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IN THE HIGH COURT OF DELHI AT NEW DELHI

NEUTRAL CITATION NO.: 2022/DHC/002714

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Reserved on: 7th July, 2022

Pronounced on: 21st July, 2022

CRL.A. 328/2017

ANIL KUMAR

..... Appellant

Represented by: Ms. Anjana
Prakash, Sr. Advocate with Anwesh
Madhukar, Ms. Prachi Nirwan, Mr.
Pranjal Shekhar & Mr. Yaseen
Siddiqui, Advocates

Versus

STATE OF NCT OF DELHI

..... Respondent

Represented by: Mr. Tarang
Srivastav, APP for the State with Insp.
Pawan Kumar & SI Sachin, PS Ali
Pur.

CRL.A. 329/2017

AJEET

..... Appellant

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CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL



1. The above captioned appeals impugn the judgment dated 26th December, 2016 whereby the appellants have been convicted for offence punishable under section 302/34 IPC and have been awarded life imprisonment vide order on sentence dated 11th January, 2017 with a fine of Rs.50,000/- and in default, to further undergo simple imprisonment for one year. The fine so realised was directed to be given to the wife and children of the deceased.

The Incident:

2. The facts in brief, as culled out from the documents and Trial Court's Record are as under:

(i) As per the prosecution, 'SM', the wife of the deceased lodged a missing complaint at PS Narela on 14th October, 2013 at 4:30 P.M. that her husband had left home on 12th October, 2013 at about 11:45 AM for his official duty at Patel Nagar but did not return thereafter. On that basis, General Diary Entry No.67B was recorded. On the other hand, on 12th October, 2013, DD No.20A was recorded at PS Alipur that a dead body of an unknown (unidentified) male was lying in the field near Batra Farmhouse with wounds on the neck. Police arrived at the spot and during investigation the dead body was identified as that of the deceased.

(ii) Statement of 'SM', wife of the deceased was recorded who informed the police that her husband was working in a private company at Patel Nagar and appellant No.1 was his friend who was residing in Narela. She further stated that he used to visit their house



and also had some money transactions amongst themselves. A few days back her husband (deceased) had told her that a signed cheque was missing which he later came to know that by way of the said cheque, appellant No.1 had withdrawn a sum of Rs.47,000/- from Axis Bank, Kundli Branch. As per her further statement, the deceased talked to appellant No.1 many times on mobile but the latter was not returning money and they had heated arguments.

(iii) 'SM' further stated that on 12th October, 2013 at about 11:00 AM, deceased along with her went to a temple at Sector A-10. Both the appellants, (whom she identified before the Learned Trial Court) met them while on a red colour Pulsar motorcycle near the petrol pump and spoke to the deceased, and purportedly promised to return money to him. The deceased asked both the appellants to wait there and went back home along with his wife. Thereafter the deceased left home along with a black bag but never returned thereafter. On the same day at about 10:00 PM, the deceased sent an SMS to 'SM' informing her that he was going to Ambala along with his boss.

(iv) Subsequently, both the appellants were arrested and recoveries were made of blood-stained clothes, the red motor cycle and also the weapon of offence i.e., a blood stained 'daav'. While mobile phone (Samsung make, No.8130393049) and a black bag (make 'Rock Polo') were recovered from the possession of appellant No.1, ATM card, Voter I Card and other documents of the deceased were recovered. Call details were also collected according to which appellant No.1 had sent message from the mobile of the deceased to 'SM', the wife of the deceased to mislead her. All these articles were sent for forensic examination to the FSL.



(v) Separate statement of one gentleman KA was recorded who had withdrawn the amount of Rs.47,000/-, on being given the said cheque by appellant No.1 for encashing the same.

(vi) Charge under Section 302/34 IPC and 201/34 IPC was framed against both the accused persons, the appellants herein, to which they pleaded not guilty and claimed trial.

(vii) Prosecution examined 22 witnesses, statements of both the appellants were recorded and the defence examined only one witness during trial.

Submissions by the appellants:

3. Aggrieved by the judgment dated 26th December, 2016 and order on sentence dated 11th January, 2017, both the appellants preferred these appeals and raised the following contentions:

(i) Learned counsel for the appellants contended that there was no eyewitness of the alleged incident and the case was purely based on circumstantial evidence. Circumstantial evidence was in turn based on four primary elements viz. motive, circumstance of last seen, recovery of the weapon and recoveries of the belongings of the deceased. It is contended that none of these circumstances had been proved.

(ii) *Firstly*, as regards motive, PW-6, 'KA' did not support the prosecution version as he stated that the cheque in question was signed by 'SM'; was given to him on 3rd October, 2013 by the deceased himself towards discharge of payment for the goods he had purchased; and that he had encashed the said cheque on 7th October, 2013 itself. As per the learned counsel for the appellants, in light of this testimony, the first core element of 'motive of return of money', as put forth by



the prosecution collapses as ^{NEUTRAL CITATION NO: 2022/DHC/002714} appellant no.1 neither received nor encashed the cheque in question.

