

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

Reserved on : 14th January, 2015
Date of decision: 12th February, 2015

STATE OF NCT OF DELHI Appellant
Through: Mr.Varun Goswami, APP for the State.

versus

JAI KUMAR & ORS. Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

Crl.M.A No.16723/2014 (for condonation of delay in filing the Petition) and CRL.L.P. 654/2014

1. There is a delay of three days in filing the petition. A prayer has been made to condone the same. Instead of issuing notice to the Respondents, we deem it desirable to look into the grounds of appeal and the Trial Court records to ascertain whether leave to appeal could be granted.

2. This leave petition is directed against the judgment dated 17th June, 2014 passed by the learned Additional Sessions Judge-III, North District, Rohini Courts, Delhi in Sessions Case No.113/2013 whereby

the respondents have been acquitted of the charges under Sections 302 and 120 B of the Indian Penal Code.

3. The Respondents, four in number, namely Jai Kumar (Respondent No.1), Vikas (Respondent No. R-2), Parveen Kumar (Respondent No. 3) and Kuldeep Singh Saharawat (Respondent No. 4) have been charged with the offence of conspiring and killing the deceased (Om Prakash @ Omi) in the intervening night between 8.11.2008 and 9.11.2008.

4. The genesis of the prosecution case is that on 9.11.2008, a DD No.5A (Exh.PW.2/DA) was lodged stating that Om Prakash @ Omi was lying unconscious near the Dariyapur fields. Receiving such information, ASI Samundar Singh, PW.27 reached the place of occurrence, only to find that the injured has been taken by his son Rajesh Kumar, PW.2 to some hospital for treatment. A little while later, DD No.10B (Exh.PW.17/B) was received with the information that the deceased suffered injuries at the hands of unknown accused persons leading to his death.

5. Pursuant to the DD No.10B, the police party arrived at Saroj hospital where the statement of PW.2 was recorded and on the basis of

which, a rukka (Exh.PW.2/A) was prepared.

6. The materials on which heavy reliance has been placed by the prosecution are the oral dying declaration of the deceased before PW.2, Rajesh Kumar and PW.7 namely Dilip; evidence of PW.6, Dinesh who overheard the conversation between Respondent Nos.1, 2 and 3 in the evening prior to the incident regarding planning to eliminate the deceased; the extra judicial confession of Respondent No.4 namely Kuldeep Saharawat before PW.2 that he participated in the killing of the deceased by taking help of Respondent Nos.2 and 3 at the instance of Respondent No.1 as well as the recoveries of weapons of offence from Respondent Nos.1, 2 and 3 and mobile phone without sim card on the basis of the disclosure made by Respondent No.4.

ORAL DYING DECLARATION

7. In order to appreciate the contention of the parties namely the prosecution and the defence, we first need to examine the evidence of oral dying declaration by the deceased which is stated to have been made before PWs.1 and 2.

8. PW.2 deposed before the Trial Court about the family dispute

and stated that Respondent No.1 had earlier threatened the deceased of dire consequences if the tube well installed by the deceased in his fields was not shut down and closed. Because of such dispute and also to guard the tube well, the deceased started sleeping in the fields. In the night of 8.11.2008, the deceased had slept in the field. PW.2 and Respondent No.1 were present at that time in the fields. PW.2 came back home and in the next morning, went to the fields again with tea for his father. The deceased was missing. On search, a pair of slippers, a cap and a broken watch belonging to his father was located by him. In the meantime, Respondent No.1 also arrived. The aforesaid respondent assisted PW.2 in searching for his father. They found Om Prakash, the deceased, lying injured in a distant field. With the help of Respondent No.1, PWs.2 and 13 (Chanderpal) lifted him and put him on a cot. Respondent No.1 had offered to bring a vehicle for carrying the injured to the hospital but PW.2 entrusted that responsibility to PW.7 (Dilip Kumar), who arranged for the vehicle. Respondent No.1 is said to have slipped away thereafter. PW.13 also left the place. Thereafter, on being asked by PW.2 as to who inflicted such injuries on his person, the injured is said to have told him that Respondent

No.1 and his associates are responsible for such a happening. PW.2 has further stated that in the meantime Dilip, PW.7 also came with his vehicle and they took the injured to M.B Hospital, Pooth khurd. Since it was Sunday, the doctors were not available and, therefore, PW.2 and 7 proceeded for Saroj Hospital. On the way, it has been stated by PW.2, the injured continuously asked for water. After reaching Saroj Hospital, the injured was declared dead. In the same breath, PW.2 has stated that the injured also told him, on way to the hospital, that the associates of Respondent No.1 (Jai Kumar) namely Vikas and Parveen Kumar also assaulted him; whereas Respondent No.1 was having an iron rod. Vikas and Parveen Kumar were armed with wooden sticks large and small respectively.

