

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

Date of Decision: 09th March, 2010

+ **CRIMINAL APPEAL NO. 600/2009**

BABU LAL

..... APPELLANT

Through: Mr. Deepak Sharma, Advocate
(DHCLSC)

Versus

STATE (GOVT. OF NCT OF DELHI) RESPONDENT

Through: Mr. Sunil Sharma, APP

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J (ORAL)

1. This appeal is directed against the impugned judgment of the learned Additional Sessions Judge dated 04.04.2009 convicting the appellant for the murder of child Pardeep under Section 302 IPC as also the order on sentence dated 08.04.2009 in terms of which the appellant has been sentenced to undergo imprisonment for life and to

pay a fine of Rs. 1000/-, in default of payment of fine, to undergo SI for a further period of one month.

2. Briefly put, case of the prosecution is that on 09th January, 2004 at around 11:00 am, ASI Pardeep Lakra of PCR intimated the police station Mandawli that one boy has been killed by '*Tau*' near Chander Vihar Public School. The information was recorded at the police station as DD No. 17-A and W/ASI Chanchal Sharma was telephonically informed to take necessary action. Additional SHO of the police station was also informed about the incident. On receipt of the information, Additional SHO Inspector Harish Chander Yati (PW20) reached at the spot where he met W/ASI Chanchal Sharma and Constable Raj Kumar. The Investigating Officer, on reaching the spot of incident, found Pardeep @ Sonu S/o Ram Shankar Dubey @ Ramesh, aged around 14/15 years lying dead with a head injury seemingly caused by a blunt object. Dimple (PW10), three years old sister of the deceased was also present at the spot, who was crying and uttering the words "*tau ne mara hai*". No other eye-witness was available at the spot. Since it appeared to be a case of murder, Additional SHO appended his endorsement on the copy of the DD No. 17-A and sent it to the police station through Constable Raj Kumar for the registration of the case, on the basis of which formal FIR No. 18/2004 (Ex.PW16/B) under Section 302 IPC was registered at Police Station Mandawli and a special report was sent to the concerned Magistrate and superior officers.

3. Investigation was carried out by PW20 Inspector Harish Chander Yati. Crime Team alongwith the photographer was summoned at the spot. They inspected the spot of occurrence and the photographer took photographs of the place of incident from various angles, which are Ex.PW7/1 to 9. Blood was lifted from the spot of occurrence on a piece of cotton. It was kept in a plastic bottle and sealed in a packet with the seal of 'HCY'. Blood-stained concrete as well as some earth control (concrete) was also lifted from the spot and converted into separate sealed *pullandas*. One '*sil-batta*' was also lying at the spot and it was also taken into possession. Inquest proceedings were conducted and the dead body was sent for post-mortem alongwith the application requesting for post-mortem Ex.PW20/C.

4. The appellant was arrested pursuant to secret information on 11th February, 2004 from beneath the over-bridge, Khichripur, Near Jhuggi Cluster. It is alleged that on interrogation, the appellant made a disclosure statement Ex.PW9/B stating that he could get recovered his blood-stained clothes which he was wearing at the time of the incident from the *jhuggi* of Hari Chandra. Thereafter, the appellant led the police party to the said *jhuggi* and he got recovered a polythene bag containing his blood-stained pant and shirt from behind a box lying in the *jhuggi*. Those clothes were sealed with the seal 'HCY' and taken into possession vide seizure memo Ex.PW9/C. The said packet of blood-stained clothes was deposited in the *malkhana*. The exhibits seized from the spot as also the blood-stained clothes recovered at

the instance of the appellant and the blood-stained clothes of the deceased were sent to CFSL, Kolkata for serological examination and as per the report of CFSL Ex.PW20/E, human blood was found on all the exhibits and the blood-stains on the '*butta*', cuttings of the clothes of the deceased, gauze piece cuttings and the cuttings of the pant and shirt of the appellant tested positive for the blood group 'O'. It is also the case of the prosecution that during investigation, it came to fore that on the succeeding day of murder at around 10:00 am, a telephonic call was made by the appellant Babu Lal to PW5 Satish Chand Upadhyay informing that Ram @ Ramesh had demanded money from him for going to Agra, which was ready with him and that one child had met with an accident and he would be available in Saroj Hospital, Ward No. 22, Bed No. 53, Sector 24, Rohini and the caller requested him to convey said message to Ram @ Ramesh, which message was conveyed by him (PW5) to Ram @ Ramesh.

