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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 651/2017 & CrI.M.B. 264/2018

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Date of Decision: 7th March, 2018

SANDEEP SINGH BHANDARI & ANR.

...Appellants

Through: Mr. Anil Kr. Basoya and Mr Ashish
Shiva Bansal, Advocates.

versus

STATE (NCT OF DELHI)

...Respondent

Through: Mr. Hiren Sharma, APP for the State

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

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This appeal is directed against a judgment dated 29th April 2017 of Additional Sessions Judge (Central) ('ASJ'), Tis Hazari Courts in Sessions Case No.27977/2016 arising out of FIR No.166/2014 registered at Police Station ('PS') Timarpur convicting the Appellants, Sandeep Singh Bhandari (A3) and Krishan Kumar (A4) for the offence under Sections 302/34 IPC for committing the murder of Deepak (deceased).

2. The appeal also challenges the order on sentence dated 4th May 2017 whereby, for the offence under Sections 302/34 IPC, each of the Appellants were sentenced to undergo rigorous imprisonment ('RI') for life and pay a fine of Rs.5,000/- and, in default of payment of fine, to undergo RI for a

further three months. By the same order, for the offence under Section 25 Arms Act, A4 was sentenced to undergo RI for a period of six months and pay a fine of Rs.3,000/ and, in default of payment of fine, to undergo RI for one month.

Police investigation

3. The case began with a call received in the Police Control Room ('PCR') at 8.08 am on 15th March 2014 from one Khursheed Khan, resident of Rajeev Gandhi Nagar, Mustafabad, Delhi that a dead body was lying behind the Jal Board at Nehru Vihar in the jurisdiction of PS Timarpur. The said PCR form (Ex.PW-14/A) also sets out the periodic reports received from the PCR Vans that reached the spot.

4. There was a report at 8.34 am confirming that the call was true and that *"DJB ke nale me pani ke andaer ek d/body padi hai LP moka par hai. Wait for details."* There is a report at 9.30 am indicating that the Crime Team had reached the spot. At 9.59 am, the report was that the dead body had been taken out of the *naala* and had been identified by Yogender (PW-2), son of Udhay Singh, resident of B-28, Gandhi Vihar who was preparing for his UPSC examination and who had stated that the dead body was of his friend, Deepak Kashyap. At 10.41 am, the report was that the deceased had been checked by the Crime Team and it had pointed out that there were five knife injury points on the chest and neck and that PW-2 had disclosed that *"Hum dono v do dost aur the. Raat ko drink karne ke baad Mukherji Nagar main ghumne gaye the uske baad Deepak hum se miss ho gaya aur uske baad kya hua hame nahi pata hai"*. The report also noted that the SHO with the staff

was also at the spot. There is a further report at 10.49 am that “*Deepak shaam ko Jammu Tawi train se kal 7 pm per unke room per aaya tha*”. The report at 11.15 am is that SHO has taken PW-2 with him.

5. As far as the police at PS Timarpur are concerned, Sub-Inspector (‘SI’) Sanjay (PW12) received the information about the dead body lying behind the DJB at Nehru Vihar at 8.10 am and this was reduced to writing as D.D.No.10A (Ex.PW1/A). He went at the spot and noticed a male dead body aged 20-25 years lying in the drain. He then passed on the information to the SHO who along with the police staff reached the spot. The crime team was also called there. According to PW12 “The blood was lying on the leaves of urandi tree. Some blood was lying at the spot. Some blood was lying at the spot.”

6. The crime team reached report noted the date and time of examination as 15th March, 2014 from 9.10 to 9.40 am. At the scene of crime, it noticed that the dead body of an unknown male deceased is found inside a water flowing *naala* of 2 ft. 4 inch width. The dead body was broader than the *naala* and found to be fully wet. Injury marks of stab wounds were found on chest and on upper spinal cord. The crime team’s advice to the Investigating Officer (IO) was *inter alia* “i) to preserve the dead body of unknown deceased at mortuary and make efforts to establish the identity of the deceased person, ii) to get the post mortem of the deceased conducted to ascertain the exact time and cause of death.”

7. Inspector R. K. Meena (PW19), who was the IO of the case, also reached the spot along with the SHO and staff. According to him, S.I. Sanjay (PW-

12) recorded the statement of PW-2 (Ex.PW-2/A) at the spot itself. PW-12 made an endorsement thereon and sent it through Constable (Ct.) Sanjay (PW-11) for getting the FIR registered.

Statement of PW-2

8. The statement of PW-2 was to the effect that he was preparing for the Civil Services Examination and staying at Gandhi Vihar. On 14th March, 2014 at around 7.30pm his friend Deepak Kumar who was working in Ludhiana came to his house to meet him and they had dinner at around 11 pm Thereafter PW-2 along with his friend Amit (PW-3) and the deceased Deepak went to Nehru Vihar to visit Mohit Sir (not examined). After meeting Mohit Sir, three of them left Nehru Vihar and headed back to Gandhi Vihar.

