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

+ **CRL.A. 1040/2015**

VEER BAHADUR alias BUDHIYA Appellant
Through: Mr. Aditya Vikram, Advocate with
Mr. Avinash, Advocate

versus

STATE Respondent
Through: Ms. Kusum Dhalla, APP for State.
SI Yogesh Kumar, PS-Adarsh Nagar
Inspector Sheeshpal, IO, PS Adarsh
Nagar

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

% **ORDER**
29.01.2018

1. This is an appeal against judgment dated 29th November 2014 passed by the learned Additional Sessions Judge-03, North West, Rohini, Delhi in Sessions Case No.14/2012 arising from FIR No.334/2011, registered at Police Station ('PS') Adarsh Nagar, convicting the Appellant for the offences under Sections 302/34 Indian Penal Code ('IPC'), under Sections 394/34 IPC and under Section 397 IPC.

2. The appeal is also against the order on sentence dated 23rd December 2014 whereby: for the offence under Sections 302/34 IPC, the Appellant was sentenced to undergo imprisonment for life and to pay a

fine of Rs.5,000/- and in default of payment of fine, to undergo simple imprisonment ('SI') for a period of five months; for the offence under Sections 394/34 IPC, he was sentenced to undergo rigorous imprisonment ('RI') for five years and to pay a fine of Rs.3000/- and in default of payment of fine, to undergo SI for three months; for the offence under Section 397 IPC, he was sentenced to undergo RI for eight years. All sentences were directed to run concurrently.

3. Ct. Somvir (PW-15) was on duty at Traffic Circle, Model Town between 8.00 pm and 8.00 am in the intervening night of 12th-13th December 2011. His duty was at the point where the impounded vehicles were parked. One of the trucks impounded was bearing registration no. HR 55 F 0625. The owner of the truck, Mohd. Iliyas (PW-9), approached him at about 10.45 pm along with Arif (the deceased). Arif was bleeding from a wound on the left side of his stomach. PW-15 passed on information to the 100 number through his own mobile phone. A PCR van then came there and took PW-9 and the deceased to the hospital.

4. The information provided by PW-15 was reduced in writing as DD No.91B (Ex.PW-16/A) by HC Laxmi Narain (PW-16) and entrusted to Sub-Inspector ('SI') Baljeet Singh (PW-27) through telephone for necessary action. PW-27 then proceeded to the spot along with Constable Kishan Gopal (PW-26). There he came to know that the injured person had already been taken to the BJRM Hospital, Jahangirpuri by a PCR van.

5. The MLC at BJRM Hospital shows that the deceased was brought there at around 11.20 pm with an alleged history of physical assault. Two injuries

were noted: (i) Incised wound 6 cm x 3 cm on left lower anterior costal area; (ii) Small incised wound superficial on left side of cheek. An endorsement was made with the time of 2.00 am that the patient was unfit for making a statement. It appears that Arif expired at around 3.00 am in the morning.

6. The post-mortem was conducted by Dr. Kulbhushan Prasad at LNJP Hospital. Apart from the abovementioned two injuries, he noticed another incised wound on the left cheek. It was opined that injury no.3, i.e. the stab wound over the left side of the chest, was sufficient to cause death in the ordinary course of nature.

7. Inspector Binod Kumar (PW-28), Investigating Officer ('IO') was posted at PS Adarsh Nagar. The case was entrusted to him. He claims that on 13th December 2011, he searched for eye-witnesses of the present case but none could be found. On 14th December 2011, he recorded the statement of HC Swaroop Singh (PW-13) who had taken the injured in the PCR van to the BJRM Hospital.

8. According to PW-28, he was not able to examine PW-9 as he had gone to his village. He stated that on 15th December 2011, PW-9 came to PS Adarsh Nagar where PW-28 interrogated him. PW-9 is stated to have pointed out to PW-28 the place of incidence at Road No.51, near the Traffic Light Malkhana, Azadpur, Delhi. It was at that stage that the crime team was called to the spot and photographs were taken. It appears that he recorded the statement of PW-9 only on that date, i.e. 15th December 2011.

