
(2010) 05 DEL CK 0049
In the Delhi High Court
Case No : Criminal Appeal 927 of 2008

Brij Kishore and Another	Vs	APPELLANT
State		RESPONDENT

Date of Decision : 10-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27, 65B
Penal Code, 1860 (IPC) — Section 302, 34, 392, 411

Citation : (2010) 05 DEL CK 0049

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Shad Anwar, for the Appellant; M.N. Dudeja, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—On 26.04.2010, noting that the appeal had reached for hearing and learned Counsel had not appeared, Court notice was issued to learned Counsel informing him that the appeal would be listed for hearing today. The notice has been served and learned Counsel as above has appeared and argued the appeal.

2. Vide impugned judgment and order dated 20.09.2008 the appellants have been convicted for the offence punishable u/s 302/392/411/34 IPC.

3. At the outset we express our displeasure at the manner in which the impugned judgment has been written. It is prolix. As a result, the issues which arose have got blurred. We also express our displeasure at the lack of knowledge of the learned Trial Judge, who has ignored the mandate of Section 65B of the Evidence Act while recording evidence and through the testimony of Const. Rajvir PW-14 has exhibited printout details of mobile telephone number 9899545415 as Ex.PW-14/A and Ex.PW-14/B. The learned Trial Judge appears to be totally unaware as to how a document in electronic form has to be proved. It has to be proved either by means of a certificate issued by the person/authority in whose

custody the device in which the document was stored in an electronic form that the printout generated has been through the device and reflects an information stored in electronic form in the ordinary course or through the testimony of the person who generates the printout from the device in which the same is stored. It cannot be exhibited when a police officer tenders it saying that he procured it.

4. It is to the knowledge of this Court that at least 10 programmes have been held at the Judicial Academy in Delhi to impart knowledge to all judicial officers in Delhi as to how electronic record has to be proved and yet we are surprised that the learned Additional Sessions Judge, in the instant case has chosen to act callously.

5. Even in respect of the judgment, we find the judgment taking a roller coaster ride and floating all over without focusing on the issue.

6. As per the charge-sheet filed, the prosecution alleged that deceased Mahender was found dead at around 10:00 AM on 26.04.2006; the place being his House No. 488/36, Omkar Nagar, Tri Nagar, Delhi. His body was found when his brother Prempal went to the house of Mahender and saw him lying dead on the floor. As per the investigation further conducted and as per the charge-sheet, it surfaced that the deceased was having a matrimonial problem with his wife and probably to pay money to her, had agreed to sell his house for a sum of Rs. 6 lacs and had received Rs. 1 Lac as advanced sale consideration. The deceased was last seen in the company of the accused in the evening of 25.04.2006. After the accused were apprehended, they made disclosure statements and Brij Kishore got recovered mobile phone and a wrist watch belonging to the deceased; Dori Lal got recovered a mobile phone belonging to the deceased. Both accused got recovered a pant and shirt each which was found to be stained with human blood of group "B", which was the blood group of deceased.

7. It is apparent that the attempt of the prosecution would have been to prove that the deceased died somewhere in the evening of 25.04.2006 or the intervening night thereafter and he was last seen in the company of accused in the evening of 25.4.2006. Further attempt would be to prove that the two mobile phones which were got recovered, one each from the two accused, belonged to the deceased and that the wrist watch got recovered by one of them belonged to the deceased. It would also have been the attempt of the prosecution to prove that the pant and shirt got recovered by the accused was stained with human blood of the same group as that of the deceased.

8. If this be so, we expected the learned Trial Judge to be focused in writing the decision whether evidence has been led to prove as aforementioned and not to take a roller coaster ride.

9. As recognized by the learned Trial Judge himself in the impugned decision, the prosecution has miserably failed to prove any evidence on record that the accused were last seen with the deceased in the evening of 25.04.2006. Thus, after recording said fact, the learned Trial Judge was expected to proceed to

consider the evidence for proof of the recoveries and the effect thereof.

