

(2010) 03 DEL CK 0404

In the Delhi High Court

Case No : Criminal Appeal No. 311 of 1997

Naresh

APPELLANT

Vs

State (N.C.T. of Delhi)

RESPONDENT

Date of Decision : 22-03-2010

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Motor Vehicles Act, 1988 — Section 117, 181
Penal Code, 1860 (IPC) — Section 302, 304, 34, 364

Citation : (2010) 03 DEL CK 0404

Hon'ble Judges : Ajit Bharihoke, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Harish Khanna, for the Appellant; Sunil Sharma, APP, for the Respondent

Judgement

Ajit Bharihoke, J.—The above appeals are directed against the impugned judgment dated 16th July 1997 in Sessions Case No. 127/95 FIR No. 73/92 P.S. Zaffarpur Kalan in terms of which the appellants have been convicted of charges u/s 302 IPC read with Section 34 IPC and Section 364 IPC read with Section 34 IPC as also the consequent order on sentence dated 17th July 1997.

2. Briefly stated, case of the prosecution is that on 10th September 1992, PW1 Umed Singh visited the P.S. Zaffarpur Kalan at around 12:50 p.m. and reported to Shri Rohtas Singh, SHO that on 05th September 1992 at around 3:30 p.m., he had gone to meet his cousin Rakesh (for short "deceased") at Taxi Stand Bahadurgarh. In the meanwhile, the appellants Naresh Kumar, Kishore Kumar, Charanjit and Anil came there and asked the deceased that they wanted to hire a taxi for going to Gurgaon. The taxi rate was settled as Rs. 350/-. Thereafter, the appellants left for Gurgaon in Maruti Van No. DL-4C-4753 alongwith the deceased. The deceased, however, did not return back and since he often used to stay out of station for 3/4 days, they did not suspect anything. On 08th September 1992, ASI Raj Kumar of P.S. Bahardurgarh City told him that he had

received an information from Bara Banki that four boys alongwith Maruti Van No. DL-4C-4753 had been arrested by Bara Banki Police. On receipt of this information, he (complainant Umed Singh) alongwith PW2 Rajender Singh and PW5 ASI Raj Kumar went to Bara Banki, where they found Maruti Van DL-4C-4753 of the deceased Rakesh parked at Kotwali Bara Banki. The appellants were also there at the police station. He took them aside and talked with the appellants separately and each one of the appellants disclosed that they had consumed liquor with the deceased at Gurgaon. Thereafter, they took him to Jhatikra Drain in Delhi, killed him and after committing the murder, they threw his dead body in the drain and took the van to Bara Banki for selling it. He also averred in his complaint that they returned back to Delhi on the morning of 10th September, 1993 and went to Jhatikra Drain in search of the dead body, which was found in the drain. SHO Rohtas Singh Yadav (PW27) recorded his statement Ex.PW1/B.

3. On the basis of the aforesaid complaint Ex.PW1/B, formal FIR Ex.PW27/B was registered and SHO Rohtas Singh Yadav (PW27) took over the investigation. On completion of the investigation, he filed charge-sheet against the appellants.

4. The appellants were charged for the offences of abduction and murder of the deceased Rakesh. However, it appears that though one of the charges was for murder, but due to typographical mistake in the formal draft of charge, it has been described as an offence punishable u/s 304/34 IPC whereas it should have been u/s 302/34 IPC. Be that as it may, learned Counsel appearing on behalf of the appellants has submitted that while defending the case, he was conscious of the charge against the appellants and this typographical error has not caused them any prejudice.

5. In order to bring home the guilt of the appellants, prosecution has examined as many as 27 witnesses. The important witnesses, however are PW1 Umed Singh, Complainant, PW2 Rajender Singh, who supposedly accompanied the complainant to Bara Banki on 08th September, 1992, PW3 Dharme, PW5 ASI Raj Kumar of P.S. Bahadurgarh City and the officials of police station Bara Banki who purportedly recovered the Van and arrested the appellants, namely PW7 Constable Girja Shankar, PW9 SI Vijay Raj Singh, PW23 Inspector Shalender Bahadur Chand, PW25 Constable Suresh Dutt Tiwari and PW26 SI Shiv Prasad Yadav.

