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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 20th September, 2023

+ CRL.L.P. 294/2022

STATE

..... Petitioner

Through: Ms. Manjeet Arya, APP for State with
Insp. Ashok Kumar, PS Delhi Cantt.

versus

ARJUN EKKA & ANR.

..... Respondents

Through: Mr. Kamal Sharma, Advocate for R-1
& 2.**CORAM:****HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T** (oral)**CRL.M.A. 12368/2022** (Condonation of delay)

1. The present Application under Section 482 of the Code of Criminal Procedure, 1973 read with Section 5 of the Limitation Act has been filed on behalf of the applicant/petitioner seeking condonation of 10 days' delay in filing the Criminal Leave Appeal.
2. For the reasons and grounds stated in the present application, the application is allowed, the delays of 10 days in filing the Criminal Leave Appeal is condoned.
3. Accordingly, the present application is disposed of.

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4. The present Criminal Leave Petition under Section 378(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C., 1973") has



been filed on behalf of the petitioner/State against the Judgment dated 05.10.2020 of the learned Additional Sessions Judge-03, Patiala House Courts, Delhi, wherein the respondents/accused were acquitted from the charges under Sections 120B/201/302/404 of the Indian Penal Code, 1860 (*hereinafter referred to as "IPC, 1860"*) registered *vide* FIR No. 313/2015 at Police Station Delhi Cantt.

5. The case of the prosecution was that on 20.06.2015, Inspector Ashok Kumar and Constable Sandeep on receiving DD No. 9A, reached V-10, Old Nangal, Delhi Cantt. where they found a male dead body who was later identified as Babu Lal (*hereinafter referred to as "deceased"*), whose throat was found slit by some sharp edged weapon, lying between House No. V-13 Old Nangal, Delhi Cantt. and T-23, Old Nangal, Delhi Cantt. The statement of Santosh, sister of the deceased, present on the scene of crime, was recorded who stated that while she was standing near her shop at about 05:30 A.M., a neighbour informed her about the man lying at the corner of the street. She went there and found that it was her brother, the deceased. She thought that deceased was lying unconscious and was in a drunken state. She with the help of Manmohan and Om Prakash, brought the deceased in front of her house when they noticed a wound on neck of the deceased and the blood oozing out. The Crime Team was called at the spot for inspection and the body was taken to Safderjung Hospital, Delhi. Thereafter, an FIR under Section 302 of IPC, 1860 was registered.

6. During the investigations, it was found that the respondent No. 2/accused-Sumitra, wife of the deceased, had been in continuous contact with the Mobile Nos. 9668240454 and 8455932896.

7. On 25.05.2015, the nephew of the deceased informed that the



respondent No. 2/accused-Sumitra had confessed to him that she had committed the murder of the deceased in connivance with her paramour. Thereafter, the respondent No. 2/accused-Sumitra was arrested. The investigations were done. Subsequently, the respondent No. 1/accused-Arjun Ekka was arrested. The blood stained knife, sofa cover and ring of the deceased were recovered from Sujan Singh Park at the instance of respondent No. 1/Arjun Ekka.

8. On completion of the investigations, the charge sheet was filed against the respondent Nos. 1 and 2. The charges were framed on 02.12.2015 under Sections 120B/302 read with 120B IPC, 1860 and Sections 201 and 404 of IPC, 1860. Both the respondents pleaded not guilty.

9. The prosecution in support of its case examined 28 witnesses in all.

10. The statements of both the respondents/accused were recorded under Section 313 of Cr.P.C., 1973, wherein they claimed that they had been falsely implicated in this case. No evidence in defence was led by both the respondents.

11. The learned Additional Sessions Judge *vide* impugned Judgment dated 05.10.2020 on the appreciation of the facts and corroborative evidence, found that the prosecution was unable to form complete chain of circumstantial evidence. There was a scant direct evidence to prove the chain of events. Though the motive of both the respondents/accused to commit the murder could be gathered from the testimony of PW10/Mukesh, nephew of the deceased, but because of the gaps in the chain of events, the benefit was given to the respondents/accused persons who were acquitted.

