

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

Judgment Reserved on: July 31 , 2014

% *Judgment Delivered on: August 06 , 2014*

+ **CRL.A. 575/2014**

SUSHIL KUMAR @ PANDITJI Appellant
Represented by: Mr.B.S.Chowdhary, Adv.

versus

STATE OF DELHI Respondent
Represented by: Ms.Aashaa Tiwari, APP
Insp. Jitender Singh

+ **CRL.A. 605/2014**

SAURABH KUMAR Appellant
Represented by: Mr.Pramod Kumar Dubey,
Ms.Pinky Dubey, Mr.Pulkit
Misra, Ms.Namita Wali, Advs.

versus

STATE Respondent
Represented by: Ms.Aashaa Tiwari, APP
Insp. Jitender Singh

+ **CRL.A. 684/2014**

SUMIT @ PAWAN Appellant
Represented by: Mr.K.Singhal, Adv.

versus

STATE NCT OF DELHI Respondent
Represented by: Ms.Aashaa Tiwari, APP
Insp. Jitender Singh

+

CRL.A. 685/2014

SONU @ JEETU

..... Appellant

Represented by: Mr.K.Singhal, Adv.

versus

STATE NCT OF DELHI

..... Respondent

Represented by: Ms.Aashaa Tiwari, APP
Insp. Jitender Singh

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. The appellants who have been convicted for murder of Mohd.Shahid and destruction of evidence on the basis of circumstantial evidence assail the common impugned judgment dated February 12, 2014 and the order on sentence dated February 14, 2014 directing them to undergo imprisonment for life and a fine of ₹ 1000/- each, in default of payment of fine to undergo simple imprisonment for three years for offence under Section 302/34 IPC and a sentence of simple imprisonment of 7 years and a fine of ₹ 1000/- each in default of payment of fine to undergo simple imprisonment for one and a half years for offence punishable under Section 201/34 IPC. The appellants have also been directed to pay compensation of ₹ 15,000/-each to the heirs of the deceased Mohd.Shahid and in default of payment of compensation to undergo six months simple imprisonment.

2. Learned counsel for the appellants Sumit and Sonu assail the judgment on the ground that no Test Identification Parade was conducted and the appellants have not been properly identified in the Court. There is

no evidence to connect these two appellants with the offence committed. Admittedly, even as per the prosecution case the appellants had no role in disposing of the dead body and hence their conviction under Section 201/34 IPC is unwarranted. Further, no FSL report has been sought to show that the blood stained soil was recovered from the spot where allegedly the deceased was beaten to death. PW-26 SI Kamlesh Kumar witness to the seizures has stated that he was on leave on the said date and hence the seizures have not been proved. The learned Metropolitan Magistrate received the copy of the FIR belatedly and hence there is non-compliance under Section 157 Cr.P.C. It has not been proved by the prosecution that the seized articles were kept safely in the malkhana and were not tampered with.

3. Learned counsel for the appellant Saurabh assails on the ground that as per the post-mortem report undigested food was found in the stomach of the deceased and thus the version that the appellants were last seen with the deceased at 7.30 pm does not sound to reason, as the deceased would not have had dinner by then. The time gap does not rule out the hypothesis that someone else was the assailant. The phone calls have not been proved in accordance with law. Though it is the case of prosecution that the identity of the dead body was not known and was revealed from finger prints pursuant to which Mohd.Sajid and Mohd.Zahid PW-3 and PW-5 respectively, the brothers of the deceased, were informed who identified the dead body, however their names are mentioned in the death report prepared on June 18, 2010 i.e. the date of recovery of the dead body vide Ex.PW-20/B. There is no material to connect the appellant with the alleged offence and hence he be acquitted.

4. Learned counsel for the appellant Sushil Kumar assails the impugned judgment on the ground that the employer who could have deposed that Sushil and Saurabh were working with him has not been brought in the witness box. The place of arrest and the manner of arrest have not been put to the appellants under Section 313 Cr.P.C. and hence cannot be used as incriminating evidence. There is no overt act attributed to the appellant and hence he be acquitted.

