

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

Date of decision: 24th July, 2013

+ **CRL.L.P. 148/2012**

STATE

..... Petitioner

Through: Ms. Richa Kapoor APP for the State.

versus

MADAN BISHWAS & ORS.

..... Respondents

Through: Mr. Raman Duggal, Adv. with
Respondents in person.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE G.P. MITTAL

J U D G M E N T

G. P. MITTAL J. (ORAL)

1. The State seeks leave to appeal against the judgment dated 30.08.2011 passed by the learned Additional Sessions Judge (ASJ), Saket New Delhi in Sessions Case No.24/2006 whereby the learned ASJ acquitted the respondents (accused before the trial court) of the charge for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (IPC).
2. According to the case of the prosecution DD No.5 (Ex.PW-9/A) was recorded at PP Madanpur Khadar to the effect that a person was lying unconscious on the slope at Kalandi Kunj, Jaitpur road, near Sukhpal Property Dealer. The DD was assigned to ASI Chaman Singh who along with Constable Virender reached the spot. The ASI noticed that a dead body was lying at the spot. Since there was no apparent mark of injury and no eye witness was available and there was none to disclose about the

identity of the deceased, the dead body was sent to AIIMS mortuary with a request to preserve the same for 72 hours. Crime team was also requisitioned at the spot.

3. Unaware of the death of his brother Kamal, Mukesh Kumar (PW-1) reached PS Sarita Vihar at 12:00 in the night of 16-17.10.2005 and informed that his brother had left for his duty to MCD office, Central Zone, Lajpat Nagar Delhi on 15.10.2005 at 10:00 A.M. in his Maruti car No.DL-6CC-2345 and that he had not returned. In the police report PW-1 did not raise any suspicion against any person. On 17.10.2005 Kamal's (deceased's) relatives gathered at PW-1 and Kamal's house. PW-1 along with some relatives visited the house of respondent Aneesh's in-laws. PW-1 met Aneesh's wife and one Taruk (Aneesh's brother in-law) (PW-6). Taruk took PW-1 to PP Madanpur Khadar where he (PW-1) was informed that his brother Kamal had died and his dead body had been recovered from Kalandi Kunj. He (PW-1) identified the photographs of the dead body. On 18.10.2005 PW-1 and one Shailender Kumar identified the dead body in the mortuary.
4. On 19.10.2005 PW-1 made a detailed statement (Ex.PW-1/B) and informed the police that respondent Aneesh, who used to live as a tenant in their house was friendly with his brother Kamal. About four months prior to the incident Kamal had caught Aneesh red handed while committing some theft in his shop. Aneesh was given beatings by Kamal on account of which Aneesh was nursing a grudge against Kamal. Later on Aneesh tendered an apology to Kamal and their relations became normal. PW-1 informed the police that on 15.10.2005 at about 9:00 A.M. Aneesh came to their house. Aneesh and Kamal left the house together in

Maruti car No.DL-6CC-2435 belonging to Kamal and they were also to attend some function at the house of Aneesh's in laws. At about 7:00 P.M. PW-1 called Kamal on his mobile phone and talked to Kamal as well as Aneesh. Aneesh told PW-1 that Kamal would return home in 1/1½ hours. Kamal did not return till late night. PW-1 again called Kamal, however, phone was switched off. On 16.10.2005 at about 3:00 P.M. PW-1 went to the house of Aneesh's in laws at J.J. Colony, Madanpur Khadar to inquire about Kamal. However, Kamal was not found there. Aneesh's wife informed PW-1 that Aneesh had also not returned.

5. According to the statement made by PW-1 to the police thereafter he lodged a missing report with the police. On 17.10.2005 while he was passing through Madanpur Khadar to inquire about his brother Kamal he came to know that a dead body had been found near Pushta Jaitpur. He went to the mortuary on 18.10.2005 and identified the dead body. He informed the police that since Aneesh had absconded there is a possibility that he may be involved in the conspiracy to kill his brother Kamal. On the basis of the statement Ex.PW-1/B given by PW-1 the present case was registered and investigation was carried out. During the course of investigation police met Taruk who took the police party to the house of respondent Madan Bishwas. Respondent Madan Bishwas was arrested. He (Madan Bishwas) allegedly pointed out the place of occurrence and got recovered a pair of shoes (belonging to the deceased Kamal) from the bushes near the place of incident.
6. Subsequently, on 16.1.2006 in pursuance of the disclosure statement Respondents Aneesh and Sanjeev were apprehended at Jalebi Chowk,

Madanpur Khadar. They also made disclosure statements. Respondent Aneesh got recovered Maruti car No. DL-6CC-2345 from the road near his house in the village near PS Rajpura, Distt. Badayun, U.P. The documents of the car were recovered from the house of respondent Aneesh in the village. In pursuance of his disclosure statement Ex.PW-1/H one mobile phone belonging to the deceased was got recovered by respondent Sanjeev.

