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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**RESERVED ON : 30.08.2011**

**DECIDED ON: 28.09.2011**

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**CRIMINAL APPEAL No. 192/1998**

RAJESH KUMAR @ RAJU SHARMA ..... Appellant

Through : Mr. G.P. Thareja, Advocate for the appellant.

versus

STATE OF DELHI ..... Respondent

Through : Ms. Richa Kapoor, APP on behalf of the State.

**CORAM:**

**MR. JUSTICE S. RAVINDRA BHAT**

**MR. JUSTICE P. K. BHASIN**

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

**MR. JUSTICE S.RAVINDRA BHAT**

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1. The Appellant (hereafter "Rajesh") impugns a judgment and order dated 18.04.1998 in S.C. No. 292/1992 whereby he was convicted of the offence punishable under Section 302 IPC. He was sentenced to undergo Life Imprisonment and pay a fine of ₹ 2,000, in default of which the convict would further undergo Simple Imprisonment for three months.

2. The case of the prosecution is that on 10.03.1992 R.K. Garg, Z.E Building, Shahdara Zone (hereafter "the deceased") along with J.E's Ravinder Kumar Khari (PW-3), Nasrul Islam

(PW-4) and Rakesh Kumar (PW-8) went to H.No. 1/5818, East Rohtash Nagar, Shahdara to demolish the unauthorized construction. A demolition squad and police force also accompanied them. At about 11:45 AM the staff started demolishing the roof of the rooms on the first floor; show cause notice and demolition notice had already been issued to the owner of the building and demolition orders had been passed earlier. The deceased along with the J.E's and SI Pratap Singh (PW-16) was standing at the ground floor when Rajesh went and told the deceased that he was in possession of a stay order. Rajesh told the deceased that he would show the stay order on the first floor roof and also asked him to see the roof of the rooms on the first floor, which was an old construction. The deceased along with the J.E's and PW-16 went to the roof (of the first floor), where the demolition was being carried out. The deceased asked Rajesh to show the stay order, whereupon Rajesh, while talking to the deceased pushed him from the roof; the deceased fell and received injuries on the head and other parts of the body. The MCD staff took the deceased to GTB Hospital from where he was referred to JPN Hospital; he later died in that hospital. PW-16 recorded the statement of Rakesh Kumar, JE (PW-8) and got an FIR bearing no. 102/1992 registered with PS Shahdara. Charges were framed against the appellant under Sections 302/307/324 IPC. The Appellant pleaded not guilty and claimed trial. After considering the evidence on record, which included 16 prosecution witnesses' testimony, and several exhibits, the Trial Court convicted the Appellant, under Section 302 IPC, and sentenced him to undergo life imprisonment.

3. Mr. G.P. Thareja, learned counsel for the Appellant, submitted that the Trial Court erred in convicting Rajesh and stated that the testimonies of the eye-witnesses cannot be relied upon as they contradicted each other on material points. It was argued that all the eye-witnesses have deposed differently about the place of recording of the statement of the complainant as well as regarding statements of other witnesses. It was argued that the statement of the witness who admitted the deceased to the hospital is also not clear; the prosecution is also hopelessly discrepant about the time when the statement of the complainant and other witnesses was recorded, as well as the place. Elaborating on this, it was submitted that PW-8 the complainant has deposed that he, PW-3 and PW-4 took the deceased first to Jyoti Nursing home and then to GTB Hospital from where they were referred to LNJPJ Hospital; they got the deceased admitted at LNJPJ Hospital. He further deposed having gone from the hospital to the police station where his statement was recorded; he reached the police station after 01:00 PM. PW-3 deposed that he,