9. As it transpired, on 16th December 2011, on receipt of secret information,

PW-26 is supposed to have arrested the Appellant at 5 pm from his house at B-24, Kewal Park, Delhi. The disclosure statement of the Appellant led to the recovery of the knife used in the offence from the bushes on the northern wall of MCD Colony, Azadpur. The knife, which was blood-stained, was seized and kept in a sealed parcel. From his house, the Appellant is stated to have got the purse of the deceased recovered which contained the identity card of the deceased and some other documents. He is also supposed to have got recovered a black and white coloured sweatshirt and a green coloured capri which he claimed were the clothes worn by him at the time of the offence.

10. On 17th December 2011, PW-26 and the Appellant along with other policemen searched for the co-accused, Varun @ Juri, but he could not be traced. According to PW-28, while returning to PS Adarsh Nagar at around 4.30 to 5 pm on 17th December 2011, the Appellant is stated to have pointed to one boy standing at the gate of MCD Colony and identified him as Varun @ Juri. The said person was apprehended. His personal search led to the recovery of a Chinese cherry-coloured mobile phone (without any battery and SIM card) from the right-side pocket of his pants. The said mobile phone was seized and sealed. Varun @ Juri disclosed himself as a juvenile and was therefore produced before the Juvenile Justice Board (JJB) which passed an order to detain him at Sewa Kutir, Kingsway Kamp, Delhi.

11. PW-28 arranged for the Test Identification Parade ('TIP') of both the Appellant and the co-accused but both of them declined to participate. As far as the Appellant is concerned, he informed the concerned Metropolitan

Magistrate ('MM') that he did not want to join TIP as his photographs had been taken by the police at the PS.

12. At the end of the investigation, the charge sheet was filed. Thereafter, as far as the Appellant is concerned, by an order dated 28th July 2012 of the trial Court, charges were framed against him for the offences under Sections 394/397/34 IPC, Sections 302/34 IPC and Section 411 IPC.

13. The prosecution examined 28 witnesses during the course of the trial. In his statement under Section 313 Code of Criminal Procedure ('Cr PC'), the Appellant pleaded innocence and claimed that the police had falsely implicated him in the present case because "it was a blind case and in order to solve this case, police has falsely implicated me in this case because I had come out on bail few days back in some other case and because of my previous involvement in a criminal case, police falsely implicated me in this case".

14. At this juncture, it is important to note that the FIR in the present case is FIR No. 334/2011. The two pending cases against the Appellant arose out of FIR Nos. 215 and 218/2011, both registered at PS Adarsh Nagar and both for the offences under Sections 392/411/34 IPC.

15. The solitary eye-witness in the present case was PW-9. The trial Court has, in the impugned judgment, relied upon extensively on the evidence of the said eye-witness to conclude that the prosecution has proved the guilt of the Appellant for the aforementioned offences beyond reasonable doubt.

According to the trial Court, nothing emerged from the cross-examination of PW-9 which could support the Appellant's defence. Further, the failure by the Appellant to offer an explanation under the circumstances put to him in his statement under Section 313 Cr PC was taken to provide the missing link to complete the chain of circumstances.

16. At the outset, it must be noted that the present case is not a case of circumstantial evidence. It is a case of direct evidence where PW-9 was put forth by the prosecution as the sole eye-witness to the occurrence. The entire case therefore hinges on the truthfulness and reliability of PW-9.

17. With the help of the counsel for the Appellant as well the learned APP, the Court has carefully examined the entire evidence of the prosecution beginning with the deposition of PW-9. His claim was that on 12th December 2011, he was bringing in his truck loaded with potatoes from Pipli, Haryana to Azadpur Mandi. PW-9 was driving the vehicle and the deceased, who was the cleaner of the said truck, was accompanying him. When they reached the red light near Sanjay Gandhi Transport Nagar, traffic police officials stopped the truck and issued a challan. The truck was impounded and vehicle was deposited at Road No.51, Azadpur Traffic Malkhana.