5. The investigation in the case was set in motion on receipt of DD No. 6-B at 6.08 AM received at PS Bhalswa Dairy on June 18, 2010 informing that one dead body was lying near jheel, Bypass Ring Road near Shamshan Ghat. SI Kamlesh Kumar PW-26 reached the spot where he found dead body of one young man with ligature mark on the neck lying there. The body also had deep injury marks beneath the knees and on the arms and lips. Some blood was found in the naali near the boundary wall of golf course. Since no identification mark of the body was available and no witness was available, on the basis of inspection of the dead body FIR under Section 302/201 IPC was registered. The scene was photographed, rough site plan was prepared, blood stained plaster, sample plaster, blood stained plastic were collected from the spot and seized. The dead body was sent to mortuary and efforts were made to identify the dead body. Finger prints of the deceased were sent to the Finger Print Bureau, Malviya Nagar from where a report was received that the name of deceased was Shahid, son of Allah Baksh, resident of Village and PO Makrana Sharif, District Bullandshihar, U.P.

6. ACP Ram Pal Singh PW-28 the then SHO who took over the

investigation sent SI Sukhpal to the native place of the deceased in Bullandshehar. On June 22, 2010 Mohd.Zahid and Mohd.Sajid came to the Police Station and on seeing the photograph of the deceased identified him to be their brother Mohd.Shahid. They also disclosed that Mohd.Shahid was working with Anil Swamy, property dealer at Kargil Colony, Burari and took ACP Ram Pal Singh to the said office. He made enquiries from one Chand who was present at the spot working as the servant of Anil Swamy who stated that Saurabh, Sushil and Mohd.Shahid were also working with Anil Swamy. Chand disclosed that on June 17, 2010 in the evening a quarrel had taken place between Saurabh, Sushil and Mohd.Shahid and at that time, Sajid who was the brother of Sahil, was present there and he pacified the matter and then Mohd.Sajid left from there. Sumit and Jeetu also came there. He further disclosed that Saurabh, Sushil, Sumit and Jeetu had quarrelled with Mohd.Shahid and gave beatings to him. After some time, Sushil and Saurabh took away Mohd.Shahid with them on motorcycle. Later Jeetu and Sumit also went away. Chand Singh PW-9 did not support the case of the prosecution and deposed that excepting him nobody else worked in the office of Anil Swamy and he had not told anything to the Police. Thus, the prosecution case rest on the testimony of Sajid PW-3 the brother of the deceased.

7. Statement of Mohd.Sajid was also recorded who stated that Shahid was his real elder brother. On June 22, 2010 he received a telephone call from his village regarding murder of his brother as informed to the family members by the Police official visiting there from Delhi. Accordingly, he reached at PS Bhalswa Dairy and from there to the mortuary. On seeing the

dead body he identified the same to be that of his brother. He informed the Police that his brother was working with one property dealer Anil Swamy. Sushil and Saurabh also used to work with his brother in the office of Anil Swamy. He also informed that his brother Shahid told him that Sushil and Saurabh used to quarrel with him. On June 17, 2010 he had reached the office of his brother Shahid as a quarrel had taken place which was informed to him on telephone by his brother. At about 7.30 PM when he reached at the office of Anil Swamy he saw Saurabh and Sushil (actual name Sonu @ Jeetu) and his brother present there. Later Sushil and Sumit also came there whom he correctly identified. No quarrel took place in his presence, nor did anyone state anything to his brother. Thus, the evidence of this witness is relevant only to the extent that on June 17, 2010 at about 7.30 he saw the four appellants with his brother in the office of Anil Swamy. In view of the statement of Chand Singh and Mohd.Sajid, Sushil and Saurabh were interrogated. Both of them made their disclosure statement and pointed out the place of occurrence.

8. Sushil Kumar got recovered motorcycle No.DL 4S A4 0470 from in front of the office of Anil on which the deceased was allegedly taken near the jheel and thrown. IO Ram Pal Singh with ACP also collected blood stained soil, sample soil, one small blood stained piece of stone, three blood stained bricks, one blood stained wooden fatta. The same were seized. Thereafter Sushil also produced his pyjama of white colour with red stripes and one blood stained white colour banian from the roof of the office of Anil Swamy. Saurabh took them near Bhalswa jheel towards the bushes and got recovered one blood stained grey colour white pant and red colour blood

stained shirt which he was wearing at the time of incident.

9. These recoveries except the motorcycle at the instance of Sushil and Saurabh are connected with the offence as per the FSL report Ex.PW-24/A, which notice blood being detected on the following exhibits.