6. The appellants were examined u/s 313 Cr.P.C. to explain the incriminating circumstances appearing against them. They pleaded innocence and stated that prosecution has foisted a false case upon them.

7. The learned Trial Judge, on appreciation of evidence, found the appellants guilty of the offence of abduction of the deceased Rakesh and his murder, and convicted the appellants u/s 364/34 IPC as well as Section 302/34 IPC.

8. The case of the prosecution rests on the circumstantial evidence. As per the impugned judgment, the prosecution relied upon the following circumstances:

(i) Deceased Rakesh was last seen alive on 5.9.92 at 3.30 p.m. at Bahadurgarh Taxi Stand in the company of the four accused persons.

(ii) On 9.9.92 at 11.00 p.m. all the four accused persons were arrested at the Police Check Post, Mohammad Pur, P.S. Kotwali, Bara Banki, U.P. when they came there from the side of Lucknow in Maruti Van No. DL-4C-4753.

(iii) On interrogation at P.S. Kotwali Bara Banki the accused persons disclosed that they had thrown the dead body of Rakesh in Jhatikra Drain at Delhi.

(iv) Recovery of dead body of Rakesh from Jhatikra Drain on 10.9.92.

(v) The post-mortem examination conducted by Dr. L.K. Baruah (PW8), who found 23 incised wounds on the dead body and opined that the injuries were caused by a sharp edged weapon and the cause of death was due to haemorrhagic shock as a result of the injuries and he fixed the probable time of death as 5 or 6 days prior to the post-mortem examination.

9. It transpires on perusal of the impugned judgment that the learned Trial Judge did not find the circumstance number (iii) firmly established on the record. Existence of circumstances No. (iv) and (v) is not disputed. Thus, the prosecution case rests on two incriminating circumstances i.e. the deceased was last seen alive on 5th September 1992 at 3.30 p.m. at Taxi Stand Bahadurgarh in the company of the appellants and on 9th September 1992 at about 11:00 p.m., the appellants were arrested at the police check post Mohammad Pur, P.S. Kotwali Bara Banki, U.P., when they were coming from the side of Lucknow in Maruti Van No. DL-4C-4753.

10. Learned Counsel for the appellants has submitted that the Trial Court has committed a grave error in appreciation of evidence by ignoring the fact that in a case based on circumstantial evidence, the prosecution, in order to succeed, is under obligation to establish the relied upon incriminating circumstances firmly and the circumstances so proved on record must form a chain so complete as to lead to an irrefutable inference of guilt of the accused and rule out any possibility of the accused being innocent. Learned Counsel submitted that in the instant case, the prosecution has neither been able to establish the recovery of Maruti Van from the appellants, as stated in the charge-sheet nor the last seen circumstance has been firmly established, therefore, the Trial Court ought to have extended at least the benefit of doubt to the appellants.

11. Learned Counsel for the State, on the other hand, has argued in support of the impugned judgment. He contended that the learned Trial Court has rightly relied upon the testimony of PW1 Umed Singh and PW3 Dharme to conclude that the deceased was last seen in the company of the appellants at Taxi Stand Bahadurgarh on 05th September 1992. He also submitted that the learned Trial Court has rightly relied upon the testimony of the officials of U.P. Police posted at P.S. Kotwali Bara Banki namely SI Ram Babu (PW21), Inspector Shalender Bahadur Chand (PW23), Head Constable Rama Shankar Singh (PW24), Constable

Suresh Dutt Tiwari (PW25) and SI Shiv Prasad Yadav (PW26) to conclude that the appellants were arrested at Bara Banki on the night of 09th September 1992 while coming in Maruti Van No. DL-4C-4753 from the side of Lucknow. Thus, he urged us to dismiss the appeal.

