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

+ CRIMINAL APPEAL No. 637/2012

Date of decision: 19th September, 2012

MOHD. ABU JARSA @ AFZAL SHAH @ RAMJANE ... Appellant

Through Mr. Ajay Verma, Advocate.

Versus

STATE

..... Respondent

Through Mr. Sanjay Lao, APP for the State.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J. (ORAL):

Appellant Mohd. Abu Jarsa, by the impugned judgment, has been convicted under Section 302 of the Indian Penal Code, 1860 (IPC) for murder of Mohd. Tabrej, in the night intervening 13th/14th December, 2009. He has been sentenced to life imprisonment and fine of Rs.5,000/- or in default of payment of fine, to further undergo rigorous imprisonment for one month.

2. Nadeem, who appeared as PW-4, stated that, on 14th December, 2009, he had made a call at No. 100, on seeing a body leaning from a rickshaw parked on the footpath of Mata Sundri Road. There were visible injuries on the head and forehead of the body. Blood had oozed

out from the person and also dispersed over the footpath. Homicidal death of the deceased, Mohd. Tabrej, is confirmed by Dr. Ankita Dey (PW-9), who had conducted the post mortem of the dead body on 15th December, 2009. According to the Post Mortem Report (Ex. PW-9/A), the body had ten external injuries. Upon internal examination of the scalp area, effusion of blood was seen over left side of the scalp layer. There was fracture of middle cranial fossa on the left side. Multiple fractures of petrous temporal bone were there on the left side. Fracture could also be seen on the posterior cranial fossa on the left side. As per PW-9, death was due to cranio cerebral damage ensuing blunt force impact on the head vide injury Nos. 1, 2 and 3. All injuries were ante mortem in nature and recent in duration. PW-9 had opined that time since death was approximately one day, i.e., 14th December, 2009.

3. Thus, homicidal death of Mohd. Tabrej is established and proved.

4. There is no eye witness in this case. To establish the case against the appellant, the prosecution primarily relies upon the alleged extra judicial confession made by the appellant, on telephone to Ranjeet Kumar (PW-16), in the presence of Ram Parvesh Chauhan (PW-1). Prosecution also relies upon the statement of Sunil Kumar (PW-17) to establish motive and application of “principle of last seen”. Recovery of the axel, the alleged weapon of offence, on the basis of disclosure

statement (Ex. PW 24/C) made by the appellant is another circumstance on which reliance is placed.

5. Sunil Kumar (PW-17) has stated that, in the night of 13th December, 2009 at about 9/9.30 P.M., he was present at his PCO shop opposite Mata Sundri Road. At about 9/9.30 P.M., both the appellant and the deceased had come there to purchase some items. At that time, an altercation took place on the issue of who would the shopkeeper attend to first. Other standing customers pacified both of them and they left the shop. PW-17 closed the shop at around 10 P.M. Next day, in the morning at about 9/10 A.M., he saw three cycle rickshaws parked across the road opposite his shop. Dead body of Mohd. Tabrej, in pool of blood, was on one rickshaw. He had injuries on his head. Thereafter, about one and a half month later, police brought the appellant at his shop for identification.

6. Statement of PW-17, mentioned above, does not truly establish, and cannot be regarded as, the evidence of last seen. It is delineated in the statement of PW-17 that both of the deceased and the appellant had left the shop, that is, they had gone their own way. He has not claimed that both of them, i.e., appellant and Mohd. Tabrej, were known to each other or had left the shop together. From the statement, it is only established that that there was a disagreement between the appellant and the deceased but the matter got pacified and that thereafter, two of

them went their own way. Thus, the deceased and the appellant went their own way after leaving the shop. There is no other witness to prove that, subsequent to leaving the shop, both deceased and accused had continued their altercation. PW-17 had stated that he closed the shop at 10 P.M., i.e., nearly half an hour after the alleged altercation between the deceased and the appellant. PW-17 had not seen them together, at any later point that night. In the morning, at about 8.30 A.M, the dead body was found on the cycle rickshaw, opposite the shop. It would seem that the deceased had gone away from the shop and then had come back to the cycle rickshaw, opposite the shop, where he suffered injuries and subsequently died. This is accentuated in the photographs. Prosecution case is not that dead body was brought from some other place and placed there, on the parked cycle rickshaw. There is no such evidence. As per the photographs placed on record (Exhibit PW10), the cycle rickshaw was duly chained, to prevent anyone from taking it away from the place in question. The deceased, it appears, had locked/chained the rickshaw and had gone to sleep or was sleeping on it. The deceased was attacked and had suffered injuries while he was on the rickshaw, in the night intervening 13th and 14th December, 2009, after 10 PM.

