

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on: 16.12.2013
Judgment delivered on: 20.12.2013

+ CRL.A. 861/2008

SHAILESH KUMAR YADAV

..... Appellant

Through: Mr.Ajay Verma and Mr.Shiv
Kumar Diwedi, Advocates.

versus

STATE

..... Respondent

Through: Mr.Sunil Sharma, APP.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

For orders see Crl. A. No.526/2008.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

DECEMBER 20, 2013

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+ CRL.A. 526/2008
RAJBIR Appellant
Through: Mr.Ashok Kumar Gehlot, Adv.

versus
STATE Respondent
Through: Mr.Sunil Sharma, APP.

+ CRL.A. 861/2008
SHAILESH KUMAR YADAV Appellant
Through: Mr.Ajay Verma and Mr.Shiv Kumar Diwedi, Advocates.

versus
STATE Respondent
Through: Mr.Sunil Sharma, APP.

+ CRL.A. 70/2009
ASHOK KUMAR Appellant
Through: Mr.Bhupesh Narula and Mr.Yash Tandon, Advocates.

versus
STATE Respondent
Through: Mr.Sunil Sharma, APP.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. The appellants are aggrieved by the impugned judgment and order

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of sentence dated 16.5.2008 and 24.5.2008 whereby accused Ashok Kumar and Shailesh Kumar Yadav had been convicted under Sections 302/365/201 read with Section 120-B as also under Section 396 of the IPC. For the aforementioned convictions the accused were sentenced to undergo imprisonment for life which was the maximum term of imprisonment for all the aforementioned offences; cumulative fine of Rs.3000/- had also been ordered against each of the two appellants for the said offence and in default of payment of fine each appellant had to undergo rigorous imprisonment for six months. Accused Udai Pandey and Rajbir had been convicted for the offence under Section 412 of the IPC. They had both been sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.1000/- in default of payment of fine to undergo simple imprisonment for a period of one month. Udai Pandey had already undergone the sentence which had been imposed upon him. Ashok Kumar, Shailesh and Rajbir are thus the appellants before this Court in the present three appeals.

2 The version of the prosecution is that on the intervening night of 08.3.2002 a truck (bearing no.DL-1GA 6654) owned by Dharmender Mishra Kumar (PW-12) was loaded with metal/iron goods from a

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Container Depot at Okhla, Phase-II. The goods were to be transported to Mandoli godown of Chander Mohan (PW-1). Ramphal (deceased) was an employee of PW-1. Accused Ashok was the driver of the truck. Jamuna (co-accused since declared a proclaimed offender) was the cleaner of the truck. Accused Shailesh had tied the rope on the goods which were loaded in the truck. After the truck had been loaded it was taken to Dyala Ka Dharam Kanta, Okhla Phase-II for weighing the goods. The truck did not reach its destination. On the following day it was found abandoned near the Manju Ka Tila. No person was found in the truck. Truck was in a working condition; 13-14 jute bags containing 500-600 kg of metal scrap were found missing.

3 Efforts were made to trace the driver, cleaner and the helper of the truck. It is not in dispute that the truck had thereafter been taken back by PW-12 and the remaining goods which had been found in the truck belonging to PW-1 had been unloaded by him.

4 On 20.6.2002 (3-½ months after the incident) a complaint was lodged by PW-1. It was to the effect that the truck of PW-12 containing metal scrap belonging to PW-1 and driven by Ashok on 08.03.2002 had not reached its destination; the truck was later found abandoned near

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Hanuman Mandir, Chandagi Ram Akhara; a large amount of metal scrap was found missing. The driver, cleaner and the helper were not found in the truck. Employee of PW-1 namely Ramphal was also missing. In spite of inquiry, none could be traced.

5 It was on this complaint (Ex.PW-1/A) that the rukka (Ex.PW-5/A) was dispatched on the same day in the afternoon at 2.10 p.m. FIR under Sections 365/407/34 IPC (Ex.PW-8/A) was accordingly registered. The rukka had not named accused Shailesh. It was in the statement of Mangal Sharma (PW-2) another driver on another truck in the Container Depot (which statement was recorded on 20.6.2012) that the name of Shailesh had surfaced; he had tied ropes on the goods which were loaded into the truck of PW-12. Further version of PW-2 being that he had last seen the deceased Ramphal in the company of driver Ashok and Shailesh at the time when they were loading the goods in the truck.