9. As they were near the Gopalpur cut at the Nandlal Jhuggi at around 2 am, they noticed two boys who were proceeding towards Nehru Vihar. They were around 20-25 years of age and appeared to be drunk. One of them collided with Deepak upon which both the boys started abusing him. PWs 2 and 3 and Deepak retaliated. One of the two boys slapped Deepak and the other pushed PW2 to the ground. PW3 then tried to intervene to save the deceased and PW-2 at which point the two boys started loudly shouting “hamaara jhagra ho gayaa hai, chakoo le kr aaoo, aaj ise zinda nahi chhorengey”

10. Thereupon from the side of the jhuggi some boys came running. Out of fear and with a view to saving themselves PW-2 and PW-3 started running.

The deceased Deepak was somehow left behind. When PW-2 and 3 reached the house of Mohit Sir and noticed that Deepak was not there they presumed that Deepak must have reached Gandhi Vihar. When in the morning, PW-2 and 3 reached Gandhi Vihar, they could not find Deepak. PWs 2 and 3 started searching for the deceased and on reaching PS Timarpur, they learnt that there was a dead body lying in Nehru Vihar. PW-2 then reached Nehru Vihar and identified the dead body as that of his friend Deepak. In the statement he stated that he was confident that the two boys along with their associates had murdered Deepak and he offered to identify the two boys if they were produced.

11. On the basis of the above statement, the *rukka* was prepared and sent to the PS for registration of the FIR. The investigation was entrusted to Inspector R.K.Meena (PW-19). On receipt of the FIR, PW-19 reached the spot and lifted the bloodstained earth control, the blood stained *arandi* leaves and blood stains on the *arandi* tree. He also prepared a site plan (Ex.PW2/B) at the instance of PW-2 and PW-12. According to PW-19, PW-3 had also come to the spot with PW-2 and during the proceedings PW-3 was also present. However, PW-3 was allowed to leave after recording his statement at the spot.

Arrests of the accused and recoveries

12. According to PW-19 during the search for the accused persons, they reached Gopal Pur near Gas Godown when PW-2 pointed to A-3 (Appellant No.1) who was present near the said godown. A-3 was then apprehended, interrogated and then arrested. While his arrest memo Ex.PW2/B bears the

signature of PW-2, his personal search memo (Ex.PW2/B) does not have the signature of PW-2.

13. A3 is stated to have made the disclosure pursuant to which he led the police to House No.20, Gali No.19, Gopalpur and pointed two of the accused persons i.e., Mohan Singh (A1) and Suraj Singh Bhandari (A2). Both of them were then arrested and they too are stated to have made disclosure statements. PW2 is also stated to have identified A1 and A2 at the time of their arrest. Thereafter, a search was made for A-4 and all of the other accused persons, that is, A1, A2 and A3 pointed to A4 in the main market in Gopalpur. A4 was arrested under arrest memo (Ex.PW12/M) and a personal search of him was undertaken (Ex.PW12/N)

14. The time of the arrest is also important. As far as A3 is concerned, his arrest memo gives the time as 5:35 pm whereas the arrest of A1 was, according to Ex.PW12/I, 7:15 pm Arrest of A4 was at 7:45 pm Therefore, by 7:45 pm on 15th March, 2014 all four accused had been arrested. The arrest memo of A1, A2 and A4 was not witnessed by PW2 although he is supposed to have identified them.

15. Pursuant to the disclosure statement made by A4, he led the police to House No.20, Gali No.19, Gopalpur and got recovered a buttondar knife kept in a black colour pouch from on the slab of the back of the above said house. This knife was found to be blood stained. PW-19 prepared a sketch (Ex.PW12/P) and also measured it. The total length of the knife was 24.2 cm and the length of blade was 12 cm from upper side and handle of blade was

13.5 cm in the lower side of the handle. According to PW19, he got recorded the statement of PW2 after which PW2 left. The police team was also deputed to get the 5th accused, Raja @ Dil Mohd. arrested. However, Dil Mohd. was not traced and remained absconding during the trial.

Medical evidence

16. The post mortem of the deceased was performed by Dr. S. Lal (PW-4), who noticed the following ante mortem external injuries:-

“ (1) stabbed incised wound 1.8 x 0.2 cm. x muscle deep over right side upper front of chest vertically placed. The lower angle of wound is acute and upper angle was blunt. The wound placed 11 cm. from midline and 11 cm. from the tip of shoulder. The wound goes downward direction to chest muscle. The total depth of wound is about 3 cm.

(2) Two stabbed incised wound intermingling to each other to formed a wound size 6 cm X 0.3 cm. x chest cavity deep over middle front of chest, obliquely placed 10 cm. from sternal notch. Both angle of the wound are acute. The blunt angle of wound are merged to each other to form a single wound. The wound enter the chest cavity by cutting through 4" intercostal cartilage and sternum in downward, backward and toward left side to pierce the diaphragm and then pierce the liver with two wound of size 2.2 X 0.1 cm. and 2.4 x 0.2 cm. on left side liver. About 1 liter of blood seen in abdominal cavity. The total depth of the wound is about 8 cm.

