

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

% *Judgment Reserved on: August 14, 2014*
Judgment Delivered on: August 21, 2014

+ **CRL.A. 713/2013**

PYARE LAL Appellant
Represented by: Mr.R.K.Anand, Mr.Chetan
Anand and Ms.Payal Juneja,
Advocates.
versus

STATE (GOVT. OF NCT) DELHI Respondent
Represented by: Mr.Lovkesh Sawhney, APP for
the State with SI Yogesh, PS
Timar Pur.

+ **CRL.A. 1071/2013**

MAHESH Appellant
Represented by: Mr.R.K.Anand, Mr.Chetan
Anand and Ms.Payal Juneja,
Advocates.
versus

STATE (GOVT. OF NCT) DELHI Respondent
Represented by: Mr.Lovkesh Sawhney, APP for
the State with SI Yogesh, PS
Timar Pur.

+ **CRL.A. 1103/2013**

AJAY Appellant
Represented by: Mr.R.K.Anand, Mr.Chetan
Anand and Ms.Payal Juneja,
Advocates.
versus

STATE (GOVT. OF NCT) DELHI

Represented by:

..... Respondent
Mr.Lovkesh Sawhney, APP for
the State with SI Yogesh, PS
Timar Pur.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Pyare Lal, Mahesh and Ajay challenge the impugned judgment dated February 21, 2013 convicting them for the kidnapping and murder of Akil, destruction of evidence and robbery in furtherance of common intention; and the order dated February 23, 2013 directing them to undergo rigorous imprisonment for life and a fine of ₹2000/- each and in default of payment of fine to undergo simple imprisonment for 15 days under Section 302/34 IPC; rigorous imprisonment for 10 years and a fine of ₹2000/- each and in default of payment of fine to undergo simple imprisonment for 15 days under Section 394/34 IPC and also Section 364/34 IPC; rigorous imprisonment for 3 years and a fine of ₹1000/- each and in default of payment of fine to undergo simple imprisonment for 7 days for offence under Section 201/34 IPC.

2. Appellants assail the conviction and consequent sentence primarily on the ground that from the documents and the statements of the witnesses the time when secret information was received, the raid was conducted, crime team was called, is not reconcilable. The witnesses being thus not truthful witnesses, no reliance can be placed on them. The appellants were not last seen with the deceased by anyone. The confessional statement of Ajay

Yadav recorded before the learned Metropolitan Magistrate cannot be relied upon as thereafter he was sent to Police custody. The alleged recoveries at the instance of the appellants do not inspire confidence in view of the material contradictions and improvements in the testimony of witnesses. Hence, it is prayed that the appellants be acquitted.

3. Learned APP for the State has taken us through the record and states that from the documentary evidence the timings mentioned in the rukka and FIR are all fortified and even the witnesses have duly corroborated the same. The difference in the timings as stated by a few witnesses could be because the witnesses were examined after a gap of time. The circumstantial evidence proved on record clearly implicates the appellants and thus the appeals be dismissed.

4. The investigation was set into motion on receipt of an information recorded vide DD No.11A on February 27, 2006 at 11.15 AM at PS Saraswati Vihar exhibited vide Ex.PW-18/D that truck No. HR-38-F-9097 loaded with stolen property is stationed at Beriwalla Bagh, three boys are sitting in the truck who are making plans to dispose of the stolen property and in case raid is conducted immediately, they can be caught. Thus a raiding team was constituted by the SHO Insp. Roop Lal PW-20 along with SI Ram Kanwar Dahiya PW-18, HC Ashok, Ct. Rajender, Ct. Satinder, Ct. Satish and Ct. Harish. When they reached near the truck they found Mahesh occupying the seat of the driver, Pyare Lal sitting adjacent to him and Ajay sitting at the conductor seat. They all were brought down from the truck and asked to show the documents of the vehicle. They showed the (bilty) goods receipt as per which 407 cartoon of tea were loaded from Eastern Roadways at Apsara Boarder. As per the goods receipt the destination was Kalan

Khera, Delhi and the name of the truck owner was revealed as Jeet Singh. On the rear portion of the truck, phone No. 9811638897 of Jeet Singh was written, who was contacted. Jeet Singh informed that his truck was missing from Apsara since morning. He had gone to register the FIR but the same was not registered and thus on the basis of this information FIR No.210/2006 was registered under Section 411/34 IPC at PS Saraswati Vihar vide Ex.PW-18/A.

