

\$~

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

Reserved on: 25th September, 2018

Decided on: 8th October, 2018

+
DANISH

CRL.A. 38/2017

.....Appellant

Through: Mr. Pramod Kumar Dubey,
Advocate with Ms. Pinky
Dubey, Mr.Saurabh Kumar,
Ms. Shivika Singh and Mr.
Prince Kumar, Advocates.

versus

STATE

....Respondent

Through: Mr. Hirein Sharma, APP for
the State.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 24th February 2016 passed by the learned Additional Sessions Judge-02 (South-East), Saket Courts, New Delhi in Sessions Case No.74 of 2012 arising out of FIR No.241 of 2012 registered at Police Station ('PS') Hazrat Nizamuddin, New Delhi, convicting the Appellant for the offence under Section 302 of the Indian Penal Code ('IPC') and the order on sentence dated 25th February 2016 whereby for the said offence, he was sentenced to rigorous imprisonment ('RI') for life along with fine of Rs.5,000/-, and in default of payment of fine, to undergo simple imprisonment ('SI') for six months.

2. It must be mentioned at the outset that the Appellant was sent up for trial along with his mother Maimo, who was convicted by the trial Court by the same impugned judgment for the offence punishable under Section 201 IPC and sentenced to undergo RI for a period of 5 years along with fine of Rs.2,000/-, and in default of payment to undergo SI for three months. The Court in this judgment is dealing only with the appeal filed by the present Appellant.

Charge

3. The charge against the present Appellant was that at 5.30 pm on 24th July 2012, at H. No. A-47 Kotwali Masjid Basti, Hazrat Nizamuddin, New Delhi, he murdered his father Sadruddin ('the deceased') by cutting his throat. As far as Maimo is concerned, she was charged for having caused disappearance of the evidence of the murder by wiping blood from the floor in order to screen the present Appellant, thereby committing an offence punishable under Section 201 IPC.

Information to the police

4. The Police Control Room ('PCR') received a call from Jairuddin (PW-5) at 5.25 pm to the effect that '*ek admi ka gala kat rakha hai or sua ghoos rakha hai.*' The PCR form, which was not marked as an exhibit, recorded in the right hand column that mentioned the name of the deceased and noted '*jisne churi se apne app khud apni gardan (neck) kaat li hai, mauka par dead hai.*'

5. The information was noted as DD No.18A at PS Hazrat Nizamuddin and was marked to Sub Inspector Ajay Kumar (PW-21), who at around 5.30 pm,

accompanied by Constable Shahid (PW-11) and Constable Anand (PW-14) went to the spot. He noticed that several public persons had already collected there. Meanwhile, the Station House Officer ('SHO') Inspector Sunil Kumar, Inspector Binay Singh (PW-22) and other police officers had also reached at the spot.

6. After removing the public persons from the spot, they entered to find a person lying on a mat inside the house on the first floor of the building. His right arm was over his abdomen while the left arm was on the floor. Cut marks were observed on his neck while some stab wounds were present on other parts of the body. Blood was scattered on the floor as well as on the walls of the room. One *sua* (poker) was lying there in two parts i.e. the iron rod and handle separately. The spot appeared to have been washed.

7. PW-21 prepared a *rukka* (Ex.PW-21/A) and gave it to PW-11 for registration of the FIR. The crime team had already reached there. The crime team report (Ex.P3) shows that the crime team remained at the spot between 6.15 and 7 pm. The exhibits picked up by them were: (i) blood in gauze, (ii) bloodstained floor, (iii) control sample floor, (iv) *sua*, (v) handle (of the *sua*), (vi) a blood soaked *pocha* (cleaning rag) and (vii) bloodstained mat. According to PW-21, there were no eye witnesses at the spot.

8. At that stage, PW-22 took over the investigation. According to PW-22, he interrogated the public persons gathered at the spot before returning to the PS. PW-21, however, stated in his cross-examination that he himself did not examine any public person and that "none came to him there to depose in this regard". He added: "It is true that family members of deceased were

present at the spot. None from them deposed at that time.”

Statement of PW-5

9. According to PW-22, on the next day he called PW-5, the brother of the deceased, to the PS after serving a notice upon him. PW-5 was interrogated and his statement was recorded. The statement of PW-5 (Ex.PW-5/A) under Section 161 of the Code of Criminal Procedure (‘Cr PC’) was to the effect that he was sitting in his meat shop, under the residence of the deceased, on 24th July 2012 and at around 4.30 pm, he heard some screaming sound. He then stepped out of the shop into the street and found that a crowd had gathered in the street. He saw the Appellant coming down the stairs from the first floor. He noticed that blood was coming out from a wound on the right index finger of the Appellant and he was limping on his left foot as he was walking. The Appellant then walked away briskly.

