



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

% Pronounced on: September 2, 2022

+ **CRL.A. 219/2016**

RAHUL YADAV

..... Appellant

Represented by: Mr. K.K. Manan, Sr. Adv. with Mr. Ajit Singh, Ms. Komal Vashisht, Ms. Udit Bali, Mr. Rahul Gautam, Advs.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr. Tarang Srivastava, APP for State with Manoj Kumar, PS Subhash Place.

+ **CRL.A. 369/2016**

DEEPAK @ KOKI

..... Appellant

Represented by: Mr. Kanhaiya Singhal, Ms. Priyal Garg, Ms. Anisha Agarwal, Mr. Prasana, Mr. Chetan Bhardwaj, Mr. Udit Bakshi, Mr. Ajay Kumar, Advs.

versus

STATE

..... Respondent

Represented by: Mr. Tarang Srivastava, APP for State with Manoj Kumar, PS Subhash Place.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

1. By the two appeals the appellants, challenge the common impugned judgment dated 21st January, 2016 convicting them for offence punishable under Section 302/34 IPC and the order on sentence dated 28th January,



2016 directing them to undergo imprisonment for life and to pay a fine of ₹50,000/- each in default whereof to undergo imprisonment for 10 months.

2. Learned Senior counsel appearing on behalf of Rahul Yadav contends that the learned Trial Court has convicted the appellant by shifting the burden of proof on the appellant, contrary to the law. As per the prosecution case, the injured Arvind who finally succumbed to injuries was removed from the house of the appellant and at best the appellant owes an explanation on that count in respect of the facts especially within his knowledge as per Section 106 of the Evidence Act, however for the rest of the evidence, the prosecution has to stand on its own legs and prove its case beyond reasonable doubt. The impugned judgment is self-contradictory. The case of the prosecution is based on the purported dying declaration made by the deceased to his father Ashok Kumar and his friend Pramod who appeared in the witness box as PW-2 and PW-5 respectively. However, the evidence on record clearly shows that the deceased was not in a situation to make any statement much less a dying declaration. The father of the deceased himself stated that he received a phone call from SI Vijay Dahiya stating that his son Arvind had been apprehended and he should come otherwise he will be beaten. Further, the witnesses have clearly stated that even prior to the incident dated 20th April, 2014 family members of the appellant had gone to the house of the deceased on 14th April, 2014 to make him understand that the deceased should not harass the sister of appellant Rahul. Further, even at the time of alleged incident on 20th April, 2014 it has come on record that number of people collected who were beating the deceased and the mother of the appellant and appellant were asking them not to beat him. There is no evidence on record that the two appellants herein shared a common intention



to kill or cause injuries to the deceased so as to cause his death. Even as per the case of the prosecution it was Arvind who entered the house of the appellant to harass his sister and in such a situation it is not uncommon that people of the locality gather so as to save the girl from harassment and in the process if certain people from the public or neighbours assaulted the deceased, the appellants cannot be held liable. There are glaring contradictions in the statements of the witnesses. FIR has been lodged after gross delay of more than one day on the statement of SI Vijay Kumar who lodged the concocted FIR to save himself. Material witnesses like the sister and mother of the appellant Rahul, Dr. M.K. Kaushal the CMO of Bhagwan Mahavir Hospital who first attended the deceased were not examined. Material medical documents including the MLC have been tampered with and not produced before the Court. The post-mortem Doctor has gone overboard to help the real accused i.e. the Police Officers who gave beatings to the deceased and to cover up implicated the two appellants. Further, the so-called recovery of alleged weapon of offence danda from the house cannot also be considered for the reason it was made after four days of the incident and the blood grouping on the same could not be ascertained due to no reaction and degeneration of the specific antigens. In the alternative, it is contended that even if this Court relies upon the so-called dying declaration made to Ashok Kumar and Pramod, at best an offence under Section 326 IPC is made out and the appellant being in custody for the more than 9 years, he be released on the period already undergone.

