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IN THE HIGH COURT OF DELHI AT NEW DELHI

NEUTRAL CITATION NO.: 2022/DHC/008163

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Reserved on : 20th July, 2022

Pronounced on : 3rd August, 2022

CRL.A. 168/2019

BIJENDER

..... Appellant

Represented by: Ms. Rakhi Dubey, Advocate

versus

STATE

..... Respondent

Represented by: Mr. Amit Ahlawat, APP for the
State with Mr. Gagan Kumar,
Advocate

CRL.A. 173/2019

BHARAT @ KALU

..... Appellant

Represented by: Mr. Sumit Choudhary, Advocate

versus

STATE

..... Respondent

Represented by: Mr. Amit Ahlawat, APP for State
with Mr. Gagan Kumar, Advocate

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

J U D G M E N T

ANISH DAYAL, J.

1. The above captioned appeals impugn the judgment dated 3rd November, 2018 convicting the appellants for the offence punishable under Section 302/120B IPC and order on sentence dated 5th November,



2018 awarding life imprisonment and fine in the sum of Rs.500/- each and in default simple imprisonment for 15 days, for each of the offences under Section 302/120B IPC. The sentences were to run concurrently.

The Incident:

2. As per the prosecution, information was received on the intervening night of 21st & 22nd July, 2013 regarding missing son of the complainant (Baleshwar Sahni) aged about 20 years. Upon enquiry by the police, the complainant said that his son Kishore had gone to attend a party at his friend's house namely accused Bijender (appellant in Crl.A. 168/2019) and accused Bharat @ Kalu (appellant in Crl.A. 173/2019) and had not returned home till about 7:00 p.m. despite the complainant trying to call him on his mobile phone which was switched off. PW-9 recorded statement of the father /complainant, prepared the *Rukka* which was handed over to PW-5 for registration of the FIR. Efforts were made to search for the missing Kishore but the search was unsuccessful as per the prosecution.

3. The complainant visited the police station in the morning of 22nd July, 2013 with the appellants and post interrogation, they admitted their offence of having murdered Kishore, were subsequently arrested and a personal search was conducted. Pursuant to disclosure statement of the appellants, the police was led to Gali no.6, Mukandpur in a vacant plot where they pointed out to a plastic bag which contained upper part of the body of the deceased upon which a crime team was summoned by the police. The appellants also led them to the residential H.No.100, Gali No.3, Rama Garden, Mukandpur, Delhi where they pointed out the place of offence.



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A number of exhibits were taken in possession and sealed. Thereafter the appellants led to them to Gali no.3, near Nyay Chowk, Mukandpur, Delhi and got recovered lower part of the dead body of the deceased from a plastic bag. Parts of the dead body were identified by the complainant.

4. Further investigation was conducted, charge-sheet was filed and charges under Section 302, 365, 120B IPC were framed against the appellants to which they pleaded not guilty and claimed trial. The prosecution examined 12 witnesses, statements of the appellants were recorded under Section 313 Cr.P.C. and no witness was examined by the defence.

Submissions by the appellants:

5. The appellants assailed the impugned judgment and order on sentence *inter alia* on the ground that there was no eye witness to the incident and the conviction was solely based on discoveries pursuant to the alleged disclosure statements of the appellants, however the said discoveries have not been sufficiently proved by the prosecution. Even the evidence of the police officials regarding the recovery suffered from various infirmities and discrepancies and the appellants could not have been convicted on the sole basis of disclosure statements. The discovery was conducted in day time at a place open to the public but no public persons present were called upon to join the investigation.

6. The appellants further contended that the prosecution had failed to prove any motive for the appellants to kill the deceased and it was not proved that the deceased was even present with appellants at the time of the incident. Further, no call records were traced by the prosecution of



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either the deceased or the appellants and simply a case was made out that since the appellants were working in the factory of the complainant, the deceased being son of the complainant was kidnapped by the appellants for ransom even though the FIR stated that he had gone with the appellants who were friends. Since the father of the deceased had since passed away, there was no person who could prove the last seen theory purportedly put by the deceased complainant on the basis of which the whole case of the prosecution rested. Also, the alleged place of occurrence viz. the residence H.No.100 was not proved to be under the ownership of the appellants or of any relative and no rent agreement was seized. The *post mortem* report found semi digested food with alcohol smell in the stomach of the deceased, however there was no recovery of liquor at the place of offence nor was there anything on record to show that the appellants were under the influence of alcohol.