10. PW-5 along with some persons then went up to the first floor and noticed his sister-in-law Maimo crying and shouting and using a wiper to wipe the floor. On noticing him, she stated ‘*nanhe tere bhai ke saath ye kya ho gaya.*’ He then entered the room and noticed his brother (the deceased) lying dead on a cot with his neck cut. In his statement under Section 161 Cr PC, PW-5 stated that he suspected that it was the Appellant, who along with his mother Maimo, had murdered the deceased.

Arrest of the Appellant

11. According to PW-22, after recording PW-5’s statement, he went to the house of the Appellant but did not find him there. Maimo was present at the residence. PW-22 interrogated her and they left for the PS. On his way to the

PS, PW-22 got information that the Appellant was present at the Nizamuddin Railway Station and was waiting to escape. PW-22 accompanied by HC Dharambir (PW-9), Constable Satish (PW-12) and Sub Inspector Vinita (PW-17) went there and found the Appellant present at the railway station. According to PW-22, the Appellant was already known to him and to PW-9. He was apprehended and brought to the PS where he was interrogated.

Post mortem

12. Meanwhile, the post-mortem of the deceased was performed at the All India Institute of Medical Sciences ('AIIMS') by Dr. Adarsh Kumar (PW-13) along with Dr. Sanjay Kumar. The post-mortem report (Ex.PW-13/A) noticed as many as 16 external injuries, of which 15 were incised stab wounds or punctured wounds on various parts of the body. The opinion as to the cause of death was hemorrhagic shock coupled with asphyxia as a result of the multiple injuries. The injuries were ante-mortem.

13. Injury Nos. 1, 2 and 5 were to the neck region; injury Nos. 6 and 11 to the lungs and injury No.15 to the heart were opined to be able to cause death collectively and also individually in the ordinary course of nature. It was opined that injury Nos.1 to 5 were caused by a sharp weapon; injury nos. 6 to 13 by a sharp-edged and pointed weapon, injury Nos. 14 and 15 by a long pointed tip cylindrical weapon; injury no.16 was said to have been caused by blunt force impact by surface or object. This post-mortem took place between 2 and 3.30 on 25th July 2012.

Recoveries

14. Meanwhile, at the PS, a personal search was undertaken of the Appellant. He also gave a disclosure statement (Ex.PW-9/A). The Appellant then led the police to the spot and brought out one dagger from behind an iron box kept in the same room where the crime was committed. It was seized under seizure memo Ex.PW-9/C. Apparently, the Appellant also disclosed the involvement of his mother Maimo. She was present in the house and was interrogated by PW-22. She was formally arrested, her personal search undertaken and a disclosure statement (Ex.PW-17/D) given by her.

15. According to PW-22, Maimo handed over to him one shirt from a washing machine and the said shirt was stated to have been worn by the Appellant at the time of the incident. This was seized under seizure memo (Ex.PW-17/C). Accused Maimo is also stated to have produced one wiper from behind the gas cylinder in the kitchen which was apparently used by her to wipe the floor in the aftermath of the incident.

16. The next day i.e. 27th July 2012, PW-22 interrogated both the accused, who again gave disclosure statements. The Appellant is stated to have led the police to a dustbin at Alvi Chowk and got recovered one shirt, stated to belong to his father. This was bloodstained and was seized by PW-22. The accused persons then led the police to their house, where Maimo produced a vest from a dustbin stated to have been worn by the Appellant at the time of the incident.

17. The exhibits were deposited in the *malkhana* and then sent to the Forensic Science Laboratory ('FSL'), Rohini. On 30th August 2012, PW-22 again visited the spot along with SI Mahesh Kumar (PW-6), while the site plan (Ex.PW-22/C) had been prepared by PW-22 on 24th July 2012 itself. The latter took the rough notes of the measurements on the pointing out of PW-22.

Charge sheet

18. The Appellant had been, on 28th July 2012, remanded to judicial custody for 14 days. At that stage, on 25th August 2012, the Appellant filed an application before the criminal Court claiming to be a juvenile. Accordingly, his ossification test was ordered. This was conducted on 30th August 2012 by the Board in Safdarjung Hospital. The result was obtained on 6th September 2012 with the doctor opining the Appellant's age to be more than 22 years.