3. Learned counsel for the Appellant Deepak @ Koki contends that even as per the evidence of prosecution Deepak @ Koki was not present at the spot and has been falsely implicated. The call detail records produced by



the prosecution itself prove that after Rahul made a call to the appellant informing of Arvind coming to their house and harassing his sister, the appellant made a call to Sunil/ PW-10 who reached the spot. The fact that appellant did not go to the house of Rahul is evident from his mobile phone locations. Further, the wireless log registers show the manner in which manipulations have been carried out in the case. The FIR is anti-timed. Despite the alleged incident having taken place at around 2.30 PM and the PCR call having been made at 2.48 PM on 20th April, 2014 a concocted FIR was registered purportedly at 9.20 AM on 21st April, 2014 after Arvind was declared dead at 9.30 AM on 21st April, 2014 on the statement of SI Vijay Yadav. Though in the FIR the complainant SI Vijay Yadav stated that he did not find any eye-witness, however the statements of the father and friend of the deceased and other witnesses clearly showed that appellant Rahul was present at the hospital beside other people. Learned counsel for the appellant Deepak @ Koki has also handed-over a time-line chart to show the manner in which concoction has been carried out and states that all the witnesses of the PCR have also not been examined as also the Doctors, which would show the manipulation carried out by the Police in the case. In the alternative, Deepak having undergone more than eight years imprisonment, he be released on the period already undergone.

4. Learned APP for the State contends that there is no unexplained delay in registration of the FIR. Since the deceased was injured at the house of the appellant Rahul it was for him to explain as to how the deceased got injured in terms of Section 106 of the Indian Evidence Act. The post-mortem report clearly shows that fatal injuries on the vital parts of the body of Arvind were inflicted. The weapon of offence has been recovered at the instance of



appellant Rahul and the blood thereon tallies with the blood of the deceased. Arvind made a dying declaration to his father as also the friend and in this regard Dr. Prabhat stated that when the injured reached the hospital he was conscious and oriented. Subsequent declaration of unfit for statement would not belie the dying declaration made by Arvind to his father and friend. In view of the evidence proved by the prosecution in the form of dying declaration and other circumstantial evidence, the prosecution has been able to prove beyond reasonable doubt the offence punishable under Section 302/34 IPC having been committed by the two appellants.

5. FIR No. 388/2014 was registered at PS Subhash Place at 9.20 AM under Section 308 IPC pursuant to a rukka received at 9.00 A.M. which was recorded vide DD No. 33A and thereafter converted to 302 IPC on the information of death of Arvind received at 9.30 AM on 20th April, 2014. The above-noted FIR was registered on the statement of SI Vijay Kumar stating that on 20th April, 2014 on receipt of a call he reached WZ-174 Shakur Pur Gaon where he found a man aged about 30 years was severely wounded and not in a condition to speak nor were there any witnesses around. He took the wounded to Bhagwan Mahavir Hospital with the help of PCR where MLC No. 1259/14 was prepared for the injured Arvind, S/o Ashok Kumar, R/o Mundka. On the MLC which during the course of trial was exhibited as Ex.PW-1/A the Doctor remarked “*allegedly beaten up lathis as per patient, L/E bruise over mid forehead & Lt forehead, Lt side of cheek, bruise and blackening over back and wrote the patient was unfit for statement*”. At the hospital too there were no eye-witnesses. DD No. 33A was kept in abeyance since the injured was unfit for statement. Later it was learnt that he has been shifted to DDU Hospital. Attempts to get his



statement there also failed as the CMO said he was unfit to give the statement. There too no eye-witnesses were to be seen. Thus, the above-noted FIR was registered on the basis of the MLC for offence punishable under Section 308 IPC.

