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IN THE HIGH COURT OF DELHI AT NEW DELHI

+CRL.A. 107/2013

Judgment reserved on 23.02.2015

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Judgment delivered on 30th April, 2015

KALICHARAN

...Appellant

Through: Mr. Sameer Chandra, Advocate

Versus

STATE NCT OF DELHI

...Respondent

Through: Mr. Sunil Sharma, APP for State.

CRL.A. 163/2013

MAHENDER SINGH

....Appellant

Through: Ms. Aishwarya Rao, Advocate.

Versus

STATE

....Respondent

Through: Mr. Sunil Sharma, APP for State

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J.

1. Present appeals arise out of a common judgement dated 30.11.2012 and order on sentence dated 14.12.2012 passed by learned Additional Sessions Judge, Delhi, in Sessions Case No. 298/09. The appeals have been heard together and are being disposed of by a common judgment.
2. Present appeals have been filed by the appellants under Section 374(2) read with Section 482 of the Code of Criminal Procedure, and are directed

against the impugned judgment dated 30.11.2012 and order on sentence dated 14.12.2012 passed by the learned Additional Sessions Judge convicting the appellants under Section 302/394 r/w 397/34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life for the offence under Section 302 IPC with fine of Rs. 10,000/- and in default to further undergo simple imprisonment for one year. The appellants were also sentenced to undergo rigorous imprisonment for seven years for the offences under Section 394/397 of the Indian Penal Code with fine of Rs.10,000/- and in default to further undergo simple imprisonment for one year.

3. Brief facts of the case, as noticed by the learned Trial Court, are as under:

On 08.05.2009 at 4.20 pm, an information was received in PS Sarita Vihar about an unknown person having been stabbed, under flyover Sarita Vihar, New Delhi. Information was recorded as DD No. 20A and was marked to SI Tika Ram for investigation. The latter along with Ct. Biren reached at spot i.e. under flyover Sarita Vihar, New Delhi. Injured was known to have already been taken to Trauma Centre, AIIMS by a PCR van. No person claiming to be eyewitness was found there. IO reached Trauma Centre after leaving Ct. Biren at spot. The injured had been declared as 'brought dead'. The IO noticed that deceased had stab wounds on his abdomen. The intestines were protruding from the abdomen. Same was also having some injury marks near his left eye. Duty Constable handed over him a pullanda containing clothes of deceased and a sample seal. IO returned to spot. One Suman Kumar (complainant) met him there, who narrated the incident as under:

"I am residing at address mentioned above i.e. D175, Near Surya Public School, Sangam Vihar, New Delhi as a tenant and working with Max Well Security, Lado Sarai, New Delhi. I was deputed at NHAI, Sarita Vihar. Today i.e. 08.05.2009, at about 3.50 pm, I was on

my duty, watching the goods belonging to NHAI, lying under flyover Sarita Vihar. At about 3.50 pm, when I came out to ease water and was urinating near wall, I saw an auto rickshaw having been parked on Badarpur road. Two boys, one thin and tall in appearance while other of short height were grappling with a person aged about 30-35 years. The boy having short height was armed with a knife. The victim came there, after climbing over the wall. He was holding his abdomen by hand. He threw his mobile phone which fell down on the ground after hitting a tanker belonging to NHAI. That person also fell down on the ground but somehow managed to get up and laid on a cot lying nearby. The offender, who was tall in body followed the victim and picked up mobile phone belonging to the latter. Both of assailants fled away in that auto rickshaw. I informed the incident to my Incharge Mr. Pandey, who further informed the incident to police control room by calling at phone No. 100”.

IO made an endorsement and got FIR registered in his case for offence punishable under Section 302 /394/397/34 IPC. After investigation of the case, police indicted both of accused for the offence punishable under Section 302/394/397/411/34 IPC. The accused persons were charged by this court on 01.12.2009 for the offence punishable under Section 394/34 and Section 397 IPC as well as for offence punishable under section 302/34 IPC. Accused persons pleaded not guilty and claimed trial when charge was read over and explained to them.

