

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

RESERVED ON : 09.02.2012

DECIDED ON : 15.03.2012

+ **CRL.A. 772/2011, Crl. M. (Bail) 1092/2011**

BABLOO SHARMA & ANR.

..... Appellants

Through: Ms. Purnima Maheshwari, Advocate

versus

STATE

..... Respondent

Through: Ms. Richa Kapoor, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. The appellants – Babloo Sharma and Dinesh, challenge their conviction and sentence recorded by the Additional Sessions Judge, through judgment and order dated 23.03.2011 in S.C. No. 44/2009, for the offences punishable under Sections 120-B/201/364/302 IPC. They also challenge the order on sentence dated 25.03.2011 whereby they were sentenced to undergo rigorous imprisonment for life and also other prison terms, besides a direction to pay various amounts as fines.

2. The prosecution had alleged that the appellants and Bajrangi had taken away Rajan on 24.05.2002 at about 10.00 AM, promising to show him a movie. Rajan did not return; consequently his father intimated the police. The complaint was recorded as D.D. 12A (Ex.PW-35/C-11), on 25.05.2002. In this complaint, it was alleged that Babloo, Dinesh and Bajrangi had taken Rajan. Apparently, nothing was heard for the next few days. Thereafter, on 26.05.2002, the deceased's dead body was recovered at Loni; it was seen by PW-5, a property dealer, who had his office at Village Behta, Hajipur, Loni Border. On 27.05.2002, Rajan's brother, Gajender learnt about the recovery of the body. He went to the mortuary at Ghaziabad and identified the body as Rajan's. The prosecution case was that the accused were arrested in the end of July. After conclusion of investigation, they were charged with committing the offences. They pleaded not guilty and claimed trial.

3. During the trial, the prosecution relied on the testimonies of 39 witnesses and also several exhibits, including the documents produced, such as the CFSL report, the Postmortem Report, Seizure Memos etc. After considering all these materials, the Trial Court concluded that the appellants were guilty for the offences they were charged with and sentenced them in the manner prescribed previously.

4. Ms. Poornima Maheshwari, learned counsel for the appellants contended that the impugned judgment cannot be sustained. She highlighted that the entire prosecution story was based upon the "last seen" circumstance as well as the fact that the appellants had a previous quarrel with the

deceased. It was submitted that the testimony of PW-6 makes it clear that she only claimed that she had seen the deceased leaving the house with the accused. On the other hand, the other prosecution witness, i.e., the deceased's brother Gajender was clearly not an eyewitness to the circumstance of last seen. Similarly, the testimony of PW-6 reveals that she informed her father-in-law, PW-9 about the circumstances in which Rajan left the house. Her testimony clarifies that the father-in-law returned home in the evening of 24.05.2002. This was corroborated by PW-9 himself, who stated that his daughter-in-law told him that Rajan was taken-away by the accused. Learned counsel highlighted that the very first complaint, Ex.PW-35/C-11, i.e. the D.D. entry recorded by the concerned Police Station Loni, was silent about the fact that the deceased had been taken-away by the appellants in a TSR. It was submitted that the complaint, Ex. PW-35/C-11 was based on hearsay information because PW-9, who lodged it with the police had himself not seen the accused allegedly taking away the deceased.

5. Learned counsel argued that the testimony of PW-5 made it clear that the Delhi Police had in fact carried on investigations and had gone to his office to interrogate him within a few days of the recovery of the body, i.e. on 27.05.2002. Yet the police did not record any statement of the crucial prosecution witnesses, such as PWs- 3, 6 and 9. The investigations were carried out much later, towards the end of July, after the arrest of the accused. If in reality, the facts alleged by the prosecution were known by these witnesses, nothing prevented the police from recording the statements

at the earliest opportunity or within reasonable time of the said witnesses becoming aware that Rajan had died. Learned counsel underlined the fact that the testimonies of PWs-3, 6 and 9 made it clear that Rajan had been killed and they were made aware of it on 27.05.2002. In fact the body was handed over to the complainant and his family then. In these circumstances, the unexplained delay in recording the statements of the witnesses was fatal to the prosecution case.

6. Learned counsel also submitted that there is no evidence on the record to corroborate the prosecution allegation that accused had left their premises or were absconding. In fact the testimony of PW-3 established that the accused was kept in Police Station for 4-5 days.