6 Pursuant to the aforementioned statement of PW-2, accused Shailesh was arrested on the same day i.e. on 20.6.2002. His disclosure statement (Ex.PW-1/C) was recorded. The role of Asif Ali and Udai Pandey was revealed. It was to the effect that both the aforementioned persons along with the other co-accused had committed the murder of Ramphal and his

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dead body was thrown in the ganda nala. Shailesh, Asif Ali and Udai Pandey were arrested on the same day i.e. on 20.6.2002 from the koyala siding at Okhla Phase-II vide memo Ex. PW-2/E, 2/F and 2/G respectively. They disclosed that they had killed Ramphal and thrown his body in a canal at Kalindi Kunj.

7 The dead body was admittedly not recovered. As per the version of the investigating officer SI Satish Kumar (PW-13) the SHO of police station Sarita Vihar in the course of inquiry had confirmed that a dead body had been found around that period which was unidentified; photograph and the clothes of the dead body had been preserved. The brother of the deceased Ashok Kumar (PW-11) was asked to identify from the photograph and clothes as to whether this dead body was of Ramphal but he was unable to do so.

8 Pursuant to the disclosure statement of accused Udai Pandey (Ex.PW-1/D) on 22.6.2002 he led the police party to a shop at Chara Mandi Jakhira. This was in the early morning hours at 5.00 a.m. Rajbir who was the owner of the shop was apprehended. He was interrogated and on 23.06.2002 his disclosure statement (Ex.PW-1/H) was recorded. He disclosed that he had purchased certain articles from Udai Pandey.

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which were worth Rs.74,000/- but he had purchased the items for Rs.36,000/-. Pursuant thereto from the search of the shop and on the identification of PW-1 a bora (bag) containing scrap material was seized vide memo Ex. PW-1/H. This case property was deposited in the Malkhana.

9 Scaled site plan Ex.PW-13/A was prepared.

10 This was the sum total of the evidence collected by the prosecution.

11 In the statement of the accused persons recorded under Section 313 of the Cr.P.C. they pleaded innocence. Rajbir in his version under Section 313 Cr.P.C. also pleaded innocence. Submission being that no recovery had been effected from his shop; this is a case of false implication.

12 No evidence was led in defence.

13 On behalf of the accused arguments have been addressed at length. On behalf of accused Ashok arguments have been addressed by Counsel Mr.Bupesh Narula, Advocate; Mr.Ajay Verma addressed arguments on behalf of accused Shailesh. Mr.Ashok Kumar Gehlot has addressed arguments on behalf of the accused Rajbir. It is pointed out
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that the evidence qua accused Ashok and Shailesh is only the circumstance of last seen which is shaky as is evident from the version of PW-2; he had admitted that he could not say whether Ramphal had accompanied Ashok in the truck; PW-2 had in fact gone off to sleep at 11:00 pm and what transpired after that was not in his knowledge. Even otherwise the circumstance of 'last seen' by itself would not be sufficient to sustain a conviction. Motive for the crime is wiped out in view of the clear finding that only 13-14 jute bags were missing; had it been a case of planned dacoity, the entire metal scrap would have been stolen which was admittedly not so. On all counts, the accused Ashok and Shailesh are entitled to a benefit of doubt and a consequent acquittal. Qua accused Rajbir, it is pointed out that when admittedly there were tea shops in the surrounding area why no public witness was joined has not been explained; the case property which was admittedly sealed was in an open condition when exhibited. Recovery qua this version is clearly doubtful. Accused Rajbir is also entitled to a benefit of doubt and a consequent acquittal.

14 Arguments have been refuted by the learned public prosecutor. It is pointed out that the judgment of the trial Court does not suffer from

any infirmity. All the links in the chain of circumstances qua all the accused persons stand complete.

15 We have heard the arguments of learned counsels for the parties and perused the record.

16 This is admittedly a case of circumstantial evidence. There is no eye-witness. Law on circumstantial evidence is clear; unless and until all the links in the chain of circumstances are complete a conviction cannot be founded.

17 In 2010 (2) SCC 583 Aftab Ahmad Anasari v. State of Uttaranchal etc. the Hon'ble Apex Court has made the following observations:-

"In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such

as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court."