5. On completion of formalities of investigation, the appellant was challaned and sent for trial.

6. After the committal, the appellant was charged for murder of Pardeep under Section 302 IPC. The appellant pleaded not guilty to the charge and claimed to be tried.

7. In order to bring home the guilt of the appellant, the prosecution examined 20 witnesses in all. The prosecution, however, mainly relied upon the testimony of PW10 Baby Dimple

who was around 2½ years at the time of incident. Besides her testimony, the prosecution also relied upon the last seen evidence claimed to have been witnessed by PW3 Ram Shankar Dubey and the recovery of blood-stained pant Ex.PW9/P2 and shirt Ex.PW9/P1 of the appellant at his instance, pursuant to his disclosure statement, which he got recovered from behind a box lying in the *jhuggi* of Hari Chandra near Khichripur over-bridge. Learned Trial Court, relying upon the above referred evidence found the appellant guilty of murder of Pardeep @ Sonu and convicted the appellant under Section 302 IPC.

8. Learned amicus appearing on behalf of the appellant submitted that the case of the prosecution basically rests on the testimony of PW10 Dimple, who was only 2½-3 years old at the time of incident. Thus, it is not safe to rely upon her testimony, particularly when she was examined in court after a lapse of 3½ years from the date of incident. Learned amicus further submitted that the prosecution had deliberately not produced her as a witness in the court at the earliest because prosecution wanted her to attain sufficient mental maturity to understand the questions that may be put to her in the cross-examination and give reply as tutored. Learned amicus further submitted that even if the testimony of PW10 Dimple is to be believed, then also, she was not specific about the identity of the person who actually committed the murder and

she only referred to the assailant as '*Tau*', which is a general expression of respect for elderly people. Despite that, the Investigating Officer did not care to get the identity of the appellant fixed in a Test Identification Parade. Therefore, it is not safe to rely upon the identification of the appellant by the child witness 3½ years after the incident in the court. Regarding the recovery pursuant to the disclosure statement made by the appellant, learned amicus has submitted that as per the record, the appellant was sent for medical examination in the morning of 12th February, 2004 after his arrest and as per his MLC available on the record, the doctor, on examination, found tenderness and swelling on both the hands of the appellant and advised X-Ray. The X-Ray report has not been placed on record and there is no reference to the result of the X-Ray in the charge-sheet. It is submitted that Withholding of the X-Ray report and the opinion of radiologist also point towards the unfair investigation and raises a doubt that even the disclosure statement is the result of the 3rd Degree used against the appellant and the blood-stained clothes have been planted upon him. Learned amicus further submitted that serological report Ex.PW20/E is also of no avail to the prosecution because as per the case of the prosecution, a light sky blue coloured pant and black & white checked shirt were recovered at the instance of the appellant, whereas samples which were examined vide report Ex.PW20/E were

cuttings and even the colour or pattern of those sample cuttings have not been mentioned so as to link them with the alleged recovery. Thus, it is submitted that the prosecution has even failed to establish beyond doubt that the clothes purportedly recovered at the instance of the appellant were stained with the blood of the deceased. Learned amicus has thus urged us to conclude that prosecution has failed to prove the guilt of the appellant under Section 302 IPC beyond reasonable doubt and extend benefit of doubt to him.

