

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

+ CRL.A. 76/2005

% Date of Order : February 03, 2009

SUBHASH Appellant
Through: Mr.V.K.Raina, Advocate.

versus

STATE OF NCT OF DELHI Respondent
Through: Ms.Richa Kapoor, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE ARUNA SURESH

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

PRADEEP NANDRAJOG, J. (Oral)

1. Since limited submissions have been urged at the hearing of the appeal today, we propose to note the charge laid against the appellant and co-accused Manoj and the evidence marshalled against the appellant. We note that the co-accused Manoj has been acquitted. The State has not filed any appeal challenging the impugned order in so far Manoj has been acquitted.

2. Deepak son of Subhash aged 3 years was murdered in the early hours on 3rd July 2002 at the terrace of the house of his grandmother Maya Devi PW-7.

3. Maya Devi was blessed with two sons named Subhash and Manoj. She was blessed with a daughter, Babli. Babli was married to the appellant Subhash. (The reader of the present decision may be cautioned that there would be a reference to two persons named Subhash. One Subhash is the son of Maya Devi and is the father of the deceased and the other Subhash is her son-in-law i.e. the appellant).

4. Subhash son of Maya Devi was blessed with a son Deepak and three daughters. The second son of Maya Devi namely Manoj, the co-accused, was issue-less.

5. As per the prosecution, Manoj son of Maya Devi, and Subhash the son-in-law of Maya Devi, thought that by removing Deepak they could reach out to the property of Maya Devi and for said reason entered into a conspiracy to murder Deepak. In furtherance of the conspiracy both committed the offence when Deepak was sleeping at the terrace of the house of his grandmother Maya Devi. Unfortunately for the two, Baby Kiran and Baby Savita, the two minor sisters of deceased Deepak happened to be also sleeping on the terrace; they arose from

their slumber and raised a hue and cry. According to the charge-sheet, Manoj and the appellant had stuffed the body of Deepak in a gunny bag and were in the process of removing the same to some other place, when, as a result of Kiran and Savita raisin a hue and cry, other family members as also neighbours reached the spot.

6. The appellant and co-accused Manoj were charged for having entered into a conspiracy to murder Deepak i.e. for the offence punishable under Section 120-B IPC. They were also charged with the offence of having murdered Deepak i.e. the offence punishable under Section 302 IPC.

7. During trial Kiran, the sister of the deceased aged 6 years when she deposed (being 5 years old when the incident took place), supported the case of the prosecution but limited to the role of the appellant. She deposed that on the day of the incident she, her sister Savita, her brother Deepak and the appellant were sleeping on the roof of the house. The appellant picked up a brick and started pounding her brother on the chest as a result whereof he died.

8. Savita the other sister of the deceased, also aged 6 years when she deposed, was examined as PW-3. She corroborated PW-1 with respect to the two sisters, their brother

and the appellant sleeping on the terrace of the house of her grandmother and the appellant inflicting injuries on her brother.

9. Since a submission has been made, we note that Savita has stated that the appellant had picked up a stone to pound her brother on the chest but PW-1 has deposed to a brick being used as the weapon of offence.

10. The grandmother of the deceased, namely Maya Devi PW-7, corroborated the testimony of PW-1 and PW-3 on the fact that the two sisters, along with their brother and the appellant were sleeping on the terrace of the house. She further deposed of having heard the two young girls shrieking '*Mummy mar dia – Mummy mar dia*', at which she along with Manoj, who were sleeping on the ground floor, ran up-stairs and on reaching the terrace saw that appellant Subhash was hitting Deepak and attempted to run away when she saw him, but was apprehended by the public who had gathered on hearing their cries.

11. Witnesses of the prosecution who were to depose in support of having heard co-accused Manoj speak with the appellant to liquidate Deepak turned hostile. The result was that the prosecution had no material to prove the charge of conspiracy or involvement of Manoj; resulting in Manoj being acquitted.

12. The learned Trial Judge has held that the child witnesses were cross-examined and withstood the test of cross-examination. Their grandmother Maya Devi was also cross-examined and even she has withstood the test of cross-examination. The result is, the learned Trial Judge holding that PW-1, PW-3 and PW-7 are the eye-witnesses to the incident and that there is no reason they should not be believed.

13. Pertaining to how Deepak died we may record that the body of the young infant child was sent to Sanjay Gandhi Memorial Hospital, Mangolpuri, Delhi where post-mortem was conducted by Dr.Komal Singh PW-13. The post-mortem report Ex.PW-13/A records multiple pressure linear abrasions spreading over the chest on the back over the right lung and the forearms. The laceration on the frontal area of the skull was noted. Internal examination revealed that the eight to the tenth ribs of the left side were fractured. Third to the sixth ribs on the right side were fractured. The left lung was lacerated. The thoracic cavity contained 300 ml of clotted blood.

14. It is apparent that the young child was brutally clubbed to death.

15. Learned counsel for the appellant has urged that there are material contradictions and variations in the testimony

of PW-1 and PW-3. Counsel urges that PW-1 has deposed that the accused hit her brother with bricks whereas PW-3 has deposed of her brother being hit with a stone.

16. The submission merits no further consideration; save and except to note that PW-1 and PW-3 were 5 years of age when they saw the incident. The young child would not know the generic difference between a brick and a stone. A young child would possibly use the two words interchangeably.

17. The second submission made by learned counsel for the appellant is that it is unnatural for the deceased and his two sisters to be sleeping on the roof with a stranger. Counsel urges that the natural conduct of the grandchildren would be to sleep with their mother.

18. The argument misses the point that the appellant was not a stranger in the family. He was the husband of the maternal aunt of the children. How on earth would Maya Devi and the parents of the deceased ever conceive that the son-in-law of the family would do such a heinous act.

19. Besides, children do enjoy the company of relatives and it is not unheard of children insisting to sleep in the room with their uncles and aunts.

20. The argument has hardly impressed us.

21. Clutching on to straws, learned counsel for the appellant urges that PW-1 has stated that the family members reached when the appellant had put her brother in a gunny bag and was in the process of removing him with Manoj. Counsel urges that the other witnesses have not so deposed.

22. As noted above, Kiran PW-1, was 5 years when she saw the incident.

23. We note that photographs of the deceased child were taken at the spot by HC Subhash Chander, a photographer PW-11, which have been proved as Ex.PW-11/A-10 to A-18, negatives whereof are Ex.PW-11/A-1 to A-9. The same do not show the presence of any gunny bag much less the child being put in a gunny bag.

24. It appears that the young girl had blogged the subsequent events where she must have seen the dead body of her brother being wrapped in a sheet and removed.

25. The said variation in the testimony of PW-1 is an explainable variation keeping in view her tender age when she witnessed the crime i.e. being 5 years of age.

26. Unfortunately for the appellant the tell-tale evidence which has come on record coupled with the evidence that he was apprehended at the spot is of such a high quality that even

his counsel has hardly any worthwhile submissions to make.

27. We note that the charge of conspiracy has failed. The appellant has been convicted for the offence punishable under Section 302 IPC.

28. Noting that the extreme penalty of death has not been inflicted upon the appellant, we dismiss the appeal.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

FEBRUARY 03, 2009
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