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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.L.P. 685/2017

TARA CHAND YADAV

... Petitioner

Through: Mr. Ramesh Gupta, Senior Advocate
with Ms. M. Begum and Mr. Ajay P. Tushir,
Advocates along with Petitioner in person.

versus

STATE & ORS.

..... Respondents

Through: Ms. Kusum Dhalla, APP for State
Inspector Pankaj Kumar PS Vasant Kunj (South)

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S.MEHTA

ORDER

29.01.2018

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1. Mr. Tara Chand Yadav (PW-2), father of the deceased, Virender Yadav, has filed the present criminal leave petition seeking leave to appeal against the impugned judgment dated 25th September 2017 passed by the learned Additional Sessions Judge-03 ('ASJ') South District, Saket Courts, New Delhi in Sessions Case No. 7131 of 2016 arising out of FIR No. 118 of 2010 registered at Police Station (PS) Vasant Kunj (South) acquitting Respondent Nos. 2 to 5 of the offences punishable under Sections 302/201/34 IPC.

2. Respondent Nos. 2 to 5 were sent up for trial for having conspired to kill the deceased who was the husband of Respondent No. 5 [Accused No. 4 (A-

4)] on the basis that she was having a love affair with Respondent No. 3 (A-2). The case of the prosecution is that on 25th April 2010 A-2 and A-4 with three associates, i.e., Respondent No. 2 (A-1), Respondent No. 4 (A-3) and one Juvenile in Conflict with the Law (JCL) in furtherance of their common intention killed the deceased in his own house at Mahipalpur Extension, New Delhi by strangulating him. The deceased was driving taxis owned by his father and operating from a taxi stand.

3. It is stated that whilst A-1 to A-3 and the JCL were taking the body of the deceased in his own Wagon-R Car to dispose of the body in an unknown location, the car broke down on the way. Subsequently, they abandoned the car with the dead body inside it in the middle of the road near Rangpuri. A-1 to A-3 and JCL ran away from the spot. The said Wagon-R car with the dead body inside it was noticed at 3.45 am on 26th April 2010 by Ct. Shamsher (PW-12) and Ct. Amit (PW-17) of PS Vasant Kunj who were on patrol duty in the area of Mahipalpur Extension. They noticed a dark colour ligature mark on the neck of the deceased.

4. During the investigation, through the details of the registration number of the car, its owner, the Petitioner herein (PW-2) was traced. PW-2 reached the spot and identified the dead body as that of his son aged about 30 years. The deceased was wearing a sleeveless vest, underwear and black pants. The crime team and the photographer were called at the spot.

5. After registration of an FIR the case was assigned to Inspector Ishwar Singh (PW-28). The post-mortem of the deceased confirmed that the death was homicidal.

6. The trial Court has, in the impugned judgment, delineated the following thirteen circumstances put forth by the prosecution to establish the guilt of the accused:

(I) Recovery of dead body of deceased from a Wagon-R car bearing No. DL-1YB-0447 belonging to deceased's father, lying stationed on the road in front of Gaii no.6, old Rangpuri, Mahipalpur Road, Rangpuri.

(II) The homicidal death of deceased by strangulation

(III) Dead body being found barefooted with vest and pant lying in the leg space portion of rear seat of aforementioned car.

(IV) Accused., persons namely Hemant Raj, Mahadev, Pramod and JCL Ashok seen by VeerSingh (PWI) coming out of deceased's house at 10:00 pm on 25th April 2010 and refusal to join judicial TIP by accused Pramod and Mahadev,

(V) Arrest of accused Hemant Raj from Sikandrabad on 29th April 2010 and recovery of above mobile phone no. 8010072695 from his possession.

(VI) Accused Hemant Raj's was on leave from 24th April 2010 till 27th April 2010 and arrived at Delhi during said period and on the night of 25/26th April 2010, he left Delhi.

(Vii) Recovery of deceased's wallet containing his RAN card from Railway Cantt. area pursuant to accused Hemant Raj's disclosure statement made to police.

(VIII) Accused-Mahadev was arrested on 9th May 2010 and he pointed out to Hotel Night Stay where accused person on 24th April 2010 matched conspiracy to kill the deceased and also got recovered The booking record of said hotel.

