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IN THE HIGH COURT OF DELHI

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Judgment reserved on : 23.03.2009

Judgment delivered on: 30.03.2009

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CRL.A. No.730/2008

VINOD KUMAR

...Appellant

Through : Mr.Manish Kumar, Advocate.

versus

STATE

...Respondent

Through : Mr.Pawan Sharma, Advocate.

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CRL.A. No.945/2008

SUNITA DEVI

...Appellant

Through : Ms.Anu Narula, Advocate.

versus

STATE

...Respondent

Through : Mr.Pawan Sharma, 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? Yes
3. Whether judgment should be reported in Digest? Yes

: PRADEEP NANDRAJOG, J.

1. Since co-accused Om Prakash absconded when he was granted interim bail and declaring him to be a proclaimed offender, vide impugned decision dated 26.7.2008, the learned Trial Judge has convicted the appellants for the offence of having entered into a conspiracy to murder Budh Narain.

Appellant Vinod Kumar has additionally been convicted for the offence of having murdered Budh Narain.

2. We may note that Budh Narain is the husband of appellant Sunita.

3. In a nut shell, the case of the prosecution is that Sunita developed illicit relations with Vinod and her husband Budh Narain, got knowledge of the same, which fact they learnt, to carry on their amorous relationship, Sunita and Vinod, decided to do away with Budh Narain. Vinod knew Om Prakash who agreed to help them to liquidate Budh Narain. The three hatched a conspiracy to murder Budh Narain. Sunita gave logistic support i.e. made available the movements of her husband to Vinod and Om Prakash on the day when Budh Narain was murdered i.e. 1.11.2001. Vinod drove the scooter, on the pillion seat of which, Om Prakash was sitting with a country made pistol in hand. Om Prakash shot Budh Narain when he was riding on his scooter at around 8.30 PM. Rajesh Kumar PW-14, a nephew of the deceased and Ishwar Chand PW-23, employed in the factory of Budh Narain, happened to be nearby. The gun shot attracted them. They chased Vinod and Om Prakash. The wheel of the scooter on which they i.e. Vinod and Om Prakash were riding got stuck in

a drain and the two abandoned the same and ran away, taking along the country made pistol.

4. Involvement of the police commenced when DD No.27, Ex.PW-17/A, was recorded at the police station at 8.45 PM pursuant to a telephonic call made by Harish PW-7 who resides near the place of occurrence. SI Rajbir Singh PW-24, accompanied by HC Kishan Lal PW-9 and Const.Ram Pratap PW-22, left for the place of occurrence and were informed that the injured had been removed to Maharaja Agrasen Hospital. They went to the hospital and learnt that the patient had been brought dead, as recorded in the MLC Ex.PW-1/A. They collected a copy of the MLC and the clothes of the deceased which were removed by the doctor on duty and recorded the seizure of the clothes as per seizure memo Ex.PW-9/A. They met Ishwar Chand PW-23 in the hospital who claimed to be an eye-witness. SI Rajbir Singh recorded the statement Ex.PW-13/A made by Ishwar Chand and after making an endorsement thereon, sent the same, at around 11.00 PM for an FIR to be registered. The dead body was seized and was sent for post-mortem.

5. Insp. Inder Singh PW-33, was entrusted with further investigation on the same day after the FIR was registered. He went to the place of occurrence and with the help of Ishwar

Chand prepared a rough site plan Ex.PW-33/A and from the spot where the deceased was shot, as recorded in the seizure memo Ex.PW-23/A, seized a scooter bearing registration No.DL 4SW-9035 which was being driven by the deceased and from a distance of about 100 meters therefrom, a scooter bearing registration No.DL 4SAB-1433 which was seized vide seizure memo Ex.PW-23/B. The dickey of the scooter bearing registration No. DL 4SAB-1433 was opened and from within, an application Mark 'A' for issue of a learner's license and a registration certificate Mark 'B' of the scooter were recovered which were seized vide seizure memo Ex.PW-23/D. The application for issue of a learner's license had a photograph of Vinod Kumar. The application was in the name of Vinod Kumar son of Parmanand R/O L-542, Mangolpuri, New Delhi-110 083.