PW-4 and PW-8 took the deceased to GTB Hospital from where they were referred to LNJP Hospital. He further deposed that he did not return to the spot after admitting the deceased to the hospital and stated that his statement was not recorded by the police. PW-4 deposed that he, PW-3 and PW-8 took the deceased first to 2-3 nursing homes and then to GTB Hospital from where they were referred to LNJP Hospital. However, PW-16, IO SI Pratap Singh deposed that it is incorrect that PW-3, 4 and 8 took the deceased to the hospital. He stated that all the three J.E's were with him at the spot till 05:00 PM and that the complainant, PW-8's, statement was recorded by him at the spot itself. He further stated that the statement of PW-5 and 11 was also recorded at the spot. PW-5 corroborated PW-16's deposition as he too deposed that the statement of PW-8 was recorded at the spot. He further deposed that his (PW-5) statement as well as that of PW-11 was recorded at the spot whereas PW-11 deposed that his (PW-11's) statement as well as that of PW-5 was recorded at the police station. He further deposed that 5-7 minutes after the incident he, PW-5 and PW-16 took Rajesh to the police station and he (PW-11) did not return to the spot. These internal and *inter se* contradictions in the relevant eyewitnesses' testimony, according to the Appellant's counsel, falsified the prosecution case. Therefore submitted the counsel for the Appellant, the Court fell into error in convicting Rajesh.

4. The counsel further pointed out that the MLC of the deceased Ex.PW-14/A mentioned PW-4's name and therefore it was not possible that PW-4 was at the spot all along as alleged by PW-5 and 16. Counsel for Appellant further urged that the story of the deceased being pushed by Rajesh was an afterthought as the death report Ex. PW-12/DA stated the cause of death as, "*not known (by falling from first floor roof)*" and the death summary prepared by Dr. Jindal Ex.PW-12/DB also mentions history of fall from a height.

5. The learned counsel further pointed out that according to PW-16, Rajesh was with him at the spot till 05:00 PM in the evening whereas PW-11 stated that 5-7 minutes after the incident they (PW-5, 11 and 16) left the spot and took Rajesh to the police station. The incident occurred at about 12:20 PM and therefore if PW-11 is believed then Rajesh would have been in the police station latest by 12:45 PM, and hence Rajesh could not have been at the spot till 05:00 PM.

6. It was urged that the prosecution could not establish any motive, and its allegation that Rajesh had pushed the deceased, during an argument, whilst both were on the roof of the premises, was not only improbable, but false. It was submitted that the prosecution case itself

was that the demolition started in the midst of security, and protection provided by the Delhi Police, which was a part of the MCD demolition team. Senior and middle level MCD officers were present at the spot. In these circumstances, it was impossible for Rajesh to have acted brazenly in the manner alleged (and found by the Trial Court) in pushing R.K.Garg to his death. What was an accidental death was shown and manipulated by the police, in connivance with the MCD officers, to be a homicidal attack, in order to cover up the authority's lapses and misdeeds. The Appellant did not have the requisite *mens rea*, all the witnesses relied on by the prosecution did not depose truthfully. According to the counsel, the case was simply one of false implication, and Rajesh was entitled to be acquitted.

7. It was alternatively, and without prejudice, submitted that even if the prosecution story were held to have been proved, at the highest, the offence of culpable homicide not amounting to murder could have been made out, and the Appellant convicted under Section 304 Part II IPC, because he had no intention of killing the deceased. Furthermore, the elements if held proved could lead the court to reasonably infer that a sudden quarrel had taken place, justifying invocation of Exception 4 to Section 300 IPC, and converting the conviction to one under Section 304.

8. The learned APP submitted that the pushing incident that took place at 12:30 PM on the roof of the first floor rooms was witnessed by a number of people and PW-3, 4, 5, 11 and 16 have supported the prosecution case to that effect; they were all eye-witnesses to the incident and therefore the guilt of Rajesh is established beyond any doubt. It was urged that the Appellant cannot be allowed to take advantage of minor discrepancies in the testimonies of witnesses, which are bound to occur due to passage of time, varying powers of observation and ability to remember and recall events and their proper sequence. It was urged that the Appellant was unable to elicit anything in the cross examination of the material witnesses, to show that they had any ill motive to falsely implicate Rajesh. Further, submitted the APP, Rajesh's presence at the site was not disputed. He had sought to claim being in possession of a stay order; however the evidence led by him, and the material adduced during the trial disclosed that a suit for permanent injunction along with an application for ex-parte stay had been filed after the incident by its owner, his (Rajesh's) uncle.