12. Aggrieved by the impugned Judgment dated 05.10.2020, the



prosecution has preferred the present Petition seeking Leave to Appeal against the impugned Judgment dated 05.10.2020 passed by the learned Additional Sessions Judge, essentially on four grounds; **firstly**, the extra-judicial confession made by the respondent No. 2/Sumitra to PW10/Mukesh has not been considered in the right perspective. Though PW10/Mukesh had turned hostile still there were admissions in his testimony which establish the commission of crime by the respondents.

13. **Secondly**, the Court did not appreciate that the blood stains on sofa recovered at the instance of the respondent No. 2/Sumitra connecting the commission of offence by her. Though no DNA could be lifted from the alleged blood stains found on sofa cover, but this was of little significance since the recovery of blood stained sofa has been effected at the instance of respondent No. 2/Sumitra.

14. **The third** incriminating evidence was the knife and the sofa cover recovered at the instance of the respondent No. 1/Arjun Ekka. Though no DNA could be lifted from the blood on these articles, but it clearly connected the respondent No. 1 to the offence.

15. **Fourthly**, the learned Additional Sessions Judge has also wrongly discarded the recovery of one ring which the deceased was wearing at the time of his death that was recovered at the instance of respondent No. 1/Arjun Ekka. It was thus, submitted that the acquittal was based on imagined doubts and not on factual matrix and the circumstances coupled with extra-judicial confession, recovery of case property and scientific evidence by way of FSL Report, have not been rightly appreciated.

16. In support its submissions, the State has placed reliance on the decisions in Khujji @ Surender Tiwari vs. State of Madhya Pradesh (1991)



3 SCC 327, Bhagwan Singh vs. State of Haryana AIR 1976 SC 202, wherein it has been held that merely because the prosecution has chosen to treat any witness as hostile and has cross-examined him, does not imply that his testimony must be treated as effaced or washed from the record.

17. For the same proposition, the reliance has been placed by the State on the decisions in Shri Dashrath Singh Chauhan vs. CBI Criminal Appeal No. 447/2001 decided on 20.07.2009 by the Coordinate Bench of this Court, Prithi vs. State of Haryana (2010) 8 SCC 536 SCC and Ramesh Bhai Mohan Bhai vs. State of Gujarat (2011) II SCC III.

18. It is also stated that the evidence of PW23/Dr. Mohit Gupta, Associate Professor, Department of Forensic Medicine and Toxicology, Vardman Mahavir Medical College, Delhi, who conducted the post mortem Ex. PW23/A and opined that the knife recovered at the instance of respondent No. 1, could have been the weapon of offence by which the injuries found on the body of the deceased, could have been caused, which has also not been considered and appreciated by the learned Additional Sessions Judge.

19. The State has also placed reliance on the decision in Kamal vs. State decided on 15.09.2020 by the Coordinate Bench of this Court and Sharad Birdhichand Sarda vs. State of Maharashtra decided by the Hon'ble Apex Court, to argue that once the circumstantial evidence has been established by the prosecution, the accused cannot be acquitted.

20. The reliance has also been placed by the State on the decisions in Vasanta Sampat Dupare vs. State of Maharashtra 2014 SC, Inder Singh & Anr. vs. The State 1978 AIR 1091, State of U.P. vs. Krishna Gopal & Anr. 1988 4 SCC, Yogesh Singh vs. Mahabeer Singh & Ors. Decided on



20.10.2006 by the Hon'ble Supreme Court, State of Karnataka vs. Papanaika 2004 13 SCC 180 and Ram Gopal and Others vs. State decided on 11.02.2015 by the Allahabad High Court

21. **Submissions heard.**

22. The deceased, husband of respondent No. 2/Sumitra, was found dead by his sister, Santosh on 20.06.2015 at 05:30 A.M. on whose statement the police registered the FIR No. 313/2015. The factum of a person found dead in unnatural circumstances i.e., by slitting of his neck and 11 injuries on his body which was confirmed by the Post Mortem Report Ex. PW23/A, was established by the prosecution.

23. The big question that arose was "*who were the culprits*"? There was no direct evidence and the entire case of the prosecution rested on the circumstantial evidence.