Circumstance (i)

12. In order to prove this circumstance, the prosecution examined three witnesses namely PW1 Umed Singh, PW3 Dharme and PW4 Kartare. PW4 Kartare turned hostile and he did not support the case of the prosecution. The other two witnesses have testified that on 05th September, 1992 at around 3.30 p.m., the appellants had come to Bahadurgarh Taxi Stand to hire a Taxi. They hired Maruti Van No. DL-4C-4753, which the deceased Rakesh used to ply. They further stated that Rakesh left with the accused persons in said Maruti Van and never returned thereafter. Learned Trial Court has believed aforesaid version of PW1 Umed Singh and PW3 Dharme. Learned Counsel for the appellants submitted that aforesaid version of the witnesses is not reliable as it is belied by the report of the Crime Team Ex.PW14/DA wherein it is recorded in the column of "advice to the Investigating Officer" that the dead body was identified by the cousin brother of the deceased Umed Singh (PW1) and he narrated that "the deceased had left the house by the Maruti Van on 05th September, 1992".

13. The learned Trial Judge has dealt with the above argument in Para "8" of the impugned judgment and he has, inter alia, observed thus:

8. The accused have relied on the crime team report Ex.PW14/D-A to discredit Umed Singh. In column 13 of the report, the incharge of Crime Team writes that Umed Singh narrated that the deceased had left the house by the Maruti Van on 5.9.92. From this recital Id. Counsel wants me to conclude that Umed Singh had seen Rakesh for the last time at the house and not at the Taxi Stand. I don't think that the recital in the Crime Team Report can be used to discredit the witness. It is not a statement under 161 Cr.P.C. which could be used for purpose of contradiction. Moreover Umed Singh states that he made no statement to the Crime Team. The incharge of Crime Team was merely giving a gist of the information gathered by him at the spot and he was not expected to be very meticulous.

It is true that the observation in the Crime Team Report Ex.PW14/DA is not in the nature of the statement of PW1 Umed Singh u/s 161 Cr.P.C. However, the fact remains that in his report Ex.PW14/DA, the Incharge, Crime Team has mentioned that Umed Singh (PW1) identified the dead body of Rakesh and narrated that the deceased had left his house in Maruti Van on 05th September, 1992 which raises a strong doubt against the version of PW1 Umed Singh and PW3 Dharme that they last saw the deceased alive in the company of the appellants on 05.09.1992 at around 03:30 p.m. at Taxi Stand Bahadurgarh. The aforesaid doubt is further compounded by the fact that PW5 ASI Raj Kumar has stated that on 06th September, 1992, PW1 Umed Singh met him and told that

his cousin Rakesh has not returned home for 3 or 4 days. If the aforesaid version of ASI Raj Kumar is true, then the deceased was missing since much prior to 05th September 1992, as such, witnesses could not have seen him alive on 05th September 1992 at Bahadurgarh Taxi Stand. Thus, we do not find the last seen evidence produced by the prosecution reliable.

Circumstance (ii)

14. Constable Girja Shankar (PW7), Head Constable Rama Shankar Singh (PW24), Constable Suresh Dutt Tiwari (PW25) and SI Shiv Prasad Yadav (PW26) are the witnesses of arrest of the appellants and recovery of the Maruti Van. All these witnesses were posted at Police Post Mohd. Pur, P.S. Kotwali Bara Banki on 09th September, 1992. They have stated in the court that while they were checking the vehicles, the appellants came from the side of Lucknow in Maruti Van No. DL-4C-4753. The van was stopped at the check barrier and the appellant Charanjit, who was driving the van, on enquiry, gave his name as Ramesh. However, on sustained interrogation, he disclosed his real name but could not produce the driving licence. They further stated that a "karoli" was recovered from the possession of the appellant Kishore and knives were recovered from appellants Anil and Naresh. Thus, all three of them were booked u/s 27 of the Arms Act and appellant Charanjit was arrested u/s 117/181 of the Motor Vehicles Act. FIR Nos. 1000/92 to 1003/92 were registered against them at the police station. Aforesaid version of the police officials of Bara Banki stands contradicted from the contents of the FIR Ex.PW1/A and the testimony of PW1 Umed Singh, PW2 Rajender and PW5 ASI Raj Kumar. PW1 Umed Singh stated that on 08th September, 1992, PW5 ASI Raj Kumar visited his house and informed him that the Van of his cousin Rakesh has been traced and the appellants had been detained at police station Bara Banki in U.P. The above three witnesses have stated that in view of the said information, all three of them left for Bara Banki and reached there in the morning of 09th September, 1992 where they identified Maruti Van of the deceased found parked in P.S. Kotwali Bara Banki. They also stated that the four appellants were found detained there and according to PW1 Umed Singh, he identified all of them. If aforesaid version of PW1 Umed Singh, PW2 Rajender and PW5 ASI Raj Kumar is to be believed, then the version of police officials of P.S. Bara Banki regarding the arrest of the appellants and seizure of Maruti Van on the night of 09th September 1992 at 11:00 p.m. cannot be true. This circumstance raises a strong doubt against the correctness of story of arrest of the appellants and seizure of Maruti Van at Bara Banki. The learned Trial Judge, while dealing with this contradiction did not find it significant and in the impugned judgment, inter alia, observed thus:

