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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 537/2015

Reserved on: 4th July, 2018

Decided on: 10th July, 2018

HARISH

.....Appellant

Through: Mr. Ashwin Vaish, Mr. Vinod Pandey, Mr. V. Thomas and Mr. Kunal Awana, Advocates.

versus

STATE

....Respondent

Through: Mr. Hirein Sharma, APP for State.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 10th February 2015 passed by the learned Additional Sessions Judge-04 (North), Rohini Courts, Delhi in SC No.195/14 arising out of FIR No.295/2011 registered at PS Sultanpuri convicting the Appellant for the offence punishable under Section 302/34 IPC. It also seeks to challenge the order on sentence of the same date whereby the Appellant was sentenced to imprisonment for life and fine of Rs.5,000/-; and in default of payment of fine to undergo rigorous imprisonment for two months.

2. The charge against the Appellant was that he, along with Nitin @ Rohit @ Golu, a Juvenile in Conflict with Law ('JCL'), in furtherance of their

common intention, committed the murder of Bhupinder Pandey (the deceased) on 6th July 2011 at 9.30 pm at Block A-B Park, Main Road, Sultanpuri thus committing an offence punishable under Section 302/34 IPC. The second charge was that the Appellant along with the JCL robbed the mobile phone of the deceased from his possession and thereby committed an offence punishable under Section 392/34 IPC. The third charge was that the Appellant along with the JCL used a deadly weapon while committing the robbery and thereby committed an offence punishable under Section 397 IPC.

3. By the impugned judgment, the Appellant has been acquitted of the charges under Section 392/34 IPC and Section 397 IPC. Furthermore, it has been asserted by the learned defence counsel (and not contradicted by the learned APP) that the JCL has also been acquitted in the trial which proceeded against him separately before the Juvenile Justice Board. No appeal appears to have been filed by the State against his acquittal.

Deposition of PW-4

4. The prosecution has projected the case as one based on direct evidence. It has relied considerably on the deposition of Chamru Lal (PW-4). According to PW-4, on 6th July 2011, he was working as a labourer in the sugar warehouse of the Food Corporation of India ('FCI') at Siraspur and was on duty on a truck the driver of which was the deceased. On that date, Shambhu (PW-24) was also on duty on the same truck. He states that at around 10 am that morning, they loaded sugar from the warehouse which was to be delivered to different ration shops in the city. At around 9 to 10 pm at night,

the truck reached Jalebi Chowk, Sultanpuri. The deceased stopped the truck near a park. At that time, two boys (i.e. the Appellant and the JCL) came there. The deceased enquired from them about a hotel and also about a liquor shop. According to PW-4, the Appellant told the driver about the liquor shop. Thereupon, the deceased asked PW-24 to fetch the liquor.

5. PW-4 stated that the Appellant also gave money to PW-24 for bringing liquor and eggs. PW-24 then went and fetched the liquor and some snacks. Thereafter, according to PW-4, the Appellant, the JCL, the deceased, PW-24, and PW-4 began consuming liquor while sitting in the truck. After they had consumed one peg each, the Appellant asked PW-4 to fetch eggs but he refused. Thereafter, the Appellant asked PW-24 to bring eggs. While PW-24 went away to fetch the eggs, the Appellant is stated to have taken the mobile phone of the deceased. After some time, the deceased demanded his mobile phone back. However, the Appellant declined to do so. PW-4 also asked the Appellant to return the mobile phone of the deceased but he refused. At this point, the JCL punched PW-4's nose. The Appellant took out a knife from his dub and stabbed the deceased. PW-4 ran away from there. On the way, he met PW-24 and informed him about what had occurred. Thereafter, PWs- 4 and 24 went to the FCI warehouse at Siraspur and informed their contractor, Ghanshyam (PW-3), about the incident. Thereafter, when they returned to PS Sultanpuri, they were informed that the deceased had expired.