Accused Mahender Singh in his statement recorded under Section 313 Cr.P.C. admitted the evidence that in year 2007, he was working with deceased Balbir Singh and his wife Smt. Rajni (PW7) in Escort Hospital, New Delhi. Rest of incriminating evidence, when put to the accused persons, was denied alleging the same as incorrect. None of accused opted to lead any evidence in his defence. However, it was undertaken by accused Kalicharan that he will give list of witnesses before next date, no such list was ever provided.”

4. The learned Trial Court, after scrutiny of the evidence, found that prosecution had been able to prove its case against the appellants and,

accordingly convicted them for the offences and imposed the sentence as has been stated hereinabove.

5. While arguing the appeals, learned counsel for the appellants contended that the judgment and order on sentence passed by the learned Trial Court are wrong and illegal as the prosecution has failed to prove its case beyond reasonable doubt and overlooked the basic principles of criminal jurisprudence.
6. Learned counsel for the appellants vehemently argued that the case of the prosecution rests only on the sole testimony of PW-1 Suman Kumar, who is a stock witness of the police. There is no explanation why PW-24 Mr. Brahmananda Pandey did not mention the name of PW-1, who was working under him, in his testimony who has described the whole incident to him.
7. It is further contended by counsel for the appellants that the testimony of the witnesses sought to be relied upon by the prosecution are full of contradictions which go to the root of the matter.
8. The counsel further submits that as per the testimony of PW-19 SI Vijay Kumar there was no eyewitness present at the spot and there was no blood found on the soil, whereas PW-1 claims himself to be an eye witness.
9. It is further contended that the description given by PW-1 did not match with the appellants. As per his statement one of the appellants was thin and tall while the other one was a dwarf and fatty. However, the appellants do not fit into any of the two descriptions and hence the testimony of the PW-1 cannot be relied upon.
10. Mr. Sameer Chandra learned counsel for the appellant Kalicharan contended that the refusal for Test Identification Parade (TIP) by the

appellants is justified for the reason that the appellants were shown to him in the police station on the day of incident.

11. The learned counsel has relied upon *State of Andhra Pradesh Vs. Sayyaad Siraj Mohammed & Ors.* (2010) 1 SCC (cri)1039 wherein it was held by the Apex Court that in a case where accused are shown to the witnesses before TIP the High Court rightly disbelieved prosecution versions and directed acquittal of respondent accused. Reliance is also placed on *Deepak Singh Negi & Ors. Vs. State (NCT OF DELHI)* 2007 (3) JCC 2366 wherein it was held that

“ The witness PW-1 and PW-4 cannot be strictly termed as eye witnesses. They appeared to be chance witnesses and chance witnesses cannot be safely relied as held in Baldev Singh Vs. State of M.P., (2003) 9 SCC 45, Mousam Singha Roy Vs. State of W.B., (2003) 12 SCC 377, Harjinder Singh Vs. State of Punjab, (2004) 11 SCC 253 and Varkey Joseph Vs. State of Kerala , 1993 Supp (3) SCC 745.”

12. It is further submitted by the counsel that as per the case of the prosecution, the mobile phone robbed from the deceased Balbir was having IMEI No. 351941039360177. However, the Nokia mobile phone which was carried by the deceased had IMEI No. 351941039360170 and its SIM No. 9958492216 which was neither recovered from the possession of the appellants nor at their instance proves the innocence of the appellants and their false implication.
13. Ms. Aishwarya Rao, learned counsel for the appellant Mahender submits that the prosecution has not been able to prove its case and the appellant had been arrested on the basis of suspicion and the recovery of mobile phone is also doubtful, thus the appellant deserves to be acquitted.
14. On the other hand, Mr. Sunil Sharma learned counsel for the State contended that PW1 Suman Kumar is a trustworthy and reliable witness

and on the basis of the material on record and evidence adduced by the prosecution, both the appellants are liable to be convicted. Learned counsel further submits that PW1 is neither an interested witness nor he had any enmity with the appellants and his testimony is very natural and corroborated by medical evidence which is sufficient to convict the appellants.