(iii) It is the contention of the learned counsel for the appellants that the testimony of 'SM' is full of contradictions as she was not able to tell whether the account from which the cheque was issued, was individual or in the joint name of herself and her deceased husband. She could also not tell if only one signed cheque was missing or how many cheques were missing.

(iv) *Secondly*, as regards the theory of last seen circumstance, the prosecution relied solely on the testimony of 'SM'(PW-8) who neither disclosed in her deposition that the deceased was lastly seen in the company of the appellants nor any such thing finds a mention in the missing complaint lodged by her at PS Narela. It was only during her cross examination that she stated that the deceased left for duty on motor cycle but the said motor cycle has not been recovered or produced. During her cross examination, 'SM' confirmed that she had not stated to the police that her husband met the appellants when he was ostensibly going for duty or that he left for the duty along with any bag. Though she stated that in the missing report she had recorded that her husband had informed her via SMS that he was going to Ambala with his boss, it was actually not so recorded and has been introduced only subsequently by the investigating agency or PW-8.

(v) Contention of learned counsel for the appellants is that the prosecution story suffers from various serious lacunae in as much as the body of the deceased was identified for the first time on 16th October, 2013 at 9:30 AM, as corroborated by the testimonies of PW-8 'SM' and PW-1, brother-in-law of the deceased and PW-7, cousin of



NEUTRAL CITATION NO: 2022/DHG/002714

the deceased whereas admittedly, the arrests were already made on 15th October, 2013 itself when even the identity of the deceased was not known to the police.

(vi) *Thirdly*, as regards issue of recovery, the appellants through their counsel contended that PW-3 who had informed about the dead body was not even made witness to the proceedings at the spot. During cross examination, PW-3 stated that he was not shown any articles allegedly recovered by the police from the spot or from the vicinity from where the dead body was recovered. It is contended that there was some haste by the police to declare that they had solved a murder case in an express manner as is evident from the Press Release dated 15th October, 2013 (Ex. PW-19/DX-A) made by the Additional Commissioner of Police claiming that they have solved a blind brutal murder case. The testimony of PW-3 casts serious aspersions qua the alleged recovery by the police from the place of occurrence.

(vii) While the prosecution stated that the secret informer told the names of both the accused-appellants who were later on arrested on that tip, the press release stated that the appellants were arrested on the basis of statement of deceased's wife. There are other variances in prosecution version and the ones reflected in the press release which cloud the real fact as to when and on what basis the appellants were got arrested.

(viii) Prosecution examined as PW-10 the doctor who conducted post mortem on the body of the deceased and opined that the murder could have been caused by the alleged weapon of offence but the injuries could have been possible "*by any of the crop cutter used for agricultural purposes*". He further stated that there was no blood stain



on the weapon of offence sent to him for examination. Further, PW-12 who was witness for recovery stated that blood was found on both the sides of 'daav'. Moreover, on 11th November, 2013, when the weapon was taken out from the *malkhana*, there was entry in the Register to that effect but there is no entry regarding murder weapon being sent to the FSL. Importantly, no chance prints were taken from the murder weapon and it was recovered after 3 days of the date of incident on 15th October, 2013 and that too at a distance of about 30 steps from the spot from where the dead body was found.

(ix) *Fourthly*, as regards the recovery of belongings of the deceased, there was no independent witness to attest the veracity of the arrest, search and recovery of the articles. The alleged recovery of the mobile phone of the deceased from appellant No.1 is shrouded in mystery since the IMEI and IMSI numbers mentioned on the seizure memo and in CDR of deceased are different and dissimilar, which discrepancy has not been explained by the prosecution. Also, there was overwriting on the seizure memo as well, seemingly to correct it at a later stage. Alleged recovery of the blood-stained clothes from the house of appellants did not return any positive result from FSL of any DNA. The alleged recovery of the articles of the deceased vis-a-vis black bag and his ID cards etc. were never put for TIP or exhibited during trial nor were identified by any witness. As such, neither the alleged recoveries from the spot of occurrence nor the recoveries allegedly at behest of the appellants, inspire confidence.

Submissions by the Prosecution:



4. On the other hand, learned APP has vehemently opposed the contentions of the appellants and controverted them by stating as under:

(i) The prosecution relied upon the last seen circumstance as stated by the wife of the deceased having seen the husband leaving the house, stating that he was going along with the appellants to sort out the issue of return of money. Also the circumstance of money being borrowed and not returned was evident from the fact that Rs.47,000/- had indeed been encashed on presenting the cheque of the deceased and/or his wife. In addition, the prosecution has heavily relied upon the recovery of the effects of the deceased and the murder weapon at the behest of the appellants.