7. On completion of the investigation a report under Section 173 of the Code of Criminal Procedure (the Code) was laid in the Court. On framing of a charge for the offence punishable under Section 302/34 IPC and in order to establish its case the prosecution examined 19 witnesses.
8. The prosecution case rests upon (i) the last seen evidence in the shape of testimonies of PWs 1,4,5,8 and 19; (ii) extra judicial confession made by respondent Madan Bishwas to PW-6; (iii) recovery of shoes belonging to the deceased Kamal at the instance of respondent Madan Bishwas in pursuance of the disclosure statement made by him; and (iv) recovery of car, mobile phone, its sim card and its documents at the instance of the respondent Aneesh and Sanjeev.
9. The trial court found that none of the circumstances have been established by the prosecution beyond reasonable doubt. The trial court observed that although PWs 4 and 5 were cited as witnesses in respect of last seen theory but they tried to project themselves as witnesses to the murder. The trial court disbelieved that they were witnesses to the infliction of any injury by the respondents on deceased Kamal. Having found that the case of the prosecution had not been proved beyond shadow of all reasonable doubt, the respondents were acquitted of the

charge framed against them.

10. The finding given by the trial court is extracted as under:-

“Extra Judicial Confession

8.0 Law regarding extra judicial confession is very well settled. The basis test to find extra judicial test is – whether the confession was primarily volunteered. If so, whether it is true or trustworthy.

x x x x x x x x

Similarly, in *Sanjay Vs. State*, 2009 (3) JCC 2337, it was *inter alia* held as under:

“Law is well settled. An extra judicial confession is on the face of it a weak piece of evidence and in the absence of corroboration on material particulars rule of caution demands that it should not be relied upon. Courts are reluctant in the absence of chain of cogent circumstances to rely on this piece of evidence for the purpose of recording conviction.”

x x x x x x x x

8.3 Now if we see the testimony of PW6 Taruq, he stated to have taken accused Madan Bishwas to PP Madan Pur Khadar on the same day when allegedly he (accused Madan) made extra judicial confession. Whereas, the case of the prosecution is that Madan Bishwas was arrested on 23.10.05 from his house. This itself *per se*, creates a doubt in the entire story put by prosecution. Taruq has shifted his stands from time to time. In the statement made before the police, he stated that on 16.10.05 Madan had come to his house and on being asked he told that he along with Sanjeev and Aneesh had committed murder of Kamal. In the examination on chief, this witness stated that when he met Madan Bishwas, he himself told him that he along with Sanjeev and Aneesh had killed Kamal. In the cross examination by Ld. Addl. PP, Taruq stated that firstly, Madan Bishwas came to him in the morning and told that Aneesh had taken away kamal and in the evening Madan

Bishwas told him that they had killed Kamal. During the cross examination by defence, Taruq stated that he met Madan Bishwas on 16.10.05 in the morning at his house.

It is also worthwhile to mention here that as per statement u/s. 161 Cr.P.C., Taruq had seen accused persons along with deceased, wherein as per statement made before the court, he had not met them. Thus, I consider that evidence regarding extra judicial confession allegedly made by accused Madan Bishwas to Taruq is not reliable at all.

In Kavita Vs. State of T.N., (1998) 6 SCC 108 at page 108, it was inter alia held as under:-

“4. There is no doubt that conviction can be based on extra judicial confession but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the witness to whom it is made. It may not be necessary that the actual words used by the accused must be given by the witness but it is for the court to decide on the acceptability of the evidence having regard to the credibility of the witnesses.”

It is also a settled law that normally a person makes an extra judicial confession to whom he repossess some faith. There is no special relationship between accused Madan Bishwas and Taruq which could have prompted Madan Bishwas to share his secret with him. Therefore, I consider that evidence regarding extra judicial confession is absolutely weak and is not reliable.”

