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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 31st May, 2022Pronounced on: 8th July, 2022

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CRL.A. 55/2022

DANISH @ BEHRA

.... Appellant

Represented by: Mr. Arun Sharma with Mr. Yatendra Singh and Mr. Vikas Kaushik, Advocates.

versus

THE STATE

....Respondent

Represented by: Mr. Tarang Srivastava, APP for the State with SI Mahavir , PS Daryaganj.

CORAM:**HON'BLE MS. JUSTICE MUKTA GUPTA****HON'BLE MS. JUSTICE MINI PUSHKARNA****J U D G M E N T****MINI PUSHKARNA, J.**

1. By this appeal, appellant challenges the impugned judgment dated 30.09.2021 and order on sentence dated 24.12.2021 passed by learned ASJ-02, Central District, Tis Hazari Courts, Delhi in Sessions Case No.27557/2016 in FIR No.84/2014, under Section 302 IPC, registered at Police Station Daryaganj, New Delhi. The appellant has been convicted for offence punishable under Section 302 IPC and directed to undergo sentence of imprisonment for life and a fine to the tune of Rs.10,000/-. In default of payment of fine, he has been directed to undergo rigorous imprisonment for one year.



2. The criminal machinery in this case was set into motion on receipt of DD No.50B, dated 17.02.2014 at 3.50 PM, at Police Station Daryaganj regarding the information sent by Const. Mahesh from LNJP Hospital that one male injured has been brought to the hospital by one Mohd.Zahid, who is admitted in the hospital vide MLC No.305096/14. DD was marked to ASI Rajesh who along with Const. Amit reached at the hospital and collected the MLC of injured on which history was mentioned as 'found injured in Daryaganj park' as told by Mohd. Zahid who brought the injured to the hospital. ASI Rajesh inquired about Mohd. Zahid who brought the injured to the hospital, however he was not found.

3. Thereafter, ASI Rajesh along with Ct. Amit reached at the spot i.e. Hindi Park, Daryaganj, Delhi, where no eye witness was found but blood drops were found near the mother dairy booth. Crime team was called at the spot, which took the photographs and exhibits. ASI Rajesh and Ct. Amit again came back to the hospital where doctors declared the injured 'not fit for statement'. On this, FIR under Section 307 IPC was registered.

4. ASI Rajesh collected the mobile phone of the injured from the hospital staff and made a call on the phone number of one Nazar Khan. Nazar Khan informed ASI Rajesh that the said mobile phone belongs to his brother Feroz Khan. Later, Nazar Khan along with his brother Afsar Khan reached the hospital, where they both identified the injured as their brother Feroz Khan.

5. Investigation was started and statements under Section 161 Cr.P.C. of Afsar Khan and Nazar Khan were recorded. In his



statement to the police, Afsar Khan, PW12 stated that on 16.02.2014 at about 9.00 PM, he was accosted by Danish @ Behera i.e. the appellant herein, along with his two associates, namely, Idrish and Ashraf, during which appellant had stated that he mistook Afsar for Feroz Khan (deceased) and that he would have accidentally slit his throat instead of his brother, Feroz Khan. Appellant threatened him that he shall kill his brother Feroz Khan.

6. Subsequently, information was received at Police Station Daryaganj from LNJP Hospital that injured Feroz Khan had expired. Thereafter, FIR was converted to one for offence punishable under Section 302 IPC and investigation was handed over to SHO/Inspector Ravinder Kumar. On 18.02.2014, on secret information, the appellant was apprehended. His disclosure statement was recorded in which he stated that 25 days back, the deceased attacked him with a surgical blade due to which he sustained certain marks on his face and his friends used to make fun of him. Therefore, he wanted to teach the deceased a lesson. He further stated that he along with Ashraf and Mustkin attacked the deceased with a blade and knife and ran away from the spot. The surgical blade was thrown in the park and the knife was handed over to Sanu @ Mustkin.

