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

Reserved on: 28th November, 2017

Pronounced on: 8th January, 2018

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CRL.A. 1148/2016

JABBAR SINGH

..... Appellant

Through: Ms. Rakhi Dubey, Advocate
(DHCLSC)

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP

**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 19th February 2016 passed by the learned ASJ-02, South East, Saket Court, New Delhi in S.C.No.37/2011 arising out of FIR No.727/2011 registered at Police Station (P.S.) Okhla Industrial Area convicting the Appellant for the offence under Section 302 IPC and the order on sentence of the same date whereby the Appellant was sentenced to rigorous imprisonment for life and to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo further simple imprisonment for 6 months.

Background facts

2. The case of the prosecution is that on 29th January 2011 at around 8:12 am, information was received at Police Station ('PS') Okhla Industrial Area about a dead body lying in *kabari* godown, opposite A-93, Okhla Phase-II. The precise information read: "A-93 ke saamne OIA-II near lohe ke *kabari* ka godaam ke paas ek male dead body pari hai."

3. The above information was logged at 8:12 am. The name of the informant was Krishan and his mobile number was also noted. Two policemen were alerted and they reached the spot at 8:16 am. The report received from van was that the deceased was Ram Avtar, s/o Desh Raj, aged 45 years, resident of Village Sirsoli, P.S. Ujjaini, Budaun District, U.P. Further, he was stated to be working in the Kabari Godown of Shyam Lal Chawla. It was further stated there that "*raat me Jabbar se jhagra hua tha*". The report also indicates that there were injuries on the head and the face. It notes that at the spot, the police met the nephew of the deceased, Girish (PW-3), who has given a statement. The Station House Officer ('SHO') of P.S. Okhla Industrial Area had also managed to reach the spot by then. This PCR form was marked as Ex.PW-18/A.

4. The said information was recorded as DD No.2A and was marked to S.I. Mukesh Kumar (PW-15) for action. Thereupon, PW-15 along with Constable Omkar and Constable Muslim (PW-20) went to the godown of Chawla *kabari*. There they found a male lying dead on a cot in front of a *jhuggi* which is in front of Chawla Kabari's godown. The face was imbued with blood. His pant zip and the front button of his shirt were open. His face

appeared to have been crushed. His clothes were blood stained.

5. PW-20 returned to the P.S. and got an FIR registered. He came back to the spot, handed over a copy of the FIR and the original *tehrir* to Insp. Pradeep Kumar (PW-24) who was the investigating officer ('IO'). The crime team was also called. The owner/proprietor of the godown, Shyam Chawla (PW-14), was examined. On the pointing out of PW-14, photos of the spot were taken by the Crime Team. One mattress (*dari*), 2 blankets, one quilt (*rajai*), one scarf (*saffi*) and one shawl, all blood stained were seized by the IO. Two plastic tumblers and two wrappers of *bhujia* having Haldiram Bhujiawala written on them were also found lying outside the gate of *jhuggi* and were seized by the IO.

6. The post-mortem of the deceased was conducted by Dr. Asit Kumar Sikary (PW-1) at All India Institute of Medical Sciences (AIIMS). He found 5 bone deep lacerated wounds over middle forehead, the outer aspect of the eye, the right, middle and left side of forehead, the outer aspect of the left eye and just above the right angle of the mouth. There was another sixth lacerated wound present over the upper lip over right side involving the whole thickness of lips. On the examination of the sub-scalp, a haematoma was found present over the frontal and parietal region of both sides. There was a fracture of the anterior cranial fossa involving the frontal bone and base of the skull. Subdural haematoma was present all over the brain amounting to about 200cc. The opinion for the cause of the death was "shock due to cranio-cerebral injury caused by blunt external force". The first injury individually and all the injuries collectively were held to be

sufficient to cause death in the ordinary course of nature.

Investigation

7. No chance print could be developed from the black plastic disposable glass found at the crime scene.

8. The son of the deceased also reached the spot and was interrogated by PW-24. PW-24 came to know that the wrist watch, mobile phone and some other belongings of the deceased were missing.

9. The IO collected the call detail records (CDR) of the mobile phone belonging to the deceased which had the No. 9717923464. It was noted that the said instrument was used even after the death of the deceased. On the basis of the call details, PW-24 sent a team comprising Inspector Mahender Singh and S.I. Jatan Singh (PW-13) to Jalaon in U.P.

