

\$~4, 5

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

+ **CRL.A. 360/2002**

CHHATAR PAL

..... Appellant

Through: Ms. Neha Kapoor, Advocate.

versus

STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP.

and

+ **CRL.A. 721/2002**

PAPPU

..... Appellant

Through: Ms. Neha Kapoor, Advocate.

versus

STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP.

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

ORDER
18.01.2018

%

Dr. S. Muralidhar, J.:

1. These appeals are directed against the impugned judgment dated 5th February 2002 passed by the learned Additional Sessions Judge ('ASJ') in Sessions Case No.220/1999 arising out of FIR No.104/1999 convicting

the two Appellants, Chhatar Pal (A-1) and Pappu (A-2), under Section 302 read with Section 34 of the Indian Penal Code ('IPC') and the order on sentence dated 6th February 2002 whereby for the aforementioned offences each of them was sentenced to imprisonment for life along with a fine of Rs.5,000/- and, in default of payment of said fine, to simple imprisonment for a period of six months.

Background Facts

2. The prosecution case began with recording of DD No.34A dated 11th June 1999 at Police Station ('PS') Maurice Nagar at 5.30 am. The wireless operator informed that a dead body of male aged 25-30 years was lying on a rickshaw on the main road outside Sri Ram College and that he was wearing wrist watch, *baniyan* and plastic shoes.

3. On receipt of the said DD, the information was passed on to Assistant Sub Inspector ('ASI') Balkishan (PW-17) who along with Constable ('Ct.') Ramroy (PW-20) went to the spot opposite Sri Ram College where a dead body was lying on a rickshaw. Meanwhile, the Station House Officer ('SHO') of PS Maurice Nagar, Inspector Bhag Singh (PW-21), also reached the spot.

4. PW-21 called a private photographer, Rakesh Bhardwaj (PW-19), to take photographs of the dead body. He also called ASI Narinder Singh (PW-5), Finger Print Expert (FPE) posted at the Crime Branch, to come to the spot. This is because, according to PW-21, in the basket in the rickshaw there were three bottles, one of which was a glass one, 1/6th of which contained liquor. PW-5 has stated that he lifted two chance-prints from the liquor

bottle. One of those chance prints was Ex.PW-5/A.

5. At the spot, PW-21 found one match box and at a distance of around 30 yards from the dead body, one blood stained knife was recovered. One *chappal* (slipper) was also found. These were, however, not photographed. According to PW-21, Sunil Kumar (PW-12) reached the spot and identified the body as that of Pappu, son of Nathi Singh, resident of Ghazipur. According to PW-12, the rickshaw was taken on hire from him by the deceased. PW-21 prepared the *rukka* and sent it to the PS through Ct. Ramroy (PW-20) for registration of the case. The seized articles were converted into *pullandas*; the earth control blood samples, blood stained earth and blood sample from the spot were also converted into parcels. A rough site plan was prepared on the spot (Ex.PW-21/2).

6. The statement of Naksay Ram (PW-15), who happened to be the younger brother of the deceased, was recorded. He gave a statement that at 'Chander ki Garage' where he was also residing, he noticed that on the intervening night of 10th/11th June 1999, at around 9 pm, the deceased was consuming liquor in the company of A-1 and Pappu A-2. According to PW-15, he questioned the deceased about taking liquor with A-1 and A-2 with both of whom he had a past rivalry. According to PW-15, the deceased told him that he could very well manage and asked him to sleep.

7. PW-15 further stated that in the next morning he woke up early to take passengers from the railway station and started looking for A-1 and A-2. He somehow reached the spot and noticed that there was a huge gathering and the dead body of his brother (the deceased) was lying there. He also stated

that he noticed a *chappal* lying there.

8. With PW-15 having named A-1 and A-2, both of them applied for anticipatory bail which was rejected. On 22nd June 1999, they moved an application before the Duty Magistrate offering to surrender. From a copy of the said application which is available in the Trial Court Record ('TCR') it is seen that the Duty Magistrate made an endorsement that they should be taken into custody and directed notice to the SHO, returnable on 24th June 1999.

9. Upon the surrender of the two accused, they were arrested. According to PW-21, they made their respective disclosure statements. A-1 is supposed to have offered to get recovered one *chappal* from the stairs near the Law Faculty which was then recovered under Seizure Memo (Ex.PW-21/8). PW-21 then states that thereafter, "exhibits were sent to FSL as well as Finger Print Bureau for expert opinion". The scaled site map was also prepared by the draughtsman (Ex.PW-2/A).