Deposition of PW-24

6. PW-24 was the other witness who spoke about the events of 6th July 2011.

He too stated that the Appellant and the JCL had come towards the truck from the front and the deceased had asked them about the whereabouts of the liquor shop. According to him, both the Appellant and the JCL pointed to the liquor shop. The deceased purportedly then gave Rs.50 to PW-24 to buy liquor. The two boys, i.e. the Appellant and the JCL, also gave him Rs.100 to buy liquor for them. PW-24 then brought three quarter-bottles of liquor, five glasses and a *namkeen* packet. He gave one quarter-bottle to the deceased and two to the Appellant and JCL. The five of them then sat on the rear side of the truck. After each of them had one peg, one of the two boys asked PW-24 to bring eggs and gave him money for that. PW-24 went to fetch the eggs but since they were not available, he brought *samosas*. While he was returning to the vehicle, he noticed PW-4 running from the truck towards PW-24. The deceased was also running to his side in order to save himself. According to PW-24, PW-4 told him that the two boys had stabbed the deceased. PW-4 was frightened and upon seeing him, PW-24 too was perturbed.

7. According to PW-24, he directly went to the FCI warehouse, met the contractor, and along with the contractor, went to PS Sultanpuri at around 11:00-11:30 pm. According to him, they remained at the PS for the whole night. On that night, they came to know that the deceased had expired.

Deposition of PW-19

8. The third witness who had spoken of what had happened on that night is Constable Ashok Kumar (PW-19). He was posted as a constable at PS Sultanpuri. At around 9:30 pm on 6th July 2011, while on patrol, he reached

AB Block, Sultanpuri where he saw a person who was stained with blood running (“*ladkadata hua*”) towards Jalebi Chowk. When PW-19 questioned him, the injured person told him that he had been stabbed by two boys who had run away from there. PW-19 looked for the two boys but could not find them. According to PW-19, he subsequently came to know the names of the injured person as that of the deceased. PW-19 stopped an auto-rickshaw and took the deceased to SGM Hospital where he was medically examined and treated.

9. PW-19 then came back to the PS and thereafter, along with Assistant Sub-inspector Manmohan Singh (PW-28), reached AB Extension Park where they saw a truck carrying sugar bags standing. There was blood on the rear side of the truck. Upon making inquiries, they came to know that the deceased was the driver of the said vehicle. The crime team was called at the spot and the site plan was prepared at the instance of PW-19. The truck was also seized.

Medical evidence

10. The MLC of the deceased (Ex.PW-10/B) shows that he was brought to SGM Hospital at Mangolpuri at 10:00 pm on 6th July 2011 by PW-19. It had been prepared by Dr. Mahipal Singh (PW-9) who *inter alia* noted that “the patient has alleged history of physical assault (by a sharp weapon) as told by patient.” Under the supervision of PW-9, the MLC was prepared by Dr. Arvind, who noted the deceased having the following injuries:

- “1. Clear incised wound above and parallel to left clavicle 4 cm x 1 cm x 0.3 cm.
2. Clear incised wound from left mastoid bone to below left

- angle of mandible 11 cm x 0.5 cm x 0.3 cm.
- 3. Clear incised wound over lateral left region of back around level of T12 vertebra 4 cm x 1 cm x 1 cm.
- 4. Clear incised wound over right forearm 3 cm x 0.2 cm x 0.1 cm.
- 5. Abrasion over right forearm.”

11. After administering first-aid and advising chest x-ray, the deceased was referred to the surgery department. The deceased was next seen by Dr. Suryotam Kumar (PW-10) who, at the time, was the Senior Resident (Surgery) at SGM Hospital. He noticed that there was tenderness in the left flank with the clear incised wound in the left flank to back region. He further states that “there was injury above and parallel to left clavicle 4 cm x 1 cm x 0.5 cm from left mastoid bone to below left angle of mandible. All the bleeding was secured by stitching”. Despite taking all the necessary measures, PW-10 was unable to revive the deceased and he was declared clinically dead at 10:30 pm on 6th July 2011.

12. The post-mortem examination of the deceased was conducted by Dr. Manoj Dhingra (PW-8) on 7th July 2011. PW-8 noted the aforementioned injuries and opined that the death was due to haemorrhage and shock consequent upon the sharp injuries on the abdomen and left side of the neck and the left clavicle and right forearm. The injuries were opined to be ante-mortem, sharp in nature and “sufficient to cause death in the ordinary course of nature.” *Inter alia*, the clothes of the deceased were preserved and handed over to the Investigating Officer (‘IO’).

