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

+ **CRL.A.1005/2002**

JAMUNA PRASAD Appellant

Through: Mr.Rajeshwar Singh, Advocate.

versus

STATE Respondents

Through: Mr.Kewal Singh Ahuja, APP with SI
Brijesh Kumar, P.S. Lodhi Colony.

+ **CRL.A.14/2003**

JINENDER @ MIRCHI Appellant

Through: Mr.Vidur Sanjeev Kamna, Advocate.

versus

STATE Respondents

Through: Mr.Kewal Singh Ahuja, APP with SI
Brijesh Kumar, P.S. Lodhi Colony.

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

JUDGMENT

12.04.2018

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1. These two appeals are directed against the common judgment dated 22nd November, 2002 passed by the learned Additional Sessions Judge, New Delhi in Sessions Case No.93/2001 arising out of FIR No.57/2001 registered at Police Station ('P.S.') Lodhi Colony convicting the Appellants for the offences under Section 302 read with Section 34 of the Indian Penal Code ('IPC') and the order on sentence dated 23rd November, 2002 whereby each

of them were sentenced to imprisonment for life with a fine of Rs.500/- each, and in default of payment of fines to further undergo simple imprisonment for two months.

2. The two Appellants, along with two juveniles in conflict with law ('JCL') Mukesh and Rohit, were charged with committing, in furtherance of common intention, the murder of Sudesh (the deceased) on 9th February, 2001 near the railway track near Railway Staff quarters with sharp edged weapons thereby committing an offence punishable under Section 302 read with Section 34 IPC. Additionally, the two Appellants were also charged with having committed an offence under Section 27 of the Arms Act for having used a chopper and a knife in the commission of the crime. However, both the accused were acquitted of the latter offence.

3. The background is that deceased Sudesh and the JCL Rohit were studying in the same school, that is, Sarvodaya Vidyalay, INA Colony, New Delhi of which Om Pal Singh Dixit (PW-1) was the Vice Principal. They were both in the 9th class in B-Section. According to the prosecution, both Sudesh and Rohit attended the first period on the morning on 9th February, 2001 and thereafter both were found missing. The roll number of the deceased Sudesh was 24 and the roll number of the accused Rohit was 40. Thereafter, the JCL Rohit attended classes from the sixth period on that day but the deceased did not return to the school. PW-1 brought with him the relevant attendance record which was marked as Ex.PW-1/A.

4. The story of the prosecution, as spoken to in the disclosure statement of Jamuna Prasad (Accused No.1:A-1) made to the police on 13th February,

2001 is that he was friends with JCL Mukesh and Jinender @ Mirchi (A-2) for about 1 and a half years prior to the incident. A-1 was working as a waiter. He stated that both JCL Mukesh and A-2 had an ongoing quarrel with the deceased who is stated to have beaten up Mukesh on quite a few occasions. A-1 claimed that in the month of July, 2000 the deceased had even attacked Mukesh on his arm with a knife. This incident was, however, not reported to the police. The deceased was also having problems with A-2. Around 5 days prior to the incident Sudesh had along with his friends threatened A-2 in the market upon which A-2 had warned the deceased that if he interfered in A-2's relationship with his girlfriend, then he would kill the deceased. According to A-1, A-2 was fed up of the threats extended by the deceased.

5. According to A-1, on 9th February, 2001 JCL Mukesh and A-2 had come to him. They had asked him to accompany them so that they could teach the deceased a lesson. This was at around 9 am in the morning. They went near the bushes near the Defence Colony Masjid which was near the Railway line running behind the school. While A-2 was carrying a chopper, JCL Mukesh had a knife. At around 10 am, they saw the deceased and JCL Rohit emerge from under the Sewa Nagar Flyover. A-1 recognized the taller boy as Sudesh who had quarrelled with JCL Mukesh about 5-6 days ago. The shorter one was Rohit. A-1 then stopped the two of them and asked them which one was Sudesh @ Lambi. A-2 and JCL emerged from the bushes. A-2 grabbed the deceased by the collar. After seeing the weapons carried by A-2 and JCL Mukesh, the deceased got scared, fell at their feet, sought to be pardoned and offered to compromise with them. However, A-2 attacked him

on the neck and also asked the JCL Mukesh to do so and they proceeded to attack him several times with their sharp edged weapons. The other JCL Rohit at that point ran away from the spot. They then handed over to A1 the sharp edged weapons wrapped in a paper and he threw it in the jungle close to the INA Colony. However, the above disclosure statement was inadmissible evidence as it was made to a police officer. The only admissible portion was about the knife having been thrown in the jungle.