6. In his statement Ex.PW-13/A Ishwar Chand stated that today i.e. 1.11.2001, Budh Narain had left his house for some personal work. At about 8:30 PM, he i.e. Ishwar Chand and Rajesh Kumar who is the nephew of the deceased, were going to meet a friend who works in the factory of the deceased. That when they were about to reach the main road of Adhyapak Nagar, they heard gun shots and on reaching the main road they saw appellant Vinod Kumar driving past in a scooter with a pillion rider holding a revolver in his hand,

whom he could identify if brought before him. Thereafter, he i.e. Ishwar Chand and Rajesh went near C-30 Adhayapak Nagar and saw Budh Narain lying in a pool of blood alongside his scooter. That raising an alarm, he and Rajesh, chased the scooter of the accused. That Vinod drove his scooter towards Najafgarh road and at some distance from the road his scooter got stuck in a drain. That Vinod and his co-rider abandoned the scooter near the drain and ran away. Thereafter Rajesh and he went back to the place where Budh Narain was lying unconscious. Many people had gathered around the injured. That, in a Tata Sumo, belonging to Ramesh, they removed the injured to Maharaja Agrasen Hospital, where the doctor declared him dead.

7. Since name of appellant Vinod was given to the police by Ishwar Chand, and from the dicky of the scooter bearing registration No.DL 4SAB-1433 the application for grant of a learner's license in the name of Vinod was recovered, and identity of the pillion rider was not known, obviously the police had to get hold of Vinod for further investigation.

8. The dead body of Budh Narain was sent to the mortuary, where Dr. Komal Singh PW-6, conducted the post-mortem on 2.11.2001 and on the post-mortem report Ex.PW-

6/A noted the following external injuries on the person of the deceased:-

- a. Gunshot entry wound at the left on the 8th inter coastal space in posterior auxiliary line plane, oval shape, 6X3mm in size, blackening of 2mm thickness present around the wound. Tatting spreading over 3cm area, margin inverted.
- b. Exit, oval wound at right 5th inter-coastal space 1X0.6cmX 8cm lateral to the right nipple, clotted blood present.

9. The cause of death was noted as haemorrhagic shock and injury to the vital organs of the body resulting from the gun shot injuries.

10. On 5.11.2001 at about 9:00 PM, appellant Vinod Kumar was arrested from his factory. He was having a mobile phone with a SIM card inside which were seized vide seizure memo Ex.PW-23/G. Appellant Vinod Kumar was interrogated by Insp. Inder Singh PW-33 who recorded his disclosure statement, Ex.PW-23/H, in which, he named accused Sunita and Om Prakash as his co-conspirators. He revealed that on the day of the incident when Budh Narain left his house for some work, Sunita contacted him on his mobile and kept him informed about the movements of Budh Narain. He further revealed that accused Om Prakash accompanied him on the scooter while he drove the scooter around Adhyapak Nagar,

waiting for the deceased and when they saw Budh Narain in Adhyapak Nagar, accused Om Prakash shot him with a katta (country made pistol).

11. Appellant Sunita was arrested from her house on 5.11.2001 and she made a disclosure statement Ex.PW-23/K admitting her role in the conspiracy; role being of keeping appellant Vinod Kumar informed of the whereabouts of the deceased. Subsequent to the disclosure statements, the call records of mobile number 9811267016 which was in the name of the appellant and related to the SIM card seized along with the mobile phone vide seizure memo Ex.PW-23/G were procured by Const. Rajbir Singh PW-20 from the Okhla office of the Hutchison Essar Company. The call records revealed that ten calls were exchanged between the mobile phone of appellant Vinod Kumar and landline number 5478903 of which three calls, were made within an hour of the incident; i.e at 7:42 PM, 8:02 PM and 8:28 PM respectively.

