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

Judgment reserved on 19th December, 2018
Judgment pronounced on 29th January, 2019

+ **CRL.A. 582/2018**

KABIR

..... Appellant

Through : Ms.Kavita Jha, Mr.Vaibhav Kulkarni and
Mr.Rajiv Jha, Advocates.

Versus

STATE

..... Respondent

Through : Ms.Radhika Kolluru, APP for the State with
Insp. Rajesh Mishra and SI Vishnu Dutt,
P.S. New Friends Colony.

+ **CRL.A. 822/2018**

MOHD. NOOR JAMAL

..... Appellant

Through : Ms.Sunita Arora, Advocate.

Versus

STATE

..... Respondent

Through : Ms.Radhika Kolluru, APP for the State with
Insp. Rajesh Mishra and SI Vishnu Dutt,
P.S. New Friends Colony.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. Vide this common order, we shall dispose of the Crl. Appeal No. 582/2018 and Criminal Appeal No.822/2018. These appeals have been preferred by the appellants under Section 374(2) of the Code of

Criminal Procedure, 1973, (hereinafter referred as “Cr.P.C.”) assailing the impugned judgment of conviction dated 21.12.2017 and order on sentence dated 29.01.2018 passed by the learned Additional Sessions Judge, Rohini Court, Delhi in case FIR No. 490/2009 under Section 302/34 registered at Police Station - New Friends Colony, Delhi by virtue of which the appellants have been convicted under section 302/34 of the Indian Penal Code, 1860 (herein after referred as 'IPC') and to pay a fine of Rs.20,000/- for the offence punishable under Sections 302/34 of IPC.

2. The brief facts of the case, as noticed by the learned Trial Court are as under:-

On 01.11.2009 at about 10:30 PM, DD No.21A was registered at PS New Friends Colony stated therein that injured Goverdhan had sustained injuries and he was admitted to Holy Family Hospital where the doctor declared him brought dead. The duty officer had entered the information in the Roznamacha as DD No. 28A and same was entrusted to HC Dinesh Kumar. On the information Inspector Jagbir Singh along with HC Karambir, Ct. Ravinder, Ct Anil and other police officials reached at Holy Family Hospital and obtained the MLC of injured/deceased Goverdhan. The eye witness Mahidullah and other staff members reached at the spot where he prepared Rukka Ex.PW20/A and handed over the same to Ct. Ravinder for registration of FIR. In the meantime, the crime team had also arrived at the spot and had inspected the scene of crime. IO prepared site plan at the instance of complainant Ex. PW 12/A. IO recorded the statement of PW1 Mahidullah who stated that he was running a Kabadi shop at Pahari No.2, Taimur Nagar. On

01.11.2009, he was present at his Kabadi shop. There was milk diary opposite his kabadi shop. The milk diary was run by one Ishwar. On that day at about 9:30PM, he was collecting garbage at his Kabadi shop. He saw several persons coming from Pahari No.1 and accused Noor Jamal was also among them. He saw one boy namely Goverdhan who was tying calf with a rope. At that time he saw that accused Kabir and Dulal caught hold the deceased Goverdhan and accused Noor Jamal stabbed the injured/deceased. IO collected the blood stained earth control as well as the earth control from the spot, from cow dung (Gobar) and from the cemented concrete and kept the same in 6 separate boxes and sealed the same with the seal "JS" and took into possession the same vide seizure memo Ex. PW1/B. He also collected the blood stained brick and removed the blood from the wall with the help of cotton separately sealed the same with the seal of "JS" and took into possession vide seizure memo Ex. PW1/C. He sent the dead body to the mortuary of AIIMS Hospital through Ct. Munesh and Ct. Kishan Swaroop. Accused Noor Jamal was arrested from CRR bus stand, Mathura Road vide arrest memo Ex. PW1/D and his personal search was also conducted vide personal search memo Ex. PW1/E. Accused Noor Jamal made a disclosure statement Ex. PW2/E. Accused Kabir was arrested from PS Satbadi, Jammu accused Dulal was absconded and he was declared proclaimed offender.

On completion of the investigation and other formalities the charge sheet was finally filed against Md. Noor Jamal and Kabir in the court of Ld. MM. The Ld. MM after complying with the provisions of section 207 CrPC committed the case to the court of sessions for trial."