6. SI Vijay Kumar appeared in the witness box as PW-15 and reiterated what he stated in the rukka. He, however, also stated that at the spot he met the mother and sister and made enquiries from them when it was informed that despite the sister of the appellant not wanting to proceed with the deceased as he was already married, the deceased kept approaching her and thus her relatives had gone to the house of Arvind to make him understand. The Court thus asked him a question as to whether he recorded the statement of the mother and sister of Rahul at any stage, to which SI Vijay Kumar stated that he only made inquiries from her and did not make her a prosecution witness and thus the Court noted that no hearsay evidence be recorded. In his deposition this witness stated that he moved an application at the DDU Hospital, however the Doctor at DDU Hospital also claimed that the injured was unfit for statement and thus the DD No. 33A was kept pending and on the next date with the discussion of the senior officers FIR under Section 308 IPC was registered. He stated that he called the crime team and inspected the spot. He further stated that on 24th April, 2014 on a secret information he along with Insp. Om Dutt and Ct. Rameshwar reached Bhardwaj Chowk and at the instance of secret informer apprehended Rahul Yadav who was interrogated and taken to his house where the quarrel occurred and pointing out memos and search memos were recorded and his mobile phone was also recovered. This witness thereafter clarified that at Bhardwaj Chowk only the informer met and at the instance of informer they



went to the house of the appellant from where he was arrested. He stated about the recovery of the lathi at the instance of the appellant Rahul which was seized and converted into a pullanda and that next day morning he arrested Deepak @ Koki who got recovered his mobile phone on which he received the phone call.

7. On perusal of the entire record it would be evident that the testimony of this witness SI Vijay has several gapping loopholes which seriously dent the case of the prosecution.

8. A perusal of the call records of appellant Rahul's mobile No. 955524516 to appellant Deepak's mobile No. 9810830930 would show that call was made by Rahul to Deepak at 1431 hours on 20th April, 2014 followed by a call from Deepak to Rahul at 1432 hours. Thereafter Deepak called Sunil at 1443 hours. As per Sunil who appeared in the witness box as PW-10, he went to the spot on receipt of call from Deepak and from there made the call to 100 number at 1448 hours. Thus, the first call which is received at PCR and the Police Station was from the phone of Sunil/ PW-10 and recorded vide DD No. 33A at 2.55 PM at PS Subhash Place which notes that at house No. WZ-175, Shakur Pur village quarrel is going on, DD has been handed over to SI Vijay Kumar and informed on phone to take necessary action. The wireless logs of the PCR would reveal that on reaching the spot the PCR/ CMD-27 informed back that it had received the call, reached the spot and reported "*Rahul ke ghar mai ak Arvind naam ka ladka aaya hai jo Rahul ki sister ke..... Kuchh nashili cheez kha rakhi hai use lekar sath lekar Bhagwan Mahavir hospital le ja rahe hain.*" Further the wireless log register entries shows "*sister ka peechha karte hue unke ghar mai aay gya jo jabardasti bat karna chah raha tha etc.*" At 3.20



PM another wireless message is flashed which says “*Local Police Constable Kamlesh has reached. Injured wanted to ease himself*”. Then it is stated that at 3.30 PM “*injured has eased himself*”. At 3.40 PM the information released is that “*injured has been shifted to hospital*”. The MLC Ex.PW-1/A notes admission of Arvind S/o Ashok Kumar R/o Mundka, Delhi brought by C-27 PCR at 4.10 PM on 20th April, 2014. Thus from wireless logs, it is evident that the deceased was taken away from the house of appellant around 3.20 PM and reached Bhagwan Mahavir Hospital at around 4.10 PM.

9. It may be further noted that the MLC Ex.PW-1/A has noting of two Doctors one being Dr. M.K. Kaushal and the other being Dr. Prabhat. Dr. M.K. Kaushal though cited as a prosecution witness was not examined nor any witness was examined to prove the handwriting of the endorsement by Dr. M.K. Kaushal. The notings of Dr. M.K. Kaushal “*alleged history of assault? Head injury? Abnormal gate, altered behaviour, vital stable, complain of nausea, vomiting and he referred the patient to SR Surgery*”, have been partly scored off.