24. The first significant fact in the chain of circumstantial evidence sought to be established by the prosecution, was the **motive**.

25. It was the case of the prosecution that respondent No. 2/Sumitra, wife of deceased, was having an extra-marital affair with the respondent No. 1/Arjun Ekka and they both hatched a conspiracy in furtherance of which they killed the deceased on 20.06.2015. The only piece of evidence relied upon by the prosecution was the CDRs of the mobile phones which belonged to both the respondent Nos. 1 and 2. The Mobile No. 83866950745 was proved to be in the name of respondent No. 2/Sumitra from the Customer Application Form Ex. PW12/A. Another Mobile No. 78382081171 was also proved to be in the name of respondent No. 2/Sumitra and its CDRs are Ex. PW12/G. The prosecution further examined PW13/Surender Kumar, Nodal Officer from Bharti Airtel Ltd. to



prove that Mobile No. 9668240454 was in the name of one Garubaru as reflected from the Customer Application Form Ex. PW13/A. The mobile phone in the name of Garubaru was recovered from the possession of respondent No. 1/Arjun Ekka at the time of his arrest and the same was seized *vide* Seizure Memo Ex. PW19/D. The other Mobile No. 8455932896 was also recovered from the personal search of respondent No. 1/Arjun Ekka which was seized *vide* Seizure Memo Ex. Ex. PW13/H. There is no evidence led that the respondent No. 1/Arjun Ekka had been talking to respondent No. 2/Sumitra through this mobile phone. It was the case of the prosecution that the CDRs of these mobile phones clearly reflected that numerous calls were exchanged between the respondent No. 1 and the respondent No. 2 at odd hours and even on the date when the offence was committed. The CDR records were claimed to be the evidence to prove the relationship between the two accused/respondents and their motive for commission of offence.

26. Interestingly, the evidence as produced by the prosecution only established that there were frequent conversations between the two mobile phones as reflected from their respective CDR records, however, as rightly observed by the learned Additional Sessions Judge that even if the case of the prosecution is accepted that there were frequent calls exchanged between these numbers, then the mere frequent calling does not lead to any conclusion of intimate relationship between two accused.

27. The second significant circumstantial evidence relied upon by the prosecution was “*the extra-judicial confession*” allegedly made by the respondent No. 2/Sumitra to PW10/Mukesh, nephew of the deceased. According to the testimony of PW10/Mukesh, in the morning of 20.06.2015



at about 06:00- 06:15 P.M. (sic), the respondent No. 2/Sumitra, wife of his deceased uncle/Babu Lal had held him outside his house to identify the person lying on the street outside her house. He identified the dead body and after post mortem on 21.06.2015 *vide* Memo Ex. PW10/A and Ex. PW10/B, he then also identified the body. PW10/Mukesh received a phone call of Investigating Officer, Sub-Inspector Ram Pratap on 25.06.2015 asking him to reach the Police Station along with the respondent No. 2/Sumitra. He woke her up and talked to her about the incident of death of the deceased and after a long silence, she became perplexed and enquired if anything would happen to her and also told that she was having an affair with a boy and that boy had murdered the deceased. Similar was his statement made before the learned M.M. in his statement under Section 164 Cr.P.C Ex.PW10/C. Pertinently Sh. Mukesh in his statement under Section 161 Cr.P.C. had stated that Smt. Sumitra has stated to him that **she along with that** boy had killed Babulal. However, PW10 deposed differently and was confronted on this aspect in his cross-examination by the prosecution as he had been declared hostile. He denied that any such statement was made by Smt. Sumitra. Further, in his testimony in the Court PW10/Mukesh had disclosed that 15-20 days prior to the death of the deceased who was in a drunk state had told him that “*tumhari chichi ne mera dimag kharab kar rakha hai aur vo bekar aurat hai*”.

28. The witness was cross-examined by the prosecution as he turned hostile, but he denied that the respondent No. 2/Sumitra had ever disclosed to him that her lover murdered the deceased by slitting his throat inside the house. PW10/Mukesh, therefore, denied any extra-judicial confession was made by her to him.



