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

+ **CRL.A.184/2004 & CRL.M.A.No.7863/2005**

DHANANJAY @ BUNTY

..... Appellant

Through: Mr. M.K. Sharma, Advocate with
Mr. Manish Tanwar, Advocate.

versus

STATE

..... Respondent

Through: Mr. Hirein Sharma, APP.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL

JUDGMENT
08.10.2018

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Dr. S. Muralidhar, J.:

1. This is an appeal directed against the judgment dated 17th February 2004 passed by the learned Additional Sessions Judge, New Delhi in SC No.75A/2001 arising out of FIR No.197/2001 registered at PS Najafgarh convicting the Appellant for the offences under Sections 397 and 302 IPC and the order on sentence dated 20th February 2004 whereby, for the offence under Section 302 IPC, he was sentenced to imprisonment for life with fine of Rs.500/- and in default of payment, to undergo rigorous imprisonment for one year; and for the offence under Section 397 IPC, he was sentenced to 7 years rigorous imprisonment with fine of Rs. 500/- and in default of payment, to undergo rigorous imprisonment for a further six months. The sentences were directed to run concurrently.

The charges

2. The present Appellant ('A-1') was sent up for trial along with four other co-accused, viz. Narender @ Bholu ('A-2'), Praveen ('A-3'), Sunil ('A-4'), and Rajesh ('A-5'). The charge against them was that at around 11:15 am on 18th April 2001, in Laxmi Garden, near H.No.C-21, Najafgarh, all of them committed robbery while armed with a deadly weapon (a firearm) by snatching a bag containing Rs.75,000/- from the possession of the deceased Sunil and thereby committed the offence punishable under Section 397/120B IPC. They were also charged with having murdered the deceased by firing a shot with the intention of causing death and thereby committed the offence punishable under Section 302/120B. An alternative charge was framed against the five accused of having committed the murder of the deceased while committing dacoity and thereby committing the offence punishable under Section 396 IPC.

The incident

3. The case of prosecution is that a message was received in the Police Control Room ('PCR') at 11:22 am on 18th April 2001 from one Rajnath (not examined) about the above incident in which a man had been shot. It is also mentioned that three men had come in a white Maruti car, intercepted the deceased, attempted to snatch the money bag from him, and having failed to do so fired a shot at the chest of the deceased resulting in his death. Thereafter, they picked up the money bag and fled. There is a further noting at 11:37 am on the said PCR form that the number plate contained numbers in such small letters that it was impossible to read. There is also DD No.15A recorded at 11:24 am at PS Najafgarh about a man having been found dead

near H.No.C-21, Najafgarh near Laxmi Garden.

4. Rajinder Singh (PW-5), the Manager of Gemini Gas Agency where the deceased was an employee, stated that on 18th April 2001 he was informed at around 11:15 am that the deceased was lying injured in a serious condition near Laxmi Garden. He then rushed to the spot with another employee, Rajinder Kaur (PW-10), and they found the deceased lying in a serious condition, bleeding. PW-5 disclosed that on the morning of the incident he had asked the deceased to deposit Rs.75,000/- in cash at Punjab & Sind Bank situated at Chabla Road, Najafgarh.

5. PW-5 took the deceased to the nearest primary health centre at Najafgarh where he was declared as having been brought dead. A *rukka* was prepared on the statement of PW-5 (Ex.PW-5/A) and sent for registration of FIR. PW-5 disclosed that the sum of Rs.75,000/- entrusted to the deceased was in denominations of 100, 50, 20, and 10. According to him, “the currency note bundles of Rs.75,000/- which victim Sunil had carried to be deposited in bank bearing slips have been signed by Sunil on the slips and none of the bundles have been signed by me on the slip”.

6. Two days after the incident, the statement of Rozy (PW-2), a resident of the area, was recorded. However, while deposing in the trial, she did not stand by her previous statement to the police as regards witnessing an incident of firearm shooting. She merely stated that she and her grandmother were on the ground floor of their house when they heard a large number of people had gathered outside their house and when she came out, she saw one person lying by the side of the road with a bicycle loaded with 3 LPG

cylinders lying by the side.

Investigation, recoveries, and arrests

7. Inspector Anand Sagar (PW-25), SHO of PS Najafgarh, took over the investigation on 20th April 2001. On 23rd April 2001, PW-25 received a message from Sub-Inspector (SI) Kalander Singh, CIA Rohtak, Haryana to the effect that he had arrested the present Appellant, A-2 and A-3 in FIR No.127/2001 under the Arms Act as well as under Sections 398 and 401 IPC. SI Kalander Singh further informed PW-25 that the three accused had confessed to their involvement in the present case. Thereupon, PW-25 accompanied by SI Sunil Kumar (PW-16) proceeded to Rohtak District Courts. There, SI Veer Pal Singh (PW-11) handed over their disclosure statements to PW-25, the seizure memo of the weapons, and the sketch of the fire arm recovered. Incidentally, it should be mentioned at this stage that the case of the prosecution is that a .32 bore firearm was recovered from A-2 but no fire arm was recovered from the present Appellant.