...The claim of Umed Singh having gone to Bara Banki on 8.9.92 may be false but there is abundant evidence to establish that all the four accused persons had been arrested at Bara Banki while travelling in Maruti Van No. DL-4C-4753. The Maxim "Falsus in Uno, Falsus in Omnibus" is not strictly applicable to criminal trials in our country.

We are unable to agree with the approach adopted by the learned Trial Judge. Even if, for the sake of argument, it is assumed that PW1 Umed Singh, PW2 Rajender and PW5 ASI Raj Kumar of Haryana Police had not visited the police station Kotwali Bara Banki in the morning of 09th September, 1992 and seen the appellants under detention, then also it remains unexplained as to how the details about the arrest of the appellants at police station Bara Banki and the seizure of Maruti Van No. DL-4C-4753 came to the knowledge of the above three witnesses. Learned Counsel for the State has submitted that the aforesaid infirmity in the evidence stands explained from the testimony of PW23 Inspector Shalender Bahadur of U.P. Police, who deposed that he had informed about the recovery of Maruti Van and arrest of the appellants to the area Superintendent of Police and he, in turn, conveyed the information to Delhi Police and Haryana Police. This also is of no help to the prosecution because, even if Delhi Police was informed about the detention of the appellants at police station Bara Banki, it remains a mystery as to how the complainant Umed Singh (PW1) came to know of aforesaid details about the seizure of Maruti Van and arrest of the appellants by Bara Banki Police recorded in his complaint statement Ex.PW1/B. Thus, we find that there is a serious lacuna in the prosecution case which remains unexplained, as such it is not safe to rely upon the testimony of prosecution witnesses regarding the arrest of the appellants and recovery of Maruti Van from their possession at Bara Banki, U.P on the night of 09th September 1992.

15. The doubt against the prosecution story is further compounded by the fact that the complainant Umed Singh (PW1), the witnesses Rajender Singh (PW2) and ASI Raj Kumar of Haryana Police (PW5), if their version is to be believed, took it upon themselves to solve the case. Despite of their having come to know about the arrest of the appellants and the recovery of the Maruti Van belonging to the deceased at Bara Banki, they did not inform the local police at Delhi and took it upon themselves to go to Bara Banki for verification of the facts and even after their return to Delhi, they approached the local police only after they managed to recover the dead body from Jhatikra drain, Delhi. This conduct of the witnesses is highly suspicious, as such they are not worthy of reliance, and if it is assumed that the story put forth by the police of P.S. Bara Banki is correct, then there is a strong been introduced as witnesses with a view to strengthen the prosecution case. Thus, we find that prosecution case is highly suspect.

16. In view of the above discussion, we find ourselves unable to sustain the impugned judgment of conviction and the consequent order on sentence and thus, acquit the appellants for the charges u/s 302 IPC read with Section 34 IPC and Section 364 IPC read with Section 34 IPC, giving them benefit of doubt.

17. All the appellants are on bail. Their bail-cum-surety bonds stand discharged.

18. The appeal is disposed of accordingly.