13. When the purported weapon of offence, a knife with a blade of 19 cm length, was shown to PW-8, he gave a subsequent opinion on

9th September 2011 that the injuries mentioned in the post-mortem report could have been caused by that or any other similar knife.

Investigation, arrest and recoveries

14. Inspector Arun Sharma (PW-31) was posted as the Station House Officer of PS Sultanpuri on 6th July 2011. Duty Constable Narayan (PW-15) who was posted at PS Mangolpuri and was on duty at SGM Hospital gave information to PS Mangolpuri about the deceased having been brought to the hospital at 9:45 pm in an injured condition. This information was recorded in writing as DD No.53A and entrusted first to Assistant Sub-inspector Manmohan Singh (PW-28) who went to SGM Hospital along with Sub-inspector Sandeep Mann (PW-26). The doctor who was treating the deceased opined that the deceased was unfit for statement. The two police officers then went to the spot where they found the truck parked. However, no eye witness was present at the place of occurrence. On the basis of DD No.53A and the MLC, PW-28 prepared a *rukka* and got the FIR registered through PW-26. After the crime team visited the spot, PW-28 seized the quarter-bottles, glasses, the packet of *namkeen* and an iron hook lying in the rear portion of the truck. He also prepared a site plan (Ex.PW-28/B) and seized the truck itself. The seized property was deposited in the *maalkhana*.

15. The information was given to PW-31 about the death of the deceased at around 12:40 am. He then went to SGM Hospital and met the police officials there and collected the death summary of the deceased. The body was then shifted to the mortuary. He then took up the investigation and converted the offence noted in the FIR from Section 307 IPC to

Section 302 IPC. On the same night, PW-31 received information that the owner of the truck (PW-3) along with the labourers had visited SGM Hospital. From SGM Hospital, he came back to PS Sultanpuri and recorded the statements of PW-3, PW-4, and PW-24. The relatives of the deceased reached PS Sultanpuri and were taken to the mortuary where they identified him. PW-31 conducted proceedings under Section 174 Cr PC and recorded the statement of Shiv Kumar Pandey (PW-11), the father of the deceased, and Ram Babu, the brother of the deceased.

16. According to PW-31, on 8th July 2011, during the course of the investigation, he obtained the call detail record ('CDR') in respect of a mobile number ending 3268 which was being used by the deceased. Upon scrutinizing the CDR, it was found that the said mobile number was used in an instrument which ordinarily used a mobile number ending 7132. Scrutiny of the CDR of the mobile number ending 7132 revealed that the said number was in constant contact with one Sushil @ Tinka (PW-1).

17. On 9th July 2011, PW-31 along with Sub-inspector Dhirender Singh (PW-16), Constable Vijender Singh, and Constable Munawar Khan (PW-30) left the PS and reached the address of PW-1 in Sultanpuri where they met PW-1 and Vijender (PW-5), son of Zail Singh. Upon making inquiries from them, it was revealed that the mobile number of the deceased ending 3268 was with PW-1. According to PW-1, the said mobile was handed over to him by the Appellant in lieu of Rs.300/- which the Appellant had borrowed from him. According to PW-1 the Appellant had handed over the said mobile during the night hours of 6th July 2011. At that time, the JCL was

also with the Appellant.

18. PW-1 then told PW-31 that he had handed over the SIM-card of that phone to his uncle Vijender (PW-5) which was being used by him in his mobile phone. PW-5 then started using the said SIM-card from 7th July 2011 onwards. According to PW-31, PW-1 handed over the mobile phone instrument of the deceased having a Vodafone SIM-card with and IMEI number ending 6180. The mobile phone and SIM-card handed over to PW-31 were seized and a seizure memo (Ex. PW-1/A) was prepared.

19. As regards the arrest of the Appellant, PW-31 stated that while they were present at C-Block, Sultanpuri, an informer met and informed them that the offenders were present at Ambedkar Park and if raided, they could be apprehended. According to PW-31, he requested 4-5 public persons to join the raiding party but none agreed. They left the spot expressing their inability without disclosing their names and addresses. The police team led by PW-31 reached Ambedkar Park along with the secret informer. On the pointing out of the secret informer, at around 11:10 pm, the police party apprehended the Appellant and the JCL from inside the park. Since both of them seemed to be juveniles on the basis of appearance, PW-31 contacted their respective parents and they were arrested and searched in their presence.

