

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

% Date of Decision :27th April, 2010

+ **Crl. A. No. 956/2008**

BIJENDER Appellant
Through: Ms. Shraddha Bhargava,
Advocate
versus

THE STATE OF DELHI 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?

PRADEEP NANDRAJOG, J.(Oral)

1. Noting, vide order dated 26.04.2010, that the appeal had reached for hearing but learned counsel for the appellant had not appeared and that learned counsel had been contacted over the telephone and informed of said fact upon which he disconnected the telephone and hence a SMS message was transmitted to him and inspite thereof none had appeared, we had appointed Ms. Shraddha Bhargava, Advocate as the Amicus Curiae on behalf of the appellant and had retained the matter on the Board to enable learned Amicus Curiae to prepare the matter.

2. We are happy to note that learned Amicus Curiae

has prepared the matter overnight and has communicated her willingness to argue the appeal today. Hence, we have heard arguments in the appeal.

3. Three accused; namely, A-1 Bijender (Appellant), A-2 Chandra and A-3 Leelay Singh were charged for the offence of having entered into conspiracy to kill Om Parkash, husband of Chandra A-2 and in furtherance of the conspiracy having murdered Om Parkash on the night intervening 29th and 30th January, 2004. The appellant Bijender was also charged for the offence of concealing/destroying evidence pertaining to the murder.

4. Vide impugned judgment and order dated 17.09.2008, the appellant has been convicted for the offence punishable under Section 302 IPC, for which offence, vide order dated 19.09.2008, he has been sentenced to undergo imprisonment for life and pay fine in sum of Rs.5000/-.

5. Needless to state Chandra A-2 and Leelay Singh A-3 have been acquitted.

6. As laid in the charge-sheet, deceased Om Parkash and his wife Chandra were residing in their own house bearing municipal No.G-91, Harkesh Nagar, Delhi. Om Parkash was deployed as a Beldar at the Tehkhand Pump House, Okhla. He let out a room in his house on rent to A-3 Leelay Singh and, so alleges the prosecution, A-3 Leelay Singh developed intimate

relationship with A-2 Chandra. This was discovered by Om Parkash and naturally there resulted frequent bouts of quarrel between not only Om Parkash and Chandra but even Leelay Singh and Om Parkash. Leelay and Chandra hatched a conspiracy in which A-1 Bijender participated for consideration, and it was decided that Om Parkash would be liquidated. As per the prosecution, Chandra handed over a mobile phone of Reliance Company bearing No.33103191 to Bijender and also paid Supari money to Bijender. As per the prosecution, Leelay Singh was the user of mobile No.9818879029 and, the conspirators i.e. the accused remained in touch with each other not only through connectivity provided to them by the aforesaid two numbers but even through another number being 26382451.

7. That Om Parkash was murdered got detected at 8:00 AM on 30.01.2004 when Rattan Lal PW-1, a Pump Operator reached for duty and found that Om Parkash who was on night duty was not present and blood was lying on the floor of the Pump House. Police was informed. SI A.K. Singh PW-17 reached the Pump House Tehkhand, Okhla and found blood on the floor of the Pump House. On searching around, the dead body of Om Parkash was found in a well near the Pump House.

8. Except for confessional statements made by

Chandra and Leelay Singh, the prosecution was able to get nothing more from them. As regards the appellant, pursuant to his arrest and disclosure statement being recorded, an iron DAO Ex.P-2 and a Muffler Ex.P-3 were recovered at a short distance from the place where the dead body of the deceased was found. An iron rod Ex.P-1 was also recovered at a short distance from where the dead body of the deceased was recovered. A jacket Ex.P-4 was recovered from the room occupied by Bijender.

9. The four exhibits were sent for serologist examination and as per FSL report, human blood group whereof could not be found, was detected on all the four exhibits.

10. Needless to state charge of conspiracy qua involvement of Chandra A-2 and Leelay Singh A-3 was attempted to be proved with reference to the calls inter-se exchanged using telephone numbers 9818879029, 26382451 and 33103191, being a mobile number, a fixed landline number and a mobile Reliance service provider number respectively.