(IX) Accused Hemant, Raj.and Manju visited Hotel Night Stay on 25th

April 2010 at 11:30 am and stayed there in Room No. 2 for 2-3 hours and then accused , Hemant Raj checked out said room at 11:30. pm on same date.

(X) Accused Hemant Raj (ex-tenant of deceased) was in love affair with deceased's wife, i.e., co-accused Manju,

(XI) The transfer of Rs,20,000/- & Rs,12,000/- by accused Hemant Raj In the bank account of accused Mahadev.

(XII) Deceased received threatening calls on his mobile phone No. 9550329217 from, accused Hemant Raj's mobile phone No. 8010072695-just few days before deceased's death and in that regard deceased had made police complaints on 100 number but no action was taken,

(XIII) Accused Hemant Raj, as per CDR/location chart of his mobile phone No. 8010072695 was in constant touch with accused Mahadev on his mobile phone No. 9265360424 on or before the date of alleged incident and location of their mobile phones at relevant time was near Mahipalpur Extension.”

7. In a very detailed judgment, the trial Court has returned specific findings in relation to each of the above circumstances. The trial Court held circumstance Nos. I and II as proved. As regards circumstance No. III, while it was proved that the body of the deceased was recovered barefooted wearing only a vest and trousers, it could not be proved that he was killed in his own house, particularly when there was no evidence to show that the deceased had proceeded to his house after leaving the taxi stand at 8.30 p.m. In particular, the prosecution had failed to show that the deceased was seen in his house after 8.30 pm on the evening of 25th April 2010. No neighbour was examined. The possibility of the deceased having visited some other unknown person in the same locality could not be ruled out. The trial Court

further held that:

“the investigation was absolutely lacking as to the alleged place of murder as except the scaled site plan of said place, there is nothing on record to show that any investigation was carried out by police in respect of said room where murder allegedly took place. The bed box where the dead body was allegedly dumped after strangulation for taking away the same in the late night hours, was not even' got inspected through any forensic expert of crime team. As, per record, the crime team had Inspected only the car from where the dead body was allegedly recovered and never visited the deceased's house. No ligature material was recovered during investigation either from said room or from any other place, In said circumstances,' from mere fact that the dead body was found barefooted in vest and- trouser, no such conclusion of fact that deceased was murdered in his own house, can be drawn as urged by the prosecution.”

8. Mr. Ramesh Gupta, learned Senior counsel for the Petitioner, was unable to point out how the above conclusions reached by the trial Court regarding failure of the police to inspect the room in the house where the deceased was allegedly killed can be regarded as perverse.

9. Turning to circumstance No. IV the trial Court noted that the fact that the four accused were seen outside the house of the deceased would have been relevant only if the prosecution had been able to prove that the deceased, after leaving the taxi stand at 8.30 pm, went straight to his house or even at any time prior to 10 pm when the accused were allegedly seen there. There was no last seen witness to establish the deceased was seen in the company of the four accused before the probable time of his death. No witness had seen the accused taking away the car from the *gali* outside the house of the deceased. Merely because the CDR of the mobile phone of the deceased showed the last location signal from the tower at Mahipalpur, New Delhi,

would not be enough to draw a conclusion that "location of his mobile phone at that time was of his house only." The trial Court further noted:

"Even the place of recovery of dead body was also located about 1 km away from the house of the deceased. Therefore, possibility of deceased's presence at some other place near his house or near the place of recovery of his dead body cannot be ruled out. Hence, from the said evidence, no conclusion can be drawn that on 25th April 2010 after deceased left his taxi stand at 8.30 pm, he had reached his home or that at the relevant time, prior to 10 pm he was present in his house."

10. Mr. Gupta relied on that portion of the deposition of PW-2 where he stated that at about 1.30-2.00 a.m. in the intervening night of 25th-26th April 2010, he heard the sound of the door being latched. When he asked A-4 about who it was, she informed him that it was the deceased leaving for work. According to him, A-4 attempted to mislead PW-2 that the deceased had left his house for some work whereas he was in fact killed in the house itself.