15. Mr.Sharma, further submits that the testimony of PW7 Smt. Rajni, wife of deceased inspires confidence as she has categorically admitted during her examination in chief that the mobile phone (make Nokia 1650) shown to her in court belonged to her husband. She further deposed that the appellant Mahender threatened the deceased in her presence and he had personal grudge against the deceased which finally culminated in his death.
16. The Learned Counsel for the State also submits that the guilt of the appellants is further proved in view of their denial to participate in the TIP proceedings.
17. We have heard learned counsel for the parties and considered their rival submissions.
18. The case as set up by the prosecution is that the complainant PW1 Suman Kumar was working with Max Well Security and was deputed at NHAI, Sarita Vihar. On the fateful day, PW1 witnessed two boys, one thin and tall in appearance (Mahender) while the other short and fatty (Kalicharan) grappling with the deceased. They were trying to snatch the mobile phone of the deceased. The boy having short height (Kalicharan) was armed with a knife. The deceased came to the compound of NHAI after climbing over the wall. The deceased was holding his abdomen by his hand thereafter he lay on a cot lying nearby. The assailant who was tall in body (Mahender) followed the deceased and picked the mobile phone

belonging to the deceased and the one who was short and fatty gave stab injuries to the deceased. Both the assailants fled away in an auto rickshaw parked there. PW1 informed this incident to his incharge PW24 Brahmanand Pandey who further informed the police.

19. Before dealing with the arguments of the parties it would be useful to examine the testimonies of the material witnesses. In this case the prosecution has examined 29 witnesses. PW1 Suman Kumar, PW7 Smt. Rajni are the material public witnesses and we will discuss their testimonies in detail.
20. PW1 Suman Kumar is the sole eyewitness of the incident and his testimony is material and relevant, and the same is reproduced below:

“On 08.05.09, I was present at my duty at under Sarita Vihar Flyover. I was posted as Guard there to look after the articles of NHAI lying under the said flyover. At about 3.50 pm, I was urinating near the wall of flyover. I saw that two person were trying to snatch mobile phone from a person aged about 30/35 years. One TSR was parked there and one cycle was also parked there. When person aged about 30/35 years did not hand over the mobile phone, one person whipped out a knife and stabbed in the abdomen of person aged about 30/35 years. That person threw his mobile phone towards water tank situated inside the compound of NHAI. Mobile phone struck against the said water tank and fell down on the ground. The injured person entered inside the compound of NHAI. He laid down on a cot lying there. In the meantime, a person, who was thin and tall, came there and picked up the mobile phone. The other person of short height was sitting in the TSR in starting condition. The thin and tall person sat down in the TSR and run away towards Badarpur Border. I informed to in-charge Mr. Pandey about the incident who informed to police on 100 number telephone. Police officials came there and took the

injured with them. After half an hour, police again came back at the spot and interrogated me. My statement was recorded. I have seen my statement Ex.PW1/A which bears my signatures at point A.

The witness has pointed towards the accused Kalicharan as the accused who had caused stabbed injuries to the deceased. The witness pointed towards the accused Mahender Singh as the one who had taken the mobile phone of deceased.

The Cycle which was lying near the road was seized by the police. The cot on which the injured was lying was also seized. These were taken into possession vide memo Ex.PW1/B which bears my signatures at point A. Police also prepared site plan. I can identify the cycle and cot which was seized by the police.”