18. PW-9 claimed that at around 10.20 pm on 12th December 2011, he sent the deceased to Azadpur with Rs.100/- to bring them some food. According to PW-9, soon after the deceased left for Azadpur, PW-9 thought that since it was winter, and the food would not remain hot by the time Arif brought it

back, PW-9 would go to the hotel himself and have dinner with Arif. Therefore, PW-9 followed the deceased. PW-9 claimed that when he reached near the red light, he saw from a distance of about 20-25 meters that two persons were grappling with the deceased. When he hastened towards the deceased, PW-9 saw in the light of the street light that one person, who appeared to be from Nepal, stabbing the deceased with a knife on the left side of his stomach. The other person appeared to be younger. After assaulting the deceased, both the persons fled in an easterly direction and entered the colony after crossing a wall.

19. PW-9 stated that he came near the Traffic Malkhana with the injured Arif and sought help from the traffic police. A PCR van arrived and they were taken to BJRM Hospital from there. The deceased was thereafter referred to the LNJP Hospital given his serious condition. PW-9 then stated that:

“I was also accompanying the Arif. We reached LNJP and Doctor started treatment there. I made telephone call in the village to give the information after coming out from the Hospital and again went back to the Hospital. When I returned to the hospital I came to know that local police had arrived. During treatment, Arif expired in the hospital. Doctor at the hospital told me that dead body of Arif would be handed over to his relative after post-mortem, so I left for my village to bring the family members of Arif and send them to Delhi. I remained in the village for making necessary arrangements of last rituals (burial) of Arif.”

20. It has come in the evidence of PW-9 that he returned only on 15th December 2011. On that day he went to the PS and met the IO. It is therefore, the version of PW-9 that between 12th December 2011 and

15th December 2011, he was not present in Delhi. The explanation offered by him is that he left to inform the family members of the deceased and send them to Delhi. PW-9 further claimed that he remained in the village to making necessary arrangements for the last rites of the deceased.

21. The crucial question that has been raised by Mr. Aditya Vikram, learned counsel for the Appellant, is that whether it can be said that PW-9 was in fact an eye-witness to the occurrence? He has drawn attention to the *rukka* (Ex.PW-12/D) which was penned down by S.I. Baljeet (PW-27). Significantly, in the said *rukka*, which ultimately led to the registration of the case FIR, it is noted that PW-27 reached the BJRM Hospital where he was told that the injured was unfit for statement. PW-27 notes in the *rukka* that he looked to see if there were any eye-witnesses available in the hospital who could give him information about the crime but he could not find even one. What was noted by him in the *rukka* was reiterated by him during his deposition in the Court where he said “No eye witness met me in the hospital”.

22. The learned APP before the trial Court did not, at this juncture, ask for permission to cross-examine PW-27 witness or even re-examine him. This was a critical aspect of the matter since, even in the MLC, the name of PW-9 finds mention along with his mobile number apart from Head Constable Swarup as the persons who brought the deceased to the hospital. If indeed PW-9 was present at the hospital and remained there till the deceased was declared dead, i.e. around 3 am, and left for his village only thereafter, there should have been no difficulty for PW-27 to meet PW-9 and record his

statement. The gap of three days in recording the statement of PW-9 throws considerable doubt on whether he was at all an eye-witness to the occurrence as claimed by the prosecution.

23. Mohd. Tarif (PW-18) states that PW-9 called him on 12th December 2011 at around 10.30 pm to inform him that he had witnessed the deceased being assaulted by two persons with a knife and then fleeing. On receiving that information, PW-18 reached Delhi along with his brother-in-law, Mohd. Tahir (PW-5), the very next morning, i.e. on 13th December 2011. Therefore, the whole story of PW-9 having to go to the village to bring the relatives of the deceased to Delhi for the dead body to be handed over to them does not appear to be convincing at all.