20. According to PW-31, both the JCL and the Appellant led the police party to the AB Extension Park and pointed towards one drain where dirty water and mud were lodged. The Appellant purportedly disclosed that as the spot where he had hidden the knife used in the commission of the offence. The JCL also purportedly made a similar disclosure to PW-31. The Appellant is

stated to have picked up the knife from inside the drain and stated that the knife picked by him was the same knife used in the commission of the offence. The mud was removed from the knife by PW-31. He prepared a sketch of the knife. The total length of the knife was 31 cm long, the blade being 19 cm in length and the handle being 12 cm in length. The knife was then seized and placed in a sealed parcel.

21. The Appellant then led the police party to his house at K-283, Mangolpuri. From a room in the first floor, he produced a black coloured pant and a white coloured T shirt and disclosed that he was wearing those clothes at the time of commission of the offence. The clothes were then seized and sealed. The JCL similarly took the police party to his residence and got the clothes worn by him at the time of commission of the offence recovered. These were also seized and sealed. Both the Appellant and the JCL were produced before the JJB. Subsequently, as far as the Appellant was concerned, the JJB concluded that he was above 18 years of age and, therefore, he was sent up for trial before the regular criminal Court.

22. On 20th July 2011, an application was filed before the Link Metropolitan Magistrate ('Link MM') for conducting the Test Identification Parade ('TIP') of the Appellant. The TIP proceedings (Ex. PW-29/B) revealed that the Appellant declined to participate in the TIP proceedings because "my photographs were taken by the police which might have been shown to witness". From the liquor bottle found on the rear side of the truck, two chance prints – Q1 and A2 were lifted by the crime team. These were sent to the Finger Print Bureau ('FPB') of the Delhi Police which submitted a report

(Ex.PW-25/A) concluding that the chance prints were faded and did not disclose sufficient number of ridges for comparison with the specimen finger prints of the Appellant. As far as the Forensic Sciences Laboratory ('FSL') is concerned, while blood was detected on the t-shirt worn by the Appellant (Ex. 8A), it could not be detected on the pant worn by him (Ex.8B). However, the FSL report could only identify that the blood stains on the T shirt were of human origin but had no reaction.

Trial

23. The trial Court framed charges against the Appellant in the manner mentioned hereinbefore by an order dated 5th March 2012. On behalf of the prosecution, 31 witnesses were examined. When the evidence gathered against the Appellant was put to him under Section 313 Cr PC, he denied his involvement. It is significant that the evidence of PW-1 was, for some reason, not put to the Appellant at all. This might have been because PW-1 turned hostile and did not support the prosecution's version of events. On the aspect of his arrest, while denying the case of the prosecution, the Appellant maintained as under:

“I was lifted from A-2 Park, where I had gone to attend the marriage function on 08.07.2011 at about 8.30 pm and I was illegally detained in PS and thereafter, falsely implicated in this case.”

24. He further claimed that the knife was planted on him and when asked whether he had anything else to say, he stated:

“I have been falsely implicated in the present case. In fact, I had borrowed a sum of Rs. 1000/- in the month of March, 2011 from PW Sushil @ Tinka and I had already returned a sum of

Rs. 5000/- to him including the interest amount within 15 days thereof. However, after about few days, while I was passing through A-2 Block, Sultanpuri, PW Sushil @ Tinka met me and he asked me to indulge in some crime, but I refused. Thereafter, I narrated the entire occurrence to my family members and my parents advised me not to meet said Sushil @ Tinka in future. However, after about few days, while I was again passing through A-2 Block, Sultanpuri, the said Sushil @ Tinka met me and he took my mobile phone make Classic, which was having SIM no. XXXXXX5563 in the name of my mother Smt. Shanti. Devi, but since thereafter, neither Sushil @ Tinka met me nor he returned, the said mobile to me. I narrated the said facts to my family members. In fact, on 08.07.2011, I was attending the marriage of daughter of one of our neighbours at A-2 Park, Sultanpuri and in the said marriage at about 8.30 pm, the said Sushil @ Tinka came along with police officials and police officials lifted me from the said marriage and took me to PS where I was illegally detained for about 2-3 days and later on I was falsely shown to be arrested in the present case at the instance of Sushil @ Tinka who was informer of police. I am innocent and I have nothing to do with the offence of the present case.”

