

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

% Judgment delivered on 22.12.2011

+ **CRL.A No. 1091/2010 & CRL.M.B. No. 1918/2011**

DINESH KUMAR @ DINU ... Appellant

versus

STATE ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Anil Soni

For the Respondent : Mr Pawan Narang

AND

+ **CRL.A No. 1202/2011& CRL.M.B. No. 1693/2011**

NEERAJ @ VIPIN ... Appellant

versus

STATE ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sumer Kumar Sethi

For the Respondent : Mr Pawan Narang

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MS. JUSTICE VEENA BIRBAL

BADAR DURREZ AHMED (ORAL)

1. These matters were listed before us for consideration of the applications for suspension of sentence on behalf of the appellants Dinesh Kumar @ Dinu and

Neeraj @ Vipin. In the course of the arguments the learned counsel took us through the evidence on record. Inasmuch as the lower court record is available, they submitted that the appeals themselves could be heard and disposed of as a short point was involved. Consequently, we heard the appeals themselves.

2. The present appeals are directed against the judgment dated 05.06.2010 passed by the learned Additional Sessions Judge, Rohini Court, Delhi in sessions case No. 85/08, arising out of FIR No. 106/2008, registered at P.S. Saraswati Vihar, under section 302/468/471/34 IPC and sections 25/27 of the Arms Act, 1959. By virtue of the impugned judgment, the appellants were convicted under section 302/34 IPC as well as sections 25 and 27 of the Arms Act, 1959. The appellant Neeraj @ Vipin was also convicted under section 471 IPC.

3. The impugned order on sentence was passed on 09.06.2010 whereby the appellants were sentenced to life imprisonment along with a fine of ₹. 5000/- each in respect of the offence punishable under section 302 IPC read with 34 IPC and in default of the payment of fine, the appellants were required to undergo rigorous imprisonment (R.I.) for six months. The appellants were also sentenced to two years R.I. along with a fine of ₹. 1000/- each in respect of the offence punishable under section 25 of the Arms Act, 1959 and, in default thereof, to undergo R.I. for two months. The appellants were also sentenced to undergo two years R.I. with a fine of ₹. 1000/- each for the offence punishable under section 27 of the Arms Act, 1959 and, in default of the payment of fine, to undergo R.I. for two months. Additionally, the appellant Neeraj @ Vipin was also sentenced to R.I. of one year along with a fine of ₹. 1000/- for the offence punishable under section 471 IPC and

in default of payment of fine he was required to undergo R.I. for six months. All the sentences were to run concurrently.

4. The case of the prosecution is that on 28.02.2008 at about 1.46 AM information was received in Police Control Room that a person is lying unconscious by the side of the Railway Track, Near Shakur Basti Railway Station. The message was flashed. PCR van reached there. The police officers from PS Saraswati Vihar also reached the spot. The Ambulance also reached there. A person was found dead. He was identified as Manoj by Sh. Sukhdev Singh who had also arrived at the spot. Gunshot injuries were found on the dead body. Near the dead body, one quarter bottle of the liquor was found along with a packet of *namkeen*. A pair of slippers was also found. The identity of the deceased was also established from the documents found in the pocket of the deceased. During investigation, the son of the deceased stated that the deceased was seen with Neeraj @ Vipin on his scooter at about 8.30 PM. Neeraj was interrogated. His disclosure statement was recorded. At the instance of Neeraj, the co-accused Dinesh was also arrested. He also allegedly led to the recovery of a country made pistol with eight live cartridges and three empty shells. During the *post mortem* examination of the dead body, two bullets were recovered. Exhibits were sent to the Forensic Science Laboratory for analysis. The scooter on which the deceased was allegedly last seen accompanying the accused Neeraj was also recovered. The accused also allegedly led to the recovery of the Registration Certificate and number plate of the scooter.

5. After completion of the investigation, the charge sheet against the accused persons was filed in the court. The learned Metropolitan Magistrate after

complying with the provisions of Section 207 Cr. P.C. committed the case to the court of Sessions.

6. Before the Sessions Court, the accused Dinesh @ Dinu was charged for the offences punishable under Section 302 read with section 34 IPC and sections 25 and 27 of the Arms Act, 1959. Accused Neeraj was charged for the offences punishable under section 302 read with section 34 IPC and sections 25 and 27 of the Arms Act, 1959 and sections 468/471 IPC. The accused pleaded not guilty and claimed trial. The Prosecution, in order to prove its case against the accused persons examined 35 witnesses. Statements of both the accused persons were recorded under section 313 Cr.P.C. wherein they denied the entire case against them and stated that they had been falsely implicated. They, however, did not lead any evidence in their defence.

