

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

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Reserved on: 7th March, 2018

Decided on: 18th April, 2018

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CRL.A. 852/2017

SANDEEP TIWARI

..... Appellant

Represented by: Ms. Neelam Singh, Advocate

versus

THE STATE

..... Respondent

Represented by: Mr. Ashok Kr. Garg, APP

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, Sandeep Tiwari challenges the impugned judgment dated 2nd June, 2017 convicting him for the offence punishable under Sections 304 Part-II IPC in FIR No. 676/2016 registered at PS Aman Vihar, Delhi and the order on sentence dated 5th June, 2017 directing him to undergo simple imprisonment for a period of four years.
2. Assailing the conviction, learned counsel for the appellant contends that the main witnesses have not supported the prosecution case and turned hostile. Danda, the alleged weapon of offence, has not been identified either by Geeta (PW-2) or Raju (PW-3). Thus in a case of no evidence against the appellant, he has been erroneously convicted by the learned Trial Court.
3. Learned APP for the State on the other hand contends that the impugned judgment and the order on sentence suffer from no illegality as the learned Trial Court rightly raised the presumption under Section 106 of Indian Evidence Act which the appellant failed to rebut.
4. Process of law was set into motion on 26th June, 2016 at about 11:43 P.M. when information was received that one Vinod Tiwari was brought

dead to Sanjay Gandhi Hospital. Aforesaid information was recorded vide DD No. 138B (Ex.PW-13/A) and was assigned to ASI Bhagwan Sahai (PW-13) who along with Ct. Sudhir reached Sanjay Gandhi Memorial Hospital and found that Vinod Tiwari s/o Chander Dev Tiwari, who was brought to the Hospital, was opined to be brought dead. He met the family members of deceased Vinod Tiwari i.e. Ganesh Tiwari, Sandeep Tiwari and one neighbour. He recorded the statements of Ganesh Tiwari and Sandeep Tiwari. The family members did not raise any suspicion on anyone in respect of the death of the deceased. On cursory inspection of the dead body, he found that there were injury marks on hands, legs, shoulder, back, nose and chest of the dead body of the deceased. He prepared the death summary report (Ex.PW-13/B) and got conducted the post mortem. On the basis of the post mortem report and on seeing the condition of the dead body, he prepared the rukka (Ex.PW-13/C). On the basis of rukka, FIR No. 676/2016 (Ex.PW-4/A) was registered under Section 302 IPC at PS Aman Vihar.

5. On 28th June, 2016, further investigation was marked to Insp. Rakesh Kumar (PW-9) who along with Ct. Rajkumar went to the spot at A-16/2, Inder Enclave Phase-II, Kirari, Suleman Nagar, Delhi. He prepared the site plan (Ex.PW-9/B) at the instance of Sandeep Tiwari (appellant herein). In the meantime, FSL team also reached the spot. The spot was inspected and blood was lifted from the crime scene. Dead body was handed over to the legal heirs vide receipt Ex.PW-9/D.

6. On 1st July, 2016, Insp. Rajender Prasad (PW-10) undertook the investigation of the present case. He, along with his team, went to the place of incident where he met the wife of the deceased and asked about the tenants who were living in the same premises. She told that they had gone to

the nearby colony to their relatives after the incident. After the local inquiry, he came to know that the tenants had shifted to C-41, Prem Nagar-1. He reached the aforesaid place and interrogated the tenants, Raju and his wife, Geeta and recorded their statements under Section 161 Cr.P.C. Thereafter, they went to H.No. A-16/2, Inder Enclave Phase-II and apprehended Sandeep Tiwari s/o Vinod Tiwari and interrogated him at length. During interrogation, Sandeep Tiwari confessed his involvement in the incident. He was arrested vide arrest memo Ex.PW-10/A, his personal search was conducted vide Ex. PW-10/B and his disclosure statement was recorded vide Ex.PW-10/C. Thereafter, he along with the staff and appellant proceeded for the recovery of weapon of offence to a vacant plot near to his house bearing Khasra No. 36/18/19, Inder Enclave, Phase II. A wooden danda was recovered from the junk lying in the corner of the said plot and the same was seized vide seizure memo Ex.PW-10/E.

7. After the completion of investigation, charge sheet was filed. Vide order dated 21st October, 2016, charge was framed for the offence punishable under section 302 IPC.