Medical Evidence

10. In the meanwhile, the post-mortem of the deceased was performed by Dr. Komal Singh (PW-1) who noticed the following external injuries:

"On external examination, there was an incised cut on left antero lateral side of neck at upper part of the thyroid cartilage up to posterior hair line of neck. 17 cm x 5 cm in size, sharp edged, acute at both the side.

2. Just 2 cm below of above injury, another incised wound on left A.N.T. LAT at lower level of upper ring trachea 10 x 2 cm in size acute on the both the ends.

3 & 4. Superficial incised (wound) on the right side of the neck 4 cm x 2 cm, both angle acute and edges were sharp and 3.2 cm below to above injury, another wound on the right lateral side of the neck 4 cm x 2 cm in size, edges were sharp.

5. Defence wound on the left little finger 2 cm in size.

6. Another defence wound on the right middle finger 2 x .2cm in size on palm surface.

7. Abrasion of 14 cm x 6 cm present on the left lateral side of the thigh.”

11. As far as examination of stomach is concerned, PW-1 noted as under:

“Stomach was found to contain 100 ml of digested material.”

12. The opinion of PW-1 as to the cause of death was “haemorrhagic shock following a cut over neck vessel by an assailant.” The death was confirmed as being homicidal.

13. Subsequently, on 28th June 1999, the knife recovered was sent to the Forensic Science Laboratory (‘FSL’) and it was opined by PW-1 that injuries no.1 to 6 could have been caused by the said weapon.

Forensic evidence

14. SI Gyanender Singh (PW-10) the FPE from the Finger Print Bureau (‘FPB’), PTS, Malviya Nagar, New Delhi, stated that he received on 2nd July 1999 for comparison the specimen print with the chance-prints from the crime investigation team. Upon comparison, he found that the left index finger on the finger impression slip of A-1 (mark S-1) matched one of the chance-prints (Q-1) which had been lifted from the bottle containing liquor.

Charge

15. At the conclusion of the investigation, charge sheet was filed and subsequently, by an order dated 19th January 2000, the trial Court framed the following charge against both the accused:

“That at the night between 10/11th June 1999 (Exact time not know), G.T.B. Road, Opposite S.A.C.C., Outer Gate, Delhi University, Delhi within the jurisdiction of P.S. Maurice Nagar, you both in furtherance of common intention committed the murder of Pappu s/o Nathi Singh with knife and thereby committed an offence punishable under Section 302 read with Section 34 IPC.”

16. The prosecution examined 21 witnesses. In their respective statements under Section 313 Code of Criminal Procedure, 1973 (CrPC), both the accused maintained that they were innocent and had been falsely implicated by the police. While no defence witness was examined, copies of the three FIRs against the deceased registered at PS Badayun (UP) were marked as exhibits on behalf of the accused.

Impugned judgment of the trial Court

17. In the impugned judgment, the trial Court came to the conclusion that the following circumstances stood proved by the prosecution pointing unerringly to the guilt of the two accused:

(i) PW-15 proved both the ‘last see’ evidence and the motive for the commission of the offence. He pointed out that two accused and the deceased had been seen by him having liquor together at 9 pm and further that they had past enmity;

(ii) The death was homicidal as confirmed by the medical evidence. It occurred as a result of the injuries caused by a sharp edged weapon;

(iii) A knife recovered from the spot was opined by PW-1 to be capable of causing such injuries. The blood group on the knife matched with the blood group of the deceased;

(iv) PWs 14 and 15 stated how two accused is to take rickshaws on hire basis from PW-15. Both were absconding after the incident. Both of them surrendered before the Court subsequently;

(v) The blood stain on the match box matched with the blood group of the deceased.

(vi) The chance prints lifted from the liquor bottle matched the specimen print of A-1.

18. It was accordingly concluded that all the above circumstances, which had been successfully proved by the prosecution, formed a complete chain and led to the only possible conclusion that it was the accused who committed the offence and no one else.

Analysis and Reasons

19. This Court has heard the submissions of Ms. Neha Kapoor, learned counsel for the Appellants as well as Ms. Kusum Dhalla, learned APP for the State.

20. The first circumstance which requires to be discussed is the circumstance of 'last seen'. The statement of PW-15, the younger brother of the deceased, being an interested witness, requires to be carefully examined.

The Court is required to be cautious in ensuring that there are no glaring inconsistencies and contradictions in his evidence.

