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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
42&43

+ **CRL.A. 1042/2014**

MAHENDER SINGH @ MOTAAppellant

Through: Mr. Chetan Lokur, Advocate

versus

STATE ...Respondent

Through: Mr. Kewal Singh Ahuja, APP for State
with Insp. Ashok Giri, PS Mandir
Marg

+ **CRL.A. 1316/2014**

RAHUL alias BATOLA Appellant

Through: Mr. Suneet Verma and Ms. Preeti,
Advocates

versus

STATERespondent

Through: Mr. Kewal Singh Ahuja, APP for State
with Insp. Ashok Giri, PS Mandir
Marg

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

ORDER
20.03.2018

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1. These are two appeals directed against the impugned judgment dated 13th February 2014 passed by the Additional Sessions Judge-03 Patiala House Courts, New Delhi ('ASJ') in Sessions Case No. 37/2014 arising out of an

FIR No.254/2011 registered at Police Station ('PS') Mandir Marg convicting the two Appellants under Sections 302/34 of the Indian Penal Code ('IPC') and the order and sentence dated 17th February, 2014 whereby each of them were sentenced to undergo the rigorous imprisonment ('RI') for life and to pay a fine of Rs. 5,000/- each; and in default of payment of fine, to undergo further RI for six months.

2. The charge against both the Appellants was that at 10.30 pm on 20th December 2011 they, in furtherance of their common intention, murdered Pintu @ Jamura (deceased) by striking his head with the iron rod near the Sulab Shochalay in front of Bangla Saheb Gurudwara, Baba Kharag Singh Marg, New Delhi.

3. The prosecution has based its case against the two Appellants on two eye-witnesses, i.e. Siddharth @ Nepali (PW-5) and Rajesh @ Rajwa (PW-6), and on Kuldeep (PW-14) to whom both the Appellants purportedly made an extra-judicial confession.

4. Constable Raj Yadav (PW-11) received information which was reduced into writing as DD No.68B on the night of 20th December 2011 that one person had been injured and had been brought to the RML Hospital. The MLC (Ex.PW-12/A) revealed that the deceased had been brought there at around 11.15 pm on 20th December 2011 by Siddharth @ Chotu Nepali. It was noted that he was brought dead. The MLC itself noted that there were two contused wounds over the temporo-occipital scalp, there was bleeding from both ears and nostrils. PW-11 along with ASI Suresh Babbar (PW-13) went to RML Hospital and thereafter came back to the spot where he found blood

spilt over. By this time, the SHO and the other police staff were also present.

5. The *rukka* was prepared by PW-13 and handed over to PW-11 for the purposes of getting the FIR registered. The *rukka* notes that no eye-witness was available at the hospital at the time that the police reached there. The *rukka* was sent for registration of the FIR at around 1.30 am.

6. Inspector Sanjay Kumar (PW-17) was the Investigating Officer ('IO') attached to PS Mandir Marg. He states that after shifting the body of the deceased to the mortuary of RML Hospital, he met PWs- 5 and 6. He recorded their respective statements under Section 161 Cr PC.

7. On 23rd December 2011, post-mortem of the deceased was performed by Dr. Manoj Kumar Hansda (PW-7). The injuries noted by him were as under:

- “1. Linear lacerated wound with upper margin over hanging the under line lower margin present obliquely downwards from left temporal to left occipital region of size 7.5 cm x 1.5 cm x bone deep. The center of the wound is 7.5 m above left mastoid process and posterior end of the wound is present 4 cm lateral to external occipital protrubance.
2. Linear lacerated wound with upper margin over hanging the undermining lower margin present obliquely downwards from left parietal to left occipital region of size 5 cm x 1cm x bone deep present almost parallel to injury 1 the centre of the wound is 4 cm above the center of injury 1 and posterior end of the wound is present 6 cm. Upwards and lateral to external occipital protrubarence.
3. Boggy swelling of size 4.5 cm diameter present on right parietal region.”

8. He further found upon internal examination:

“Under surface of scalp contused of size 7 cm x 5 cm over right parietal region, of size 8 cm x 3 cm over left temporo occipital region and of size 5 cm x 3 cm over left parieto occipital region. Fissured fracture present in left temporal bone going vertically downwards from external injury 1 to posterior of left external auditory meatus of 4 cm in length.”