8. Geeta (PW-2) stated that she knew the appellant since she was residing as tenant in one of the room of the appellant at Inder Enclave, Phase-II. Vinod Tiwari (deceased) was her landlord. On 27th June, 2016, at about 5:00-6:00 P.M., she heard the quarrel which was taking place between the appellant and his father. They were quarrelling inside their house and since there was a curtain on the door, she could only hear the quarrel and did not see them quarrelling. She further stated that her husband returned home at about 9:00 P.M. and thereafter, they had their meal and were preparing to sleep, when they again heard sound of quarrel from their house. She

voluntarily stated that it was daily job and they both used to quarrel very frequently with each other. On a court question being posed to elaborate the reason behind the quarrel, she stated that as their dialect was Bihari, she was not able to understand the same. On being asked that did she see the quarrel with her own eyes, she replied in the negative and stated that she only heard the quarrel. During her cross-examination, she stated that when the appellant was outside his house, she had seen a danda in his hand and at that time, his father was not with him and he was inside his house. She also stated that the appellant was a habitual drunker and he was drunk that evening also. She stated that it was correct that she had never seen the appellant beating his father.

9. Raju (PW-3) stated 27th June, 2016, he left for his duty and returned at 9:00 P.M. and his wife Geeta told him that the appellant had beaten-up his father badly with a danda in the evening. He further stated that when they were preparing to go to sleep, they heard the sound of quarrel from the appellant's room. At about 10:30 P.M., when they heard noise and shouts, they learnt that the father of appellant was unconscious. He also did not see the quarrel, only heard the quarrel.

10. Dr. Anurag Thapar (PW-1), SR (Forensic Medicine), SGM Hospital, Mangolpuri, Delhi stated that on 28th June, 2016, he conducted the post-mortem on the body of the deceased. On external examination, he found 17 injuries:

1. Bruise, reddish, 6 X 4 cm, present on the left cheek.
2. Bruise, reddish, 4 X 3cm, present in the front of abdomen on the left side.
3. Bruise, reddish, 4 X 3 cm, present on the centre of the forehead.
4. Bruise, reddish, 15 X10 cm, present on the left lower side of back.

5. Bruise, reddish, 10 X 7 cm, present on the outer aspect of left thigh.
6. Bruise, reddish, 7 X 4 cm, present on the back aspect of left shoulder.
7. Bruise, reddish, 9 X 6 cm, present in the centre of back.
8. Bruise, reddish, 7 X 6 cm, present on the back aspect of right shoulder.
9. Bruise, reddish, 15 X 12 cm, present on the outer aspect of right arm.
10. Bruise, reddish, 5 X 5 cm, present on the lower 1/3rd part of right buttock.
11. Bruise, reddish, 8 X 5 cm, present on the left wrist, dorsal aspect.
12. Bruise, reddish, 15 X 7.5 cm, present on the outer aspect of left thigh.
13. Bruise, reddish, 12 X 6 cm, present on the left flank.
14. Bruise, reddish, 5 X 3 cm, present on the front of the left knee.
15. Multiple abrasion, reddish, in an area of 10 X 7 cm, present on the front of right leg.
16. Bruise, reddish, 3 X 1 cm, present on the front of nose, with underlying fracture of the nasal bone.
17. Bruise, reddish, 6 X 3.5 cm, present on the right wrist, dorsal aspect.

11. On the internal examination of neck, blood extravasation in superficial and deep neck muscles were prominent in suprahyoid area. Tracheal mucosa was found congested. Thyroid and cricoid cartilage were found intact. Said blood extravasation was suggestive of manual strangulation.

12. On the internal examination of chest, blood clots adhering to posterior chest wall were noticed in rib cage. It was suggestive of blunt force impact over the chest.

13. On the examination of head, he noticed sub scalp bruising in frontal region. Base of skull was fractured. Internal examination of brain also revealed diffused thin film of sub dural haemorrhage in bilateral

temporoparieto-occipital lobes. Brain matter was congested and oedematous.

14. He prepared the Post Mortem Report (Ex. PW 1/A) and opined that the death was due combined effect of manual strangulation and hemorrhagic shock as a result of abdominal and chest injury and cranio-cerebral damage, subsequent to blunt force impact and the manner of death is homicidal.

15. He further stated that all the injuries (except injury no. 15) mentioned in the post mortem report were possible with danda. His subsequent opinion is Ex.PW-1/B.

16. During his cross examination, he stated that the internal injury was not possible because of fall. Since the base of the skull had been fractured, mere fall on same level would not result in such fracture. It was only possible when the fall is from substantial height.

17. Dr. Subhra Kumar Paul (PW-6), Senior Scientific Officer (Chemistry), FSL, Rohini, Delhi stated that on 30th August, 2016, she received the sealed parcel containing the viscera of the deceased. On the examination of the exhibits (Ex. 1A, Ex. 1B and Ex. 1C), ethyl alcohol 75.1 mg/100 ml of blood was found on the exhibits. The detailed report is Ex.PW-6/A.

