

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

% *Judgment Reserved on: May 27, 2009*
Judgment Delivered on: May 29 , 2009

+ **CRL.A. 594/2001**

SANJAY Appellant

Through: Mr. S. B. Dandpani, Advocate

versus

STATE Respondent

Through: Ms. Richa Kapoor, APP

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. On 16.1.2000 at about 7:25 AM, information was received from PW-17 Sunil Kumar at Police Station Sarojini Nagar that a dead body was lying in the park near Kamal Cinema. The same was recorded in D.D No.15A Ex. PW-2/A.

2. Investigative machinery was set in motion. This D.D. was assigned to PW-16 SI Durga Lal. He was accompanied by PW-10 Ct.Ombir and Ct.Ramesh who reached the spot i.e. B-4, Park Safdarjung Enclave where the dead body was lying in a park.

Trail of blood from the dead body to bus no. DL-IPA-1294 parked near the park was found. Dead body was identified by PW-4 Rohan, PW-5 Mahinder Pal and PW-8 Omkar Singh vide memo Ex. PW-8/A as that of Nirmal Singh who often used to visit that area.

3. Endorsement was made on the D.D. and the rukka Ex. PW-16/A was handed over to Ct. Ombir for registration of the FIR Ex. PW-14/A under Section 302 of the IPC.

4. Offence being grave, investigation was handed over to PW-19 Inspector Surinder Kapoor who reached the spot at 8:00 AM.

5. The case of the prosecution is that bus no. DL-1PA-2602 which used to ply on route no. 353 was on the fateful day being driven by Raju @ Rakesh. Mohd. Niaz was the helper in the bus. Accused Sanjay was working as a helper in another bus. On 15.1.2000 at about 4:30 PM Joginder had boarded bus no. DL1PA-2602 coming from Noida on route no.353. He was known to Mohd. Niaz being his neighbour. Bus developed a snag and instead of going on normal route it went back to Dhaula Kuan and driver of the bus parked it near Kamal Cinema. At about 9:30 PM Mohd. Niaz and Raju @ Rakesh alongwith accused Sanjay and co accused Joginder had dinner in the bus. Thereafter Joginder and Sanjay slept in the same quilt in the

aforesaid bus i.e. DL1PA-2602. The other bus i.e. DL1PA-1294 was parked behind bus no. DL1PA-2602. Sanjay was working as a conductor in that bus. In the morning of 16.1.2000 Joginder and Sanjay made a confession to Mohd. Niaz that they had committed murder of one Nirmal Singh in the bus parked behind their bus i.e. in a bus no. DL1PA-1294. They had further disclosed that they had left the dead body in the park which was later on identified as that of Nirmal Singh.

6. The driver of the bus Raju @ Rakesh , has been examined as PW-11. Mohd. Niaz has been examined as PW-6.

7. Further case of the prosecution is that pursuant to this extra judicial confession made by the accused persons before Mohd. Niaz the accused persons were apprehended and arrested and their disclosure statements were recorded. Disclosure statement of accused Sanjay is Ex.PW-16/L and that of co-accused Joginder is Ex.PW-16/F. Pursuant to the disclosure statement of accused Sanjay, he had got recovered one blood stained wheel pana, the weapon of offence, from the tool box near the driver seat of bus no. DL1PA-1294. He had also got recovered his blood stained pant from Jhuggi of co-accused Joginder. Pursuant to the disclosure statement of co-accused Joginder, he had got recovered a blood stained pana from the tool box near the driver seat of bus no.DL1PA-2602. Both these

blood stained panas and the pant got recovered at the instance of the accused bore human blood. Trail of blood from bus No. DL1PA-1294 to the park from where the dead body had been recovered had also been noted.

8. Accused Joginder was tried before the Juvenile Court being less than 18 years of age as on the date of offence.

9. Trial Court while convicting the accused Sanjay under section 302/34 of the IPC had relied upon the aforesaid two circumstances :-

“i- Extra-judicial confession made by accused Sanjay to Mohd. Niaz inculcating himself and revealing his involvement in the crime of murder of Nirmal Singh.

ii. Recovery of the blood stained wheel pana from bus no. DL1PA-1294 and the blood stained pant of appellant pursuant to his disclosure statement.”

10. Admittedly, case is based on circumstantial evidence. In a case of circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and should be such as to exclude every hypothesis but the one proposed to be proved.

11. In State of U. P. vs. Ashok Kumar Srivastava 1991 2 Crl. L. J. 1104, it was pointed out by the Hon'ble Apex Court that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences the one in favour of the accused must be accepted. It was also pointed out that the circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established consistent only with the hypothesis of guilt.