10. Dr. Prabhat who was a Senior Resident (Surgery) appeared in the witness box as PW-1 and stated that on 20th April, 2014 he was posted in casualty of Bhagwan Mahavir Hospital. On that day, injured Arvind aged 30 years was brought in the casualty with alleged history of physical assault of being beaten by lathi, as stated by the patient. The patient was medically examined by Dr. M.K. Kaushal, CMO and was referred to Surgery Department for further management and treatment. After that the witness examined the injured and made a note on the MLC from point A to A1 and also signed the same at point X. He then exhibited the MLC as Ex.PW-1/A.



He further stated that as the patient had received head injury and the CT scan was not available in the said hospital, the patient was referred to a higher centre for NCCT brain and further treatment and management. He stated that as per his examination, there was no history of Loss of Consciousness, ENT bleed, vomiting, seizure, pupil was bilateral normal and reacting to light. The patient was conscious and oriented, obeying all commands. He further stated that on local examination, bruise over mid forehead and left forehead and left side of cheek was found. Bruise and blackening over back was also found. In cross-examination he stated that he examined the patient at 4.10 PM and it would have taken him 10 minutes for writing his observations and referring the case to higher centre. However, he could not state as to when the patient was actually shifted for higher centre. He was confronted with the endorsement made by the CMO Dr. M.K. Kaushal, where he noted not fit for statement, to which he stated that the same was not prepared in his presence.

11. However, examination of Dr. Anuj Tripathi/PW-17 who was a Junior Resident doctor at DDU Hospital and exhibited the medical certificate as Ex.PW-17/A and the death report as Ex.PW-17/B would show that material facts have been concealed. Dr. Anuj Tripathi stated that Dr. Vikas who appeared as PW-13 was also with him at that time. CPR was done over the patient and DC shock was also given. Since no ECG activity was noticed, the deceased was declared dead on 21st April, 2014 at 9.30 AM and the cause of death was Cardio Pulmonary arrest.

12. Dr. Vikas Sharma who appeared as PW-13 stated that on 20th April, 2014 he was posted in the Neuro Surgery Department of DDU Hospital and received a patient named Arvind 30 years in the casualty with GCS E1Vt



M1 and pupil bilateral dilated. The patient was managed in casualty and DC shock was given. The patient was then referred to Neuro Surgery Ward and the patient expired on 21st April, 2014 at 9.30 AM and that he prepared the death summary of the patient.

13. The post-mortem of Arvind was conducted by Dr. Komal Singh at the DDU Hospital who appeared as PW-9 and on examination of the deceased, following ante mortem external injuries were found:

- “1. Abrasion on the left side of forehead of size 4 cm x 1 cm, obliquely placed linear in shape underneath of it has presence of clotted blood.*
- 2. Periorbital oedema on left side underneath of it has presence of clotted blood.*
- 3. On left lateral side near angle of mouth over lower lip there was bruise of size 2.5 cm x 1 cm, underneath of it has presence of clotted blood.*
- 4. Linear parallel rail line pattern abrasion present on the outer surface of left elbow about 7 cm x 2.8 cm in size, underneath of it has presence of clotted blood.*
- 5. On the left lateral side of left leg linear parallel rail line pattern bruise present, underneath of it has presence of clotted blood.*
- 6. Bruise/contusion present over the supra pubic area on left side spreading in area of 4 cm x 3 cm in size.*
- 7. Scattered small size abrasion present over the upper surface of right supra scapular area in an area of size 7 cm x 5 cm, clotted blood present around it.*
- 8. 1 nail mark present on the posterior auricular area.”*

14. As per the post-mortem report, the cause of death was due to multiple injuries to the multiple vital organs of the body caused by the forcible blunt impact directly made over the body of the deceased. All injuries together



were sufficient to cause death in ordinary course of nature and the manner of death was homicide. All the injuries were antemortem and were of the same duration. The post-mortem report was exhibited as Ex.PW-9/A. The witness also rendered a subsequent opinion regarding the weapon of offence i.e. bamboo stick and opined that external injury No. 4, 5 & 6 could have been inflicted by the said bamboo stick. This witness in cross-examination was also suggested that the witness has deliberately given her observations in the brief history of post-mortem report that the patient was fit for statement and conscious at the instance of the investigating officer.