10. Thereafter, on 31st January 2011, upon receipt of secret information, the Appellant, Jabbar Singh, was apprehended from ISBT, Anand Vihar. He was arrested and a personal search undertaken. The Appellant is stated to have given a disclosure statement (Ex. PW-15/E). One wrist watch, one mobile phone of Nokia make, cash of Rs.430/- and 3 bus tickets were recovered from the Appellant. A seizure memo was prepared (Ex.PW-15/G). The Appellant purportedly led the police to the spot, pointing out the place of the incident (Ex.PW-15/F) and disclosed that he could aid in the recovery of the 10kg weight used by him in the murder of the deceased. The Appellant is stated to have led the police to the vacant plot in front of Plot No.A-90-91, Okhla Phase-II, New Delhi and got recovered the 10kg weight

from behind a bush. It was seized and sealed with the seal of PK. On 1st February 2011, after obtaining police remand for a day, the police was led by the accused again to the place of occurrence and he produced the clothes he was wearing at the time of the incident from a tub. PW-24 found that the above mobile No. 9717923464 was issued to one Dharmender (PW-5). The consumer application form of PW-5 was collected.

The trial

11. An initial charge sheet was filed on 26th April, 2011. Thereafter, two supplementary charge sheets were filed after the FSL reports were received. The charge framed against the accused Appellant on 29th August 2011 was for having committed the offence of murdering the deceased, punishable under Section 302 IPC.

12. The prosecution examined 25 witnesses. In his statement under Section 313 Cr PC, the Appellant accused denied the circumstances. He claimed to have been arrested on 30th January 2011 from Bhind, Madhya Pradesh and not from ISBT, Anand Vihar. As regards the recoveries, he maintained that the watch and mobile phone were planted on him. He stated:

“It is a false case. I was working under Prem Pal and there was a dispute between me and Prem Pal over the money. He wanted to remove me from the job that is why the police with the connivance of the Prem Pal has implicated me in this false case.”

“I am innocent and have been falsely implicated in the case at the instance of Prem Pal.”

13. He declined to lead any defence evidence.

Trial Court judgment

14. On analysis of the evidence, the trial Court in the impugned judgment dated 19th February 2016, came to the following conclusions:

- i) The death of the deceased was homicidal. The injuries could be caused by the 10 kg iron weight which was recovered at the instance of the Appellant.
- ii) The blood detected from the 10 kg iron weight matched with the blood found on the clothes of the deceased. Thus, it stood proved that the iron weight recovered at the instance of the Appellant was used for committing the murder of the deceased.
- iii) No witness was examined by the Appellant to prove his version that he was arrested from Bhind, M.P. and not from ISBT, Anand Vihar. The Appellant failed to produce the ticket of the bus which he has reported to have boarded on 29th January 2011 for reaching his native place.
- iv) The Appellant was absconding after the death of the deceased, although the evidence showed that both the accused and the deceased used to sleep together at the godown of scrap on F-30/5, Okhla Industrial Area, Phase-II, New Delhi. The conduct of the Appellant in disappearing from the spot of crime was relevant under Section 8 of the Indian Evidence Act, 1872 (IEA).

15. It was accordingly concluded that the circumstances proved on record by the prosecution established that it was the Appellant, and no one else, who

murdered the deceased by using the 10 kg iron weight.

Submissions on behalf of the Appellant

16. Ms. Rakhi Dubey, the learned counsel for the Appellant, submitted as under:

- i) Although the PCR form showed that a call was made from Prem Pal's (PW-4) phone by Anek Pal, the prosecution failed to examine Anek Pal. It could not, therefore, be said that there was evidence to show that it was the Appellant who was last seen with the deceased.
- ii) In the absence of any chance prints on the glasses, there was no clinching evidence to show that the Appellant was present with the deceased on the previous night or had any quarrel with him.
- iii) The prosecution was unable to prove the motive for the crime, viz., that a quarrel took place between the Appellant and the deceased leading the Appellant to kill the deceased. There was no TIP conducted of the objects purportedly belonging to the deceased which was found with the Appellant upon his arrest. This included the mobile phone and watch.
- iv) The personal search memo of the Appellant did not reveal the presence of the mobile phone and watch on his person. Only the seizure memo did.
- v) Although the PCR form mentioned the Appellant's name, it did not figure in the report of the crime team. The FIR which was registered

at 11 am was registered against an “unknown person”.

vi) There were no public witnesses for any of the recoveries. No site plan was prepared to show where the objects recovered were found

vii) The recovery of the weapon of offence from an open vacant plot from the bushes did not inspire confidence.