6. The case of the prosecution was based on circumstantial evidence. In *State of Tamil Nadu v. Rajendran (1999) 8 SCC 679* the Supreme Court held:

“... the law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused.”

7. In *Brajesh Mavi v. The State (2012) 7 SCC 45*, the Supreme Court explained:

“From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime.”

8. One circumstance sought to be proved was the recovery of the weapons of offence. In that context, the above disclosure statement of A-1, was not in

the form of a disclosure statement under Section 27 of the Indian Evidence Act. As it transpired, the seizure memo recorded how all the three accused, that is, A-1, A-2 and JCL Mukesh took the police to the *ganda nala* and got recovered a knife jointly from their own pointing out. There is, in fact, no statement of A-1 that he would take the police to the *ganda nala* and get the weapons of offence recovered. The recovery of the weapons from the *ganda nala* contradicts the statement of A-1 that the weapons were thrown in the jungle.

9. The Court has seen the scaled site plan Ex.PW-6/A. It too does not corroborate the above version of A-1. A-1 stated how they had killed the deceased on the Railway track. However, the place shown in the scaled site plan where the body was found was some distance away from the railway track and more near the railway quarters abutting the tracks. There was no site plan drawn up for that place from where the knife was recovered.

10. The memo of seizure of the knife does not precisely state from where in the *ganda nala*, the knife could be recovered. The memo Ex.PW-15/O jointly talks of the three accused i.e. A-1, A-2 and JCL Mukesh taking out the knife and the chopper. The witness who was supposed to have been present at the time of this recovery is Rajiv Kumar (PW-16). His *jhuggi* is, however, near Kidwai Nagar. The distance between the Kidwai Nagar *nala* and the place where the crime took place makes it doubtful whether the accused would have gone there to throw the knife and the chopper. A joint recovery of the weapons of offence at the instance of all three accused is fraught with the difficulties when it is not shown as to which of the accused

pointed to which place.

11. In his cross-examination, PW-16 stated that “first A-2 brought the weapon but A-1 could not produce any weapon. Mukesh also did not produce any weapon but he was searching for the weapon.” This is contrary to what is written in Ex.PW-15/O. The second difficulty is that according to the prosecution, the knife was bloodstained. If it was thrown into a dirty drain, it is unlikely that the knife would still have any bloodstains on it. The third difficulty of course is that the FSL report which shows that the blood on the knife was of human origin and belonged to ‘A’ group is not particularly helpful since strangely the deceased and the accused all were of ‘A’ group.

12. Consequently, the Court is unable to accept that the prosecution has been able to prove, beyond any reasonable doubt, the circumstance of recovery of weapons of offence at the instance of the accused.

13. The other circumstance is that post-crime extra judicial confession purportedly made by all the accused in the presence of the tea vendor Sanjay Kumar (PW-2), who was having his tea shop in Amrit Nagar, Kotla Mubarak Pur which is at quite a distance from the Sewa Nagar Fly Over where the crime took place. According to PW-2, the four accused took tea in his shop two days after the occurrence on 11th February, 2001. He noticed all of them to be scared and talking to each other that they had done something wrong. According to him, they were talking among themselves that they had killed Sudesh on a very petty matter and had thus committed a

mistake. After sometime, they left his shop. He did not see them after that.

14. Why the four accused would go to the shop of PW-2 which is at some distance from where they live is not understood. Why they would be discussing their having killed Sudesh within the hearing distance of PW-2 is also unexplained. What is strangest is that the prosecution failed to explain how PW-2 even approached the police or *vice versa*. It is simply stated that his statement was recorded by the police. The further mystery is that PW-2 states: “It is correct that on 13.02.2000 I had seen Jamuna Prasad, Mukesh and Rohit with the police.” What led to him going to the PS on that precise date is not understood.