19. Without waiting for the FSL results, the charge-sheet was filed on 13th October 2012, concluding that the evidence gathered established that it was the Appellant and Maimo who, in connivance with each other, had committed the murder of the deceased and it was Maimo who had destroyed the evidence at the scene of the crime.

20. By an order dated 4th December 2012, the trial Court framed charges against the Appellant and Maimo in the manner noticed hereinbefore.

The trial

21. 22 witnesses were examined for the prosecution. Specific to the

Appellant, when the incriminating evidence was put to him in his statement under Section 313 Cr PC, he denied them. He claimed that PW-22 had obtained his signatures on blank papers. According to him, on 25th July 2012, he had gone to the PS to enquire about his mother and instead was arrested. When asked whether he had anything else to say, he stated as under:

“I am innocent and have been falsely implicated in the case. My uncle Zahiruddin and my younger brother Nadeem want to grab the property i.e. H.No. A-47, First Floor, Kot Wali Masjid, Basti Hazrat Nizamuddin and therefore, with their ulterior motive, they have falsely implicated me in the present case.”

Defence evidence

22. One defence witness Ms. Zeba was examined as DW-1. She was the younger sister of the Appellant. She pointed out that on 24th July 2012, she along with their mother Maimo and the Appellant had gone to a jeweller shop at Jama Masjid where she had purchased ear rings. She tendered the bill of the said purchase as Ex.DW-1/A. This was around 12 noon. According to her, the Appellant left them at the jeweller's shop and departed. She and her mother returned home at Nizamuddin Basti at around 4 pm. On opening the door, DW-1 noticed her father lying on the floor having his face down on the floor. There was no light in the room and blood was on the floor. DW-1 called Maimo upstairs, who raised an alarm upon arriving. DW-1 became unconscious. When she regained consciousness about 10 -15 minutes later, she found several persons gathered in the house, including PW-5 and her brother Nadeem (PW-2). According to DW-1, PW-5 asked PW-2 to go out. According to her, the police took one *sua* which was lying near the body. The police also searched the room where she and

her mother were present. Nothing was picked up from that room. According to DW-1, a washing machine was lying in the room.

23. DW-1 disclosed that Maimo was taken to the PS; and on being questioned by DW-1 and her *bua* as to why this was being done, the police informed them that they would release Maimo after some time. No enquiry was made from PW-2 at this stage. The Appellant was also not at home. According to DW-1, Maimo returned home at around 6 am in the morning. There were 2/3 police officials present with her, but they undertook no search of rooms nor picked up any articles. She also stated that the Appellant had returned to the house and then gone to the police station.

Impugned judgment of the trial Court

24. By the impugned judgment, the trial Court came to the conclusion that the prosecution had proved the case against the Appellant for the offence punishable under Section 302 IPC beyond reasonable doubt. In the conclusions of the trial Court, it was noticed that

- (i) The conduct of accused Danish in leaving the room immediately after the murder and thereafter, absconding and not coming to his house is a relevant fact and same is admissible in view of Section 8 of The Evidence Act, 1872 (IEA).
- (ii) The dagger i.e. weapon of offence (Ex.P1) (used in committing the murder) was recovered at the instance of the Appellant. Given the circumstances, except the Appellant and his mother Maimo, no one else could have told who committed the murder of the deceased.

- (iii) The trial Court also relied upon the previous statement of the Appellant (Ex.PW-9/A) as a confession of his guilt, whereas pursuant to the statement given by him, the Appellant led the police party on 25th July 2012 to his house at Hazarat Nizamuddin and then brought out one dagger from behind an iron box kept in the room.
- (iv) The post-mortem report confirmed that the death was homicidal.
- (v) The bloodstained clothes worn by the Appellant and the deceased at the time of commission of the offence were sent to the FSL for examination. The FSL result (Ex.PW-22/A) shows that as per the report of forensic expert, the DNA profiles generated from the source of exhibits 2 (blood stained cotton) 6 (shirt), 8 (kurta), 9 (knife), 11a (pyjama) and 11b (baniyan) is consistent with each other and consistent with the DNA profile of deceased Sadruddin (source of exhibit 12 : blood stained gauze). Thus, the blood found on the clothes of accused Danish has matched with the blood found on the clothes of deceased Sadruddin. The blood found on knife (dagger) i.e. the weapon of offence Ex.P-1, which was recovered at the instance of accused Danish also matched with the blood of deceased Sadruddin.

