



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

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Reserved on: 4th August, 2022

Decided on: 20th September, 2022

+ CRL.A. 32/2018

CRL.M.A. 12721/2018 (for additional evidence)

PARVEZ @ TANTRIK @ SONU @ RADHEY Appellant

Represented by: Mr. Mohit Mathur, Sr. Adv. with Mr. Harsh Prabhakar, Adv. DHCLSC with Mr. Anirudh Tanwar, Mr. Dhruv Chaudhry, Mr. Harsh Gautam, Mr. Sitaram Yadav, Advs.

versus

STATE

..... Respondent

Represented by: Ms. Shubhi Gupta, APP for the State with Insp. Lekh Raj, Insp. Rahul, PS Karawal Nagar.

+ CRL.A. 86/2018

YAKUB @ HADDI

..... Appellant

Represented by: Mr. Mohit Mathur, Sr. Adv. with Mr. Harsh Prabhakar, Adv. DHCLSC with Mr. Anirudh Tanwar, Mr. Dhruv Chaudhry, Mr. Harsh Gautam, Mr. Sitaram Yadav, Advs.

versus

STATE

..... Respondent

Represented by: Ms. Shubhi Gupta, APP for the State with Insp. Lekh Raj, Insp. Rahul, PS Karawal Nagar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

MUKTA GUPTA, J.

1. By these two appeals the appellants challenge the impugned judgment dated 26th October, 2017 whereby they have been convicted for offences



punishable under Section 365/302/201/34 IPC as also the order on sentence dated 30th October, 2017 whereby they have been directed to undergo imprisonment for life and to pay a fine of ₹5000/- each under Section 302 IPC, in default whereof to undergo two years simple imprisonment for offence punishable under Section 302 IPC; imprisonment for a period of five years and fine of ₹3000/- each under Section 365 IPC, in default whereof to undergo simple imprisonment for a period of one and a half years and to undergo imprisonment for a period of one and a half years and a fine of ₹2000/- each, in default whereof to undergo simple imprisonment for four months for offence punishable under Section 201 IPC.

2. Learned counsel for the appellants challenging the impugned conviction contends that the very genesis of the case of the prosecution is shrouded with grave suspicion since Salma, wife of the deceased, did not disclose the involvement of the appellants at the earliest opportunity on 7th April, 2012 and even thereafter despite numerous visits to PS Karawal Nagar. This material information that she suspected the appellants was disclosed only in the evening of 10th April, 2012 pursuant where to rukka was registered. Version of Salma is further contradicted by the fact that in the rukka she stated that when her husband, namely, Istekhar @ Pappu did not return home in the evening of 7th April, 2012, she along with her brother-in-law Sagar who was not examined as a witness during the course of trial, visited the office of appellant Parvez located at '2 Number Loni', however in her cross-examination Salma admitted that her husband did not tell her the place where he was going to meet the appellants and that she did not visit the office of the appellant Parvez along with Sagar on 7th April, 2012. Further, Iqbal Ahmed/ PW-2 deposed that his son Sagar had come to Delhi only on



9th April, 2012, hence there was no question of Sagar going to the office of appellant Parvez along with Salma on 7th April, 2012. Further, to the PCR Salma informed that her husband had gone to Lal Bagh Mandi in the morning as she had asked him to stay at home. There are material contradiction in the testimony of Salma and Faheem/ PW-3. Though Salma deposed that she had gone to the office of appellant along with Faheem as well and Faheem met her on 10th April, 2012 after 7th April, 2012, however Faheem stated that before 10th April, 2012 he had not visited the shop of appellant.

