

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

Date of Judgment Reserved: March 23rd, 2018

Date of Decision : May 15th, 2018

+ CRL.A. 1241/2014

SUNNY alias HINGOLI Appellant

Through: Mr.Ashutosh Jha, Advocate.

versus

STATE OF GOVT OF NCT OF DELHI Respondent

Through: Ms.Aasha Tiwari, APP for the State.

AND

+ CRL.A. 1666/2014

AJAY Appellant

Through: Ms.Sonal Singh, Advocate.

versus

THE STATE (GOVT OF NCT OF DELHI) Respondent

Through: Ms.Aasha Tiwari, APP for the State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

P.S. TEJI, J.

1. Since both these appeals have been preferred against a common judgment of conviction dated 28.07.2014 and common order

on sentence dated 04.08.2014, therefore, both these appeals are disposed of by this common judgment.

2. The present appeals have been filed by the appellants, namely, Sunny @ Hingoli and Ajay under Section 374(2) Cr.P.C. against the judgment dated 28.07.2014 vide which they have been convicted for the offences punishable under Section 120-B IPC and 302 read with Section 120-B IPC; and order on sentence dated 04.08.2014 passed by learned Additional Sessions Judge, E-Court, Karkardooma Courts, Delhi sentencing the appellants for life imprisonment and fine of Rs.10,000/- each and in default of fine to further undergo RI for one year each for the offence under Section 120-B IPC; and also for life imprisonment and fine of Rs.10,000/- each and in default of payment of fine to further undergo RI for one year each for the offence under Section 302 read with Section 120-B IPC.

3. The factual matrix emerging from the record is that on 15.10.2011 at about 22:40 hours, an information was received in the Police Station Pandav Nagar vide DD No.35A to the effect that a man had been stabbed in the forest in front of jhuggi No.419 and 420, near Nehru Nagar drain, 20 Block Kalyanpuri. On receipt of information, SI Ramvir along with Ct.Sandeep reached Kalyanpuri Main Road, near Sanjay Jheel where they came to know that a man was lying inside Sanjay Jheel drain in an injured condition who had been removed to LBS Hospital by the PCR Van. Ct.Sandeep was left at the spot and SI Ramvir reached the hospital where he found the injured

Pradeep Kumar admitted. On the MLC of the injured, the doctor mentioned that the patient was admitted with the history of assault and he was unconscious. No eye witness of the incident was found in the hospital. SI Ramvir along with PCR staff reached the spot where a lot of blood was lying. Crime team was called at the spot which inspected the scene of crime. On the basis of MLC of the injured, the FIR was registered under Section 308 IPC. Spot was got photographed by the crime team. SI Ramvir prepared site plan at the instance of HC Naresh Kumar, incharge PCR Van. Blood was lifted from the spot. Blood earth control and earth control were also lifted and seized. Crime team report was collected from SI Naveen Kumar. Statements of SI Naveen Kumar and photographer-Ct.Manoj Kumar were recorded.

4. During the course of investigation, one Vijender (PW-7) got his statement recorded. He had stated that on 15.10.2011 at about 9.15 p.m., after having his meals, he was walking towards Sanjay Jheel. On the way near the toilet, he saw Pradeep, Sunny @ Hingoli, Ajay and Ashish going towards Sanjay Jheel who were having liquor bottle, some plastic glasses and water pouches in a plastic polybag. At about 10 p.m., when he was returning he saw that all those four boys were having liquor while sitting on the drain. Accused Sunny @ Hingoli, Ajay and Ashish were abusing and manhandling Pradeep. The complainant did not pay any heed to the same and went to his house. Later on, he came to know that Pradeep had been admitted in LBS hospital in an injured condition. He also stated that few months

back, on 21.06.2011 accused Sunny @ Hingoli had a quarrel with Pradeep during which Pradeep had beaten up the accused Sunny. He had raised suspicion, that to settle the score, accused Sunny along with his associates attacked Pradeep.

5. Statement of Smt.Anandi, mother of the injured was also recorded in which she stated that a few months back Sunny had a quarrel with Pradeep, during which Pradeep had beaten up Sunny and then they stopped meeting each other. But for the last 10-15 days, accused Sunny again started meeting with Pradeep. For the last 8-10 days, Sunny had been visiting their house. On 15.10.2011 at about 6-7 p.m., she along with her son Pradeep were present in their house. Accused Sunny @ Hingoli, resident in the neighbourhood came to their house and took away Pradeep with him. Later on, she came to know that Pradeep had been removed to LBS Hospital by the police. She had raised the suspicion that to settle the score, accused Sunny attacked Pradeep. Statement of Sh.Manohar Lal (PW-2), father of the injured was also recorded who had also stated on the similar lines of Smt.Anandi. On the basis of statements of the witnesses, penal section 307 IPC was added in place of Section 308 IPC.