12. On behalf of the accused, it has been argued that the trial court had committed grave error in recording the finding of guilt against the appellant ; there was no material before the trial court to draw this conclusion ; testimony of Mohd. Niaz to whom the extra judicial confession had been made is unreliable and trial court has recorded a finding contrary to the factual averments; the recovery of the wheel panna and the pant purported to have been recovered at the instance of the appellant is also washed away in the light of the conflicting version of the recovery witnesses.

13. We shall first deal with the first circumstance; i.e. the extra-judicial confession made by accused Sanjay and Joginder to Mohd. Niaz which was a vital piece of evidence before the trial court hinged upon the version of PW-6 Mohd. Niaz.

14. PW-6 had deposed that he was working with Mahinder Pal(PW-5) since the last six years as a helper on his bus no. 2602. On 15.1.2000 at about 4:30 PM when the bus was coming from Noida, Joginder his neighbour boarded the bus; at about 5:30 PM Joginder got down from the bus and told him that he would see him in the night. Bus developed a snag near Ashram and came back to Dhaula Kuan and was parked near Kamal Cinema. Mohd. Niaz (PW-6) returned to his home at about 9:30 PM. He again came to the bus for sleeping and was joined by Raju driver (PW-11) for dinner. Sanjay and Joginder also had dinner with them. Raju driver and he i.e. PW-6 then slept in the bus. Thereafter Joginder and Sanjay also slept in the same bus in one quilt. In the morning when PW-6 woke up, he found that Sanjay and Joginder were still sleeping. He woke them up and asked them to leave the bus. On this Sanjay and Joginder confessed before him that they had killed one person Nirmal Singh in the bus which was parked behind their bus. He i.e PW-6 accompanied them to the park nearby where the dead body of Nirmal was lying but could not be identified because of the presence of blood and injuries on his face. Appellant and co-accused Joginder threatened PW-6 not to disclose this fact to any person. PW-6 returned to the bus. Thereafter police came to the spot and interrogated him and these facts were narrated to

the police. In his cross-examination the witness has stated that it was quarter to six when he had woken up the accused persons and at that time driver Raju was also present. He, however, did not tell Raju about the disclosure made by Sanjay and Joginder to him. He neither informed the owner of the bus. He denied the suggestion that he is deposing falsely.

15. We are constrained to hold that the finding of the trial judge is contrary to this version as set up by the prosecution. Version of the prosecution is that the offence of murder had been committed in the bus parked behind the bus no. DL-1PA-2602 i.e. in bus no. DL-1PA-1294 from where the trail of blood had also been noted to the place where the dead body had been recovered. Trial Court while recording its finding, in para no.21 of the judgment has held that it has been proved on record that accused Sanjay slept in the bus alongwith his co-accused Joginder and in the morning he was found sleeping in the same bus where the incident had taken place, meaning thereby that the offence of murder had taken place in bus no. 2602 itself. It was on the basis of this conclusion which is clearly a wrong recording of fact that the conviction had been sustained. Facts have been given a complete twist and are contrary to the record. Reliance upon wrong factual averments and drawing a conclusion from such an incorrect hypothesis throws out the case of the

prosecution. Nowhere has PW-6 stated that the accused persons had disclosed to him that the incident had taken place in the same bus in which he had found Sanjay and Joginder sleeping; his clear testimony is to the effect that the incident had taken place in the bus parked behind their bus i.e. in bus no. DL1P-1294.

16. Site plan Ex. PW-19/A has also been perused. Point 'L' depicts the place where the bus no. DL1PA-2602 was parked and point 'K' depicts the place where the bus no. DL1PA-1294 was parked i.e. one behind the other. The extra judicial confession made before Mohd. Niaz by the accused persons was in bus no. DL1PA-2602. They had revealed that they had committed the murder of Nirmal Singh in the bus parked behind their bus i.e. in bus no. 1294.

17. Trial judge has mis-appreciated this finding of fact and has drawn an erroneous conclusion holding that the incident had taken place in the same bus where the accused persons have been found sleeping.

18. PW-6, in his cross-examination has admitted that driver Raju was also present at the time when he had woken up the accused persons but he i.e. PW6 had not disclosed to him i.e. to PW Raju about this revelation which had been made to him by the accused persons of their involvement in the crime. PW-11

Raju @ Rakesh has controverted this version. In his cross-examination by Ld. APP, he has stated that Mohd. Niaz had told him that Sanjay and Joginder had disclosed that both of them had murdered one person who was sleeping on the rear seat of bus no. DL1PA-1294 and they had thrown his body in the park.