(3) The stabbed incised wound 3 x 0.3 cm. into chest cavity deep over front of chest placed just about the injury no. 2 and placed 7 cm. below, the sternal notch and just right to midline. The wound is vertically placed, lower angle of wound is acute and upper angle is blunt. The wound enter the chest cavity by cutting the 4" costal cartilage in downward and backward and towards left side to pierce the diaphragm and enter the left lobe of liver by making a wound of size of 2 x 0.1 cm. total depth of

wound is about 9 cm.

(4) Stabbed incised wound 3 x 0.2 cm. into chest cavity over right side lower front of chest vertically placed. The wound is placed 3 cm. right to midline and 22 cm. below the mid point of clavicle. The upper is acute and lower angle is blunt. The wound enter the chest cavity by cutting the 7th intercostal cartilage in downward, backward and towards left side. The wound pierce the diaphragm and then enter the liver by making a wound of size 2 x 0.1cm. total depth of the wound is about 7 cm.

(5) Stabbed incised wound 3 x 0.2 cm. into chest cavity deep over left side upper back of chest vertically placed. The wound is placed 3 cm. from midline and 7.5 cm. from upper border of trapezoid fold. The upper angle is acute and lower angle is blunt. The wound enter the chest cavity by cutting the 3rd rib on back in backward downward and towards left side and then given the nick in descending order. Total depth of the wound is about 8 cm.

(6) Stabbed incised wound 5 x 0.4 cm. into chest cavity deep over right side back of upper chest, vertically placed. The wound is placed 1 cm. from midline and 5cm. from nape of neck. The upper angle is blunt and lower angle is acute. The wound enter the muscle downward direction upto 6 cm. the total depth of the wound is about 6 cm. ;

(7) Reddish abrasion 1 x 0.5 cm. over right side forehead placed 5 cm. From midline and 3 cm. above the eyebrow.

(8) Reddish abrasion 1.5 x 0.3 cm. over right side forehead placed 2 cm. Below injury no. 7.

(9) Multiple reddish scratch abrasion (10 in no.) over left upper limb varies in size from 7 x 0.1 cm. to 1.5 to 0.1 cm.

(10) Multiple reddish abrasions over right upper limb varies in size from 1 x 0.5 cm. to 0.5 X 0.3 cm.

(11) Multiple reddish abrasions in area of 6.5 Cm. over left knee and in area of 6cm. over right knee.”

17. The cause of death was shock and haemorrhagic shock due to the stab injury to liver and vessels by a single sharp edged weapon with a pointed tip. Injuries 1 to 5 were sufficient in the ordinary course of nature to cause death individually and collectively. The time of the death was about 24 to 36 hours prior to the time of the post mortem, that is, 12.15 pm on 16th March, 2014. It must be noticed at this stage that the viscera of the deceased was asked to be preserved.

Forensic evidence

18. The report of the Forensic Science Laboratory (FSL) gave the result of the examination of Exhibts.1A, IB and IC of the deceased i.e. stomach, pieces of intestine, pieces of liver and blood sample respectively. All the three exhibits were found to contain ‘ethyl alcohol’ and Ex.1C, which is the blood sample of the deceased, was found to contain ethyl alcohol 93.4 mg per 100 ml of blood. As far as the blood stain on the knife was concerned, the Biology Division of the FSL gave a report dated 20th November, 2014 in which it was stated that the blood was of human origin but there was no reaction since group specific antigens had degenerated.

19. The result of the FSL examination therefore was that the blood on the knife could not be matched to the blood group of the deceased and the fact

that the deceased had consumed alcohol soon before his death stood proved.

20. At the end of the investigation, a charge-sheet was filed and by an order dated 21st August, 2014, all four accused were charged with the offence of murder punishable under Section 302 read with Section 34 IPC; and Accused Nos. 1 and 2 were separately charged with the offences under Sections 27 and 25 of the Arms Act. According to the prosecution, A1 had helped recover a knife and A4 had helped recover a 'buttondar knife'.

Defence of the accused

21. Twenty five witnesses were examined by the prosecution. As far as the statements of the accused are concerned, since two of them have been acquitted i.e. A1 and A2 by the impugned judgment of the trial Court, the statements under Section 313 of the Code of Criminal Procedure ('Cr PC') of the present two Appellants i.e. A3 and A4 alone are relevant. As far as A3 is concerned, while denying the circumstances put against him in his statement dated 20th August, 2016, he claimed to be falsely implicated. A supplementary statement was recorded on 18th January, 2017 of A3 where the recovery of mobile phone Nokia black colour from his personal search was put to him and he denied it.

22. As far as A4 is concerned, he too denied the circumstances and claimed to be falsely implicated. In the supplementary statement dated 18th January, 2017 he denied the circumstance of recovery of two mobile phones from A1 and one mobile phone each from A2 and A3.