9. Learned counsel for the State, on the other hand, has argued in support of the impugned judgment. He has contended that under law, there is no bar upon the court to act on the testimony of a child witness. Only requirement of law is that testimony of child witness should be approached with due care and caution and if found reliable, the conviction can be based upon such evidence. Learned counsel for the State submitted that PW10 Dimple has fully supported the case of the prosecution and she has withstood the test of cross examination. He pointed out that during cross-examination, PW10 Dimple was categorical that she used to address only one person as '*Tau*' and he was the appellant Babu Lal. In response to another question in the cross-examination, she has clarified that she never addressed another Babu Lal, who was the husband of Kamlesh, as '*Tau*'. Learned counsel for the State further

submitted that PW3 Ram Shankar Dubey categorically stated in the court that on the fateful morning while he and the appellant were going for work, the appellant went back to his house on the pretext of having tea, which evidence clearly shows that the appellant was the only person present at the house at the time of incident, who alone had an opportunity to commit murder of the deceased. Besides that, learned counsel submitted that blood-stained pant Ex.PW9/P2 and shirt Ex.PW9/P1 were recovered at the instance of the appellant which, according to him, are linked with the murder in view of the serological report Ex.PW20/E, which found that the clothes recovered at the instance of the appellant were stained with the human blood group 'O' which was the blood group of the deceased. Learned counsel for the State also submitted that PW5 Satish Chand is of no consequence as he has deliberately tried to mislead the Investigating Officer by introducing a new story that the appellant rang him up with a request to convey a message to Ram @ Ramesh that he had arranged for money requested by him and that he (appellant) was available in Saroj Hospital, Ward No. 22, Bed No. 53, Sector 24, Rohini.

10. We have considered the rival contentions and perused the material on record. The only eye-witness of the occurrence, PW10 Dimple, was a child of tender age of around 2½ - 3 years at the time of the incident. Admittedly, her statement under Section 161 Cr.P.C. was

not recorded by the police. We, therefore, do not find it safe to base conviction of the appellant on her solitary statement, particularly when her version is not even specific about the identity of the appellant Babu Lal. The witness, when asked in her cross-examination, as to whether on her previous visits to the courts, her mother used to point to the appellant as the person referred to as '*Tau*', responded by saying "*Mummi har baar batati thee*". From this, it appears that identification of the appellant by this witness as '*Tau*' referred to in the FIR is the result of the tutoring by her mother. Further, even though as per the case of the prosecution, the child witness did not divulge the identity of the assailant by name and only referred to him as a person known as '*Tau*', the Investigating Officer did not deem it appropriate to arrange for a Test Identification Parade to fix the identity of the appellant as the assailant. This circumstance also puts a question mark upon the fairness of the investigation. The witness is said to have identified the appellant in the court when he was in the dock after a lapse of 3½ years from the date of incident. Admittedly, the child witness Dimple even at the time of her examination as a witness was aged around 6 years, therefore, we do not find it safe to rely upon the identification made by the witness. In our afore-said view, we find support in the judgment of the Supreme Court in the matter of **Bhagwan Singh & Ors. Vs. State of M.P., AIR 2003 SC 1088**, wherein it was inter alia observed thus:

“25. In our opinion, the reason assigned to brush aside such an important omission of not holding a test identification parade is unconvincing. The child was aged about six years at the time of the incident. He used to live with his father and mother at Alampur. It has been mentioned in the evidence of some of the witnesses that he used to come off and on with his mother and younger brothers to Murawali to live with his grandfather Mata Prasad. Looking to his age and understanding of the child even though he might have identified the accused Bhagwan Singh who lived in the neighbourhood, it was most unlikely that he would have known the other two accused who were merely residents of the same village Murawali. The High Court is not fully right in observing that the child was acquainted with three accused already and there was no necessity for the prosecution to have held a test identification parade. In our opinion, therefore, the High Court was wholly unjustified in taking a view of the testimony of the child witness contrary to the one taken by the trial Judge and relying on it to convict the accused”.