5. The three accused persons were interrogated as to the place of unloading the bags, however they could not tell anything. On further interrogation Ajay revealed that truck was stolen from Apsara Boarder and they came to the area of Saraswati Vihar for the purpose of disposing of these bags and truck. Jeet Singh also informed that his cleaner Akil Hussain was also in the truck. Mahesh, Pyare Lal and Ajay were arrested. Pyare Lal made disclosure statement Ex.PW-18/3 wherein he disclosed that they had killed the cleaner/helper of the truck Akil and had thrown the body near Gandhi Vihar Colony on footpath, Outer Ring Road, Delhi and they could point out the place where the body was thrown. The three of them led the Police party to the Outer Ring Road on the footpath near Gandhi Vihar colony in between the electricity pole No. 19 & 20 where one person was lying covered with the blanket. The three accused pointed out the dead body of Akil and the memos in this regard were prepared by PW-18 SI Ram Kumar vide Ex.PW-18/A-1, Ex.PW-18/A-2 and Ex.PW-18/A-3. Immediately information regarding the murder was given to PS Timarpur which was recorded as DD No.13A at 3.55 PM which was exhibited vide Ex.10/A. On the basis of the said information about the death of Akil FIR No. 94/2006 under Section 302/201/34 IPC was registered at PS Timarpur

on February 27, 2006 at 7.45 PM. Mahesh got recovered accelerated wire from the cabin of the truck under the back side, Pyare Lal got recovered one purse containing documents including the driving license belonging to the deceased from behind the driver's seat of the truck and Ajay got recovered photocopy of the toll tax receipt.

6. Post mortem of the deceased was conducted by Dr.K.Goel PW-19 who found the following injuries on the body of deceased Akil and exhibited his report vide Ex.PW-19/A:

“External injuries

1. *Both lips were found bruised all over externally as well as orally against the teeth along with multiple scratch abrasions linear to slightly curved 0.5 cm to 1.5 cm in length, 7 in numbers on the right side of right angle of mouth and right side of nose over cheek and same type of scratch abrasions about 13-14 in numbers 0.3 cm- 1.00 cm in length scattered around left angle of mouth and left cheek, scratch abrasion 1.00 cm x 0.2 cm just below and adjacent to left lower eye lid. Intervening area around mouth was bruised. All injuries are reddish brown in colour.*

2. *Ligature mark:- There was ligature pressure abrasion mark running horizontally all around the neck in double layer with very thin layer of healthy ecchymosed skin layer in intervening gap of two marks, on and below the apple of adam. Ligature marks were faint on front and both sides front of neck but well prominent and slightly parchmented on the back of neck with slight inclination inwards at right lateral side of neck. Width of each layer was about 0.9 cm and were about 0.25 cm apart each other. Area above and below the ligature mark were ecchymosed and reddish brown in colour.*

3. *Multiple coalesced pressure abrasions 5 cm x 4 cm area about 5 cm below left mandibular angle and few scratch abrasions linear to slightly curved 0.5 cm x 1.00 cm long scattered over left side front and mid line of neck and reddish*

brown in colour.

4. *Abrasion 1.00 cm x 1.00 cm over nasal bridge reddish brown in colour.*

Internal examination

On reflection of skin of neck, there was subcutaneous platysmal bruising seen all over front of neck. Deeper neck muscles were extensively bruised with extra vacation of blood in neck layers. There was fracture subluxation of right superior horn and body of thyroid cartilage with massive bruising around. There was bruising with patechial haemorrhages over epiglottis and larynx. Rest of neck structures were intact. There was blood tinzed frothy discharge in trachea.