11. Discussing the evidentiary worth of the call records inter-se the three afore-noted telephone numbers, in para-27 of the impugned decision, learned trial Judge has concluded as under:-

"I fully agree with Ld.APP that circumstantial evidence led by the prosecution clearly proves that phone no.9818879029 belongs to accused Leelay. The call records also prove that on 29.01.2004 a telephonic call from STD booth of Sarika Sharma was made from phone no.26382451 to phone no.9818879029. However unfortunately the prosecution case that this call was made by accused Chandra is highly doubtful. It is pertinent to note that PW18 Yudishter Kumar, who has testified that accused Chandra made this telephonic call has been a police witness in numerous cases which is admitted by him in numerous cases. In cross-examination he admitted that he was a witness in about 15 cases and was also a witness in FIR No.139 of the year 1989. This witness testifies that on 29.1.2004 accused Chandra had made the above stated telephonic calls in his presence. However this witness although was well versed with the police working and had been cooperating with them in numerous cases, surprisingly keeps mum for about two years and he informs SHO PS Okhla Industrial Area on 26.7.2006. He has explained that although he tried to visit police station but one constable discouraged him from meeting the SHO and therefore he did not inform the police about this fact. I am of the opinion that this explanation is not believable. He had been cooperating the police for quite a long time even before the present offence and it is highly doubtful that he would not have stated this fact to the police just because one police constable discouraged him. In view of very peculiar circumstances in which he informed the SHO about this fact after two years, it

would be highly unsafe to place reliance upon his testimony. Therefore I am not inclined to accept the testimony of PW18 that accused Chandra made a telephonic call in question. Therefore although the call record does prove the telephonic conversation between the callers from phone no.9818879029, 26382451 and phone no.33103191 and the circumstances also show that mobile phone no.9818879029 belongs to accused Leelay, still the prosecution has been unable to connect that on the other two phone numbers 26382451 and 33103191, accused Chandra and accused Bijender were talking to him on the day/night of the offence. In these circumstances I am of the opinion that the evidence and circumstances are not sufficient to pin point the guilt of accused Leelay and Chandra in unmistakable manner. In these circumstances I acquit accused Leelay and Chandra."

12. There being no other incriminating evidence against A-2 and A-3, as noted above, Chandra and Leelay Singh have been acquitted.

13. As noted above, appellant has been convicted only on account of the fact that after his arrest he made a disclosure statement and got recovered an iron rod Ex.P-1, an iron DAO Ex.P-2, a muffler Ex.P-3 and a jacket Ex.P-4 on all of which human blood group whereof could not be detected was found as per the report of the serologist. Further, evidence used against the appellant is his being found missing from his tenanted house.

14. Unfortunately, the learned trial Judge has ignored a vital circumstance of the iron rod, the iron DAO and the muffler being recovered from a place which is at a short distance wherefrom the dead body of the deceased was recovered in the morning of 30.01.2004. The recoveries of the said three articles are on 05.02.2004. The possibility that the police had seen the three in the morning of 30.01.2004 cannot thus be ruled out.

15. That apart, in the decisions reported as AIR 1963 SC 1113 Prabhu vs.State of UP; AIR 1977 SC 1753 Narsinhbhai Haribhai Prajapati etc. vs. Chhatrasinh & Ors.; AIR 1994 SC 110 Surjit Singh and Anr. vs. State of Punjab; 1999 CrLJ 265 Deva Singh vs. State of Rajasthan and JT 2008(1) SC 191 Mani vs. State of Tamil Nadu the Supreme Court has repeatedly cautioned qua the weightage to be accorded by courts to incriminating recoveries of ordinary articles and objects. As a rule of prudence, the Supreme Court has held that such recoveries carry very little weightage as far as their evidentiary worth is concerned.

16. Now, inasmuch as people abscond to evade the process of law knowing that they are guilty, innocent people also abscond fearing false implication. Needless to state, inference of guilt on conduct of absconding is based on an assumption that the person has absconded due to guilt. It is

settled law that assumptive logic is weak logic and hence the incriminating worth of such evidence is weak.

17. Under the circumstances, we hold that the charge of conspiracy having failed, afore-noted incriminating evidence against the appellant Bijender being weak evidence does not justify the conclusion that from said evidence only conclusion possible is the guilt of Bijender.

18. Bijender would certainly be entitled to, if not more, a benefit of doubt.

19. The appeal is allowed. Bijender is acquitted of the charge framed against him.

20. Since Bijender is in Jail, we direct that a copy of this decision be sent to the Superintendent, Central Jail Tihar with a direction that unless required in custody in some other case, Bijender be set free forthwith.

PRADEEP NANDRAJOG, J

SURESH KAIT, J

APRIL 27, 2010
'nks'