10. That the scene of the crime is the house of the deceased is not in dispute. That the post-mortem report of the deceased shows a homicidal death and of the kind, making out the offence of murder is also not in dispute. The post-mortem report Ex.PW-21/A authored and proved by Dr. Upender Kishore PW-21 shows that an attempt was made to strangle the deceased and also to smash his skull. There are extensive injuries in the occipital region with brain oedema. There are extensive strangulation injuries on the neck with the thyroid cartilage fractured. Cause of death was opined to be asphyxia as a result of ante mortem strangulation by ligature sufficient to cause death in the ordinary course.

11. 3 police officers, Const. Surender Singh PW-24, ASI Satya Narain PW-25 and ACP R.K. Budhiraja PW-26 then posted as the SHO PS Keshav Puram have deposed to the arrest of the appellants and the recoveries at their instance. Satya Narain Aggarwal PW-15 is an additional witness to depose regarding recoveries against accused Brij Kishore.

12. The mobile phone Ex.P-5 and the wrist watch Ex.P-6 are the recoveries attributed to accused Brij Kishore. The mobile phone Ex.P-4 is the recovery attributed against accused Dori Lal.

13. The shirt Ex.P-12 and the pant Ex.P-13 is the recovery attributed to Dori Lal. The shirt Ex.P-8 and the pant Ex.P-7 is the recovery attributed to Brij Kishore.

14. The link evidence pertaining to the recoveries of the two mobile sets are the testimonies of Prempal PW-1, Harpal PW-2 and Lalit PW-3.

15. Prempal and Harpal have deposed that their brother used to keep two mobile phones and used to wear a golden coloured watch. The two witnesses duly identified, in Court, the two mobile phones and the wrist watch which was produced; being Ex.P-4, Ex.P-5 and Ex.P-6.

16. We find that the testimony of the two brothers as regards the identification of the said 3 objects has not been challenged.

17. To satisfy our judicial conscious we have looked at the statements recorded during investigation by the investigating officer and find that on the day when the crime was detected i.e. 26.4.2006, statement of Prempal as also Harpal were recorded and in the said two statements immediately recorded after the crime was detected they stated that their brother used to keep two mobile phones and had the number 9899545415 and that he used the SIM card on 2 mobile phones. They also disclosed that their brother used to wear a Titan watch and that all three articles were missing. The watch Ex.P-6 is a watch of Titan make.

18. Lalit PW-3 is a relation of the deceased and has also deposed that mobile phones Ex.P-4 and Ex.P-5 belonged to the deceased Mahender Pal, his uncle.

19. Having perused the cross-examination of the 3 witnesses, we find that cross-examination of Prempal PW-1 was on the lines that the mobile phones were not

recovered in his presence, a fact which he admitted. But no questions were put to him as to how come he identified the said mobile phones as that of his brother. Similarly regarding cross-examination of Harpal we find that he has just not been cross-examined with respect to his identifying the two mobile phones and the wrist watch as belonging to his brother. Similar is the position when we notice the cross-examination of Lalit.

20. Unfortunately for the prosecution, the further link evidence that mobile No. 9899545415 belonged to the deceased has failed for the reason the call details Ex.PW-14/A and Ex.PW-14/B have not been proved as per law and notwithstanding the finding returned by the learned Trial Judge, we eschew reference thereto.

21. Had the call details been proved as per law, they would have shown that the SIM card pertaining to the mobile number in question was being used on two sets having IMEI Nos. 352038103418620 and 350177404181160.

22. We find that the recovery memos Ex.PW-15/A and Ex.PW-20/G record that the mobile phones recovered bear aforementioned IMEI numbers.