23. On the side of the defence, Sub-Inspector (SI) Pawan Kumar was examined as DW1. He brought the summoned record i.e. a certified copy of the PCR call From-I (Ex.DW1/1) and stated that its contents were correct. Head Constable (HC) Shakeel Ahmed, attached to the PS Timarpur was examined as DW2. He brought the DD register relating to the DD No.5A dated 15th March, 2014 at PS Timarpur. He pointed out that DD No.18A was also related to DD No.5A. This DD No.5A i.e. Ex.DW2/B was recorded that at 1.28 am, regarding a ruckus had been created by certain persons who were in a drunken condition and destroying public property.

Impugned judgment of the trial Court

24. In the impugned judgment dated 29th April, 2017, the trial Court came to the following conclusions:

- (i) PWs 2 and 3 had stated that the accused persons had called out their associates by shouting that there was a fight and knives should be brought and that the victims should not be spared.
- (ii) PWs 2 and 3 had identified A3 and A4. A3 was arrested at the instance of PW2 the very next day after the incident.
- (iii) By applying the theory of 'last seen' it had been established, and not disputed by the accused, that the deceased was last seen on the spot being chased by A3, A4 and his associates.
- (iv) The following circumstances were said to have been established by the prosecution as constituting a continuous unbroken chain;
 - (a) PWs 2, 3 and the deceased were passing through the Nehru Vihar Jal Board in the early hours of 15th March, 2014.
 - (b) There was a scuffle between PWs 2, 3 and the deceased on the

one hand and the accused on the other.

- (c) PW-2 was injured in the scuffle as proved by the medical evidence of PW22.
- (d) The testimony of PW2 was consistent with the earlier statements given by him to the IO that at 2 am, he was going along with PW3 and the deceased and A3 and A4 thrashed them and called their associates to kill them.
- (e) The CDRs of the mobiles used at the time of the incident would establish that the mobiles used at the time of the incident were in the possession of A1.
- (f) There was no *alibi* of accused persons.
- (g) PWs 2, 3 and the deceased had grave apprehension that if they did not escape then something is going to happen to them.
- (h) The deceased was found dead within six hours of the incident.
- (i) A3 was arrested on 15th March, 2014 at the instance of PW-2. Both PWs 2 and 3 identified the accused in the Court as well.
- (j) The death of the deceased was unnatural and had been caused by multiple injuries inflicted by a sharp-edged weapon.
- (k) The weapon of offence was recovered at the instance of A4.
- (l) The presence of A1 and A2 had not been established beyond reasonable doubt.

25. Consequently, while giving A1 and A2 the benefit of doubt, the trial Court convicted A3 and A4 for the offence punishable under Section 302/34 IPC. It was further held that it had not been established beyond reasonable doubt that A1 had used the knife in the commission of the crime. He was,

therefore, acquitted for the offence under Section 27 of the Arms Act. The knife recovered from the possession of A4 was in violation of Circular dated 2nd November, 1974 and, therefore, he was convicted for the offence under Section 25 of the Arms Act.

26. By a separate order on sentence dated 4th May, 2017, both the Appellants were sentenced for the aforementioned offences in the manner noted hereinbefore.

27. This Court has heard the submissions of Mr. Anil Basoya, learned counsel appearing for the Appellants and Mr Hiren Sharma, learned APP for the State.

Law relating to circumstantial evidence

28. This is a case based on circumstantial evidence. The law in relation to circumstantial evidence is well-settled. In ***Ram Avtar v. State 1985 Supp SCC 410*** the Supreme Court explained that:

"...circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

29. In *State of Tamil Nadu v. Rajendran (1999) 8 SCC 679* the Supreme Court held:

"... the law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused."

30. In *Trimukh Maroti Kalan v. State of Maharashtra (2006) 10 SCC 681*, the Supreme Court held:

"The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.

31. In *Brajesh Mavi v. The State (2012) 7 SCC 45* the Supreme Court explained:

"From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime."

Circumstance of 'last seen'

32. In the present case, the trial Court has accepted the evidence of PWs 2

and 3 as having proven the circumstance of 'last seen'. In the first place, it should be noticed that the first reporting of the incident was by a call made to the PCR at 8.08 am on 15th March, 2014 by Khurshid Khan (who was not examined). The message was to the effect that there was a dead body lying behind the Jal Board at Nehru Vihar.

33. The notings on the said PCR form were proved by DW-1, who brought the record. It shows that the identification of the dead body by PW-2 took place at 9.59 am. At around 10.41 am the noting was to the effect that PW-2 also informed the police at that stage that the deceased and two other friends had gone out in the night to have drinks at Mukherjee Nagar and after that Deepak had gone missing. The *rukka* is supposed to have been prepared on the said statement of PW-2 recorded by PW-12 at the spot. This was purportedly at 11.30 am.

