

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

Judgment Reserved on: April 19, 2016

% *Judgment Delivered on: April 25, 2016*

+ **CRL.A.752/2000**

BIJENDER SINGH

..... Appellant

Represented by: Mr.Kunwar C.M.Khan,
Advocate.

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP for
the State.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Convicted for murdering Babloo vide the impugned judgement dated November 01, 2000 and directed to undergo imprisonment for life vide the impugned order on sentence of even date, Bijender Singh has filed the present appeal claiming that there was no incriminating evidence against him for conviction and that on the same evidence the co-accused Veer Pratap @ Kalu and Satender Singh have been acquitted however, he has been convicted with the aid of Section 34 IPC though no other co-accused had been convicted.

2. On January 18, 1998 at 8.20 AM an information was received regarding a dead body lying near Pahari, C-Block, House No.12, Sangam Vihar which was recorded vide DD No.4 and exhibited as Ex.PW-15/A. SI Suraj Mal, PW-18 went to the spot along with HC Nanka Ram, Constable Dev Karan and Constable Prem Raj where they found a dead body lying in a

pit near a vacant plot. Besides others, Attar Singh father of the deceased Babloo was also present. Injury marks were found on the face, neck and head of the deceased. A blood stained handkerchief was also found near the body. Statement of Attar Singh Ex.PW18/A was also recorded and sent for registration of FIR.

3. Attar Singh stated that he had three sons and three daughters of which Arun Kumar, who was also called as Babloo, was the eldest, doing a private job. Babloo was friendly with one Bijender who used to come often to their house. In their neighbourhood, a girl namely Meenu was residing who thereafter shifted to Tuglakabad. Of late there was acrimony between Bijender and his son Babloo because of Meenu. On January 16, 1998 Bijender at around 8.00 PM came to their house in his Maruti Car No.DL 2 CJ 5613 and asked about his son Babloo. On being informed by Attar Singh that Babloo was not at home, Bijender left in his Maruti car. Next day on January 17, 1998 Bijender at around 8.00 AM again came in his Maruti car No.DL 2 CJ 5613 and met his son Babloo. Bijender stated to him that they would come soon and took away his son Babloo in his Maruti Car whereafter his son did not come back. On the morning of January 18, 1998 at around 7.15 AM while he was present in his house, a neighbour namely Bhopal Singh informed that his son Babloo was lying dead in a pit in the gali. On this he along with his wife reached the spot where they found his son Babloo dead, who had injury marks on his head and face. From the spot one broken teeth, four stones, blood stained earth control and one blood stained handkerchief were recovered. The same day at about 5.00 PM on an information received, SI Vimal Kishore, PW-19 along with Constable Ved Ram, PW-12 and Constable Mukesh arrested Bijender. Maruti Car No.DL 2

CJ 5613 was seized parked outside the house of Bijender wherein blood stains were found at various places. Bijender got recovered his blood stained clothes. Pursuant to the disclosure of Bijender, he led the police party to R.D.Marg, near Hamdard University in between Gate Nos.5 and 6 and pointed out towards blood stained brick (cemented stone) which was seized and exhibited as Ex.PW-11/C. The car was sent for FSL examination whereafter blood was lifted from the front door, back seat, back side glass and dickey of the car.

4. Dr.S.K.Gupta, PW-13 conducted the post-mortem on the dead body of Arun Kumar @ Babloo and found the following ante-mortem injuries on his body:

- “1. Lacerated wound 6 cms x 2 cms on the right parietal region. Bleeding seen on scalp tissues. Underneath parietal bone was fractured. On further examination brain tissues showed laceration collected blood was 500 ml on the brain. Durameter of the brain was also teared. The wound was situated 6 cms above right eye-brow.*
- 2. Lacerated wound measuring 5 cms x 2 cms on the right parietal area near injury No.1.*
- 3. Lacerated wound 4 cms x 2 cms on the upper lip. Bleeding present in mouth. Broken left upper incisor teeth and gums.*
- 4. Abraded contusion 7 cms x 6 cms on the back of chest. Underneath tissue showing bleeding.”*

5. Dr.S.K.Gupta, PW-13 opined the cause of death to be due to ante mortem head injury Nos.1 and 2 both of which were sufficient to cause

death individually and were produced by blunt force. Time since death was opined to be about 1½ day. He also examined the cement concrete block weighing about 3800 gms with stains of blood and hair on it and opined that the injuries mentioned in the post-mortem report could be produced by the said weapon.

6. As per the FSL report Ex.PW-20/A and Ex.PW-20/B human blood of 'B' group was detected on the cemented and concrete slab and the stone pieces which matched with that of the deceased. Though no blood grouping of the blood stains collected from the car could be ascertained however, they were opined to be of human origin. Further the bunch of hair found with the stone pieces, morphologically and microscopically tallied with the hair of the deceased. The blood stains on the clothes recovered at the instance of the accused also matched with the blood group of the deceased and were opined to be of 'B' group human origin.

