

(2010) 05 DEL CK 0244
In the Delhi High Court
Case No : Criminal A. No. 1025 of 2008

Mahender Singh	Vs	APPELLANT
State		RESPONDENT

Date of Decision : 17-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Identification of Prisoners Act, 1920 — Section 5
Penal Code, 1860 (IPC) — Section 302, 380

Citation : (2010) 05 DEL CK 0244

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

Bench : Division Bench

Advocate : Ritu Gauba, for the Appellant; Richa Kapoor, APP, for the Respondent

Final Decision : Dismissed

Judgement

Suresh Kait, J.—Accepting the testimony that the deceased made a dying declaration inculcating the appellant and the evidence of the presence of the appellant at the place where the crime was committed, vide judgment and order dated 16.03.2007, the appellant has been convicted for the offences punishable u/s 302 IPC and Section 380 IPC.

2. We shall be noting only such evidence as is required to be discussed by us and would be eschewing reference to the other evidence.

3. In holding that the presence of the appellant at the house stands established, the learned Trial Judge has heavily relied upon the report of the finger print expert as per which one of the three chance prints lifted from the scene of the crime matched that of the appellant. We are not noting the evidence led on the said aspect for the reason the sample finger print impressions from the appellant were taken without the permission of the competent Court and without the appellant being identified as per Section 5 of the Identification of the Prisoner's Act 1920. This evidence is clearly inadmissible in view of the law laid down by the Supreme Court in the decisions reported as State of Uttar Pradesh Vs. Ram

Babu Misra, State of U.P. v. Ram Babu Mishra Sukhvinder Singh and Others Vs. State of Punjab, and State of Haryana Vs. Jagbir Singh and Another,

4. It is not in dispute that in different portions of the same building, in one portion resided the appellant, in the other resided his brother and the deceased and in the third resided his parents. The deceased suffered a homicidal death in the night of 28/29.11.2004 in a room which was in the portion of the house occupied by the deceased and her husband and the post-mortem report Ex.PW-11/B clearly establishes that the homicide was murder keeping in view the injuries on her person. Relevant would it be to note that as per report Ex.PW-11/B, the ten incised and penetrating wounds on the body of the deceased were opined to be the possible result of use of the knife which was got recovered by the appellant after he was arrested.

5. On 29.11.2004, DD No. 5, Ex.PW-22/A, was recorded at Police Post Jharodha, under jurisdiction of PS Timarpur at 3:20 hours recording that at House No. 2819, Gali No. 70-B, Sant Nagar a person had been stabbed with a knife. On receiving DD No. 5, SI Arvind PW-23 accompanied by Ct.Joseph PW-24 proceeded to the spot where they found that ASI Ramesh Chand PW-17 and Ct.Satbir Singh PW-19 were already there. They went to ground floor of the house where they found a dead body of a lady on the floor having multiple sharp edged wounds on face, neck, leg and thighs. In the same room, one TV, one fridge and other household articles were lying. On enquiry they learnt that the dead body was of Bharti, wife of Diwan Singh PW-4. Diwan Singh was also present at the spot along with his father Mohan Singh PW-6 and mother Nandi Devi PW-7. In the meanwhile SHO Inspector Bir Singh PW-25 also reached there.

6. Inspector Bir Singh PW-25 recorded the statement Ex.PW-4/A of Diwan Singh who stated as under:

I work with Royal Palace, Vijay Nagar, Delhi as a waiter. My duty hours are mostly during night time. I normally return to my house around 2-3:00 Hrs. in the morning. On 28.11.2004 I left the house at 9:30 in the morning and returned back from the duty around 3-3:15 Hrs. I saw the gate of my portion open. My wife was lying on the floor in a pool of blood. Her salwar was downward. I put the salwar upwards and tied the string. I called my father and mother who immediately reached there. I phoned at No. 100. At that time my wife was breathing. My father administered water to my wife. On his asking as to what happened, Bharti replied ?Muniya had come?, ?Muniya had come? and thereafter she left her breath. That Muniya is the nick name of my younger brother who is 25-26 years old. He is unmarried and is unemployed for the last 3-4 months. He is habitual of liquor. Presently, he is not in the house. I suspect that this crime has been committed by my brother Mahender at about 1?O Clock in the night. My neighbour had seen my brother entering in his portion where the dead body was found. The bangles were found in a broken condition. Near the bed cigarette butts were lying and adjacent to the room which is inner side, one tin kanastar in which my wife used to keep some money and some jewellery including one small

golden chain. The above said articles were missing from the said tin kanastar.