6. On 18.10.2011, on the pointing out of secret informer, accused Sunny @ Hingoli was arrested and his disclosure statement Ex.PW18/C was recorded. Accused Sunny got recovered his blood stained clothes and shoes from his house which were seized. He pointed out the scene of crime. One blood stained stone was produced by accused Sunny from the bushes near Sanjay Jheel drain with which

the injured was assaulted. The said stone was seized vide memo Ex.PW18/F. On 21.10.2011, the statement of witness Vijender (PW7) was recorded under Section 164 Cr.P.C. vide Ex.PW19/A. On 03.11.2011, accused Ajay was arrested and his disclosure statement was recorded vide Ex.PW17/C. On 21.12.2011, juvenile Ashish was apprehended and charge sheet against him had been filed before the concerned court. During the entire period of hospitalization, injured Pradeep remained in coma and he was discharged from the hospital on 11.11.2011, but remained in coma. On 12.12.2011, exhibits of the case were sent to FSL. On 30.12.2011, Pradeep expired and information in this regard was recorded vide DD No.7A. Further investigation of the case was assigned to SI Rajkumar.

7. Dead body of the deceased was sent to LBS Hospital. Treatment papers of the deceased were handed over to the IO. On 30.12.2011, inquest papers were prepared. After postmortem the dead body of the deceased was handed over to his relatives. Postmortem report of the deceased was obtained in which the doctor opined the cause of death as septicemia consequent to injury sustained with anemia and brain neurosis. Penal Section 302 IPC in place of Section 307 IPC was added in the case. After completion of investigation, charge sheet was filed in the Court.

8. Charge for the offence under Section 120B and 302 read with 120B IPC was framed against both the appellants to which they pleaded not guilty and claimed trial.

9. To prove its case, the prosecution had examined 28 witnesses.

10. After completion of prosecution evidence, statements of the accused persons under Section 313 Cr.P.C. were recorded in which they claimed innocence and denied the entire case of the prosecution. Appellant Ajay did not choose to lead defense evidence, whereas appellant Sunny @ Hingoli examined one defence witness, namely, Tek Chand (DW1).

11. On appreciation of evidence and material brought on record, the trial court convicted the appellants for the offences charged against them vide judgment dated 28.07.2014 and order on sentence dated 04.08.2014. Feeling aggrieved of the same, the appellants have preferred the instant appeals.

12. Argument advanced by the learned counsel for the appellant Sunny @ Hingoli is that all the allegations leveled against the appellants are false. No such beating had been given to the deceased, or injury inflicted by the appellants on the person of the deceased. Rather, the deceased had given beatings to accused Ajay on 21.06.2011. It is further submitted that the prosecution has failed to establish its case beyond reasonable doubt against the appellants. The motive put forth is a very small quarrel/fight between the deceased and the accused. The prosecution has miserably failed to establish the motive behind the commission of murder by the appellants. It is further submitted that PW-6 (Smt.Anandi), mother of the deceased

had deposed that she had last seen the deceased in the company of the accused together and on the other hand, PW7 (Vijender) stated that he had seen the deceased in the company of the accused persons and one juvenile at 10.00 p.m. quarreling/taking liquor. It is further submitted that the testimony of both these alleged last seen witnesses is not convincing, and is full of contradictions and discrepancies which cannot be the basis of conviction of the appellants. It is further submitted that as per the postmortem report, the deceased died due to septicaemia and not because of any injury allegedly caused by the appellants. The deceased remained in coma for about 1½ months; thereafter he was taken to his house and then had expired due to septic/blood infection, for which the appellants cannot be connected in causing his death. It is further submitted on behalf of the appellants that there is no evidence on record to convict the appellants for hatching criminal conspiracy.

13. Per contra, Ms.Aasha Tiwari, learned APP for the State has argued that there is enough evidence on record to convict the appellants. The last seen witnesses (PW6 & PW7) have duly supported the case of the prosecution that they had seen the deceased in the company of the accused persons on the day of incident. All the incriminating circumstances proved on record complete the chain and lead to only one conclusion of the appellants being responsible for the murder of the deceased. The deceased remained in coma due to injuries caused to him by the appellants and that was the cause of his

death. It is further submitted that there is no illegality in the impugned judgment of conviction and the same needs to be upheld.

14. We have heard the submissions made by the learned counsel for the appellants as well as learned APP for the State. We have also gone through the evidence led by the parties.