Both lungs were profusely oedematous, congested and frothy.”

7. As per Dr.K.Goel the cause of death was asphyxia consequent upon ligature strangulation. All injuries were ante-mortem in nature. Injuries No.1 were consistent with manual grip over mouth repeatedly to ward off cries. Injuries No.3 and 4 were caused by blunt force impact, injury No.2 was ligature mark caused by some hard flexible material. Mode of death was homicidal. Ligature pressure over neck was sufficient to cause death in the ordinary course of nature. He gave the time since death was 36-37 hours. In his subsequent opinion Ex.PW-19/B he opined that the ligature mark on the neck of the deceased was possible by the cord Ex.P1 or by similar such type of other material.

8. During the course of investigation Ajay made a confessional statement recorded under Section 164 Cr.P.C. before Shri Ajay Goel PW-22 learned Metropolitan Magistrate.

9. Pursuant to the dead body being recovered investigation was carried

by PW-25 Inspector Hari Singh Rawat and a common charge-sheet was filed in both the FIRs against the appellants for offences punishable under Section 392/394/302/201/411/34 IPC. During the course of trial the witnesses who appeared gave different timings as to the information received and their reaching the spot, which is thus the main ground of challenge by the appellants. However, certain facts which do not need much elaboration in view of being duly documented are that on February 26, 2006 goods were loaded in the truck by the Eastern Road Carriers Pvt. Ltd. from U.P. Border to Delhi in HR-38-F-9097. The toll tax slip Ex.PW-18/Y shows that the truck crossed the border from the state of U.P. to Delhi on June 27, 2006 at 2.00 AM.

10. PW-3 Arun Kumar Dubey, the driver of the truck has deposed that on February 26, 2006 it was Sunday and Shivratri. He got loaded the truck with bundles of tea and parked the same inside the godown premises of Eastern Road Carrier, Delhi-U.P. Border and he left Akil Hussain to guard the truck. On the next day when he reached the godown at about 9.00 AM he did not find the vehicle nor the cleaner Akil. He informed the owner of the truck Jeet Singh PW-2 who also deposed in sync with Arun Kumar Dubey. Both these witnesses knew Ajay since he was working as a cleaner on the vehicle of some other person but did not know Pyare Lal and Mahesh.

11. PW-2 Jeet Singh also deposed that he had gone to Police post U.P. border and informed about the missing truck, however no report was lodged. Thereafter he was going to the house of Akil Hussain when he received a telephone call from the Police of Police Station Saraswati Vihar informing about truck No. HR-38-F-9097. He went to Saraswati Vihar Police Station where he was shown the three appellants. Though he knew Ajay as he was

working as a cleaner on the vehicle of some other person, however he did not know the other two persons. He was also taken to Timarpur where dead body of Akil was recovered. The pointing out memos were prepared in his presence. He also stated that he received the telephone call on his mobile at about 12.30 PM to 1.00 PM from the Police of Police Station Saraswati Vihar.

12. On the basis of the testimony of PW-6 Naresh Kumar and PW-7 Insp. Subey Singh who were member and in-charge of the crime team respectively, of which Naresh Kumar stated that they had reached the spot at about 9.30 AM to 10.30 AM and Subey Singh stated that they had reached at about 10.00 AM and spent 40 minutes; it is claimed that DD No.11A lodged at 11.15 AM on secret information vide Ex.PW-18/D about information of truck being stationed is a fabricated document. A perusal of the crime team report Ex.PW-18/B1 itself note the date and time of examination as 2.26 PM to 3.00 PM on February 27, 2006. The version of HC Naresh Kumar and Insp. Subey Singh with regard to time of inspection which they deposed after two years of the incident is against the documentary evidence and we are not inclined to rely upon the same. It is quite normal for the witnesses to forget the time of inspection specially when they carry out a number of inspections either on each day or almost daily.