15. In the light of the evidence as noted above, the following circumstances are required to be analysed:

- i. Unexplained delay in registration of the FIR.
- ii. Presence of Deepak at the spot.
- iii. Dying declaration.
- iv. Evidence beside the dying declaration that the appellants assaulted the deceased and if yes what injury was caused by the appellants.
- v. Non-examination of material witnesses including Dr. M.K. Kaushal”.

Unexplained delay in registration of FIR:

16. Even as per the case of the prosecution, the alleged incident took place prior to the recording of DD No. 33A at 2.55 PM on 20th April, 2014. The said DD entry was marked to SI Vijay Kumar who reached the spot. The PCR officials also reached the spot. However, the FIR was registered under Section 308 IPC on 21st April, 2014 at 9.20 AM and Arvind passed away at 9.30 AM on 21st April, 2014. SI Vijay Kumar to whom the DD No.33A was marked, and on whose statement the FIR was registered, appeared as PW-15 and stated that when he reached the third floor of House



No. WZ-174, village Shakur Pur, he found one person aged about 30 years in an injured condition who was vomiting. The said person was sent to Bhagwan Mahavir Hospital through PCR officials. He admitted that at the spot mother and sister of the appellant Rahul, residents of the said plot met him. He made inquiries from them, however did not record their statement. On a Court question SI Vijay Kumar clearly stated that he did not record the statement of the sister of the appellant Rahul, only made inquiries from her and did not cite her as a prosecution witness. According to this witness since he did not find any eye-witness at the hospital and the injured was declared unfit for statement at Bhagwan Mahavir Hospital and thereafter at DDU Hospital and as no eye-witness was available, he did not register the FIR, but after discussion of the matter with the senior officers decided to register the FIR under Section 308 IPC keeping in mind the condition of the injured. The explanation of SI Vijay Kumar that he found no witness is belied by his own version when he stated that he met the mother and sister of Rahul, resident of the said plot at the place of incident. Ashok Kumar (PW-2) father of the deceased also stated that Rahul was present at that time even at the Bhagwan Mahavir Hospital. Further, though injured was declared unfit for statement by Dr. M.K. Kaushal who was not examined as a witness, however Dr. Prabhat who examined the injured after Dr. M.K. Kaushal noted that Arvind was conscious, oriented and responding to command. The FIR was registered at 9.20 AM and according to SI Vijay Kumar he received information at 9.30 AM on 21st April, 2014 that Arvind has passed away. It is thus evident that DD No. 33A was kept pending by SI Vijay Kumar and only on receipt of information of the death of Arvind he



got registered FIR on his own statement by anti-timing it for a few minutes under Section 308 IPC and then converting it to one under Section 302 IPC.

Presence of Deepak @ Koki at the spot:

17. Stand of Deepak @ Koki in the suggestions given to the witnesses as also in his statement under Section 313 Cr.P.C. including the supplementary statement was that his name was Deepak @ Deepu and he is not known by the name Koki at all. He has been falsely implicated in the case. He further stated that after he received a call from Rahul he made a call to Sunil Kumar Yadav/ PW-10 on his phone informing him that Rahul had made a call to the effect that one person was standing outside the house of Rahul and was abusing and thus Deepak asked Sunil Kumar Yadav to go to the house of Rahul claiming that Deepak could not go to the house of Rahul as his father would not allow him. This version of Deepak is duly supported by the evidence of prosecution witness Sunil Kumar Yadav as also the call detail records produced by the prosecution which have been totally ignored by the learned Trial Court.