12. Accused Om Prakash could not be traced at his address in Delhi. Information was received by the police at Delhi that Om Prakash had been arrested by the local police of his native village with an unlicensed firearm and a case was registered against him under the Arms Act. SI Babu Ram PW-31 and HC Rohtas PW-25 went to District Siwan Bihar and after completing the legal formalities took custody of Om Prakash

and brought him to Delhi. A country made pistol with one live cartridge which were recovered from accused Om Prakash by the local police were handed over to SI Babu Ram PW-31, pursuant to court orders on 19.6.2002; the same was seized vide seizure memo, Ex.PW-26/A.

13. Armed with the recovery of a scooter stated to be belonging to appellant Vinod Kumar, in the dickey of which an application for grant of a learner's license in the name of appellant Vinod Kumar was found; the call record of the mobile of appellant Vinod Kumar and the statements made to the police by Rajesh Kumar and Ishwar Chand; citing other witnesses to prove an amorous relationship between appellant Vinod Kumar and appellant Sunita and alleging the role of shooting with a country made pistol to Om Prakash, a charge sheet was filed indicting the three accused of entering into a conspiracy to murder the deceased and in pursuance thereof having murdered the deceased.

14. Ishwar Chand PW-23, an employee at the factory of the deceased deposed that on 1.11.2001 at about 8:30 PM while he and Rajesh PW-14 were on their way to a friend's house as soon as they reached the main street he heard 2-3 gun shots. Thereafter, he saw appellant Vinod drive past in a scooter and accused Om Prakash was sitting on the pillion seat with a country made pistol in his hand. He and Rajesh started

chasing the scooter and raised an alarm. The scooter of the accused collided with a cycle and got stuck in a drain upon which both the accused abandoned the scooter and ran away. Thereafter, he and Rajesh went to the place of occurrence where they saw Buddh Narain lying in a pool of blood. With the help of Ramesh PW-8, the nephew of the deceased, who had reached the spot, he and Rajesh removed the deceased in a TATA Sumo Car to the hospital. He further stated that one year prior to the incident, the deceased had learnt about the illicit relationship between his wife Sunita and appellant Vinod Kumar and had asked appellant Vinod Kumar to stop visiting his house. He further deposed that Budh Narain had asked him not to allow Vinod Kumar to enter his house or factory and to inform him in case Vinod Kumar comes.

15. Rajesh Kumar PW-14, the nephew of the deceased deposed that he was working in the factory of the deceased and resided at the first floor of E-6 Adhyapak Park and his uncle lived in the same building on the ground floor. He deposed that the relations between appellant Vinod and the deceased Budh Narain had turned sour about a year prior to the date of incident and about a month or two before the incident, Budh Narain had asked him not to allow Vinod Kumar to visit his house. On the date of the incident at about 8:30 PM or 9:00 PM he was going with Ishwar Chand to visit a

friend and while on their way, he saw appellant Vinod ride past on a scooter with a pillion rider holding a revolver like weapon in his hand. He heard a gun shot fire. He and Ishwar Chand raised an alarm and ran after the scooter towards Najafgarh road and the scooter struck against a cycle and fell into a nali. Vinod Kumar and Om Prakash abandoned the scooter and ran away.

16. Ramesh Kumar PW-8, deposed that he saw the deceased lying in a pool of blood near house No. C-30, Adhyapak Nagar while on his way back from his office in the evening of 1.11.2001. He removed him to Maharaja Agrasen Hospital with the help of Rajesh Kumar and Ishwar Chand. On being cross examined he deposed that he resided on the first floor of House No. E-6 Adhyapak Park. He stated that a week before the incident, he and his wife Rekha Devi had seen accused Vinod with accused Sunita at the ground floor and that he had informed the deceased of the same. He also stated that he was having an extension of the telephone installed on the ground floor in the house of Budh Narain.

17. After recording a satisfaction that Ashish Kumar PW-2, aged 10 years was able to understand the questions, Ashish, son of the deceased and Sunita, was examined as a witness, who deposed that once, on returning from school, he

had seen accused Vinod and his mother Sunita lying on a cot talking to each other. He deposed that a few days before the incident, he had once again seen his mother and accused Vinod lying down and talking to each other. He deposed that on seeing him, accused Vinod scolded him and threatened that he would kill his father if he told him anything about what he had seen. He deposed that he told his father about the incident in the evening, upon which his father had beaten his mother Sunita.