17. Ms. Dubey also placed reliance on the decision in ***Sudhir Kumar & Ors. v. State of NCT of Delhi (2013) VIII AD (Delhi) 217*** to urge that the recovery of the mobile phone by itself will not constitute a clinching piece of evidence to determine the guilt of the accused. Reliance was also placed on the decisions in ***Jitender Mahawar v. State (2014) 4 JCC 2583*** and ***Raj Kumar @ Raju v. State of NCT of Delhi 202 (2013) DLT 370***.

Submissions on behalf of the State

18. In reply, Ms. Radhika Kolluru, the learned APP, submitted that the two clinching circumstances which were unable to be purportedly explained by the Appellant were: (a) the recovery of the mobile phone of the deceased from him; and (b) the recovery of the weapon of offence at his instance. She pointed out that although the personal search memo may not reveal the mobile phone and watch, the seizure memo does. It was argued that the objection raised by the Appellant in this regard is a highly technical one which ought not to come in the way of its admissibility.

19. Ms. Kolluru submitted that the phone of the deceased was shown to be used at different places. She referred to the CDR details which showed the

location of the phone in different places in Western U.P. The bus tickets recovered from the person of the Appellant also corroborated this. The failure to examine Anek Pal was not fatal to the case of the prosecution since there was sufficient evidence in the form of the son of the deceased, Kunwar Pal (PW-9), his nephew, Girish (PW-3), Prem Pal (PW-4), and Vinod (PW-12) all of whom completely supported the case of the prosecution. The PCR form itself noted the name of the accused and the failure to mention the name of the accused in the FIR was only because at that stage, the IO could not have been 100% certain of who the accused may have been.

20. As regards the recovery of the weapon from an open place, she placed reliance on *State of Himachal Pradesh v. Jeet Singh (1999) 4 SCC 370* and urged that since it was recovered from under the bushes, it could not be said to be inadmissible. The knowledge that the 10kg weight was hidden from public view in the bushes was exclusively with the Appellant and could have been pointed out only by him. Reliance was also placed on the decisions in *State of Maharashtra v. Bharat Fakira Dhiwar (2002) 1 SCC 622*, *Kulvinder Singh v. State of Haryana AIR 2011 SC 1777*, *Ramesh Kumar v. State (2010) Cri LJ 85*

Analysis of the evidence

21. The Court has carefully analysed the evidence on record. It is true that the PCR form itself, at the very first instance, mentions the name of the Appellant as the person who had a quarrel with the deceased. The persons who were present at the spot included Girish, whose name finds mention in

the PCR Form. Girish was examined as PW-3. His statement was recorded by the police which is marked as Ex.PW-3/A. He identified the dead body of his uncle at the mortuary in the said statement. He does not appear to have disclosed the name of the Appellant.

22. Prem Pal (PW-4) was also working at the godown of Chawla Kabari for more than 17 years. He stated that at 8 am he came to know of the death of Ram Avtar and subsequently, he and Girish (PW-3) reached the spot. He stated that one Nanak, a tea vendor, had taken his mobile phone and informed the police. He confirmed that his mobile number was 99110712894. The person referred to as 'Nanak' by Prem Pal was in fact Anek Pal. It is a fact that Anek Pal was not examined by the police.

23. The next person of relevance is Dharmender (PW-5) who was also working in the same area. He was earlier working at Shyam Chawla Godown. He knew that the deceased was working there. He disclosed that at the request of Ram Avtar, he had taken a mobile connection no.9717923464 on the basis of his ID proof on behalf of Ram Avtar and that the said number was in fact being used by Ram Avtar. His cross-examination has not yielded much. The fact that the above mobile phone was being used by Ram Avtar has been clearly established through this witness. The son of the deceased Kunwar Pal (PW-9) also confirmed that his father used to have a Nokia make mobile phone and was also wearing a wrist watch. He stated that he had identified both these objects. Again, the cross-examination of this witness did not yield much.