9. The cause of death was stated to be as under:

“Death is due to cranio-cerebral damage produced by blunt force trauma to head via external injury no. 1, 2 and 3.”

10. Subsequently when the iron rod which was stated to be recovered at the instance of the accused was shown to him, he pointed out that the external injuries one and two and the corresponding internal injuries were caused by the weapon of offence shown to him.

11. According to PW-17, after the post-mortem, he again went in search of the accused persons. The post-mortem was performed on 23rd December 2011 on which date he had gone to the RML Hospital for shifting the body to the LHMC Hospital for the post mortem. There he met Kuldeep (PW-14) and recorded his statement.

12. What is to be noted here is that PW-14 was working in RML Hospital as a driver and claimed to know both the accused persons as they would come to the Gole Dak Khana and he used to meet them there. It has emerged in his cross-examination that the accused persons and PW-14 “used to sit in the evening and have liquor and drugs”. It also emerged that PW-14 was, in fact, running a private ambulance in partnership with the RML Hospital. He also was having “acquaintance with the police people as well”. PW-14 informed PW-17 that the two accused had made an extra-judicial confession to him on

22nd December 2011 at gate no. 4 of the RML Hospital that they had quarrelled with the deceased, PW-6, and one Prashant on 20th December 2011 and during that quarrel, they had attacked the deceased with an iron rod as a result of which he had died.

13. According to PW-17, on 28th December 2011 while he was present in the PS, a secret informer met him and informed him that Rahul (A-2) and Mahender (A-1), the two accused, would come to Gate no. 4 of the RML Hospital. PW-17 is stated to have assembled the raid party and reached gate no. 4 of the RML Hospital. Both the accused persons were seen coming from Gole Dak Khana side and on the pointing out of the secret informer, both of them were arrested. PW-14 also happened to reach there at that point in time. The arrest memo in respect of A-1, marked as Ex.PW-10/C, gives the time of arrest as 7.00 am and has been witnessed by PW-14 apart from two other policemen. Likewise, the arrest memo of A-2 (Ex.PW-10/D) has been witnessed by PW-14 and shows the time of arrest as 7.10 am.

14. According to PW-17, after their disclosure statements were recorded, the Appellants led the police party to the place where they had concealed the iron rod. This was a spot on Mandir Lane, 100 yards from Mandir Marg. The iron rod was then taken into possession and deposited in the *malkhana*.

15. Upon conclusion of the investigation, a charge-sheet was filed and by an order dated 7th May 2012. Charges were framed against the appellants for the offences punishable under Section 302/34 IPC. The prosecution examined seventeen witnesses.

16. The defence of both the accused in their respective statements under Section 313 Cr PC was that they have been falsely implicated in the present case.

17. PWs- 5 and 6 during their examinations-in-chief on 6th August 2012 maintained their versions as given to the police in the first instance. When they were cross-examined nearly five months later on 14th January 2013, they resiled from their earlier statements. In their respective examinations-in-chief, both these witnesses stated that at 6.00 or 7.00 pm, a quarrel had taken place between PWs- 5 and 6 and the deceased on one side and the two accused on the other over the issue of money which the accused persons were allegedly demanding from the deceased. At 10.30 pm, along with the deceased, the two of them were sitting at the telephone junction in Baba Kharag Singh Marg near the Sulabh Shochalay when the two accused came over there. A-2 was carrying an iron rod

18. PWs- 5 and 6 both stated that A-2 first struck them with the iron rod. While PWs- 5 and 6 escaped the attack, the deceased could not save himself and the blow landed on his head. A-1 is stated to have picked up the same rod from the hand of A-2 and also hit the deceased on his head. Both accused persons were saying that they would eliminate all of them even while they were assaulting the deceased. Blood started oozing from the head of the deceased. Some Sikh persons are also stated to have assembled there and the co-accused fled away with the iron rod.

19. PWs- 5 and 6 then took the deceased to the RML Hospital in a three wheeler rickshaw. After admitting him in the hospital, they came back to the

spot in search of the accused persons but could not find them. When they returned to the RML Hospital, the police met them there.