3. It is contended that from the over-writing on the report of the crime team it is evident that there is an attempt to score off letter '8' and to show that the inspection was carried out on 10th /11th April, 2012. This assumes significance for the reason FIR had already been registered on 10th April, 2012 at 6.30 PM, however the report of the crime team relating to the inspection of the spot which allegedly commenced at 10.15 PM on 10th April, 2012 does not bear the FIR number. Thus, by the time crime team inspection was carried out, no FIR had been registered, as its particulars were not mentioned. There are material contradictions in relation to the spot from where motorcycle had been recovered. As per the seizure memo of motorcycle Ex.PW-3/B the motorcycle was hidden in foliage around 20-22 steps towards the North of the spot where the body of the deceased was allegedly recovered at the instance of appellant Parvez. However, in his deposition Insp. Lekh Raj Singh/ PW-21 stated that the motorcycle was lying at a distance of around 25 steps away in West direction from the body of the deceased.



4. Learned counsel for the appellants further contends that the appellants are liable to be acquitted for the charge of offence punishable under Section 302 IPC on the sole ground that no cause of death has been opined by the post-mortem Doctor. The burn injuries found on the body of the deceased were post-mortem injuries. In the absence of the prosecution having proved that a homicidal death was caused, the appellants cannot be convicted for the offence punishable under Section 302 IPC. According to the post-mortem Doctor, time since death was around 3 days whereas the case of the prosecution was that the deceased was eliminated on 7th April, 2012 itself. Reliance is placed on the decisions reported as (2014) 4 SCC 31 M.B. Suresh Vs. State of Karnataka; (2010) 15 SCC 588 Madho Singh Vs. State of Rajasthan; (2002) 8 SCC 45 Bodhraj @ Bodha & Ors. Vs. State of Jammu & Kashmir; (1993) Supp (1) SCC 7 Kedar Nath & Ors Vs. State of M.P. and (1975) 4 SCC 472 State of Punjab Vs. Bhajan Singh & Ors.

5. Case of the prosecution that the deceased went from his residence to Loni with the appellants on the same motorcycle is not corroborated by the analysis of the call detail records of the mobile phone numbers which were allegedly used by the appellants. The said analysis was exhibited by the investigating officer before the learned Trial Court with much reluctance which shows that the location of both the appellants at around 1.00 to 1.15 PM on 7th April, 2012 was at their office Indrapuram. The two mobile phone numbers allegedly attributed to be used by the appellants were not registered in their names and no cogent evidence was led to prove that the appellants were using the said mobile phones. Circumstance of recovery of key of the motorcycle used by the prosecution against the appellant Yakub @ Haddi



also does not inspire confidence. Reliance is placed on the decision of this Court reported as (2010) SCCOnline Del 769 Bhupinder Kumar Vs. State.

6. Learned counsel for the State rebutting the arguments contends that the dead body was duly identified by the wife, father and nephew of the deceased. Further, the DNA analysis report showed that the dead body recovered was of the son of PW-2. There is a recovery of chain pursuant to the disclosure statement. The clothes of the deceased were found burnt and had remnants of kerosene. The time since death was 3 days which was roughly near the time when the appellants were seen with the deceased. In view of the body being burnt, though burns were post-mortem in nature, the prosecution having not proved the cause of death will not mitigate the offence of kidnapping and murder as also destruction of evidence committed by the appellants. Hence, the appeals be dismissed.

7. Investigation sprung into action on receipt of a PCR call Ex.PW-15/A on 7th April, 2012 at 9.36.30 PM wherein Smt. Salma informed that her husband had gone to Lal Bagh Mandi in the morning and since then has not returned. On the PCR reaching the place, Salma stated that her husband has not come back home since 2.00 PM. The second PCR form notes that Salma informed that her husband had gone on motorcycle DL-7SVA-3104 for “*pese ke tagade me gaye thee, unka phone No. 8285647064 hai, ju band chal raha hai, ghar nahi laute hai*”. Thus, these are the information given by Salma to the two PCR which reached the spot on her making the PCR call. The said PCR calls were recorded vide DD No. 72B at PS Karawal Nagar. Further, DD No. 9A was recorded on 8th April, 2012 at PS Karawal Nagar which noted that Smt. Salma had personally come to the Police Station and her statement was recorded that her husband Ishtekar aged 35 years left the



home on 7th April, 2012 at around 2.00 PM on his pulsar motorcycle bearing registration No. DL-7SBA-3104 and has not returned home since then and his mobile phone was also switched off. She tried to search her husband, however could not trace him. On 10th April, 2012 statement of Smt. Salma was recorded vide Ex.PW-1/A and on the said rukka FIR No. 104/2012 under Section 365/34 IPC was registered at PS Karawal Nagar at 6.30 PM