13. The registration of FIR No.94/2006 under Section 302/201/34 IPC on February 27, 2006 at 1945 hours is also assailed on the ground that the corresponding record of the DD entry shows that the contents of the entire FIR has been squeezed into the available space. PW-10 HC Kripal Singh who recorded the contents of FIR as DD No.13A in the DD register has

denied the suggestion that the space had been left blank and later the contents of DD No.13A were entered into. The difference in the ink or pen cannot sustain a doubt on the recording of the contents of the FIR in the DD entry register as a perusal of the photocopy of the document exhibited as Ex.PW-10/DA shows that the space utilisation has been as per the contents of the information to be recorded in the various blocks that were available for writing the same. Further, PW-9 ASI Ved Pal, the Duty Officer of PS Timarpur appeared in the witness box and deposed that at about 7.45 PM he received the rukka through HC Yashpal and he recorded the FIR No.94/2006. He also produced original FIR register containing the FIR No. 94/2006 and exhibited the copy thereof as Ex.PW-9/B. This witness has not been cross-examined. Thus, the registration of FIR No.94/2006 being done at 7.45 PM is not disputed. Hence mere recording of the FIR in the DD register would not discredit the registration of FIR at the time noted therein.

14. The prosecution case thus rests on the circumstantial evidence. From the testimonies of the witnesses and the documentary evidence the prosecution has been able to prove the following incriminating circumstances against the appellants:

i) *From the evidence of Arun Kumar Dubey it is proved that he left the truck in the godown at about 11.00 P.M. on February 26, 2006 and Ajay was also present there besides the deceased Akil. Further Mahesh and Pyare Lal were standing at a distance of about 5-6 steps away from Ajay.*

ii) *Arun Kumar Dubey also stated that on February 26, 2006 he got the truck HR 38 F 9097 loaded with Tata tea bags in the evening and handed over the challan Ex.PW-23/A and the keys to Akil at about 6.00-7.00 PM. The challan is dated February 26, 2006 showing that the truck had been booked with 407 bags of tea and to carry the tea bags from UP border to*

Delhi and the driver of the truck was Arun Kumar.

iii) On the next morning when he found the truck and Akil missing from the godown he informed Jeet Kumar and went along with him to Apsara Border, Police Post.

iv) Arun Kumar Dubey and Jeet Ram deposed that the phone call from PS Saraswati Vihar was received at 1.00-1.30 PM thus corroborating the version that on February 27, 2006 at 11.15 AM information regarding the stationary truck was received pursuant to which police officers of Saraswati Vihar went to the spot and found the truck with stolen goods and the appellants sitting inside the truck. The information was thereafter given to Jeet Ram the owner of the truck as his number was written on the backside of the truck when Arun Kumar Dubey was with him searching the truck and going to Akil's house.

v) From the evidence of SI Ram Kanwar Dahiya, Inspector Roop Singh and the members of raiding team it has been proved beyond reasonable doubt that the truck No.HR 38 F 9097 was found stationed near Beri Wala Bagh containing cartoons of tea bags and the appellants were found sitting therein and on the raid being conducted, they were arrested.

vi) On being arrested in the FIR No.210/2006 under Sections 411/34 IPC Pyare Lal made disclosure about the dead body of Akil lying in the jurisdiction of PS Timar Pur. The accused got recovered the dead body from near Gandhi Vihar Colony between electricity pole No.19-20 covered with a blanket.

vii) PW-18 SI Ram Kanwar Dahiya, PW-21 Constable Satender Kumar, PW-23 Yatinder Kumar Sharma and PW-26 HC Ashok Kumar deposed that Mahesh got recovered the accelerated wire from the cabin of the truck under the back seat.

viii) The post mortem report Ex.PW-19/A opined the cause of death to be ligature pressure on neck which was sufficient to cause death in the ordinary course of nature.