21. In his statement made in the first instance to the police, which is undated, PW-15 talks of seeing the deceased in the company of the two accused drinking liquor at 'Chander ki Garage'. Incidentally, this is the very place where he is supposed to have been residing. In the trial Court record, there is no document which can help the Court appreciate where this 'Chander ki Garage' is exactly located. This becomes important because the place where the dead body was found, i.e. on the main road outside Sri Ram College, is admittedly at some distance away from the 'Chander ki Garage'. The Investigating Officer ('IO') does not appear to have asked PW-15 to point out where the place was. The IO did not visit that spot and did not make even a rough site plan which could have helped both the trial Court as well as this Court understand the exact location of this 'Chander ki Garage' (if at all there is such a place).

22. The second aspect is that although PW-15 states that he saw them drinking at 9 pm he claims to have gone to sleep soon after. When he woke up in the morning, as per his statement under Section 161 CrPC, he did not immediately start looking for his brother but immediately started looking for the two accused. This suggests that his statement was recorded by the police after the dead body had already been found. If he did not look for his brother after having noticed him last with the accused before going to sleep, that would be highly unnatural unless, of course, he was not looking for his brother in the first place.

23. Thirdly, even as per the post-mortem report, death had occurred during the intervening night, perhaps around midnight of 10th/11th June 1999. Between 9 pm, when PW-15 noticed the deceased in the company of the two accused, and midnight, clearly the deceased moved from 'Chander ki Garage' to the spot outside Sri Ram College on the main road in his rickshaw. There is no evidence to prove in what circumstances the deceased moved from 'Chander ki Garage' to the spot where he was found. There is no evidence to prove that at the spot the deceased was ultimately found, the two accused were in the company of the deceased. There is no evidence to prove that two accused were on their respective rickshaws, if any, and whether those rickshaws belonged to PW-14 and what happened to those rickshaws if at all they were present at the spot. There is no evidence to prove that two accused also reached the spot where the dead body was found.

24. More importantly, when the post-mortem report of the body was conducted, the contents in the stomach did not reveal any presence of alcohol. It is also not proved that any part of the body viscera was preserved for detecting alcohol. This completely belies the assertion of PW-15 that he saw the deceased drinking in the company of the accused.

25. Barring the shaky evidence of PW-15, there is no evidence to show that there was previous enmity between the two accused and the deceased in which case there is failure of any evidence regarding motive for the commission of the offence.

26. While motive is not necessarily of the essence in a case of direct evidence, it attains significance in a case of circumstantial evidence particularly when the other circumstances have not been proved beyond reasonable doubt. In the present case, the 'last seen' evidence cannot be vouched for particularly because the two accused were not last seen with the deceased at the place where the dead body was ultimately found.

27. In *Arvind @ Chhotu v. State ILR (2009) Supp. (1) Delhi 704*, this Court observed as under:

“106. Thus, the circumstance relatable to the place, where the deceased was last seen in the company of the accused as also the circumstance of the place where the dead body was found does not rule out anything happening involving a third person. Thus, howsoever suspicious may be the evidence of last seen, the same has not attained the status of proof.”

28. In this case too, it may be observed that even though the evidence of 'last seen' may give rise to suspicion, it has not attained the status of proof.

29. The Court has carefully perused the next circumstance relied upon by the prosecution viz., that the chance-print lifted from the liquor bottle found in the basket of the rickshaw in which the dead body of the deceased was found, matched with the specimen print of A-1.

30. It appears that soon after the arrest of the accused, their finger prints were taken on finger print slips by the IO. By this time, the chance print already been lifted. The police officer present in this Court, during the hearing, explained to the Court that when a finger print expert reaches the scene of the crime he comes armed with a camera and takes photographs of

chance prints which are lifted from any article found at the scene of the crime. He offered this explanation in the context of the fact that, in the TCR, what the Court finds has been mark as Ex.PW-5/A is the photograph of the chance print and not the chance print itself. Even in the report submitted by the FPB under the signature of PW-10, it is noted that what has been received for comparison are the photographs of chance prints marked Q-1 and Q-2 along with their negatives by the police photographer.

31. While the above explanation as to why the original chance prints are not on the file, but only the photographs thereof are, may be plausible, what has not been sufficiently explained is why the original specimen prints of the two accused are not found in the TCR. What appears to have happened is that the original specimen prints taken on 'specimen finger prints slips' were photographed and enlarged thrice by PW-10 for the purpose of comparison. Thus, what we have in the TCR is only the enlarged photograph of the specimen print with the photograph itself bearing date of 18th August 1999, which was perhaps the day on which the comparison was undertaken by PW-10.