23. Const. Surender Singh PW-24 has deposed that when Brij Kishore was arrested on 5.5.2006 he led the police to House No. 831/51, Lekhu Nagar, Delhi and got recovered a mobile phone and a wrist watch as also blood stained clothes and that when Brij Kishore was arrested on 6.5.2006 he led the police and got recovered a mobile phone and blood stained clothes. ASI Satya Narain PW-25 has spoken with greater clarity. He deposed that when Brij Kishore was arrested as recorded in the arrest memo Ex.PW-20/B he made a disclosure statement Ex.PW-20/A and led the police to House No. 831/51, Lekhu Nagar, Tri Nagar and got recovered a mobile Ex.P-5, a wrist watch Ex.P-6, a pant Ex.P-7 and a shirt Ex.P-8 which were taken into possession as recorded in the memos Ex.PW-15/A and Ex.PW-15/B respectively. He further deposed that the next day i.e. on 6.5.2006 Dori Lal was arrested as recorded in the arrest memo Ex.PW-20/B (it appears that the same is a typographic mistake) and that he made a disclosure statement Ex.PW-20/B (another typing mistake) and thereafter he took them to House No. 2792/207 Vishram Nagar and got recovered a mobile phone Ex.P-4 as also a shirt Ex.P-12 and a pant Ex.P-13 which were taken into possession vide memo Ex.PW-20/G.

24. Once again we have noticed a callous manner in which the learned Trial Judge has recorded the testimony. Dori Lal's disclosure statement has been referred to as Ex.PW-20/B. Brij Kishore's arrest memo has also been recorded as Ex.PW-20/B. Dori Lal's arrest memo has also been recorded as Ex.PW-20/B.

25. ACP R.K. Budhiraja PW-26 working as the SHO and the investigating officer, has deposed that Brij Kishore was apprehended on 5.5.2006 as recorded in the memo Ex.PW-20/B and he made a disclosure statement Ex.PW-20/A. He led the police to House No. 831/51, Lekhu Nagar, Tri Nagar and got recovered a mobile phone, a wrist watch, a pant and a shirt which were seized as per memos

Ex.PW-15/A and Ex.PW-15/B. He also deposed that on 6.5.2006 Dori Lal was arrested vide memo Ex.PW-20/B and he made a disclosure statement Ex.PW-20/B and got recovered a mobile phone, a shirt and a pant as entered in the seizure memos Ex.PW-20/G and Ex.PW-20/H respectively. All exhibits have been duly identified by him in Court.

26. Satya Narain Aggarwal PW-15 has corroborated the recoveries against accused Brij Kishore and has successfully withstood the test of cross-examination.

27. We find that Const. Surender Singh PW-24 has just not been cross-examined with respect to the recoveries proved by him. ASI Satya Narain and ACP R.K. Budhiraja have been cross-examined in a most lackadaisical manner.

28. It is apparent that the recoveries attributable at the instance of the two accused have been duly proved.

29. The two mobile phones and the wrist watch were subjected to test identification proceedings on 6.6.2006 and were successfully identified by Prempal PW-1 as also by Harpal PW-2. The said TIP proceedings have been proved during trial by Sh. D.K. Jangala PW-22, the learned Metropolitan Magistrate who conducted the test identification proceedings.

30. FSL Report Ex.PW-26/H1 shows that the pant and the shirt each got recovered by the appellants was found to be stained with human blood of group "B" and that the blood group of the deceased was also "B".

31. Learned Counsel for the appellants, who we note defended the appellants at the trial, has cut a very sorry figure while arguing the appeal and has conceded that in the absence of any meaningful cross-examination by him on the issues of recovery, the inevitable conclusion has to be that the prosecution has successfully proved that the two mobile phones and the wrist watch of the deceased were recovered at the instance of the appellants and after they made the disclosure statements and led the police to their respective houses and got the exhibits recovered. However, learned Counsel argues that since the call record details Ex.PW-14/A and Ex.PW-14/B have been held to be not proved there is no proof that the two handsets recovered having IMEI Nos. 352038103418620 and 350177404181160 respectively pertained to mobile No. 9899545415 and since nobody deposed that this was the mobile number of the deceased, it hardly matters that the two mobile phones Ex.P-5 and Ex.P-6 were recovered from appellant No. 1 and appellant No. 2 respectively.