(ii) It is the case of the prosecution that the message was sent from the mobile phone of the deceased to his wife after the murder which explicitly shows involvement of the appellants since the mobile was found from the possession of appellant No.2.

5. Learned counsels for the parties have been heard, Trial Court Record has been perused and written submissions filed by the appellants have been considered.

Analysis:

6. It would be apposite to appreciate the events as they transpired in a chronological sequence, as under:

i. On 12th October, 2013, DD 20A was recorded at 5:20 PM that a dead body of unidentified male was found near Batra Farmhouse, Tajpur Road. In the statement of PW-2 the duty officer, it is duly recorded that PW-20 and PW-18 were deputed to go the spot.



ii. On 12th October, 2013 at about 9:10 PM, pursuant to a *rukka*, FIR No.471/2013 was registered at PS Alipur recording that an unidentified dead body was found with injuries behind the head, left ear and two fingers on the right-hand cut, wearing a brown colour trousers and shoes and that no witness was found at the spot. PW-2 deposed regarding the registration of the FIR.

iii. On 14th October, 2013 at about 4:30 PM, a missing report was lodged with PS Narela at the instance of PW-8 'SM' that her husband had left the residence at 11:45 AM on 12th October, 2013 and had not returned home since.

iv. PW-8 in her testimony stated that on 12th October, 2013 at about 9:45 PM, she had received a message on her mobile allegedly from her husband (the deceased) informing her that he was going to Ambala along with his boss. She waited for her husband to return but his phone was switched off and therefore, she lodged the missing report the next day. However, the names of the appellants do not find a mention in the 'missing report'.

v. On 15th October, 2013, the appellant no.1 was arrested at about 2:00 PM while the appellant no.2 was arrested at about 2:30 PM by PW-19, the ACP. PW-19, testified that he was responsible for the arriving at the spot of the occurrence on 12th October, 2013 and the effects of the deceased and blood samples were seized and sealed and a site plan was prepared. He also stated that he had made arrests of the appellants on the basis of tip of a secret informer. He further deposed that on being interrogated, the appellants admitted to their offence.

vi. Recoveries were made from the appellants including their red motorcycle and thereafter he was led to the house of the appellants



where a black bag was produced by the appellant No. 1 containing mobile phone of the deceased; the appellants then led the police to the place of offence and appellant No.1 produced the alleged blood-stained weapon from behind the bushes which was accordingly seized. Similarly, seizures were made of the effects of the deceased recovered from the house of appellant No.2.

vii. On 16th October, 2013, body of the deceased was identified by PW-1, the brother-in-law of the deceased and PW-7, cousin of the deceased. PW-8 'SM' deposed that she learnt about the death of her husband at about 9:30 AM.

viii. PW-3 who was the first to spot the dead body on 12th October, 2013 and called the PCR, in his cross examination confirmed that he was neither taken to the police station by the police nor the police met him again with regard to investigation of the case. He further confirmed that he was not shown any article, if found by the police from the place of occurrence or the vicinity. Therefore, there is no corroboration of what exactly was recovered by the police from the place of occurrence. All other recoveries were made at the behest of the appellants including the murder weapon which was allegedly found at a distance of 7m from the place of occurrence in an open field that too only on 15th October, 2013, i.e., 3 days after the dead body was recovered and the place which had already been searched by the police party on 12th October, 2013 itself.

ix. As per the testimony of PW-10 the doctor from Department of Forensic Medicine, the weapon handed over for examination had no blood stains and he opined that the injuries on the body of the deceased could have been possible "*by any of the crop cutter used for*



agricultural purposes”. As per the testimony of PW-17, the Assistant Director of FSL, the weapon of offence had rusty brownish blackish stains and the DNA profile of the blood-stained gauze of the deceased did match with the blood found on weapon of offence. However, no finger prints nor chance prints were taken from the weapon.

x. As per the testimony of PW-6 ‘KA’, it is quite evident that the cheque no. 172405 dated 3rd October, 2013 was given to him by deceased towards payment of certain goods and that the cheque was not handed over to him by the appellant No.1. Further testimony of PW-8 with respect to bank account is extremely vague and varying as to whether the account was in sole or in joint names and also as to whether only one blank cheque was missing or entire cheque book was missing.

xi. As per the testimony of PW-8, the wife of the deceased, while she stated that she was accompanied by her husband on 12th October, 2013 at about 11 AM returning from the temple to their home, she did not state that she had seen her husband leaving the house in the company of the appellants. Also, on the issue of message on her mobile allegedly received from the phone of the deceased to the effect that he was going to Ambala, she had not disclosed to the police at the time of filing of the missing report.

xii. As regards the call records, in the analysis provided by the counsels, it is apparent that on the date of offence, the deceased and his colleagues from his employer’s company were talking to each other constantly and were at the same location since a batch of 40 mobile numbers were issued by employer if the deceased as is evident from Ex. PW-5/D4. The last call made by the deceased was at 2:23



