to a place near railway line Haiderpur and got recovered a knife Ex.P-1. The knife was sealed into a parcel and was taken into possession. After the investigation had been completed Inspt. Joginder Kumar filed a challan against the accused.

3. The Prosecution in order to establish its case examined as many as 23 witnesses, of which PW-1, Israr Mohd., is the complainant while PW-2, Mohd. Yusuf, and PW-5, Naseem Ahmed, are the eye witness. Counsel for the appellant has not challenged the procedural aspect of the investigation but has chosen to rest his case by submitting that PW-2 and PW-5 are not the reliable witnesses. Their testimony contradicts each other in material aspects and, therefore, should not be made the basis of conviction. Counsel for the State has relied upon the testimony of PW-2 and PW-5 to state that these witnesses were present at the spot and they had seen the occurrence from a close distance. Minor contradictions cannot be allowed to the benefit of the accused. He contended that the judgment of the trial court is a well reasoned one and need not be interfered with.

4. Having heard the counsel, we have carefully examined the case and gone, through the evidence on record. PW-1, the complainant, does not support the Prosecution. He states that about seven months ago he went to the house of the accused, Amjad, at about 7.00 a.m.; to look after the arrangements of the party of Walima which was to be hosted around 9.00 a.m. At that time some outsiders gate-crashed on which he and Ismail tried to expel the intruders from the party. In the process, someone from the crowd stabbed Ismail and people started running in panic. The witness goes on to state that he along with the mother of the accused took Ismail to the doctor in Gali No. 3 who advised them to take Ismail to the hospital. The injured "thereafter was taken to Hindu Rao Hospital where he was declared "brought dead". This witness was cross-examined by the Public Prosecutor, but what is most glaring is that the Public Prosecutor did not confront the witness with his previous statements. In other words, the Prosecution accepts the version of PW-1 as narrated by him in his examination-in-chief.

5. PW-2, Mohd. Yusuf, states that he works in the factory of Ismail. Shabbir is the father of accused, Amjad Khan, who lives in Gali No, 8. The witness goes on to say that on 2.4.1999 son of Shabbir got married and a party of Walima was organised. This witness along with Nasim went to attend the Walima party at 9.30 a.m. The witness says that the father and the brother of the accused, Amjad Khan, had caught hold of Ismail while Amjad attacked Ismail with knife. The accused ran towards the witness when he along with Nasim ran away out of fear. This witness was cross-examined by the Public Prosecutor, but was not confronted with his previous statement. In further cross-examination by counsel for the accused, he states that he had not received any invitation to attend the party but was asked to come there by Ismail, the deceased. He also says that he saw the incident from a distance of about 12 feet. After the incident, this

witness ran away to his village, but returned on the same day by bus. He did not inform the Police.

6. PW-5 is Nasim Ahmed who states that Ismail was his elder brother. On 30.3.1999, he along with Ismail had gone to the house of Shabbir because of some function. Around mid-night Ismail switched off the music deck which caused annoyance to Amjad who abused Ismail. Amjad also threatened Ismail and warned him that he should not come to their house. The witness also advised Ismail not to go to the house of the accused. On 2.4.1999, Walima party was hosted, the mother of the accused convinced Ismail to attend the party. After sometime, this witness along with Mohd. Yusuf also went to collect articles which had been given for arrangements. When they reached, they found Ismail was repairing the motor. Accused Amjad reached there and challenged Ismail for coming there inspite of being told not to come to their house. Then, the accused went upstairs and brought a churi. He gave one blow with churi on the chest and another blow on the axilla of Ismail. Seeing the assault, this witness along with Mohd. Yusuf ran away and returned to the spot after about one-and-half hours when they were told that the mother of Ajmad had taken Ismail to the Hospital. He goes on to say that Ismail had been visiting the house of the accused for the last eight or nine years. There were illicit relations between Ismail and the mother of the accused.

7. Analysing the deposition of PW-2 and PW-5, the trial court had discarded the version of PW-2 but relied upon the version of PW-5 inasmuch as it supports the Prosecution''s case as a whole. The trial court also relied upon the recovery of knife at the instance of the accused.

8. We have carefully examined the statements of PW-2 and PW-5 and find that PW-2 states that he saw the father and brother of accused, Amjad, holding Ismail when Amjad attacked Ismail with a knife. He claims that Nasim, PW-5 was present with him to witness this occurrence. Nasim, on the other hand, does not support the version of the incident given by PW-2. He talks of Ismail repairing a pump and asking Amjad to get a refill of a gas cylinder which annoyed Amjad who thereafter attacked Ismail with a knife The versions given of the incident by both the witnesses are poles apart, yet both witnesses claim to have seen the same incident in each other''s presence. None of these witnesses came to the aid of Ismail, moreso when PW-5, is the brother of Ismail. PW-2 states that he ran away to his village and returned in the evening while PW-5 states that both of them returned to the spot after about one-and-half hours. It is also not clear as to how these witnesses went to the party when they were not invited. PW-5 explains that he went there to collect articles which had been given for arrangement. There is nothing on record to show as to what were these articles which had been given for arrangement and had to be retrieved. Further, going by the evidence of PW-5 that serious altercation had taken place on the day before between Ismail and Amjad, there is hardly any justification of PW-5 to have gone to the party uninvited even if Ismail had been persuaded by the mother of the accused, Amjad.

9. Coming to the recoveries, there is nothing to connect the knife with the murder. No doubt, the doctor opines that the injuries could have been caused by such a weapon, yet we find there is no evidence to show that the knife was, in fact, used in the incident and that too by Amjad.

10. The reliance placed on the statement of PW-5 by the trial court does not address itself to the fact that PW-5 and PW-2 are stated to be together at all points of time, yet their versions of the incident are quite at variance. Discarding one in favour of the other would be dangerous in the absence of any other corroborative evidence. Both the witnesses rely upon each others presence to establish their own presence at the site of occurrence, yet their versions of the incident are materially different. Their statements do not inspire confidence. Another aspect of this case is that the version given by PW-1 as also PW-2 has not been challenged by the Prosecution. None of these witnesses were confronted with their previous statements to show that they were not telling the truth or had materially altered their versions. In that view of the matter, to discard the statement of one witness in favour of the other would be highly dangerous.

11. There is no challenge on the procedural aspect of this case and, therefore, we need not burden the judgment with that aspect. Suffice it to say, that from the ocular evidence relied upon by the Prosecution it cannot be safely said that the Prosecution has been able to establish their case beyond doubt. We, therefore, set aside the impugned judgment and order dated 17.10.2001 and 18.10.2001 and acquit the appellant of all charges. Criminal Appeal No. 886/2001 is accordingly allowed. The appellant, if in custody, shall be released forthwith, if not wanted in any other case.