8. After obtaining permission from the learned Metropolitan Magistrate ('MM') at Rohtak, the police officials brought the three accused to Delhi and produced them before the jurisdictional MM/Duty Magistrate. Relevant to the present appeal, is the claim of the prosecution that the Appellant gave a disclosure statement (Ex.PW-16/F). Thereafter, joined by Pradeep Kumar (PW-6), the Appellant led the police to his residence at Roshan Mandi, Najafgarh and pointed out a Maruti car bearing registration DL-2CC-8346 which was parked outside the house. He is supposed to have disclosed that the said car had been used in the commission of the crime. The father of the

Appellant is supposed to have produced the key for this car. Upon opening it, a *danda* was found in the boot which A-2 confessed to have used in striking the victim on the head during the incident. According to the prosecution, one empty/hole of a fired cartridge was recovered from beneath the driver's seat. A-3 supposedly disclosed that the empty cartridge was that of the bullet which was fired at the deceased. According to the prosecution, the said car was stolen around two years earlier and its original number was DL-2CJ-1860.

9. The Appellant then purportedly took the police to his house and pointed out a box attached with the double bed and took out two currency note bundles of Rs.100/- denomination. According to the prosecution, both bundles bore the 'note slip' of Punjab & Sind Bank and the stamp of Gemini Enterprises, i.e. the employer of the deceased. The note slips also had the initials of a person, later admitted to be PW-5.

Trial Court's findings

10. The other co-accused were arrested subsequently and a charge-sheet was filed against all of them for the aforementioned offences. By an order dated 1st February 2002, the charges were framed against the accused as indicated hereinbefore.

11. The case was based on circumstantial evidence as PW-2 was not an eye witness to the actual robbery and killing of the deceased. The circumstances which, according to the trial Court, unmistakably pointed to the guilt of the Appellant were as follows:

- (i) The homicidal killing of the deceased while he was carrying a sum of Rs.75,000/- along with three LPG cylinders on a bike at around 11 am on 11th April 2001. This homicidal death was duly proved by the post mortem report.
- (ii) In the earlier version of the FIR, it was disclosed that three men in a white Maruti car had come to the spot and committed the murder and had taken away the bag containing Rs.75,000/-.
- (iii) The disclosure made by the accused while in custody having been arrested in FIR No.127/2001 at PS Rohtak.
- (iv) The recovery of the stolen car which was used in the commission of the robbery and the empty cartridges recovered from under the driver's seat.
- (v) The matching of the cartridge with the firearm .32 bore by the FSL, Malviya Nagar. The recovery of Rs.20,000/- at the instance of the Appellant in two currency bundles with each bundle bearing the bank slip of Punjab & Sind Bank and also the stamp of Gemini Enterprises.

12. According to the trial Court, each of the above circumstances was proved beyond doubt by the prosecution and they unerringly pointed to the guilt of the present Appellant. By the same judgment, the trial Court acquitted the co-accused holding that they were entitled to the benefit of doubt. The trial Court held that except their confessions, which were inadmissible in evidence, there was no acceptable evidence to prove the guilt of the co-accused.

13. This Court has heard Mr. M.K. Sharma, learned counsel appearing for

the Appellant, and Mr. Hirein Sharma, learned APP for State.

Law relating to circumstantial evidence

14. As the present case is based on circumstantial evidence, it is necessary to recapitulate the legal position. The following observations made by the Supreme Court in ***C. Chenga Reddy v. State of Andhra Pradesh (1996) 10 SCC 193*** are also instructive on the manner in which the circumstantial evidence is to be weighed:

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence.”

15. The following observations in ***Sattatiya v. State of Maharashtra (2008) 3 SCC 210*** are also relevant:

“10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The Court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances...”

... 17. At this stage, we also deem it proper to observe that in

exercise of power under Article 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court *Bharat v. State of M.P.* (2003) 3 SCC 106. In the light of the above, we shall now consider whether in the present case the prosecution succeeded in establishing the chain of circumstances leading to an inescapable conclusion that the appellant had committed the crime.”

16. In *G. Parshwanath v. State of Karnataka* (2010) 8 SCC 593, the Supreme Court held:

“23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court

has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.”

17. In ***Rajendra Pralhadrao Wasnik v. The State of Maharashtra (2012) 4 SCC 37***, the Supreme Court held:

“12. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion which is inconsistent with the innocence of the accused and the only possibility is that the accused has committed the crime.

13. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.”