7. No other material has been put forth, other than statement of PW-17 quoted above, to establish and show the motive. It is difficult

to calibrate that a small disagreement, that had taken place and ended shortly, on intervention of other customers, was the impelling motive on the part of appellant to kill the deceased. There is no averment in the statement of PW-17 that the deceased and the appellant knew each other from before and antagonism, past enmity or illwill existed between them due to any quarrel or dispute. In the absence of said details, there is a grave doubt whether the quarrel, which as per PW-17, resolved was the motive for the murder.

8. Ram Parvesh Chauhan (PW-1) stated that he was working as a Munishi, in a godown at Okhla. According to him, the appellant came to the godown, on 14th December, 2009 at 7 A.M., and asked him to dial telephone number of Ranjeet from PW-1's mobile. PW-1 himself dialed Ranjeet's telephone. Since PW-1 had little balance on his phone, Ranjeet was asked to call back. Ranjeet called back PW-1 and immediately thereupon the appellant spoke to Ranjeet. In the presence of PW-1, appellant is alleged to have told Ranjeet that, following a quarrel previous night with a rickshaw puller, he had murdered the rickshaw puller, at Mata Sundri Road. Ranjeet (PW-16) had stated that he knew appellant as he was also a driver. On 14th December, 2009 he had received a call from Ram Parvesh Chaushan (PW-1) at about 7 A.M. Ram Parvesh Chauhan was a Munshi in a godown, where he was earlier working as a driver. Ram Parvesh Chauhan had called him

on 14th December, 2009 and had asked him to call back. He made a call on the telephone number of the Ranjeet, which was picked up by the appellant. The appellant told him that a quarrel had taken place between him and one Mohd. Tabrej, at Mata Sundri Road, and he had killed Tabrej. Thereafter PW-16 went to ply the vehicle.

9. The alleged extra judicial confession made by the appellant to PW-16, in the presence of PW-1, forms the substratum of prosecution case, against the appellant. In the present case, we find it difficult to accept and believe that the appellant would have made the extra judicial confession to PW-16 in the presence of PW-1, knowing that PW-1 would have heard the same. There are several reasons for the same.

10. PW-16 in the cross-examination had stated that the appellant had worked for him for about 5-6 months. He had stated that, after the telephone conversation, he continued to do his work and went to Noida, and the police came to him in the evening, at about 5.00 PM, to record his statement. Extra judicial confession is normally made to a person with whom one is closely associated and in whom one can have confidence. It may be also be made to a person from whom one may seek guidance, advice and help. No such evidence or material is on record. What is inextricable is PW-1's statement that appellant did not have any qualms about attempting a murder, and accepting and admitting of

PW-16, that too in presence of PW-1. Statement of PW-1 and PW-16 have treated and regarded the said alleged confession casually as if something normal had happened. Killing a person is a serious offence and everybody knows the consequences of committing such a crime. PW-1 had stated that the appellant had admitted, in front of him to PW-16, that he had committed murder of a rickshaw puller. Name of the rickshaw puller was not mentioned. PW-16, on the other hand, has not mentioned that the appellant had killed a rickshaw puller but has given the name of the said person as Talweej. It is also not understood why the appellant had gone all the way to Okhla to make a telephone call to PW16 from the mobile phone of PW-1. The address of PW-16 is recorded as Tokhar No. 6, Okhla, Jamia Nagar, Delhi, which is nearby to PW-1's place. The address of PW-1 is D-4, Abu Fazal Enclave, Mamia, Okhla, Delhi. In case the appellant wanted to have a private conversation with PW-16, he could have very well gone to his place, which is located in the same area. PW1 has not claimed or stated that the appellant had made any extra judicial confession to him separately in confidence. It is not the case of the prosecution of PW1 or PW16 that they thereafter met the appellant or spoke to him. The appellant either did not have a mobile or did not use his mobile for the said purpose. Neither PW-1 nor PW-16 reported the matter, immediately after appellant's conversation with PW-16, to the police. Neither did