9. PW.2 has further stated before the Court that on 12.11.2008 at noon time, Respondent No.4 came to him and confessed about his involvement in the crime.

10. PW.7, Dilip Kumar who is the cousin of PW.2 stated before the Court that he accompanied PW.2 to the hospital along with the injured. On way the injured stated about Respondent No.1 as the author of the injuries on his person. PW.7 resiled from his earlier

statement made to the police that the injured had taken the names of Respondent Nos.2 and 3 also along with the name of Respondent No.1.

11. It would be relevant in this context to refer to the statement of PW.1 Dr.Ravi Gupta who prepared the MLC No.2262 pertaining to the deceased. He stated before the Trial Court that he found stab injuries on the limbs of the deceased and bruises over the anterior aspect of the neck. The deceased was declared dead at 8.45 PM on 9.11.2008. The MLC has been exhibited as Exh.PW.1/A. It has been stated by PW.1 that the history of the patient was narrated to him by his son.

12. On a careful analysis of the testimonies of PWs.1, 2 and 7, three facts came to fore:- (i) deceased was alive in the fields from where he was taken to the hospital; (ii) Respondent No.1 Jai Kumar was present along with PW.2 and the injured for some time and (iii) till the time of recording of the first information report there was no reference of Respondent No.1 or his associates namely Respondent Nos.2 and 3 or for that matter Respondent No.4 of having committed the occurrence. If the injured was alive in the fields, then it is difficult to accept that he

would not speak anything about Respondent No.1 having caused injuries to him, when Respondent No.1 was admittedly present along with PW.2 at the fields. In this view of the matter, the statement of PW.2 that the injured told him in the field that the occurrence is the handy work of Respondent No.1 and his associates and that he further told PW.2, on way to hospital that Respondent Nos.1, 2 and 3 were responsible for the injuries on his person, does not appear to be believable. Rather it is apparently an afterthought. Similarly, PW.7, Dilip has also made different statements at the trial and has resiled from his earlier statement given to the police that the injured had spoken about Respondent Nos.1, 2 and 3, having assaulted him.

13. It also appears to be rather surprising that the doctor, PW.1 was not informed about the name of the assailants. True it is that in all cases, it is not required to state the name of the assailants to the doctor treating the injured. But the MLC Ex. PW1/A recorded post 8:35 AM on 9/11/2008 records “patient found near tube well in his garden at around 7 AM this morning. At that time he was alive and he told the history of assault by four unknown persons around 11:00 PM on 8/11/2008”. The MLC was recorded after the journey and subsequent

to alleged oral dying declaration. Contradicting the testimonies of PW1, it records that the deceased had not named the respondents. The assailants were four in number but unknown persons. Recording in the MLC Ex PW1/A is reliable, credible and worthy of acceptance.

14. The statement of Respondent No.1 under Section 313 of the Code of Criminal Procedure, 1973, lends support to the defence version that Respondent No.1 was present at the fields while the injured was still alive. In fact the injured had asked his son, PW.2 to provide cover to him as he was feeling cold.

15. The name of Respondent No.1 does not find mention in DD No.10B (exhibit PW.17/B). No explanation has been given by the prosecution as to why PW.2 did not disclose the name of Respondent No.1 or others when he was told by his father about their participation in the occurrence. The PCR Form (exhibit PW.18/A) through which information was given while the deceased was being taken to the hospital also does not mention or name the assailants. The respondents, it is apparent and accepted were named by PW.2 subsequently.

16. The Trial Court has, therefore, rightly rejected the testimonies

of PWs.2 and 7 regarding the deceased having made oral dying declaration before them. The reasoning given by the Trial Court in para 39 of the judgment is cogent and satisfactory. Para 39 of the said judgment is reproduced as under:-

“39. All the aforesaid factors go to suggest that the name of the accused Jai Kumar was neither mentioned in the PCR form Ex. PW18/A nor in the DD no. 10B Ex. PW17/B and neither it finds mention in the history of assault at Saroj hospital. Accordingly, the possibility of manipulation by PW2/complainant Rajesh cannot be ruled out for furnishing the name of the accused Jai Kumar in his statement made before the police, Ex. PW2/A. this court could not find any reasons as to why when the PW2/complainant Rajesh was well aware of the name of the accused Jai Kumar being furnished by the injured before his death to him, he could not mention the same to the responsible authorities like the police and the doctors. Accordingly, the plea of the Ld. APP that said version of the injured made before his death to the PW2/complainant Rajesh that the accused Jai Kumar was one of the assailants is admissible u/s 32 of the Indian Evidence Act, 1872 or that u/s 6 of the Indian Evidence Act, 1872 is rejected in view of the aforesaid discussion as the said information as claimed being given by the injured prior to his son has become open to suspicion.”

