



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

% **Decided on: 20th May, 2022**

+ **CRL.A. 418/2019**

STATE

..... Appellant

Represented by: Mr.Tarang Srivastava, APP for the
State with SI Jitender, PS Jamia
Nagar.

versus

SHIV KUMAR & ANR.

..... Respondent

Represented by: Mr.Anwesh Madhukar, Advocate
(DHCLSC) with Mr.Pranjal Shekhar,
Advocate.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE MINI PUSHKARNA

MUKTA GUPTA, J. (ORAL)

1. State prefers the present appeal against the judgment dated 30th January, 2018 passed by the learned Additional Sessions Judge (South-East), Saket Courts, Delhi in case FIR No.217/2012 under Sections 302/201/34 IPC and 174A IPC registered at PS Jamia Nagar, Delhi.
2. Leave to appeal was granted by this Court vide order dated 27th March, 2019. Since the respondents could not furnish the surety bond, vide the order dated 23rd May, 2019, the bond amount was reduced. However, the respondents could not even furnish the same and did not appear. Consequently, initially bailable warrants and then non-bailable warrants were issued vide order dated 16th December, 2019 against the respondents as they were not appearing and again on 5th February, 2020. Pursuant to the non-bailable warrants, Shiv Kumar was arrested on 25th March, 2022 and produced before this Court, when he was remanded to judicial custody and



further, non-bailable warrants were issued against Rakesh, respondent No.2 who has been arrested on 6th May, 2022. Hence, the two respondents are in judicial custody. Thus the appeal is heard on merits.

3. Briefly, case of the prosecution is that on 22nd March, 2012, Praveen Bano (PW-2), wife of Yakoob lodged a missing complaint in police station – Jamia Nagar claiming that her husband left the house at about 12.00 noon on 19th March, 2012 and informed her that he was going to Dhobi Ghat, Yamuna River alongwith Kanhaiya. In the *rukka* based whereon FIR No.217/2012 was registered at PS Jamia Nagar, Praveen Bano claimed that she had given a missing report on 20th March, 2012, which was recorded vide DD No.48, however, the said DD No.48 was never exhibited by the prosecution. Based on the complaint of Praveen Bano dated 22nd March, 2012 the abovenoted FIR was registered. It may be noted that in the meantime, DD No.20A was recorded on 23rd March, 2012 at PS Jamia Nagar at about 02.55 PM informing that a dead body of a male has been recovered behind Shamshan Ghat, Okhla. Dead body of Yakoob was identified by Sameeruddin, the elder brother of Yakoob and his father-in-law. On the missing report as also the recovery of the dead body, the investigation started and body was sent to postmortem which was conducted vide Ex.11/A. Alongwith the application for conducting the postmortem, it was noted that the body has been identified by Sameeruddin and Gulsher, brother and father-in-law, respectively, of the deceased and that the body was recovered on 23rd March, 2012 at the instance of accused Shiv Kumar.

4. In the FIR lodged by the wife-Praveen Bano, she suspected Kanhaiya, his brother- Rakesh and Shiv Kumar for kidnapping her husband who was addicted to drinking and thus prayed that he be traced. Based on the



statement of Praveen Bani, Shiv Kumar was traced and the time of arrest of Shiv Kumar was shown as 03.00 PM on 23rd March, 2011. However, as noted vide the DD No.20A recovery of the dead body had already been made and DD No.20A does not specify that the recovery of the dead body was made at the instance of Shiv Kumar.

5. Further, the application sent for postmortem examination was received by the concerned postmortem doctor on 24th March, 2012 at 10.45 AM, wherein there is over writing in the date and time of incident. As per the postmortem report, 21 *ante mortem* injuries were found on the body of the deceased including on the head, spinal column and chest as well. The opinion as to cause of death was coma and shock due to injuries mentioned which could be caused by blunt external force which was sufficient to cause death in the ordinary course of action.

6. The viscera which was preserved was sent to FSL for finding out the intoxication level. However, the FSL report has not been exhibited by the prosecution.

7. Thus, the case of the prosecution hinges on the suspicion expressed by the wife of the deceased (PW-3), recovery of the wooden stick pursuant to the arrest of Rakesh and the statement of Akbar, the witness of last seen.

