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

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Date of Decision: 18.07.2018

% **CRL.A. 1102/2017**

ARSHAD @ AJAY

..... Appellant

Through: Mr. Sumeet Verma, Advocate with
Ms. Preeti Jakhar, Advocate.

versus

STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP for State
with SI Ravinder, PS-Alipur.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE I. S. MEHTA

VIPIN SANGHI, J. (ORAL)

1. The appellant has preferred the present appeal to assail his conviction by the learned Additional Sessions Judge/Pilot Court/North District, Rohini Courts: Delhi under Section 302 IPC in Sessions Case No.59142/2016 titled State v. Arshad @ Ajay vide judgment dated 21.08.2017, arising out of the FIR No. 273/2016 under Section 302/392/411 IPC registered at Police Station Alipur. The appellant also assails the order on sentence dated 29.08.2017, whereby he has been sentenced to undergo rigorous life imprisonment for the said offence, with a fine of Rs.10,000/-. In default of payment of fine, he is directed to undergo simple imprisonment for a period of 1 year.

2. The trial Court has taken note of the background facts of the case.

We reproduce the same herein below:-

“1. On 06.04.16 a call was received at 100 number from mobile phone No.9212191554 from Ramesh Kumar who informed that Highway Dharam Kanta, Alipur block Kante par caller injured hai, need ambulance. On this information DD No.27B was recorded at police station Alipur. SI Anil along with Ct. Attar Singh reached Highway Dharam Kanta, old GTK road Delhi. They came to know that injured had already been removed to the hospital. They found that there were three rooms behind the Highway Dharam kanta in one of those rooms opening towards North there was a wooden Takhat with bedding. There was blood on the bedding as well as on the floor of the room and one blood stained axe was also lying. SI Anil left Ct. Attar Singh and Ct. Manish, who also reached there, to protect the scene of crime. He informed crime team to reach the spot. SI Anil reached SRHC hospital, from there he collected the MLC of the injured.

2. In the meanwhile Mukesh came there who identified the injured as Ashok, his father. No eye witness met him. Thereafter, SI Anil reached LNJP hospital there also no eye witness met him. Doctor declared the injured unfit for statement. SI Anil Deshwal prepared the rukka on the DD itself, came back to the spot and sent the rukka through Ct. Attar Singh. Crime team came there and inspected the scene of crime photographs were taken, from the spot bedding having blood stains. Blood from the floor. Piece of the floor having blood stains, the axe having blood stains were seized. He also came to know that the wallet and mobile phone of the injured is also missing therefore, sections 394 and 397 IPC were also added.

3. Statement of Ashok (Sic Mukesh) was recorded who

told that on 06.04.2016 he went to the Highway Service station along with his father. There one Arshad was also working along with his father. When he reached the service station at about 11 am he found that some altercation was taking place between Arshad and his father regarding salary. Arshad abused his father. His father assured him and thereafter the dispute was settled. Thereafter, Mukesh came home. At about 1:30 pm. Babloo from the Highway Dharam Kanta came and told that somebody had hit on the head of his father and that Arshad is missing from there. Sanjay Singh also deposed about the dispute between Ashok and Arshad with respect to the salary and then Ashok told Arshad that he will make the payment of salary within 2 to 4 days. Arshad could not be found on that date. On 07.04.2016 Arshad was arrested and in his search the mobile phone of Ashok was recovered which was identified by Mukesh. He confessed about the commission of crime. He also told that he removed the money from the wallet and threw the same in the adjoining plot. He got recovered the lock and the key ring. During treatment on 14.04.2016 Ashok died. After post mortem the dead body was handed over to the relatives. After completion of investigation the charge sheet was filed after adding section 302 IPC as Ashok had died. Ld. MM after complying with the provisions of section 207 Cr.PC committed the case to the Sessions Court as offence u/s 302 IPC is exclusively triable by the Sessions Court. Accused was charged by my Ld. Predecessor for the offence punishable u/s 392/302 IPC and in the alternative u/s 411 IPC to which he pleaded not guilty and claimed trial.”

3. The material witnesses examined by the prosecution were PW-3-Sh. Sanjay Singh @ Bablu and PW-17-Sh. Deepak Kumar, who are witnesses to lastly seeing the deceased and the accused together on the date of the incident between 10:00 AM -11:00 AM. They have deposed consistently

that they saw the accused have a verbal fight with the deceased over payment of salary of the accused. PW-17 stated that they intervened and defused the situation, and the deceased assured the accused that his salary would be paid in a couple of days. The said witnesses have also deposed that they learnt of the attack on the deceased at about 1:00 PM -1:15 PM, when the deceased Ashok was found lying in his room in a pool of blood. Both these witnesses have also stated-and so did PW-12-Mukesh- (the son of the deceased), state, that on the service station, apart from the deceased, the accused was the only other person working, and that there was no other employee.