7. Inspector Bir Singh PW-25 made an endorsement and prepared the rukka and sent the same through Ct.Satbir Singh PW-19 for registration of the FIR.

8. At the police station, as deposed to by ASI Chander Pal PW-3 on 29.11.2004 at about 4:45 AM he received rukka from Ct. Satbir PW-19 and he recorded the FIR Ex.PW-3/B.

9. Kuldeep Singh PW-2 deposed that on 29.11.2004 at about 5:45 PM he was coming from village Jharoda. When he reached near Nala, Adarsh Nagar by-pass, some police officials requested him to join the investigation. One public person was also there whose name he came to know thereafter as Mahender @ Moni who was in custody of police. The police told him that Mahender had committed murder of his bhabhi. Mahender was wearing blood stained jeans pant, yellow shirt and one black jacket. Personal search of Mahender was conducted in his presence at which a sum of Rs. 5950/-, some jewellery articles including two pajeb pairs, one heavy and one light, one gold chain and six small karas of child were recovered and were seized vide memo Ex.PW-2/A. Police had also collected the clothes of Mahender including his under garments which he was wearing at the time of his arrest vide memo Ex.PW-2/B. Mahender was arrested as recorded in the memo Ex.PW-2/C and made a disclosure statement Ex.PW-2/G. He led them to a vacant plot opposite house No. 31/135 in Sant Nagar area. From within the bushes he took out a knife which was blood stained. The knife was taken into possession vide memo Ex.PW-2/F. During cross-examination he admitted staying opposite the house of the father of the deceased.

10. Diwan Singh PW-4, the brother of the appellant resiled substantially from his statement Ex.PW-4/A notwithstanding having admitted signed the same at point ? A?. He stated that his wife was in no condition to speak when he saw her. He was declared hostile and was cross-examined by the learned A.P.P.

11. On being cross-examined by the learned APP he admitted that the pet name of his brother Mahender is Muniya. He further stated that the appellant was a bachelor and was jobless for the last 3-4 months as he had met with an accident. He admitted that the police recovered cigarette butts lying around the Kanastar and also seized the Kanastar. He also admitted that the piece of broken glass bangles of his wife were also collected by the police from the spot and that his father-in-law Manohar Lal PW-1 also reached at his house on the same day. He further stated that the appellant was arrested next day i.e. on 29.11.2004 from the Ring Road in the area of Jharoda and that he called the police from his telephone No. 55365126. He also admitted that he had identified the appellant when he was arrested and that the appellant was interrogated by the police and his disclosure statement is Ex.PW-2/G. He further admitted his signatures on the sketch of knife Ex.PW-2/E. He also admitted that at the time of arrest, the appellant was wearing check shirt, pant and jacket and that the police seized the underwear, banyan, shirt, pant and jacket of the appellant vide memo Ex.PW-2/

B. He further stated that his wife used to keep jewellery items in Kanastar. He admitted that he was the first person who had seen the dead body of his wife and also the first to inform the police. The family members of his in-laws reached at the spot next day morning. He denied the suggestion that at the place of incident three glasses were lying but voluntarily he stated that a number of tumblers made of glass and steel were there. He denied that the jewellery shown as recovered from the pocket of the appellant when he was apprehended and as entered in the memo Ex.PW-2/A was recovered from the pocket of the appellant and claimed that the police took it from his house.

12. Smt. Murshida Begum PW-5 deposed that she was staying in front of the house of Diwan Singh PW-4. She came to know about the death of deceased Bharti in the morning when she woke up after hearing the noise. As she was resiling from her statement recorded u/s 161 Cr.P.C. she was declared hostile and was cross-examined by the learned APP. She denied that she woke up at midnight to go to the toilet. She denied having seen the appellant at the door of the house of Diwan Singh.

13. Mohan Singh PW-6, the father of the appellant deposed that Diwan Singh PW-4 is his only married son. Bharti was the wife of Diwan Singh. She was living with them. Diwan Singh was employed as a waiter in marriage parties. Whereas the appellant was employed in Taj Mahal Hotel but due to accident in July, 2004, he was without work and was staying at house only. Sometimes the appellant used to consume liquor and for buying liquor he was taking money either from him or from his wife. His son Diwan Singh returned from his work in the night of 28/29.11.2004 and woke him up around 3:30 AM midnight. He saw Bharti was lying in pool of blood. His son Diwan Singh PW-4 informed the police. When he saw Bharti, she was dead. He stated that the appellant was also present when he came to the room of Bharti. Since he did not support the case of the prosecution he was declared hostile and was cross-examined.

