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

DECIDED ON : 10.01.2012

+ CRL.A.815/2009

TINKU & ORS.

....Appellants

Through : Mr.A.J.Bhambhani, Advocate with
Mr.Elangbham Premjeet Singh and
Ms.Lakshita Sethi, Advocates for
Appellants.

versus

STATE

....Respondent

Through : Ms.Richa Kapoor, APP for the State.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P.GARG

S.P.Garg, J. (Open Court)

1. Appellants Tinku, Dharmender @ Jhoney and Nitin Yadav have challenged the judgment and order on sentence dated 04.08.2009 and 06.08.2009 respectively, passed by Ld. Addl. Sessions Judge whereby all of them were convicted for the commission of offence punishable under Section 302/34 IPC and were sentenced to undergo life imprisonment with fine of ₹ 3,000/- each. In brief, facts of the prosecution's case are as under :

2. On receipt of DD No.25 dated 11.08.2005, Police Post Sangam Park made a record, at about 6.05 P.M., on receiving such information from the PCR about an injured boy lying in front of A-8-45/46, Rana Pratap Bagh, Kabir Nagar, Peer Wali Kothi. When ASI Jai Prakash reached the spot, the PCR was already there and its members

were in the process of taking the injured to the hospital. ASI Jai Prakash deputed Ct. Balwan Singh to accompany the injured in that PCR van. The injured was admitted at Hindu Rao Hospital where he was declared “brought dead”. ASI Jai Prakash on reaching the hospital collected the MLC of the deceased Ramesh and made an endorsement on the copy of DD No.25 and sent the Rukka for registration of FIR.

3. On reaching the spot, Inspector Y.K.Sharma, SHO, P.S. Model Town recorded the statements of the concerned witnesses including that of Kishan Kumar brother of the deceased at about 11.00 P.M. On 13.08.2005, the appellant Dharmender was arrested at the bus stand in front of Gurudwara Nanak Piao at the instance of a secret informer. In pursuance of the disclosure statement made by him, a danda lying in the bushes near the spot was seized.

4. On 14.08.2005, a post-mortem of the deceased’s body was conducted. After the port-mortem, the dead body was released to the deceased’s legal heirs. On 18.08.2005, on the basis of secret information the accused Monu @ Ashok (facing trial before the juvenile court) was apprehended. On 01.09.2005 the appellant Tinku was arrested from his house and at his instance, a danda lying in a corner of the park at Rana Pratap Bagh was recovered, which was seized. Appellant Nitin Yadav was arrested on 22.04.2006 on the pointing out by a secret informer.

5. During investigation, the IO recorded the statements of the concerned witnesses at different stages of the investigation. After the completion of investigation the police filed a challan against the appellants for the commission of the offence punishable under Section 302/34 IPC in the Court of Ld. MM.

6. On appraisal of evidence adduced on record and considering the rival contentions of the parties, appellants were held guilty by the Trial Court and were sentenced to undergo imprisonment for life. Hence the appeal.

7. The learned counsel for the appellants has assailed the findings recorded by the Trial Court basing its conviction on the sole testimony of PW-4 Kishan Kumar, the brother of the deceased, whose presence at the spot at the time of occurrence of the event, the prosecution failed to establish. Ld. Counsel pointed out various inconsistencies, contradictions and improvements in the deposition of the prosecution witnesses. The counsel argued that the recoveries of weapons of offence are doubtful and no independent public witness was joined at any stage after the arrest of the appellants. No motive of the appellants to commit murder was established by the prosecution. Conduct of the PW-4 Kishan Kumar during the incident was described as ‘unnatural’.

8. Ld. Addl. PP for the State has justified the conviction recorded by the Trial Court, it is urged that PW-4 Kishan Kumar (the brother of the deceased) had witnessed the appellants beating the deceased Ramesh Kumar with lathies and dandas on the excuse that he (the deceased) used to tease Dharmender’s sister. When PW-4 Kishan Kumar attempted to intervene to save his brother, he was also threatened, and out of fear, he fled from the spot. No ulterior motive can be imputed to PW-4 Kishan Kumar to falsely implicate the appellants. The appellants had further led to the recovery of the weapons of offence in pursuance of their disclosure statements and there is nothing to disbelieve the positive testimonies of the prosecution witnesses.

9. We have considered the submissions of the Ld.Counsel for the parties and have scrutinized the evidence on record. PW-1 Gopal and PW-3 Sonu had found the injured Ramesh lying near the railway line at about 4.00 P.M. on 11.08.2005. As per their depositions before the Court, Ramesh was alive at that time and was crying. He had asked PW-3 Sonu to take him across the line. Both PW-1 Gopal and PW-3 Sonu had taken Ramesh outside the house of PW-2 Rani. She also testified that Ramesh was crying at that time. At about 5.00 P.M. or 5.30 P.M. she called her nephew Manoj who informed the police. On receiving this information from Manoj, the police from the PCR reached the spot and removed Ramesh to Hindu Rao Hospital where he was declared “brought dead”. Ramesh who was crying in pain before his removal to Hindu Rao Hospital did not name the assailant who had caused him injuries. Ramesh did not reveal to PW-1, PW-2 and PW-3 how and under what circumstances he had sustained injuries and who had caused them. He did not disclose if PW-4 Kishan Kumar was with him at the time of occurrence. He did not ask these prosecution witnesses to inform his relatives including PW-4 Kishan Kumar. When the rukka was sent for registration of the case by PW-20 ASI Jai Prakash at 9.30 P.M. on 11.08.2005, PW-4 Kishan Kumar was not in the picture. The rukka does not reveal the name of PW-4 Kishan Kumar. Rather, it records that no eye witness was found at the spot. Time of incident was also shown as “unknown”.