19. Testimony of PW-6 even otherwise does not inspire confidence. It is difficult to imagine that if murder had been committed by the accused persons in the intervening night they would be found sleeping soundly till the next morning when they were woken up by PW-6 and suddenly without any instigation or any provocation decided to confess to a crime of murder. It is not the case of the prosecution that Mohd. Niaz was a close confidant of the appellant or he shared any special relationship with him which had led the appellant and his co-accused Joginder to decide to unburden themselves to Mohd. Niaz by confessing to this crime disclosing their culpability. It is also improbable that PW-6 did not think it fit to query the appellant as to the reason why he had done such an act; was it because of sudden fight or quarrel; was it because of any previous enmity; all these questions remain unanswered. Version of PW-6 has also been controverted by the version of PW-11 as discussed Supra. In our view the conduct of PW-6 appears to be highly unnatural and

unreliable and no reliance should have been placed upon his version.

20. PW-19 was the investigating officer. He has nowhere in his testimony stated that he had recorded the statement of Mohd. Niaz wherein Niaz had disclosed to him about this extra-judicial confession purported to have been made to him by appellant Sanjay and co-accused Joginder. Investigating officer is silent on this aspect. He has stated that at the pointing out of Mohd. Niaz he had arrested the appellant but does not whisper a word as to whether he had recorded statement of any witness much less the statement of Mohd. Niaz. If Mohd. Niaz had not given his statement to the investigating officer then where from is the prosecution relying upon it ? Question is unanswered.

21. Law is well-settled. An extra-judicial confession is on the face of it a weak piece of evidence and in the absence of corroboration on material particulars rule of caution demands that it should not be relied upon. Courts are reluctant in the absence of chain of cogent circumstances to rely on this piece of evidence for the purpose of recording conviction.

22. In the instant case, we find that the confession made by the appellant and his co-accused to Mohd. Niaz cannot be used against the accused. Apart from the fact that investigating officer is silent as to whether , if at all, he had recorded the

statement of Mohd. Niaz, Mohd. Niaz had also given a version which is contrary and conflicts the version of PW-11; whereas Mohd. Niaz had stated that he had not disclosed about this confession to PW-11, PW-11 on oath speaks otherwise. PW-11 had deposed that Mohd. Niaz had told him about this confession having been made to him by the appellant. Further version of the prosecution as per the statement of PW-6 is that the offence of murder had been committed in the bus parked behind their bus i.e. in bus no. DL1PA-1294 but the trial judge while recording the finding of conviction has drawn an erroneous conclusion on the factual narration and had concluded that the incident of murder has taken place in the same bus where the co-accused were found sleeping i.e. in bus no. 2602. This is also not the conformity with the further line of investigation that a trail of blood had been noted from bus no. DL1P-1294 to the park where the dead body had been found. If murder had taken place in bus no. DL1PA-2602 which is the finding of the trial judge [opposed to the versions set up by the prosecution] how was the trail of blood running from bus no.1294? There appears to be no answer.

23. PW-8 Omkar Singh brother of the deceased Nirmal Singh has also not ascribed any motive to the appellant for this crime. PW-5 Mahender Pal the owner of the two buses i.e. bus No. DL1PA-2602 and DL1PA-1294, being the employer of the

appellant is also silent on this score. They were relevant witnesses who could have shed some light on the possible reason for the murder of Nirmal Singh. Both are quiet on this score.

24. In our opinion trial court in this scenario has gravely erred in relying upon this circumstance i.e. the extra-judicial confession and because of the varying versions put forward this piece of evidence has to be discarded.

25. The second circumstance relied upon by the trial judge to return the finding of conviction against the appellant was the recovery of a blood stained pana and his blood stained pant pursuant to his disclosure statement.

26. Disclosure statement of the appellant is Ex.PW-19/L Recovery memo Ex.PW-6/B is the recovery of the wheel pana which had been got recovered at his instance from bus No. DL1PA-1294. Attesting witnesses to this document are PW-16 SI D.L. Sharma, PW-8 Omkar Singh, Paramjit Singh and PW-6 Mohd. Niaz. Paramjit Singh has not been examined.

27. Ex. PW-6/E is the recovery memo of the blood stained pant of accused Sanjay having been got recovered at his instance from the jhuggi of Joginder. Attesting witnesses to this document are also the same witnesses namely PW-16 SI D.L.

Sharma, PW-8 Omkar Singh, Paramjit Singh and PW-6 Mohd. Niaz.

