

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CRL.A.649 /2002

Reserved on: 8th March, 2018

Decided on: 21st March, 2018

JANARDHAN

....Appellant

Through: Mr. Jitender Ratta, Advocate.

versus

THE STATE

....Respondent

Through: Mr K.S. Ahuja, APP for the State.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This appeal is directed against the impugned judgment dated 28th January, 2002 passed by the learned Additional Sessions Judge ('ASJ'), Delhi in Sessions Case No.71/97 arising out of an FIR No.522/1996 registered at Police Station ('PS') Karol Bagh convicting the Appellant for the offence under Section 302 Indian Penal Code ('IPC') and the order on sentence dated 29th January, 2002 sentencing him to imprisonment for life with a fine of Rs.1,000/- and in default of payment of fine, to undergo simple imprisonment for one week.

2. At the outset it requires to be noticed that the Appellant and the co-accused Satish (Accused No.2 – 'A2') (Proclaimed Offender - 'PO') were charged with conspiring to murder Ujjwal Dev Nath ('deceased') and

pursuant thereto committed his murder on 2nd September, 1996 at 10 to 11 am at Shop No.34/B-112, Second Floor, Beadan Pura and thereby committed offences punishable under Sections 120B IPC and 302 IPC.

3. By the impugned judgment, the trial Court held that A-2 was entitled to the benefit of doubt and accordingly acquitted him.

4. The case was one of circumstantial evidence. One of the key witnesses was Swapan Devnath (PW-1) – brother of the deceased Ujjwal Devnath. He stated that the deceased was having a *dharam kanta* at 3072, Gali No.36, Beadan Pura, Karol Bagh, New Delhi. On 2nd September, 1996, the deceased left his house at around 10 am after taking Rs.40,000/- from PW-1 stating that he was going to the Appellant for getting the sale deed of the Shop No.34/3112, Second Floor, Beadan Pura, Karol Bagh executed. PW-1 stated that the deceased had already paid to the Appellant Rs.1,10,000/- as part consideration. When the deceased did not return till 9 pm, PW-1 along with his other brother Ratan Devnath (PW-7) went to the Appellant at his shop, where Satish (A-2) was also purportedly present and inquired about the deceased. In reply, the Appellant informed them that deceased had not come to him that day.

5. After searching for the deceased till the night, when PW-1 reached the *dharam kanta*, he came across one constable at around 1.30 am on 3rd September, 1996 and disclosed to him that the deceased had left the house in the morning and not returned since. The said constable then accompanied PW-1 to the house of the Appellant. They found the Appellant as well as A-

2 sleeping there. When the constable inquired, the Appellant again told him that the deceased had not come to him since morning.

6. In all the prosecution examined 22 witnesses. According to PW-1, at around 5.30 to 6 am, the constable again came to Gali No.36 and asked PW-1 to accompany him to the PS. The brother of PW-1, PW-7, who had returned home by then, was also called. At around 10.50 am on 3rd September, 1996 the FIR was registered. According to PW-1, the Appellant and A2 were also present in the PS at the time.

7. According to PW-1, a disclosure statement of the Appellant was recorded at around 2 pm on the same day (Ex.PW1/B), after which the Appellant is supposed to have led the police party to his house at No.3112 in Gali No.34. They found the house locked. The Appellant claimed that he had lost the key. On the asking of the police, the Appellant then broke open the lock. On opening the door, a foul smell was coming from within. A cloth having blood stains and some papers were found lying in the rear portion of the room. One iron *saria* (rod) and one hammer were also found in the room. The police recovered the hammer.

8. According to PW-1, the Appellant and A-2 supposedly admitted to having killed the deceased and pointed to a box where the dead body was lying. The box was opened and PW-1 was asked to identify the deceased. The body was found wrapped in a *daril/kambal* (blanket) and the hands were tied and some cloth was also present in the mouth. The money was supposed to have been recovered by the police, in a plastic bag kept in an *alla* in the wall in

the room of the Appellant. Among the other things recovered were a wooden *phatta* and a brick, apart from the hammer (Ex.P6). An iron pipe was also seized from the spot along with the plastic which was used to tie the body. A photo album (Ex.PW13) was seized. A *bori* was also seized along with a *kambal/dari* and other clothes found on the body of the deceased. The clothes of the Appellant and A-2 were also seized. Blood was lifted from the floor of the room and earth control was also lifted.

9. According to PW-1, the deceased was wearing a gold chain and a gold *kada* weighing 3 tolas, a gold ring having *pukhraj* stone and these jewels were not on his body when it was found.

10. In his cross-examination, PW-1 denied that any *saria* was recovered from the room and reiterated that what was recovered was a pipe. According to PW-1, the Appellant also disclosed to the police that he would get recovered the *kada*, chain and a ring. When they took him back to the premises at 3112/34, Beadan Pura, the gold chain and *kada* could not be traced. The Appellant is supposed to have pointed out that the ring was kept under the Laxmi Devi Idol. That ring with the *pukhraj* stone was recovered from there.