ix) The accelerated wire Ex.P1 recovered at the instance of

Mahesh was sent for opinion to PW-19 Dr.K.Goel, who gave the subsequent opinion Ex.PW-19/B and opined that the ligature mark as mentioned in the post-mortem report Ex.PW-19/A was possible by wire of P1 or any such type of other wire.

x) Recovery of photocopy of the toll receipt at the instance of Ajay.

xi) Recovery of purse of the deceased along with the documents including driving license of the deceased at the instance of Pyare Lal from behind the seat in the truck.

xi) As per the post-mortem report which was conducted at 12.45 PM on February 28, 2006 the time since death was 36 to 37 hours thereby indicating that on or before the truck crossed the Apsara Border between Delhi and Uttar Pradesh Akil was murdered just after the time when Akil was seen at the godown along with truck and Ajay, Mahesh and Pyare Lal were present over there as per the testimony of Arun Kumar Dubey.

15. Statement of Ajay was recorded under Section 164 Cr.P.C. by PW-22 Shri Ajay Goel the then Metropolitan Magistrate vide Ex.PW-22/B. Learned counsel for the appellant has attacked this confessional statement on the ground that after recording of the confession Ajay Kumar was sent to police custody remand. A perusal of the order sheet shows that the request for recording of the statement of Ajay Kumar was made to the learned Metropolitan Magistrate on March 06, 2006 as Ajay wanted to turn an approver. The learned Metropolitan Magistrate fixed the matter for recording of his statement before Shri Ajay Goel PW-22 on March 07, 2006. On March 07, 2006 when Ajay Kumar was produced from the judicial custody before PW-22 as he was not responding to the questions the matter was adjourned to March 08, 2006. Even on March 08, 2006 the Court was of the view that Ajay Kumar should be granted some more time to reconcile

and rethink and the consequence of the statement were explained to him. He was remanded to judicial custody and called for March 10, 2006 when statement Ex.PW-22/B was recorded. In the statement so recorded Ajay Kumar described the sequence of events. However, the same does not implicate Ajay Kumar for the murder of Akil but Mahesh and Pyare Lal though it speaks of the presence of Ajay, Mahesh and Pyare Lal with Akil. Thus the learned Trial Court rejected this confessional statement as it did not implicate him and in our opinion rightly so. Even in the absence of this statement showing that the appellants were present along with Akil on the fateful night there is sufficient evidence proved by the prosecution on record to show the presence of appellants with Akil and the truck.

16. The defence of the appellants is of mere denial. They have stated that they are innocent and falsely implicated. According to Mahesh he was lifted from Samai Pur Badli at 10.00 AM on February 27, 2006. According to Pyare Lal and Ajay Kumar they were lifted from Mangol Puri at 4.00 PM on February 27, 2006 and have been falsely implicated in this case. No defence evidence has been led. Thus as urged by the learned counsel that the plea of alibi is not considered it may be noted that no plea of alibi has been taken but of illegal arrest and false implication. Neither from the cross-examination of the witnesses nor by leading defence the appellants have been able to show that they were lifted at the time alleged and falsely implicated in this case.

17. In the present case the appellants have been arrested along with the stolen property which was in the guard and custody of the deceased. Thus they were found in the possession of the stolen articles of the deceased and they have rendered no explanation for the said stolen goods. Thus a

presumption under Section 114 Illustration (a) and 106 of the Indian Evidence Act is required to be raised against the appellants. The appellants have not led evidence to discharge the said presumption. In (2001) 3 SCC 190 Sanjay @ Kaka vs. State (NCT of Delhi) the Hon'ble Supreme Court raising the presumption under Section 114 Illustration (a) and 106 of the Indian Evidence Act held:

“28. Besides Section 27, the courts can draw presumptions under Section 114, Illustrations (a) and Section 106 of the Evidence Act. In Gulab Chand v. State of M.P. [1995] 3 SCR 27 where ornaments of the deceased were recovered from the possession of the accused immediately after the occurrence, this Court held:

"It is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced. It has been indicated by this Court in Sanwat Khan v. State of Rajasthan AIR1956SC54 that no hard and fast rule can be laid down as to what inference should be drawn from certain circumstances. It has also been indicated that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. A note of caution has been given by this Court by indicating that suspicion should not take the place of proof. It appears that the High Court in passing the impugned judgment has taken note of the said decision of this Court.