24. The other aspect of the deposition of PW-18 concerns the mobile phone of the deceased. According to PW-18, he had purchased the said mobile phone from a truck owner at Alwar. The number of the said mobile phone was, at that time, 7876544735. He claimed that it was a double-SIM mobile phone in which he thereafter inserted his own SIM bearing number 9992514341. PW-18 then handed over the mobile phone to the deceased for his use. The seizure memo of the mobile phone from the personal search of the co-accused Varun @ Juri (Mark X-1) mentions the IMEI number on the said instrument as well as the IMEI number of the SIM card. However, for some reason, no call detail records (CDRs) of the SIM bearing number 9992514341 was collected by the IO. This is confirmed by him in his deposition in the Court.

25. This crucial piece of evidence would have corroborated the claim that

this was the very mobile phone that was being used by the deceased. This particular piece of evidence assumes significance because of the fact that there were two previous cases against this very Appellant under Sections 392/411 read with Section 34 IPC. While the fact that the deceased died a homicidal death cannot and is not disputed, whether it was, in fact, the Appellant who caused it is the central question in this appeal.

26. A careful examination of the evidence of PW-9 does not lend assurance to the Court that he is speaking the entire truth. His explanation for his absence between 12th and 15th December 2011 without attempting to give a statement to the police during this time when he was an eye-witness to the occurrence raises serious doubts as to whether he was in fact an eye-witness.

27. It is possible that the deceased came back to PW-9 in an injured condition and PW-9 may have taken him to the hospital for treatment. Perhaps PW-9 was not an eye witness to the occurrence. This ties up with the deposition of PW-27, who reached the hospital, to the effect that he did not come across any eye-witness to the incident at the hospital. The fact that there were no blood-stains on the clothes of PW-9 is another factor which raises doubts about his actually witnessing the occurrence and thereafter accompanying the injured to the hospital.

28. The failure by the Appellant to participate in the TIP cannot be held against him. With his being named as an accused in two previous FIRs, it is entirely possible that photographs of him were already taken by the officers of PS Adarsh Nagar.

29. Another factor which has not been noticed by the trial Court is that the blood-stained clothes of the accused were not proved to contain the blood of the deceased. While blood was detected, the DNA report showed that no DNA previously could be generated from the shirt of the accused (8) or the knife (7) or even the blood-stained clothes (3). Therefore, the scientific evidence did not corroborate the eye-witness' account.

30. In a case based on direct evidence, if the eye-witness' account is corroborated by scientific evidence, the Court is more assured about its truthfulness and credibility. In the present case, the scientific evidence fails to do so. With there being no other evidence and with the IO having failed to collect the necessary evidence that would have connected the Appellant with the crime, the Court is unable to concur with the conclusion reached by the trial Court that the prosecution has proved the guilt of the Appellant beyond reasonable doubt.

31. While it is true that the Appellant may be facing trial in other cases under Sections 392/411 IPC read with Section 34 IPC arising in the jurisdiction of the same PS, it does not automatically lead to an inference adverse to the Appellant that he is also involved in the present crime. Some cogent convincing evidence will have to be placed on record to bring home the guilt of the Appellant.

32. For the aforementioned reasons, the Court sets aside the impugned judgment dated 29th November 2014 and the order on sentence dated 23rd December 2014 and acquits the Appellant of the offences under

Sections 302/394 IPC read with Section 34 IPC and Section 397 IPC. The Appellant will be released forthwith unless wanted in some other case. The Appellant will comply with the requirements of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. A certified copy of the judgment be sent forthwith to the Jail Superintendent for further consequential action.

33. The appeal is allowed in the above terms. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 29, 2018

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