25. No defence evidence was led. The Court examined one Ramesh (CW-1) as a Court witness who brought the record of the proceedings before the JJB regarding the determination of the age of the Appellant.

Trial Court's findings

26. In the impugned judgment, the trial Court came to the following conclusions:

- (i) There was no sufficient evidence available on the record to prove beyond doubt that the Appellant, along with the JCL with whom he shared a common intention, had committed robbery of the mobile phone of the deceased. The prosecution failed to prove the charge

against the Appellant under Sections 392/34 IPC and Section 397 IPC and, therefore, the Appellant stood acquitted of the said offences.

- (ii) The testimony of PW-8, which went unchallenged by the accused, left no doubt that the deceased died a homicidal death.
- (iii) The testimonies of PWs- 4 and 24 proved that it was the Appellant who stabbed the deceased with the knife. Further, there was no time gap between the apprehension of the accused and the recovery of the knife upon his disclosure. The cuts appearing on the clothes of the deceased corroborated the testimony of PW-4 about the knife injuries inflicted on him.
- (iv) The mobile phone belonging to the deceased was recovered from the possession of PW-1. Although PW-1 had not supported the case of the prosecution, it had been duly established that the said mobile phone belonged to the deceased and it was recovered from PW-1, as spoken to by the police witnesses, i.e. PWs- 16, 30, and 31. The statement by the Appellant under Section 313 Cr PC that he had borrowed a sum of money from PW-1 corroborated the prosecution story that there was a loan transaction between the Appellant and PW-1 which showed that PW-1 was known to the Appellant. However, it was unbelievable that the Appellant had repaid Rs.5,000/- against Rs.1,000/- borrowed from PW-1 within 15 days of such borrowing. This lent credence to the story of the prosecution that the Appellant had borrowed Rs.300/- from PW-1 and he had handed over the mobile phone of the deceased as security.
- (v) The testimony of PW-5 left no scope of doubt that the mobile phone was given to him by PW-1 and he inserted his SIM-card in the same.

The evidence of the Nodal Officers, Israr Babu (PW-7) and R.K. Singh (PW-38), had gone unchallenged.

27. For all of the aforementioned reasons, the trial Court concluded that the prosecution had proved the guilt of the Appellant under Section 302/34 IPC beyond all reasonable doubt and proceeded to sentence him in the manner stated hereinbefore.

28. This Court has heard the submissions of Mr. Ashwin Vaish, learned counsel appearing for the Appellant, and Mr. Hirein Sharma, learned APP for the State.

Charge under Section 302 IPC not independently proved

29. It would be pertinent to note at the outset that the motive for commission of the offence, as projected by the prosecution, was the robbery of the mobile phone from the deceased. It is to be remembered that the altercation leading to the fatal stabbing of the deceased was due to the Appellant's purported refusal to return the deceased's phone while they were drinking liquor together in the back of a truck of which the deceased was the driver. PW-4, who was also present and is the sole eye-witness in the present case, did not mention any other article belonging to the deceased being taken away by the Appellant and the JCL as they fled the scene. In fact, the charges framed against the Appellant under Section 392/34 IPC and Section 397 IPC only refer to the robbery of the mobile phone and nothing else.

30. The trial Court has in the impugned judgment disbelieved this particular

aspect of the prosecution story and has acquitted the Appellant of the offences under Section 392/34 IPC and Section 397 IPC. Therefore, in plain terms, the robbery of the deceased's mobile phone by the Appellant while using a deadly weapon has been disbelieved. The State has not preferred an appeal against the acquittal of the Appellant of these charges.

