

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

Judgment reserved on: 07.05.2018

% **Judgment delivered on: 02.07.2018**

+ **CRL.A. 1096/2015**

SANJAY SAHA @ SANJU Appellant

Through: Mr.Harsh Prabhakar & Mr.Anirudh
Tanwar, Advocates.

versus

STATE Respondent

Through: Ms.Aashaa Tiwari, APP for the State.

AND

+ **CRL.A. 1309/2015**

JALLANDHAR KUMAR @ NAKTA Appellant

Through: Ms.Rakhi Dubey, Advocate.

versus

STATE Respondent

Through: Ms.Aashaa Tiwari, APP for the State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

VIPIN SANGHI, J.

1. Since both these appeals have been preferred against a common judgment of conviction and order on sentence, therefore, both the appeals are decided together.

2. The appeal bearing CrI.A. No.1096/2015 has been filed by the appellant-Sanjay Saha @ Sanju, whereas CrI.A. No.1309/2015 has been filed by the appellant-Jallandhar Kumar @ Nakta against the judgment of conviction dated 19.08.2015 vide which, both the appellants have been convicted under Section 302/34 IPC, and vide order on sentence dated 27.08.2015, the appellants have been sentenced to undergo life imprisonment with fine of Rs.25,000/- each and in default of payment of fine, to further undergo simple imprisonment for three months.

3. The factual matrix emerging from the record is that on 04.06.2012 at about 8.55 a.m., an information was received by the police vide DD No.16A Ex. 9/B that one man was lying unconscious at house no.1112, Badiyal Mohalla, behind Shiv Mandir, Palam Village. ASI Jagdish Rathi along with Ct.Rajesh reached the spot. Insp. Mahender Singh also reached there and found the dead body of a man on the floor of a tenanted room. There were injury marks on the mouth, left eye, head, and blood was oozing out from the nose of the deceased. One shirt button was also lying near the dead body. During inquiry, it was revealed that the dead body was of Dilip Swain and he was working as a helper to plumbers. Crime team was called at the spot. No eye witness was found at the spot. The dead body was sent to the hospital and FIR under Section 302 IPC was registered. During the course of investigation, IO prepared the site plan and seized one white button of

shirt, blood in gauze and blood stained pieces of floor. IO recorded the statement of Sh.Samandar Singh, landlord of the room of accused Jalandhar, where the deceased was found dead. Statement of one Parshant Nayak, relative of the deceased was recorded in which he stated that, both the accused had a quarrel with the deceased over theft of Rs.300/- and he had seen the deceased last time on 03.06.2012 at about 9 p.m. in the room of the accused Jalandhar and both accused were having liquor. Postmortem of the dead body of the deceased was conducted and as per the report Ex.PW8/A, cause of death was due to ***“cranio cerebral injuries (head injury) caused by hard, forceful impact and the manner of death was homicidal.”*** Both the accused persons were arrested vide arrest memos Ex. PW5/A and 5/B and they allegedly admitted the commission of murder of the deceased as the deceased was not returning their money. Shirt of the accused Jalandhar was seized Ex. PW-5/G. As per FSL report Ex. PW-10/A, the button recovered from the spot was of the shirt of the accused Jalandhar. After completion of investigation, charge sheet was filed in the Court.

4. Charge for the offence under Section 302/34 IPC was framed against the appellants, to which they pleaded not guilty and claimed trial.

5. To prove its case, the prosecution had examined 21 witnesses, including PW1-Parshant Nayak, PW2-Partap Chandra Swain, PW3-Sanjay Swain (relatives of the deceased) and PW4-Samandar Singh, landlord of the accused Jalandhar.

6. After completion of prosecution evidence, statement of appellants under Section 313 Cr.P.C. were recorded in which they claimed innocence and denied the entire case of the prosecution. Despite opportunity being granted, the appellants did not choose to lead defense evidence.

7. On appreciation of evidence and material brought on record, the trial court convicted the appellants under Section 302/34 IPC vide impugned judgment dated 19.08.2015 and order on sentence passed on 27.08.2015. Feeling aggrieved of the same, the appellants have preferred the instant appeals.