21. PW7 Smt. Rajni wife of deceased deposed that on 08.05.09 when her husband did not return home she made a call to her husband around 7.50 PM. Someone told her to search for her husband in the hospital. Thereafter, she went to AIIMS hospital and identified the dead body of her husband. PW7 further deposed that she knew Mahender (appellant herein), as in the year 2007 she along with her husband used to work in the housekeeping department at Escort Hospital. The appellant Mahender also used to work in the housekeeping department in the said hospital. After sometime she and appellant Mahender had left the job due to break in service but the deceased remained in the job. PW7 next deposed that she again joined the housekeeping department in the year 2008. Up to that time deceased was promoted as a Supervisor (housekeeping). PW7 further deposed that in November 2008, appellant Mahender came to Escort Hospital and asked the deceased for employment but the senior officer refused to give a job to the appellant Mahender as his behaviour was not good thereafter appellant Mahender threatened the deceased of

dire consequences as the appellant Mahender had lost his job due to the deceased and the deceased had not taken him back on his job.

22. The learned Trial Court has convicted the appellants on the basis of ocular evidence.
23. As per the testimony of PW-1, he was on duty under Sarita Vihar flyover on 8.5.2009 to guard and look after the articles of NHAI lying under the said flyover. This witness has also testified that the distance between the cot and the place where the articles of NHAI were lying including iron grill (jali) and loha lakkar was about 10 ft., whereas PW-14, SI Tika Ram, deposed that he did not notice any iron scrap near the spot, nor was any iron scrap shown in the site plan. PW-1, Suman Kumar, had deposed that the Police officials had come at the spot and had taken the injured with them. After half an hour the Police came back again and interrogated him whereas in the FIR it is mentioned that no eye-witness was found at the spot at the first visit of PW-14, SI Tika Ram. PW-1 has also testified that his statement was recorded on 8.5.2009 in the Police Station by the Police official Tikka Ram whereas PW-14, SI Tikka Ram, deposed that he did not record the statement of Suman Kumar in the Police Station and the FIR also indicates that the statement of PW-1 was recorded at the spot.
24. We may also note that PW-19, SI Vijay Kumar deposed that he reached the spot within seven minutes from 4.00 p.m., when he received the information, and took the injured to the hospital. While PW-1, Suman Kumar, deposed that after half an hour from the time when the Police took the injured with them, they came back at the spot and interrogated him and his statement was recorded. Thus, it would mean that his statement was recorded at about 4.45 p.m. whereas as per the Delhi Police Control Room Form the local Police reached the spot on 17:51:11.

25. We find the testimony of PW-1 unreliable also for the reason that PW-1 claimed to be present near the spot as he was posted as a security guard, but in case he was present there, he would have met PCR officials and local Police when they visited the spot at the first instance. Statement of PW-1 is also unworthy of reliance as the PCR official, PW-19, SI Vijay Kumar, did not depose in the Court that they found the deceased lying inside the NHAI compound nor PW-19 claimed to have met Suman Kumar, who told him that the deceased was killed during commission of robbery. Rather, PW-19, SI Vijay Kumar, deposed that somebody told him that quarrel took place between the deceased and others but they did not disclose their names.
26. PW-22, Ct. Biren Singh, one of the local Police officials, who stayed at the spot for about two hours has testified that no eye-witness was found at the spot. It is also strange that PW-1, who claims to have been employed by NHAI, informed his incharge, Mr.Pandey, however, Mr.Pandey informed the Police that one public person had given him information. It is improbable that Mr.Pandey, who was incharge, according to PW-1, did not know his name and even if he did not know his name Mr.Pandey would not refer to PW-1 as a public person.
27. We also find that there is no clarity with regard to the place where the deceased was lying as there is contradiction between the testimonies of PW-1, Suman Kumar, and PW-19, SI Vijay Kumar, as noticed hereinabove. We also find that there is no clarity with regard to presence of public persons at the spot of the incident. While PW-1, Suman Kumar, deposed that many people were residing where the cot was lying but he also volunteered to state that no person was present there. Whereas PW-19, SI Vijay Kumar, who reached the spot within seven minutes of receiving the call, has deposed that juggies were situated three steps away

