

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INDIAN PENAL CODE

CRIMINAL APPEAL No. 1062/2011

Reserved on: 30th January, 2013

Date of Decision: 11th February, 2013

GAGAN

....Appellant

Through Mr. Sanjay Dubey, Advocate.

Versus

THE STATE

...Respondent

Through Ms. Richa Kapoor, APP for the State.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

SANJIV KHANNA, J.:

1. The appellant Gagan by the impugned judgment dated 29th March, 2011 stands convicted under Sections 302 and 411 of the Indian Penal Code, 1860 (IPC, for short). By the order of sentence dated 31st March, 2011, he has been sentenced to undergo life imprisonment and fine of Rs.3,000/- for the offence punishable under Section 302 IPC and, in default of payment of fine, to undergo Rigorous Imprisonment of six months. The appellant has been sentenced to undergo Rigorous Imprisonment of six months for the offence under Section 411 IPC.

2. To put it succinctly, the prosecution case is that the appellant-Gagan along with two or three other boys in the night of 22nd December, 2008, at about 12.15 A.M., tried to loot belongings of Chutkou @ Nanku and, in the process, wielded stab injuries resulting in his death. At this stage, we record that the co-accused Vinod Kumar has been acquitted, by the same impugned judgment. This relevant aspect has been considered and examined later on.

3. To curtail prolixity we would like to refer first to the prosecution version. In the present case, the prosecution relies upon the statement of Vinay Kumar (PW-3), the complainant on whose statement FIR No. 405/2008, Police Station Gokul Puri (Ex. PW-8/B) was recorded. The prosecution asserted upon the disclosure made by the appellant-Gagan (Ex. PW-7/A) pursuant to which alleged blood stained T-shirt worn by the appellant-Gagan, the knife used in the incident and the wrist watch snatched from the deceased Chutkou were recovered. Reliance is placed upon FSL Report (Exhibit PW-18/A and B) as per which blood group A was detected on the appellant's T-shirt. It is submitted that blood of group A was also found, as per the serological report, on the shirt, pant and the undergarments of the deceased. It is urged that acquittal of Vinod Kumar by itself does not justify acquittal of the appellant-Gagan as the appellate court can re-examine and appreciate the entire evidence and is free to come to any conclusion without being influenced by the said acquittal. The only bar is that the order of acquittal passed in favour of Vinod Kumar cannot be set aside unless an appeal has been preferred against his acquittal. Reliance in this regard is placed upon *Sunder Singh and Others v. State of Punjab*, AIR 1962 SC 1211.

4. The legal proposition is undoubtedly correct and supported by *Sunder Singh* (supra) and other authorities. As the first appellate court we have to re-appreciate the entire evidence and come to the conclusion whether or not the appellant-Gagan has been rightly convicted for the two offences in question. The fact that Vinod Kumar has been acquitted cannot be the ground alone to acquit the appellant-Gagan. As we perceive, the issue in question here relates to credibility and truthfulness of identification of the appellant by Vinay Kumar (PW-3) in the court. As already noticed above, Vinay Kumar (PW-3) is the complainant on whose statement (Exhibit PW-3/A), the FIR in question (Exhibit PW-8/B) was registered. Vinay Kumar (PW-3) in his deposition has stated that a year prior to his deposition, one late winter night, at about 12.00 to 12.30 A.M., he was driving his motorcycle from LNJP Hospital. When he reached ganda nala, Gokul Puri, he saw a group of three-four people were stabbing a person. PW-3 stopped the motorcycle and saw the said persons, under the gleaming head light of the motorcycle. When the head light flashed on the assailants, i.e., the boys, they ran away towards ganda nala. PW-3 made a call to the police, upon which the PCR van arrived at the spot. The injured was in a moribund state yet alive and breathing. Thereafter, PW-3 left the spot. The said witness was declared hostile and was cross-examined by the Public Prosecutor as he

refused to identify Vinod Kumar, one of the assailants, and support that Vinod Kumar was apprehended by him at the spot and was later on handed over to the PCR officers. In the cross-examination he denied that any of the accused was apprehended by him at the crime spot. On the other hand, he exhorted that the assailants scurried away after stabbing. He even denied the suggestion given by the Public Prosecutor that the police officers had taken away one canvas bag containing one diary of green colour, another diary having red colour, an I Card, mobile phone and Rs.3,800/- which the deceased was carrying. Vinay Kumar (PW-3), however, identified his signatures at point A of Exhibit PW-3/B, which is the seizure memo. He further identified his signatures on Exhibit PW-3/C, the seizure memo of the slippers (chappal) which was worn by the deceased. Vinay Kumar (PW-3) was confronted with his statement (Exhibit PW-3/A) but did not accept the same and has stated that Insp. V.S. Malik (PW-25) had obtained his signatures on a blank paper. In (Ex. PW-3/A) it is recorded that one Vinay Kumar was coming on his motorcycle at about 12.15 A.M. at night and near ganda nala, Gokul Puri flyover he saw one person caught amongst three-four boys, who were stabbing him with knives/daggers. He halted his motorcycle and rushed to save the person. Upon this, the boys with the knives/daggers ran towards ganda nala but one boy who was trying to snatch a bag from the injured person was caught by PW-3 at the spot itself. Subsequently, he came to know that the name of the said assailant was Vinod Kumar. The PCR van reached the spot. The occurrence was seen by three-four other persons, who were on cycles. We may note here that the said three-four persons, who had come on the cycles, were not produced by the police possibly because their whereabouts and details could not be ascertained.