8. Ld. Counsel for the appellant- Sanjay Saha has argued that the testimony of PW1 is unworthy of credence and cannot be acted upon to hold the appellant guilty. PW1 deposed that he made a call to the police and reported the occurrence, but PW19 deposed that one Prakash informed the police about the incident. DD No.16A did not mention the name of the informant. Ld. Counsel further submits that PW1 had admitted that he was present at the spot, but his statement was not recorded by the police and not made the basis to register the FIR, and the endorsement made by the IO on DD No.16A records the identity and parentage of the deceased. He submits that even if the statement of PW1 is accepted then as per his testimony, the case is made out against the accused Jalandhar only and not against the accused Sanjay. He further submits that it may be a case of involvement of one accused only, and the single circumstance of last seen cannot be made basis to convict the appellant Sanjay.

9. In support of the submissions made, he places reliance on *State of Goa v. Sanjay Thakran and another* AIR 2007 SC (Supp) 61, *Ramreddy Rajesh Khanna Reddy and another v. State of A.P.* (2006) 10 SCC 172 and *Jaswant Gir v. State of Punjab* (2005) 12 SCC 438 to argue that conviction cannot be based solely on last seen evidence and the case of the prosecution needs further corroboration. In the case of *Sujit Biswas v. State of Assam* (2013) 12 SCC 406 and *Bipin Kumar Mondal v. State of W.B.* (2010) 12 SCC 91 it was held that an innocent man may abscond in order to evade arrest, and such conduct may be part of the natural conduct of the accused, and the same cannot be said to be conclusive proof of guilt of the accused. Reliance is placed on *Sawal Das v. State of Bihar* (1974) 4 SCC 193, *Mohd. Iqbal & ors. v. State* ILR (2011) IV Delhi 35, *Mulak Raj v. State of Haryana* (1996) 7 SCC 308 and *Wasim Ahmed v. State* 2017 SCC OnLine Del 8907, to submit that, since there was uncertainty in the facts of the case as to whether all the accused persons committed the murder of the deceased, the accused can be acquitted while extending them the benefit of doubt.

10. Ld. counsel for the appellant, Jalandhar, argues that there was no intention of the appellant to commit the murder of the deceased. The prosecution has failed to prove that any such quarrel between the deceased and appellants had taken place, and that too for a small sum of Rs.300/-. She submits that even if the case of the prosecution is accepted, the same portrays that it was a case of sudden quarrel, and conviction under Section 302 IPC is not made out.

11. Per contra, learned APP for the State has argued that PW1 is the witness of “last scene” of the deceased in the company of the accused

persons, and he has specifically deposed against the accused persons that he had seen them quarreling with the deceased on account of theft of Rs.300/- while consuming liquor. She further submits that the dead body of the deceased was found in the room of accused Jalandhar, and even his shirt button was found at the spot which further corroborates the case of the prosecution. The accused Sanjay Saha absconded and was arrested only on 06.06.2012. His conduct also reflects on his guilt. She submits that the prosecution has successfully established the chain of events which leads to the only conclusion that the appellants are guilty of the offence and no one else.

12. We have heard the submissions advanced by learned counsels for the parties and given our thoughtful consideration to the matter.

13. The present case is based on the circumstantial evidence as there is no direct eye witness evidence. The first issue that arises for consideration is whether the appellants had the motive to commit the murder of the deceased. To prove this circumstance, PW1 deposed that on 03.06.2012, when deceased Dilip was present at his house, the accused Jalandhar came to his house and had a quarrel with Dilip. Accused Jalandhar had stated that Dilip had stolen Rs.300/- from the pocket of his pant. PW1 further deposed that initially, Dilip denied stealing the money but later promised to return the said amount. Thereafter, Dilip left the house of PW1 along with accused Jalandhar to consume liquor. PW1 further stated that when deceased did not return to his house at about 8.45 pm., PW1 had gone to the room of accused Jalandhar, where he found both the accused quarreling with the deceased Dilip over the issue of Rs.300/- and Rs.10/-. PW1 returned to his

house on the assurance given by the accused persons that deceased will return after sometime, but Dilip did not return that night. On the next morning, it was told by accused Jalandhar, that Dilip was lying unconscious in his room.