14. Cross-examined by the learned APP he stated that the case has been registered on the statement of his son Diwan Singh PW-4. Police came within 15 minutes of the call. All family members were present there except Mahender appellant. He denied having any knowledge of Murshida Begum making any statement to the police on the intervening night of 28/29.11.2004 at about 1:00 AM in which she said that she saw the appellant entering the portion of the house of Diwan Singh PW-4, the husband of the deceased. He admitted that the appellant is known by the pet name of Muniya but denied that his daughter-in-law told him that Muniya had come.

15. Nandi Devi PW-7, the mother of the appellant also turned hostile and did not support the case of the prosecution.

16. ASI Ramesh Kumar PW-17 and Ct. Satbir Singh PW-19 deposed of being present at the spot when Insp. Bir Singh conducted the proceedings after they all reached on receiving information of the crime. They proved the various exhibits

which were recovered from the spot. SI Arvind PW-23 corroborated their testimony in respect of the spot proceedings and additionally deposed that the appellant was apprehended at Y point, Hardev Nagar on being identified by Diwan Singh. In his formal search, from his left pocket a sum of Rs. 5950/- was recovered along with some jewellery items including one gold chain, two pair of pajeab, five bangles, out of which two pair were similar and one bangle was different. On having seen the same Diwan Singh identified the same as the one kept in tin kanastar in the room. Cash recovered was also the part of the amount in kanastar. These articles were sealed in a parcel with the seal of ?AK? and were seized vide memo Ex.PW-2/A. At the time of arrest of the appellant one public person Kuldeep Singh PW-2 was also joined in the proceedings. The clothes of the appellant were having blood stains. The clothes which the appellant was wearing include black colour jacket, one check shirt, one blue colour jean, baniyan and underwear. All the clothes were sealed in a pullanda with the seal of ?AK? and were seized vide memo Ex.PW-2/B. The appellant made a disclosure statement which is Ex.PW-2/G. In pursuance of his disclosure statement, he got recovered a blood stained knife from the bushes at Gali No. 31 near to his house. The knife was sealed with the seal of ?AK? and taken into possession vide memo Ex.PW-2/F.

17. Insp.Bir Singh PW-25 the IO of the case deposed that on 29.11.2004 he received a wireless message regarding lodging of DD No. 5. He along with his staff reached at the spot. He found SI Arvind PW-23 along with other staff over there. He saw the dead body of a female lying on floor in a pool of blood in the first room after entering through the Iron Gate. The body was having multiple sharp edged wounds on face, neck, legs and thighs. One Diwan Singh PW-4, husband of the deceased on inquiry stated that when he returned from his job at about 3:20 AM he saw that the gate was opened and Bharti was in a pool of blood. The string of salwar was open and it was under down up to her knee. Her kameez was on her face. He corrected her clothes. Tied the string of her salwar. He disclosed that at that time she was alive and on enquiry she disclosed to Diwan that Muniya had come. Diwan Singh PW-4 further disclosed that Muniya is the nick name of his brother Mahender. He further deposed that in the first room where the dead body was lying there was a bed having bed sheet with blood stains. One TV, fridge and other household articles were lying there. After crossing the said room he find that there was one more room behind the corridor. There was one bed lying there having a blood stained bed sheet and blood stained mattress. He saw broken pieces of bangles of green and orange colour scattered on the bed. One cigarette butt was lying on the right side of the bed. One tin kanastar having a tilted lid but lock intact was also lying in that back room and near that one cigarette butt was lying. Diwan Singh, husband of the deceased disclosed that they used to keep cash and jewellery in the tin kanastar and Diwan Singh suspected his brother Mahender for committing the offence. He recorded the statement of PW-4 Diwan Singh. Rukka was sent on the statement of Diwan Singh through Ct.Satbir Singh and the FIR was registered Ex.PW-3/B.