7. Learned counsel for the appellants contended that the whole investigation was fabricated and it was not possible that the appellants would come to the police station at 5:00 a.m. in the morning with the complainant if they had committed the crime. He further pointed that there were serious discrepancies in the testimonies of the police witnesses. As per PW-5 the disclosure was recorded at 8:00 p.m. while as per DD No.10A the recovery happened at 7:00 a.m. As per Crime Team Report they left at 11:00 a.m. on 22nd July, 2013 so all recoveries were done by then. PW-9's testimony mentions that recovery of upper part of body was at Gali no.6, Mukandpur, Delhi while DD No.10A mentions Gali no.3, Nyay Chowk when the SHO was called. Disclosures were not corroborated by the Crime Team Report which was an independent document external to the police station.



8. Learned APP countering the contentions of the appellants submitted that even though the complainant had expired but the investigating officer in the statement which specifically mentioned the name of the appellants with whom the deceased stated to be going to a party when he was leaving home that night. According to the prosecution the learned Trial Court had correctly relied on this dying declaration of the deceased. The prosecution also stressed on the recoveries of the parts of the body made at the behest of the appellants and the weapon (knife) was also recovered in the vicinity. Parts of the dead body were found in vacant plots, however public could not have known what was lying inside such closed bags and that the appellant no.1 himself took out the weapon from the garbage in the open plot.

Evidence:

The following relevant aspects are gleaned from a perusal of the evidence on record:

9. At 1:40 AM on the intervening night of 21st and 22nd July, 2013 information was received on call that complainant's son was missing since 2:00 p.m. of 21st July, 2013 and was recorded as DD No.6A. SI Kishan PW-9 was assigned the task to attend to the situation and he went to Gali no.2, Kapil Vihar, Mukundpur with Constable Manoj PW-5 where the complainant Baleshwar Sahni gave a statement that his son Kishore had gone to attend the party at his friends viz. the appellants and had not returned till about 7:00 p.m. despite the complainant having called on the mobile of his son (the deceased) which was switched off. *Rukka* was prepared at 2:30 a.m. whereas the FIR was recorded at 2:50 a.m. under Section 365/34 IPC. Thereafter, as per the prosecution, the



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complainant came with the appellants to the Police Station Bnaiswa Dairy in the morning at 5:00 a.m. on 22nd July, 2013 and personal interrogation was conducted and upon them confessing to murder of deceased they were arrested. The arrest memos showing time of arrest as 6:20 a.m. for the appellants are duly exhibited as Ex. PW-5/H and PW-5/J. As per the prosecution, the recovery of the dead body at the behest of the appellants was recorded as No. DD10A dated 22nd July, 2013 at about 7:00 a.m. from Gali no. 3, Nyay Chowk, Mukundpur, Delhi.

10. Strangely enough, while the FIR was registered under section 365/34 IPC and the recovery was made at 7:00 a.m. allegedly at the behest of appellants, the arrest memos (showing the time of arrest at 6:00 a.m. for Bharat and 6:20 a.m. for Bijender) records the applicable sections of law as sections 365/302/201/120-B/34 IPC. It is inexplicable as to how a charge of Section 302 read with Section 201/120B IPC was recorded at prior point of time when the body was not recovered till later at 7:00 a.m. as per police themselves.

11. Further, Ex. PW-7/A is the Crime Team Report which records that it is based on DD No.18B and does not provide the FIR number even though the date and time of examination as per the Crime Team Report is 9:10 to 11:00 a.m. on 22nd July, 2013. As per the prosecution, FIR had already been recorded at 2:50 a.m. It is also evident from the Crime Team Report that the place of offence has been the room at the house of Ran Singh Rane, Gali No.3, Rama Garden, Mukund Vihar, Delhi. The Crime Team Report further records the seizures including earth control with blood, pieces of intestine, blood stained bed cushions, bed sheet, handkerchief, roof and deceased worn underwear. It is further recorded that on receipt of call from Control Room, the team reached a vacant plot