“Deceased

Ex. '4a': one T-shirt having dirty brown stains.

Ex. '4b': one dirty pants along with fungal growth.

Ex. '4c': one pair of dirty sandal along with fungal growth.

Sushil

Ex. '7a': one dirty banian having few brown stains along with fungal growth.

Ex. '7b': one dirty pyjama having brown stains along with fungal growth.

Saurabh

Ex. '8a': one dirty T-shirt along with fungal growth

Ex. '8b': one pants having brown stains.

Ex. '13': one wooden danda having brown stains.

Ex. '14': one bamboo stick having darker stains.

From behind the office of Anil Swamy

Ex. '9': blood stained earth described as 'Soil with blood'.

Ex. '10': earth described as 'Sample soil'.

Ex. '11': damp foul smelling small stone piece.

Ex. '12a': one wooden piece having brown stains.

Ex. '12b': one brick having blackish stains.

Ex. '12c': one brick having blackish stains

Ex. '12d': one brick”

10. As per the FSL report PW-24/B 1, 3, 4a, 4b, 5, 7a, 7b, 8a, 8b, 9, 12b, 13 and 14 gave blood group 'A' which includes the Danda recovered at the instance of Sonu @ Jeetu. The recoveries of the weapon of offence are further connected with the offence by the opinion of Dr.V.K.Jha who

conducted the post-mortem report vide Ex.PW-20/A. He noticed the following injuries on the deceased.

- “i) Fracture deformity of left leg 10 cm below the knee joint.*
- ii) Incised wound on left arm lower aspect two in numbers placed 0.5 cm apart of size 1 cm x 1 cm and 1 cm x 1 cm x .5 cm respectively.*
- iii) Multiple bruises on right side of the face. Size varying from 3 cm x 2 cm x 1 cm.*
- iv) Bruise on top of shoulder left size measuring 3 cm x 2 cm.*
- v) Extensive bruise on right forearm, right arm left back of thigh.*
- vi) Incised wound in wave space between ring finger and middle finger measuring 1 cm x 0.5 cm x muscle deep.*
- vii) Incised wound on right wrist 1 cm x 1 x cm x muscle deep.*
- viii) Incised wound below right knee joint of size 1 cm x muscle deep.*
- ix) Incised wound of size 6 cm x 1.5 cm x bone deep and 3 cm x 1 cm x muscle deep in the middle of leg.*

On internal examination of head, there was subscalp hametoma on left parietal region and there was subdural hammehorage on the frontal region. Stomach contained undigested food.”

11. Dr.V.K.Jha opined that the cause of death was due to shock as a result of combined effect of multiple bruises and fracture sustained and stab wounds inflicted by other party. All injuries were ante-mortem in nature and cumulatively sufficient to cause death in the ordinary course of nature. Time since death was 6 days. He received 18 inquest papers which he returned to the IO after signing. He had also preserved the clothes and gauze piece of the deceased and handed over to the investigating officer. He also proved his subsequent opinion Ex.PW-20/B which he gave after examining the

wooden fatta and lathi. According to him injuries No. 1,3,4 & 5 could be caused by these two objects or similar such weapons. This witness has not been cross-examined and his testimony has thus gone unchallenged.

12. Appellants Sushil and Saurabh have challenged the authenticity of the evidence against them on the ground that name of Mohd.Sajid and Mohd.Zahid have been mentioned in the death report prepared on June 18, 2010. No doubt, the report Ex.PW-28/B is signed on June 18, 2010 however dead body was only identified on June 22, 2010 by Sajid and Zahid and thereafter post-mortem was conducted. This could have been an inadvert error. In any case this fact has not been put to the author of the document ACP Ram Pal Singh and thus no mileage can be derived by the appellants on this count. In the decision reported as AIR 1998 SC 1328 State of U.P. Vs. Nahar Singh, the Supreme Court noted observation of Lord Herschell, L.C. in the opinion (1893) 6 The Reports 67 Browne v. Dunn.

“14. The oft quoted observation of Lord Herschell, L.C. in Browne v. Dunn, (1893) 6 The Reports 67 clearly elucidates the principle underlying those provisions. It reads thus:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that

the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing."