At about 4:30 AM crime team along with photographer reached at the spot. The finger print expert was also with the crime team. The photographer took the photographs Ex.PW-10/A-1 to A-13. During the course of investigation they found one glass tumbler having blood stains on it and some finger print impressions. The said glass was lying in between bed and wall in the back room. Chance prints were lifted from the glass tumbler. The same was sealed with the seal of 'BS' in a cardboard box. The report of lifting chance prints is Ex.PW-9/A. He collected the blood sample from the spot and also collected blood stained earth and earth control and sealed it with the same seal. He also sealed the bed sheet from the first room and bed sheet and mattress from the other room. Cigarette butts were also sealed. Tin kanastar was also taken into possession. Broken pieces of bangles were sealed. All the above sealed articles were seized vide memo Ex.PW-4/B. He prepared the site plan Ex.PW-25/C. Dead body was shifted to mortuary. Ct.Abdul Karim handed over to him one Mangal Sutra, one pair of tops, one ring, one pair of pajeb, one nose pin, one pair of chutki which were seized vide memo Ex.PW-21/A. He also received three sealed parcels bearing seal of 'KLS' which were seized by him vide memo Ex.PW-23/A. He deposited the case property in the malkhana. The same day he along with SI Arvind and other staff came to the place of occurrence. PW-4 Diwan Singh joined investigation with him. When they reached Y point, Ganda Nala, Hardev Nagar, one public person Kuldeep Singh PW-2 also joined them voluntarily on his request. At about 6:00 PM the appellant was seen coming from the side of Sant Nirankari Ground. Diwan Singh PW-4 identified him. Accordingly he was apprehended. He was wearing black jacket, yellow check shirt, one jean, one banyan and one underwear. The shirt, jean pant and banyan were also having blood stains. Upon search of the appellant a sum of Rs. 5950/-and one gold chain, 5 silver karas of child and one pair of pajeb were recovered from inside the pocket of the jacket. These articles were identified by Diwan Singh PW-4 as of her daughter and were seized vide memo Ex.PW-2/A. The clothes which the appellant was wearing were sealed with the seal of 'AK' and seized vide memo Ex.PW-2/B. On interrogation the appellant made disclosure statement Ex.PW-2/G. His personal search was carried out. Opposite to the house of the occurrence from the vacant plot, a blood stained knife was got recovered from the bushes at the instance of the appellant. The knife was seized vide memo Ex.PW-2/F. He sent the various exhibits for serological examination and received the report Ex.PW-25/E.

18. The report Ex.PW-25/E reveals that the parcel 12 contained Ex.12a one shirt, Ex.12b one jeans, Ex.12c Banyan, Ex.12d underwear and Ex.12e Jacket. Out of the above five exhibits Ex.12a, Ex.12c and Ex.12d were got detected with human blood of group 'O' which also happened to be that of the deceased. Whereas, on Jacket Ex.12e human blood was found but blood group could not be determined. On the weapon of offence which is Ex.13 human blood of group 'O' was detected. On Ex.6 tumbler, human blood was detected but the blood group thereof could not be determined. There was no reaction on Ex.3 cigarette butts.

No blood was detected on Ex.3 therefore no reaction was there.

19. In the statement u/s 313 Cr.P.C. which was recorded wherein the appellant has denied all the incriminating evidence put forth to him. But in the answer to the question No. 15 he stated as under:

Q. 15 It is in evidence against you through the statement of PW-6 that you were present in the house with him when he came to the room of Bharti. What do you have to say?

Ans. It is incorrect. I was not present in the house. I had gone to my village at Almoda.

20. While answering the question No. 88 he stated as under:

On 29.11.2004 I returned from my Village Almoda from a bus. I left the bus at Buradi Bypass and from there I was walking down to the side of my house. When I reached near Hardev Nagar I found police there. They apprehended me. They brought me to my house. I was disclosed about the killing of my bhabhi. They inquired from where I was coming. They gave me water to drink. Then they inquired from me as to who is involved in the occurrence. I expressed my ignorance. I wanted to meet my parents. I was told that all of them are at PS. I was threatened that if I accept the blame of this case they will be let off. The police persons told me that even they are not aware about the actual culprit. I was told that someone from us would have to take the blame otherwise all of us would be sent to jail. I was taken to the room of my brother where blood was lying on the floor. I was asked to dip my hands in that blood and after the impression of that blood stained was put on my cloth. This all I have to say. I am innocent. I have no role. I have been falsely implicated. No recovery has been effected at my instance. No knife was got recovered at my instance.

21. In answer to question No. 63, he denied any recovery got affected from him while in answer to question No. 66 he admitted that his wearing clothes were seized afterwards. In answer to question No. 18, he admitted that his nick name is Muniya.

22. It was urged before us that the FIR was ante timed inasmuch as there is no proof when copy thereof was delivered to the Magistrate.