they inform any third person about it. PW-1 had stated that his statement was recorded in the Police Station on 14th December, 2009 at 7 A.M. Immediately, thereafter he changed his stand and stated that he did not remember the time. PW16's statement under Section 161 Cr.P.C. was recorded on 14th December, 2009 in the evening. Inspector Naresh Khanka (PW-26) is the Investigating Officer. He has not delineated how and in what manner he had come across PW-1 and PW-16 and how did he reach them on the evening of 14th December, 2009. There is nothing on record to suggest that the telephone number of either PW-1 or PW-16 was found at the place of the occurrence, or was given to the Investigating Officer PW-26 by PW-17 or any of the witnesses. There is no chain or evidence/material to show, how PW-26 stumbled upon and reached PW-1 and PW-16, on the 14th December, 2009. No doubt, the prosecution has placed on record mobile phone details of PW-1 and PW-16 but this does not help the prosecution's case. Mobile phone details will only prove and establish that there was conversation between PW-1 and PW-16. This does not mean that the appellant had made any extra judicial confession to PW-16 or PW-1. This also does not prove and establish how and what led the police or PW-26 to reach PW-16 or PW-1 in the evening of 14th December, 2009.

11. Evidentiary value of the alleged extra judicial confession even

otherwise in the present case is minimal and weak. Keeping in view the questions and discrepancies mentioned above, it will not be safe to rely upon the alleged extra judicial confession and convict the appellant on this basis. Caution and care is required before extra judicial confession is accepted as a voluntary statement which was true and was made by the accused in a fit state of mind. Supreme Court in ***Sahadevan and Anr. v. State of Tamil Nadu*** 2012 (5) SCALE 415 has dealt with the evidentiary value of extra judicial confession in cases based on circumstantial evidence and held that:

“12. ...In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra judicial confession, the court has to examine the same with a greater degree of care and caution. It is a settled principle of criminal jurisprudence that extra judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

It laid down the following principles which would make an extra judicial confession a reliable and trustworthy piece of evidence capable of forming the basis of conviction of an accused:

22....The Principles:

(i) The extra judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

12. Last circumstance relates to recovery of the axel, alleged weapon of offence, which was used to cause the injuries. The appellant was arrested after 19 days on 4th January, 2010. PW-26, who is the Investigating Officer, has not stated that the appellant was absconding or could not be traced in his statement recorded in the Court. He has not indicated or stated what steps were taken to interrogate and arrest the appellant after statements of PW-1 and PW-16 were recorded under Section 161 CrPC, on 14th December, 2009. PW-17 has stated that his statement under Section 161 CrPC was recorded on 14th December, 2009. The recovery of the axel on 5th

January, 2010 allegedly on the basis of the disclosure statement, therefore, does not inspire confidence. The axel was allegedly recovered from a park inside the bushes. The axle in question is a rod of a rickshaw. As per the prosecution version, the appellant was a driver of a truck who was unemployed. The axle type cycle rickshaw rods are easily available in the market. As per the CFSL report blood was found on the axle, but blood group could not be ascertained. We are not inclined to accept the said recovery and the disclosure statement.

13. In view of the above, we feel that the prosecution has not been able to establish that the appellant is responsible and had given the injuries to the deceased in the night intervening 13th/14th December, 2009. The appellant is entitled to acquittal and the appeal succeeds. Conviction of the appellant and the sentence awarded to him are set aside. The appellant will be released unless he is required to be detained in any other case.

14. Copy of this order will be sent to the Jail Superintendent.

SANJIV KHANNA, J.

S.P. GARG, J.

SEPTEMBER 19, 2012
VKR