7. On being pointed out by the appellant, IO prepared the site plan and recovered his shirt and shoes on which blood stains were found. The clothes of the appellant were sent to FSL. Weapons of offence i.e. the knife and surgical blade were not recovered. The Investigating Officer ('IO') collected the Call Detail Record



(‘CDR’) of the appellant, Ashraf, deceased and witnesses. During investigation, accused Ashraf and Mustkin were not found and therefore, they both were declared Proclaimed offenders. Both accused surrendered before the concerned Court subsequently.

8. After completion of investigation, charge-sheet against appellant was filed and after arrest of accused Ashraf and Mustkin, supplementary charge-sheet was also filed. Vide order dated 15.09.2014, charge under Section 302 IPC was framed against appellant and vide order dated 25.09.2015, charge under Sections 302/174A IPC was framed against accused Ashraf. However, Mustkin was discharged of the substantial offence and was charged only for offence under Section 174A IPC.

9. Prosecution examined 28 witnesses. On completion of trial, appellant was convicted for offence under Section 302 IPC, whereas Ashraf was acquitted for offence punishable under Section 302 IPC. However, both Ashraf and Mustkin were convicted for offence punishable under Section 174A IPC. Hence, the present appeal on behalf of the appellant.

10. Assailing the conviction, learned counsel for the appellant contended that there is no direct evidence in the present case, the motive has not been proved in evidence as recorded in the impugned judgment and there is no last seen witness in the present case. Witness Afsar Khan, PW12 had deposed before the Court about meeting the appellant along with one Idrish and co-accused Ashraf, who had given threat on 16.02.2014 to kill the deceased. However, the said Idrish was not examined. Further, conduct of the



said witness Ashraf Khan, was unnatural as the said witness did not inform about the incident of threat by appellant on 16.02.2014 to anyone. Location of the appellant near the place of incident as per CDR cannot be taken against him, as the appellant is resident of the same area. Further, the deposition that the appellant was wearing the same shirt having the blood stains till he was arrested next day after more than 24 hours, does not stand to logic.

11. Learned APP for the State on the other hand contended that the impugned judgment and order on sentence suffer from no illegality. He relied upon FSL Report, Ex.PW25/A; deposition of PW12, Afsar Khan, brother of the deceased, who had deposed regarding the threat extended by appellant to murder his brother, Feroz Khan; CDR showing the presence of appellant at the spot of murder.

12. Perusal of the record show that there is no eye witness or last seen witness in the present case and the case of the prosecution is based solely upon circumstantial evidence.

13. Prosecution relies heavily upon the deposition of PW12, Afsar Khan, brother of the deceased. He deposed that on 16.02.2014 at about 9.00 PM after purchasing beer from Government Wine Shop at Netaji Subhash Marg, he was going towards Golcha Cinema. At that time, appellant along with his associates Idrish and Ashraf caught hold of him from the collar and after seeing him, told him that he mistook him for Feroz Khan (deceased) and that he would have hit him with a knife on his neck thinking him to be Feroz Khan. He deposed that appellant



threatened him to convey to his brother Feroz Khan that he should save himself from them and that they would kill Feroz Khan with a knife. During his cross-examination, PW12 admitted that he and his brother Feroz Khan (deceased) used to meet daily at Hindi Park and gamble by playing cards with unknown persons. PW12 further deposed that he did not lodge any complaint with the police nor informed any family member including his brother Feroz Khan (deceased) about the threat extended by appellant on 16.02.2014. This conduct of PW12 about not informing the police or even his family members or even the deceased about any threat extended by the appellant, raises doubts about the credibility of his statement regarding threat by the appellant. In case any death threat is received by any person for killing his brother, it would be logical for the said person to inform such an incident of death threat to his family members. It would be rational to at least caution his brother towards whom the death threats were directed. Conduct of PW12 in not informing his brother, family or the police of the death threat, is thus, unnatural. Further, this version of PW12 has not been corroborated by other evidence as the other alleged associate Idrish was not examined.