10. PW-4 Kishan Kumar subsequently claimed to have witnessed the occurrence, where the appellants along with Monu (facing trial before juvenile court) caused injuries to Ramesh on the pretext that Ramesh used to tease the appellant Dharmender’s sister. In his deposition before the

Court as PW-4, Kishan Kumar implicated the appellants for the commission of the offence. He elaborated that due to fear, he had run away from the spot. Thereafter, he had gone to the place of occurrence at about 6.30 P.M. and there he came to know that his brother Ramesh had been taken to a hospital by a PCR van. On reaching Hindu Rao Hospital, he could not trace his brother and returned to the spot, where the police met him and he narrated the whole incident to them at about 11.00 P.M.

11. On considering the entire prosecution case, we find that the presence of PW-4 Kishan Kumar along with his brother Ramesh at the time of incident has not been proved beyond reasonable doubt. PW-6 Tota Ram turned hostile and did not support the prosecution. He testified that one day during the summer of 2005 at about 2.00 P.M. he saw 8-10 boys playing cards under a tree near the railway tracks and they were arguing among themselves. Later, he came to know that one boy had been killed at that place. In the cross-examination of Ld. Addl. PP for the State, he denied having seen 5-6 boys beating Ramesh on 11.08.2005 at about 4.00 P.M. No suggestion was given to the witness in the cross-examination by Ld. Addl. PP for the State if at the time of alleged occurrence, PW-4 Kishan Kumar was present along with the deceased or that he had fled from the spot on being threatened by the assailants.

12. The conduct of PW-4 Kishan Kumar at the time of occurrence and subsequent to that, creates a doubt about his presence with the deceased at the time of incident. PW-4 Kishan Kumar did not sustain any injury at the hands of the assailants. He did not intervene to save his brother from the assailants. He did not raise any alarm. He failed to report the matter to the police. He did not bother to return to the spot soon after

the incident to take care of his injured brother and to move him to hospital to provide medical assistance. He remained missing from the scene for a sufficiently long time and allegedly visited the spot at 6.30 P.M. and on finding that Ramesh had been taken to the hospital, he reached there. During this period he did not inform the police. When he did not find his brother at Hindu Rao Hospital, he allegedly returned to the spot at 9.30 P.M. and narrated the incident to the police. This explanation given by PW-4 does not justify the delay in narrating this incident to the police. This unnatural and abnormal conduct of PW-4 Kishan Kumar, particularly since he is the brother of the deceased, creates doubt about the story presented by him. Had PW-4 Kishan Kumar witnessed the incident, his natural conduct would have been to intervene to save his brother or at least to raise an alarm and to inform the police. The conduct of PW-4, thus, is such that it renders the case of prosecution doubtful or incredible.

13. The post-mortem on the dead body of the deceased was conducted on 14.08.2005. PW-4 did not join any investigation during this period with the police when it was alleged that some of the appellants were arrested. None of the appellants were arrested at the pointing out of PW-4 Kishan Kumar. Admittedly, no application was ever moved by the police for conducting a test identification parade of any of the appellants on their arrest. No independent public witness was joined at the time of alleged arrest of the appellants and the recovery of the weapons at their instance.

14. In the cross-examination, PW-4 Kishan Kumar stated that he came to Delhi in 2001. Ramesh was unmarried and was living in Delhi for the last five years. However, in his cross-examination PW-5 Sonphi

Paswan his father stated that his son Kishan Kumar had come to Delhi 10-15 days prior to the occurrence and he was living with him in the village prior to that. Of course, he voluntarily added that he had also come to Delhi. On being further cross-examined he disclosed that prior to coming to Delhi (10 -15 days of the occurrence), PW-4 Kishan Kumar had been living with him in the village for about six months. PW-4 Kishan Kumar has not given any plausible explanation for his acquaintance with all the appellants and his ability to identify them by face and name.

15. The prosecution further failed to establish the alleged motive of the appellants to commit murder of the deceased. In the cross-examination, PW-4 Kishan Kumar admitted that none of the appellants had ever come to their jhuggi to complain about the deceased's conduct in teasing Dharmender's sister. No evidence was collected by the prosecution to show if the appellant Dharmender had any grievance against the deceased Ramesh for allegedly teasing his sister.

16. The recovery of weapons is of no consequence, in this case as there was no special mark of identification on the weapons. It did not contain any blood of the deceased. These weapons were never shown to the prosecution witnesses during their examination before the Court. They were also not shown to the doctor who conducted the post-mortem to ascertain if injuries found on the deceased were possible with those allegedly recovered weapons. These recoveries, in the absence of any independent public witness, including PW-4 Kishan Kumar, are doubtful. PW-6 Tota Ram did not testify in his deposition if any of the assailants playing cards was armed with any such weapon.

17. The incident had allegedly taken place when both the deceased Ramesh and PW-4 Kishan Kumar were returning to their jhuggi after finding no work on that day. The appellants, despite allegedly grievance against the deceased, were not expected to be armed with lathies and dandas at that time as they had no anticipation that the deceased would reach there at that time.

18. It is a fundamental maxim of criminal jurisprudence administered in this country that suspicions and conjectures are no substitute for proof. Suspicion by itself howsoever strong, is not sufficient to take the place of proof. In the absence of reliable evidence, it is unwise to act on mere suspicion.

19. The above discussion reveals that the prosecution failed to prove its case beyond reasonable doubt. The findings of the Trial Court basing its conviction on the sole testimony of PW-4 Kishan Kumar without corroboration cannot be sustained. The Trial Court failed to appreciate the evidence on record minutely and carefully.

20. The appeal filed by the appellants therefore has to succeed; it is allowed and the orders of conviction and sentence are set aside. The appellants shall be released forthwith, if not required in any other case.

(S.P.GARG)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

January 10, 2012/tr