20. As noted earlier, the above examination-in-chief took place on 6th August 2012. The cross-examination of both these witnesses took place five months later on 14th January 2013. This time each of them stated that they were earlier being prosecuted in a case of quarrel with their friends under the influence of liquor/drugs. Both of them were at the time of cross-examination in jail as under-trial prisoners in FIR No.127/2012 registered at Parliament Street. This was a theft case in which each of them had been arrested 20th August 2012, i.e. two weeks after the examination-in-chief of PWs 5 and 6.

21. Both PWs 5 and 6 said that they were on drugs at the relevant time. There were many vagabonds residing on the pavements opposite Gurudwara Bangla Sahib. All of them were in the habit of consuming sedatives or liquor or other sorts of intoxicating substances. PWs- 5 and 6 both stated that they were under the influence of drugs most of the time. Now each of them stated that no quarrel had taken place in their presence. They did not even know if anyone had expired. They admitted that they had seen the deceased lying in the injured condition and had removed him to the hospital but claimed that they did not know how he sustained the injuries.

22. PW 5 stated, "I had stated on the last date about the involvement of the accused persons in this case as I was under threat. Earlier also, I had been threatened of being implicated in this case by the police after I had got Jamura

admitted in the hospital and only then, I had named the two accused persons. I was under heavy sedation and intoxication, as such I have no idea about how the incident occurred. The two accused persons, present in the Court today had not committed any crime”.

23. As far as PW-6 is concerned, he claimed in the cross-examination that he did not see the incident happening as he was under the influence of drugs. He claimed that he was asked to depose against the accused as otherwise he would have been implicated in the case. He stated, “I had stated on the last date about the involvement of the accused persons in this case as I was under threat”.

24. However, both these witnesses were unable to state the date on which the police had threatened them. Both of them agreed that they did not make any complaint against the police officials who have threatened them. PW-6 admits to having met the two accused in the jail outside the canteen but claim that it was “incidental and not by any reason”. PW-5, on the other hand, denies having met the accused persons while in custody and states that no threat has been made to him by them. Neither of them were able to give the name and rank of the police official who pressurized them to depose against the accused.

25. The question is whether the evidence of PWs-5 and 6 should be discarded in entirety or, under the circumstances wherein they have turned hostile five months after their examinations-in-chief, such evidence ought to be given some weight on account of the possibility of their being won over. The question of how such evidence must be weighed by the Court has been

considered in *Paramjeet Singh @ Pamma v. State of Uttarakhand* (2010) 10 SCC 439 wherein it was held that the deposition of a hostile witness can be relied upon “at least up to the extent he supported the case of the prosecution”. The Court further held:

“...the evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.”

26. In *Bhajju @ Karan Singh v. State of Madhya Pradesh* (2012) 4 SCC 327, the Supreme Court held as under:

“...the court will always have to take a very cautious decision while referring to the statements of such witnesses who turn hostile or go back from their earlier statements recorded, particularly, under Section 164 of the Code of Criminal Procedure. What value should be attached and how much reliance can be placed on such statement is a matter to be examined by the Courts with reference to the facts of a given case.”

27. Similarly, in *Attar Singh v. State of Maharashtra* (2013) 11 SCC 719, the Supreme Court opined that “if some portion of the statement of the hostile witness inspires confidence, it can be relied upon and the witness cannot be termed as wholly unreliable” and went on to hold:

“It is, therefore, open to the Court to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused.”

28. Fortunately for the prosecution, there is another piece of evidence available in the form of the extra-judicial confession purportedly made to Kuldeep (PW-14). At the outset, it requires to be noticed that an extra-judicial confession is a weak form of evidence and, at best, can corroborate the other

evidence in the case. In *Pancho v. State of Haryana (2011) 10 SCC 165*, the Supreme Court explained legal position as under:

“16. The extra-judicial confession made by A-1, Pratham is the main plank of the prosecution case. It is true that an extra-judicial confession can be used against its maker, but as a matter of caution, courts look for corroboration to the same from other evidence on record. In *Gopal Sah v. State of Bihar* this Court while dealing with an extra-judicial confession held that an extra-judicial confession is on the face of it, a weak evidence and the courts are reluctant, in the absence of a chain of cogent circumstances, to rely on it for the purpose of recording a conviction. We must, therefore, first ascertain whether the extra-judicial confession of A-1, Pratham inspires confidence and then find out whether there are other cogent circumstances on record to support it.”