CONSPIRACY

17. PW.6 deposed before the Trial Court that on 8.11.2008 at about 10 PM while he was returning after meeting the deceased Om Prakash at his fields, he noticed the headlight of a motorcycle of Respondent

No.1 and also found Respondent Nos.2 and 3 along with Respondent No.1 standing near the room of one Baljeet. On seeing them, aforesaid Dinesh (PW.6) is stated to have stopped his motorcycle and asked Respondent No.1 as to why they were standing there. He has also stated all the accused persons were talking amongst themselves that they would not spare the deceased. However, on the query put forth by PW.6, no reply came forthcoming. PW.6 is then stated to have returned to his village and he learnt about the murder of the deceased only on the next day.

18. We are of the opinion that PW.6 has not made a true statement. It is curious that he overheard Respondent Nos.1, 2 and 3, conspiring amongst themselves to kill the deceased. It is difficult to believe that anybody, hearing such plans, would go away and not inform the relatives of the person about whom planning was being made, at least for the purpose of warning the family against whom such a conspiracy was being hatched. That apart, such deliberations, that is the plan to kill, would not be hatched in the presence of or at the hearing distance of any outsider.

19. The story of PW.6 having overheard such a conversation,

therefore, is absolutely unacceptable.

EXTRA JUDICIAL CONFESSION

20. Respondent No.4 is sought to be prosecuted in this case on the basis of a disclosure in the nature of extra judicial confession having been made by him before PW.2.

21. The law regarding extra judicial confession is by now well settled. An extra-judicial confession is a weak piece of evidence and it could be relied upon only if it is made voluntarily; appears to be truthful and inspires confidence; such confession being supported by other circumstances and that it does not suffer from any material discrepancies or inherent improbabilities.

22. The co-called extra judicial confession by Respondent No.4 does not inspire confidence for the following reasons:-

a) It was not made before any competent authority or some responsible person of the authority rather it is said to have been made before the son of the deceased;

b) No hue and cry was raised by PW.2 and no effort was made by him to nab Respondent No.4 or to have him arrested when such confession was made before him;

c) The confession allegedly made at the residence of PW.2 is not being supported by anyone of the witnesses who could have been present at the house post incident;

d) PW.2 did not disclose about such confession by Respondent No. 4 to the police in the first instance.

23. We are of the view that such extra judicial confession of Respondent No.4 before PW.2 cannot be accepted as a valuable piece of evidence for charging the respondents for murder.

24. The learned Trial Court has rightly rejected the theory of extra judicial confession having been made by Respondent No.4 before PW.2.

25. The recovery of iron rods and dandas respectively on the disclosures made by Respondent Nos.1, 2 and 3 do not prove any aspect of the story. The dandas recovered at the instance of Respondent Nos.2 and 3 did not have any blood marks. The iron rod recovered at the instance of Respondent No.1 had blood marks but the prosecution failed to establish that the blood marks on the iron rod matched with the blood of the deceased.

26. The recovery of mobile phones of the accused persons from the

house of Respondent No.4 without the sim cards, pursuant to the disclosure of Respondent No.4 also does not lend any assistance to the prosecution. The aforesaid recovery is stated to have been made from the house of Respondent No.4. On the contrary, PWs.10 (Sudesh, wife of Respondent No.1) and PW.22 (Anita, mother of Respondent No.3) have deposed before the Trial Court that the mobiles were seized from them. In this view of the matter even the recovery of said mobile phones on the pointing of Respondent No.4 is doubtful. There is no evidence of any call from the telephone number of Respondent No.4 to the telephone numbers of Respondent Nos.2 and 3.

27. Thus, once the statements of PWs.2, 6 and 7 are disbelieved on all material aspects, the entire edifice of the prosecution falls on the ground.

28. We find no error/impropriety in the judgment and order of acquittal which is impugned in this petition. The reasoning given by the learned Trial Court for discarding the prosecution version is justified.

29. The leave to appeal, therefore, on the above premised reasons, is refused.

30. There is thus no requirement of passing any order on the application for condonation of delay as the leave to appeal has been refused.

31. Consequently, they are dismissed.

32. Trial Court record be sent back forthwith.

(ASHUTOSH KUMAR)
Judge

(SANJIV KHANNA)
Judge

FEBRUARY 12, 2015
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