opposite a house in Gali No.3, Mukund Vihar where an old plastic bag was discovered from which a human leg was sticking out and on opening the bag, a sliced half dead body of a male (lower portion from the belly) with the incision wound about 3 inch on the backside of foreleg was found. The crime team was told by the IO/SHO that the other half of the body was dumped at Gali no.6, Mukund Vihar and when the crime team reached there they found a plastic bag in a vacant plot which upon opening revealed the upper portion of the dead body (half body from the belly). The incised wounds were found on left forearm and on left elbow and two incised wounds on right arm and on the right wrist. Since the body of the deceased had been sliced, the internal organs could be seen. The crime team was further informed that the incident of this murder has taken place in a room in house in Gali no.3, Rama Garden, Mukund Vihar and therefore upon reaching that house which was identified as of Ran Singh Rane, the blood stained pieces of intestine were found on the floor of the room in the rear alongwith blood strained bed cushion, piece of rope, handkerchief, bed-sheet and torn underwear, all of which were seized as exhibits.

12. What is evident from the Crime Team Report is that *firstly*, there was no FIR that was registered at the time when the crime team departed at 8.35 a.m. for the examination or when they started examination at 9:10 a.m. on 22nd July, 2013, since the information as recorded is based upon DD no. 18B. *Secondly*, the recovery of parts of the body was at the behest of police team as well as the place of crime viz. Gali No.3, Mukund Vihar, Delhi. *Thirdly*, both the recoveries of each part of sliced body were recovered from vacant plots in that vicinity, the lower part (with the legs sticking out of the bag) from Gali no.3, Mukund Vihar, Delhi and the upper part in a plastic bag in Gali No.6, Mukund Vihar.



Based upon this report of the crime team, this Court finds it bizarre that the case of the prosecution principally rested on recoveries of parts of the dead body at the behest of the appellants which is not corroborated at all by the Crime Team Report nor is it possible that prior to recovery of parts of the dead body, the appellants had already been arrested upon their visit to the police station and a case of Section 302 IPC had been noted in the arrest memos. The fact that Crime Team Report does not mention the FIR number clearly shows that the FIR was registered later after the recovery of the body parts by the police. It seems an FIR was carefully registered as under Section 365/34 IPC i.e. kidnapping or abducting with common intent *ante* timed at 2:50 a.m. while the arrest memo at 6:00 a.m./6:20 a.m. included Section 302/201/120 B IPC as well. The giveaway was that the bodies were recovered only (as per the police) after 7:00 a.m. The chronology provided by the prosecution of events which transpired in early hours of 22nd July, 2013 till the forenoon, are not corroborated by the documentary evidence on record. This seems to have been missed by the learned Trial Court.

13. There is yet another discrepancy in the chronology of events provided by the prosecution and the evidence on record which the learned Trial Court does not advert to PW-5 Constable Manoj who was the first to arrive along with PW-9, SI Kishore (the initial Investigating Officer) after receiving the information stated in his testimony that they reached the place of occurrence at 7:00 p.m. while disclosure of the appellant no.1 was recorded at about 8 p.m. on 22nd July, 2013 and the dead body was handed over to relatives of the deceased at about 9:00 a.m. on 23rd July, 2013. Even if it is assumed that 'a.m.' has wrongly been recorded as 'p.m.', this testimony only confirms that the recovery of the body and the weapon was not at the behest of the appellants. For



some unknown reason, the documents on police record seem to have been manipulated to implicate the appellants.

14. As per the prosecution, the last statement of the deceased as provided to his father (the complainant) was exhibited as Ex. PW1/A wherein it is mentioned that on 21st July, 2013 at about 2:00 p.m., his son Kishore left his house stating that he was going with his friends, the appellants who stayed in Gali No.3 Rama Garden, for a party. The prosecution had argued that this be treated as dying declaration under Section 32(1) of the Indian Evidence Act. This was countered by the defence that the fact that the father of the deceased also passed away before he could be examined in the court, therefore, the dying declaration stood unproved. The prosecution instead contended that since the Investigating Officer had testified to the statement of the complainant as Ex. PW9/A, it could not be stated that this was not proved. The learned Trial Court rightly rejected the contention of the prosecution on this account.