24. It is therefore seen that, from the evidence of PW-5 and PW-9, it has

been clearly established that the mobile No. 9717923464 on a Nokia instrument was being used by the deceased. The evidence of R.K. Singh, Nodal Officer of Bharti Airtel (PW-2) further proves that the mobile connection was in fact issued in the name of Dharmender (PW-5) which fully corroborates what PW-5 himself had stated. He proved the Section 65B IEA certificate regarding the CDR of the said mobile number. There is not much in the cross-examination of this witness to doubt the veracity of the CDR of this mobile number.

25. The CDR shows that the mobile phone that was used by the deceased had the IMEI no.353541029309930. The CDR showed that the said SIM card was used at 12:33 am on the intervening night of 28th-29th January 2011 in the Delhi Circle. There is an additional sheet to the CDR which shows that two text messages were sent at 6:44 pm and 7:46 pm on 29th January 2011 and the location was in the Western U.P. area.

26. In this context the evidence of PW-13 is of significance. He stated that he was asked to send two text messages from his mobile No. 9999999411 to the mobile No. 9717923464, which belonged to the deceased, on 29th January 2011 in order to ascertain the location of the phone. This was well after the death of the deceased. This was fully corroborated by the CDR showing that when the two text messages were sent, the mobile phone was in the Western U.P. circle. This witness was not cross-examined.

27. Vinod (PW-12), who is the brother-in-law of Prem Pal (PW-4) and who also happened to be a relative of the deceased stated that in the morning of 29th January 2011, he received a call from Prem Pal asking him to search for

the Appellant. PW-4 is stated to have disclosed to PW-12 that Jabbar had fled away after killing Ram Avtar. While PW-12 himself did not witness any quarrel between the Appellant and the deceased, he was able to state that the deceased was residing in a room near the godown and that he used to wear a wrist watch and keep a mobile phone. This witness also was able to identify the mobile phone and wrist watch which was shown to him in Court. In his previous statement to the police (Ex.PW-12/DA), he had stated that he too was present when the deceased, PW-4 and the Appellant consumed liquor together till around 8-8:30 pm and that the deceased and the Appellant kept consuming liquor even after PW-4 and PW-12 left. However, in Court, he denied the same and was consequently treated as a hostile witness. He further denied hearing a quarrel between the Appellant and PW-4 or that Anek Pal was trying to pacify them. In his cross-examination, he stated that he did not know the mobile number used by PW-4 to call him on 29th January 2011. Nevertheless, there are portions of his examination-in-chief which can still be relied upon as they support the prosecution.

28. It is clear therefore, that even after the demise of the deceased on the intervening night of 28th-29th January 2011, the mobile phone was found to be used at different locations. This has to be tied up with the fact that the accused was found absconding from the scene of crime where he was certainly present on 28th January 2011 as he was working in the very same area in the godown of PW-14.

29. The evidence of PW-14 is clear that the accused as well as his friends used to sleep on the roof of the godown. He confirms receiving a call at

7:30 am on 29th January 2011 from Prem Pal about Ram Avtar having been killed. He confirmed that he had given the deceased Rs.6,000/- on the previous night and he noticed, when he saw the dead body of Ram Avtar, that the said cash and his wrist watch and mobile phone were missing.

30. None of these witnesses state that they noticed the Appellant the next morning. Therefore, it was for the Appellant to explain his whereabouts in some convincing manner. In his statement under Section 313 Cr PC, in response to Question No.21 he states that “on 28th January, 2011, I was in Delhi and in the evening at 5 p.m. I boarded bus for my native place, i.e., Bhind (M.P.)”. Having been arrested on 31st January 2011 itself, it should not have been difficult for the Appellant, if indeed he was arrested in Bhind, to produce the bus ticket of his travel to that place. Apart from leading no evidence, he has not produced any such bus ticket. The trial Court is, therefore, right in concluding that the burden was on the accused to prove his alibi which was that he was in Bhind when he was arrested. That burden has not been discharged by the accused in accordance with law.

31. On the other hand, the evidence of his arrest at ISBT, Anand Vihar, where he was found with the mobile phone and wrist watch of the deceased, has not been able to be shaken by the Appellant. The deposition of PW-24 inspires confidence that the said recoveries were indeed made.

32. Interestingly, he admitted in response to Question No.16 that “I was working beside the godown of Sh.Shyam Chawla under Prem Pal. It is wrong that Ram Avtar was also living with me in the godown”. The point was not whether the deceased was living with him but as stated by PW-14

that he was living inside the godown whereas the Appellant and some of his friends were sleeping on the roof.