15. PW-2 does not appear at all to be a natural witness. When asked as to why he did not lodge any report with the police, he stated “Because I could not make out as to what and whom the accused are talking about along with two other boys.” He further stated, “I did not lodge the report on that date because I did not know Sudesh.” The evidence of PW-2 is not convincing. The trial Court appears to have accepted the evidence of PW-2 without noting the improbability of this evidence.

16. As regards the circumstance of ‘last seen’, the prosecution, in order to show that Rohit and the deceased were together in the class in the first period of 9th February 2001, and thereafter went missing, has produced the attendance sheet Ex.PW-1/A and got it exhibited through PW1. As already noted, the roll number of Rohit was 40 whereas that of the deceased was 24. Ex.PW-1/A is a record of the absentees for each of the eight periods. In the first period neither roll number 24 nor roll number 40 is shown absent. As

far as the second period is concerned, while roll number 24 is shown absent and written in sequence, roll number 40 does not immediately follow roll number 24. What follows roll number 24 is 41. Below all these numbers, roll numbers 40 and 24 are again written and encircled. As submitted by the learned counsel for the accused, this is indeed a strange practice. When all those roll numbers which have remained absent were already noted down together, why only two of the numbers should again be written and circled is not known. At the same time, why roll number 24 was repeated and circled whereas 40 is not at all shown in the first list of absentees is not explained. In other words, it is not clear whether Rohit was in fact absent. The evidence of PW-1 in this regard is unhelpful. There had to be some independent evidence to show that both Rohit and the deceased were together absent from the second period onwards. The evidence placed on record does not convincingly prove this. Even the time of the occurrence, i.e., 10 am does not quite tally with this piece of evidence. The prosecution did not bother to prove the actual hours during which the classes took place, i.e., whether the first period began at 9 am or earlier.

17. Then there were the defence witnesses. The parents of A2, DW-1 and DW-2, both stated that A-2 was present with them throughout on 9th February, 2001. To speak of the presence at home of A-1, DW-3 (Moolchand) and DW-4 (Rajaram) were examined. The trial Court has simply disregarded this evidence by terming them as interested witnesses whereas in the cross examination, the APP was unable to shake any of these witnesses.

18. Lastly, the motive for the crime has not been proved at all. What we have are only the statements made by the accused in custody which are clearly inadmissible in evidence. If there was a problem with A-2's girlfriend being harassed by the deceased, then she ought to have been examined as a witness. Perhaps the best witness for the prosecution was Rohit who is supposed to have strangely come back to the school later in the day and again attended classes, even though he was an eye witness to the murder. He is shown to have started attending the classes from the 6th period onwards. Whether this would be the natural conduct of a person who has witnessed his own friend being killed, raises serious doubts on the case of the prosecution. In a case of this nature when other circumstances have not been proved beyond reasonable doubt, why A-1 and A-2 would want to kill the deceased is an important aspect which cannot be ignored. In a case of this nature, the failure to prove the motive for the crime considerably weakens the case of the prosecution.

19. The only circumstance the prosecution appears to have proved through the evidence of the doctor who conducted the post-mortem (PW-7) is that the death was homicidal with several incised and cut wounds all over the body. However, that circumstance by itself will not constitute a substantive piece of evidence to connect the accused with the crime. Each link in the chain of circumstances has to be proved beyond any reasonable doubt. The chain of circumstances so proved have to unerringly point to the guilt of only the two accused and no one else. This threshold has not been met by the prosecution in the present case.

20. Consequently, the Court is of the view that the prosecution has miserably failed to prove the guilt of the Appellants for the crime with which they were charged beyond all reasonable doubt. The impugned judgment of the trial Court and the order on sentence are hereby set aside. The Appellants are acquitted of the offence under Section 302 read with Section 34 IPC.

21. The appeals are accordingly allowed. The bail bonds and surety bonds furnished by the Appellants are discharged. They will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. A certified copy of this judgment along with the trial Court record be returned forthwith.

S. MURALIDHAR, J.

I.S. MEHTA, J.

APRIL 12, 2018
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