

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

% Judgment Reserved on : 12th April, 2010
Judgment Pronounced on : 21st April, 2010

+ **Crl. A. No. 562/2008**

AJAY KUMAR @ AJJU SON OF
RAM KISHAN Appellant
Through: Mr.S.M.Chopra, Advocate
versus
STATE Respondent
Through: Ms.Richa Kapoor, APP

Crl. A. No. 563/2008

VIJENDER @ BIDDI SON OF
PHOOL SINGH Appellant
Through: Mr.S.M.Chopra, Advocate
versus
STATE Respondent
Through: Ms.Richa Kapoor, APP

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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

SURESH KAIT, J.

1. Instant appeals have been preferred against the judgment and order dated 03.04.2008 convicting the appellants for the offence punishable under Section 302/34 IPC and for the offence punishable under Section 201 IPC. For the former offence, the appellants have been sentenced to

undergo imprisonment for life and for the latter to undergo RI for a period of 7 years. The third accused namely Manoj was not committed to trial since he was declared a Proclaimed Offender.

2. On 15.10.2000 Omwati PW-10 went to the police station where HC Bhim Singh recorded her statement Ex.PW-6/A vide DD No.27 wherein it was recorded that her son Rajender @Marshall aged 24 years wearing black coloured pant and grey coloured check shirt had not returned since he left his house at 7:00 PM on 13.10.2000. No suspicion was cast on anybody. On 17.10.2000 Omwati went to the police station where her statement Ex.PW-2/A was recorded in which she informed that on 13.10.2000 her son Rajender @ Marshall had left the house at 7:00 PM on 13.10.2000 with Ajay in respect whereof she had already lodged a complaint and since her son had not returned she suspected Ajay. HC Baljeet Singh who recorded the statement Ex.PW-2/A made an endorsement Ex.PW-2/B beneath the statement and handed over the same to HC Rajesh Kumar PW-3 who registered the FIR Ex.PW-3/A.

3. The investigation was entrusted to SI Rajbir Singh PW-14 who recorded the statement of Deepak Sharma PW-11, the brother-in-law of Rajender who claimed that on 13.10.2000

he went to the house of his sister Omwati and in his presence Ajay came to the house of his sister and took Rajender. When Rajender did not return till around 9/9:30 PM his sister told him to look for Rajender. He searched for Rajender and when he was on Nazafgarh Road, near Mohan Garden he saw a DCM Toyota belonging to Ajay. He saw Vijender and Manoj as also Rajender and Ajay in the said DCM Toyota. All were drinking. Ajay told him that he would leave Rajender at his house.

4. It is apparent that the further break through could be found only after Ajay, Vijender or Manoj could be contacted.

5. All three eluded the police till 31.10.2000 when Omwati and her son Surender PW-8 came to the police station and informed that they had seen the appellants. They led the police to Uttam Nagar Bus Terminal where appellants were apprehended and on interrogation made disclosure statements Ex.PW-8/A and Ex.PW-8/B respectively confessing to having killed Rajender after intoxicating with liquor. Both disclosed that after Rajender was strangulated his body was removed to a jungle where they hit the dead body with a spade and after collecting dry grass and twigs and pouring petrol over the body it was set on fire. Both appellants disclosed that they could lead the police to the place where the body of the deceased was burnt. Thereafter, as recorded in the memo

Ex.PW-8/A both appellants led the investigating officer to a jungle near B-Block, Sainik Nagar and pointed out the spot where they had brought the body of Rajender and inflicted blows on the dead body with a phawda. From the said spot blood stained earth as also a locket Ex.P-1 having the emblem 'Om' and picture of Lord Hanuman, a packet of gutka Ex.P-2 of Raj Darbar make, jaw bone Ex.P-12 with two teeth intact, three teeth Ex.P-13 were lifted. Burnt ash as also burnt twigs Ex.P-4 and Ex.P-5 having remnants of blood thereon were lifted. All of which were sealed. At a little distance from the said spot burnt pieces of cloth being Ex.P-7, half-burnt belt Ex.P-8 were lifted. At a little distance a semi burnt skull was got recovered by the appellants. As recorded in the memo Ex.PW-8/C, the appellant stated that since the skull did not get fully burnt, they threw the same at the spot wherefrom it was recovered.

6. Further investigation was entrusted to Insp.T.P.S.Tomar. Appellants led him to a vacant plot in Sainik Nagar and lying concealed within bushes got recovered two phawdas Ex.P-10 and Ex.P-11 which were seized as per memo Ex.PW-8/D. Appellant Ajay led him to his house No.139, Village Navada, Uttam Nagar and got recovered a pant Ex.P-12 and a shirt Ex.P-13 stated to be worn by him when the crime was committed. Appellant Vijender led the investigating officer to

his house B-84 Mansa Ram Park, Uttam Nagar and got recovered a pant Ex.P-14 and a shirt Ex.P-15 which were seized vide memo Ex.PW-8/E.