31. With this important limb of the prosecution story being taken away, it became imperative for the prosecution to strictly make out a case against the Appellant for the remaining charge, i.e. the charge under Section 302 IPC. Therefore, the prosecution had to establish the commission of this offence by the Appellant independent of the robbery of the mobile phone of the deceased. In the considered view of the Court, the trial Court has missed this crucial aspect of the case. In the impugned judgment, the learned trial Judge acquitted of the Appellant of the charges under Section 392/34 IPC and Section 397 IPC in para 40. However, as he proceeds to the discussion of the charges against the Appellant under Section 302/34 IPC, the learned trial Judge inexplicably reverts to relying on evidence which was relevant to the charges under Section 392/34 IPC and Section 397 IPC. This, in the view of this Court, is a fatal flaw in the trial Court's findings qua the guilt of the accused.

Sole eye-witness testimony of PW-4 unreliable

32. As already noticed earlier, this was a case based on direct evidence. From the narration of the case by the prosecution, it is plain that PW-4 was the sole eye-witness who claimed to have actually seen the stabbing of the deceased by the Appellant. As far as PW-24 is concerned, he is supposed to have been sent away to buy eggs by the Appellant at the relevant time and,

therefore, by his own admission, was not present when the Appellant purportedly stabbed the deceased. Since the entire prosecution case qua the offence under Section 302 IPC hinges only on the sole eye-witness testimony of PW-4, his testimony requires very careful scrutiny.

33. It emerges from the deposition of PW-3 that the deceased was employed as a driver of the truck maintained by him only 15-20 days prior to the incident. Therefore, it is not as though the deceased was known to PW-3 or, for that matter, PW-4 who was employed on that truck as a labourer. It is also apparent that the Appellant and the JCL were total strangers to PW-4 and he would, therefore, not have had any photographs which he could have handed over to the police. All they had to go on was the description of the Appellant given by PW-4 based on his short acquaintance on the fateful night. This is particularly crucial when it comes to the arrest of the Appellant.

34. PW-4 also claimed to have been punched on the nose by the JCL as a result of which he was bleeding from his nose. However, no blood stained clothes belonging to him have been seized. When confronted on this aspect during his cross-examination, he stated:

“I was not medically examined. The blood also fell down on my clothes. I had shown my blood stained clothes to the police but police had not seized the same as I had washed out the same. It is wrong to suggest that no such incident was occurred and that is why I was not medically examined and blood stained clothes were not handed over to the police.”

35. The Court does not find the explanation of his clothes not being seized as they had been washed to be convincing. It should also be recalled that

according to PW-4, soon after he himself ran away from the truck, he ran into PW-24 who was returning with *samosas* and then both of them went straight to the contractor (PW-3). In other words, they did not go straight to the police. PW-3, however, contradicts this by stating that on the next morning, i.e., on the morning of 7th July 2011, he came to know from his employees that a quarrel had taken place between the deceased and some persons and that the deceased had been stabbed and the said persons had run away from the spot. No mention is made by PW-3 of PWs- 4 and 24 coming to him on the night of 6th July 2011 to tell him about the incident. This was a major contradiction which has not been noted by the trial Court.

36. PW-24 also contradicts PW-4 on this aspect when he stated, “I directly went to FCI godown and called the contractor. I along with the contractor directly went to PS Sultanpuri at about 11/11.30 pm and we remained at the PS for the whole night”. He does not mention about PW-4 going along with them to PS Sultanpuri. His version of events also departs from that of PW-4 when he states that PW-4 had told him that both the boys had robbed the purse and mobile phone of the driver whereas PW-4 had stated that only the mobile phone of the deceased had been taken away by the Appellant and the JCL.

37. A fifth factor which raises doubts about the credibility of PW-4 is his statement in his cross-examination that the IO had briefed him about the case just prior to his deposition in the Court. His specific answer in this regard reads as under:

“It is correct that I had received summons of the court to appear today. The summons was received to me from PS Samastipur

on 2.7.12. I have come alone to Delhi. I had not met the IO of the present case today and I came directly in the court from the railway station. I have met the IO outside the court. It is correct that IO had briefed me about the case.”

38. There should have been no occasion for the IO to brief a crucial prosecution witness about the case just prior to his deposing in the trial.