11. PW1 Ranjana, sister of the deceased and PW2 Rajni, mother of the deceased have claimed in their testimony that when they reached at the place of incident, they found the deceased lying on the floor in a pool of blood around his head. PW2 Rajni also stated that she took the deceased to Mahesh Hospital where he was declared brought dead and thereafter, she brought him back to the spot. If this version is to be taken as true, then when the Investigating Officer reached at the spot of occurrence either he would not have found the dead body in the room or if it is to be assumed that by that time, Rajni had returned back from the hospital, then he should have found Rajni and Ranjna at the spot. Neither of these possibilities get substantiated by the *rukka* i.e. the endorsement of the Investigating Officer at the bottom of copy of DD report Ex.PW16/A. In the ‘*rukka*’ Ex.PW20/A, the Investigating Officer has detailed the facts observed by him at the spot of incident but in the aforesaid narration, there is

no mention of the presence of either PW1 Ranjana or PW2 Rajni at the spot, but it is mentioned that the body of the deceased Pardeep Kumar was found lying in the room. If this endorsement is to be believed, then the version of PW1 as well as PW2 becomes doubtful. As such, we are of the view that the testimonies of PW1 and PW2 also do not provide any corroboration to the testimony of PW10 Dimple to the effect that she was saying "*Tau ne mara hai*".

12. Regarding the recovery, case of the prosecution is that the appellant got recovered his blood-stained pant and shirt from the jhuggi of Hari Chandra near Khichripur over-bridge. Even if it is believed that pant Ex.PW9/P2 and shirt Ex.PW9/P1 were actually recovered at the instance of the appellant, those are not linked with the death of the deceased because as per serological report, the samples which were examined by the chemical examiner were not the pant and the shirt but those were cuttings of a pant and a shirt. The colour or pattern of those cuttings is not mentioned in the report so that one could compare and match it with description of the pant and shirt given in seizure memo Ex.PW9/C prepared by the Investigating Officer. Prosecution has not cared to examine the chemical examiner to clarify this aspect also. Therefore, in our view, even the recovery is not connected with the murder of the deceased. Otherwise also, the presence of unexplained injuries on both the hands of the appellant at the time of his medical

examination on 12.02.1994 also raises a strong possibility of 3rd degree approach having been adopted by the police. This circumstance also makes the disclosure statement as also the recovery pursuant to it, suspect.

13. As regards the last seen evidence, learned counsel for the appellant drew our attention to the testimony of PW3 Ram Shankar Dubey, who stated in his examination-in-chief that his wife had left the house in the morning of the fateful day at about 7:45 am. The appellant also left the house and thereafter came back after 10 minutes. He (the witness) took tea, but the appellant declined to have tea and said that he would have it later on. Thereafter, the witness also left for the job and the appellant joined him. Five minutes later, the appellant said that he would like to go back and take tea and when he stated that it was OK with him, the appellant went back to his (the witness) house and he went for his job. Even if the aforesaid version is taken to be the gospel truth, then also the above testimony of PW3 establishes only one fact that the appellant parted company with PW3 Ram Shankar Dubey saying that he would like to go back and take tea. This does not mean that the appellant actually went to the house of PW3 Ram Shanker Dubey. A possibility cannot be ruled out that instead of going to the house of the witness, the appellant might have gone somewhere else. Thus,

in our view, even the last seen circumstance relied upon by the prosecution is not firmly established.

14. The result of above discussion is that the circumstantial evidence adduced by the prosecution is not convincing and that the prosecution has failed to establish the guilt of the appellant beyond reasonable doubt. We are, thus unable to sustain the impugned judgment of conviction and the consequent order on sentence. We accordingly set aside the conviction of the appellant under Section 302 IPC and acquit him, giving him benefit of doubt.

15. The appellant is in jail. He may be released forthwith, if not required in any other case.

16. The appeal is disposed of accordingly.

A.K. SIKRI, J.

AJIT BHARIHOKE, J.

MARCH 09, 2010

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