7. Learned counsel argued that the testimonies of PWs-3, 6 and 9 are also full of contradictions and inconsistencies. PW-9 did not mention that he had seen the accused taking away the deceased. Similarly, PW-3 did not categorically or unambiguously depose anywhere that he saw the deceased and the accused leaving together or that the deceased was last seen with them. He admitted during the cross-examination that he was with his father, PW-9 when the first complaint was lodged, on 25.05.2002. Even though PW-3 stated that one of the accused had returned 2 ½ months after the incident, neither he nor his father nor his wife had deposed that the accused had left the premises because they had been suspected of the crime. Furthermore, the counsel emphasized that PW-3's testimony about Babloo going to his house, telephoning his wife and threatening that if they

informed the police, they would face dire consequence, was utterly improbable. No approximate date for such allegation was made. It was also argued that the testimony of PW-6 is inconsistent on this aspect because she did not mention anything about having received a telephone from Babloo. The prosecution case itself was that on 27.08.2002, Babloo visited their house and extended a threat, a fact which was not corroborated by PW-6 and had to be elicited in cross-examination by the prosecution with the permission of the Court.

8. It was argued that the most significant fact in this case is that all prosecution witnesses relied upon by the Trial Court to convict the appellants were related to the deceased. The testimonies of PW-s 3, 6, 9 and PW-5 proved that the deceased's body was recovered on 27.05.2002 and even handed-over to his relatives. Even at that stage, the deceased's close relatives, who deposed during the proceedings, did not voice any suspicion against the accused or even record any statement neither did the police record any statement under Section 161 Cr.PC. to this effect. That the Delhi Police was aware about these stands was proved by the testimony of PW-5, who deposed to being interrogated soon after the body was recovered. In these circumstances, the inordinate delay in recording the prosecution witnesses' statements under Section 161 Cr.PC is both unexplained and fatal.

9. The learned counsel urged that the prosecution theory about the accused having taken-away the deceased in a TSR bearing No. DL 1R F

9444, is unbelievable since PW-10, the registered owner deposed that she had given the TSR to Mohan Kumar two years before she testified in the Court. According to her deposition, Mohan Kumar used to give the TSR on rent to someone whom she did not know. She was permitted to be cross-examined by the learned APP; during that cross examination, she denied the suggestion that the TSR was purchased by Mohan Kumar. It was argued that further testimonies of Mohan Kumar and Mahesh Chand at the most proved that Mohan Kumar, PW-13, used to rent-out the TSR and Mahesh Chand (PW-12) had rented it out to one of the accused Dinesh in August 2002. Having regard to these circumstances, and the complete lack of any mention of the TSR in the complaint or in the recording of the surrounding circumstances in which the TSR was used by the accused to take away the deceased, the allegation about its recovery at the behest of the accused also could not be believed.

10. It was argued that there are other important and glaring lapses in the prosecution story. Learned counsel emphasized that during the investigation, some photographs appeared to have been taken, as is evident from the Ex. PW-35/C-13, recorded by the U.P. Police on 26.05.2002. Yet those photographs were not produced during the course of the trial. More importantly, argued counsel, the Postmortem in this case, conducted on 27.05.2002 at Ghaziabad mentioned that the body was that of 30 year old male. Further, all the prosecution witnesses stated that the deceased Rajan was 22 years old or so. The learned counsel also emphasized that the time

since death was 2-3 days, which too casts grave doubts about the prosecution version regarding the abduction and murder of Rajan.

11. Learned counsel lastly urged that the prosecution had a duty to prove all the circumstances conclusively and to further prove each link that binds all the circumstances. The counsel further urged that at the same time, the prosecution was under an obligation to satisfy the Court that all the circumstances linked together pointed only to the guilt of the accused and none else and further that every hypothesis consistent with the accused's innocence had been ruled-out. In the present case, urged counsel, the delay in recording the witnesses' statements, the inconsistencies between their versions; the failure to prove the last seen circumstance and the highly improbable motive for the crime, gravely undermined the prosecution case. In these circumstances, the impugned judgment could not have held the accused persons guilty for the offence they were charged with.