3. To bring home the guilt of the appellants the prosecution examined 20 witnesses in all. The statements of the appellants were also recorded under Section 313 Cr.PC wherein they pleaded their innocence by denying all the incriminating circumstances and claimed to have been falsely implicated.
4. Appearing for the appellant in Crl. A. No. 582/2018, Ms. Kavita Jha, Advocate contended that the impugned order is perverse, illegal and bad in law; that the appellants have been falsely implicated in the case and the prosecution have failed to prove its case against the appellants beyond reasonable doubt; that there are material contradictions in the testimonies of PW-1 and PW10, who claimed to have reached the spot; that the weapon of offence was not recovered from the possession of the appellants which casts a doubt on the story of the prosecution, to bring home the culpability of the appellants; that there are numerous discrepancies and contradictions in the story of the prosecution, hence, the same cannot be relied upon; that the prosecution failed to adduce any independent witness/public witness to the recovery as well as arrest of the appellants; that the prosecution failed to prove the motive behind the alleged murder, as there was no previous enmity between the appellants and the deceased person; that the case of the prosecution miserably suffers from inherent weaknesses mainly due to faulty and defective investigation.
5. Ms. Sunita, Advocate appearing for the appellant in Crl. A. No. 822/2018 adopted the arguments addressed by Ms. Kavita Jha, learned counsel for the appellant.

6. Per contra, supporting the conviction and sentence awarded to the appellants, Ms. Kolluru, learned counsel appearing for the State submitted that the evidence led by the prosecution witnesses, more particularly, PW-1 clearly establishes the case of the prosecution which has led to the conviction of the appellants; that the learned Trial Court has properly appreciated the evidence and rightly convicted and sentenced the said appellants, warranting no interference by this Court.
7. We have heard the arguments advanced by the learned counsel for the rival parties, perused the materials on record and the lower court records as well.

Post Mortem Report of the deceased

8. Before delving into the merits of the case, it would be appropriate to refer to the medical evidence adduced by the prosecution. Prosecution examined Dr. Susheel Sharma, Assistant Professor, Department of Forensic Medicine as PW-2, who conducted the post mortem on the body of the deceased and deposed that:

"On external examination - Rigor Mortis was present all over body. Post mortem staining present at back except pressure area. Sign of decomposition was not present. Body was pale and wearing blue underwear and grey coloured pant (blood stained). Mouth and eyes were closed.

Ante Mortem injuries

1. A stab wound size 2.6 X 1 cm X Cavity deep, obliquely placed, wedge shape, single sharp angle, present at front aspect of right chest wall, situated 21 cm below of right mid clavicle, 128 cm. above to right heel and 2 cm from midline. On

dissection, a blood stained track established directed inward, backward and downward, lower edge of wound is undermined. Track passing through wound through right 5th intercostal space through chest cavity through pericardium and penetrate out upper aspect of right ventricle wall of heart measuring 1.7 X .5 cm X cavity D associated with haemothorax about 1.5 liter of blood.

On internal examination, all visceral organs were place. Stomach contained 200 CC partial digested food material, mucosa was pale and no abnormal smell was present. In this case clothes of deceased were preserved.

OPINION: *Cause of death to the best of my knowledge and belief in this case is shock consequent upon stab injury. Injury No. 1 is sufficient to cause death in ordinary course of nature caused by pointed sharp edge weapon. Time since death in this case was consistent with hospital record.*

9. From the above, it is evident that the deceased died an unnatural death due to shock consequent upon stab injury caused by pointed sharp edged weapon.

Testimony of eye-witnesses

10. Material witnesses who unfolded the case of prosecution are PW-1 and PW10. They are stated to have witnessed the incident and removed the injured to the hospital. Mahidullah has a shop opposite to the place of occurrence. He was examined as **PW-1** and deposed that:

“ I run a kabadi shop at Pahar No.2, Taimur Nagar. On 01.11.2009, I was present at my kabari

shop. There is milk dairy opposite my Kabari shop. The milk dairy is run by one Ishwar . on 11.01.2009 at about 9.30 PM, I was present near my Kabari shop and collecting the garbage. In the meantime, I saw several persons were coming from Pahari No.1. witness has pointed out towards the accused Noor Jamal that he was among the said persons. I saw one boy whose name was Goverdhan who was also tying calf with a rope. **“MAINE DEKHA KI GOVERDHSAN APNE GAY KE BACHE KO BANDH RAHA THA AUR USI DAURAN MAINE DEKHA KI MULZIM KABIR NE AUR USKE SATHI DULAL NE GOVERDHAN KO PAKAD LIYA AUR MULZIM NOOR JAMAL NE CHAKU SE GOVERDHAN PAR VAR KIYA.”** Goverdhan raised alarm as **“BHAII MUJHE CHAKU MAR DIYA.”** After stabbing, accused persons fled away towards Yamuna side. This incident occurred at the gate of Milk Dairy of Ishwar Singh. **I immediately rushed towards Goverdhan and he told me he was stabbed by accused persons.** Goverdhan stabbed injuries on his chest. In the meantime, some relatives of Goverdhan reached the spot. I along with their relatives took Goverdhan to Holy Family.”