15. Even otherwise, a dying declaration is an exception to general rule of exclusion of hearsay evidence and its scope is crystallized in Section 32(1) of the Indian Evidence Act. Although Section 32(1) of the Indian Evidence Act does not require that the statement sought to be admitted in evidence should have been made in inherent expectation of death, the words used “as to any of the circumstances of the transaction which resulted in the death” must have some proximate relation to the occurrence. The Hon’ble Supreme Court held *inter alia* in **Kans Raj v. State of Punjab** (2005) SCC 207 traversed the principles of law laid down *inter alia* in **Sharad Birdhi Chand Sarda v. State Of Maharashtra** (1984) 4 SCC 116 and **Rattan Singh v. State of Himachal Pradesh**



(1997) 4 SCC 161. The Hon'ble Supreme Court held that statement of the deceased relating to the cause of death or the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction. In any event as discussed above neither can this statement be considered as proved without the father being examined nor is there other credible evidence to prove the guilt of the appellants beyond reasonable doubt.

16. PW-10 (the subsequent Investigating Officer) who was present alongwith the crime team when they visited the place of incident, testified that appellant Bharat was living as a tenant on the ground floor of the House No. 100 which was owned by Ran Singh but he did not seize the rent agreement, nor the record of ownership of the landlord nor made any enquiries from the neighbours nor recorded their statements regarding tenancy of appellant Bharat. Considering that there was no evidence to prove that tenancy or occupancy of the place where the crime had been committed was of any of the appellants, the case of the prosecution would not stand ground, even on this aspect.

17. This Court also notes that the Investigating Officer noted in the Crime Team Report is S.I. Hazari Lal who was not a prosecution witness during the trial. This too is a serious discrepancy in the case put forward by the prosecution.

18. The motive as alleged by the prosecution that the appellants were employed at the factory of the complainant i.e. the father of the deceased has not been proved by the testimony. The disclosure statements of the appellants to this extent are inadmissible in evidence. The recovery as mentioned earlier, is shrouded in mystery particularly due to the serious discrepancy in the documentation by the police. It is also significant that



the appellants were stated to have come with the complainant to the police station reportedly at 5.00 a.m. on 22nd July, 2013. Even though, such occurrences do take place (i.e. accused turning themselves in at the police station) but in the conspectus of the evidence on record and the discrepancy in the documentation by the police and that the prosecution case is based only on recovery of the dead body pursuant to disclosure statements and alleged recoveries at the behest of appellants, this Court finds as highly suspicious.

19. Pursuant to an examination of documents and evidence on record, this Court finds that the prosecution has not been able to prove the guilt of the appellants beyond reasonable doubt for *inter alia* the following reasons:

- a. Since the whole case of the prosecution was based on the recovery of the parts of the dead body of the deceased and the weapon at the behest of appellants, the fact that the recoveries are itself shrouded in mystery and not corroborated by the documents on record and that there are huge discrepancies in the FIR, DD entry and the Crime Team Report, the conviction of the appellants by the learned Trial Court is not sustainable.
- b. As detailed above, the chronology as presented by the prosecution, in documents as recorded by the police, was highly incongruous and unacceptable and cannot be relied upon to prove the prosecution's case. While the Crime Team Report is based on DD entry and not on FIR, however the FIR is said to be registered at about 7 hours prior to the arrival of Crime Team Report and at about 5 hours prior to the recovery of the body parts of the deceased. Further, as per the arrest memos arrests were made at



6:00 a.m. and 6:20 a.m. and added Section 302/201/120 B IPC as relevant sections in addition to Section 365/34 IPC in the FIR even when the body parts of the deceased were recovered after 7:00 a.m. as per the police.

- c. The learned Trial Court after having heard submissions by the prosecution and defence, states in the impugned judgment that: “ .. In the present case, the fact that the parts of dead bodies are lying at two different places enclosed in two different plastic bags and recovery of the clothes, which were found to be stained with the blood of same group as that of deceased, makes these joint recoveries an unimpeachable evidence against the accused persons.”. In opinion of this Court, this conclusion by the learned Trial Court cannot be sustained in light of the above discussion.
- d. The learned Trial Court has ignored that the first bag which was recovered with the lower portion of the body of the deceased had a leg sticking out as per the testimony of the police and as clearly recorded in the Crime Team Report. Thus, the fact that the plastic bag containing the dead body would have been quite obvious to any member of the public and it cannot be concluded merely on basis of the alleged recovery that it was at the behest of the appellant.
- e. Clothes which were recovered from the place of occurrence, found to be stained with the blood of the deceased, are also not sufficient to prove the guilt of the appellants. There is no scientific evidence which has been led regarding any blood or DNA of the appellants which was found on the seized articles of the deceased or the dead body.