12. Learned APP urged that the Trial Court was justified in convicting the appellants since intimation about the disappearance of Rajan was given through the complaint at the earliest opportunity, i.e., on 25.05.2002 by PW-9. This complaint itself mentioned the names of all the three accused. The omission to mention the TSR or other details, could not, by itself constitute such an infirmity as to undermine the prosecution case. Learned counsel highlighted that in this case, the crime scene was in U.P. and in all probability that was the reason why the Delhi Police took some time in obtaining the papers and proceeding with the investigation. However, once

the statements of the witnesses were recorded, there was no inconsistency in their version as regards Rajan's disappearance, the facts pertaining to the recovery of his body and also the disappearance of accused soon after the crime. Learned APP argued that the recovery of the TSR was an important material circumstance. The overall effect of the testimonies of PWs-10, 12 and 13 was that the link between the TSR and one of the accused was established. This went a long way in corroborating the testimony of PW-6, who had in fact seen the deceased with all the accused. Thus the last seen circumstance spoken to by PW-6 had been proved beyond reasonable doubt. This factor, coupled with the appellants' lack of explanation as to why they were missing from their normal place of residence till their arrest in July 2002, proved beyond reasonable doubt that they and none else were responsible for the crime.

13. As far as motive was concerned, learned APP relied upon the testimonies of PW-3, 6 and 9 and submitted that the previous quarrel between the deceased and the accused had been recorded in DD-25A, Police Station Mansarover Park; it was produced and proved during the trial as Ex. PW-2/A. Learned APP also emphasized that the Trial Court had found another important circumstance, i.e. that the deceased's face was in a burnt condition; reliance was based upon Ex. PW-18/A, which described the condition of the body. The testimony of PW-8 clearly pointed to the fact that the accused had purchased a bottle of acid from his shop. This witness too was independent. Having regard to all these circumstances, and the limited

jurisdiction of the High Court in interfering with the findings of the Trial Courts in criminal cases, the conviction and sentence in this case do not call for any interference, according to the learned APP.

14. The above discussion would reveal that the crime in this case, took place on 24.05.2002 at about 10.00 AM, when the deceased was lured with the promise of being taken to a movie. He never came back alive. The deceased's father, PW-9 intimated to the police that Rajan, the deceased son had been taken away by the accused. That intimation had been recorded, and produced. Yet, the circumstances under which the deceased went with the accused, i.e. their promising to take him to a movie, and going in a TSR, subsequently developed during the trial, were not mentioned in the complaint. In this case, the FIR was registered on 26-05-2002 (Ex. PW-35/D). The relatives of the deceased were aware that his body was recovered; PW-3, the brother, applied for release of the body on 27-05-2002 (Ex. PW-35/DA). The statements of these relatives, however, narrating how the deceased had been taken away by the accused, in a TSR, with details of its registration number, etc, were recorded much later. PW-9's statement was recorded, under Section 161 Cr. PC, on 22-08-2002 (Ex. PW-9/DA). The statement of PW-6, similarly was recorded on 22-08-2002 (Ex. PW-6/DA). The prosecution case is that Babloo was arrested on 28-07-2002 (Ex. PW-7/B) while Dinesh and Sukhiram were arrested on 15-08-2002.

15. The question of delay in recording the statements of witnesses to a crime, has to be considered in the context of the facts of each given case.

Thus, in *Ganesh Bhawan Patel v State of Maharashtra* 1978 (4) SCC 371, it was held that:

“All the infirmities and flaws pointed out by the trial Court assumed importance, when considered in the light of the all-pervading circumstance that there was inordinate delay in recording Ravji’s statement (on the basis of which the “F.I.R.” was registered) and further delay in recording the statements of Welji, Pramila and Kuvarbai. This circumstance, looming large in the back-ground, inevitably leads to the conclusion, that the prosecution story was conceived and constructed after a good deal of deliberation and delay in a shady setting, highly redolent of doubt and suspicion.

48. This all-vitiating circumstance, we say so with great respect, could not be, and has not been, effectively dispelled by the High Court, except by a blind acceptance of the Ipse Dixit of Sub-Inspector Patil, on this point, in preference to the testimony of Ravji (PW 1) who was, according to the Prosecution, the Prime-mover of the gear...”

This aspect had been emphasized earlier by the Supreme Court, in the judgment reported as *Phoolchand v State of Rajasthan* 1976 (4) SCC 405.

16. The case of the Delhi Police appears from the testimony of PW-35, who deposed about the arrest made, under Section 41, Cr. PC, on 28-07-2002. He claims to have received papers connected with the dead body, the post-mortem examination of the body, and other documents from the UP Police, on 31-07-2002. In the meanwhile, the examination of PW-5 had been conducted by the Delhi Police, soon after discovery of the body, on 27-05-2002. Interestingly, PW-9 stated that his intimation DD-18/A (report Ex. PW-7/C) was recorded on 27-05-2002; however, the date appearing on that

document is 27-07-2002. In these circumstances, the unexplained delay in recording the witnesses' statement, reckoned from any time (2-1/2 months after the incident, and 3 weeks after the arrest of the accused) is serious, and casts grave doubt on the prosecution story.