“Last seen

x x x x x x x x

9.1 In the present case, last seen evidence has been sought to be proved by the prosecution by testimonies of PW1 Mukesh Kumar, PW4 Priyanka, PW5 Sakeena, PW6 Taruq, PW8 Yogender and PW19 Bharti.

PW1 Mukesh Kumar stated that Kamal had gone from the house along with Aneesh. PW6 Taruq in the statement made before the police stated that he had met the deceased along with accused

persons when they visited his house. PW8 Yogender stated that he had met the deceased along with accused persons during the evening hours when he was coming from Faridabad near Kalindi Kunj. PW4 Priyanka and PW5 Sakeena also stated that they have met deceased along with accused persons. PW19 Bharti stated that her husband had left the house with Aneesh in Maruti Car. At the outset, testimonies of PW4 Priyanka and PW5 Sakeena have been rejected by this court. PW6 Taruq when appeared in the witness box stated that he never met accused persons with deceased on 15.10.05. Now remains the testimonies of PW1 Mukesh, PW8 Yogender and PW19 Bharti. Testimonies of these witnesses also suffers from inherent contradictions.

9.2 The missing report was lodged by PW1 Mukesh in the intervening night of 16th / 17th October, 2005 vide DD No.36A, which has been proved as Ex.PW16/A. In this missing report, PW1 Mukesh told that his brother had gone on 15.10.05 at around 9 am to attend his office. Mukesh specifically stated that he do not suspect anybody. The statement of Mukesh regarding identification of dead body was also record on 17.10.05. In his statement also, PW1 Mukesh stated that his brother Kamal had gone on 15.10.05 in Maruti car for his duty at MCD office, Lajpat Nagar. In both these statements, PW1 Mukesh did not speak anything about involvement of accused Annesh.

9.3 PW8 Yogender also made himself unreliable for two reasons. Firstly, as per the case of prosecution, he met Kamal on 15.10.05 during evening hours and in his statement recorded before the court, he specifically stated that on 16.10.05 he had come to know from PW1 Mukesh and Kamal has not returned back. But his statement was recorded only on 24.10.05. If he had met deceased with accused persons on 15.10.05, what stopped him for informing this to the police. Secondly, PW8 stated on oath before this court that he told Mukesh Kumar that he had seen Kamal along with accused persons at 6 pm. He had accompanied Mukesh where he met Kamal and also went to Usman Pur for lodging a missing report. If Yogender was present along with Mukesh at the time of lodging of missing report, then whey he did not mention this fact in DD No.36-A (Ex.PW16/A). There is no explanation for the delay in recording his statement. It has come in the testimony of this witness that PW8 Yogender was relative of

deceased. He remained with the complainant party since beginning and the delay in recording the statement of this witness creates a doubt in the mind of court. Hence, testimony of PW8 Yogender does not inspire the confidence of this court.

Testimony of PW19 Bharti is also not reliable for the reason that here statement was also recorded on 27.10.05. She also stated that her husband Kamal left with Aneesh on 15.10.05 at 9 a.m. But this fact was not disclosed in the missing report.”

“Recovery of shoes

“ 10.1 In this case, two seizure memos of shoes have been prepared and PW20 Insp. Ashok Singh had guts to say during the cross examination that initially seizure memo Ex.PW13/B was prepared as PW1 Mukesh was standing at some distance and thereafter, another seizure memo was prepared. However, he lost the original of that seizure memo and only filed the photocopy of the same, which is Mark A. Is this not tainted investigation? Investigation Officer is preparing two seizure memos showing different witnesses.”

“Recovery of car

“11.0 Prosecution has sought to prove recovery of Car by testimony of PW8 Yogender, who initially turned hostile and during the cross examination by Ld. Addl. PP admitted that he had gone with the police in the area of PS Rajpura Distt. Badayun near the village of accused Aneesh from where a Maruti car being DL 6CC 2435 was recovered at the instance of accused Aneesh. The car was allegedly found parked on the road. I consider that this recovery cannot be attributed to accused nor does it complete the chain of circumstances. The recovery at the instance of Sanjeev is also doubtful and do not inspire confidence of the court. I consider that in view of the total contradictions in the case of prosecution, this part of the evidence also fails to prove the case of prosecution.”