7. Thus on the strength of the statement of the father of the deceased, Attar Singh, the last seen witness, recovery of the weapon of offence which was connected with the injuries and blood stains found on the clothes of the Bijender and recovered from the Maruti car in which Bijender Singh took the deceased in front of his father and the FSL report, the learned Trial Court convicted Bijender however, granted benefit of doubt to Veer Pratap @ Kalu and Satender Singh.

8. Assailing the impugned judgment, learned counsel for the appellant contends that though the prosecution had produced three witnesses as the last seen witnesses, that is, PW-1 Jagdish Gupta, PW-2 Attar Singh, father of the deceased and PW-4 Ram Dass however, the two independent witnesses that is, Jagdish Singh and Ram Dass did not support the

prosecution case. Further Attar Singh saw Bijender Singh taking the deceased in his car at 8.00 AM on January 17, 1998 whereas the dead body was found in the morning at about 7.15 AM on January 18, 1998. Thus Attar Singh cannot be said to be the witness of the last seen.

9. Further Attar Singh PW-2 deposed that appellant was in custody of the police at the police post and he was never asked to identify the appellant. It is thus contended that since the appellant was in custody of police at 8.00 AM whereafter the rukka was sent for registration of the FIR, the version of the police officers that appellant was arrested from his house at 5.00 PM was false. The case being based on circumstantial evidence, no motive has been proved and in the absence thereof, the appellant cannot be convicted for the offence of murder. Reliance is placed on the decision reported as 2010 (6) SCC 525 Niranjan Panja vs. State of West Bengal.

10. Learned counsel for the appellant further contends that no public witness was associated at the time of recovery of alleged weapon of offence, from R.D. Marg, Hamdard University, Jamia Nagar, New Delhi which is a public place. Post-mortem doctor in cross-examination admitted that the injuries could have been caused by more than one person thus the conviction of the appellant alone for the offence is not warranted. Chain of circumstances not being complete, the appellant was entitled to acquittal.

11. No doubt Jagdish Gupta, PW-1 and Ram Dass, PW-4 the two other witnesses of the last seen have not supported the prosecution case however, nothing has been elicited in the cross-examination of Attar Singh who has deposed in sync with his statement on the basis of which ruqqa was recorded. He stuck to his stand that after visiting his house to meet Babloo at 8.00 PM on January 16, 1998 Bijender again came back at 8.00 AM on

January 17, 1998 and took Babloo along with him in car bearing No.DL 2 CJ 5613 informing him that they would return back soon. However, neither Babloo returned back nor Bijender. Even though the body of the deceased was recovered the next day, in view of the specific deposition of Attar Singh that in the morning of January 17, 1998 Bijender had taken Babloo along with him, under Section 106 of the Indian Evidence Act the onus shifts on Bijender to explain when and where he parted company with Babloo on January 17, 1998. No explanation has been rendered by Bijender as to where he took Babloo in his car after 8.00 am on January 17, 1998.

12. The Supreme Court in the decision reported as (2006) 12 SCC 254 State of Rajasthan Vs. Kashi Ram succinctly recapitulated the principles governing Section 106 of the Indian Evidence Act as under:

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory

or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. [AIR 1960 Mad 218 : 1960 Cri LJ 620]”

13. We may note that the post-mortem on the body of Babloo was conducted at 12.20 PM on January 19, 1998 and time since death was opined to be one and a half day. Thus death of Babloo was caused somewhere in the intervening of January 17 and 18, 1998. The stomach showed semi-digested and non-digested food with liquid. Though there may be a time gap of around 16 hours in between Baboo living his residence with Bijender and his death, however present is not a case where the last seen evidence of the father can be rejected on the ground that there is a considerable time gap between the last seen and death. The decision reported as (2010) 6 SCC 525 Niranjan Panja Vs. State of West Bengal relied upon by learned counsel for the appellant has no application to the facts of the case for the reason the Supreme Court noted that where the prosecution depends upon the theory of “last seen together”, it is always necessary that the prosecution should establish the time of death which the prosecution had failed to do so in the said case. As noted above in the present case the time of death was around 12.00 O’clock in the intervening night of January 17 and 18, 1998.

14. The chain of circumstances against the appellant is further evident from the recovery of cement concrete block weighing 3800 grams on which an opinion was rendered by Dr.S.K.Gupta, PW-13 that the injuries on the deceased were possible by the said concrete earth brick. The said brick was also bloodstained and recovered at the instance of the appellant. The clothes

of Bijender recovered at his instance were also found to be stained with blood of the deceased being 'B' group of human origin besides the car No.DL 2 CJ 5613 in which he took Babloo in the presence of his father, Attar Singh. Further the hair found on cement concrete microscopically and morphologically tallied with the hair of the deceased, further fortifying that the deceased was attacked with concrete cement slab.