25. On the above basis, the trial Court concluded that the prosecution had conclusively proved that it was the Danish who had murdered the deceased. According to the trial Court, the conduct of the Appellant after the murder also raised doubts about his involvement in the case. DW-1 was held to be a non reliable witness. There was no proof of purchase of jewellery from a

shop, as claimed by her. Also, the delay in deposing in the trial made her unreliable.

26. The trial Court further examined the submission on behalf of the Appellant that PW-5 and PW-2 (Nadeem, the other son of Maimo) wanted to grab the property where they were staying and, therefore, with an ulterior motive, the Appellant and Maimo had been falsely implicated in the case. There was an assertion made by the IO that during his investigation, he learned that the deceased used to suspect Maimo of infidelity and used to say that the Appellant was not his son. It was, however, concluded that there was no evidence to show that any dispute existed between PW-5 and the deceased over the property in question and thus the plea raised by the accused persons as regards their false implication was without any basis.

27. The trial Court concluded that since the case had been proved by the prosecution beyond all reasonable doubt, the Appellant was guilty of the offence with which he was charged. He was also sentenced in the manner indicated hereinbefore.

Discussion and reasons

28. This Court has heard the submissions of Mr. Parmod Kumar Dubey, learned counsel appearing for the Appellant and Mr. Hirein Sharma, learned APP for the State.

29. There is no manner of doubt that the death was homicidal and the medical evidence more than adequately proves that. The question really was whether it is the Appellant who killed his father (the deceased)?

30. The criminal law process was put in motion by the call made to the PCR room. From the evidence of PW-5, it appears that it was he who called the PCR; whereas the name given in the PCR form is one 'Mittal', who has not been examined. Secondly, PW-5 does not state that he left the spot after calling the police. According to him "police arrived at the spot. Police took me to the house of the accused again." This is quite contrary to the evidence of PWs 21 and 22 as neither of them stated that they found PW-5 at the spot when they reached there.

31. On the contrary, PW-22 states that he had called PW-5 on the following date i.e. 25th July 2005 to PS for questioning. It is a mystery why the statement of PW-5 was not recorded then and there if he was indeed already present at the spot when the police arrived there. Further, if indeed he had seen the Appellant come down the stairs with an injured right index finger and the limp on the left leg; and if indeed he had a doubt that it was the Appellant who was the murderer, he would have stated so to the police whilst informing them but the information given to the PCR was '*ek admi ka gala kat rakha hai or sua ghos rakha hai*', without mentioning that the deceased had been murdered. Even when the police reached there, what they were told was that the deceased had killed himself with a *sua*.

32. What makes PW-5 even more unreliable is his stating in his examination-in-chief that when he went upstairs, Maimo told him "*aap ke bhai ne kya kar diya*" whereas in his statement under Section 161 CrPC, PW-5 had stated that Maimo asked him "*nanhe ye kya ho gaya hai*". When he was confronted during his deposition with his previous statement made to

the police to the above effect by the APP, he denied having made any such statement. This further made PW-5 an unreliable witness. His statement in the examination-in-chief that Maimo told him “*aap ke bhai ne kya kar diya*” is in fact consistent with the initial information given to the police namely that the deceased had killed himself.

33. There are more problems with the evidence of the PW-5. According to him, he noticed the Appellant walk down the stairs from the first floor house with a bleeding right index finger and a limp and it was only 15 – 20 minutes later that he had heard a cry from the floor premises which then led to him going up there. This gap of 15 – 20 minutes is crucial, as the only person present during these 15 – 20 minutes with the deceased was Maimo and not the Appellant. If she did not make any noise when the Appellant left the house, but gave out an alarm only after 15 – 20 minutes thereafter, then it cannot be said that at the time of the deceased suffering the injuries, the Appellant was present there. In other words, PW-5 totally weakens the case of the prosecution that the deceased was last seen in the company of the Appellant.

34. Importantly, in his examination-in-chief, PW-5 states that after the police arrived at the spot, they found “one knife lying behind a box (*sandook*).” This meant that the knife was already there in the very first instance and, therefore, the attempt by the prosecution to show the same knife recovered subsequently pursuant to the disclosure of the Appellant is unbelievable.