39. Even more damaging to the prosecution case is the admission by PW-4 in his cross-examination that after they reached PS Sultanpuri on the night of 6th July 2011, he along with PW-24 remained in the PS for about 3-4 days. The learned counsel for the Appellant was justified in his submission that the detention of PWs- 4 and 24 by the police for 3-4 days without producing them before a magistrate was unlawful and contrary to the specific guidelines issued by the Supreme Court in ***D.K. Basu v. State of West Bengal (1997) 4 SCC 216***.

40. The learned APP sought to point out that the witness had also stated immediately after the abovementioned disclosure that the “police took us outside the PS during this period for the identification of the accused”. The witness goes on to state that the police continued to interrogate him during that period and that he did not return to the PS thereafter. In the Court’s view, rather than aid the case of the prosecution, these statements only reflect that the witness was in the *de facto* custody of the police when being asked to identify the Appellant and was possibly under threat of being implicated in the case himself.

41. Owing to the litany of inconsistencies and contradictions in the

deposition of PW-4, the Court is unable to consider his evidence to be reliably corroborated to the extent that it can be relied upon as sole eye-witness testimony to implicate the Appellant in the crimes with which he has been charged.

Unconvincing arrest of the Appellant

42. Furthermore, this leads us to yet another glaring contradiction in the case of the prosecution on the aspect of arrest of the accused. Apart from the deceased, the Appellant, and the JCL, only PWs- 4 and 24 were present on the night of the incident and would have seen the two purported assailants. But for either of these two witnesses, no other person could have provided a description of the Appellant to the police. Even so, as is apparent from the depositions of PWs- 16 and 31, the arrest of the Appellant was made on the pointing out of a secret informer with no mention of either of PWs- 4 or 24 being present.

43. The obvious question, therefore, is how the police were able to identify that the person they were arresting was indeed the one responsible for the murder of the deceased. It is also a mystery how the purported secret informer could have known that the Appellant and the JCL were wanted in this particular case and were able to identify them for the benefit of the police. In light of such monumental lapses, it can only be said that the circumstances of the arrest of the Appellant are seriously doubtful.

44. The learned APP pointed to the fact that the Appellant had refused to participate in the TIP and, therefore, undertook the risk of his identification being done subsequently by the PWs. This submission overlooks an

important fact that the TIP was sought to be undertaken on 20th July 2011, i.e. almost two weeks after the arrest of the Appellant. It should also be recalled that, according to PW-4, he and PW-24 were present in the PS for 3-4 days after the incident. Therefore, if the Appellant was indeed arrested on 7th July 2011 as stated in the arrest memo (Ex.PW-16/B) and taken to PS Sultanpuri, PWs- 4 and 24 were already present and there is a more than slight possibility that they had seen him as he was brought in, thus giving rise to the fair apprehension that a TIP sought to be conducted on 20th July 2011 would have been prejudicial to the Appellant.

45. Even the manner in which the identification of the Appellant was done by PWs- 4 and 24 give rise to serious doubts. PW-24 deposes that he along with PWs- 3 and 4 came to Rohini Courts Complex on 25th July 2011 to obtain release of the truck belonging to the brother of PW-3 on *superdari*. He goes on to state that as they were waiting near the entrance to the Courts Complex, he saw the Appellant entering the Court along with police staff and recognised him as one of the assailants who had given him Rs.100 to purchase liquor on the night of 6th July 2011. He then states that that person was the one present in the Court at the time of his deposition. This narration of events is particularly unusual considering PW-4's deposition that he did not interact or contact the police after the initial 3-4 days after the incident. Presumably, when the truck was being released on *superdari*, the IO would have been present. This contradiction only creates further doubts as to the identification and arrest of the Appellant.

No incriminating circumstances proved

46. Where the prosecution has failed to establish a case based on direct evidence due to the testimony of the sole eye-witness suffering from various deficiencies, the question is then whether the guilt of the accused person can be established by way of establishing a chain of circumstance pointing unerringly to the guilt of the accused person.

47. In this regard, the first stumbling block for the prosecution is the absence of motive in light of the acquittal of the Appellant of charges under Section 392/34 IPC and Section 397 IPC which negates a major portion of the prosecution narrative that the assault on the deceased using a deadly weapon was carried out by the Appellant and the JCL with the intention of robbing him of his mobile phone.