13. We are not inclined to accept the contention of learned counsel for the appellant that in the absence of morphological examination of soil from the spot it cannot be stated that blood stained soil was not recovered from behind the office of Anil Swamy where the deceased and Sushil and Saurabh were working. Ram Pal Singh PW-28, HC Dhan Singh PW-23 and PW-26 SI Kamlesh Kumar have deposed about the recoveries made. In cross-examination, nothing has been elicited to dent the veracity of these witnesses that SI Kamlesh Kumar was not present on the said date and was on leave, or that the recoveries were planted. Though SI Kamlesh Kumar admitted in his cross-examination that as per the Chittha on June 23, 2010 he was not on duty in the day time however he asserted his being on duty. It is not uncommon to the police officer to continue on duty in day time even after completion of night duty in exigencies of service.

14. Learned counsels for the appellants also assail the judgment on the ground that the learned Metropolitan Magistrate received the FIR belatedly.

A perusal of the FIR shows that the same did not name either the deceased or the assailants and hence there is no reason attributable to the investigating officer in delaying the registration of FIR. Further the contention that the learned Magistrate ought to have been furnished details of seizure, last seen evidence, quest and recoveries under Section 157 Cr.PC is also untenable. There is no requirement that while sending the copy of FIR to the Magistrate all these documents should be sent as the same cannot be sent at that time. All these documents are produced with the case diaries when remand is sought and there is no challenge on this count during remand proceedings.

15. Though PW-8 Pradeep has not supported the case of the prosecution that he received a phone call from Sushil on June 17, 2010 asking him to bring Sumit and Jeetu at the office of Anil Swamy and PW-13 Sonu has denied knowing Pradeep and the possession of Mobile No. 9560657180 however, the prosecution has proved the CDRs of mobile No. 9560657180. The same has been produced vide Ex.PW-30/A by Dr. R.K. Singh Nodal Officer, Bharti Airtel Limited. As per the customer application form, the mobile number is in the name of Sonu, Son of Charan Singh and all supporting documents have been proved which include voter ID Card of Sonu, which belies the version of Pradeep and Sonu. PW-31 Israr Babu has produced CDRs of mobile No. 9582430731 for the period June 17, 2010 to June 18, 2010 along with other details. According to the customer application form and the supporting documents, mobile phone was in the name of Sushil Kumar, with copy of driving license, Cell ID chart and certificate under Section 65 of the Evidence Act all being exhibited. According to Ex.PW-30/B, mobile number 9560657180 has been activated

in the name of Sonu PW-13 and mobile number 9582430731 in the name of Sushil Kumar which fact could not be rebutted in cross-examination. These prove the call made by Sushil to Pradeep. According to the CDR, he made another call to mobile No. 9560657180 belonging to one Sonu which apparently was used by Pradeep on June 17, 2010 at about 8.00 PM and again vice-versa calls were made at about 10.28 PM. Again calls were made between both mobile numbers at about 10.30, 10.37 and 11.59 PM. No explanation has been rendered for these calls.

16. Though Sonu, Pradeep and Chand have not supported the prosecution case however, in view of testimony of PW-3 Mohd.Sajid, recoveries at the instance of appellants duly supported by the FSL report and the opinion of the post-mortem doctor and the CDR, it is proved beyond reasonable doubt that the deceased along with the four appellants was present at the office of Anil Swamy at 7.30 PM where after he was murdered behind the office resulting in blood stained soil, stone, fatta, danda etc., being recovered from there. Further recoveries of the blood stained clothes of Sushil and Saurabh, danda at the instance of Jeetu and the CDR make complete chain of circumstances proving the case of prosecution beyond reasonable doubt against the appellants. Hence, we find no infirmity in the impugned judgment convicting the appellants for offence under Section 302/34 IPC and 201/34 IPC. We find that vide the order on sentence learned Trial Court has directed all the four appellants to pay fine of ₹1000/- each on both the counts i.e. for offence under Section 302/34 IPC and 201/34 IPC, however the sentence in default of payment of fine is simple imprisonment for three years and one and a half year respectively which in our opinion is excessive.

Consequently, while maintaining the fine, the default sentence is modified to 3 months each on both the counts separately.

17. The appeals are accordingly disposed off.

18. T.C.R. be returned.

19. Two copies of the judgment be sent to the Superintendent Central Jail Tihar one for his record and the other to be handed over to the appellants.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 06, 2014
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