11. Ishwar Singh, owner of the dairy where the incident took place stepped into the witness box as **PW-10** and deposed as under:-

“ I am running a dairy at Taimur Nagar near Pahari No.2. on 01.11.2009, at about 9:00 PM, after checking my dairy. I was coming from Jamuna Pushta side towards my dairy. I saw Nuru, accused present today in the court, having knife in his hand and dulal and Kabir were also running behind Nuru who were at a little distance from Nuru. Accused Kabir is present today in

court (witness has correctly identified the accused by name and face)(accused Dulal is a proclaimed offender). When I reached my dairy, I heard the noise of shouts and I saw that inside the dairy, my brother Goverdhan was lying in an injured condition with a knife inflicted in his chest and blood was coming out. Goverdhan told me that **“Bhai Nuru ne mujhe chaku maar hai aur Dulal aur Kabir uske sath the”** and while telling he collapsed. Some persons were collected there and I with the help of other persons took my brother Goverdhan to Holi Family Hospital, where some altercations between him and Noor Jamal and he had abused him and threatened him to kill. The dead body of my brother was identified by me in the mortuary of AIIMS hospital on 03.11.2009 and my statement to this effect was recorded i.e. Ex.PW10/A, which bears my signature at point A.”

12. It is settled position of law that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable case of prosecution. In ***State of U.P. Vs. Naresh*** reported in ***(2011) 4 SCC 324***, wherein the Apex Court has observed that :

“In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution

case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited."

13. The close reading of the testimonies of PW-1 and PW-10, inspires confidence that PW-1 and PW-10 witnessed the incident and were present at the scene of occurrence. The appellants cannot be given the benefit of a contradiction which has occurred when comparing their testimonies about their time of arrival at the spot of incident. The omission and discrepancies in the testimonies of these two witnesses cannot be treated as material omission and irreconcilable discrepancies. Rather the slight variation which has occurred in the testimonies of these witnesses clears the air of not being tutored and not giving a parrot like statement which may create a suspicion. The presence of both the witnesses and the chain of circumstances stands

established on record. Rather the testimony of PW-9, who otherwise turned hostile further strengthen the testimonies of PW-1 and PW-10, stated that “I saw Noor, Kabir and Dulal running towards Pahari No. 2 and Aslam, Kobra Bilal, Kalia Ramjan, Jyotsana and many more persons, made them to run.”

14. Another inconsistency on which the learned counsel for the appellants is relying upon is that PW-1 stated that “BHAI MUJHE CHAKU MAR DIYA” whereas PW-10 stated that “BHAI NURU NE MUJHE CHAKU MAAR HAI AUR DULAL AUR KABIR USKE SATH THE”. It is true that the testimonies of PW-1 and PW-10 are inconsistent to the extent that PW-1 did not give the names of the assailants in his testimony whereas PW-10 divulged the names of assailants and made improvement in his testimony.
15. It is quite natural that there would be some discrepancies in the testimonies of these witnesses, for after passage of time a witness cannot recollect everything with precision out of context. While appreciating the evidence of the witnesses, it must be kept in mind whether the evidence of these witness read as a whole appears to have a ring of truth and evaluate to find out the general tenor of the evidence by the witness and whether the evaluation of the evidence renders it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case and hypertechnical approach is not be taken.
16. In our view, once the testimonies of both witnesses PW-1 and PW-10 are found to be trustworthy and reliable, the variation as pointed out

by learned counsel for the appellants is immaterial and does not go to the root of the case.

Discrepancies on arrest of appellants

17. Another limb of argument raised on behalf of the appellants is that the story set up by the prosecution with regard to the arrest of appellants is highly doubtful. According to the prosecution, the appellant Noor Jamal was arrested from CRRI Bus Stand, New Delhi on pointing out of complainant/PW-1 Maidul and appellant Kabir was arrested from Satbadi, Jammu. As far as arrest of appellant Noor Jahan, is concerned Investigating Officer Inspector Jagbir Singh/PW-20 deposed that the appellant Noor Jamal arrested from CRRI Bus Stand, Mathura Road, New Delhi on pointing out of the complainant. Witnesses to the arrest memo PW-12 Ct. Ravinder and PW-16 HC Vinesh Kumar deposed on the same lines. The complainant PW-1 in his cross examination stated that no arrest had been made till 5:00 p.m. We find this witness reliable as prosecution successfully proved the arrest memo Ex.PW1/D of the appellant Kabir which depicts the time of arrest as 6:10 p.m.
18. According to counsel for the appellant, arrest of appellant Kabir from Satbadi, Jammu is highly doubtful as the arresting officer PW-8 Inspector Dheeraj Singh failed to produce the DD entries of their departure and arrival entries on police record and even PW-12 HC Ravinder failed to give particulars of the place from where appellant Kabir was arrested.
19. Perusal of the record shows that PW-6 Ct. Dhir Singh, who had accompanied PW-8 Inspector Dheeraj Singh to Satbadi, Jammu

