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

% *Date of Decision: July 14, 2014*

+ **CRL.A.54/2014**

SHANKAR REKWAL Appellant
Represented by: Mr.Avi Singh, Advocate

versus

STATE Respondent
Represented by: Mr.Varun Goswami, APP with SI
Rajesh Kumar P.S. Raja Garden

CRL.A.319/2014

LALLAN KUMAR CHAUDHARY Appellant
Represented by: Mr.U.M.Tripathi, Advocate

versus

STATE Respondent
Represented by: Mr.Varun Goswami, APP with SI
Rajesh Kumar P.S. Rajouri Garden

CRL.A.512/2014

AJAY @ RAMNATH Appellant
Represented by: Mr.Chetan Lokur, Advocate

versus

STATE Respondent
Represented by: Mr.Varun Goswami, APP with SI
Rajesh Kumar P.S. Rajouri Garden

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. It is the case of the prosecution that in furtherance of a common intention to cause the death of Shree Kishan, on the intervening night of February 24th and 25th, 2010 the appellants murdered Shree Kishan at an unknown time at Priyadarshani Park, Rajouri Garden Delhi under the jurisdiction of PS Rajouri Garden thereby committing an offence punishable under Section 302/34 IPC. It is the further case of the prosecution that in furtherance of the common intention the appellants dishonestly misappropriated movable property belonging to Shree Kishan comprising mobile phone with cover and a diary and thereby committing an offence punishable under Section 404/34 IPC.

2. Holding the appellants guilty of the two indictments for which the appellants were sent for trial, vide impugned decision dated September 27, 2013, the learned Trial Judge has succinctly summed up the incriminating evidence in the concluding paragraph (No.25) of the decision. Since in appeal we are re-charting the journey navigated by the learned Trial Judge, it would be apposite if we note the light-houses and the signages noted by the learned Trial Judge while navigating the journey and thereafter reconsider the evidence, as the Appellate Court ought to do, to see whether what was apparently seen as a light-house by the learned Trial Judge was actually a light-house or was it a mirage. Para 25 of the decision dated September 27, 2013 reads as under:-

“25. In this case vide aforesaid disclosure statement of

accused Lallan it appears that motive of accused Lallan Kumar Choudhary was to take revenge from the deceased on account of his belief that his son might have suffered death due to black magic by deceased. Although, the disclosure statement implicating the accused is not admissible in law but the fact discovered in pursuance of the disclosure statement is admissible. In the present case consequent upon the disclosure statement the recovery of knife has established vide depositions of PW-17 IO Insp.Shankar Lal, PW-16 Ct.Dharmender, PW-7 SI Ram Gopal; PW-3 Dharmender (helper in Bharadwaj Shuttering Company) vide seizure memo Ex.PW-7/M and vide deposition of PW-9 Dr.Sushil Kumar Chaurasia who opined that injuries could have been possibly by the recovered knife, in this regard vide his report Ex.PW-9/B. This directly gives and inference that at the instance of accused Lallan Kumar Choudhary all the accused persons committed murder of deceased Shree Kishan. Apart from this, the crucial aspect of this case are that the deceased was seen in the company of accused persons on 24.02.2010 vide depositions of PW-4 Sunita (daughter of deceased) and PW-5 Smt.Mona (wife of deceased) and PW-11 Rakesh (friend of accused persons). PW-4 Sunita in her deposition has testified that deceased was seen lastly in the company of accused persons while taking liquor together at around 9 p.m. on 24.02.2010. As per deposition of PW-5 Smt.Mona, she left the deceased to go with accused Shankar and other accused persons for a party when accused persons met her at Mayapuri Chowk. PW-11 Rakesh has also confirmed the fact that he was present in the company of accused persons and deceased Shree Kishan on the day of incident. He left them lastly at around 8.30 p.m. or 9 p.m. on 24.02.2010. Thereafter, dead body of deceased was found in the Priyadarshni Park, near Mayapuri Chowk on 25.02.2010 at 7 A.M. vide deposition of PW-17 Insp.Shankar Lal and to this effect the site plan has also been got exhibited vide Ex.PW-17/B. Post-mortem was conducted on the dead body of deceased on 26.02.2010 at 1:00 p.m. and it has come on record that death took place prior to 38 hours vide PM Ex.PW-9/A. Thereafter, two accused persons namely Lallan and Shankar