18. Shri Bajrangi Lal PW-3, the brother of the deceased, deposed that he had identified the dead body of the deceased in the hospital. He was cross-examined not with reference to his examination-in-chief but on the issue, whether he knew anything about the amorous relationship of Vinod with Sunita. He replied that his son had once heard Sunita talk to Vinod on the parallel line installed on the first floor of the house and he had informed the deceased about the same and advised him to call the father of Sunita to intervene in the matter. That father of Sunita had visited the house the next day but he did not know as to what transpired.

19. Ashok Kumar PW-10, deposed that he got acquainted with accused Vinod at the committee meetings

as they belonged to the same community and met each other in the community meetings. He stated that accused Vinod did not have a ration card and hence requested him to get financed a scooter in his own name and the accused would pay the installments for the scooter. He stated that though, Ex.PW-10/A, the RC of scooter no. DL-4S AB 1433, was in his name, accused Vinod was the real owner of the scooter and was in possession of the same.

20. Deepak Gupta PW-27, an employee of Hutchison Essar Company proved Ex.PW-27/B, a computer generated record pertaining to phone movement of the mobile No.9811267016.

21. PW-32, Sh.Gulshan Arora, another employee of Hutchison Essar Company proved Ex.PW-32/B being the computer generated record of call details pertaining to mobile No.9811267016 for the period 15.10.2001 to 1.11.2001. He proved Ex.PW-32/C being the form submitted while applying for the telephone connection for the mobile phone in the name of Vinod Kumar S/o Shri Prabha Bhagat Singh R/o H. No. 542, L-Block, Mongol Puri, New Delhi. He also proved Ex.PW-32/C1 being photocopy of the voter's identity card issued by the Election Commission of India submitted by appellant Vinod while applying for the mobile

connection. He also proved a bill-cum-invoice Ex.PW-32/C2 for charges when the mobile connection was provided.

22. Relying on the testimony of eye witnesses Rajesh Kumar and Ishwar Chand; the recovery of the application for learner's license in the name of accused Vinod Kumar from the dickey of the scooter No.DL-4SAB-1433 recovered near the place of occurrence; the testimony of Ashok Kumar PW-10 to the effect that the scooter was in the use and possession of Vinod Kumar; the call record pertaining to mobile No.9811267016 which showed that the said number was in contact with the landline No.5478903 on the date of the incident; and the evidence of motive to eliminate the deceased in view of the testimony of PW-2, PW-3, PW-8, PW-14 and PW-23, the learned Trial Judge has held that there was sufficient evidence brought on record against appellant Vinod Kumar wherefrom his involvement in the crime stood established. As against appellant Sunita, the learned trial judge held that it was pursuant to her statement made to the police that the police got knowledge that mobile No.9811267016 belonged to the co-accused Vinod Kumar and the call records of said number showed it being in touch with the landline No.5478903; said evidence coupled with the

evidence of motive established the involvement of Sunita in the crime.

23. Pertaining to Sunita, learned counsel for Sunita submitted that there was no evidence on record that the landline No.5478903 was installed in the house of the deceased and therefore, there was no incriminating evidence against Sunita of being in contact with accused Vinod Kumar on his mobile No.9811267016. Counsel urged that hence it does not stand established that on the day when Budh Narain was murdered, Sunita gave whereabouts of his movements to Vinod by means of a telephonic communication. Counsel urged that the only evidence of motive was insufficient to connect Sunita with the crime.

24. Learned counsel for appellant Vinod, firstly urged that the testimony of PW-2, a child witness was not sufficient to establish any illicit relations between Vinod and Sunita. Thus, counsel urged that motive was not proved. Secondly, counsel urged that the scooter bearing registration No.DL-4SAB-1433 was admittedly registered in the name of Ashok Kumar PW-10 and thus it was for Ashok Kumar to explain how the scooter was lying abandoned near the place of occurrence. Pertaining to the mobile phone No.9811267016, learned counsel urged that the same was in the name of one

Vinod Kumar, son of Prabha Bhagat Singh, but the name of the father of appellant Vinod Kumar was Parmanand Kushwaha. It was urged that there was no evidence to establish any conspiracy. Counsel urged that DW-1, the brother of Vinod Kumar deposed that he i.e. Vinod Kumar was present in the house on 1.11.2001 at the time when the incident occurred and there was no reason to disbelieve DW-1.