11. Nothing much in favour of the Appellant could be elicited from PW-1 in his cross-examination.

12. Basant Lal (PW-2) deposed to the effect that he used to run a committee of which the Appellant was a member. After paying instalments 3-4 times, the Appellant is stated to have defaulted. On pressure from PW-2 with the

help of two other persons from the market, the Appellant gave his shop to PW-2 for Rs.3 lacs i.e. a shop at House No.3112, Gali No.34 and executed a sale deed with the understanding that the Appellant would vacate the shop after three years but in case he paid the money, PW-2 would return the shop to the Appellant. The said sale deed was supposed to have been executed on 7th May, 1996. PW-2 clarified that the shop continued to be in the possession of the Appellant. Later PW-2 learnt that the Appellant had sold the same shop to some other person.

13. In PW-2's cross-examination, it emerged that the property bearing No.3112, Gali No.34 consisted of 4 floors being ground, first, second and third. PW-2 admitted that there were three portions in the second floor and one portion was owned by the Appellant, out of which one half had been sold to PW-2 and the other half to one Vimal. The portion sold to PW-2 was stated to have one door and two windows. PW-2 pointed out that there is a wall separating his portion and the adjoining second portion of the second floor and he could not say as to who the owner of the adjoining portion was but that some persons were living there. He maintained that there was an oral understanding between him and the Appellant about the return of the property.

14. Head Constable ('HC') Virender Kumar (PW-5) was the policeman, who met PW-1 on the intervening night of 2nd/3rd September, 1996. He confirmed that PW-1 and his brother met him in Gali No.36. Dhanesh Tiwari (PW-6) was a taxi driver of vehicle bearing No. DLT-4122. According to him, the Appellant had come to his taxi stand at 8 pm on 2nd

September, 1996 and booked a taxi for the Sarai Rohilla Station. He was asked to come at 1 am to Gali No.34 at Beadan Pura. At around 1 am while he was trying to get his taxi started with the help of others at the taxi stand, the Appellant himself came there and asked him as to why he was delayed. PW-6 claims that after he had reached the Gali No.34 in front of one house and the Appellant had gone upstairs, Ct. Vijender along with another person came there and inquired from him why the taxi was standing there. When the said constable went upstairs in the presence of the taxi driver, the Appellant denied having called the taxi. This gave rise to some suspicion and therefore the Appellant was made to sit in the taxi and was taken to the PS.

15. Rattan Devnath (PW-7) has also supported the deposition of his brother Swapan Devnath (PW-1). Nothing much has turned on his cross-examination as well.

16. When these circumstances were put to the Appellant, he denied them. He claimed to be innocent and to have been falsely implicated. According to him, he was arrested in front of the PS at about 5 pm on 2nd September, 1996. No defence evidence was led.

17. In the impugned judgment, the trial Court acquitted A-2 and convicted the Appellant for the offence of murder of the deceased punishable under Section 302 IPC and sentenced him in the manner indicated hereinbefore.

18. The trial Court based its conclusions essentially on two factors. One was that the dead body was recovered from the house of the Appellant while he

was still in its possession. Therefore under Section 106 of the Indian Evidence Act ('IEA') it was for the Appellant to offer an explanation. The second factor was the Appellant's disclosure leading to the recovery of the dead body from a trunk kept inside the said house. Further, the recovery of the jewels worn by the deceased at the instance of the Appellant also stood proved. The depositions of PWs 5 and 6 also corroborated the fact that it is the Appellant who called for the taxi. It showed that he was trying to run away to dispose of the body. The trial Court, however, did not believe the recovery of the ring from the same house on 12th September, 1996 i.e. 9 days after the arrest of the Appellant. The premises had remained in the possession of the police since 3rd September, 1996.

19. The above proved circumstances have to be seen along with the fact that the death was homicidal as was proved by the post-mortem report which was never challenged. It showed that the death was as a result of cranio cerebral damage consequent upon a blunt force impact on the left side of the skull which is due to a circular shaped object like hammer. There was also evidence of strangulation and gagging which along with the injury to the head was held to be sufficient to cause death in the ordinary course of nature.

20. In the considered view of the Court, the contradictions pointed out by learned counsel for the Appellant in the depositions of PWs 1 and 5 are not material. The key aspect of the Appellant offering to get the dead body recovered and then taking the police to the house; getting it broken open and then pointing to the box in which the dead body was placed have all been

proved by the prosecution beyond reasonable doubt.

21. The fact that PW-1 stated the weapon of offence to be a *saria* whereas it was a pipe that was recovered is again not material. Merely because no chance print was found on the hammer will not dilute the probative value of the evidence of PW-1. The Court is unable to find any legal infirmity in the impugned judgment of the trial Court holding the Appellant liable for the killing of the deceased.

22. The next question that arises is the nature of the offence. Is it murder or culpable homicide not amounting to murder? According to the post mortem report, the fatal injury was the one caused by the hammer on the left side of the skull. It was a single blunt force injury. The prosecution has not proved the motive for the crime. In the circumstances, the possibility that the killing was not premeditated and took place at the spur of the moment cannot be ruled out. In the circumstances, the Court is persuaded to modify the conviction of the Appellant to one for the offence of culpable homicide not amounting to murder punishable under Section 304 Part I IPC.

23. The Appellant had already served more than seven years of sentence at the time of suspension of his sentence. Therefore, the sentence awarded to the Appellant is modified to the period already undergone, inclusive of the default sentence, if any, for the non-payment of fine.

24. In that view of the matter, the bail bond and surety bonds furnished by the Appellant stand discharged.

25. The appeal is disposed of in above terms. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 21, 2018
rd