23. Since there is no eye-witness and the question of ante timing the FIR to squeeze in or plant a witness does not arise, we hold that it hardly matters even if the FIR was ante timed; we specifically note that when we repeatedly asked learned Counsel as to in what manner she intends to show to us prejudice caused on account of FIR being ante timed, learned Counsel could show none.

24. The plea that from the post-mortem report of the deceased it is apparent that so badly cut was her neck that there was no possibility for her to speak and the claim of the prosecution that the deceased spoke shows that the case is false, needs to be noted and rejected for the simple reason this was what was

projected by the prosecution since in the statement Ex.PW-4/A i.e. the complaint Diwan Singh so stated, but while deposing in Court he did not stand by said version. The learned Trial Judge has not been very clear when we read the impugned decision whether he has relied upon the contents of the statement Ex.PW-4/A in their entirety for the reason in para 23 of the decision we find an inchoate discussion on the said issue with a finding that with passage of time Diwan Singh may have been swayed in favour of his brother. But noting that while putting the incriminating circumstances to the appellant, no dying declaration has been put as an incriminating circumstance we hold that it would be impermissible to use the projected dying declaration made by the deceased as indicative of the guilt of the appellant.

25. The issue has to be decided with reference to two facts which have been projected against the appellant. The first is his presence in the house in the night in question and his absconding therefrom and his being arrested the next day with the jewellery of the deceased.

26. As regards the recovery of the jewellery, since the husband of the deceased who happens to be the brother of the appellant has turned hostile, we have to consider the effect of Kuldeep Singh PW-2, a witness to the recovery, who has successfully supported the case of the prosecution, being a person who resides in the neighbourhood of the father of the deceased as also with reference to the fact that the police officers associated with the recovery have stood their ground.

27. Diwan Singh resiling from his statement Ex.PW-4/A can certainly be attributed to his relationship with the accused who is his brother. But, Diwan Singh having accepted his signatures at point ?A? on the statement Ex.PW-4/A, requires us to infer that indeed some jewellery belonging to the deceased was stolen as it is specifically recorded to said effect therein. It is apparent that Diwan Singh's later utterance that the police had removed the jewellery is false. We note that no suggestion has been given to any police officer who had reached the scene of the crime that the IO had removed any jewellery belonging to the deceased. The projected stand of Diwan Singh and his father that the appellant was present in the house when the police came is contrary to their statements recorded contemporaneously by the police. None of the police officers who reached the house when the crime was reported have been suggested that the appellant was present in the house. Even the appellant has not so stated when he was examined u/s 313 Cr.P.C. He has taken a vacillating stand evidenced by his answers to question No. 15 and 88 and as noted above.

28. It is apparent that the appellant was found absconding from his house and was apprehended later on. No doubt PW-2 resides in the neighbourhood of the father of the deceased but this could only mean that we have to carefully weigh his testimony and which we do and find complete corroboration through the mouth of the police witnesses. The recovery of the jewellery from his pocket, which jewellery he has not claimed to be his, and even his brother Diwan Singh has not denied the jewellery not belonging to his wife (he has only claimed that

the police planted it on his brother, which we have already opined to be a false statement) is highly incriminating in the light of the statement Ex.PW-4/A made by Diwan Singh which is the complaint pursuant where to the FIR has been registered.

29. The appellant claims to have been on his return from Almora when he was arrested in the morning of 29.11.2004. The appellant has led no evidence to show that he was ever in Almora. The prosecution has successfully proved that the clothes which were seized from the person of the appellant and which he was wearing when he was apprehended were stained with human blood of the same group as that of the deceased. This is further incriminating evidence against the appellant. It has also to be factored that the knife got recovered by the appellant was also stained with human blood and has been opined to be the possible weapon of offence.

30. To summarize, we hold that the appellant not establishing the plea of alibi, notwithstanding Diwan Singh and his father turning hostile and unfortunately the report of the finger print expert requiring to be excluded, from the fact that jewellery of the deceased was reported to be stolen by her husband Diwan Singh which jewellery was recovered from the appellant and his clothes were stained with human blood of the same group as that of the deceased, we hold that there is enough evidence to hold that the appellant was present in the house where the deceased was murdered. The appellant absconded at an unearthly hour and was arrested a few hours later with the jewellery of the deceased in his pocket and his clothes found to be stained with human blood of the same group as that of the deceased are sufficient circumstances wherefrom the guilt of the appellant can be inferred.

31. The appeal is dismissed.

32. Since the appellant is in jail we direct that a copy of this decision be sent to the Superintendent, Central Jail, Tihar for being made available to the appellant.