18. Sunil Kumar Yadav who appeared in the witness box as PW-10 stated that on 20th April, 2014 at about 2.45 noon he received a call from Deepak, o whom he knew being a resident of the locality stating that he had received a call from Rahul. Sunil Kumar knew Rahul as well. Deepak told him that Rahul had informed him that one person was standing outside his house and was abusing and thus Sunil should go to the house of Rahul as Deepak was unable to go to the house of Rahul as his father would not allow. When Sunil reached the street outside the house of Rahul, he saw many people outside the house beating up one person. Mother of Rahul was standing in the balcony of her house and shouting not to beat that person. In the



meanwhile Rahul also came there. Rahul told Sunil to make a call to the Police by dialing 100 number and in the meantime Rahul would try to rescue that person. Sunil Kumar made a call to the Police and both Sunil Kumar and Rahul tried to save that person and took him inside the house of Rahul. Thereafter, Sunil received a call from Police to ascertain the location, followed by two Police officials coming to the house of Rahul. Those two PCR officials wanted to take away the boy whom they had rescued but the boy was not willing to go without one girl Arti. He was not sure perhaps that girl was sister of Rahul. That person was in a drunken state and those two PCR officials gave him danda blows as he was abusing them also. Then he was taken by those two Police officials. Though, learned APP cross-examined this witness, however nothing could be elicited which could discredit the version of this witness as noted above.

19. Further, version of this witness Sunil and the defence of Deepak that he had not gone to the place of incident is corroborated by the call detail records. From the call details of Rahul, Deepak and Sunil exhibited vide Ex.PW-22/B and PW-23/B it is evident that Rahul made a call to Deepak at 14.31.16 hours followed by a call made from Deepak to Rahul at 14.32.48 hours followed by Deepak making a call to Sunil at 14.43.31 hours. Thereafter, Sunil made a PCR call at 2.48 PM resulting in the registration of DD No. 33A at 2.55 PM at Police Station Subhash Place. Thus the testimony of Sunil Kumar Yadav and call records exhibited by the prosecution prove that it was not Deepak but Sunil who reached the spot. Thus from the prosecution evidence itself it is proved that Deepak was not at the place of incident and rather Sunil had reached the place of incident.



Dying declarations made by the deceased to his father Ashok Kumar/ PW-2 and friend Pramod/ PW-5:

20. Case of the prosecution is that after Arvind was taken to the hospital and was found conscious and oriented, he informed his father Ashok Kumar and friend Pramod that he had been beaten by Ramesh, Deepak who was known as Koki and Rahul and that his son did not know the names of the other assailants. Similarly, Pramod also stated that Arvind was in emergency on the bed and on seeing his father he got up and sat on the bed. When Ashok uncle asked him as to what has happened he told him that he was in some pain and would tell a little later. When his father asked him where he received injuries, he shook his head and responded by indication that he was feeling acute pain in abdomen. When Ashok uncle asked him as to how incident had happened and who had done the same, he told that 6 – 7 people had collectively beaten him. Ashok uncle then asked the name of those persons to which he answered that he had been beaten inside the house of one Rahul at Shakur Pur and the door was bolted from inside. He did not know the name of the persons but knew that one person was Rahul and Rahul was addressing other person as Koki and the third person as Ramesh. Names of the rest of the persons he did not know.

21. It may be noted that despite the claim of Ashok Kumar and Pramod being that at Bhagwan Mahavir Hospital while Arvind was in the emergency he made the dying declaration; the claim of SI Vijay Kumar while recording the FIR on the next day was that no eye-witness was available and statement of the injured could not be recorded as he was not fit for statement. Further all these facts were not noted in the FIR including the fact that the injured made dying declaration of these witnesses. Further, Ashok Kumar/ PW-2 in



his cross-examination stated that *“SI Vijay Dahiya met me during night hours in DDU Hospital. I did not disclose the history and name of the assailants to SI Vijay Dahiya. I did not make any call myself to the Police from DDU Hospital. Vol. My other relatives might have made the call to the police. The mobile of my son remained with me after the same was handed over to me at the gate of Bhagwan Mahavir Hospital”*.