11. Ms. Richa Kapoor, learned APP for the State urges that the reasoning given by the trial court for acquitting the respondents is based on

conjecture and surmises. There was sufficient circumstantial evidence in the shape of extra judicial confession; last seen evidence; recovery of shoes; recovery of car, etc. to hold the respondents guilty of the charge for the offence punishable under Section 302/34 IPC.

12. We are not impressed with the contention raised on behalf of the State. The evidence with regard to extra judicial confession was disbelieved as according to PW-6, who deposed about the extra judicial confession; immediately after respondent Madan Bishwas admitted his guilt on 16.10.2005, he was taken to the Police Station by him; whereas according to the prosecution respondent Madan Bishwas was arrested from his house only on 23.10.2005. The trial court noticed improvements as to how respondent Madan Bishwas had met him after the incident; the trial court further noted the contradictions made in the examination-in-chief and the cross-examination and observed that the extra judicial confession which is inherently a weak type of evidence, was not reliable. Thus, the extra judicial confession was rightly discarded.
13. With regard to last seen theory, the trial court observed that PW-1's silence about deceased Kamal leaving with accused Aneesh in the morning of 15.10.2005 while lodging a missing report on the night intervening 16-17.10.2005 created serious doubt in his testimony. Obviously, if PW-1 would have seen the deceased leaving with Respondent Aneesh and then talking to the deceased and respondent Kamal in the evening of 15.10.2005, he would have definitely made a mention thereof in the missing report. Testimony of PW-19 deceased's wife was also rejected for the same reason. PW-8 was disbelieved as if he would have come to know of deceased being missing from PW-1 on

16.10.2005 he would have informed him (PW-1) about seeing Aneesh and Kamal together on 15.10.2005. Again PW-1 would have mentioned this fact in the missing report lodged on the night intervening 16-17.10.2005. Moreover, the trial court discarded PW-8's testimony also on the ground that his statement under Section 161 Cr.P.C. was recorded after much delay, that is, on 24.10.2005. Testimony of PWs 4 and 5 with regard to last seen theory was rejected on account of wholesale improvements and contradictions on material points with which they were confronted during their cross examination.

14. Recovery of shoes at the instance of respondent Madan Bishwas is a classic case of fabrication of evidence by the investigating agency. The prosecution relied on seizure memo Ex.PW-13/B in respect of recovery of two shoes belonging to the deceased at the instance of respondent Madan Bishwas. PW-1 Mukesh, the deceased's brother is not a witness to this seizure memo. The respondent came in possession of another seizure memo Mark A which was also admitted by the IO, in which PW-1 Mukesh is a witness to the seizure of the two shoes. This kind of conduct of the police officers in fabricating evidence loses faith in the credibility of the investigating agency and pricks judicial conscience. We are of the opinion that to instil faith of the general public in the Delhi Police, it is desirable that action should be taken against the police officers who indulge in fabricating evidence or false prosecution. The Commissioner of Police is, therefore, directed to initiate necessary departmental action against Inspector Ashok Singh, the then Additional SHO, Police Station Sarita Vihar and the police officials who were attesting witnesses to the seizure memo Mark A, which somehow landed in the hands of the accused.

15. Recovery of car was found to be of no consequence as this was parked on an open road. Obviously, it is not discovery of any fact as envisaged under Section 27 of the Evidence Act. Similarly, the alleged recovery of the mobile phone at the instance of respondent Sanjeev is inconsequential in view of the fact that although as per prosecution version the deceased spoke to PW-1 on his mobile phone in the evening of 15.10.2005 but the call details of the deceased and PW1 were neither collected nor proved by the prosecution.
16. For the reasons stated above it cannot be said that the view taken by the trial court was not a legal view on the basis of evidence adduced. It is well settled that even when two views are possible the High Court would not interfere with the order of acquittal as the presumption of innocence is reinforced by an order of acquittal. In the instant case, there is no question of two views; rather there was only one view possible, that is, of acquittal which has been rightly taken by the trial court.
17. The Petition is devoid of any merit; the same is accordingly dismissed.
18. A copy of the judgment be transmitted to the Commissioner of Police for necessary action in view of observation made in para 14 of the judgment. Report shall be filed by the Commissioner of Police before the next date.
19. List for directions on 16.09.2013.

(G.P. MITTAL)
JUDGE

(G.S. SISTANI)
JUDGE

JULY 24, 2013/vk