29. The significant aspect to observe is that PW10/Mukesh deposed about the extra-judicial confession of Smt. Sumitra but it cannot be termed as extra-judicial confession of respondent No. 2/Sumitra as she had merely stated that the murder was committed by a boy with whom she had an affair. Even if it is accepted that she told PW10/Mukesh about committing the murder of the deceased by a boy with whom she had an affair, this only is a hearsay and is not an extra-judicial confession as she had nowhere stated that the murder was committed by her or she was involved in any way in the alleged murder of the deceased. The learned Additional Sessions Judge has, therefore, rightly rejected this extra-judicial confession which in any case, was not proved in the evidence by the prosecution.

30. The third circumstantial evidence relied upon by the prosecution was the recovery of sofa cover at the instance of accused/respondent No. 2-Sumitra as well as recovery of sofa covers at the instance of accused/respondent No. 1/Arjun Ekka. A knife was also recovered pursuant to disclosure of statement of the accused/respondent No. 1/Arjun Ekka. While the recovery of these objects pursuant to the disclosure statements may be accepted, but admittedly, the FSL Report stated that the DNA could not be extracted from any of the blood stained objects and there was no evidence whatsoever linking the blood stains found on the sofa covers and knife with that of the deceased. There was no link evidence to connect the knife as the weapon of offence or that the sofa covers had the blood of the deceased.

31. The prosecution had examined PW23/Dr. Mohit Gupta who had given his opinion in the post mortem report that there were 11 injuries which were incised wounds on different parts of the body. He had also opined that the



incised wound on the left side of the neck was sufficient in ordinary course to cause death. In his subsequent opinion, he had stated that the knife allegedly recovered at the instance of respondent No. 1/Arjun Ekka, could have been the weapon to inflict the injuries found on the body of the deceased. Even though the recovery of knife was made pursuant to the disclosure statement of the respondent No. 1/Arjun Ekka and it could have been a weapon that could cause injuries found on the body of the deceased, but it was merely an opinion and in the absence of cogent evidence establishing that knife was the weapon of offence, the opinion of the PW23/Dr. Mohit Gupta cannot be made the basis to conclude that the knife recovered was indeed the weapon of offence.

32. The fourth circumstantial evidence relied upon by the prosecution was the recovery of a ring allegedly belonging to the deceased that was recovered at the instance of the respondent No. 1/Arjun Ekka.

33. Significantly, the ring was allegedly recovered on 01.07.2015, the learned Additional Sessions Judge has rightly observed that if the ring, in fact, was intended to be taken away by the respondent No. 1/Arjun Ekka, it does not appeal for reason that he would take out the ring and then throw it away.

34. We find that the prosecution in its desperation to create some link evidence, has tried to do so by relying upon this alleged recovery of ring which not only is illogical but is also in no way a link evidence connecting the respondent No. 1/Arjun Ekka to the commission of offence.

35. The learned Additional Sessions Judge has also noticed that the said ring which was allegedly recovered, was never subjected to TIP. According to the prosecution, the TIP of the ring was to be done subsequently and a



supplementary Charge Sheet was to be filed, but pertinently, neither the TIP was got done nor the supplementary Charge Sheet was ever filed. The identification of the ring by PW10/Mukesh for the first time in the Court was of little significance as that was the single ring presented to him for identification.

36. The learned Additional Sessions Judge has rightly concluded that the circumstantial evidence relied upon by the prosecution was not sufficient to bring home the offence and consequently, both the respondents were acquitted by giving them the benefit of doubt. We are in full agreement with the observations of the learned Additional Sessions Judge. The prosecution has not been able to show any incongruity in the conclusions drawn in the impugned Judgment dated 05.10.2020 acquitting both the respondents and the prosecution has also not been able to submit any ground on which the Criminal Leave to Appeal can be granted.

37. Accordingly, we find no infirmity in the impugned Judgment dated 05.10.2020 passed by the learned Additional Sessions Judge, the present Criminal Leave Petition seeking leave to appeal against the impugned Judgment dated 05.10.2020 is hereby dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 20, 2023
S.Sharma