22. Further considering the nature of injuries and the endorsements on the MLC Ex.PW-1/A, as noted above it is evident that Arvind was not in a fit state to make the statement. Arvind was examined in Bhagwan Mahavir Hospital at 4.10 PM on 20th April, 2014 and the first endorsement was made by the CMO Dr. M.K. Kaushal whose notings had cuttings, however it was noted *“alleged history of assault? Head injury? abnormal gate, altered behaviour, vital stable, complain of nausea, vomiting and he referred the patient to SR Surgery”*. In the same handwriting it is noted patient unfit for statement, though no time when the patient was declared unfit for statement has been noted. Though Dr. M.K. Kaushal was cited as a witness, however he was not produced in the witness box despite repeated adjournments.

23. The only doctor to prove the MLC Ex.PW-1/A prepared at Bhagwan Mahavir Hospital was Dr. Prabhat who categorically stated that initially the patient was examined by Dr. M.K. Kaushal, CMO whereafter he was referred to Surgery Department and thereafter he examined the injured and made the notings from portion A to A-1 and signed the same at point X. According to this doctor there was no history of loss of consciousness, ENT bleeding, vomiting, seizure, pupils were reacting normal, patient was conscious, oriented obeying all commands, his general condition was stable. He noted bruises over mid forehead, left forehead, left forehead and left side



of cheek and bruise and blackening over the back and administering him injections, referred him to the higher centre for NCCT brain. Apparently these notings of Dr. Prabhat are incorrect for the reason repeatedly witnesses including the Police officials stated that Arvind was vomiting and thus to note that there was no history of vomiting is wholly incorrect. Immediately Arvind was referred to higher centre by Dr. Prabhat and the injured was taken to DDU Hospital he was admitted to DDU Hospital where he died at 9.30 AM on 21st April, 2014.

24. Dr. Vikas Sharma who was in the casualty on 20th April, 2014 stated that Arvind 30 years came to the casualty of DDU Hospital with GCS E1,VT, M1 and pupil bilateral dilated. They tried to manage him in casualty and gave DC shock. Thereafter he was referred to Neuro Surgery ward where he died on 21st April, 2014 and his death summary was prepared.

25. Dr. Anuj Tripathi who was a Junior Resident at DDU appeared and exhibited the medical certificate form Ex.PW-17/A issued from DDU Hospital and the death report Ex.PW-17/B. While he was being examined, he stated that cause of death was cardio pulmonary arrest and that CPR was done and DC shock was given to the patient. However since no ECG activity was noticed the patient was declared dead on 21st April, 2014 at 9.30 AM. When learned APP put him a question in relation to the post-mortem report, he stated that he could not comment about post-mortem report. However the patient had been admitted with multiple injuries and they tried to revive him but his heart stopped functioning and thus cause of death was given as cardio pulmonary arrest. In cross-examination this witness stated that he did not know when the patient was admitted in DDU Hospital as he was not posted in the casualty. The GCS index of the patient was given as



E1,VT, M1 and there was no spare bed in the ICU. They were called later and they tried to revive him but they could not do so.

26. It is thus evident that after Dr.Prabhat referred the injured to a higher centre for NCCT brain and the injured when reached the casualty of DDU hospital on 20th April 2014 his pupils were dilated. He was tried to be managed in casualty by giving DC shocks and then referred to neurosurgery ward. This condition of the injured is in consonance with the medical findings of Dr.M.K.Kaushal who noted altered sensorium and patient unfit for statement and contrary to the findings of Dr.Prabhat.

27. At this stage it would be relevant to note testimony of SI Vijay Kumar/PW-15 who reached the spot on receiving DD No. 33A and was the informant on whose statement FIR No. 388/14 was registered at PS Subhash Place. SI Vijay Kuamr stated that on 20th April, 2014 on receipt of information through telephone that a quarrel had taken place at WZ-174, Village Shakur Pur, he along with Constable Rameshwar reached third floor of the said house where one person aged 30 years was found in the injured condition who was vomiting. The said person was sent to Bhagwan Mahavir Hospital through PCR officials. At the spot Kanta and Arti resident of the said plot met them. At the spot Arti told her that despite the fact that she has stopped talking to Arvind as he was already married, Arvind kept on approaching her. Her relatives also tried to make him understand and went to his house but did not deter. This witness categorically stated that he went to the hospital, collected the MLC, where the injured was declared unfit for statement and as no eye-witness was available despite his visit to even DDU Hospital and the injured was still unfit, he could not record either the statement of injured or any eye witness. In cross-examination this witness