35. It is also strange that the arrest of the Appellant has also not been

convincingly proved by the prosecution. He is supposed to have been arrested at the Hazarat Nizamudin Railway Station at 4.15 pm on the following day i.e. 25th July 2012. The railway station is obviously a busy area. However, there was not a single public witness to the arrest memo (Ex.PW-17/F); indeed both the witnesses are police officers. No attempt appears to have been made by PW-22 to even associate any member of the public to the arrest of the Appellant. In his cross-examination, he does say that he requested some public persons to join but none agreed. This, however, is unconvincing.

36. The Appellant is stated to have taken the police to a big dustbin near the Alvi Chowk from where he recovered the *kurta* of the deceased, but the memo of the pointing out and recovery of *kurta* (Ex.PW-12/B) again is not witnessed by any member of a public. This recovery is, therefore, also not convincing.

37. As regards recovery of the knife, its seizure memo (Ex.PW-9/C), attested only by policemen, states that the Appellant offered to get it recovered from behind the *sandook* and this took place on 25th July 2012, whereas according to PW-5, the knife was already there on 24th July 2012, when he went to the spot. In fact, it will be recalled that according to PW-5, “police found one knife lying behind the box (*sandook*).” Therefore, the circumstance concerning the disclosure made by the Appellant leading to the recovery of the knife is unbelievable and deserves to be rejected.

38. One of the incriminating circumstances put forth by the prosecution to link the Appellant to the crime is the bloodstained shirt supposedly worn by

him. It will be recalled that the bloodstains on his shirt, when sent to the FSL, were found to have matched the blood group of the deceased. However, what is important to note is that the Appellant did not make any disclosure offering to get this shirt recovered. On the other hand, his mother Maimo is the one who handed over the shirt from inside the washing machine to PW-22. It is possible that when the deceased was lying in a pool of blood, Maimo used the said shirt to wipe the blood from the floor. In other words, the mere recovery of the bloodstained shirt of the Appellant cannot be said to be a clinching circumstance that points to the unmistakable guilt of the Appellant alone. Considering that the Appellant was not the one who got the shirt recovered, the said link in the chain of circumstances to connect him to the crime cannot be said to have been proved.

39. Even the motive for commission of crime has not been proved. In a case where the other circumstances have not been convincingly proved, it becomes imperative for the prosecution to prove the motive for the crime, as explained by the Supreme Court in *Arjun Marik v. State of Bihar 1994 Supp (2) SCC 372* in the following words:

“...mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anybody else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime

must have been committed by the accused.”

40. The case of the prosecution is that there was a fight over the property with Maimo and the Appellant conniving to get rid of the deceased. The other brother of the deceased was Nadeem (PW-2), but he did not speak of any such dispute *inter se* the family members concerning the property. He was called only to identify dead body and nothing else. In his cross-examination, he admitted “it is true that my father was addicted to smack.”

41. The evidence of DW-1 has been rejected by the trial Court as being unbelievable. However, the Court finds that she being the daughter of the deceased and the sister of the Appellant, stated how the deceased was not doing any work and “was in the habit of taking and drinking drugs.” She mentioned how PW-2 and PW-5 were working in the meat shop under the house. She also mentioned how Maimo had also “also lodged complaint regarding bad behaviour of my brother Nadeem and uncle Zahiruddin for giving her house to tenants.” She also brought a copy of the petition (suit) filed by PW-5 against Maimo and the deceased regarding the house and how “my uncle always wanted to possess her house and throw us from our house.” Apparently that case was dismissed. The copies of the petition and Court order were collectively exhibited as DW-1/C1 to C13.

42. The cross-examination of DW-1 could not shake her testimony. She denied the suggestion that there was no such dispute between PW-5 on the one hand and her parents on the other. Consequently, this Court is not able to reject, as the trial Court has done, the evidence of DW-1 only because the jeweller from whose shop she is stated to have purchased jewellery had not

been examined.

Conclusion

43. The offshoot of the above discussion is that each of the links in the circumstances, as depicted by the prosecution, have not been convincingly proved by it and the circumstances taken collectively do not point unmistakably to the guilt of the Appellant to the exclusion of everybody else.

44. Consequently, the Appellant is entitled for the benefit of doubt. As a result, the impugned judgment and consequent order on sentence *qua* the Appellant, convicting and sentencing him for the offence under Section 302 IPC are hereby set aside. The Appellant shall be set at liberty forthwith unless wanted in some other case.

45. The appeal is accordingly allowed. The Appellant will fulfil the requirement of Section 437-A Cr PC to the satisfaction of the trial Court at the earliest. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL J.

OCTOBER 08, 2018

tr