14. PW1 was cross-examined at length by the defence, but the defence has failed to put any dent to his testimony. A submission was made by the appellants that the testimony of PW1 cannot be relied upon to convict them as the same is not reliable. We are not inclined to accept this submission, for the reasons that PW1 has deposed that a night before the dead body of the deceased was found, accused Jalandhar came to his house where he had a quarrel with the deceased on the pretext that the deceased had stolen Rs.300/- from the pant pocket of accused Jalandhar. PW1 also stated that when he went to the room of accused Jalandhar, he had seen both the accused persons present there, quarreling with the deceased over the issue of Rs.300/- and Rs.10/-. As per the testimony of PW1, two quarrels were witnessed by him; firstly at the house of PW1 wherein accused Jalandhar had a quarrel with the deceased for stealing Rs.300/-, and secondly, at the room of accused Jalandhar where both the accused were quarreling with the deceased on the issue of Rs.300 and Rs.10.

15. From the testimony of PW1, it emerges that the accused and the deceased were known to each other. In fact, it appears is that they were friends, since the deceased left the house of PW1 along with the accused-Jalandhar to consume liquor. PW1 later went to the room of the accused-Jalandhar where he found the two accused and the deceased present. They were quarreling over the issue of Rs.300 and Rs. 10 which, apparently, the

deceased had allegedly stolen from the pocket of the accused-Jalandhar. It also appears that the deceased, after initially denying the stealing of the money, later promised to return the said amount. Thus, it appears that the accused did not have the motive to commit the murder of the deceased since:(i) the deceased and the accused were friends;(ii) the deceased went with the accused to his room to consume liquor; (iii) the deceased promised to return the amount of Rs. 300 to the accused Jalandhar; (iv) the amount of Rs. 300— by all accounts, was a small amount which is not likely to drive a person to commit the murder of a friend/ acquaintance, particularly after he has promised to return the same; (v) the accused and the deceased continued to remain together in the room of the accused-Jalandhar for a substantial time, compelling PW1 to go to the room of the accused-Jalandhar to look for him.

16. However there is no denying the fact that the deceased was lastly seen in the company of the accused persons. To establish this circumstance, PW1 deposed that on the night just before the dead body of the deceased was found, he was taken away by accused Jalandhar from the house of PW1, on the pretext of consuming liquor. PW1 waited for some time for the return of the deceased Dilip, but when he did not return, he went to the room of accused Jalandhar at about 9 p.m., where he found both the accused persons present, consuming liquor and quarreling with the deceased on the issue of theft of Rs.300/- by the deceased from the pocket of the pant of the accused Jalandhar. PW1 returned back alone to his house on the assurance given to him by both the accused that the deceased would return after sometime, but

the deceased did not return on the said night and PW1 got the information of the death of the deceased in the morning of 04.06.2012.

17. It is a matter of record that the dead body of the deceased was found in the room of the accused Jalandhar and this fact has not even been disputed by the appellants. The room where the dead body of the deceased was found, was in the occupation of accused Jalandhar and this fact has been proved from the testimony of the landlord, PW4-Samandar Singh. This fact has even been admitted by the accused Jalandhar in his statement under Section 313 Cr.P.C. The testimony of the FSL expert (PW21) further corroborates the case of the prosecution to the effect that PW21 found presence of alcohol in the body of the deceased on examination of the samples. This report of PW21 corroborates the testimony of PW1, that he had seen both the accused persons at the room of accused Jalandhar consuming liquor with the deceased and quarreling with him.

18. As per the testimony of the IO-Insp. Mahender Singh (PW19) and the police staff associated with him, the dead body of the deceased was found in the room which was in the occupation of the accused Jalandhar. Though, there are some contradictions in the house number where the dead body was found, but the same has duly been explained by PW11-ASI Jagdish and PW19-Insp. Mahender Singh.