4. It has come in the evidence of these witnesses that at the time of discovery of the deceased in an injured condition, the accused was missing. This fact is also noticed in the crime team report (Ex.PW-1/A).

5. The submission of Mr. Sumeet Verma, learned counsel for the appellant is that it has come in the evidence of PW-17 during his cross examination, that their Dharam Kanta was 50-60 meters away from the service station, and his submission is that from such a large distance the said witnesses PW-3 and PW-17 could not have clearly seen, with definiteness, whether there was a quarrel, and as to who the deceased was quarrelling with.

6. Mr. Verma next contends that the prosecution had, firstly, claimed the recovery of a lock and key of the service station from the accused. This recovery has been rejected by the learned ASJ. Learned ASJ has also

rejected the testimony of PW-12-Mukesh, when he claims that he was present at the service station when a quarrel took place between the deceased and the accused. He also submits that so far as recovery of the mobile instrument of the deceased from the accused is concerned, PW-12 turned hostile and did not support the case of the prosecution. He also stated that the signatures of both of them were taken on blank sheets by the police. He submits that the recovery of the lock and key was also not supported by PW-12. However, the learned ASJ has wrongly distinguished the said two recoveries, and submits that on a parity of reasoning, the recovery of the mobile phone instrument of the deceased ought to have been rejected for the same reasons, on which the recovery of the lock and key was rejected. Mr. Verma further submits that the personal search memo of the accused Ex.PW-12/A-6 drawn at the time of his arrest, shows 'nil' recovery from him. However, it is claimed by the prosecution witnesses that the recovery of the mobile phone instrument of the deceased was made from the pocket of the accused at the time of his arrest, apart from cash of Rs.300/-. He submits that a recovery memo-Ex.PW-12/A-3 was led in evidence by the prosecution in respect of the mobile phone instrument and the cash of Rs.300/-. The said recovery memo has not been supported by PW-12-Mukesh. He submits that this recovery memo is doubtful in the face of the personal search memo of the accused showing 'nil' recovery upon is personal search.

7. Mr. Verma further submits that PW-3 in his statement has disclosed that at around 1:00 PM to 1:15 PM, brother of Ismile-who had visited at the service station in connection with the delivery of payment, had informed

him that the deceased Ashok was lying in a pool of blood. However, no investigation was conducted with regard to the identity of the said person and he has not been cited as a witness by the prosecution. Mr. Verma submits that the possibility of the involvement of the said person in the crime cannot be ruled out. He further submits that the absence of accused from the site-when the deceased was discovered in an injured condition in the room at the service station, was on account of fear.

8. On the other hand, Ms. Dhalla has supported the impugned judgment. She submits that in the present case, the last seen evidence is very strong in as much, as, there are two independent witnesses who have deposed that they had seen the accused and the deceased in the quarrel at the service station at about 10-11:00 am, and within about two hours, the deceased was found lying in a pool of blood in his room i.e. between 1:00-1:15 pm. She submits that this time lag is not much. She further submits that apart from the deceased, the accused was the only person working at the service station and it was for him to explain the circumstances in which the deceased was attacked and injured, which he has failed to do. She further submits that the conduct of the accused in absconding from the scene of crime and his absence when the crime was detected also points to his guilt. She submits that the fact that there was a quarrel between the accused and the deceased also provides the motive for commission of the crime.

9. Ms. Dhalla has submitted that the recovery of the mobile phone instrument of the deceased from the accused has rightly been believed by the Trial Court. In this regard, she submits that PW-12 has admitted his

signatures on the recovery memo. Apart from PW-12, there are other police witnesses to the said recovery who have supported the case of the prosecution and she draws a distinction between the nature of evidence led in respect of the lock and key, and the mobile phone instrument. She points out that so far as the mobile phone instrument is concerned, PW-12 had identified the same as the one belonging to his father. However, it was not established on record that the lock and key were the ones used at the service station. Moreover, the recovery proceedings do not show that the lock and key were recovered on the pointing out of the accused, as they were found lying behind the service station.

10. She explains that the personal search memo shows 'nil' recovery, since the mobile phone instrument and the cash were considered as case property and not the personal belongings of the accused. For this reason, the recovery was recorded under recovery memo Ex.PW-12/A-3. She submits that the doubt raised by the appellant on the role played by the brother of Ismile is misplaced, since it is he who had informed about the deceased lying in an injured condition, to PW-3. On the other hand, the accused had gone missing from the place of occurrence, even though he and the deceased were the only two persons working on the service station. This conduct of the appellant going missing from the service station points to his guilt. The defence that he ran away out of fear is not probablised, because he did not report the incident to the police or to the relatives of the deceased, or to any other person. He did not say as to who had committed the crime and at that time where was he.