28. PW-6 Mohd. Niaz had not supported the recovery purported to have been effected by accused Sanjay in his presence. He had denied that he had accompanied the police to any place from where either the weapon of offence i.e. the wheel pana or the blood stained pant of appellant Sanjay had been got recovered. He was permitted to be cross-examined by Ld. APP but he stuck to his stand.

29. PW-8 Omkar Singh has on oath deposed that on 15.1.2000 accused persons i.e. the appellant and his co-accused Joginder had led the police party and from the tool box near the driver seat of two different buses had got recovered, two blood stained panas which were taken into possession vide memos Ex. PW-6/B and Ex. PW-6/C . He has further deposed that the police had also recovered blood stained pant of Sanjay which was taken into possession vide memo Ex. PW-6/E. As per his version this pant of accused Sanjay had been got recovered from his own house which is not the case of the prosecution; version of the prosecution is that the appellant had got this pant recovered from the house of co-accused Joginder. PW-8 has reiterated this

stand in his cross-examination and stated that Sanjay had taken the police party inside his house for effecting this recovery.

30. PW-16, SI D.L. Sharma also a witness to the recovery has controverted this stand and as per his version Sanjay had led the police party with Joginder to the bus and pointed out towards the tool box inside the bus near the driver seat and two wheel panas were recovered from this tool box at the instance of Sanjay and Joginder which had been taken into possession vide memos Ex. PW-6/B and Ex. PW-6/C. As per the version of this witness both the wheel panas had been got recovered from the same bus. This is not the stand of the prosecution. Recovery memos Ex. PW-6/B and Ex. PW-6/C of the wheel panas show that they were recovered from two different buses i.e. bus no. DL1PA-1294 and bus no. DL1PA-2602 respectively. Further version of this witness is that Sanjay had led the Police Party to the jhuggi of Joginder and had got recovered pant from there, which was seized vide memo Ex.PW-6/E.

31. Investigating Officer PW-19 has also on oath stated that Sanjay had led the police party with the co-accused Joginder to bus no. DL1PA-1294 and pointed out the tool box inside the bus from where two wheel panas had been recovered. As per his version Sanjay had got recovered his blood stained pant from the

house of Joginder which was taken into possession vide memo Ex.PW-6/E.

32. From this evidence which has been brought on record, it is clear that recovery of both the articles i.e. wheel pana Ex.P-9 and the blood stained pant Ex.P-8 stand demolished. Whereas PW-6 is hostile on the recovery and Prosecution cannot draw any support from his version; PW-8, PW-16, and PW-19, have all given contrary versions. Stand of the prosecution is that two wheel panas were recovered from two different buses which is evident from the Ex.PW-6/B and Ex.PW-6/C. PW-16 SI Durga Lal and PW-19 Investigating Officer Inspector S.K. Kapoor have themselves controverted this version and deposed that both the wheel panas were recovered from the tool box of one bus only. Qua the pant, PW-8 has deposed that appellant had got this pant recovered from his own house which is again not the case of the prosecution as Ex.PW-6/E i.e. the recovery memo of the pant shows that it was recovered from the house of co-accused Joginder. PW-6 is hostile on this recovery as well.

33. Having discarded the first circumstance that is the extra-judicial confession, the recovery of the wheel pana, the alleged weapon of offence and the blood stained pant of the accused also have to be disbelieved as contrary and conflicting versions have

been given by the witnesses in this regard which tarnish their credibility; in the absence of any cogent and convincing evidence on this score it is clear that the appellant has been able to demolish this recovery. No reliance can be placed on the second circumstance either; testimony of the witnesses has become suspect.

34. In this situation the recovered wheel pana and blood stained pant having human blood upon them is of no relevance. The trail of blood from the bus no. DL1PA-1294 to the place where the dead body was recovered is also of no value. None of these circumstances lend any assurance to the case of the prosecution.

35. It is a cardinal rule of criminal jurisprudence that the prosecution has to stand on its own legs and must prove the circumstances upon which it is relying to sustain a finding of conviction. This is clearly not so in the instant case. What had compelled the trial judge to convict the accused becomes a question mark. Circumstances have not been appreciated in the correct perspective and unmindful reliance has been placed upon them.

36. End result is that the conviction cannot be sustained. Appellant is entitled to an acquittal. He is acquitted. Bail bond

cancelled ; surety is discharged. Appellant be released, if he is in custody.

37. A copy of this order be sent to the Superintendent of jail.

**(INDERMEET KAUR)
JUDGE**

**(PRADEEP NANDRAJOG)
JUDGE**

May 29, 2009
Nandan