5. Vinay Kumar (PW-3) in his examination-in-chief identified the appellant-Gagan as one of the assailants. The other assailants have not been arrested and brought to trial. Thus, at the time of identification there were only two accused, i.e., Vinod Kumar, who was caught at the spot as per police version and the present appellant-Gagan. Appellant-Gagan was arrested by the police on 15th January, 2009 at 9.45 P.M. vide arrest memo (Exhibit PW-14/A). The appellant was, therefore, arrested nearly 24 days after the occurrence. The appellant refused to participate in the TIP proceedings (Exhibit PW-16/C) conducted by Mr. Lalit Kumar, Metropolitan Magistrate (PW-16). It is recorded in Exhibit PW-16/A that the appellant-Gagan had refused to participate as he purported that he was shown to the witness, at the police station, and his photograph was taken by the police.

6. From the statement made by Vinay Kumar (PW-3) in the court and in his statement (Exhibit PW-3/A) it is conspicuous that PW-3 was himself not attacked and was unscathed through the perilous incident. As per the court testimony, Vinay Kumar (PW-3) stopped the motorcycle and then ran towards the assailants, who on seeing him ran away. He could see the assailants as the head light of his motorcycle was on. At best, therefore, Vinay Kumar (PW-3) had a fleeting glimpse of the assailants when they were scurrying away. He did not have a chance to have a considerable look at the assailants and was not involved in any scuffle at close range with them. The emanating light from the approaching motorcycle's head light would have been visible to the assailants too. In the present case, only one of the assailants, other than Vinod Kumar who has been acquitted, as per the police was caught and charge sheeted. Vinay Kumar (PW-3) did not identify Vinod Kumar in the court, the assailant allegedly caught at the spot, but identified the appellant-Gagan, the only other person, who was standing trial as an accused. We do not think that the identification by Vinay Kumar (PW-3) in the court should be accepted, in the present case, without other credible and substantially correlating and corroborating evidence. Vinay Kumar (PW-3) does not appear to us to be a reliable witness and the said identification is debatable and susceptible. It is discernible that he has gone out of the way to help Vinod Kumar and not identify him, even though Vinod Kumar was apprehended by him and then arrested by the police, at the crime spot. Keeping in view the conduct of Vinay Kumar (PW-3), it is plausible that he may have identified the present appellant as he was the only other accused facing the trial.

7. We may have accepted the identification made by Vinay Kumar (PW-3) in the court if there was reliable corroborative evidence to show involvement of the appellant, as one of the assailants who were the perpetrators of the crime. As noticed above, the appellant-Gagan was arrested nearly 23-24 days after the occurrence though Vinod Kumar, as per the police version, had been nabbed at the spot itself. Inspector V.S. Malik (PW-25), the investigating officer, in his deposition, has not averred to the effect that he had searched for the appellant-accused Gagan, other co-accused Bhim and the co-associates but they could not be traced in spite of the best efforts. The deposition merely states that on 15th January, 2009 he was present with Head Constable Ajesh and Head Constable Yoginder Singh when one person Raghuvir met and told them that he knew Gagan who was standing near Hanuman Mandir, Loni, Gole Chakkar. There Gagan was

apprehended and, thereafter, his disclosure statement (Exhibit PW-7/A) was recorded. On the basis of disclosure statement, T-shirt, which the appellant-Gagan had worn at the time of occurrence was recovered vide seizure memo (Exhibit PW-7/C). The said seizure memo is dated 15th January, 2009 and records that the same was seized from House No. B-488, Gokul Puri, Delhi which is the residence of the appellant. It is difficult to perceive that the appellant would have kept and not washed his alleged blood stained T-shirt and it would be recovered after about 23/24 days. The recovery of the said blood stained T-shirt is thus a suspect and doubtful. This in turn creates doubt about the FLS reports (Exhibit PW-18/A and B) and renders them unreliable.