8. Akbar (PW-4) in his testimony stated that he was working as a driver on Gramin Seva vehicle and was driving the vehicle from Community Centre to Shahin Bagh. On 19th March, 2012 at about 3.00 – 4.00 PM while he was waiting for the passengers at Community Centre/ Surya Hotel in his vehicle, accused Shiv Kumar boarded the vehicle for going to Okhla Head. At that time he had four half bottles of liquor in his jacket. Akbar could see the same while he was sitting in the said vehicle. On Akbbar asking Shiv



Kumar where he wanted to go, Shiv Kumar replied that he would go to Jamuna Tapu and that he was invited there for a party. He further told him that the party was hosted by himself, Yakoob and Rakesh. When the vehicle reached at Okhla, accused Shiv Kumar got down from the vehicle and started moving towards Jamuna Tapu and at that time he saw deceased Yakoob and Rakesh already standing there and they joined Shiv Kumar. Akbar further stated that he knew three of them even prior to the said date, as Yakoob was his immediate neighbour and Shiv Kumar and Rakesh were rowing boat in Yamuna river bank and when he used to go to stroll, he used to board on the boats of Shiv Kumar and Rakesh. He further stated that Shiv Kumar and Rakesh were having jhuggis near Yamuna bank. PW-4 stated that he was interrogated on 23rd March, 2012 in respect of Yakoob's murder wherein he expressed his suspicion on the said two persons.

9. In his cross-examination Akbar/PW-4 stated that he did not know the name of any other passenger who boarded the Gramin Seva vehicle on 19th March, 2012 except the accused and that he had seen him number of times transporting liquor bottles in Gramin Seva vehicles. In his further cross-examination he stated that his statement was not recorded by the Police on 21st March, 2012 but six months back and he did not remember the date.

10. Akbar thereafter, stated that his statement was recorded after two and a half months after the incident. Further, Insp. G.S. Rawat (PW-17), the investigating officer stated that he recorded the statement of Akbar on 19th May, 2012. It is, thus, evident that the statement of this witness even as per the investigating agency and Akbar himself was not recorded immediately, but after a delay of two and a half months in May, 2012.

11. As regards, the reliance of the prosecution on the two other witnesses



of the last scene i.e. Ashok (PW-5) and Vijender (PW-6) are concerned, it may be noted that the two witnesses have turned hostile and have not supported the case of the prosecution. Ashok (PW-5), in his examination-in-chief itself stated that he saw three persons eating and drinking in the jungle in front of Okhla head but could not see their faces due to darkness.

12. The other piece of evidence relied upon by the prosecution is the recovery of a wooden stick at the instance of Rakesh pursuant to his disclosure statement vide Ex.PW17/G. However, there is no opinion of the postmortem doctor that the 21 injuries caused to the deceased were by the said stick and hence, the recovery of the said stick at the instance of Rakesh is meaningless and is not connected with the offence. Further, the wooden stick was recovered after a period of seven months' on 16th October, 2012.

13. It is well settled principle of law as laid down by the Hon'ble Supreme Court in Sharad Birdhichand Sarda vs. State of Maharashtra, 1984 (4) SCC 116 that in a case of circumstantial evidence, the chain of circumstances should be complete and each of the circumstance should point towards the guilt of the accused and in case, there is a break in the chain, the benefit of that is to be given to the accused. Thus neither the recovery of the weapon of offence from Rakesh is connected to the offence and the recovery of the dead body of Yakoob at the instance of Shiv Kumar is also not established from the prosecution evidence as the DD Entry which informed of the recovery of dead body and the evidence at the spot does not show that it was at the instance of Shiv Kumar that the dead body was recovered. There being over writing in the application in the details in relation to the application filed for conduct of the post mortem, the only evidence left with the prosecution is the statement of the Akbar who claims himself to be the



last seen witness having seen the accused with the deceased while he dropped Shiv Kumar at the spot. This statement of Akbar can also not be relied upon for the reason as admitted by Akbar and also stated by the investigating officer, the statement was recorded after the period of two and a half months after the incident and from his cross-examination, it is clear that he was not aware of any other detail for the date of 19th March, 2012 except that he saw Shiv Kumar and Shiv Kumar told him that he was meeting Rakesh and Yakoob for a party.

14. Considering the nature of deposition of Akbar, his statement cannot be relied upon and cannot be the sole basis of conviction of the two respondents as rightly held by the learned Additional Sessions Judge.

15. Hence, this Court finds no infirmity in the impugned judgment dated 30th January, 2018 passed by the learned ASJ acquitting the two respondents. The appeal is accordingly dismissed. The two respondents, who have been arrested pursuant to the non-bailable warrants be released forthwith by the Superintendent, Tihar Jail, if not required in any other case.

16. Copy of this order be sent to the Superintendent, Tihar Jail by the Registry for compliance updation of record.

17. Order be uploaded on the website of this Court.

(MUKTA GUPTA)
JUDGE

(MINI PUSHKARNA)
JUDGE

MAY 20, 2022
‘pb’/ ‘ga’