14. Another fact which is important for consideration is that in the MLC, it was recorded that the injured, later deceased, was brought to the hospital by one Mohd. Zahid. However, the said Mohd. Zahid has also not been traced. Non-examination of Mohd. Zahid, coupled with the fact that it has come on record that the deceased used to gamble daily with unknown persons in the Hindi



park, adversely affects the case of the prosecution, as the role of unknown persons with whom the deceased used to gamble in the park daily has not been examined.

15. Further, no investigation has been conducted to find out if the deceased had inflicted injuries on the appellant prior to the incident, which could have proved the motive for the appellant to commit the offence. Thus, the learned trial Court rightly held that the prosecution has not proved the motive to kill the deceased.

16. Finding of the trial Court that presence of appellant at the spot of incident on the basis of CDR, is not tenable. As per the impugned judgment, presence of appellant and co-accused Ashraf was proved on 16.02.2014 at the place of threat and thereafter on the day of murder at the relevant time, at the place where the alleged incident of murder took place, on the basis of same set of evidence i.e. mobile recovered from co-accused Ashraf and the appellant. However, co-accused Ashraf was acquitted for the reason that the said mobile was proved to be in the name of some other person, who was not produced in Court. The other mobile, alleged to be that of the appellant, was proved to be in the name of the mother of the appellant. However, the fact remains that neither the mother of the appellant nor any other witness has been examined by the prosecution to prove that appellant used the said mobile. The location on the basis of CDR cannot be taken against the appellant, as the appellant is resident of the same area. Being resident of the same area, it is plausible that the appellant would be present in the same area. Thus, the presence of appellant in the



vicinity of the site of the incident at the given time, cannot be used as incriminating evidence against the appellant.

17. As per the prosecution, the incident took place on 17.02.2014 at about 3:00 pm. The appellant was arrested on 18.02.2014 at 8:30 pm as per the Arrest Memo, Ex. PW24/A. As per the deposition of PW26, ACP Ravinder Kumar, at the time of his arrest, the appellant was wearing a blood stained shirt and shoes. As per his deposition, he got the clothes of the appellant changed and kept the shirt and shoes of the appellant in a sealed cover. It is highly improbable that an accused after committing the crime would continue to wear blood stained clothes even after more than 24 hours of commission of the offence. Further, the weapons of offence were never traced.

18. Further the FSL report shows that blood group “A” found on the shirt worn by the appellant, Ex. PW24/A, matches with the blood group of the deceased. However, the same is not a conclusive proof in the absence of sample of blood of the appellant, which was admittedly not taken in the present case.

19. Hon’ble Supreme Court in the case of Kali Ram Vs State of Himachal Pradesh, (1973) 2 SCC 808 has held as follows:-

“25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the



accused is sought to be established by circumstantial evidence.....

20. With regard to conviction on the basis of circumstantial evidence, Hon'ble Supreme Court in the case of Padala Veera Reddy Vs State of Andhra Pradesh and Others, 1989 Supp (2) SCC 706, has categorically held as follows:-

"10. Before adverting to the arguments advanced by the learned Counsel we shall at the threshold point out that in the present case here is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. this Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests :

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence"

21. Keeping the above principle of law enunciated by the Hon'ble Supreme Court and after scrutinising the record and



evidence of the present case, this Court finds that the prosecution has not been able to prove any incriminating circumstance against the appellant, much less proving the same beyond reasonable doubt. Accordingly, the appellant is acquitted. The appellant be released forthwith unless he is required to be detained in any other case.

22. A copy of this judgment be communicated to the Jail Superintendent forthwith for taking necessary action, updation of record and communication to the appellant.

**(MINI PUSHKARNA)
JUDGE**

**(MUKTA GUPTA)
JUDGE**

JULY 8th, 2022

c/PB

नस्यमेव जयते