9. It was emphasized that the essential facts had been deposed to by PW-8 complainant, who supported the prosecution in all material particulars, such as the manner by which the incident unfolded, the steps taken to give relief to the deceased, i.e. taking him to Jyoti hospital, later GTB hospital, and then the LNJP hospital. The witness also deposed having given his statement to the police. These were corroborated by the police. The medical evidence, also supported death as a result of fall from a height. In these circumstances, the variation in the witnesses' testimony, as regards the time, or place, was of secondary importance, and not much weight could be attached. The Trial Court's findings, according to the State, did not call for any interference; the reasoning in the impugned judgment was sound.

10. The prosecution to prove its case examined 16 witnesses and relied upon several exhibits. PW-3 Ravinder Kumar Khari, PW-4 Nasrul Islam, PW-5 Constable Pramod Kumar, PW-8 Rakesh Kumar, PW-11 Constable Mukesh Kumar and PW-16 SI Pratap Singh are all eye-witnesses to the pushing incident; PW-5, 11 and 16 are police witnesses. PW-8, the complainant deposed that on 10.03.1992 at about 10:30 AM he and the deceased, PW-3, PW-4 and PW-16 (along with his staff) reached H. No. 1/5818, East Rohtash Nagar for the purpose of demolition. The demolition work was being carried out by the labour on the roof of the first floor. He further stated that while the demolition work was going on, they (PW-3, 4,8,16 and the deceased) were waiting on the ground floor of the building. The owner of the building went to him (PW-8) and said that he had a stay order and further stated that he (Rajesh) would show the stay order on the roof of the first floor. PW-8 further deposed that on reaching the roof of the first floor, the three J.E's (PW-3, 4 and 8) were waiting on one side while the deceased and Rajesh were talking to each other; there was no wall on the roof of the first floor and Rajesh while talking to the deceased pushed the deceased from the roof. Rajesh was apprehended on the spot and was kept in the custody of the police. He further testified that he along with PW-3 and 4 took the deceased to GTB Hospital from where they were referred to LNJP Hospital. In his cross-examination he admitted that no police officials accompanied them to the hospital and that from the spot they had taken the deceased first to Jyoti Nursing Home and from there took him to GTB Hospital and then finally got him admitted in LNJP Hospital. He further admitted that his statement was recorded at the police station and that he had reached the police station after 01:00 PM; at that time the other MCD officials were already present in the police station. The statements of PW-3 and 4 were not recorded in his presence. He further stated that after his statement was recorded,

he went to his house and did not go back to the spot. He denies that they had demolished the wrong premises i.e. 1/5820. He denies that the deceased had an accidental fall and that they changed their version after the arrival of senior police officials.

11. PW-3 has corroborated PW-8's deposition regarding the deceased being pushed by Rajesh from the roof of the first floor. PW-4 has deposed that he did not see Rajesh push the deceased but heard people saying "*Dhaka de diya Dhaka de diya*". PW-5, 11 and 16 have also corroborated PW-8's deposition regarding the deceased being pushed by Rajesh.