But as rightly indicated by the High Court, the said decision is not applicable in the facts and circumstances of the present case. The High Court has placed reliance on the other decision of this Court rendered in Tulsiram Kanu v. State AIR 1954 SC 1. In the said decision, this court has indicated that the presumption permitted to be drawn under Section 114, Illustration (a) of the Evidence Act has to be drawn under the 'important time factor'. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case. In the instant case, it has been established that immediately on the next day of the murder, the accused Gulab Chand had sold some of the ornaments belonging to the deceased and within 3-4 days the recovery of the said stolen articles was made from his house at the instance of the accused. Such close proximity of the recovery, which has been indicated by this Court as an 'important time factor', should not be lost sight of in deciding the present case. It may be indicated here that in a latter decision of this Court in Earabhadrapa v. State of Karnataka 1993 (2) SCC 330, this Court has held that the nature of the presumption and Illustration (a) under Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time-limit can be laid down to determine whether possession in the recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such

as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. In our view, it has been rightly held by the High Court that the accused was not affluent enough to possess the said ornaments and from the nature of the evidence adduced in this case and from the recovery of the said articles from his possession and his dealing with the ornaments of the deceased immediately after the murder and robbery a reasonable inference of the commission of the said offence can be drawn against the appellant. Excepting an assertion that the ornaments belonged to the family of the accused which claim has been rightly discarded, no plausible explanation for lawful possession of the said ornaments immediately after the murder has been given by the accused. In the facts of this case, it appears to us that murder and robbery have been proved to have been integral parts of the same transaction and therefore the presumption arising under Illustration (a) of Section 114 Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments."

29. In the instant case also, the disclosure statements were made by the accused persons on the next day of the commission of the offence and the property of the deceased was recovered at their instance from the places where they had kept such properties, on the same day. In the same affect are the judgments in Mukund Alias Kundu Mishra & Anr. v. State of M.P. 1997 CriLJ 3182 and Ronny Alias Ronald James Alwaris & Ors. v. State of Maharashtra 1998 CriLJ 1638 . In the latter case the Court held:

"Apropos the recovery of articles belonging to the

Ohol family from the possession of the appellants soon after the robbery and the murder of the deceased (Mr.Mohan Ohol. Mrs. Runi Ohol and Mr. Rohan Ohol) which possession has remained unexplained by the appellants the presumption under Illustration (a) of Section 114 of the Evidence Act will be attracted. It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion would therefore, be that the appellants and no one else had committed the three murders and the robbery."

30. The disclosure statements by the accused persons stand established by the testimony of Satish Khanna (PW22) and the investigating officer. The trial court was, therefore, justified in relying upon the circumstances of the disclosure statements of the accused persons and consequent recovery of stolen property blood stained shirt of Vinod appellant besides weapon of offence. We find no substance in the submission of the learned defence counsel that as no independent witnesses were associated with the recoveries, doubt is created in the prosecution version Satish Khann (PW22) is the natural witness being brother of the decease to be present during the investigation when the accused at stated to have made the statements within the meaning Section 27 of the Evidence Act. Otherwise also there is reason to disbelieve the testimony of the IO Harbans Sir (PW25)."

18. In view of the aforesaid discussion we find no merit in the appeals. The judgment of conviction and the order on sentence are upheld and the appeals are dismissed. The appellants will suffer the remaining sentence.

19. T.C.R. be returned.

20. Copies of the judgment be sent to the Superintendent Central Jail Tihar for his record and to be handed over to the appellants.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 21, 2014
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