18 The circumstances which have been alleged and sought to be proved by the prosecution against the appellants Ashok Kumar and Shailesh are to the following effect:

- i. Ashok Kumar was the driver of the truck which was owned by PW-12. This truck was loaded with jute bags containing valuable scrap material which scrap belonged to PW-1 and had to be transported from the Container Depot of Okhla Industrial Area to his office. The cleaner of the truck Jamuna was not traceable; he had been declared proclaimed offender. The helper was also not traceable.
- ii. The role attributed to Shailesh is that he was tying a rope on the jute bags containing the metal scrap while loading it into the truck owned by PW-12.

19 Against both the appellants Ashok Kumar and Shailesh PW-2 (Mangal Sharma) is a witness to the last seen. This circumstance of last

seen has been alleged against both the accused and as per the prosecution this circumstance is evident from the version of PW-2.

20 PW-2 was the owner of another truck which was also parked at the Container Depot, Okhla, Phase-II. On 08.3.2002. PW-2 was also loading goods in his truck. He had to go to Mandoli for the delivery of the goods. It was in his presence that the truck owned by PW-12 was also being loaded with metal scrap. Ashok Kumar was the driver of the truck and Jamuna (proclaimed offender) was his cleaner. The goods belonged to Chander Mohan (PW-1) and Ramphal @ Guddu (the deceased) was the representative of PW-1. Appellant Ashok Kumar and PW-2 were to leave the Container Depot together. Further version of PW-2 being that he had lastly seen the truck of PW-12 at about 11.00 p.m.; Ashok Kumar was present there; so also Shailesh who was tying the goods with a rope. Thereafter he slept and woke up the following morning at 4.00 a.m.; by that time the truck had already left the premises. In one part of his cross-examination he admitted that he cannot tell if Ramphal accompanied the appellant Ashok in his truck or not.

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21 Trial Judge has relied upon his testimony to establish the circumstance of last seen.

22 It appears that the trial judge has ignored vital parts in the version of PW-2. Testimony of a witness has to be read as a whole. This court also notes that this incident had been reported 3½ months after its occurrence. That apart even in examination-in-chief itself PW-2 had stated that he had seen the accused persons and the deceased in the company of one another at 11.00 p.m. on the night of 08.3.2002 and after that he had gone off to sleep. The deceased was a representative of PW-1 and he had come to supervise the loading of the goods of PW-1 for transportation from the Container Depot to Mandoli. From this version it cannot be gathered that Ramphal had accompanied Ashok Kumar in his truck. Ramphal only having come to the site in a supervisor capacity was not in natural course required to accompany the truck. So also Shailesh. Shailesh was neither a helper and nor a cleaner of the truck. His role (as assigned by PW-2) was only of tying the rope on the loaded goods. As per this version once this role was over there was no question of Shailesh accompanying the truck which was not his job; his job only being to see that the goods had been loaded; his role

ended on the loading of the goods. He also, in natural course, was not required to accompany the truck. This part of the testimony of PW-2 wherein PW-2 admitted that he cannot tell if Ramphal accompanied accused Ashok in his truck or not has also been given a go-bye.

23 This is in fact the only circumstance relied upon by the prosecution qua the role of accused persons.

24 Learned trial judge has entered into an arena of imagination. Admittedly PW-2 had gone off to sleep after 11.00 p.m.; he woke up at 4.00 a.m. when the truck of PW-1 had already left. How in these circumstances could it be presumed that Ramphal and Shailesh who were both otherwise unrelated to the truck had accompanied the driver Ashok Kumar and travelled in the truck. There was nothing to show that either Ramphal or Shailesh had accompanied Ashok in the truck.

25 In view of this version of PW-2 and as has been discussed supra this circumstance of last seen relied upon by the trial Judge is liable to be discarded. Evidence of PW-2 does not establish any such circumstance against either accused Ashok Kumar or accused Shailesh. This circumstance qua both the accused is necessarily to be rejected.

Apart from this circumstance there is no other circumstance available with the prosecution against accused Ashok Kumar and Shailesh.