7. After hearing arguments, the learned Additional Sessions Judge passed the impugned judgment as also the impugned order on point of sentence. The learned counsel for the appellants submitted that the entire case against the appellants is based on the alleged circumstance of the victim Manoj being last seen in the company of the appellant Neeraj @ Vipin on a scooter at 8.30 p.m. on 27.2.2008. The learned counsel for the appellants submitted that no motive has been established by the prosecution. According to the learned counsel for the appellants the establishment of a motive in a case of circumstantial evidence is of vital significance, which is lacking in the present case. The learned counsel for the appellants also submitted that the alleged recovery of the country made pistol at the instance of both the accused is not free from doubt. According to the learned counsel for the appellants the two witnesses in support of the last seen theory were PW-5 Alka (wife of the deceased Manoj) and PW-6 Aditya (son of the deceased

Manoj). According to the learned counsel for the appellants, PW-5 Alka's testimony is clearly hearsay and insofar as the PW-6 Aditya is concerned his testimony has also been demolished in the cross examination where he has stated that the police had told him that the accused persons had murdered his father and further that police told him (*inko saza karani hai*) (*they have to be convicted and punished*). PW-6 Aditya, also stated that he had only seen Vipin. Our attention was also invited to the statement of PW-6 Aditya in his cross examination where he has stated that it was 'correct that before 12.03.2008 he did not tell the police that he had seen his father going with Neeraj @ Vipin'. Thus, it was submitted by the learned counsel for the appellants that the prosecution case which was based entirely on circumstantial evidence and that too on the last seen theory coupled with the alleged recovery has been completely demolished by the prosecution witnesses themselves. Coupled with this, the prosecution has not been able to bring before the court any motive as to why the appellants would have committed the murder of the deceased Manoj.

8. Mr Pavan Naranag, appearing on behalf of the State submitted that PW-6, Aditya in his examination-in-chief has categorically testified that on 27.02.2008 at about 8/8.15 p.m. he had seen his father going with Neeraj @ Vipin on the scooter, the number of which he could not remember. He identified Neeraj @ Vipin who was present in court and again stated that Neeraj @ Vipin was driving the scooter and his father was sitting on the pillion seat. Thus, according to Mr Pavan Narang the fact of the PW-6, Aditya having seen the appellant Neeraj @ Vipin in the company of his father at around 8.30 p.m. stand established. He also submitted that although PW-6, Aditya made the statement referred to by the counsel for the appellants, he also stated in his cross examination that although he did not tell the

police that prior to 12.3.2008 he had seen his father going with Neeraj @ Vipin, he had told this fact to his mother that his father was going with Neeraj @ Vipin. Thus, this reinforces the testimony of PW-5 Alka who stated that her son Aditya told her that he had seen Manoj leaving in the company of the appellant Neeraj @ Vipin on a scooter on 27.2.2008 at about 8.30 p.m. It was, therefore, contended by Mr Pavan Narang that the last seen theory has been established by the prosecution. He also supported the decision of the learned Additional Sessions Judge with regard to recovery of the country made pistol and submitted that the same cannot be faulted. He submitted that the trial court was correct in observing that from the expert opinion it was clear that the bullets which were found in the body of the deceased, were fired from the *katta* (Exhibit-P-4) which, according to the prosecution, the appellants had got recovered. He also supported the findings of the learned Additional Sessions Judge that it has been proved and established that it was Exhibit P-4 which was the weapon of offence with which the gun shots were fired on the deceased. Thus, according to Mr Pavan Narang who appeared on behalf of the State, there is no infirmity in the impugned judgment and therefore the order of conviction and the order on point of sentence ought not to be disturbed.

9. After considering the evidence in detail and going through the record we find that unless and until the last seen theory is established by the prosecution, the rest of the case cannot stand. We also note that the prosecution has not been able to establish any motive as to why the appellants would have committed the said offence. There does not appear to be any previous enmity. The deceased Manoj had voluntarily left in the company of the appellant Neeraj @ Vipin on 27.2.2008 at about 8.30 p.m. There is no indication that Manoj, even as per prosecution case, had been forced to accompany Neeraj @ Vipin.

10. We now come to the most crucial aspect of this case and that is that testimonies of the so-called last seen witnesses PW-5 Alka, and PW-6 Aditya. Insofar as PW-5 Alka is concerned it is apparent that she is not the person who had actually seen the deceased in the company of either of the appellants. She has only stated that her son told her that he had seen Manoj on the scooter which was driven by the appellant Neeraj @ Vipin. Insofar as PW-5 Alka is concerned her testimony with regard to the last seen theory has to be discarded inasmuch as it falls in the category of hearsay.