17. The testimonies of PW-3 and PW-9, the brother and father of the deceased clearly reveal that they were not eyewitnesses to the "last seen" circumstance. Both admitted that they were informed about this circumstance, by PW-6, the daughter in law of PW-9 (and the wife of PW-3). According to PW-3, the accused had threatened his wife over telephone, sometime in July, 2002. However, PW-6, his wife, did not support that aspect. She instead mentioned – in her cross examination by the prosecution with permission of court, that Babloo had been arrested on 28-07-2002 after he had been overpowered by PW-3 and PW-9. These two variations are serious discrepancies. Apart from these, the prosecution story was that a quarrel had taken place between the deceased and the accused, on 19-02-2002, which led to a police complaint; that was proved, and marked in evidence as Ex. PW-2/A. If that were true, and the quarrel led to such violence as to lead to a police complaint, the whole theory about the deceased leaving with the accused, willingly is utterly improbable. Neither PW-3, nor PW-6 or for that matter, PW-9 mentioned during their deposition that the quarrel had been resolved, amicably between the disputing parties. In this background, the question of the deceased voluntarily leaving with the

accused, for seeing a movie would not arise. Further, this discrepancy also casts a doubt on the existence of motive, on the part of the accused.

18. There are several other unexplained loose ends, which the prosecution has not been able to satisfactorily explain. For instance, the post mortem report mentions the age of the deceased as 30 years; however, the testimonies of PW-3 and PW-9 reveal that he was younger, by about 10 years. The evidence also reveals that Babloo and Dinesh lived in the same building as PW-3, PW-6 and PW-9. None of them mentioned categorically that the accused had disappeared soon after the deceased went missing; indeed there is no evidence of such being the case, in any contemporaneous document or record produced during the trial. Furthermore, curiously, Dinesh and other accused were arrested one after the other, in the same neighbourhood, casting doubt as to whether they really had absconded, as contended by the prosecution. Even the circumstance of the accused having used a particular TSR, in the opinion of the court, was not proved. PW-10, the owner of the TSR, stated that she had given it to Mahesh, PW-13. The latter said that he used to rent it, and that sometime in August, 2002, the TSR had been rented out to Dinesh. This does not amount to proof of any circumstance, except that Dinesh had rented out the TSR, in August, 2002 – three months after the incident.

19. It has been held time and again that the last seen theory comes into play only when the time gap between the Appellant and the deceased being last seen together alive and the time of death is so small that the possibility

of anybody else being the author of the crime becomes impossible. (*State of U.P. v. Satish*, AIR 2005 SC 1000; *Malleshappa v. State of Karnataka*, AIR 2008 SC 69). It is not only the time gap but the close proximity of the place which is important. There may be cases when there is some time gap between the accused being seen in the deceased's company or in the deceased's house but there is lack of opportunity of anybody else going to the place where the accused and the deceased were alive together. In such cases, the accused is saddled with the responsibility to explain how and under what circumstances he parted company with the deceased. In this case, the deceased was seen at 10-00 AM on 24-05-2002; he was not heard again. Yet, apart from the testimony of PW-6, on this aspect, there is no other corroborative material. Her statement to the effect that the deceased left in a TSR, was recorded nearly 3 months after the first intimation. The TSR owner's deposition merely revealed that Dinesh had rented out the TSR in August 2002. The deceased had left fairly early in the morning. The prosecution therefore had a duty to prove that the deceased could not have had any occasion to interact with anyone else, and that it was the accused only who could have been with him, and they and none else could have committed the crime. Evidence proving such a high degree of probability – measuring almost to certainty was not led during the trial.

20. As observed earlier, the prosecution, wherever it rests its case on circumstantial evidence, has to prove each circumstance, and also to prove that the link between every circumstance is so strong that the possibility of

anyone other than the accused, being the perpetrator of the crime, is eliminated. Every hypothesis of the accused's innocence too has to be ruled out. In this case, the delayed recording of statements of prosecution witnesses, the contradiction between testimonies of key or crucial prosecution witnesses, the collapse of the motive put forward to support the prosecution, cast grave doubts and suspicions about the truth of its version. In these set of circumstances, it was unsafe for the Trial Court to have convicted the accused. The impugned judgment cannot, therefore, be sustained. It is set aside. For these reasons, the appeal has to succeed; it is allowed. The appellants shall be set at liberty immediately if not required in any other case.

Crl. A. 772/2011 is allowed in these terms. Order dasti.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

MARCH 15, 2012