48. One circumstance which stands established beyond reasonable doubt is that the death of the deceased was homicidal. However, the burden of proving that it was the Appellant and no one else who was guilty of committing the offence rests with the prosecution. In that regard, it should be recalled that the finger prints found on the liquor bottle could not be matched with the sample finger print of the Appellant.

49. The knife recovered from the *nala* near Ambedkar Park also did not have any finger prints on it. In fact, the Court finds the recovery of the knife to be doubtful in and of itself. The recovery was made from an open *nala* which was easily accessible to the public and situated very close to the place where the police found the parked truck two days earlier. It would be

pertinent, at this stage, to note the observations of the Supreme Court in a similar scenario which arose in *Mani v. State of Tamil Nadu (2009) 17 SCC 273*:

“19. ... It need not be stated that where the discovery of the relevant articles have been made from the open ground though under the bush, that too after more than 10 days of the incident, such discovery would be without any credence. It does not stand to any reasons that the concerned investigating officer did not even bother to look hither and thither when the dead body was found. We are, therefore, not prepared to accept such kind of farcical discovery which has been relied by the courts below without even taking into consideration the vital facts which we have shown above.

20. The discovery is a weak kind of evidence and cannot be wholly relied upon on and conviction in such a serious matter cannot be based upon the discovery.”

50. It is inconceivable that a knife which was thrown in a publically accessible open *nala* near the scene of the crime was not noticed by the police during their inspection of the scene. Furthermore, the non-association of any public witnesses to this recovery further weaken the prosecution’s bid to establish this circumstance. It is also not the case that there is any distinguishing or unique feature of this knife which would make it an exclusive object and with nothing emerging from the FSL report that would connect the knife with the Appellant, it can only be concluded that the confidence of the Court is not inspired qua the recovery of the weapon of offence.

51. The trial Court’s discussion of the evidence of PW-1 on the question of the recovery of the deceased’s mobile phone from his possession is also odd

considering that that witness has plainly turned hostile. The trial Court has also overlooked the fact that it had already acquitted the Appellant of the offence of robbing the deceased of his mobile phone thus making any evidence in that regard of no relevance to the guilt of the Appellant under Section 302 IPC. Furthermore, the evidence of PW-1 had not been put to the Appellant while recording his statement under Section 313 Cr PC and therefore, could not have been relied upon by the trial Court to convict the Appellant.

52. The trial Court has also made the egregious error of relying upon the explanation offered by the Appellant for his being falsely implicated in the present case to draw an adverse inference against him. The Appellant claims that he had borrowed a certain sum of money from PW-1 and even though he had repaid it, the latter was asking him to participate in some criminal activity. The Appellant states that he refused to do so and had, therefore, been falsely implicated in the present case by PW-1 who he claims is an informer of the police. The trial Court has wrongly relied on this aspect of his statement under Section 313 Cr PC to infer that he was previously known to PW-1. Even if this relationship between PW-1 and Appellant can be said to be established, the prosecution must still do a great deal more before it can be said that its burden of proof has been discharged.

53. Therefore, this Court finds that no circumstances, much less a chain of the same, which can be said to point to the guilt of the Appellant and no one else, have been established. The doubts surrounding the arrest of the Appellant, the recovery of the weapon of offence and the identification of

the Appellant all result in vast gaps in the case of the prosecution.

54. In that light, the absence of established motive for commission of the offence becomes even more significant as explained in *Arjun Malik v. State of Bihar 1994 Supp (2) SCC 372* in the following words:

“...mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anybody else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.”

Conclusion

55. For all of the aforementioned reasons, the Court is of the view that the Appellant is entitled to the benefit of doubt as far as the offence punishable under Section 302/34 IPC is concerned. He is accordingly acquitted of the said offence. The impugned judgment of the trial Court to the extent that it convicts the Appellant for the offence punishable under Section 302/34 IPC and the consequent order on sentence are hereby set aside.

56. The Appellant is directed to be released forthwith unless wanted in some other case. The appeal is accordingly allowed. The Appellant will comply with the requirements of Section 437A Cr PC to the satisfaction of the trial

Court at the earliest. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

JULY 10, 2018
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