29. The Court further noted that:

“10. ... cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession, he would not be prepared to accept.

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27. This Court in *Haricharan* case further observed that Section 30 merely enables the court to take the confession into account. It is not obligatory on the court to take the confession into account. This Court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself

that the conclusion which it is inclined to draw from the other evidence is right.”

30. In *Tejinder Singh v. State of Punjab (2013) 12 SCC 503*, the above legal position was reiterated. Reference was made to *Sahadevan v. State of Tamil Nadu (2012) 6 SCC 403*, where the principles involved in the appreciation of extra-judicial confession were explained as under:

“16. Upon a proper analysis of the above referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

- (i) The extra-judicial confession is weak evidence by itself. It has to be examined by the court with greater care and caution.
- (ii) It should be made voluntarily and should be truthful.
- (iii) It should inspire confidence.
- (iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
- (v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
- (vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

31. Learned counsel for the Appellants submitted that it could not have been by mere coincidence that PW-14 was available to talk to PW-17 on

23rd December 2011 when the latter visited the RML hospital. If indeed, as according to PW-14, an extra-judicial confession was made to him by the co-accused on 22nd December 2013, it would be surprising that he did not inform the police about the same.

32. In the cross examination of PW-14, it has emerged that he himself is a drug user. He was friends with the two accused and together they consumed liquor and drugs. He also stated that he never goes to the police although he is acquainted with them. He is clear that “I never informed the police regarding the same at any point of time”. He appears, in fact, to be a natural witness. It is understandable that being a drug user himself he would not be expected to go to the police at all for anything whatsoever.

33. Also, if all of them were drug users, as is evident from the depositions of PWs- 5, 6 and 14, and they were all in the same area, namely the Bangla Sahib Gurdwara, Gole Dak Khana and Baba Kharag Singh Marg, then it is not surprising that the police would have made inquiries with people who may possibly have leads regarding the case. This also makes PW-14 a probable witness.

34. Thirdly, PW-14 himself is a driver of a private ambulance which he is operating for RML Hospital. His presence near the gate of RML Hospital, including at 7 am on 28th December 2011 when the two accused were arrested, cannot also be said to be unnatural.

35. Finally, it must be observed that nothing has emerged in the cross-examination of PW-14 which can be said to help the accused. PW-14 is

clear that both of the accused made an extra-judicial confession to him and had murdered the deceased on 20th December 2011. This is not relatively shaken by the accused during his cross-examination. The testimony of PW-14 does not suffer from any material discrepancies and inherent improbabilities. It is both voluntary and truthful. It inspires confidence.

36. The fact that the iron rod did not have bloodstains or that no chance prints were lifted from the iron rod does not affect the case of the prosecution which rests on the deposition of PWs- 5, 6 and 14. The circumstances under which PWs- 5 and 6 have turned hostile and the explanation given by them about the circumstances under which they were allegedly compelled to depose against the accused does not persuade the Court to discard their evidence in entirety. It is quite apparent that with the entry of PWs- 5 and 6 into the same jail which housed the two accused, there was opportunity for the accused to win over these two key witnesses.

37. The Court is therefore satisfied that the prosecution has been able to prove the guilt of the two accused beyond reasonable doubt and that the trial Court has committed no error in coming to such a conclusion.

38. It was then argued on behalf of the Appellants that since there was in effect only one injury on the head of the deceased, the Court should consider the offence as culpable homicide not amounting to murder. The post-mortem report shows that there were three injuries on the head which were cumulatively sufficient to cause the death of the deceased. There was the fracture at the base of the skull and deep cut wounds on the parietal region.

There were two such wounds and not just one. The eye-witness testimony speaks of each of the accused giving the blow on the head of the deceased with the same iron rod. In these circumstances, there is no scope for application of any of the exceptions under Section 300 IPC or even otherwise viewing the offence as culpable homicide not amounting to murder.

39. The impugned judgement of the trial Court convicting the two appellants for the offences under Section 302/34 IPC and consequent order on sentence does not call for any interference. The appeals are accordingly dismissed. The trial Court record be returned along with a certified copy of this order.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 20, 2018

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