categorically stated in his cross examination that before returning to Delhi, the appellant Kabir was produced in a local Court at Jammu. Another witness of the arrest of appellant Kabir i.e. PW-12 Ct. Ravinder though failed to give the place of arrest of appellant categorically stated that the appellant Kabir was produced before the local Court at Jammu & Kashmir.

20. From the joint reading of testimonies of these witnesses, we find that the same, does not cast any shadow of doubt on the story set up by the prosecution as the prosecution has been successfully able to prove that the appellant Kabir was produced before the local Court in Jammu and Kashmir and obtained his Transit Remand which clearly shows that the appellant Kabir was arrested from Jammu.

Motive

21. The last contention on behalf of the appellants is that the case is false as the prosecution failed to bring the motive behind the murder. In this regard it is essential to elaborate on what exactly motive is; motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime. In case where there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by reason of the absence of motive, if otherwise the evidence is worthy of reliance.

22. In *State of U.P. v. Kishanpal and Ors* reported in (2008) 16 SCC 73 held as under:

“The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.”

23. Further, in *Shivji Genu Mohite v. State of Maharashtra* reported in *AIR 1973 SC 55*, the Apex Court observed that :

“ in case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not established, the evidence of an eye-witness is rendered untrustworthy.”

24. From the above settled law, it can be drawn that motive becomes insignificant in a case of direct evidence like the present one. The testimonies of PW-1 and PW-10 are cogent, reliable and have stood the test of cross examination.

Non Recovery of Weapon / Defective Investigation

25. Another limb of argument raised by learned counsel for the appellants is that the alleged weapon of crime was not recovered at the instance of the appellant and non-recovery of the weapon weakens the story of the prosecution and fails to prove their case beyond a reasonable.
26. In ***Krishna Mochi and Ors. v. State of Bihar*** reported in ***AIR 2002 SC 1965***, the Hon'ble Supreme Court held that where non recovery of the weapon of offence at the instance of accused persons, cannot be considered in isolation so as to exonerate them from the charges. The relevant para is reproduced as under:-

“It has been then submitted on behalf of the appellants that nothing incriminating could be recovered from them, which goes to show that they had no complicity with the crime. In my view, recovery of no incriminating material from the accused cannot alone be taken as a ground to exonerate them from the charges, more so when their participation in the crime is unfolded in ocular account of the occurrence given by the witnesses, whose evidence has been found by me to be unimpeachable.”

27. In ***Sanjeev Kumar Gupta and Ors. vs. State of U.P.*** reported in ***2015 (3) AJR 773***, the Apex Court has observed that:-

“We do note that the investigation suffers from certain flaws such as non-recovery of the weapon

used by the accused Appellants and recovery of the blood stained shirt after six days of the date of the incident. However, merely on the basis of these circumstances the entire case of the prosecution cannot be brushed aside when it has been proved by medical evidence corroborated by testimonies of the prosecution witnesses that the deceased died a homicidal death. This Court has held in Manjit Singh and Anr. v. State of Punjab and Anr. (2013) 12 SCC 746, that when there is ample unimpeachable ocular evidence and the same has received corroboration from medical evidence, non-recovery of blood stained clothes or even the murder weapon does not affect the prosecution case.”

28. In a murder case, the accused cannot be acquitted simply on the ground of non-recovery of weapon of offence, particularly, when there is clinching, trustworthy and reliable evidence of the eyewitnesses, leaving no room of doubt about presence of the eyewitness at the relevant time.

Conclusion

29. In our view, therefore, the chain of circumstances as recited above coupled with the law laid down by Apex Court unerringly lead to one conclusion and that is the guilt of the appellants. From the above discussion, we are of the considered view that the evidence adduced by the prosecution is sufficient, cogent and credible to establish that the appellant are the perpetrators of crime and that the Trial Court has rightly convicted and sentenced them for the offences under Sections 302/34 of the IPC.

30. The present appeals, therefore, deserve to be dismissed which we hereby do. The order of conviction and sentence recorded against the appellants is therefore upheld.
31. Ordered, accordingly.
32. Trial Court Record be returned along with a copy of this order.

SANGITA DHINGRA SEHGAL, J

SIDDHARTH MRIDUL, J

JANUARY 29, 2019
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