8. In her statement Smt. Salma stated that she was staying in a rented accommodation and was a housewife. Her husband used to sell fruits and vegetables in Lal Bagh Mandi. On 7th April, 2012 her husband spoke to someone on the phone at 1.15 PM. After sometime her husband left stating that he was going to meet his friends Yakub @ Haddi and Tantrik Parvez @ Sonu at '2 number Loni'. Saying this her husband took the motorcycle No. DL-7SBA-3104. By evening when her husband did not come, she along with her brother-in-law Sagar went to the office of Tantrik at '2 number Loni'. There she met Parvez @ Sonu and Yakub @ Haddi who were both under the influence of liquor. When she inquired about her husband, they stated that her husband had come in the afternoon and left thereafter and they did not know about his whereabouts. She gave the description of her husband and that he was wearing two gold chain and was having one mobile phone with number 8285647064 which is switched off since 7th April, 2012.

9. After registration of FIR the Police reached the shop of Parvez at C-59, Tyagi Niwas, Indrapuri, Loni, Ghaziabad and he was arrested vide arrest memo ExPW-1/B at 8.00 PM on 10th April, 2012. According to Insp. Lekh Raj/ PW-21, he further recorded his disclosure statement in the presence of SI Ashwani Ambariya/ PW-20 and Faheem/ PW-3 as also the statement of Smt. Salma. Pursuant to the disclosure statement, Parvez led the Police team



along with Faheem to the forest area located in Sector-5, Tronica City, Loni, Ghaziabad and pointed out to the place of occurrence i.e. a drain in the said forest area where a dead body was recovered in burnt condition at the instance of Parvez. Spot inspection was conducted and control earth, brick, sample earth, etc. were taken into possession and seized. The investigating officer also took possession of the burnt pieces of jeans and T-shirts etc., lying near the dead body of the deceased and seized the same vide seizure memo Ex.PW-3/D. The pulsar motorcycle bearing No. DL-7SBA-3104 was also found hidden in the foliage at around 20-22 steps towards the North direction from the spot where the dead body of the deceased had been recovered. The motorcycle was seized vide seizure memo Ex.PW-3/B. The crime team reached the spot at 10.15 PM and inspected the place till 12.15 AM on the intervening night of 10th and 11th April, 2012. On 11th April, 2012 Insp. Lekh Raj visited the shop of Parvez again and took into possession a black colour mobile phone bearing IMEI Nos. 861669000705814 and 861669000726810 with mobile No. 8744929381) on which U 225 and G-Five was scribed along with two visiting cards. Statements of various witnesses were recorded and inquest proceedings were carried out. The body was sent for post-mortem and it was opined that the death was about 3 days prior to the examination at 12.00 Noon. The burns were opined to be post-mortem in nature. However, the final opinion as to cause of death was kept pending subject to the outcome of the chemical analysis report.

10. Subsequently appellant Yakub @ Haddi was arrested on 25th April, 2012 at around 4.00 PM. His pointing out memo of the spot and motorcycle were recorded. Pursuant to the disclosure statement of Yakub @ Haddi



being recorded vide Ex.PW-15/A, a grey coloured Nokia mobile phone bearing SIM No. 9911403528 pertaining to the appellant Yakub @ Haddi was recovered and the keys of the motorcycle pertaining to the deceased were also recovered.