34. In the cross-examination of both PWs 2 and 3, at several places they admit to having informed the police about Deepak having gone missing. In his examination-in-chief although PW-2 maintained what he had stated in the first instance to PW-12, in his cross-examination by counsel for the accused PW-2 confirmed that when they returned to Gandhi Vihar in the morning time, the exact time which he did not remember, they had reached PS Timar Pur and remained there for about 20/25 minutes. He then states, "we had enquired from the officer on duty at the said PS and had told them that Deepak had not returned, on this, we were told that a dead body one person had been found." In other words, what he told the officer was only that Deepak had not returned, but not that all of them were attacked by two

persons and that two of them i.e. PWs2 and 3 had got scared and run away to the house of Mohit.

35. PW-2 disclosed that there were three other friends on the night of 14th March, 2014, viz., Ram Meena, Anup Singh and Mayank Jaiswal. However, he admitted that these names were not mentioned by him to the police earlier. In any event, these friends were not even produced as PWs. He also denied the suggestion that he had told the police that Deepak had gone missing from their company from Mukherjee Nagar and that he did not know what happened to Deepak thereafter. He admitted that he had left the PS only in the morning of 16th March, 2014, by which time all the accused had been apprehended.

36. PW-2 asserted for a second time, “It is correct that I was in the PS from 15th March, 2014 till the morning of 16th March, 2014. I had finally left the PS in the afternoon of 16th March, 2014.” Why PW-2 would remain in the PS till the afternoon of 16th March, 2014 when he was only a witness to the incident, has not been explained by the prosecution. A suggestion was put to him in regard to DD No.5 dated 15th March, 2014 at 1.28 am regarding a call having been received from a mobile phone from the House No.V-45, Nehru Vihar near MCD School about certain persons in a drunken state causing nuisance and damaging vehicles at Nehru Vihar. He denied the suggestion that, “public ran after us and on reaching the gate near Nandlal Jhuggi, I fell down on the road.” He denied the suggestion that, “police would have booked me under Section 302 IPC and, therefore, under pressure of police I have implicated the accused persons in the case or that due to this reason I

was detained in the PS on 15th and 16th March, 2014.”

37. PW-2 was not able to satisfactorily answer why, if indeed he and the deceased had been attacked by the accused, and if indeed both PWs 2 and 3 had run away from there in fright, they did not report the matter to the police at all till the next morning. He admitted, “I had not called on 100 from my house in Gandhi Vihar. Amit had also not telephoned at 100.”

38. The Court has perused the rough site plan as well as the scaled site plan. The rough site plan has four alphabets ‘A’, ‘B’, ‘C’ and ‘D’. Alphabet ‘A’ indicates the spot where the dead body was found. Alphabet ‘B’ is where the electric pole was found. Alphabet is ‘C’ where the earth control was lifted and alphabet ‘D’ where, among the bushes, blood was found.

39. What is missing in this rough site plan, which is supposedly prepared by the IO on the statement of PW-2 and in the presence of PW-12 are the following:

- (i) The route which was taken by PWs 2 and 3 and the deceased while walking back from the house of Mohit in Nehru Vihar to Gandhi Vihar.
- (ii) The exact location of the house of Mohit.
- (iii) The place where the altercation and clash took place between PWs 2, 3 and the deceased on the one hand and A3 and A4 on the other.
- (iv) The direction from which persons from the Nandlal Jhuggi are supposed to have reached on the loud call supposedly given by A3 and A4.

40. This is a serious lapse on the part of the IO. If there are two eye witnesses to say that they saw a particular incident, it is important to indicate the exact location of those eye witnesses and more importantly the exact location where the incident took place. Nowhere does PW-2 suggest that the spot where the altercation took place is the very spot where the dead body was found on the next morning. There was no clarification sought in this regard from PW2.

41. Why PW-2 would not give a complaint to the police in such circumstances immediately after reaching back to the house of Mohit is not clear. Also, what is strange is that despite Mohit being an important witness, because the deceased and the two witnesses i.e. PWs 2 and 3 visited him and left his house only at 2 am, he would have corroborated, if at all, what was spoken by PWs 2 and 3. This was particularly important since after the alleged attack on them by A3, A4 and their associates PWs 2 and 3 are supposed to have run back to Mohit's house and stayed there till the next morning. Mohit was never questioned by the police. He was not produced as a witness. This lapse is also not explained by the prosecution.

42. In his cross-examination, PW-2 denied the suggestion that Deepak had "taken the liquor, went missing from Mukherjee Nagar itself and fell down of his own." The denial of the suggestion that Deepak had taken liquor was obviously false. The FSL report has adequately proved the fact that there was a high quantity of liquor in Deepak's blood and that clearly showed that Deepak had consumed liquor just before his death.

43. In the statement made in the first instance to PW-12, on the basis of which the *rukka* was prepared, PW-2 did not indicate that he was himself injured. This surfaced much later. What is most surprising is that PW-2 was sent for medical examination only at 11 pm on 16th March, 2014 i.e. more than 24 hours after the alleged incident in which he also was injured. Why he was not medically examined earlier is a mystery.