7. Blood samples of Omwati were taken and along with the bones recovered as afore-noted were sent for DNA analysis and as per report Ex.PW-17/F it was opined that the DNA extract obtained from the skull Ex.A matched the DNA of Omwati. It was opined that the skull was of the biological offspring of the person whose blood sample Ex.D (Omwati's) was sent for DNA analysis.

8. The bones recovered were sent for forensic examination to DDU Hospital. Dr.R.K.Sharma prepared the report Ex.PW-16/A, proved at the trial by Dr.Lalit Kumar PW-16, recording as under:-

“This contained one skull bone without mandible and zygomatic bone. Offensive odour coming out from the bone which is attached with wet torned ligaments. The skull bone is of human in origin which is deduced from its shape bony prominence and other anatomical features.

Keeping in view of the odour wet texture of the ligaments I am of the opinion that the skull bone is of few weeks old.

The left temporal bone and adjoining area of bone has gap measuring 6 cm x 2 cm x Carinal cavity deep. This gap has irregular margins and could have occurred from hard and heavy blunt impact. In absence of any blood clot around the margins and

adjoining area it cannot be precisely said that it is antemortem or postmortem.

The frontal bone on its right side shows black and faint reddish area with line of redness all around suggesting exposure of front of head on head. The lower part of the burnt area of frontal bone shows irregular small holes about 0.3 cm x 0.3 cm. This impression could have been due to hard blunt piercing instrument. These could have occurred from the weapons supplied for opinion.

Further the base of the skull shows the remnants of muscle and pigment attachments.

The right optic nerve shows hard projection in the orbital cavity.

The sutures of the skull bone is not showing synostosis indicating that the skull bone does not belong to old person.

The supercilliary archs, mastoid process & external occipital protuberance are intact. The prominence are well marked which suggest that the skull bone is possibly of male person.

A zygomatic process on right side is intact while on left side is found broken. No firm opinion can be given about this fracture. No brain mater in the skull cavity seen but dried meninges at places were seen attached on the inner table of the skull bone.

Dried dark brown blood clot have been seen from foremen magnum on viewing in sun-light. No opinion about the age of blood clot can be given.

JAR -2 SMALL

It contains (1) front part of mandible showing mental foremen which is 1 cm above the base of the mandible and 1.5 cm below the alveolar margin.

Opinion: The age of the person based on the situation of the mental foreman suggests that this is of an adult person. There is dried muscle attached on both sides of this bone.

(2) Piece of maxilla of left side with five teeth namely one canine, two premolars & two molars. The socket of the third molar is separate which on assembling appears to be of same side.

In other words all the permanent molars have erupted and indicate the age of the person around 25 years to 30 years. The colour of the teeth is stained dark brown at its root extending upwards & fade thereof. This suggest that the person was habitual tobacco chewer.

(3) Appears to be the remnant of mandible bone having two permanent teeth. The colour of the teeth is dark brown.

(4) One incisor teeth stained dark brown all over (adult age).

JAR – 3 (Medium)

The anatomical study of the bone do not suggest that these are of human in origin. The bones are of mixed type, burnt and blackened.”

9. The appellants were sent to trial. The prosecution sought to establish the case through the testimony of Deepak Sharma PW-11 of having seen Rajender in the company of the appellants and co-accused Manoj in the night of 13.10.2000 and this was the last seen of Rajender. Further evidence led at the trial was the discovery of the spot at the instance of the appellants wherefrom the bones as afore-noted were recovered, the skull bone being found to be that of the biological offspring of Omwati. Thus, the knowledge of the appellants of Rajender being murdered and burnt at the spot

as recorded in the memo Ex.PW-8/A from where bones proved to be those of Rajender, with reference to the skull bone, was sought to be established. Needless to state, the locket Ex.P-1, the half-burnt belt Ex.P-8 and burnt pieces of cloth Ex.P-7 claimed to be remnants of the pant and the shirt of Rajender recovered from the said spot were sought to be the evidence led against the appellants.

10. The learned Trial Judge has held that Deepak Sharma's testimony establishes last seen evidence. The report Ex.PW-17/F establishes that the skull recovered as entered in the memo Ex.PW-8/A was that of Rajender and the locket Ex.P-1 and the burnt clothes Ex.P-7, the belt Ex.P-8 proved to be those of Rajender, being identified by Omwati in Court, were sufficient evidence wherefrom guilt of the appellant could be inferred.