26 The incident had admittedly occurred on 08.3.2002. It was not reported for almost 3½ months. The complaint was made by PW-1 (employer of the deceased) on 20.6.2002. An attempt has been made by the prosecution to show that Ex.PW-11/DA was a complaint which had been lodged by PW-11 as early as 09.3.2002 i.e. one day after the incident and had been submitted to the Chowki In-charge duly signed by his employer. A perusal of Ex.PW-11/DA does not advance this submission. It admittedly does not bear the signature or thumb impression of PW-11. That apart Ex.PW-11/DA (which is a photocopy of a document) also does not show that it has been received by the Chowki In-charge; there is no such endorsement or seal. Reliance by the trial judge on this complaint is also an illegality.

27 Dead body of the victim was not recovered. There is no doubt to the proposition that even in the absence of the recovery of the corpus delicti the offence of murder may be established if there are other connecting pieces of evidence. As noted supra a dead body around the same date i.e. 08.3.2002 had been recovered which had remained

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unidentified. The photograph of the dead body had been shown to the brother of the deceased (PW-11) but he had failed to identify this dead body as that of his brother. This court is thus unaware as to whether Ramphal had actually died or is still alive.

28 The truck was found lying abandoned on the following day i.e. 09.03.2002. As per the rukka (Ex.PW-1/A) some scrap material had been found missing from the truck. This material belonged to PW-1. As noted supra up to 20.6.2002 no complaint had been lodged by PW-1 of these missing articles. Complaint had been lodged 3½ months later. Ex.PW-1/1 is a consignment note of the Rajdhani Freight Carrier; this document reflects the actual amount of scrap which was loaded in the truck on the fateful night was 8690 kg. As per the deposition of PW-1 on checking the truck, on the following day 13-14 bags of scrap were found short which contained 500-600 kg metal. This was out of a total 8690 kg. Even presuming 600 kg were missing out of 8690 kg, the balance quantity would be 8090 kg which was still in the truck. Possibility of dacoity for the purpose of taking away this valuable material goods as sought to be set up by the prosecution clearly becomes doubtful; if this was the motive on the part of the accused they would

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not have been satisfied with 500-600 kg alone when the total weight in the truck was 14 times more. The possibility that the truck had met with an accident and had fallen into the bushes cannot be ruled out.

29 Not even a single link in the chain of the circumstances qua either of the two accused persons stands established. Both of them are entitled to benefit of doubt and a consequent acquittal. Accused Ashok Kumar and Shailesh are accordingly acquitted. Accused Ashok Kumar is in judicial custody; he be released forthwith if not required in any other case. Accused Shailesh is on bail; his surety bond is cancelled and surety stands discharged.

30 Qua accused Rajbir also there is no evidence. He has been charged and convicted for the offence under Section 412 of the IPC. He was purported to be a receiver of stolen property; this property which had been sold by the accused persons to him and which he had purchased for Rs.36000/- although its worth was about 74,000/-. Recovery from Rajbir had been effected on 23.06.2002 from his shop in the early morning hours. It was a recovery of a gunny bag containing certain metal scrap; this metal scrap was seized vide memo Ex. PW-1/H.

The recovery memo was attested by PW-1 and by PW-7 (constable
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Ashok Kumar). The disclosure statement of Rajbir (not to be read in evidence) has revealed that this material was purchased by him on 09.3.2002. He had purchased 14 such bags for Rs.36000/- out of which 13 bags had been sold and this bag alone remained.

31 PW-7 admitted that at the time when the recovery was made tea shops were open but no public witness had joined this recovery; he admitted that the bag recovered from the shop was bearing No.PCM/9; it was sealed with the seal of 'SK'; the bag when exhibited in court admittedly did not have either the number or the seal. This admission by PW-7 is by itself sufficient to demolish this recovery. That apart PW-1 has given a still contrary version. His version in his examination-in-chief is that accused Ashok had got recovered a bag of metal from his possession. In a later part of his version he has stated that this recovery had been effected from Rajbir. The learned public prosecutor did not cross-examine the witness on this irreconcilable statement. There were admittedly no marks of identification on this goods. Description of the stolen goods was also nowhere given by PW-1.

32 This recovery is not only doubtful but clearly suspicious.

Accused Ra bir is also entitled to a benefit of doubt and a consequent acquittal. He is on bail. His bail bond is cancelled; surety discharged.

33 Appeals are allowed in the above terms and disposed of accordingly.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

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