44. If indeed all of them had gone out for taking drinks, as informed by PW-2 to the police in the first instance (as noted in the PCR form), it was essential for the IO to have got the MLCs prepared of both PWs 2 and 3 immediately to find out if there was any alcohol present in their respective blood streams. This was, for the reasons best known to the IO, not done. By the time PW-2 was medically examined at 11 pm on the night of 16th March, 2014, no alcohol trace was present. This is yet another lapse on the part of the police.

45. The behaviour of PW-2 in the entire incident seems to be highly unnatural. There were also inconsistencies. PW2 states, "At the spot police had called the crime team and the photographs were taken of the dead body from there. As I had narrated the incident to the police official at the spot itself the search for the accused persons were made." It does appear that according to PW2, he was present at the spot when the crime team arrived there and yet, in the report of the crime team, as already noticed earlier, it is stated that the dead body was of an unknown person. This discrepancy has not been explained by the prosecution.

46. PW-2 then states, “1 alone had gone to the spot where dead body was found and Amit and Mohit had not gone. Amit remained in the police station when we had gone to the police station for reporting of missing of Deepak.” The above statements tell us two things – one that it was only PW-2 who went to the spot. This is, however, contradicted by PW3 who states that he also went to the spot from the PS. The second is that they had gone to the PS “For reporting of missing of Deepak”. Clearly, therefore, they did not go to the police to report about the violent incident that allegedly took place in the early hours of 15th March 2014.

47. PW2 further states, “Identification of the accused was carried out from me in the police station. I had disclosed to the police that one accused was fair the other was dark besides they being in the age group of 20 to 25 years.” He was immediately confronted with his previous statement (Ex.PW2/A) where the fact of the accused being fair and dark was not mentioned.

48. Also, in the deposition of the IO (PW19), it has emerged that the identification of the accused was done at the place of his arrest i.e. near the gas godown at Gopalpur. The precise statement of PW19 in this regard reads as under:

“During the search of accused person, we reached at Gopal Pur near Gas godown, in the meantime Complainant pointed out the accused Sandeep Singh Bhandari present today in the Court (correctly identified) who was present near the said godown pointed out the accused Sandeep Singh Bhandari present today in the court(correctly

identified) who was present near the said godown and thereafter on the pointing out and identification of complainant, we apprehended accused Sandeep Singh Bhandari.”

49. As already noted PW-2 has contradicted this. According to him, he identified the accused at the PS. Identifying an accused in the PS has an entirely different connotation. It places a serious question mark on the arrest of an accused on the pointing out and identification by a witness at the spot of arrest.

Proof of arrests doubtful

50. The manner of arrest of A3 is also strange. According to PW-2 on the same day i.e. 15th March, 2014

“...between afternoon and evening, time I do not remember, I identified and pointed towards one accused in the area of Gopalpur. Exact location I am not familiar with.”

“On the same day between afternoon and evening time I do not remember. I identified and pointed towards one accused in the area of Gopal Pur. Exact location I am not familiar with. And the said accused were apprehended by the police. The accused disclosed his name Sandeep. The said accused was the person who had pushed me at the time of quarrel between us.”

51. How the police could miraculously find A3, who was present very close to the place of occurrence, on the very same day is not understood. This appears to be highly improbable. The arrest memo of A3 shows that the time of his arrest was 5.35 pm and this has been witnessed by PW-2 as well.

52. At this stage, it is necessary to refer to the evidence of Ct. Sanjay (PW-

11) and SI Sanjay (PW-12). Although PW-11 has signed on the arrest memo, in his examination-in-chief, he is totally silent about being present at the time of the arrest of A3. On the contrary, he states that, “We went in the search of accused person for different places but they could not be traced.” He is supposed to have left at 3 pm with the dead body from the mortuary at Sabzi Mandi and he remained there for safety purpose. Clearly, therefore, he could not have signed this arrest memo.

53. As far as PW-12 is concerned, he too does not mention about the arrest of A3 in his examination-in-chief. He states that he along with PW-2, PW-3 SI Bharat Ratan (PW-13) and Ct. Sanjay (PW-11) went to the jhuggies in Gopalpur in search of the accused persons but the accused persons could not be traced. He simply states that at the instance of PW-2, A3 was apprehended when they reached agency of gas godown at about 5.30 pm and he accepted his role in the murder of the deceased with all his accomplices. This manner of arrest of A3 without his trying to abscond or even try to escape when he was sought to be apprehended is not at all believable.

54. It is the arrest of A3 which then led to the arrest of the other accused because it is A3 who is supposed to have led the police to the houses of A1 and A2 at Gopalpur, who were then arrested and who again did not try to escape or abscond. The identification of both A1 and A2 is also again only by PW-2. Within a few minutes thereafter, they searched for A4 in the main market Gopalpur and all the arrested accused are supposed to have pointed out to him and he is supposed to have been arrested.

