

IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 15.11.2011

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CRL.A. Nos. 704/2011 & 705/2011

Crl.A. No.704/2011

BAL MUKUND @ KISHAN

..... Appellant

Through : Ms. Nandita Rao, Advocate

Crl.A. No.705/2011

PRADEEP KUMAR @ ALLAHABADI

..... Appellant

Through : Ms. Sahila Lamba, Advocate

Versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through : Mr. Sanjay Lao, APP

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MS. JUSTICE PRATIBHA RANI

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The appellants impugn a judgment and order dated 31.07.2010 and 09.08.2010 respectively whereby they were convicted for the offence punishable under Section 302 read with Sections 201 and 120B IPC. They were convicted of the charges, and sentenced to undergo life imprisonment and also fined for various amounts, in default of payment of which they were directed to undergo simple imprisonment for further term.

2. The prosecution alleged that on 25.09.2005, the Station Master of New Delhi Railway Station was informed by the guard of the Frontier Mail that a bag lay in Coach No.5 of the train, which was inspected by the security service of the railway station, who discovered that it contained the dead body of a teenaged male. The concerned Police Station was informed and SI Avinash Yadav, PW-16 was assigned the matter. He also became the I.O. PW-16 went to the scene of occurrence and collected the physical evidence such as blood stained clothes, blood samples as well as the body - which was sent for post mortem. A case was registered under Sections 302, 201/ 120B IPC. It was alleged that in the course of investigation, on the same day, PW-16 met with Mohd. Najim; he furnished information about the offenders. It was further alleged that at his instance two individuals i.e. Chandan @ Chikna and Sujeet @ Shagir @ Ganja were nabbed by the police and taken into custody. It was further alleged that Mohd Najim also informed that Raj Kumar, Rajesh Bihari and Bal Mukund were involved in the murder. The police stated that the accused Rajesh and Balmukund were arrested on 30th September, 2005. It was alleged that on 23.11.2005 the Police received secret information about involvement of another person i.e. Rajesh Allahabadi @ Pradeep (one of the appellants) who was also arrested upon his being identified by the said Mohd. Nazim. On the basis of information and materials collected, a charge sheet was filed. The Trial Court was of the opinion that a *prima facie* case was made out and charged the accused for committing crime. They claimed to be not guilty and sought trial. The Trial Court examined 26 witnesses and also considered the materials and exhibits produced before it. On the basis of these it concluded that the present appellants were guilty as charged. They were accordingly convicted and sentenced in the manner described above.

3. Learned counsel for the appellants argued that the entire prosecution was on the basis of circumstantial evidence. The counsel urged that in such cases the prosecution's duty is to prove each circumstance and also prove that each link which bound all the circumstances formed a chain so complete as to eliminate the possibility of anyone, other than the accused being the author of the crime. It was urged that the prosecution's entire story relied on the information provided by Mohd. Najim; it was also their case that the appellants were arrested at his instance. Counsel emphasized that the most important element in the entire prosecution was the story or version of Mohd. Najim. However, he was not examined during trial. In these circumstances, the case could not be said to have been proved at all.

4. The appellants counsel urged that even their arrest was not proved objectively since there was no public witness who joined in the proceedings at that time. It is urged that the Trial Court has in this case relied upon the recoveries allegedly made by the Police at the instance of the present appellants. Two *ustras* were allegedly recovered but from a public place i.e. Railway Platform and that too more than a month after the incident. Having regard to the entirety of the circumstances i.e., that two appellants were arrested on 23.11.2005 for an incident which occurred on 25.09.2005, and the prosecution's inability to produce the key witness and inability to even explain or link the recoveries with the appellants; it seems that the entire story is a falsified one. It was alleged that *ustras* were a fairly common object and in the absence of special mark, or even a finger print analysis on these articles, the Trial Court could not have concluded that such recoveries were incriminating circumstances.

5. The learned APP argued that though Mohd. Najim was cited as a witness, he could not be produced during trial because despite all efforts it was not possible to trace his whereabouts. The counsel urged, however, that the deposition of PW-16

who recorded Mohd. Najim's statement could be relied upon as it was not shown to be motivated. It was urged that PW-16 in his deposition narrated the entire sequence about having received information on 25.09.2005 at around 7.45 PM and seeing the blood seeping from Coach S-5 of the Frontier Mail Train and discovering that the source of this blood was a gunny bag. Later, Inspector Ishwar Singh went to the spot, he deposed that since the wires above the train were electrified, it was disconnected by one Jagdish Shah. Upon opening the gunny bag they discovered a body of a young boy aged 13-14; this was wrapped in a blanket. The body was gagged with a cloth, neck was slit and there were injuries on the face and head. The body was identified on 27.07.2005 by one Jamila Khatoon and her son Mohd. Irfan. It is stated that on the same day he went to RML Hospital to enquire about Raj Kumar @ Chandal (another assailant) who had been admitted for treatment of electric burn injuries. His blood samples were taken.

