

(2009) 02 DEL CK 0257
In the Delhi High Court
Case No : Criminal Appeal 24 of 2002

Pramod Kumar @ Pintoo

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 09-02-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2009) 02 DEL CK 0257

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

Bench : Division Bench

Advocate : O.N. Vohra and P.C. Dhingra, in Criminal A. 24/2002, Purnima Sethi, in Criminal A. 275/2003 and Upasana, in Criminal A. 808/200, for the Appellant; Pawan Sharma, for the Respondent

Judgement

Pradeep Nandrajog, J.—Young Arjun aged 14 years was studying in Government Senior Secondary School, Tentwala, Gitanjali Park, Sagar Pur, New Delhi. He was found dead lying in a pool of blood in the toilet of the school at around 5:30-6:00 P.M. on 19.12.1999. The said information was available with the police when a telephone call was received as recorded vide DD No. 36- A. SI Neeraj Chaudhary PW-14 accompanied by Const.Randhava PW-7 and Const.Tej Pal Singh PW-1 reached the school at around 7:35 PM. They found the dead body of Arjun Sharma. Const.Chandan Singh PW-12 was summoned who took 8 photographs Ex.PW-12/2-1 to Ex.PW-12/2-8; negatives whereof are Ex.PW-12/1 to Ex.PW-12/8. One Vishnu Dutt aged 14 years was playing in the school and heard that a boy was lying dead in the school which information he gave to the family members of the deceased. Thereupon Sita Ram PW-3 the father of the deceased reached the school and vide his statement Ex.PW-3/A informed SI Neeraj Chaudhary, who recorded the statement, that he had two sons, elder named Arjun and the younger named Vijay both of whom were students of Government Senior Secondary School, No. 1, Gitanjali Park, Sagar Pur, New Delhi and that at 1:00 PM his son Arjun had gone to the school to play but did not return till the evening and that Vishnu had informed him that his son was lying dead in the

toilet of the school.

2. SI Neeraj Chaudhary made an endorsement on the said statement and sent the same to the police station through Const. Tej Pal Singh for registration of the FIR where HC Goverdhan PW-5 registered the FIR Ex.PW-5/A u/s 302 IPC.

3. The reason was obvious. The deceased was found battered on the face and the skull.

4. We eschew reference to the spot investigation conducted for the reason nothing of material consequences turns thereon save and except to note that a brick and an asbestos sheet stained with blood were recovered from near the dead body and as per the report of the serologist were opined to be stained with human blood of group "B"; the same blood group as that of the deceased. The recovery of the two objects i.e. the brick and the asbestos sheet from the spot and the presence of human blood of group "B" thereon has not been challenged by any counsel during arguments in the three appeals. However, we hasten to note that Sh. O.N. Vohra learned senior counsel for appellant Pramod and other counsel appearing for the co- accused conceded before us while arguing the appeal that indeed Arjun died in the precincts of the school and there is evidence to establish that he was brutally battered to death inside the toilet of the school.

5. The body of the deceased was sent for post-mortem to the Civil Hospital Delhi where Dr. K. Goyal conducted the post- mortem on 20.12.1999 at 12:00 noon. 10 injuries all directed towards the face, forehead and the skull were noted. Internal injuries showed that the left frontal and right temporal lobes of the brain were damaged. The skull had fractured and pieces were embedded in the brain. There was internal haemorrhage and clots were present over base of the brain. He opined that a brick could be the weapon of offence and that no definite opinion could be given with respect to the asbestos sheet being used as the weapon of offence. He further opined that the probable time of death was 20 hours to 22 hours before the time when the post-mortem was conducted.

6. Thus, it is apparent that as per the report of the post- mortem, young Arjun died between 2:00 PM to 4:00 PM on 19.12.1999.

7. Vijay Sharma PW-2, the younger brother of young Arjun informed the police that at around 1:00 PM he and his brother were playing behind the school and that Pintoo, Kalia and Mota were present there. That he i.e. Vijay played till 3:00 PM and returned home. His brother and the said three persons kept on playing. Thereafter, his brother did not return home.

8. Now, Pintoo is the pet name of appellant Pramod. Kalia is the pet name of appellant Devender and Mota is the pet name of appellant Jitender.