11. No site plan of the house was prepared as such. Although PW-2 states that he used to sleep in the front room of the house with his two grandchildren it is not explained how and under what circumstances PW-2 asked A-4 about the sound of the latch. Where A-4 was at this point in time within the house was not explained. No attempt has been made by the prosecution to elicit this vital detail. Even though cross-examination of PW-2 may not have been on those lines, the Court is required to be satisfied the circumstance as described by PW-2 concerning his question to A-4 and her reply was clearly and cogently established by the prosecution by producing some credible evidence. That is clearly lacking and therefore, the conclusion

of the trial Court that the above reply by A-4 would be relevant under Section 8 of the Indian Evidence Act, 1872 ('IEA') only if the prosecution was able to establish that the deceased was killed inside the house, cannot be faulted.

12. Turning to Circumstance Nos. V and VI, the trial Court has noticed that seizure of mobile phone and its location in Delhi during the relevant period as well as arrest of A-1 had been duly proved by the prosecution.

13. As regards Circumstance No. VII, it was held that recovery of the wallet and PAN card of the deceased at the instance of A-1 was in doubt and it could not be held to be proved on record. As regards its conclusion, Mr. Gupta again took the Court to the relevant evidence. Having examined the said evidence in detail, the Court is not persuaded to come to a conclusion different from that reached by the trial Court as far as circumstance No. VII is concerned.

14. Turning to Circumstance Nos. VIII and IX, the stay of the accused at Hotel Night Stay on 24th-25th April 2010 has not been proved by the prosecution. It is pointed out by the trial Court that PW-11 having been able to identify A-2 and A-4 in the Court two and a half years after the incident did not seem convincing. In fact the said witness initially did not support the prosecution.

15. Circumstance No. X hinged upon the deposition of the Petitioner (PW-2) herein as well as the call detail records (CDR) of the mobile phone numbers attributed to A-2 and A-4. However, no mobile phone or SIM card was

recovered from the possession of A-4. Even otherwise, in the absence of any substantive piece of evidence, the mere CDR of the mobile phones, which is only a corroborative piece of evidence, cannot help in proving the guilt of the accused.

16. Mr. Gupta submitted that what the deceased had told PW-2 prior to his death is admissible as a dying declaration under Section 32 of the IEA. He placed reliance on the decision of the Privy Council in ***Pakale Narayana Swami v. Emperor AIR 1939 PC 47.***

17. The Court is of the view that from the evidence of PW-14 it was established that the mobile number attributed to A-4 was subscribed for in the name of one Chandra Pratap Singh. Although his testimony was to the effect that he got the said SIM card issued in his own name at the request of A-4, it was not sufficient to prove that it was she and no one else using the said mobile phone. It is particularly significant that no mobile phone or SIM card was recovered from the possession of A-4.

18. None of the witnesses had spoken about A-2 and A-1 having any illicit relationship. While the dying declaration is otherwise admissible in evidence, in the present case, the evidence led by the prosecution was of a corroborative nature. The trial Court held that the aforementioned declaration by the deceased did not fall under the purview of Section 32 (1) of the IEA. The lack of corroboration by other evidence has weakened the above evidence. The testimony of PW-2 in this regard is nothing but hearsay evidence. The so-called declaration made by the deceased to PW-2 regarding A-4 talking to A-2 cannot be treated as a dying declaration

“relating to any circumstance of transaction which resulted in his death.”

19. Even otherwise the CDRs only proved that there were long conversations between the deceased and A-2. If that were true, the deceased would certainly have recognized who the other person calling was. Interestingly, the CDR showed that it is the deceased who called A-2. In any event it is unlikely that if the deceased did mention to PW-24 about the threatening phone calls he was receiving, he would not have named A-2.

20. Circumstance No. XI regarding transfer of money by A-2 in the bank account of A-1 was not proved by the prosecution since merely two pay-in slips of Punjab National Bank were filed without any bank statement of account of the A-1. No fault can be found by the trial Court coming to the said conclusion.

21. As regard Circumstance No. XII, the PCR record which could have easily shown whether A-2 made threatening calls from his mobile phone to that of the deceased could have easily been proved. Likewise Circumstance XIII could not be said to be proved. Even number of injuries on the deceased did not tally with the prosecution story.

22. Having heard the submissions of Mr. Ramesh Gupta, learned Senior counsel for the Petitioner and having perused the trial Court record carefully, the Court is unable to find any legal infirmity in the analysis/reasoning and conclusions reached by the trial Court.

23. No ground has been made out for grant of leave to appeal against the

impugned judgment of the trial Court. The petition is accordingly dismissed with no orders as to costs.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 29, 2018

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