32. It is pointed out by Ms. Neha Kapoor, the learned counsel for the Appellants that the Full Bench of this Court in *Sapan Haldar v. State* **191 (2012) DLT 225 (FB)** cautioned in para 32 that even for taking of finger specimen print, the IO should follow the procedure under Section 5 of the Identification of Prisoners Act, 1920. In the present case, obviously that procedure was not followed. There is no indication as to whether the consent of the accused was taken for obtaining the specimen finger prints. In the

event of such refusal, the IO would have had to apply to the Court for permission. Admittedly, in this case, that procedure was not followed.

33. It is another matter that no such objection to the above effect was raised before the trial Court on behalf of the accused. Also, the Court finds that there is no cross examination of PW-10 in this regard. While the Court is not entirely satisfied that the manner of lifting of chance prints and preserving the original thereof, the failure to place on record the original of the specimen finger print raises legitimate doubts about the reliability of the comparison exercise undertaken by the FPB.

34. Even if one were to accept the report of the FPE in the FPB as correct, at the highest it only shows that A-1 as having liquor with the deceased and nothing more. This one circumstance by itself will not relieve the prosecution of having to discharge the onus of showing that it was A-1 who was responsible for the murder of the deceased. This is because the deceased was not found where he was last seen drinking alcohol with the accused. The deceased was found in an open public place and being a rickshaw puller there was nothing to indicate that he did not encounter any third person who may have committed the crime.

35. The Court is not impressed with the evidence regarding the recoveries, all of which were made in an open public place. The blood stained knife used to kill the deceased was purportedly found at a short distance from where the dead body was and yet was not photographed. The recovery of the second *chappal* of one of the accused from the staircase at the Law Faculty

building more than 15 days after the occurrence is not at all convincing.

36. As already noticed, the medical evidence contradicted the version of PW-15 about the two accused and the deceased having drunk liquor together the previous night. The stomach of the deceased did not contain any trace of alcohol. The version of PW-15 in this regard, if reliable, coupled with evidence of a quarrel might have supplied the crucial element of motive. However, the evidence of PW-15 does not inspire confidence as to its truthfulness or reliability. In *State of U.P. v. Mushtaq Alam AIR 2007 SC 2672* it was observed as under:

“Though oral testimony has to get preference over the medical opinion, yet when the latter totalily improbabilises a witness’s oral testimony, same is a relevant factor.”

37. That both the accused were absconding soon after the incident and surrendered on 24th June 1999 has been held against them by the trial Court. It must be noticed that this circumstance by itself cannot conclusively determine the guilt of the two accused. It was observed by the Supreme Court in *Rahman v. State of U.P. AIR 1972 SC 110* as under:

“It is true that the appellant was concealing himself for nearly a month though he must have known that he was wanted by the police and that he left his wife to face the situation alone. But absconding by itself is not conclusive either of guilt or of a guilty conscience. For, a person may abscond on account of fear of being involved in the offence or for any other allied reason.”

38. In the present case, on coming to know that they had been named by PW-15, it is possible that the two accused anticipated their arrest. This explains their moving for anticipatory bail and their surrender upon the application for that relief being rejected. In the strict sense therefore, this

cannot be considered to be a case of the two accused absconding or evading the process of law. They were under a genuine apprehension of being falsely implicated and moved the Court for anticipatory bail. In any event, as pointed out by the Supreme Court in ***Rahman v. State of UP*** (*supra*), this circumstance by itself cannot lead to the conclusion that it is only the two accused, and no one else, who committed the crime.

39. In a case of circumstantial evidence, not only are all links in the chain of circumstances required to be proved beyond reasonable doubt but they must be continuous and unerringly point to the guilt of the accused. In the present case, the said threshold has not been met. In the considered view of the Court, both the accused are therefore, entitled to the benefit of doubt.

Conclusion

40. For the aforesaid reasons, the impugned judgment dated 5th February 2002 and the order on sentence dated 6th February 2002 of the trial Court are set aside. Both the accused are acquitted for the offence under Section 302/34 IPC. They will fulfil the requirements of Section 437-A Cr PC to the satisfaction of the trial Court not later than two weeks from today.

41. The appeals are allowed in the above terms. The TCR be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 18, 2018/Rm