18. Naresh Kumar (PW-8), Senior Scientific Officer (Biology), FSL, Rohini, Delhi stated that on biological examination. blood was detected on Ex.1 (blood gauze of deceased), 2b (nikkar of deceased), 3 (nail clipping of deceased) and 4 (gauze prepared by FSL team from the crime scene). Blood could not be detected from Ex.2a (T-shirt of the deceased), 2c (underwear of the deceased), 5 (gauze lifted by the FSL team) and 6 (danda). On DNA examination, Ex. 1, 2b, 3 and 4 were subjected to DNA isolation and DNA

was isolated from Ex.1, 3 and 4. DNA could not be isolated from Ex. 2b. On conclusion, it was found that the DNA profile of Ex.1 was matching with Ex.3 and 4. Detailed biological and DNA report is Ex.PW-8/A.

19. Court examined two witnesses Ganesh Tiwari (CW-1) and Bindu Tiwari (CW-2).

20. Ganesh Tiwari (CW-1) stated that Vinod Tiwari was his real elder brother. On the day of incident, he returned from the work at about 09:00 P.M. and slept after taking the meals. On hearing some noise, he came down from the roof and noticed that deceased was in unconscious state. The deceased was looking drowsy and then he along with other persons, took him to SGM hospital. At the hospital only, he learnt that deceased had received the injuries. He was declared brought dead. During his cross examination, he stated that the deceased was a heavy drunker, due to which he used to pick up quarrel from outside and then used to return. He further stated after consuming alcohol he used to remove his clothes and used to bang his head on the wall and used to scatter the things. Appellant was having cordial relations with his father.

21. Bindu Tiwari (CW-2), mother of the appellant and wife of the deceased, stated that when she returned home from work at about 7:30 P.M., the deceased was in the house and had consumed alcohol and was sleeping. She asked him that why was he sleeping, to which he replied that he had received injuries. She asked him as to how he had received injuries, he pleaded ignorance though claimed that someone had beaten him when he was away to Prem Nagar. She voluntarily stated that he normally used to return in injured condition as he was a habitual drunkard. She further stated that at about 9:00 or 09:30 P.M., she and her other two children were

sleeping on the roof. Her devar devrani and tenants were also on the roof. And the deceased was sleeping in his room at ground floor. Appellant knocked the door and she sent her daughter to open the door. Later, she heard the shouts of the appellant who was claiming that something had happened to deceased. Then they took him to the hospital. In her cross examination, she stated that it was correct that the deceased used to sell household goods in order to buy liquor and the deceased had sold one mobile phone of make Gionee which was used by the appellant 10-12 days prior to the incident. She denied the suggestion that because of the sale of his mobile, the appellant had become angry and he gave beating to the deceased and was responsible for his death.

22. The eye-witnesses Geeta (PW-2) and Raju (PW-3) have not supported the prosecution case. In their depositions, they have not even whispered to the effect that the appellant had caused injuries to the deceased Vinod Tiwari. Learned Trial Court had also examined two Court witnesses namely Ganesh Tiwari (CW-1) and Bindu Tiwari (CW-2) who also have not deposed about the complicity of the appellant in the offence committed.

23. Learned Trial Court had convicted the appellant with the aid of Section 106 of Indian Evidence Act, 1872 which reads as under:

106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

24. Supreme Court in the decision reported as (2000) 8 SCC 382 State of W.B. v. Mir Mohammad Omar while dealing with the applicability of Section 106 Indian Evidence Act, 1972 noted as under:

31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In *Shambhu Nath Mehra v. State of Ajmer* [AIR 1956 SC 404: 1956 SCR 199 : 1956 Cri LJ 794] the learned Judge has stated the legal principle thus:

“This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are ‘especially’ within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

25. Section 106 Indian Evidence Act does not absolve the prosecution from discharging its primary burden of proving the prosecution case beyond reasonable doubt. For the reason prosecution has failed to discharge its initial burden, onus cannot be shifted on the appellant. Further the prosecution has led no evidence to prove that what time deceased came home, whether he was in injured condition or not and that the appellant was the only person present with the deceased when he received injuries for applicability of Section 106 Evidence Act.

26. Considering the evidence on record, this Court is of the opinion that the prosecution had failed to prove the case beyond reasonable doubt against the appellant. Thus, the impugned judgment convicting the appellant and order on sentence are set aside.

27. Appeal is allowed. Appellant is directed to be released forthwith, if not required in any other case.

28. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

29. TCR be returned.

(MUKTA GUPTA)
JUDGE

APRIL 18, 2018
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