32. We disagree for the reason, the mobile phones are objects and have been proved to be belonging to the deceased through the testimony of PW-1, PW-2 and PW-3. It has to be kept in mind that PW-1 and PW-2 successfully identified the two mobile phones and the wrist watch belonging to their brother when the same were subjected to a test identification proceedings.

33. It is urged that after the accused were examined u/s 313 Cr.P.C. an application was filed to tender the FSL report which could not have been done

and hence the said report has to be eschewed while considering the incriminating evidence.

34. We disagree for the reason an application was filed to formally tender in evidence the FSL Report stating that inadvertently it could not be tendered in evidence though it was filed along with the charge-sheet.

35. Vide order dated 29.7.2008 the same was allowed to be tendered and exhibited. Thereafter, further supplementary statement of the two accused u/s 313 Cr.P.C. was recorded with reference to the said report.

36. Having successfully proved that the two mobile phones and the wrist watch of the deceased was got recovered by the appellants i.e. the two were proved to be in possession of the fruits of a robbery, the only question which further needed to be decided is whether recovery of stolen property at the instance of the accused requires presumption to be drawn that the two were recipients of stolen property or that they were the authors of the crime i.e. were the ones who stole the property and while doing so, murdered the victim.

37. The appellants have rendered no explanation as to wherefrom they acquired the two mobile phones and the wrist watch belonging to the deceased.

38. Through the testimony of PW-5 we have proof of the fact that the deceased had negotiated the sale of his house to one Ramesh Chand and had received Rs. 1 lac out of which Rs. 10,000/- was received in cash. Cheque in sum of Rs. 90,000/- was encashed by the deceased. Ramesh Chand PW-6 has also proved the said fact.

39. It is apparent that the deceased was possessed of some cash which appears not to have been recovered.

40. The date of the offence is 25.4.2006 and the recoveries have been effected on 5th and 6th May 2006. Unfortunately, the cash could not be recovered. We are of the opinion that the recoveries are of the kind which link the appellants to the crime and not as recipients of the fruit of the crime. We rely upon the fact that the mobile phones and the Titan watch had some value and could not be traded with such ease as to change hands within 10 days of the crime.

41. There is link evidence, though of a weak nature, in the form of a pant and a shirt each got recovered by the accused which were found to be stained with human blood of the group of the deceased. We are conscious of the fact that there is no witness to depose that the accused were wearing said clothes. We are also conscious of the fact that the part of their disclosure statement that when they committed the crime they were wearing the said shirt and the pant is not admissible u/s 27 of the Evidence Act. But, the fact of the matter remains that the appellants did get recovered a shirt and a pant each which were found to be stained with human blood of the same group as that of the deceased.

42. Under the circumstances we are of the opinion that with respect to the

recoveries of the mobile phone and the wrist watch at the instance of the appellants a permissible presumption can certainly be drawn that the two had authored the crime as well.

43. The appeal is dismissed.

44. We would be failing if we do not draw the attention of the learned Trial Judge to the insensitive manner in which the trial has been conducted. For future guidance of the learned Trial Judge we draw his attention to Section 65B of the Evidence Act and request him to keep himself abreast with the law and in future not accept proof of electronic document as has been done in the instant case. We would also request the learned Trial Judge to be careful in assigning exhibit marks to the document with none having repetitive exhibit marks and for this purpose we direct the Registry to send a copy of this decision to the District and Sessions Judge Delhi with a letter of request that it should be transmitted to the learned Trial Judge so that the learned Trial Judge is made known the mistakes conducted so that in future he can be careful.

45. The learned Trial Judge is requested to be brief and focused and not go rolling all over while writing decisions.

46. Since the appellants are in jail we further direct that a copy of this decision be sent to the Superintendent Central Jail Tihar to be made available to the appellants.