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

R-27

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CRL.A. 761/2002

JITENDER @ KALLU

..... Appellant

Through: Mr. Mukesh Birla, Advocate along with
Appellant in person.

versus

STATE

..... Respondent

Through: Mr. Hirein Sharma, APP.

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

ORDER

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15.03.2018

1. This appeal is directed against the impugned judgment dated 21st November 2001 passed by the learned Additional Sessions Judge, New Delhi in Sessions Case No.30/1999 arising out of FIR No.663/1998 registered at Police Station ('PS') Kalkaji whereby the Appellant was convicted for the offence punishable under Section 302 of Indian Penal Code ('IPC'). It is also directed against the order on sentence of the same date whereby the Appellant was sentenced to imprisonment for life and also to pay a fine of Rs.1,000/- and, in default of payment of fine, to undergo simple imprisonment for 15 days.

2. Originally the charge was against two accused, i.e. the present Appellant, Jitender @ Kallu (A-1), and Arvind Gupta (A-2). The charge was to the effect that on the intervening night of 14th-15th July 1998 at Gobind Puri,

both of them, in furtherance of their common intention, committed the murder of Raju (deceased), the son of Saroj (PW-1) and Ram Singh (PW-5).

3. The case of the prosecution was based on circumstantial evidence. The circumstances put forth by the prosecution were as under:

- (i) That the deceased was last seen in the company of the two accused. In order to prove this, the prosecution has relied upon the evidence of Santosh (PW-3);
- (ii) That there was a motive for the present Appellant to kill the deceased Raja inasmuch as he suspected Raja of having an illicit affair with his wife; and
- (iii) That after his arrest, A-1 made a disclosure statement and got recovered the dead body of the deceased which was tied up in a gunny bag and was lying in the bushes in the jungle opposite the Okhla Subzi Mandi.

4. The deceased was living with his parents (PW-1 and PW-5). According to the prosecution, on 14th July 1998, both A-1 and A-2 came to the *rehdi* (cart) of the deceased, Raja, at around 10.00 pm and took him with them. Thereafter, the deceased was not seen. His parents, for some reason, gave no complaint to the police for nearly a week thereafter. Saroj (PW-1) first went to the PS only on 21st July 1998. This was followed by PW-5 going to the PS on 23rd July 1998. On the basis of his complaint, an FIR (Ex.PW-9/I) was registered. In his complaint (Ex.PW-5/A), PW-5 stated that he suspected Rakesh Gupta, his brother Nargesh Gupta, Jitender Gupta (A-1), his friend Arvind (A-2) and one Sagar as being involved in the kidnapping of the

deceased. The FIR was registered initially under Sections 365/34 IPC.

5. The investigation of the case was entrusted to the Investigating Officer ('IO'), Sub Inspector ('SI') Ved Singh (PW-17) on 24th July 1998. On that very date, the present Appellant (A-1) was arrested from his house. PW-17 stated that after his arrest, A-1 gave a disclosure statement that the dead body of Raja had been packed in a gunny bag and thrown in the jungle opposite the Okhla Subzi Mandi and that he could get the dead body recovered. A-1 is stated to have led the police to the said spot and pointed out to a gunny bag lying in bushes. A foul smell was emanating from the bag. The hair of the deceased was also said to be visible. The gunny bag itself was tied with an electric cable while the dead body was rolled in a *dari* which was tied with a plastic rope.

6. The post-mortem was performed by Dr. S.K. Gupta (PW-18). He noted in the post mortem report that the body was in a highly decomposed state and the peeling of skin was present all over the body. A ligature mark 2 x 28 cm horizontal, 7 cms x 5 cms below right and left mastoid was seen. There was a fracture of the thyrohyoid complex and extravasation of blood from the neck. The time since death was stated to be twelve days. The cause of death was opined as asphyxia as a result of strangulation.

7. After completion of the investigation, a charge sheet was filed and the charge as noted earlier was framed against A-1 and A-2.

8. 18 witnesses were examined by the prosecution. In his statement under Section 313 Cr PC, the Appellant denied all the circumstances. When asked

whether he had anything to say, the Appellant stated that he had been falsely implicated; that on 14th July 1998, the police had approached his father and asked him to send the Appellant to the police station. The Appellant added that he had surrendered in the Court after consulting his advocate.