- f. The learned Trial Court considers these submissions on behalf of the defence counsel but states that “*I am of the opinion that DNA Test on the blood found on the knife and the clothes should have been conducted, had the accused persons taken a plea before IO that they themselves are having the blood group of B. Therefore, in order to differentiate as to whether the blood on the aforesaid items was of the accused persons or the deceased, such course would have been necessary. But accused person have not taken this plea even during trial...*”.
- g. This reasoning of the learned Trial Court is not sustainable since it is for the prosecution to prove its case beyond reasonable doubt and burden cannot be shifted to the accused persons by stating that the accused persons should have taken this plea before the Investigating Officer.
- h. The learned Trial Court relies on the fact that all the recoveries have been witnessed by Baleshwar Sahni, the father of the deceased and the complainant. However, the learned Trial Court does not advert to the fact that Baleshwar Sahni had already passed away prior to his examination in court. Therefore, his endorsement on the recoveries could not have been taken as unimpeachable without him being examined as a witness. It is not a situation which falls within the category of Section 32 of Indian Evidence Act.
- i. The learned Trial Court has noted the arguments of the defence that the police could not pick up any finger prints and that no evidence had been led to prove that the clothes picked up by the police actually belonged to the appellants. Learned Trial Court



further notes the arguments of the defence counsel that no evidence had been led to prove the ownership or tenancy of the place of occurrence to the appellants. However, after noting this submission, learned Trial Court states that *“I agree with the learned defence counsel that the investigation is lacking on the aforesaid points. However, I am of the opinion that simply on aforesaid points, the prosecution case cannot be held to be doubtful”*.

- j. In the opinion of this Court, learned Trial Court has inverted the concept of prosecution proving the guilt beyond reasonable doubt. As per submissions of the defence as noted in this paragraph and by the learned Trial Court there were critical gaps in the chain of circumstances and ought not to have been ignored summarily.
- k. Learned Trial Court also erred in simply relying on FSL report regarding the knife, allegedly recovered at the behest of the appellant Bijender, that it had blood of human origin, and that this in itself alongwith alleged recovery of two parts of the dead body, proves that it was in exclusive knowledge of the appellants. Learned Trial Court ignored the fact that not only there was no eyewitness; the Investigating Officer as per the Crime Team Report had not been examined; there were huge discrepancies in police documentation (as discussed above); the tenancy / ownership of the place of occurrence was not proved to be of any of the appellants; recoveries were made from open vacant plots with a human leg sticking out of one of the bags so recovered; no scientific evidence to prove that presence of the appellants at the place of occurrence; the father of the deceased being unavailable



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(having died) by the time of examination in the court to prove the last seen theory. With such grave discrepancies breaking the chain of circumstance in multiple places, in opinion of this Court, learned Trial Court has erred in convicting the appellants.

1. Even on the issue of Section 120B IPC, learned Trial Court only offered the statement towards the conclusion that “..*manner in which offence has been committed clearly shows that they had entered into a criminal conspiracy to commit the offence*”. No evidence by the prosecution had been traversed to prove that there was indeed a meeting of minds/agreement at an earlier point of time to commit the crime of murder or any illegal act.

Conclusion:

20. Accordingly, judgment and order of Trial Court dated 3rd November, 2018 and order on sentence dated 5th November, 2018 are set aside. Both these appeals are accordingly disposed and the appellants are acquitted of the charges framed.

21. Superintendent, Tihar Jail is directed to release the appellants forthwith, if not required in any other case. Copy of this order be uploaded on website and be also sent to Superintendent, Tihar Jail for intimation to the appellants and updation of records.

**(ANISH DAYAL)
JUDGE**

**(MUKTA GUPTA)
JUDGE**

AUGUST 03, 2022/sm