12. As is apparent from the above discussion, the prosecution relies on the eyewitness testimonies of PW-3, PW-4 and PW-8, all MCD officials, as well as police witnesses, PW-5, PW-11 and PW-16. All, except PW-4 supported the prosecution about the Appellant pushing R.K. Garg. Therefore, seemingly, the case against the Appellant is unimpeachable. Yet, a close and detailed scrutiny of the evidence in entirety would reveal that consistently, all the MCD officials deposed having taken the injured R.K. Garg to the hospital. PW-3 stated that he and PW-8 remained in hospital till about 3 PM on the day; PW-8 stated that he went to R.K Garg's house later, and thereafter went to the police station, where he remained for 1-1/2 hours. The testimonies of PW-5 and PW-11 prove that no policeman accompanied the MCD witnesses to the hospital; PW-11 said that PW-5 was with him, and that he did not know who recorded the *rukka* (Ex. PW-8/A, which states that it was recorded at 1:10 PM). Both the MCD officers, PW-3 and PW-8 state that they did not go back to the spot. The latter, PW-8 repeatedly stated that his statement was not recorded either in the hospital or at the spot. On the other hand, PW-16, the IO clearly denied that the MCD officers, PW-3, PW-4 and PW-8, took the injured Garg to the spot, deposing that all of them were at the spot, with him, till 05:00 PM. He also deposed to not having visited the hospital on the day of the incident.

13. From the above analysis, the following inconsistencies emerge, which are not reconcilable with the prosecution version:

(a) PW-4 did not witness the incident;

(b) PW-3, PW-4 and PW-8 took the injured to the hospital immediately after the incident, i.e. after 12:35 PM. This is corroborated by PW-5 and PW-11. However, the man who supposedly

recorded the *rukka* Ex. PW-8/A, i.e. PW-16, positively stated that they *did not* go to the hospital, and that they remained with him at the spot.

(c) PW-8, whose statement (*rukka*) triggered the criminal law into motion, deposed that his statement was not recorded at the spot, or at the hospital, where he remained for over 2 ½ hours. That he remained in the hospital for that length of time, is corroborated by PW-3. He also mentioned that his statement was not recorded at the hospital, but later, in the police station. This is contradicted entirely by PW-16, who insisted that PW-8, the informant remained with him at the spot, till 05:00 PM. This discrepancy casts a doubt about the timing of the *rukka*, and the place it was recorded.

14. The above discrepancies, which though serious, can be explained by the prosecution as attributable to memory lapses, what impels the Court to give them importance is that the inconsistencies have to be seen in the light of yet another discordant note, i.e. Ex. PW-12/DA, the Death Report which mentions the cause of death to be “not known (by falling from IInd floor roof)”. Likewise, PW-12/DB, the Death Summary mentions the cause of death as “history of fall”. As opposed to this, the Brief facts, and the inquest request, allege that the deceased was pushed. All these documents were prepared by the same individual, or at his behest, i.e. PW-12 SI Ranjit Kumar. We notice that the Trial Court took note of some of these, and yet put down the entire blame to faulty investigation, and did not doubt the veracity of the MCD officers. This is evident from the following discussion in the impugned judgment:

*“Thus it is at the police station that SI Pratap Singh recorded statement of PW- 8 Rakesh Kumar JE and SI Pratap Singh had not conducted the investigation in a proper and fair manner and his conduct is evident that he is colluding with the accused and the same as not being done in an objective manner for the reasons best known to him. The court is not to play in the hands of investigating officer in case where investigation is defective. He has recorded the statement of PW-8 Rakesh Kumar JE at the police station along with statement of constable Mukesh Kumar and constable Parmod Kumar and after the case was registered, he left for the hospital and his statement in the Court as PW- 16 that he remained along with the accused at the spot till 5 PM and also that PW-8 JE Rakesh, remained with him is nothing but an attempt to distort the real facts and to help the accused. It is for these reasons that the rukka was written at the police station. There is a discrepancy regarding the name of the person who took the rukka because PW-6 the duty officer says that it was constable Mukesh Kumar who had taken the rukka whereas PW- 5 Constable Parmod Kumar and PW- 16 SI Pratap Singh for the reasons best known to him have stated that rukka was taken by constable Parmod Kumar whereas the evidence and that the position of other witnesses on the record suggests that statement of PW-8 Rakesh*