9. It must be noted at the outset that the trial Court in fact disbelieved the prosecution evidence as regards the circumstance of 'last seen'. According to Santosh (PW-3), the deceased was seen by him in an injured condition inside the house of the Appellant. He further deposed that at that time, the co-accused (A-2) and one Vinod were standing outside the house. However, as pointed out by the trial Court, PW-3 did not give the date or the month when he actually saw the deceased lying inside the house of the Appellant. Further, PW-3 deposed that he had soon thereafter informed PW-5 (father of the deceased) of this fact. However, as pointed out by the trial Court, in his deposition in Court, PW-5 made no mention of the fact that PW-3 told him about seeing the deceased in an injured condition inside the house of the Appellant. Even in the FIR registered on 24th July 1998 on the statement of PW-5, there is no mention of PW-3 seeing the deceased inside the house of the Appellant on 14th July 1998 at 10.00 pm. Further, according to PW-3, the Appellant threatened PW-3 that if he gave evidence against him, he too would be put to death. However, no complaint was ever made by PW-3 in that regard to the police or to anyone else. The trial Court rightly held: "the prosecution has failed to prove that the deceased Raja was last seen with the accused persons."

10. Clearly, therefore, the first link in the chain of circumstances, viz. that

the deceased was last seen in the company of the present Appellant prior to his death, has not been proved by the prosecution.

11. As regards the motive for the crime, the evidence is again not clear cut. The prosecution story is that the deceased was having an illicit relationship with the wife of the Appellant and therefore, the Appellant harboured animosity towards the deceased. The reply given by PW-1, the mother of the deceased, in her cross-examination in this regard is vague. On a reading of the deposition of PW-2, the Court is not satisfied that she is categorical on this aspect. It cannot, therefore, be said that the motive for the crime has been conclusively proved by the prosecution.

12. The major circumstance relied upon by the prosecution and accepted by the trial Court is recovery of the dead body upon the disclosure statement of the Appellant. In his cross-examination, the IO (PW-17) admits that “it is correct that the place where dead body was found is open place. The road is at some distance from the place where the dead body was found”. This has to be read along with the statement of PW-5 in his cross-examination that he had been called by the police between 11.00-12.00 am on some day when the recovery was made. However, he was not clear about the date. According to the prosecution, the recovery of the dead body took place on 24th July 1998 whereas PW-5, both in his examination-in-chief and in his cross-examination, states that the Appellant was apprehended on 21st July 1998 and the dead body was recovered on 22nd July 1998.

13. With the recovery being from an open place, and that too nearly ten days after the deceased went missing, not too much reliance can be placed on the

sole circumstance of recovery to prove the guilt of the Appellant. If the dead body had already been found by the police, which in all probability it could have been since it was lying in an open area and emanating a foul smell, the recovery of the body on the pointing out of the Appellant thereafter would lose relevance. Also, if the date of the arrest of the Appellant according to PW-5 is 21st July 1998 and not 24th July 1998 as spoken to by PW-17, it would mean that the Appellant was already in police custody for three days prior to the recovery. In the circumstances, the making of a disclosure by the Appellant on 24th July 1998 leading to the recovery of the dead body is also not convincing.

14. The prosecution case rested essentially on the evidence of PWs 1 and 5 who were related to the deceased and therefore interested witnesses. Their evidence, therefore, required careful scrutiny for inconsistencies and contradictions on the material particulars. In the present case, if their evidence has been disbelieved for the circumstance of 'last seen', they cannot be said to be reliable witnesses for the other circumstances. The IO appears not to have made any independent investigation into the material circumstances to rule out an alternative to the theory that it is A-1 alone who has committed the crime.

15. This is a case whereby the prosecution started with six suspected persons and narrowed it down two at the stage of framing of charge. Even among those two, the trial Court did not confirm the guilt of one of them. Clearly, the investigation was not satisfactory. The benefit of doubt ought to be given, in the circumstances, to the Appellant.

16. In that view of the matter, the impugned judgment of the trial Court dated 21st November 2011 and the order on sentence of the same date are hereby set aside. The bail bond and surety bond furnished by the Appellant stand discharged. He will comply with the requirement of Section 437-A Cr PC to the satisfaction of the trial Court at the earliest.

17. The appeal is accordingly allowed, with no orders as to costs. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 15, 2018

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