stated that father and other relatives of the injured were present at DDU Hospital, however they did not make any statement. It is thus evident from the testimony of SI Vijay Kumar that Arvind had been declared unfit for statement and his statement could not be recorded and despite the said fact, subsequently father Ashok Kumar and Pramod stated that Arvind informed him that he was beaten by Rahul, Koki and Ramesh no such information was given to SI Vijay Kumar and thus the so-called oral dying declaration made to Ashok Kumar and Pramod cannot be relied to convict the appellants.

Evidence beside dying declaration:

28. Ashok Kumar, father of the deceased stated that on 20th April, 2014 he received a call from Police Officer Vijay Dahiya informing that they had apprehended his son and that if he did not come they would beat him. Thereafter he was asked to reach Bhagwan Mahavir Hospital and thus he called Arvind's friend Pramod and both of them went to the hospital where they were stopped by 6 – 7 persons including Rahul. He saw Arvind injured on forehead, chest and back. He further stated that the MLC Ex.PW-1/A was prepared at his instance but not in his presence. Version of Ashok Kumar that he received a call from Vijay Dahiya is evident from the call records of deceased and Ashok Kumar where a call has been made from the mobile phone of the deceased to his father at 2.55 PM.

29. It is thus evident that at 2.55 PM when the call was made by the deceased to his father on which SI Vijay Kumar spoke, the Police had reached the spot and the deceased was in their custody and SI Vijay Kumar had threatened the father of the deceased that if he did not come they will beat his son. Further it has come in the testimony of other witnesses



including Sunil Kumar Yadav as well that besides Rahul there were other people also. There is no material on record to show that the fatal injuries were inflicted by Rahul.

30. The only other evidence relied upon by the prosecution to convict Rahul is the recovery of the weapon of offence i.e. danda which was blood stained from the house of Rahul on 24th April, 2014. It is highly improbable that when the PCR officials and the local Police including SI Vijay Kumar had reached the spot and saw him wounded, they took Arvind and Rahul to the hospital, they did not see the danda in the house and the same could only be discovered pursuant to the disclosure of Rahul after four days on 24th April, 2014. As per the FSL report the blood on the danda gave no reaction hence it cannot be said that the danda was smeared with the blood of the deceased. Further even as per the post mortem Doctor PW-9, out of eight injuries, only three injuries i.e. injuries No. 4, 5 and 6 were possible by the danda. Further, since there were number of people in the house on 20th April, 2014 it cannot be said that the danda was purportedly concealed by Rahul at the said place in the house.

31. Learned APP for the State relies upon Section 106 of the Evidence Act to contend that since the injuries were caused to the deceased in the house of the appellant Rahul, he is required to explain the same. This contention cannot be accepted as the version of the other witnesses was that there were other people also around besides Rahul including his mother, sister, Sunil Kumar and neighbours. The onus under Section 106 of the Evidence Act could be shifted to appellant Rahul only if he was in exclusive possession of the house at the relevant time to attribute fact as to how injuries were caused to the deceased were especially in his knowledge.



32. Thus, no cogent evidence has been led by the prosecution to prove that the injuries were caused to the deceased by the appellant Rahul giving danda blows. The prosecution having not proved its case beyond reasonable doubt against Rahul Yadav besides the presence of Deepak @ Koki not having been proved at the spot, the impugned judgment of conviction and order on sentence are set aside. The appellants are acquitted of the charges framed against them.

33. Appeals are accordingly disposed of.

34. Superintendent, Tihar Jail is directed to release the appellants forthwith, if not required in any other case.

35. Copy of the judgment be uploaded on the website of this Court and be also communicated to the Superintendent, Tihar Jail for updation of records, intimation to the appellants and necessary compliance.

(MUKTA GUPTA)
JUDGE

(ANISH DAYAL)
JUDGE

SEPTEMBER 2, 2022
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