15. The only attack on the statement of Attar Singh is that as per Attar Singh, Bijender had been arrested in the morning of January 18, 1998 at 8.00 AM thus the version of the police officers that Bijender was arrested at 5 PM is falsified. Attar Singh deposed that he made a complaint Ex.PW-2/A at 8.00 AM however, in the next sentence he stated that "Bijender was in the custody at that time at the police post". The witness is apparently confused on this sentence for the reason he also deposed that he received the information about his son Babloo lying dead in the pit at about 7.15 am whereafter he along with his wife went to the spot and the police reached. The ruqqa was sent at 10 am on January 18, 1998 which fact has not been confronted by Bijender. The confusion in this regard is clarified by SI Vimal Kishore PW-19 who deposed about the arrest of Bijender at about 5.00 PM from outside his house in Sangam Vihar Colony and the recovery of his blood stained clothes, car and the weapon of offence at his instance. Even in cross-examination, SI Vimal Kishore reiterated the same facts. Constable Ved Ram PW-12 who stated that Bijender was arrested from house No.C-214, Sangam Vihar by Inspector Ombir Singh at 5.00 PM has not been cross-examined. Thus to this extent his testimony has gone unchallenged. Inspector Ombir Singh PW-20 who headed the team while arresting Bijender also deposed that at 5.00 PM he along with SI Vimal

Kishore, Constable Ved Ram and Constable Mukesh, on an information received by the informer arrested Bijender standing in gali outside House No.C-214, Sangam Vihar whereafter he got the recoveries made. In cross-examination PW-20 Inspector Ombir Singh is sought to be discredited only by putting to him that no public person was associated while arresting Bijender. Thus merely on the statement of PW-2 Attar Singh which does not co-relate with his earlier statement and the cross-examination, the evidence of Inspector Ombir Singh, SI Vimal Kishore, Constable Ved Ram and Constable Mukesh cannot be discredited particularly when the evidence of Constable Ved Ram has not been challenged in cross-examination. Thus, it cannot be held that Bijender was illegally arrested in the morning of January 18, 1998.

16. As regards the contention of the learned counsel for the appellant that no public person was associated at the time of making the recoveries, we may note the difference in recoveries pursuant to Section 27 of the Indian Evidence Act and search made under Section 100 Cr.P.C. as held by the Supreme Court in the decision reported as (2001) 1 SCC 652 State Govt. of NCT of Delhi Vs. Sunil and Anr. as under:

“18. Recovery of the knicker is evidenced by the seizure memo Ext. PW 10/G. It was signed by PW 10 Sharda besides its author PW 17 Investigating Officer. The Division Bench of the High Court declined to place any weight on the said circumstance purely on the ground that no other independent witness had signed the memo but it was signed only by “highly interested persons”. The observation of the Division Bench in that regard is extracted below:

“It need hardly be said that in order to lend assurance that the investigation has been proceeding in a fair and honest manner, it would be

necessary for the investigating officer to take independent witnesses to the discovery under Section 27 of the Indian Evidence Act; and without taking independent witnesses and taking highly interested persons and the police officers as the witnesses to the discovery would render the discovery, at least, not free from doubt.”

19. In this context we may point out that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person “and signed by such witnesses”. It must be remembered that a search is made to find out a thing or document about which the searching officer has no prior idea as to where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guesswork that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts the search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. This Court has indicated the difference between the two processes in

the Transport Commr., A.P., Hyderabad v.S. Sardar Ali [(1983) 4 SCC 245 : 1983 SCC (Cri) 827 : AIR 1983 SC 1225] . Following observations of Chinnappa Reddy, J. can be used to support the said legal proposition: (SCC p. 254, para 8)

“Section 100 of the Criminal Procedure Code to which reference was made by the counsel deals with searches and not seizures. In the very nature of things when property is seized and not recovered during a search, it is not possible to comply with the provisions of sub-sections (4) and (5) of Section 100 of the Criminal Procedure Code. In the case of a seizure under the Motor Vehicles Act, there is no provision for preparing a list of the things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself.””

17. It is trite law that failure to prove motive does not break the link in the circumstances where clear facts are established and the chain of circumstances conclusively proves the guilt of the accused. In the decision reported as 1992 (2) SCC 43 Mulakh Raj & Ors.vs. Satish Kumar & Ors. it was held:

“17.Undoubtedly in cases of circumstantial evidences motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case.

18. The contention of the learned counsel for the appellant that on the same evidence co-accused have been acquitted whereas the appellant has been convicted deserves to be rejected for the reason the prosecution has failed to prove that besides Bijender the two co-accused Veer Pratap @ Kalu and Satender were also last seen with the deceased as Ram Dass PW-4 turned hostile. Thus they were entitled to the benefit of doubt. In the case of Bijender there is clear evidence of PW-2 Attar Singh in whose presence Babloo was taken from his house besides the recoveries which have been linked with the injuries caused to the deceased. However, we note that the learned Trial Court committed an error in convicting the appellant for offence punishable under Sections 302 IPC with the aid of Section 34 IPC. The conviction of Bijender is modified to one under Section 302 IPC and the order on sentence is upheld.

19. The appeal is dismissed.

20. During the pendency of the appeal, the sentence of Bijender was suspended vide order dated March 01, 2001. Bijender will surrender to custody and undergo the sentence. The bail bond and surety bond are cancelled.

21. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

22. TCR be returned.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

APRIL 25, 2016 /‘vn’