33. PW-25, D.S. Paliwal, Senior Scientific Assistant (Biology) proved that the blood marks on the 10kg weight matched the blood group of the deceased. It is thus established beyond reasonable doubt that the weapon of offence was indeed the 10kg weight. The recovery of the 10kg weight at the instance of the Appellant from the bushes in an open plot opposite Plot No.90-91 has also been proved by the prosecution. It cannot be said to be a totally open place when in fact it was hidden amongst the bushes. The exhibit clearly shows that the weapon of offence was found amongst the bushes.

34. Nothing much could be made of the fact that the personal search memo did not mention the mobile phone and wrist watch of the deceased since the seizure memo very clearly mentions the exact place in the trousers from where the mobile phone and the wrist watch were recovered from the Appellant. The three bus tickets recovered showed that journeys were undertaken between Ferozabad to Agra, Agra to Delhi and Etah to Etawah, all dated 30th January 2011. This shows that the Appellant was literally on the run.

35. The Appellant in his disclosure revealed sought to explain that the cash found on him was from the polythene kept by the deceased. The Appellant had no proper explanation whatsoever in his statement under Section 313 Cr PC for the seizure of three bus tickets from his person which clearly shows that he was on the run after committing the murder.

36. As regards his defence that there was a dispute between him and Prem Pal over money and that the latter wanted to remove him from the job, the Court finds that not a single question has been put to Prem Pal in that regard in his cross-examination. Therefore, this was clearly an afterthought.

37. The recovery of the 10kg weight was, as explained by the Supreme Court in the *State of Himachal Pradesh v. Jeet Singh* (*supra*), perfectly possible since it was hidden amongst the bushes which fact could only have been known only to the Appellant. Further, as explained in the *State of Maharashtra v. Bharat Fakira* (*supra*), when the material object used in the offence is not readily visible, it cannot be said that the recovered evidence is inadmissible. Further, as explained in *Kulvinder v. State of Haryana* (*supra*), since the weapon of offence with blood stains has been disposed of at a place where it is not visible to all, it assumes great significance and it was a circumstance which could be safely relied upon.

38. While the legal position relied upon by counsel for the Appellant as explained in *Sudhir Kumar v. State* (*supra*) is unexceptionable, this is not a case where the entire case of the prosecution hinges only on the CDRs of the mobile number used by the deceased and later by the Appellant.

Proved chain of circumstances

39. In the considered view of the Court, the following circumstances which constitute have been proved by the prosecution beyond reasonable doubt unerringly point to the guilt of the accused and no one else:

- i) The accused was working in the area and he and some of his friends

used to sleep on the roof of the godown of Shyam Chawla (PW-14).

ii) The deceased used to have a Nokia mobile with no.9717923464 and he also wore a wrist watch. He had been given Rs.6,000/- cash by PW-14 on 28th January 2011.

iii) When the dead body of Ram Avtar was found on the morning of 29th January 2011, the cash, mobile phone and the wrist watch were found missing. The Appellant was not found present. The name of the accused figured at the very first instance as the person who had a quarrel with the deceased as this finds mention in the PCR form itself.

iv) Although the Appellant sought to plead alibi by saying that he boarded a bus for his village in Bhind on 28th January 2011 at 5pm in the evening, he could not produce any proof of such travel. He did not examine anyone to prove his presence at Bhind at the time of his arrest.

v) The Appellant was arrested on 31st January 2011 at the ISBT and upon his personal search, the deceased's mobile phone and the wrist watch, apart from three bus tickets showing travel to various places in Western U.P., were found on him.

vi) The mobile phone was used even after the death of the deceased as was evidenced from the CDRs. It is also clear from the CDRs, as corroborated by PW-13 (who sent two blank text messages to the said phone), that the phone was in the Western U.P. circle.

viii) After his arrest, the Appellant led the police to recover the weapon of the offence, i.e. the 10kg weight which was recovered from certain bushes in a vacant plot. The location of the said 10kg weight was in the exclusive knowledge of only the accused and therefore, the recovery was believable.

ix) The blood stains on the 10kg weight matched the blood group of the deceased.

40. In the considered view of this Court therefore, the prosecution has been able to prove beyond reasonable doubt each of the above-stated material circumstances which unerringly point to the guilt of the Appellant and is wholly inconsistent with his innocence.

41. No grounds have been made out for interfering with the impugned judgment of the trial Court and its order on sentence. The appeal is accordingly dismissed.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 08, 2018/ 'anb'