19. The appellant Sanjay Saha has raised the plea of alibi that on the intervening night of 03/04.06.2012, he was present at his house and not in the room of co-accused Jalandhar, as alleged. There is no basis in the said plea of alibi, firstly for the reasons that no evidence has been adduced by the

accused Sanjay that on the said night he was present at his house, and not at the room of accused Jalandhar. Secondly, a specific question was put to the accused Sanjay Saha in his statement under Section 313 Cr.P.C. that he along with co-accused Jalandhar was lastly seen in the company of the deceased in the night of 03.06.2012 at about 9.30 p.m. In reply to the said question, accused Sanjay Saha simply denied the same, but he did not give any explanation for such a denial. Thus, we are of the view that the prosecution has successfully established the circumstance that the deceased was last seen in the company of the appellants, just before his death and as per the postmortem report Ex.PW8/A of the deceased, the time since death was two and half days i.e. at about 1.45 a.m. of 04.06.2012, which further corroborates the case of the prosecution against the appellants.

20. The next and the last circumstance alleged by the prosecution against the appellants is the recovery of shirt button from the spot. It is alleged against the accused Jalandhar that the button seized from the spot matched with his shirt. To prove this circumstance, PW4-Samandar Singh, landlord of the room of the accused Jalandhar deposed that the shirt button was seized from the spot vide seizure memo Ex.PW4/C. The said fact has been corroborated by PW5-HC Nihal Singh, PW11-ASI Jagdish Rathi and PW19-Insp. Mahender Singh. They have also deposed that the accused- Jalandhar got recovered his shirt in pursuance of his disclosure statement and the same was seized vide seizure memo Ex.PW5/G.

21. The button recovered from the spot and the shirt of the accused Jalandhar were examined in FSL by the expert PW10-Sh.Parshuram Singh, Assistant Director. He had proved his report as Ex.PW10/A. The report

Ex.PW10/A further proves that the button recovered from the spot was of the same shirt which was seized vide seizure memo Ex.PW5/G, which duly establishes the case of the prosecution that the button was of the shirt of the accused Jalandhar.

22. So far as the contention of the appellants that the conviction cannot be based solely on the last seen evidence is concerned, apart from the circumstance of last seen, there are other circumstances also which have been discussed above and the prosecution has successfully established those circumstances which points towards the guilt of the appellants.

23. It was also contended that there was an uncertainty of facts in the present case, but as discussed above, we are of the view that the case of the prosecution is clear that the appellants have committed the homicide of the deceased.

24. So far the death of the deceased is concerned, the postmortem over the dead body of the deceased was conducted by PW8, Dr. B.N. Mishra and he proved the postmortem report as Ex.PW8/A. He also proved his subsequent opinion as Ex.PW8/B. As per the deposition of PW8 and the report Ex.PW8/A, the cause of death of the deceased was due to cranio cerebral injuries i.e. head injury caused by hard, forceful impact over the head and the manner of death was homicidal in nature. The doctor also opined that all the injuries on the person of the deceased were ante mortem in nature. Thus, the postmortem report Ex.PW8/A, duly proves that the death of the deceased was homicidal in nature and not a natural death.

25. Reliance placed by learned counsel for the appellant on **Sanjay Thakran** (supra) is misplaced for the reason that PW1, apart from being a witness to lastly seeing the deceased in the company of the accused in the room of the accused-Jallandhar, is also a witness in the altercation which took place between the accused on the one hand and the deceased on the other hand in respect of a dispute of Rs.300 and Rs. 10. Moreover, the button of the shirt of the accused-Jallandhar which was found at the spot matched with his shirt, which shows a quarrel between the accused and the deceased. The accused-Sanjay absconded and was arrested only on 06.06.2012, i.e., two days after the incident had taken place. Thus, it cannot be said that the present is a case merely based on “last seen” evidence. Moreover, the time lag between the time when the deceased and the accused were seen together by PW1, and the time of death of the deceased, as determined upon postmortem of the body of the deceased is also relatively small. The body of the deceased was recovered from the room of the accused-Jallandhar. **Sanjay Thakran** (supra), therefore, has no application in the facts of the present case. For the same reason **Jaswant Gir** (supra) and **Ramreddy Rajesh Khanna Reddy** (supra) are not applicable in the facts of the present case since there is corroborative evidence available on record, establishing the commission of the offence by the accused.