11. The FSL report was received from the Chemistry Department which revealed that metallic poisons, ethyl and methyl alcohol, cyanide, phosphide, alkaloids, barbiturates, tranquilizers and pesticides could not be detected in the viscera of the deceased. However, despite receipt of the report no final opinion as to the cause of death was given by the Doctor concerned. In this regard, it would be appropriate to note the testimony of the post-mortem Doctor Meghali Kelkar who appeared as PW-14.

“On 11.04.2012, I was working as Senior Demonstrator at Department of Forensic Medicine, in UCMS and GTB Hospital. On that day, on the request of IO/Inspector Lekh Raj Singh, I conducted postmortem on the dead body of Istekar, S/o Iqbal Ahmed, Aged about;35 Years, Male.

I had prepared postmortem report, which is already placed on the record bearing my signature at point X. The postmortem report is exhibited as EX.PW14/A.

During the postmortem examination, the following articles were preserved and sealed

- *Viscera.*
- *Scalp hair of deceased for detection of inflammable substance.*
- *Jar containing sternum of the deceased for DNA analysis along with , sample seal.*

Opinion The time since death was about three days. The opinion regarding cause of death was kept pending, till the receipt of chemical analysis report of viscera, which was sent to FSL to rule out any poisoning and intoxication.

External Injuries During postmortem examination, I did not notice any antemortem external injuries on the dead body. The burn injuries on the dead body were postmortem in nature.



There were certain soft tissue defects (showing gnawing, could be related to animal bites) on the dead body, which were also postmortem in nature.

I have seen the FSL report Ex.A-1, according to which, common poison, pesticides, metallic poisons, ethyl and methyl alcohol, cyanide, phosphide, alkaloids, barbiturates, tranquillizers in the viscera. Keeping in view this FSL report and my postmortem report, no concrete opinion can be given regarding actual cause of death. The reasons for not giving this opinion are as follows:

- *The soft tissues over various parts of the body i.e. head, lower face, neck, lower abdomen, groin (pelvic region), chest, part of limbs, bones of the right hand with wrist joint were absent with irregular margins suggestive of gnawing. Infestation by maggots was seen.*
 - *The burns were postmortem in nature and soft tissue defects were also postmortem in nature.*
 - *Vide FSL report Ex.A-1, the only mentioned poisoning/intoxication were ruled out.*
 - *On internal examination, most of the soft tissues/organs were infested and eaten up by maggots.*
 - *The internal organs showed decomposition changes.*
- Therefore, there was no sufficient evidence to indicate towards a particular cause of death."*

12. Thus, the moot question in the present appeal is whether the appellants can be convicted for the offence punishable under Section 302/34 IPC when the prosecution has not been able to prove either by direct or circumstantial evidence that the cause of death was homicidal in nature.

13. In Kedar Nath (supra) relied upon by learned counsel for the appellants the Supreme Court noted that the dead body recovered at the instance of the convict Baijnath was in a highly decomposed state beyond identification and only some pieces of cloth were seized. In the said case Supreme Court noted that there was no specific evidence as to the cause of



death and the prosecution proceeded on the presumption from the recovery of an empty cartridge seized from the side of the dead body that the deceased should have been murdered by shooting. It was held that apart from this conjecture there was no other material to prove the homicidal death. Hence the accused were acquitted of the charge of 302 IPC.

14. In Bhajan Singh (supra) Supreme Court noted that there was no eye-witness to the occurrence and that the conviction was based on circumstantial evidence. Supreme Court found that the evidence which was sought to be adduced was far from satisfactory and suffers from number of infirmities. The post-mortem Doctor clearly stated that the features of the dead body of which he committed the post-mortem were unrecognizable. It was held that the accused cannot be made to suffer for the omission on the part of the Doctor for not having examined the hyoid bone and cervical vertebra and coming to a conclusion that the death was homicidal. Reiterating this principle, Supreme Court in Madho Singh (supra) held that in order to convict an accused under Section 302 IPC first and foremost aspect to be proved by the prosecution is the factum of homicidal death. Conviction of the appellants is not based on the statements of the eye-witnesses but by circumstantial evidence. In a case of eye-witness account the prosecution can prove homicidal death even by version of the eye-witnesses, however in this case in a case of circumstantial evidence it is essential that the opinion of the Doctor should be available to conclude that the death was homicidal in nature.