11. Having heard the learned counsel for the appellant and the learned APP for State and after perusing the impugned judgment as well as the evidence brought on record, we are of the view that there is no illegality or infirmity in the impugned judgment of conviction.

12. In his testimony before the court, PW17 stated that he witnessed a quarrel between the accused and the deceased. He further stated that he intervened in the said quarrel. The submission of Mr. Sumeet Verma, learned counsel for the appellant is that, as per PW-17, during his cross examination that their Dharam Kanta was 50-60 meters away from the service station, and that from such a large distance the said witnesses PW-3 and PW-17 could not have clearly seen, with definiteness, as to whether there was any quarrel taking place, and who was quarrelling with the deceased as stated by them.

13. We do not find any merit in this submission as it has come in the evidence of PW-17 that he had himself intervened in the said quarrel which had taken place. This intervention could not have taken place without the said witness having witnessed the quarrel, and without his arriving at the place of the quarrel.

14. So far as the recovery of the mobile phone is concerned, it is the case of prosecution that at the time of arrest of the accused, a personal search was conducted by the police. Prosecution witnesses claimed the mobile phone instrument of the deceased and Rs 300 was recovered from the pocket of the accused. The mobile phone instrument was identified as that of the deceased

by PW-12. PW-12 turned hostile and did not support the case of the prosecution. He stated that his signatures were taken on a blank sheet of paper. Personal search memo showed 'nil' recovery. However, the said recovery has been mentioned in the recovery memo. Ms. Dhalla has explained that the personal search memo shows 'nil' recovery, since the mobile phone instrument and the cash were considered as case property and not the personal belongings of the accused. In our view this explanation is completely acceptable. Pertinently, the Personal Search Memo Ex.PW-12/A-6 and recovery memo Ex.PW-12/A-3 were prepared simultaneously in the presence of PW-12 and the accused.

15. As far as the recovery of the lock and key are concerned, recovery proceedings do not show that they were recovered on the pointing out of the accused as they were found lying behind the service station. Also, PW-12 does not identify the lock and key to be the same ones used at the service station. We agree with the submissions made by Ms. Dhalla, and agree with the findings of the trial court that the recovery of the lock and key at the instance of the accused is not established.

16. The Ld. counsel for the appellant has vehemently argued that the brother of Ismile, who had informed PW-3 of the deceased lying in a pool of blood, has not been examined as a prosecution witness. He further argued that it cannot be ruled out that the said person could have been involved in the said incident. In our view, the non-examination of the 'brother of Ismile' as a prosecution witness does not alter the chain of events, and it does not affect the testimonies of PW3 and PW17 regarding lastly seeing the

accused and deceased quarrelling with each other; finding Ashok- deceased lying in a pool of blood in the room of the service station, soon after; and; of the accused going missing and being apprehended with the mobile phone instrument of the deceased.

17. Mr. Verma has submitted that the conduct of the accused going missing from the service station could be due to fear of getting falsely implicated. In our view, the burden of proving what transpired after the deceased and the accused were lastly seen quarrelling was on the accused as the two of them were the only persons at the service station. As per the testimony of PW-3 Satish, there was no one else present at the scene of crime. He was informed of the crime by brother of Ismail, who had visited in connection with delivery of payment, and PW-3 Satish immediately rushed to the place of occurrence and the accused had already absconded by that time. Thus, section 106 Evidence Act comes into play.

18. Pertinently, when the accused was confronted with this fact under Section 313 Cr.P.C., he gave an evasive answer, by saying that he does not know. Even then, the plea that he got scared was not taken by him. Although human behaviour varies from person to person, and individuals may react differently to situations, the natural conduct of an employee when he sees his employer lying in a pool of blood, would be to call for help or inform the Police. There is no evidence whatsoever led by the accused to show that there was someone else present at the service station, in the absence of which, the burden of proving what transpired at the service station is not discharged by the accused. Hence, this conduct of the accused of fleeing the

scene of crime without cogent explanation calls for drawing an adverse inference against him.

19. We, therefore, hold that the prosecution has successfully established the circumstance of the deceased being lastly seen with the accused; of his quarrelling with the deceased over his unpaid salary; of his absconding from the place of occurrence- which was also his place of service, and not reporting for work thereafter, and; the recovery of the mobile phone of the deceased from the possession of the accused. The appellant had motive too, for he had just engaged in an altercation with the deceased over the issue of wages and the situation had to be pacified by others. Keeping the above discussion in mind, we reject the appeal of the appellant.

20. Consequently, the judgment of conviction passed by the trial court is upheld and the sentence passed is sustained.

21. Appeal is accordingly dismissed.

VIPIN SANGHI, J

I.S.MEHTA, J

JULY 18, 2018

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