15. The present case is based on circumstantial evidence as there is no eye witness to the incident of causing injuries to the deceased. The prosecution had examined certain public witnesses to establish that the deceased was lastly seen in the company of the appellants on the day of the incident. PW7-Vijender had deposed that on 15.10.2011 at about 9.15 p.m., when he was walking after taking meals towards Sanjay Jheel, he saw accused Sunny @ Hingoli, Ajay and Ashish going towards Sanjay Jheel along with Pradeep. At that time, accused Sunny was having a liquor bottle, water pouches and plastic glasses. At about 10.00 p.m., when he was returning back, he saw that the accused persons and Pradeep were taking liquor while sitting on the ramp over the drain and accused Sunny, Ajay and Ashish were quarrelling with Pradeep. At about 11-11.30 p.m., he came to know that Pradeep was taken to the hospital.

16. It was alleged against the appellant-Sunny @ Hingoli that there was previous enmity harboured by him against the deceased Pradeep on account of the deceased Pradeep having beaten up the appellant/accused Sunny @ Hingoli a few months prior to the date of the incident, and to settle the score, he took away the deceased and

caused injuries to him along with his associates. To prove the motive, the prosecution has examined PW1-Ashok Kumar (brother of the deceased) who had deposed that on 21.06.2011, when he was present at his house, accused Sunny @ Hingoli came in front of his house and started abusing. He, his father and brother Pradeep Kumar tried to make him understand, but he did not stop abusing. Pradeep-brother of PW1, got annoyed and gave beatings to accused Sunny as a result of which he sustained some injuries. As per PW1, accused Sunny started nursing enmity with Pradeep since then. PW2-Manohar Lal, father of the deceased and PW6-Smt.Anandi, mother of the deceased, also deposed on the similar lines as PW1 that Pradeep gave beatings to the accused Sunny @ Hingoli a few months earlier, due to which he had developed enmity with the deceased. PW6-Smt.Anandi had also deposed that accused Sunny and Pradeep started talking with each other 1-1½ months prior to the incident, and on the day of the incident i.e. on 15.10.2011 at about 7.00 p.m., accused Sunny came to her house and took Pradeep with him for roaming, and thereafter Pradeep did not return back. At about 10 p.m., she was informed that Pradeep had been admitted in LBS Hospital by the police.

17. From the testimony of PW7-Vijender, it has duly been established that on the day of incident, accused Sunny and his associates were taking liquor with Pradeep near the drain of Sanjay Jheel and they were quarreling with Pradeep. It was immediately thereafter, that PW7 came to know about Pradeep being taken to the hospital. PW6-Smt.Anandi had also deposed that on the day of

incident, accused Sunny @ Hingoli had taken away her son Pradeep, and thereafter he did not return and at about 10 p.m., she came to know that Pradeep had been admitted in the hospital. From the testimony of the above mentioned prosecution witnesses, the role of the accused Sunny @ Hingoli in taking away the deceased Pradeep has been convincingly established. But, qua accused Ajay, there is lack of evidence in this regard. There is no whisper in the testimony of PW1, PW2 and PW6 that the accused Ajay also had enmity with the deceased Pradeep, or that they had seen the deceased in the company of accused Ajay on the day of the incident.

18. The appellants were charged for the offence under Section 120-B IPC, for hatching a criminal conspiracy to commit the murder of the deceased. It was alleged against the appellants that few months earlier to the date of incident, the deceased gave beatings to the accused Sunny due to which he had developed a grudge against the deceased and to settle the score, he along with co-accused Ajay and juvenile Ashish hatched a criminal conspiracy to take revenge from the deceased. Though the prosecution had produced the witnesses to prove that few months before the day of incident, the deceased gave beatings to the accused Sunny, but there is no evidence on record to establish that there was any prior meeting of minds of the accused persons to hatch any criminal conspiracy. The prosecution has not produced any evidence or material to show that there was any prior meeting of the accused persons which led to hatching the alleged criminal conspiracy. It is a settled law that in a criminal conspiracy

the ingredients of offence are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

16. In Halsbury's Laws of England (vide 4th Edn., Vol. 11 pp. 44 and 58), the English law as to conspiracy has been stated thus :

“58. Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the court.

The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is the agreement to execute the illegal conduct, not the

execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other.”

(See *Nazir Khan v. State of Delhi (2003) 8 SCC 461*).

19. Mere knowledge-even discussion, of the plan would not *per se* constitute conspiracy. The offence of conspiracy shall continue till the termination of the agreement. To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by an illegal means is the first and primary condition. The agreement amongst the conspirators can be inferred by necessary implications. In most cases, the conspiracies are proved by circumstantial evidence, as the conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy. But, in the present case, the prosecution has failed to bring on record any circumstance from which it could be culled out that any such criminal conspiracy was hatched by and between the appellants.

20. Thus, we are of the opinion that the prosecution has failed to establish the charge under Section 120-B IPC against both the appellants and they are entitled for acquittal for the said offence.