15. As noted above, in the post-mortem report the burn injuries are post-mortem in nature. The body of the deceased was gnawed by the maggots and there was no apparent injury mark to show how homicidal death was



caused. In the present case, not only has the homicidal death not been proved, the appellants have been sought to be indicted by the prosecution based on the last seen evidence of the deceased along with the two appellants on his motorcycle. In this regard prosecution relies on the testimony of Faheem, the nephew of Salma who was examined as PW-3.

16. Faheem deposed that he knew Parvez and Yakub who was working as vegetable vendors at Lal Bagh Mandi, Loni. His uncle Pappu used to work at Lal Bagh Mandi, Loni and even Yakub was a vegetable vendor. He knew Yakub through his uncle Pappu and Parvez through Yakub. He stated that on 7th April, 2012 while he was going to the house of his uncle Pappu at Shiv Vihar, Karawal Nagar, New Delhi on foot, before reaching his house around 2 streets prior to the street leading to his house, at about 1.00 – 1.15 PM he saw his uncle Pappu was going on his motorcycle make Pulsar along with these two accused. He further stated that on 10th April, 2012 his aunt Salma came to their house at Shiv Vihar and informed that Pappu was not traceable since 7th April, 2012 and his phone was switched off, on which he informed that he had seen his uncle with the two accused persons. Whereas Salma in her deposition stated that since her husband did not return up to 8.00 in the evening, she along with her brother-in-law visited ‘2 number Loni’ at the office of Parvez where both Parvez and Yakub met her. They were intoxicated and stated that her husband came to them at noon time and after that he returned and they do not know about his whereabouts.

17. The post-mortem of the deceased was conducted on 11th April, 2012 and time since death was opined to be 3 days. It is thus evident that as per this information the deceased died on or around 8th April, 2012 whereas Faheem saw the deceased along with the appellants on 7th April, 2012. There



being a long gap between the time of death and the last seen, thus the appellants cannot be convicted for the offence of murder based on the evidence of last seen by Faheem. In this regard it would be appropriate to note the observations of the Supreme Court in Bodhraj @ Bodha & Ors. Vs. State of Karnataka wherein it was held:

“31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2.”

18. The next circumstance relied by the prosecution is the recovery of dead body of the deceased at the circumstance of appellant Parvez. However, as noted above, the inspection of the crime team carried out does not note the FIR Number, though it is the case of the prosecution that the FIR for offence under Section 365 IPC was registered prior to the disclosure. Despite the case of Salma that she went to the office of Parvez on that date which is not supported by Faheem, the names of the two appellants do not find mention in the FIR. There being material contradictions in the testimonies of Salma and Faheem, and the crime team report not supporting the case of prosecution, the appellants cannot be convicted on the sole ground of recoveries pursuant to their disclosures.



19. Considering that the prosecution has neither been able to prove the cause of death being homicidal as regard the last seen evidence, there being serious gap in the time since when the appellants were allegedly seen with the deceased and the deceased died and the last seen evidence itself not being satisfactory this Court is of the considered opinion that the appellants are entitled to the benefit of doubt. Accordingly, the impugned judgment of conviction and order on sentence are set aside.

20. Appeals are disposed of.

21. Appellants be released forthwith if not required in any other case.

22. Order be uploaded on the website of this Court and be also conveyed to the Superintendent Jail for intimation and compliance.

(MUKTA GUPTA)
JUDGE

(ANISH DAYAL)
JUDGE

SEPTEMBER 20, 2022
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