*Kumar was recorded at the police station after 1 PM and the entire proceedings i.e. writing of rukka and the recording of FIR was done at the police station itself. There is another example of improper investigation by SI Pratap Singh which has been highlighted by Learned Counsel for the accused during the course of arguments. It is the inquest proceedings Ex PW- 12/DA in which SI Pratap Singh in Col No. 20 relating to the apparent cause of death has mentioned "not known(by falling from second-floor roof)". This document is also written at the hospital as it relates to inquest proceedings. Mr. Garg died at 2:20 PM at JPN hospital and as per DD No. 53B then the section of law was changed to Section 302 IPC and he went to the hospital and wrote the death report Ex PW- 12/DA. Thus this document was prepared by him at the hospital. He has also intentionally not given the correct facts in column No 20 to help the accused. Since he was present at the spot, and eye witness to the fact that accused had pushed R.K. Garg from the roof of the rooms of the first floor. Either the knowledge of English was poor or he was not able to describe the apparent cause of death. However his overall conduct shows that he had not conducted the investigation fairly and the investigations are defective. Merely because the investigation officer has committed irregularities and illegalities during the course of investigation is no ground to discredit the testimony of eyewitnesses which is natural, consistent corroborative and trustworthy and connects the accused with the offence of murder."*

15. The Trial Court, in our opinion lost sight of the fact that some of these documents were prepared on the next day, i.e. 11<sup>th</sup> March, 1992, and at least on that day, there ought to have been no confusion in the mind of the police. Furthermore, PW-12, the IO, had clearly stated having signed the Death Report, which mentioned about fall and omitted homicidal death, as the cause for the fatal injury of R.K Garg. PW12 also mentioned, after consulting his case diary, that the statement of PW-4 was recorded more than a month after the incident.

16. While it is axiomatic that mere discrepancies which do not seriously dent the prosecution story cannot be given too much weight, and sometimes the Court gives allowances to witnesses' lapses of memory, and even tardy investigation, in the present case, all these elements are present. The credibility of the eyewitnesses' testimony is severely tested, because of contradictions between PW-4 and PW-8. Moreover, the prosecution story about the *rukka* being recorded at the behest of PW-8, around 01.30 PM itself has not been believed by the Trial Court. If that is correct, the FIR was recorded much later. The matter does not end there; PW-16's evidence about the time and venue of the recording of statements, and even investigation of the incident does not find corroboration in the testimonies of the MCD officers. Once the Court concluded- as it did in this case- that the FIR was recorded much later, and the statement of PW-8 was also noted later, the possibility of manipulating the entire sequence, with a view to implicate someone not involved, or give out a version which had not happened cannot be ruled

out. The importance of recording the first information report, on time, was underlined, in *Mehraj Singh v State of UP* 1994 (5) SCC188, in the following terms:

*“FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an after-thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR, was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr. P.C. is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in embryo and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ate timed to give it the colour of a promptly lodged FIR.”*

We are of the opinion that the prosecution’s inability to show that the Special report, which had to be sent to the area magistrate, was not in fact sent, contrary to Section 157 Cr. PC. The Trial Court’s reasoning justifying the omission, in our view was not tenable. As observed in *Mehraj Singh’s* case (supra), the requirement of complying with Section 157 Cr PC is not a ritualistic formality, but meant as a safeguard to ensure that the accused is not confronted with a set of allegations, cooked up to frame him. The prompt reporting of a serious crime like murder, to the concerned magistrate, ensures transparency, and reduces the scope of manipulation. In a case like the present one, where documentary evidence points at different reasons for death, and prosecution witnesses have contradicted each other, the special report, if available would have allayed apprehensions of false implication, and lent credence to the prosecution story. Its absence heightens doubts and suspicions.

17. In view of the above reasoning, this Court is of the opinion that the conviction and sentence, handed down by the Trial Court, in the impugned judgment, cannot be sustained; the appeal has to succeed. The personal bond and the surety furnished by the Appellant, are hereby discharged. The Appeal is, accordingly allowed.

**S. RAVINDRA BHAT  
(JUDGE)**

**P.K.BHASIN  
(JUDGE)**

**September 28, 2011**