6. On 30.09.2005 at about 12.30 PM he along with other police men went to Platform No.1 of the station where he met Mohd. Najim; the latter pointed out and stated that Chandan @ Chikna and Sujeet @ Shagir who, along with the other co-accused had committed the murder. Chandan and Sujeet were arrested. Pursuant to their disclosure statement blood samples from earth control room were recovered. A video recording of these proceedings was done; the same was produced as Ex. PW-16/F. At the instance of Sujeet one *ustara* was recovered from the Central bridge, Tin shed pillar, Platform No. 8 of the railway station, which was blood stained. All these were seized. Similarly, on 03.10.2005 at the instance of Mohd. Najim, Bal Mukund was arrested near the North yard station; at his instance his blood stained jeans were recovered. On 05.10.2005 the witness, PW-16 was entrusted with proceedings under Section 174 in respect of Raj Kumar who had been injured and was admitted to RML hospital on 25.09.2005. Raj Kumar passed away on 30.09.2005.

7. Learned APP contends that on 03-10-2005, Bal Mukund was arrested at the instance of Mohd. Najim. He submitted that on 23.11.2005, Mohd. Najim met the police party at Platform No.1, they further went to Platform No.2 where he identified the accused Pradeep @ Allahaadi, who was arrested; who lead them to Platform No.2 from where they recovered a blood stained *ustra* at his instance. The learned APP argued that testimonies of PW-16 and PW-22 were corroborated by those of PW-4 and PW-26. Reliance was also placed upon the deposition of some witnesses such as Shagir who testified that Mohd. Najim was his son and that he had left his residence four years ago and had not been heard of since then. Similarly, the post mortem report Ex. PW-13/A, and the deposition of Dr. Kulbhushan Goyal was relied upon. It was urged that having regard to this, it was clear that the deceased Sonu had a 13 cm long cut injury and another throat injury of 9.5 cm, over his occipital region both of which were sufficiently serious to have caused death. The learned APP urge that disclosure statements made in this case were corroborated further by the injuries received by the deceased Raj Kumar, who got electrocuted and died subsequently on 30.09.2005. Having regard to all these facts, the Prosecution urged that the role played by the accused appellants in killing Sonu on top of the train had been established. They were also responsible for stuffing his body along with other co-accused in the gunny bag and subsequently hiding the weapon of offence i.e., *ustras*. Though these articles were kept in public places, yet it was hidden and could not be discovered by normally searching the place. The knowledge of these articles also incriminated the appellants.

8. In this case, the prosecution version was that the crime was witnessed by Mohd. Najim. However, he was not produced to testify in court, in support of its case. The State contends nevertheless, that his statement was recorded by PW-16,

who deposed to having done so, and that he had implicated the Appellant and the co-accused for the crime. We are afraid that such reasoning is unfeasible. PW-16 can testify to what he saw and observed; his deposition regarding what someone else – who did not later depose in court- said, is clearly inadmissible, under the hearsay rule. At best, what was stated by Najim could be useful to help in the investigation. What however, is admissible in court, and permissible for the court to look into, is whether the witness who deposes about a fact seen or experienced by him, can be relied on. Therefore, this court is of opinion that PW-16's testimony about what was recorded by him, on the basis of Najim's statement, is inadmissible in law.

9. The next question is whether the prosecution was able to prove the arrest, and involvement of the present Appellants in respect of the crime. The testimonies of various prosecution witnesses is that the accused – except the present Appellants were arrested on 30th September, 2005; one of the attackers died and his inquest and post-mortem examination was done in the first week of October, that year. However, the Appellants were arrested on 3rd October 2005, and 23rd November, 2005. The witness to this arrest is alleged to have been the same Najim. PW-22 and PW-26 deposed in this regard. PW-22 mentioned how the Appellant Pradeep was pointed out, and nabbed. He further stated that upon questioning, the accused made disclosure statements which led to the recovery of articles, such as the *ustara*, blood stained clothes, etc from some places in the Railway station. Though recoveries cannot by themselves constitute strong incriminating circumstances, what is recovered, pursuant to disclosure statements, and where they are recovered, often assumes significance. It has been held repeatedly that recovery of common objects – even weapon like articles, such as knives, or sticks, etc do not clothe the prosecution version with any special significance, unless their location naturally points to special knowledge. Also if such objects are recovered from open areas, or