from the spot where dead body was lying, people were residing and found present when the Police reached. There is also material improvement in the version of PW-1 regarding the assault on the deceased. In Court, he had deposed that he had told the Police that one person stabbed the deceased, whereas he was confronted with the statement Exhibit PW-1/A wherein it has not been so recorded. The deposition of PW-1 also does not repose any confidence as he has testified that he had seen the deceased when he was lying in the cot, which would mean that he did not witness the incident but only saw the deceased when he came and lay down in the cot.

28. We also find another ground, which makes the testimony of PW-1 unreliable, is the manner in which PW-1 gave physical description of the assailants in his statement Exhibit PW-1/A, which was given to the Police, describing one culprit as thin and tall and the other dwarf and fatty. The appellants, we find, did not fit in any of the two descriptions. The trial court observed as under:

“The accused Mahender may be one and half/two inches taller than the accused Kalicharan). The accused Mahender is slim in body build and accused Kalicharan does not appear fat rather he seems to be normal.”

29. We also find that although PW-1 claims to be present at the spot when the incident took place yet he only testified that only one abdominal injury was inflicted on the deceased, whereas as per the post-mortem report there were four conspicuous external injuries on the body of the deceased including the following:

“(i) on the face of size 2 cm *0.3,

- (ii) multiple reddish abrasion of size 4 cm *4 cm just above eyebrow,
- (iii) multiple reddish abrasions on hand below elbow joint of size 7 cm *7 cm,
- (iv) injury on abdomen.”

30. PW-1 has also deposed that he had signed the site plan whereas his signatures did not appear on the same. There is no explanation for the delay in informing the Police, as according to PW-1, the time of the incident was 3.50 p.m. and within five minutes he informed his incharge about the incident, who called the Police, while, the first call was received in this case at 16:18:54 i.e. 4:18:54 more than 28 minutes later.
31. From the analysis of the testimonies of aforesaid witnesses it is apparent that there are material contradictions which go to the root of the case. On analysing the material on record, it is established that the case of the prosecution has not stood sufficiently or properly established. It is doubtful even from the testimony of the sole eyewitness whether the appellants were seen robbing and stabbing the deceased Balbir. PW1 Suman Kumar stated in the statement Ex. PW1/A that he saw two boys grappling with the deceased, however, in his Examination in chief he deposed that when deceased did not hand over the mobile phone, one person whipped out a knife and stabbed in the abdomen of deceased. This statement is duly confronted in his cross examination with Ex PW 1/A wherein it is not so recorded. There is no explanation why PW1 did not disclose this fact in the FIR which is the information received first in point of time.

32. The attention of the Court has been drawn to the Cross Examination of PW1 Suman Kumar wherein he stated that his statement was recorded on the day of incident i.e 08.05.09 in police station by the police official Tika Ram and he has signed two documents out of which one is site plan which was prepared on his pointing. PW1 further stated that he is an illiterate person and always sign in Hindi. PW1 next stated that he had identified the appellants in the police station on the day of incident i.e on 08.05.09. We have found that there is no signature on site plan Ex.PW14/B and on the contrary PW1 has signed in English on every document. We have also noticed serious contradiction in the arrest memos Ex. PW 8/A and Ex. PW 8/D dated 12.05.09 which depicts that the appellants were arrested from Jamia Nagar at 6:00 in the morning. There is no explanation given by the prosecution that when according to the testimony of PW-1, Suman Kumar he has identified the appellants on the day of incident itself in police station then why the appellants have been allowed to go from the police station.
33. After perusing the testimony of the PW7 Smt. Rajni, we have found that appellant Mahender had threatened the deceased of dire consequences in her presence as he had lost his job due to her husband and her husband had not taken him back on job, whereas neither she nor her husband made any complaint to the Police regarding threat given by appellant, Mahender Singh, to her husband. PW-7 in her cross examination has stated that appellant Mahender was employed on contract basis and the employees on contract basis in the house keeping department are given a gap in the service after 9 months by the hospital administration.
34. PW-7 has also testified that the Manager, House Keeping, and Mr.Vinay used to take interview for employment in the house keeping department,