18. The following principles of evaluation of circumstantial evidence emerging from the decisions discussed hereinabove were set out in ***Padala Veera Reddy v. State of Andhra Pradesh 1989 Supp (2) SCC 706*** :

- (i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iv) The circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Recovery of currency notes not proved

19. One important circumstance which forms the basis for the trial Court convicting the Appellant for the crimes with which he was charged was the purported recovery of two bundles of currency notes at his instance from his house. In this regard, it must be noticed that the two bundles were of Rs.100/- denomination and totalled a sum of Rs.20,000/-. Each bundle had 100 currency notes and stapled on the left side of the bundle was a note slip

of Punjab & Sind Bank. It seems that during the trial, the currency notes were released on *superdari* to the owner of Gemini Enterprises. What was retained on the record were only photocopies of the topmost and bottommost notes of each bundle with the top notes reflecting the note slip on the inside. However, the original note slips themselves do not seem to have been preserved.

20. The test identification parade ('TIP') of the recovered notes appears to have been carried out. PW-5, the manager of the Gemini Enterprises, was brought to identify those very currency notes bundles which were entrusted by him to the deceased on 18th April 2001 to be deposited in Punjab & Sind Bank. The notes purportedly recovered at the instance of the Appellant were mixed up with other similar notes of other banks. When PW-5 was brought in to identify the bundles, he picked out two bundles of Rs.100 notes which contained the aforementioned note slip and which also contained his (PW-5's) signatures.

21. The case of the prosecution is that since these two bundles were the very bundles which were recovered at the instance of the Appellant, his connection with the crime stood established.

22. A careful perusal of the evidence of PW-5 indicates that he has, in fact, not supported the prosecution on this crucial part of the evidence. As already noticed, in his examination-in-chief, he maintains that the note slips attached to the bundles of Rs.100/- notes were signed on that particular date by the deceased Sunil and not by himself, i.e. PW-5. On this aspect, there was also the corroboration of Rajender Kaur (PW-10), another employee of the gas

agency, who is categorical that “on the date of the incident, Sunil has put his signatures on the bundles which he carried from the agency to be deposited with the bank”.

23. In his cross-examination, PW-5 further disclosed what had happened when he was taken for the TIP to identify the notes. He stated, “It is also a fact that before I identified those currency notes in TIP in Court, I had also been shown those bundles in the PS also”. He maintained in his cross-examination that “it is true that these Rs.25,000/- currency notes bundles are not the ones which had been entrusted to victim deceased Sunil as part of amount of Rs.25,000/- to be deposited in the bank”. While he admitted his signatures on the note slips, he maintained that he did not recollect when he made those signatures. He further stated, “It is true that I identified those currency notes bundles of Rs.25,000/- only because of the slips bearing the stamp of Gemini Enterprises and my sign”. He further admitted, “It is true that currency note slips (Ex.PW5/A1, A2 and A3) are not those currency notes bundles which Sunil had carried”. He reiterated this when cross examined by the counsel for the other accused as well.

24. What, therefore, transpires from the evidence of PW-5 is that those very currency note bundles of Rs.100/- which were carried by the deceased were not the ones that were recovered at the instance of the present Appellant. Those currency notes bundles had the signatures of the deceased whereas what was purportedly shown to PW-5 in the TIP were the bundles having note slips which contained the signatures/initials of PW-5. Therefore, an important link in the chain of circumstances which would otherwise

conclusively prove the involvement of the present Appellant was unable to be proved by the prosecution.

25. What made it worse for the prosecution was that Pradeep Kumar (PW-6), who is supposed to have been an independent witness to the recovery of the currency notes from the present Appellant, turned hostile. He now maintained that he was approached by the police to be asked to be a witness and made to sign documents. When confronted with the documents purportedly signed by him which included the disclosure memo and the seizure memo, he denied having actually seen those documents or being present at the time of such recovery.

26. Consequently, this Court is unable to concur with the trial Court that the recovery of the two currency bundles of Rs.100/- denomination at the instance of the Appellant has been proved by the prosecution as being those currency bundles which were entrusted to the deceased on the date of the incident.

Other recoveries also not proved

27. The evidence against the present Appellant as regards the use of the firearm by him against the deceased resulting in the death of the deceased has not been conclusively proved. So too the recovery of the car parked outside his house. It is not shown that the house in front of which the car was parked was in fact the house of the Appellant. The mere recovery of a cartridge from under a seat in the car does not conclusively link the present Appellant with the crime, particularly since no firearm has actually been recovered from the Appellant.

28. With these important circumstances having not been proved, this Court is unable to concur with the trial Court that the prosecution has proved the circumstances against the Appellant beyond reasonable doubt or that such circumstances form a continuous chain which points unerringly to the guilt of the present Appellant.

Conclusion

29. This Court is inclined to grant the Appellant the benefit of doubt and consequently, acquits him of the offences punishable under Sections 397 and 302 IPC. The impugned judgment and order on sentence *qua* the Appellant are set aside.

30. The appeal is allowed and the pending application is also disposed of accordingly. The bail and surety bonds furnished by the Appellant hereby stand discharged.

31. The Appellant will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. The trial Court record be returned together with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

OCTOBER 08, 2018

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