were arrested on the tip of secret information on 02.03.2010. Thereafter, on 15.04.2010 accused Ajay was also arrested on the secret informer and knife was got recovered from a sewer near Mayapuri Chowk at the instance of accused Ajay vide seizure memo Ex.PW-7/M and sketch of the same as Ex.PW-7/L. Moreover, as per deposition of PW-9 Dr.Sushil Kumar Chaurasia who conducted post-mortem on the dead body of deceased vide post-mortem report Ex.PW-9/A and as per his deposition deceased suffered two deep injuries one on his neck and other on his chest piercing to lungs and cause of death was that injuries were sufficient to cause the death of deceased. It has also been opined that these injuries could have been possible by the recovered knife, vide his report Ex.PW-9/B. Besides, accused persons namely Lallan Kumar Chaudhary and Shankar Rekhwal made their disclosure statement Ex.PW-7/A and B and they have pointed out the place of occurrence i.e. Priyadarshani Park vide pointing out memo as Ex.PW-7/C and subsequent to the disclosure statement they got recovered one pocket diary and one mobile cover from Priyadarshani Park, Mayapuri Chowk from one corner towards Rajouri Garden Apartment, from the bushes vide seizure memo Ex.PW-7/D. Though disclosure statement is not admissible in the eyes of law but recovery of facts is admissible. These pieces of evidence again are sufficient to weave the complete chain of facts. In view of the aforesaid facts and circumstance of the case prosecution has succeeded to weave a chain of facts which can exclusively give a conclusion and points out that in all probability the accused Lallan Choudhary, Ajay and Shankar have committed the murder of deceased as there is recovery of weapon of offence i.e. knife at the instance of accused Ajay and a strong motive i.e. taking revenge by accused Lallan for his son, has been established on record along with the last seen evidences as discussed in the preceding paras. In light of these facts and circumstances of the case, the prosecution has succeeded to bring on record the circumstances that in all probability the accused persons have committed the murder of deceased Shree Kishan. So, I hold them guilty for the offence u/s 302/34 IPC read with 404 IPC.”

3. Vide order on sentence dated October 05, 2013 the learned Trial Judge has sentenced the appellants to undergo imprisonment for life and pay a fine in sum of ₹5,000/-; in default of payment of fine to undergo RI for two years.
4. A composite sentence has been imposed. There is no separate sentence for the indictment of having committed the offence punishable under Section 404 IPC.
5. At the outset we may note that the alleged motive for the crime, being a desire by appellant Lallan Kumar to take revenge from the deceased on account of the belief that his son suffered death due to black magic by the deceased has been noted by the learned Trial Judge, as emanating from the disclosure statement made to the Investigating Officer by Lallan Kumar. The learned Trial Judge has thereafter correctly noted the law that said part of the disclosure statement is not admissible in law. But yet in spite thereof the learned Trial Judge has opined that the strong motive for the crime was the revenge by accused Lallan.
6. Sans Lallan's disclosure statement where the alleged motive for the crime emerges, there being no evidence for the motive, we commence discussion of the remaining evidence concluding that the prosecution has failed to prove any motive for the crime.
7. From paragraph 25 of the impugned decision it becomes clear that the other incriminating evidence coalesced by the learned Trial Judge is of the deceased being last seen alive in the company of the appellants and Rakesh PW-11. Whereas Rakesh PW-11 parted company at around 8:30-9:00 PM, the deceased and the appellants continued to make merry: consuming alcohol. The second incriminating evidence found by the learned Trial

Judge is the recovery of the mobile phone cover Ex.P-4 and the pocket diary Ex.P-3 belonging to the deceased pursuant to the alleged disclosure statements made by accused Lallan and Shankar followed by the two jointly leading the Investigating Officer to the place where they claimed to have thrown the two exhibits and having got the same recovered. Qua appellant Ajay the incriminating evidence is recovery of knife Ex.P-1 pursuant to the disclosure statement made by Ajay, which knife was opined by Dr.Sushil Kumar Chaurasia PW-9 to be capable of inflicting the injuries found on the person of the deceased. Lastly the incriminating evidence found by the learned Trial Judge is Shankar getting recovered his pant and shirt Ex.P-7 and Ex.P-8, Ajay getting recovered his shirt Ex.P-2 and Lallan getting recovered his pant and shirt Ex.P-5 and Ex.P-6. All of which, as per the FSL Report were found to be having traces of human blood, group whereof could not be detected. No mobile phone was recovered.

8. The case of the prosecution is that during a morning walk at Priyadarshani Park in Rajouri Garden Mr.Amarjit Bindra PW-1 saw a dead body in the early hours of the morning of February 25, 2010 and informed the police of the same. Insp.Shankar Lal PW-17, HC Shriniwas PW-15 and Ct.Dharmender PW-16 proceeded to Priyadarshani Park where in the bushes they saw a dead body of a male with a wound inflicted on the neck. The deceased was wearing a blue coloured pant, a sky blue coloured T-shirt and a light brown shirt. They seized the dead body and sent it to the mortuary of DDU Hospital where Dr.Sushil Kumar Chaurasia PW-9 conducted the post-mortem and authored the report Ex.PW-9/A as per which three incised wounds were detected, one of which cut the throat and the other penetrated the lungs; both injuries were opined to be sufficient to cause death in the

ordinary course of nature. The weapon of offence was a sharp edged weapon. Later on he opined that the injuries could be caused by the knife Ex.P-1.