26. No doubt, an innocent person may also abscond in order to evade arrest and such conduct, found by itself, would not be sufficient to fix the guilt of the absconding accused, as held in **Sujit Biswas** (supra) and **Bipin Kumar Mondal** (supra). However, in the present case, PW1 is a witness to the quarrel between both the accused on the one hand and the deceased on

the other hand in the room of the accused-Jallandhar on the preceding night before the death of the deceased. This decision therefore, does not advance the case of the accused-Sanjay.

27. Reliance placed on *Sawal Das* (supra) is misplaced. This was a case where two of the accused had been acquitted by the High Court while the conviction of the third accused was maintained. In these circumstances, the Supreme Court acquitted the third accused by giving him the benefit of the doubt. The same cannot be said of the present case. Both accused stand convicted by the Trial Court and we are also of the view that the accused were responsible for the homicide of the deceased. For the same reason, we are of the view that *Mohd. Iqbal* (supra) has no application in the facts of the present case.

28. The decision in *Mulak Raj* (supra) was rendered in a different set of facts and circumstances. The fact that PW1 witnessed the deceased along with the accused quarreling amongst themselves in the room of the accused-Jallandhar is a circumstance which distinguishes the present case from *Mulak Raj* (supra). The said decision is not attracted in the facts of the present case.

29. Reliance placed on *Wasim Ahmed* (supra) is misplaced since there is no reason to conclude that PW1 is not a reliable witness. PW1 is an independent witness. He had no personal interest in securing the conviction of the accused.

30. The only submission that needs consideration now is whether the appellants can be said to have murdered the deceased i.e, whether they are

guilty of the offence under Section 300IPC or, whether, in the facts and circumstances of the case, the conviction of the appellants deserves to be converted into one under Section 304IPC.

31. As noticed hereinabove, the quarrel between the deceased and the accused was only in respect of paltry amount of Rs.300 and Rs.10. They were acquaintances, if not good friends. They were close enough for the deceased to accompany the accused-Jalandhar for consuming liquor together. In fact, they did consume liquor together, as is evident from the testimony of PW1 and the postmortem report of the deceased. As noticed hereinabove, the deceased had initially denied having taken Rs.300 out of the pocket of the accused-Jalandhar but subsequently, he had promised to return the same. Considering the paltry amount involved, which the deceased had even promised to return, we are of the view that the accused may not have entertained the intention to commit the murder of the deceased. However, it does appear to us that the accused caused the death of the deceased without pre-meditation in a certain fight in the heat of passion upon a sudden quarrel. From the postmortem report, it appears that the accused did not take any undue advantage, and did not act in a cruel or unusual manner while inflicting the fatal injury on the head of the deceased. Thus, we are inclined to accept the submission of the learned counsel for the appellants that the appellants are not guilty of the offence of murder under Section 300IPC, and that the case is covered by exception IV to Section 300. Consequently, we are of the view that the appellants are guilty for commission of culpable homicide not amounting to murder. Their act by

which death was caused, evidently was done with the intention of causing such bodily injury as was likely to cause death.

32. The conviction of the appellants is accordingly substituted from one under Section 302IPC to one under Section 304 Part I IPC. Considering the fact that the appellants are in their thirties and there are no other reported involvements of either of them, we sentence both the appellants to seven years rigorous imprisonment with fine of Rs.25,000 each. In default of payment of fine the convict(s) shall undergo simple imprisonment for a period of three months.

33. The appeals stand disposed of in the aforesaid terms.

(VIPIN SANGHI)
JUDGE

(P.S. TEJI)
JUDGE

JULY 02, 2018