11. PW-6 Aditya, as we have already noted above, in his examination-in-chief has stated that on 27.2.2008 at about 8/8.15 p.m. he had seen his father going with Neeraj @ Vipin on the scooter. He however could not notice the number of the scooter due to the fact that it was dark. He also identified Neeraj @ Vipin who was present in court. He stated that Neeraj @ Vipin was driving the scooter and his father was sitting on the pillion seat.

12. In his cross examination he has stated that his statement was recorded by the investigating officer when the accused persons were arrested. Again in his cross examination he stated that it is correct that Neeraj @ Vipin was arrested on 12.03.2008 and that it was also correct that he was called to the police station by the police on 12.03.2008. From these statements, it can be easily inferred that his statement was recorded by the investigating officer for the first time on 12.03.2008. This in itself casts serious doubts on as to whether PW-6 Aditya had, at all, seen his father in the company of the appellant Neeraj @ Vipin on 27.02.2008. Had that been a fact, he would have immediately told the investigating officer. Even during

the identification of the dead body, nobody gave the name of Neeraj @ Vipin. We also feel that PW-6 Aditya may not have been in a position to identify the person who was driving the scooter inasmuch as he has admitted that it was dark and he could not read the number of the scooter. Another factor is that the driver of the scooter was wearing a helmet which also had a visor, though, according PW-6 Aditya the visor had been raised and he could not see his face. However, we find it difficult to believe that PW-6 Aditya had in fact identified the driver of the scooter as Neeraj @ Vipin because if he had done so, he would have told the same to the investigating officer at the earliest opportunity and at-least much prior to 12.3.2008.

13. However, what really makes us to discard the testimony of PW-6 Aditya is the following statement made by him during his cross examination:-

“It is correct that Neeraj was arrested on 12.03.2008. It is correct that I was called in the PS by the police on 12.03.2008. It is correct that police told me that the accused persons murdered my father. I had seen only Vipin in the PS. It is wrong to suggest that police told me as to what I have deposed in the court. Vol. Police told me “inko saja karani hai”. It is correct that before 12th March 2008, I did not tell police that I had seen my father going with Vipin.”

From the above answers elicited in cross-examination it is absolutely clear that PW-6, Aditya, has testified at the instance of the police and his evidence is certainly not reliable and a conviction cannot be based upon his testimony. We must also note that we are not dealing with the case of an eye witness account but with the case based on circumstantial evidence and that, too, on the basis of the “last seen” testimony of PW-6 Aditya, whom we found to be unreliable.

14. In a case of circumstantial evidence, the chain of circumstances has to be completed and even one link broken, the case against the accused falls to the ground. In this case we have already noticed that the 'last seen' evidence has not been established by the prosecution. As such, this link is broken and therefore the chain of circumstantial evidence is not complete. Even if we hold in favour of the prosecution that the recovery stands established, that by itself would not be sufficient to return a finding of guilt insofar as the appellants are concerned. We have already observed above that the prosecution has not made out any case with regard to the motive behind the alleged crime.

15. We also note that even the recovery of the country made pistol (Exhibit- P-4) with 8 live cartridges is also not free from doubt inasmuch as the testimonies of PW-12, HC Narender Singh, PW-26, SI Rajiv Ranjan and PW-33 Inspector Sanjay Sharma are at variance on material points. For instance, PW-12 HC Narender Singh stated that the investigating officer had dug out the said Exhibit-P-4. PW-26 Rajiv Ranjan, however, stated that he did not know who dug out the weapon of offence from beneath the earth. PW-33 Inspector Sanjay Sharma stated that staff dug out the weapon of offence. There is also a contradiction as to whether the accused were handcuffed or not. PW-12 HC Narender Singh stated that both the accused persons were in handcuffs, whereas, PW-26 Rajiv Ranjan stated that both the accused persons were not handcuffed. Furthermore, PW-12 HC Narender Singh stated that the recovery was affected from the bushes which were 3 to 4 feet in height. But, PW-33 Inspector Sanjay Sharma stated that it was found in an open space between the bushes. There are other similar contradictions between the

testimonies of recovery witnesses and it is for this reason we feel that the recovery itself is not free from doubt.

16. Considering all the aforesaid circumstances, we are of the view that the appellants ought to be given the benefit of doubt and therefore they are acquitted of the offences for which they have been charged in this case. The appeals are allowed. The impugned judgment and order on point of sentence are set aside. The appellants are in custody. They are directed to be released forthwith.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

DECEMBER 22,2011
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