55. To say the least this manner of arrest of all the accused within a few hours in the evening of 15th March, 2014 is not at all convincing particularly since although PW-2 is supposed to have been present throughout, he has signed only on the arrest memo of A3 and not on the arrest memo of A1 and A4 (Ex.PW12/N) or even on the personal search memo of A2 (Ex.PW12/H). It is extremely doubtful whether PW-2 was present during the arrest of these persons. All of this seems to have been completely overlooked by the trial Court.

56. The unusual conduct of PW-2 and his being contradicted on material aspects by the aforementioned evidence of other witnesses throws considerable doubts whether he is a totally truthful witness.

Evidence of PW-3

57. Now we come to the evidence of PW-3. One major contradiction is that in his examination-in-chief itself he states that when he and PW-2 started running they reached, “at my room situated at Nehru Vihar”. In other words, he does not mention about their running to the house of Mohit. The second major contradiction is that according to PW-3 when they found that Deepak was not with them they, “went back towards Gopal Pur but nobody was found there so we came back to my room.” PW-2 does not say so. According to him, they remained in the house of Mohit for three hours more. The third contradiction is PW-3 states that “In the morning when we woke at about 6 am they decided to go to the room situated in Gandhi Vihar”. This means that they in fact slept in his house whereas PW2 does not say so. This conduct of PW3 in sleeping after encountering violence at the hands of A3

and A4 would be most unusual. When they went to Timarpur, they were told that a dead body had been found at Nehru Vihar. According to PW3, "We went there and found that the dead body was of Deepak." It will be recalled that according to PW2 it is he alone who went back to the spot to identify Deepak and that Mohit and PW3 remained at the PS. Therefore, PW-3 does not corroborate PW-2 on the very important detail.

58. In his cross-examination, PW-3 states as under:

"It is correct that from night of 14" till 6 a.m. on 15"* we had not lodged any complaint with the police in respect of missing of Deepak. I with Yogender had reached PS Timarpur at 09 am on 15". We remained for about 30-60 mins at PS Timarpur at the said time. During this period we told the police officer present in the PS about missing of Deepak. No report was recorded by the police at the said time.

The lodging of the report was not refused by the police but they had told us that a dead body had been found and we should first see the same. I along with Yogender and police official had gone to the place where dead body was found. We reached the said place at about 10.30 am.

59. From the above statement in his cross-examination, it is clear that even PW-3 agrees that they told the police only about Deepak going missing and not about all of them being attacked at around 2 am on 15th March, 2014. This is not consistent with what has emerged in the PCR form regarding the first statement ever made by PW-2 to the police. The second important aspect is that PW-3 is clear that he along with PW-2 had gone to the place where the dead body of Deepak was found. This is contradicted by PW-2 and even the IO i.e. PW-19. PW-19 has only mentioned about PW-2 being

present at the spot. Incidentally, PW-19 does not talk about PWs 2 and 3 coming to the PS and then their being asked to come to the spot. In any event, the presence of PW-3 at the spot is not spoken to by PW-19 at all.

60. A suggestion was given to PW-3 that he was carrying a mobile phone. He said, he did but that, "It was not charged." He denied the suggestion that the deceased and PW-2 were also carrying mobiles at that time. There is also a contradiction inasmuch as PW3 states, "I was not present with Yogender at the time of recording of the FIR but I was present in the PS at the said time. It is correct that I was in the other room when Yogender was lodging the FIR in the other room." What emerges even from the deposition of PW-3 is that they all remained in the PS till 16th March, 2014. PW-3 volunteered during his examination in the Court that: "We remained at the PS on 15-16/03/14 in respect of incident in question of the present case." He too denied the suggestion of being under the influence of liquor and damaging the vehicles at Nehru Vihar area in regard to which DD No.5A was registered at 1.28 am on 15th March, 2014.

61. Even from the evidence of PW-3 therefore the Court is not convinced that he is speaking the entire truth. If in the next morning both PWs 2 and 3 reached Gandhi Vihar from Nehru Vihar they must have crossed the same route which they attempt to take the previous day. If they took the same route, they might have encountered the dead body and yet neither of them speaks about this. This important aspect has not been investigated at all.

62. For some reason, the prosecution appears to have developed another

theory regarding the exhortations given by A3 and A4 at the time of the incident calling the others from the jhuggies to join them with knives. In this regard, the prosecution introduced mobiles in the hands of A3 and A4 as well as A1 and made it appear that a call had been given by A3 to his brother A2 on the mobile. In order to prove this, the prosecution examined Shiv Singh (PW-10) who stated that the mobile phone ending with the digit 7323 was being used by his wife Geeta Devi and he had got issued another sim with the last four digits 7102 on this ID which was used by him. The idea was to show that the mobile ending with the digit 7323 was used by his son A2 and the mobile with the digit 7102 was being used by A3.