25. In view of the fact that the prosecution has not proved that the landline No.5478903 was installed in the house of the deceased, the relevance of the call details of mobile No.9811267016 become irrelevant and the said evidence used as incriminating evidence by the learned Trial Judge, loses all significance and hence we need not discuss the effect of the record of the service provider showing that said number was in the name of Vinod Kumar, son of Sh.Prabha Bhagat Singh. But we must note that the address given to the service provider is admittedly the residential address of appellant Vinod Kumar and the photocopy of the voter's identity card i.e. Ex.PW-32/C1 given to the service provider as identity proof shows that it pertains to appellant Vinod Kumar and incidentally shows the father's name of appellant Vinod Kumar to be Prabha Bhagat. It is apparent

that appellant Vinod is a crook and creates documents to hide his identity. The learned Trial Judge discussed the worth of said evidence on the belief that landline No.5478903 was installed in the house of the deceased at E-6, Adhyapak Park, ignoring that there was no evidence to establish the said fact. Thus, the solitary evidence of motive against Sunita is insufficient to sustain her conviction.

26. That scooter bearing registration No.DL-4SAB-1433 is no doubt registered in the name of Ashok Kumar PW-10 as per the RC Mark 'B' but undisputably the application for grant of a learner's license Mark 'A', on which the photograph of appellant Vinod Kumar is affixed, was recovered from the dickey of the said scooter which was lying abandoned about 100 meters away from the place of occurrence. We have no reason to disbelieve the testimony of Ashok Kumar PW-10 that he had purchased the scooter in his name as a benamidar but the real owner thereof was appellant Vinod Kumar and that the scooter was always in his possession. We have no reason to disbelieve the testimony of Rajesh Kumar PW-14 and Ishwar Chand PW-23 who have deposed of having seen appellant Vinod Kumar on the scooter with another person on the pillion seat with a revolver in hand who shot the deceased and thereafter both Vinod Kumar and

said person ran away. The said person was identified by them as the co-accused Om Prakash during trial. We note that Om Prakash absconded mid-trial when he was granted interim bail.

27. In view of said clinching and clear evidence on record which proves the fact that Vinod Kumar was present at the spot where the crime was committed, the deposition of Manoj Kumar DW-1, the brother of Vinod Kumar is worthy of no credence. He has spoken a lie to save his brother. The fact that the scooter of Vinod Kumar was abandoned on the street is incriminating evidence virtually conclusively establishing his presence near the scene of the crime for the reason Vinod Kumar has rendered no explanation as to how his scooter reached there. Besides, we have eye witness account to prove his presence at the spot.

28. With the acquittal of Sunita by us and there being no evidence to show that Sunita participated with appellant Vinod Kumar in the commission of the crime, either by providing logistics or otherwise, the necessary conclusion has to be, that the charge of conspiracy must fail. But, for his participative act with the co-accused who was the pillion rider who shot the deceased, the pillion rider being none else other than Om Prakash who has been declared a proclaimed

offender, appellant Vinod Kumar is liable to be convicted for the offence of murdering Budh Narain i.e. for the offence punishable under Section 302/34 IPC.

29. Crl.A.No.945/2008 filed by Sunita is allowed. Impugned judgment and order dated 26.7.2008 convicting Sunita of the charges framed against her is set aside. She is acquitted of the charges framed against her. She is directed to be released from custody, if not required in any other case.

30. Crl.A.No.730/2008 is partially allowed, in that, the conviction of appellant Vinod Kumar for the offence punishable under Section 120-B IPC is set aside. His conviction for the offence punishable for the offence of murdering Budh Narain is sustained. Needless to state, the punishment for the offence under Section 120-B IPC is set aside. But the punishment for the offence of murder is sustained.

31. Copy of the order be sent to Superintendent Central jail Tihar for compliance.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

March 30, 2009
dk/rk