places accessible to all, the courts have ruled that the manner of recovery, or the recovery itself, does not assume any significance. On the other hand, if articles are recovered from some hidden places, or remote or inaccessible places, or the articles themselves are not common objects, and have some special link with the crime or the victim, the matter, and the knowledge of its location, assumes some significance. It can become an admissible piece of evidence, by virtue of Section 27 of the Evidence Act. (Ref *Pulukuri Kottayya v. Emperor* AIR 1947 PC 67).

10. The weapons allegedly recovered from the accused and the appellants were from a place as open and crowded as the New Delhi Railway Station. Despite the fact that traces of blood group 'A' were found on the *Ustra* belonging to Sujit Kumar (the blood group of the deceased), the fact that they were recovered from an open place renders this evidence highly unreliable. However, the Learned Trial Court only considered the fact that these weapons were recovered in pursuance of disclosure statements and therefore admissible as evidence under Section 27. It paid no heed to the fact that they were recovered from the open and without any public witnesses other than Mohd Najim. Further, in the case of these appellants, the recoveries were made nearly two months after the incident. Strangely, Mohd. Najim was around, to help the police; when it was his turn to depose about all these in court, mysteriously – and perhaps conveniently for the prosecution- he went missing. This aspect has to be kept in mind, because there is a singular lack of any public witness, despite the area being crowded at almost all times of the day (i.e. a Railway Station, frequented by almost 3,00,000 visitors each day). The sheer improbability of this story, and the further aspect that such common objects could remain hidden, for nearly two months, undermines the credibility of the prosecution story in this regard.

11. There is yet another glaring factor which appears to have escaped the attention of the Trial Court. PW-22 claims to having witnessed the incidents

relating to the events of 23-11-2005, including the arrests made, as well as recovery of two *ustras*. He pointedly stated that PW-16 too was associated with the arrest and recoveries. However, PW-16 is absolutely silent on this aspect. This variation is too vital for the Trial Court to have ignored. Furthermore, this court also notices that in his cross examination PW-16 stated that the mother and brother of the deceased (Sonu), identified the body on 26.09.2005 by photo. This is in stark contradiction of his earlier statement where he said that they had done so on 27.09.2005.

12. The prosecution, in this case, appears to have been caught up by the fact that the murder was committed on a train, and someone was electrocuted. Their case is that Mohd. Najim helped the investigation, which led to the solving of the crime. However, this prize witness did not depose. On the other hand, the testimonies of PW-4 and PW-26 show that whenever arrests were made, some *karmcharis* or employees working in the Railway station were present. If so, involving them –at least for the arrest- would have been easy, since the prosecution would not have been under such a strain to produce them during the trial. The arrests and recoveries made, were not during unearthly hours. The prosecution’s failure to involve any member of the public, in the arrests or join them as public witnesses, to the recoveries made, has, in this Court’s opinion, been fatal to its case.

13. This court recalls that the burden of proving that the accused alone committed the crime, and that no one else was involved in it, is always upon the prosecution. The question of the accused having to explain incriminating circumstances arises only when all those are proved beyond reasonable doubt. In this case, the prosecution sought to present the court with a case based on direct eyewitness account. However, the eyewitness to the crime did not come forward and depose in court. Its attempt to set up an alternative case based on circumstantial evidence, never really “took off” because the so-called

incriminating circumstances, largely based on recoveries, were – as noticed earlier- from places, which by any account, would be deemed public, accessible to all. Although *ustras* were recovered, the mere fact that they were so recovered at the instance of the accused, when they were in police custody, does not give it much significance; the prosecution made no attempt to link these articles with the Appellants. Furthermore, motive – which assumes little or no importance in eyewitness based prosecution, has to be proved in cases based on circumstantial evidence. Here, the prosecution made no attempt to prove motive.

14. In view of the above discussion, we are of the opinion that the prosecution failed prove that the present Appellants were guilty for the offence of murder, and other offences, punishable under Section 302/201 and 120-B IPC. The impugned judgment cannot be sustained, as far as the present appellants are concerned. The appeals consequently succeed, and are allowed. The Appellants shall be released forthwith.

(S.RAVINDRA BHAT)
JUDGE

November 15, 2011

(PRATIBHA RANI)
JUDGE