9. The deceased was named Kishan. Since he did not return home, it is apparent that his wife and daughter would contact the police. They did so. By that time the dead body had already been recovered. Mona PW-5 the wife of the deceased told the Investigating Officer that she and her husband resided at WZ-759, Village Naraina and that last evening at around 6:30 PM she had seen her husband at the Mayapuri Chowk Bus Stop in the company of appellant's Shankar, Lallan, Ajay and one Rakesh and she was told that they were going with Shankar who was to give them a treat on the joyous occasion of his sister being blessed with a male child. Sunita PW-4 the daughter of the deceased told the Investigating Officer that at around 8:30 PM she had seen Shankar carry two bottles of liquor and a beer when she had gone to the jhuggi of one Santosh (her cousin) in Mansarovar Garden. She saw her father inside the jhuggi with Ajay, Lallan, Rakesh and Shankar.

10. During investigation Rakesh told the Investigating Officer that after consuming beer he had parted company and produced a railway ticket in proof of he having purchased a railway ticket for his mother to travel.

11. The appellants became suspect. Appellants Lallan and Shankar were apprehended first on March 02, 2010 and as deposed to by SI Ram Gopal PW-7, Ct.Dharmender PW-16 and Insp.Shankar Lal PW-17 the two made disclosure statements and volunteered to take the Investigating Officer and his team to a place where they claimed to have hidden the pocket diary Ex.P-3 and mobile cover Ex.P-4 belonging to the deceased and also to get recovered the clothes which they were statedly wearing when the deceased

was murdered. The two took Insp.Shankar Lal, SI Ram Gopal and Ct.Dharmender to Priyadarshani Park and from the bushes got recovered the pocket diary Ex.P-3 and the mobile cover Ex.P-4 which were seized vide Ex.PW-7/T followed by Shankar getting recovered the pant and the sweater/jersey which he was wearing which were seized vide memo Ex.PW-7/F. Thereafter Lallan got recovered the pant and the jersey which he was wearing which was seized vide memo Ex.PW-7/E. Ajay was arrested on April 15, 2010 and he told, as claimed by the prosecution, that he had thrown the knife Ex.P-1 and the shirt Ex.P-2 which he was wearing when the deceased was killed and got recovered the knife Ex.P-1 and the shirt Ex.P-2 from a sewer which were seized vide Ex.PW-7/M. The person, whom the prosecution claims to have scavenged the sewer, is Dharmender PW-3, who stated that even a purse was recovered by him, but we find no such seizure concerning the purse recorded in any seizure memo.

12. In her deposition in the Court, Mona PW-5 stated what we have already noted above and which she had informed to the Investigating Officer i.e. she having seen her husband in the company of the three accused and Rakesh at 6:30 PM on February 24, 2010. Sunita PW-4 deposed that she saw her father in the company of the accused and Rakesh at 9:00 PM in the jhuggi of Santosh in Mansarover Garden and she saw two bottles of liquor and a bottle of beer which the four were consuming. Rakesh PW-11 deposed that after all had consumed alcohol, he left the company of the deceased and the three accused at around 9:00 PM because he had to purchase a railway ticket for his mother which he handed over to the police.

13. Having perused the testimony of the witnesses we find that the pocket diary Ex.P-3 and the mobile cover Ex.P-4 has not been put to any witness in

the dock identification to elicit a proof that the two exhibits belonged to the deceased. The two natural witnesses to prove said fact would obviously be Mona and Sunita. The two exhibits were not put to the two ladies. Thus, the link evidence that the two exhibits belonged to the deceased is missing. Similarly with respect to the clothes got recovered at the instance of the accused which as per the disclosure statements made by the accused were being worn by them when the deceased was killed, the prosecution has not put those exhibits either to Mona or to Sunita or to Rakesh, who claimed to have seen the appellants in the company of the deceased in the evening of the night when the deceased was killed. They were the competent witnesses to have identified the said clothes as worn by the accused.

14. Further, there is a problem with the recovery of Ex.P-3 and Ex.P-4 itself. As noted above, the dead body of the deceased was noticed by Amarjit Bindra PW-1 in the early hours of the morning of February 25, 2010 at Priyadarshani Park where Amarjit Bindra used to take his morning walk. As noted by us above, the recovery of the two exhibits was made after Shankar and Lallan were apprehended on March 02, 2010. As deposed to by Ct.Dharmender, SI Ram Gopal and Insp.Shankar Lal, the two exhibits were picked up from a bush at Priyadarshani Park. It is improbable that Insp.Shankar Lal did not look around the bushes where Kishan's dead body was found at Priyadarshani Park. The recovery does not inspire any confidence and the possibility of the two exhibits being picked up by the Investigating Officer when he reached the park in the morning of February 25, 2010 cannot be ruled out and later on the two exhibits being planted on appellants Shankar and Lallan. It also assumes importance to note that on being cross-examined, Ct.Dharmender PW-16 stated that the mobile cover

and the pocket diary were in fact recovered from the dead body.