PM and thereafter there is no call record till the message at 7:52 PM sent to the mobile of the deceased from his wife 'SM'. However, the appellant No.2 at 2:23 PM was at tower No.10241 (Jai Shankar Nursery, Khampur) and then at village Hamirpur, Narela at 2:27 PM. There is no location for appellant No.1 at 2:23 PM however at 1:40 PM he was in Narela and after that at 3:15 PM he was in Punjabi Colony, Kureni, Delhi. There was no location available for appellant No.2 after 4:19 PM. Interestingly the location of deceased's phone at 9:41 PM when SMS was sent to his mobile phone is the same as of location of his wife's mobile phone. i.e., the same tower number. At the time the message was sent to the mobile of deceased's wife, the location of appellant No.1 was either at Chhawla Village, Delhi or at JJ Colony, Bawana, New Delhi but nowhere near the location of deceased's mobile phone.

Conclusion;

7. On a meticulous examination of record, the evidence and the documents, all the four elements relied upon by the learned Trial Court to establish circumstantial evidence beyond reasonable doubt, i.e., motive, circumstance of last seen, circumstance of recovery of weapon, circumstance of recovery of belongings have not been proved beyond reasonable doubt to sustain a finding of guilt of appellants for *inter alia*, the following reasons:

i) It is quite evident from the timeline that while the incident occurred on 12th October, 2013, the missing report was lodged 2 days later i.e., only on 14th October, 2013 that too without any details (which were later introduced by PW-8 in her testimony). The arrests were made on 15th October, 2013 the day before actual identification of the deceased



on 16th October, 2013. *Ex-facie*, the arrests seem to have been done in serious haste by the investigating team, allegedly upon the statement of PW-8, wife of the deceased.

ii) PW8's statement also does not prove the last seen circumstance since she did not see or witnessed her husband leaving along with appellants while she was at her own house. Merely seeing the two appellants in the market while this witness and her husband were in the market does not qualify as the evidence of last seen, because thereafter the deceased came home and then left ostensibly to go with his boss and PW-8 did not see the deceased going with the appellants at that time.

iii) The testimony with respect to issue of money being owed to her husband by the appellants is also not corroborated (and in fact seriously contradicted) since as per PW-6's testimony, the cheque was encashed on 7th October, 2013 i.e., many days before the deceased went missing and there is no corroborating evidence of any sort whatsoever that any of the appellants had been involved in stealing and /or forging the cheque and/or taking benefit of the money withdrawn.

iv) Belongings of the deceased and the weapon allegedly recovered at the behest of the appellants, is shrouded in suspicion and mystery, particularly since the weapon was discovered purportedly at a distance of 7m from the spot where the body was found and that too from an open field after 3 days of the incident. Further, PW-10 the doctor from Department of Forensic Medicine, testified that the weapon handed over for examination had no blood stains however even though as per PW-17, the Assistant Director of FSL, the weapon of offence had



rusty brownish blackish stains and there was a match with the blood found on weapon of offence with that of the deceased. However, that cannot lead to a conclusion of the appellants being the assailants. Also, no finger prints nor chance prints were taken from the weapon, therefore in absence of that, there would be no forensic evidence to point towards the guilt of the accused.

v) Neither any finger print has been found on the weapon of offence of the appellants nor any DNA has been picked up to match the appellants' from either the weapon or any other clothes of the deceased. Opinion on the weapon given by PW-10, Associate Prof, Department of FSL also confirms that the weapon used for committing the crime of murder could have been any kind of agricultural equipment and not necessarily the weapon which was examined by him.

vi) The recovery of the articles of the deceased were never put up for identification by any witness nor was it corroborated in any manner by any independent witness.

vii) It is also evident from the analysis of the call records that both the appellants and the deceased were not located along the same towers during the period when his wife last saw him around noon on 12th October, 2013 and the evening at about 9:45 PM when she received an SMS on her mobile. In fact, when she received an SMS from the mobile, the deceased's phone was in the same location as that of the wife, but the location of the two appellants at the time was elsewhere.

8. Having arrived at the above conclusions on an appreciation of the evidence, this Court is of the considered opinion that the prosecution has been unable to prove, on the basis of circumstantial



NEUTRAL CITATION NO: 2022/DHC/002714
evidence, beyond reasonable doubt that the offence was committed by the two appellants. The linkages between the evidence presented by the prosecution are weak and cannot sustain a finding of guilt beyond reasonable doubt.

Accordingly, judgment and order of Trial Court dated 26th December, 2016 and order on sentence 11th January, 2017 are set aside. Both these appeals are accordingly disposed and the appellants are acquitted of the charges framed.

9. 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

JULY 21, 2022/sm