21. Now coming to the aspect: whether the appellants have committed the murder of the deceased. During the course of

arguments, it was submitted by learned counsel for the appellants that no case under Section 302 IPC is made out against both the appellants. At the highest, a case under Section 326 IPC is made out against the appellant Sunny @ Hingoli, as there is evidence on record that he had caused injury with a stone on the person of the deceased. It was submitted that the postmortem report of the deceased clearly spells out that the cause of death was the septicaemia, and not the injury caused to the deceased, which does not make out conviction under Section 302 IPC. It is further submitted that there is no evidence on record with regard to causing of any injury by the appellant Ajay on the person of the deceased, and thus he is entitled for acquittal.

22. To appreciate the contention of the parties, we have gone through the postmortem report of the deceased vide Ex.PW12/A. As per this report, the cause of death of the deceased was due to septicemia consequent to injury sustained by the deceased. As per the postmortem report, the cause of the death of the deceased was natural due to blood infection/septicemia and not due to injuries caused to him. It has not been observed by the doctor that the death of the deceased was homicidal. Even otherwise, it has come on record that the deceased was assaulted on 15.10.2011, and he remained hospitalized w.e.f. 15.10.2011 to 11.11.2011 in GTB Hospital. During this entire period, he remained in coma. Thereafter, he was discharged and sent to his home. The death of the deceased took place on 30.12.2011 i.e. after two and a half months of the alleged

incident and about 1½ months of his discharge from the hospital. The prosecution has miserably failed to establish that the death of the deceased had taken place due to injuries caused to him by the appellants. In view of this position of the matter, we are unable to concur with the findings delivered by the trial court that the death of the deceased was a homicidal death. In our view, the deceased died due to blood infection/septicaemia which is apparent from his post mortem report Ex.PW12/A.

23. From the evidence on record, it is apparent that it was the accused Sunny @ Hingoli who had caused the injuries on the person of the deceased, and the said fact has been conceded by the learned counsel for the appellant Sunny during the course of arguments. Even otherwise, the circumstantial evidence brought on record establishes the existence of motive with the appellant Sunny; that he had taken the deceased with him on the fateful night; that he was lastly seen with the deceased quarreling with him; and, that soon thereafter the deceased was taken to the hospital in an injured condition. Moreover, recoveries of the blood stained clothes and shoes of the appellant Sunny had been made from his house. He had also pointed out the place of occurrence, and got recovered the stone with which the deceased had been struck. Thus, the role of Sunny in the commission of the offence is clearly established. At the same time, we are of the view that there is no evidence on record to connect the appellant Ajay with the causing of injuries on the person of the deceased. In the

absence of any evidence, the appellant Ajay deserves acquittal for the offence under Section 302 IPC.

24. Section 320 IPC reads as follows :

“320. Grievous hurt.-The following kinds of hurt only are designated as “grievous”:—

(First) — Emasculation.

(Secondly) —Permanent privation of the sight of either eye.

(Thirdly) — Permanent privation of the hearing of either ear,

(Fourthly) —Privation of any member or joint.

(Fifthly) — Destruction or permanent impairing of the powers of any member or joint.

(Sixthly) — Permanent disfiguration of the head or face.

(Seventhly) —Fracture or dislocation of a bone or tooth.

(Eighthly) —Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.” (emphasis supplied)

25. The present case falls in the eighth clause of Section 320 IPC for the reasons that it has come in the evidence that since the day of incident, the deceased remained admitted in GTB hospital w.e.f. 16.10.2011 to 11.11.2011 i.e. for about 25 days in comatose. Thus, mere fact that the injured was confined to the hospital for more than 20 days, and, obviously, in that condition he was unable to follow his ordinary pursuits during the period. A disability for 20 days constitutes “grievous hurt”. In the instant case, as per the evidence available on record, the deceased remained on coma w.e.f. 16.10.2011 to 11.11.2011 i.e. more than 20 days. During this entire period, he

was unable to follow his ordinary pursuits. Thus, in our considered opinion, the injury caused to the deceased was a grievous hurt, and it has duly been established on record that it was caused by the appellant Sunny @ Hingoli.

26. In view of the above discussion, we are of the view that though the prosecution has failed to make out a case under Section 302 IPC against the appellant Sunny @ Hingoli, but a case for causing grievous hurt is made out against the appellant Sunny @ Hingoli, punishable under Section 326 IPC.

27. Consequently, conviction and sentence of both the appellants under Section 120-B IPC and 302 IPC is set aside. Appellant Ajay is on bail. His bail bond and surety bonds stand discharged. However, the appellant Sunny @ Hingoli is convicted under Section 326 IPC and sentenced to undergo rigorous imprisonment for seven years with fine of Rs.10,000/-, in default of payment of fine to further undergo RI for one year. The amount of fine, if realized, shall be paid to the family members of the deceased.

28. Both the appeals are accordingly disposed of.

P.S. TEJI, J

VIPIN SANGHI, J

MAY 15, 2018/dd