63. This entire theory collapsed since PW-10 turned hostile. Through the CDRs of these phones, it was sought to be established that a call was made by A3 to A4 at around the time of the incident. But this was to no avail if indeed the arrest of these accused and the recovery of mobile phones from them was unable to be proved. When cross-examined by counsel for the accused, PW-10 stated that the mobile phone ending with the digit 7102 was in his possession during the night of 14th and 15th March, 2014. He states that his relatives had come at the ISBT Kashmiri Gate at 1.30 am and they took a TSR from there which led them at Nehru Vihar so from there he called his wife and told her that his mother and sister had reached and he was coming home with them. This was the possible explanation. In any event, PWs 2 and 3 do not state that A3 had a mobile on which he called any one at all. Both of them maintained that A3 and A4 shouted to others in the jhuggies to come. It is, therefore, not understood why the prosecution went to such lengths to prove that a mobile phone call was made by A3 to A2 to

ask him to come with knives. This too has weakened the case of the prosecution.

Circumstances not proved

64. In a case of circumstantial evidence, every link has to be convincingly established beyond reasonable doubt and they must form a continuous chain that unerringly point to the guilt of only the accused and no one else. This threshold cannot be said to have been fulfilled by the prosecution in the present case.

65. To revisit the circumstances culled out by the trial Court, there is no convincing evidence about 'last seen'. The story put forth by PWs 2 and 3 that they were attacked by A3 and A4 who gave a call to the other accused to join them from the jhuggies has not been convincingly proved by the prosecution. It appears that even as spoken by PWs 2 and 3, they went to the police and that too belatedly after almost eight hours after they parted company with the deceased only to report that the deceased had gone missing. This abundantly comes through in their respective cross-examination. Consequently, the Court is unable to concur with the trial Court that the circumstance of A3 and A4 last seen with the deceased has been proved by the prosecution.

66. It was pointed out that even according to PW-2, the place where he was pushed by the accused persons was not marked in the rough site plan (Ex.PW2/B). It is not marked even in the scaled site plan. This was a serious lapse and gives rise to doubts on whether in fact any such incident of

altercation between PWs 2, 3 and the deceased on the one hand and A3 and A4 on the other took place.

67. Even the evidence of PW-3 is not convincing. He failed to corroborate PW-2 on several material particulars. Consequently, the Court is unable to agree with the trial Court that PWs 2 and 3 have proved the circumstance of 'last seen' or even the incident as it took place according to the prosecution.

68. The identification of A3 by PWs 2 and 3 at the time of his arrest is again not convincingly proved by the prosecution. It is not understood how without attempting to escape all the accused would be available in and around the same area in the evening hours of 15th March, 2014.

69. The recovery of the 'buttondar knife' from A4 is again not proved. PW-2 is supposed to have accompanied the police for all these arrests as spoken to by PW-19. Yet he has signed only on the arrest memo of A3 and not in any of the documents pertaining to A1, A2 and A4. Importantly, the knife which was supposed to be kept in the black colour pouch and yet the FSL report does not reveal the presence of any black pouch when the sealed pulanda was opened.

70. The forensic evidence has not supported the prosecution case one bit. Apart from the fact that the bloodstains on the knife had no reaction as regards the blood grouping (and even the blood group of the deceased was not ascertained), the presence of alcohol in the blood of the deceased in a

substantial quantity has not able to be explained by the prosecution. This, on the other hand, probabilized the alternative theory that PWs 2, 3 and the deceased with other friends had gone for drinks to Mukherjee Nagar. This part of the investigation is lacking and leaves a huge gap in the narration.

71. The Court is also unable to concur with the trial Court on the CDRs of the mobiles alleged to have been used at the time of the incident corroborating the case of the prosecution. In fact, it does the opposite. The trial Court failed to notice that PW-10, by turning hostile, totally demolished the case of the prosecution about a mobile call being made by A3 to A2 to ask him to come to the spot. The only thing that has been proved in this entire case is that the death of the deceased was homicidal and not that any of the accused was responsible for that act.

Conclusion

72. The Court is, therefore, satisfied that there are huge gaps in the prosecution story which remained unexplained. The two key witnesses – PWs 2 and 3 are not reliable or truthful and cannot be said to have helped the prosecution prove its case. Every link in the chain of circumstances put forth by the prosecution has not been established beyond reasonable doubt. The alternative theory of the murder having been committed by some other persons has not been ruled out. In the circumstances, the benefit of doubt ought to be granted to the two Appellants.

73. Both Appellants i.e. A3 and A4 are accordingly acquitted of the offence under Sections 302/34 IPC and A4 is acquitted of the offence additionally

under Section 25 of the Arms Act. The impugned judgment of the trial Court and the order on sentence are hereby set aside. The Appellants are directed to be released forthwith unless wanted in some other case. The Appellants will fulfil the requirements of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

74. The appeal is allowed and the application is disposed of. The trial Court record be returned along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 07, 2017

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