15. Thus, the recovery of Ex.P-3 and Ex.P-4 is rendered meaningless for two reasons. Firstly the recovery itself is highly tainted and secondly the two exhibits have not been proved to be belonging to the deceased.

16. No serious arguments have been advanced concerning recovery of the knife Ex.P-1 from a sewer pursuant to the disclosure statement made by Ajay, but the mere fact that the injuries on the person of the deceased could possibly be caused by said knife, though incriminating evidence, by itself is weak evidence and unless there is other weighty evidence and in conjunction therewith this piece of evidence shifts the scale against Ajay, this evidence would be not sufficient, being circumstantial, to hold against the innocence and in favour of guilt qua Ajay.

17. We then look at the evidence of last seen.

18. The evidence of last seen assumes incriminating character where the time and the place of last seen is so linked with the time of death of the deceased that the possibility of an outsider intervening is ruled out.

19. Mona PW-5 the wife of the deceased saw the accused in the company of her husband when even Rakesh was present at Mayapuri Chowk at 6:30 PM. As told to her the five were going to have a treat. Shankar was the host. As per Sunita she saw her father in the company of the appellants and Rakesh in the jhuggi of Santosh in Mansarovar Garden. As per Rakesh PW-11 he was in the company of the deceased and the accused in the jhuggi but parted company at 9:00 PM.

20. The place where the dead body of Shree Kishan was recovered is Priyadarshani Park in Rajouri Garden. Sunita the daughter of the deceased has categorically deposed that the jhuggi where she saw her father in the

company of the accused was in Mansarover Garden. The proximity of the place where Sunita last saw her father in the company of the accused with the place where her father was found murdered is missing. It is not the case of the prosecution that the deceased was murdered in the jhuggi or near the jhuggi of Santosh in Mansarover Garden and the body was transported to Priyadarshani Park in Rajouri Garden.

21. It has come in the testimony of Ct.Dharmender that Priyadarshani Park was at a distance of 300 metres. from Mayapuri. It has come in the testimony of Insp.Shankar Lal that Priyadarshani Park is near Mayapuri Chowk. Thus, the possibility of the deceased, when walking back to his house WZ-759, Naraina Village being waylaid by stranger who intended to rob him and in the process murdered him cannot be ruled out. We note that in their statements under Section 161 Cr.P.C. Mona and her daughter Suneeta have stated that they were residents of WZ-759, village Naraina. They gave said address when they deposed in Court.

22. We would be failing not to highlight that in the post-mortem report Ex.PW-9/A, under the caption GENERAL DESCRIPTION and the column : ‘Clothes worn & their condition’ concerning the dead body, it has been noted by PW-9 that the shirt was torn near the second button and the first and the second button of the shirt which the deceased was wearing was missing. It shows that some scuffle has taken place when the deceased was accosted by his ultimate assailant(s).

23. The impugned decision has overlooked said critical aspect of the matter. The evidence of last scene is thus without any fangs.

24. The only incriminating evidence against appellants Lallan and Shankar would thus be recovery of clothes which they were allegedly

wearing and on which human blood was detected. But we hasten to add that neither PW-4 nor PW-5 nor PW-11 were confronted with the said clothes and the confessional statements made to the police by Lallan and Shankar that they were wearing said clothes when the crime took place would be inadmissible in evidence. The only evidentiary worth of the recovery would be that the two persons got some clothes recovered. By independent evidence it had to be proved that said clothes were in fact worn by the two. The only incriminating evidence against Ajay would be the recovery of a knife which as per PW-9 could be the possible weapon of offence. The recovery of the stated clothes worn by him when the deceased was killed would suffer the same lack of incrimination as we have reasoned for Lallan and Shankar.

25. In the decision reported as JT 2008 (1) SC 191 Mani vs.State of Tamil Nadu the Supreme Court had observed that recovery of ordinary articles is weak evidence.

26. The appeals are allowed. The appellants are acquitted of the charge framed against them. They are directed to be set free forthwith if not required in some other case.

27. Copy of this decision be sent to the Superintendent Central Jail Tihar for compliance since the appellants are in custody.

28. TCR be returned.

CrI.M.B.No.9959/2014 in CrI.A.No.54/2014

CrI.M.B.No.566/2014 in CrI.A.No.319/2014

CrI.M.B.No.843/2014 in CrI.A.No.512/2014

Disposed of as infructuous since the appellants have been acquitted and prayer made in the application is to admit the appellants on bail till

pending of the decision.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JULY 14, 2014
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