which would show that Mahender Singh could not have been responsible for appellant not being hired in the house keeping Department. Moreover, PW-6, Mr.M.R. Aggarwal, has testified that he never noticed any dispute or quarrel between his employees, Balbir Singh and Mahender Singh, and the break in the service of the employees is given as per instructions of the Department.

35. PW-7 further stated that she had visited police station two times and her statement was recorded by the police on 08.05.09, and she had also visited the police station on 09.05.09. PW-7 next stated that she had seen the appellant Mahender in the police station after 09.05.09 but did not recollect the date. She had seen the appellant Kalicharan also along with Mahender in police station. She further deposed that she might have seen the mobile phone belonging to the deceased a day after the death of the deceased or may be two- three days thereafter. However, as per the Seizure memo of mobile phone, Ex. PW-8/D5 the mobile was recovered on 12.05.09 at the instance of appellant Mahender, from the possession of PW-12 Rajesh.
36. It is further pertinent to point out that PW19 SI Vijay Kumar PCR official deposed that he found the dead body lying on the side of the road under the fly over. The dead body was lying in the soil on the ground. 10-15 persons were present at the spot at that time. Jhuggies were situated there and they were about three steps away from the spot where the dead body was lying. People were present in those jhuggies at that time. Somebody told him that a quarrel took place between deceased and others, however they did not tell him their names. Thereafter they took the dead body to the hospital. 15-20 Jhuggies were situated just near the spot where the people were residing and were found present when they reached there.

However, as per the testimony of PW1 the dead body was found on the cot lying nearby; the blood was present on the cot but there is no explanation why crime team did not lift blood from the cot which leads to the inference that the investigation is faulty. PW-14 SI Tika Ram the one who reached the spot after PCR deposed in his cross examination that the ladies and children were residing in the labour jhuggies situated nearby the spot. 10-15 persons were present at the spot during the proceedings. IO did not take any signature of these persons on any of the document. This all lead to an inference that despite being so many jhuggies around, the prosecution did not examine any other public witness who were easily available. PW14 further deposed that Inspector Dinesh Chandra prepared the site plan Ex. PW-14/B and signed in his presence and PW1 did not sign on it.

37. The attention of this court has been drawn to the document showing the call details record of mobile which belongs to the deceased Balbeer. Although there is no explanation given by the appellants as to why they did not produce this document at the stage of the trial. The document shows that the mobile used by the deceased was having mobile no. 9958492216 and IMEI no. 351941039360170 however, as per the prosecution case the mobile which was recovered at the instance of the appellants is having IMEI no. 351941039360177. In our view the reliance cannot be placed on such a document which is not an exhibited document and points towards the major contradiction in the story of the prosecution.
38. In *Sunil Kumar v. State (Govt. of NCT of Delhi)*, (2003) 11 SCC 367, the Hon^{ble} Supreme Court has held that:

“9. xxxxxxxx As a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short “the Evidence Act”). But, if there are doubts about the testimony the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise.”

39. Having pointed out the loopholes in the investigation and the testimony of the sole witness having failed the test of being credible and trustworthy, we are of the view that prosecution has failed to prove its case against the appellants under Sections 302/394 r/w 397/34 of Indian Penal Code. Resultantly, the appeals are allowed. The judgment dated 30.11.2012 and order on sentence dated 14.12.2012 are set aside. The appellants stand acquitted and are ordered to be released forthwith if not required in any other case.
40. Trial Court record be returned to the concerned Court.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

APRIL 30th, 2015

gr/ssn