8. The disclosure statement of the appellant-Gagan (Exhibit PW-7/A) purportedly records that the appellant had hidden the knife used in the crime and the stolen wrist watch in a polythene bag. As per the prosecution, the knife and the wrist watch were seized on 30th January, 2009 vide memo Exhibit PW-14/D from bushes near Pooja Colony, Loni, U.P. The said watch was identified by Madhav Raj (PW-1) in the TIP proceedings (Exhibit PW-16/A and 15/A) in the court. Madhav Raj (PW-1) is the brother of the deceased, who had identified his dead body. He has stated that he was a resident of Karnailganj, District Bhonda, U.P. and the deceased was living in Delhi for last 10-12 years and had received the said watch at the time of his wedding. The watch was not in a working condition when he identified it before the Magistrate. In the cross-examination, PW-1 has admitted that such watches were easily available in the open market and the shown watch did not have any leather strap. The delay in taking the appellant to the recovery spot, i.e., the bandh in U.P. after his arrest on 15th January, 2009 has ostensibly been explained on the ground that TIP proceedings had to be conducted, but the said proceedings, as we note, were conducted on 22nd January, 2009. There is a prolonged duration, thereafter, of more than 7 days in the alleged recovery. Further, the alleged recovery is only of one allegedly stolen article and the said article, i.e., the wrist watch is easily available in the market. In the FSL report (Exhibit PW-18/A and B) on the knife, which was allegedly found and wrapped in the polythene, human blood could be detected but the grouping could not be ascertained as there was no reaction. No other property was recovered. Therefore, it would be incongruous to implicate the appellant on the basis of said recoveries.

9. This leaves prosecution case standing solely on PW-3's statement but we cannot say that PW-3 is a completely reliable witness. We have no doubt

that he was present at the spot and had the occasion to witness the occurrence but his identification of the appellant Gagan makes us uneasy and in doubt. PW1 in the court has stated that he saw the assailants running away in the head light of the motor cycle. There was no interaction of the PW1 with the appellant. The said witness does not appear to be wholly reliable and, therefore, we have to be cautious before we accept his statement. Implicit reliance cannot be placed on his testimony regarding identification of the appellant Gagan. We feel that unless his statement is sufficiently corroborated, it would not be safe to solely premise the conviction on the statement of a sole witness. In *Lallu Manjhi v. State of Jharkhand* (2003) 2 SCC 401, witnesses have been categorized into three categories: wholly reliable; wholly unreliable; and neither wholly reliable nor wholly unreliable, and it was observed that in the third category the court has to be cautious and should accept the testimony when the statement is corroborated either by other witnesses or other documentary or expert evidence.

10. Evidence of sole eye-witness should be cogent, reliable and must necessarily fit into the chain of events as stated by the prosecution. His evidence, before it is accepted, should be viewed with caution and should be tested on the touch stone of evidence rendered by other witnesses or evidence otherwise recorded. (See *Govind Raju vs. State* (2012) 4 SCC 722).

11. In *Mushir Khan v. State of Madhya Pradesh* (2010) 2 SCC 748, the accused was identified both in the Test Identification Parade and in the court by the witness. The Supreme Court, however, observed that the said witness had extremely limited opportunity of seeing the accused who was fleeing from the place of occurrence on a scooter. It was probable that the identification was based merely on a hunch. We, however, record that in the said case, there were number of other circumstances also which created doubt about the identification which had been made. We should not be understood as stating or propounding that chance witnesses or eye-witnesses in such instances or occurrences should be disbelieved or ignored unless satisfactorily corroborated by other material or evidence. Deposition of eye-witnesses necessarily depends upon the credibility and reliability of the said witness. The statement made by him in the court and to what extent the deposition regarding identification should be accepted as truthful, will necessarily vary from case to case or purported eye-witness to eye-witness. There are and will be decisions where identification by the sole eye witness

has been accepted and relied upon, when the court is satisfied that the identification can be relied upon and inspires confidence leaving no room for doubt.

12. What causes suspicion and doubt in the present case, the identity or details of assailants other than Vinod Kumar who was caught at the spot itself was unknown. Possibly the Investigating Officer and his team came to know about the identity of the other assailants upon interrogation of Vinod Kumar. However, as noticed above, there is a substantial gap of 23-24 days when Vinod Kumar was arrested on 22nd December, 2008 and when the present appellant Gagan was arrested on 15th January, 2009. The Investigating Officer and other police officials have not asserted, in the court testimony, that Gagan was on a run, absconding and therefore, could not be arrested. The purported blood stained T-shirt, which it is claimed Gagan was wearing at the time of incident, was found from the house of Gagan, hence as per the police version Gagan would have gone to his residence after the occurrence. Investigating Officer and his team had not deposed in their statements in the Court that they have visited the appellant Gagan's residence and he was not available. The police file, however, indicates that police officials had visited house of Gagan and had spoken to his father who had stated that his son Gagan has not been coming to the house. Thus, the prosecution version regarding the manner and mode in which Gagan was caught and recoveries were made is untenable.

13. In view of the aforesaid position, we are inclined to and grant benefit of doubt to the appellant, as the case against him has not been proved beyond reasonable doubt. The appellant will be released forthwith, unless required to be detained, in accordance with law, in any other case.

14. The appeal stands disposed of accordingly.

Sd/-
(SANJIV KHANNA)
JUDGE

Sd/-
(SIDDHARTH MRIDUL)
JUDGE

FEBRUARY 11, 2013