11. We find taint in the last seen evidence for the reason neither in her statement Ex.PW-6/A nor in her statement Ex.PW-2/A made by Omwati on 15.10.2000 and 17.10.2000 does Omwati disclosed that her son-in-law Deepak Sharma PW-11 saw her son in a drunken condition with the appellants and Manoj in a DCM Toyota near Mohan Garden on Nazafgarh Road at around 9:00 PM on 13.10.2000. Had Deepak Sharma actually seen what he claimed to have seen,

surely, he would have told this to Omwati who would have so stated before the police. The reasoning of the learned Trial Judge that Omwati being a rustic person may not have so told is not good reasoning for the reason merely because a person is rustic would not mean that the person is stupid. That a person is rustic would mean that the conduct and utterances of said person would have to be evaluated giving credit of the person being rustic, but factoring in the rustic commonsense which a rustic person would possess. Now, certain facts are so elementary that even a rustic person would disclose the same in a given situation. Omwati's son had not returned home for two days when she went to the police station on 15.10.2000. If she had the wisdom to tell the police the colour of the clothes which her son was wearing, she would have certainly told, as claimed by her in Court that her son left in the company of Ajay, a fact which she disclosed only on 17.10.2000. Further, when she went to the police station on 17.10.2000, she would have certainly informed that her son-in-law had on 13.10.2000 seen her son in the company of the appellants and Manoj.

12. Thus, we discount the last seen evidence sought to be proved.

13. The locket Ex.P-1 was not subjected to any Test Identification Proceedings and thus we discount the evidentiary value of Omwati identifying the same as that of her son while deposing in Court. Similarly, we discount the evidentiary value of the burnt belt Ex.P-8 and burnt pieces of cloth Ex.P-7 identified by Omwati in Court as the belt of her son and the remnants of the pant and the shirt worn by her son. The reason is that neither of them has any peculiar characteristic to prove the distinct identity of any one of them.

14. But, the report Ex.PW-17/F and the fact that the skull of the deceased which got connected with reference to the DNA extract of the skull to that of Omwati proving that the skull was of the biological offspring of Omwati is good enough evidence wherefrom the guilt of the appellants can be inferred.

15. We note at the outset that the report Ex.PW-17/F was not challenged.

16. In the decisions reported as AIR 1947 PC 67 Pulukuri Kottaya & Ors. Vs. Emperor, 1989 CrL LJ (NOC) 200 (Gauhati); Chakidhar Paharia Vs. State of Assam, 1986 CrL LJ 220 Parimal Banerjee Vs. State and AIR 1963 SC 1074 Ram Lochan Ahir Vs. State of West Bengal recoveries of dead bodies pursuant to disclosure statements were held to be not

only admissible incriminating evidence but of a very lethal variety against the maker of the statement.

17. It is not a case where an identifiable dead body was recovered. There is no scope for an argument that the appellants could have possibly a knowledge that the dead body of Rajender was lying at the spot in question and hence told the investigating officer of said fact.

18. The body was completely burnt with remnants of the skeleton at the place where the body was cremated. Only he who burnt the body could have led the police to the said spot. That the DNA extract of the skull was proved to be that of biological offspring of Omwati is independent evidence which links the recovery to the crime.

19. Further, it is not simply a case of recovery of the bones of the deceased from a spot which was not in the knowledge of the police and to which spot the police was led by the appellants, but is also a case where a fact not in the knowledge of the police and as told by the appellants got independent corroboration through the testimony of Dr.Lalit Kumar PW-16 on proof of the report Ex.PW-16/A which establishes that the person whose bones were sent for forensic examination was beaten. As noted herein above in the report

it has been opined that the irregular margins and irregular small holes detected on the left temporal bone and the frontal bone respectively show that the body was pounded with a hard and heavy blunt impact. The knowledge of the appellants as disclosed in their disclosure statements that before being burnt Rajender's dead body was bashed up with a phawda is important as it relates to the condition of an object i.e. the dead body of Rajender and was disclosed to the investigating officer much before the remnants of the body of Rajender were recovered. To put it pithily, Section 27 of the Evidence Act is attracted in the instant case not only with reference to the knowledge of the appellants as to the place where remnants of the cremated dead body of Rajender were recovered but also to the condition of the dead body of Rajender before it was burnt; the condition being that the dead body was inflicted blows with a phawda, a fact proved through the report Ex.PW-16/A.

20. Said solitary circumstance of recovery, in the facts of the instant case, is sufficient wherefrom the guilt of the appellants can be inferred.

21. The appeals are dismissed.

22. Since the appellants are in jail we direct that a copy of this decision in each Appeal be sent to the Superintendent, Central Jail, Tihar for being made available to the appellants.

(SURESH KAIT)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

APRIL 21, 2010
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