9. This led the police to track down the appellants who were apprehended by the police.

10. Relevant for the present decision is to note that appellant Pramod made a

disclosure statement Ex.PW-17/G recorded by SI Jasmohinder Chaudhary PW-17 as per which he admitted to having murdered Master Arjun and disclosed the whereabouts of the clothes which he i.e. Pramod was wearing at the time of commission of the offence and offered to get the same recovered from his house and thereafter produced a T- shirt, a jacket, grey coloured jeans and a pair of shoes which were seized vide seizure memo Ex.PW-17/J. The same were sent to a serologist for a serological test and report Ex.PW-16/A records that the jeans Ex.5A and a pair of shoes Ex.5B tested positive for blood and that on the pant the blood of group "B" was detected. On the shoes human blood was detected, group whereof could not be ascertained.

11. As noted above the brick and the asbestos sheet as also a cotton gauze containing the blood of the victim were reported to have human blood of group "B".

12. Thus, it is apparent that blood of the deceased was of group "B" and that the pant recovered from Pramod's house had human blood of group "B". The shoes recovered from his house had human blood, group whereof could not be detected.

13. Anil Kumar Dixit PW-4 had purportedly informed the police that at 5:00 PM on 19.12.1999 accused Devender who was in an inebriated condition told him that he, his brother Mota and Pintoo have killed a boy in Tentwala School.

14. Hoping that Anil Kumar Dixit would support the prosecution and prove the extra judicial confession; relying upon Vijay, the younger brother of the deceased to prove having seen the deceased in company of the appellants at about 3:00 PM on the fateful day and the recovery of the blood stained pant and the shoes of Pramod from the house of Pramod and pursuant to the disclosure statement of Pramod as also the report of the serologist opining on the presence of human blood on the pant and the shirt of Pramod and the blood group being the same as that of the deceased and as found on the brick found at the site of the occurrence a charge sheet was filed indicting the appellants of having murdered Master Arjun. We note that the motive stated in the charge sheet was based on the alleged confessions of the appellants who had told the police that to satisfy their lust they had taken Arjun inside the toilet who threatened to make public the misdeeds of the appellants, motivating them to kill him so that their honour in the locality would remain intact.

15. Anil Kumar Dixit PW-4 turned hostile and denied that appellant Devender had made any confession to him.

16. Vijay, the younger brother of the deceased supported the prosecution and deposed of playing behind the school with his brother and the appellants from 1:00 PM to 3:00 PM on 19.12.1999 and that when he parted company with the group, his brother stayed back with the appellants.

17. Sita Ram PW-3 the father of the deceased deposed that his son Arjun went out to play at around 1:00 PM and did not come home and that late evening

Vishnu told him that his son was found dead in the toilet of the school.

18. Appellant Pramod examined 3 witnesses in defence namely Subhash Chand DW-1, Devender Solanki DW-2 and Ramesh Kumar DW-3. We note that Ramesh Kumar is father of appellant Pramod. All witnesses deposed that appellant Pramod was running a general merchant shop from premises No. D- 2/142, Jeevan Park, Uttam Nagar, Delhi and that he used to open the shop at around 8:00 AM and used to close the same at around 9:30 PM. All three deposed that on the day of the incident i.e. 19.12.1999, appellant Pramod was present in the shop from 8:00 AM to 9:00 PM.

19. With reference to the testimony of PW-2 Vijay Sharma and the fact that the clothes got recovered by appellant Pramod from his house which he had told the police were the ones which he was wearing at the time of the offence, since human blood was found on the pant and the shoes and on the pant the blood was of group "B" coupled with the fact that the blood group of the deceased was of group "B", learned Trial Judge has held that the said evidence established that the appellants were the perpetrators of the crime. The result is the conviction of the appellants for the offence of murdering Arjun. Vide impugned judgment and order dated 24.12.2001 the appellants have been convicted of the offence of murder and vide order dated 2.1.2002 have sentenced them to undergo imprisonment for life and to pay a fine of Rs. 1,000/- each and in default to undergo imprisonment for 3 months.

20. The plea of alibi sought to be proved by Pramod has been negated by the learned Trial Judge inasmuch as there was no documentary proof of Pramod carrying on business as a general merchant from a shop. The defence witnesses were brushed aside as being worthy of no credence; holding them to be interested witnesses.

21. At the hearing held on 5.2.2009, Sh. O.N.Vohra learned senior counsel for appellant Pramod urged that the prosecution did not obtain a sample of blood group of Pramod and that the possibility of Pramod having blood of group "B" cannot be ruled out. Thus, counsel urged that merely because human blood was detected on the shoes of Pramod and human blood of group "B" was detected from the pant of Pramod is not an incriminating evidence against Pramod.

22. The second submission made by learned Counsel, which was adopted by Ms. Purnima Sethi and Ms. Upasana learned Counsel for the co-accused was that the appellants are aged around 25 years. The deceased was aged about 14 years. There is no evidence that they were friends and the possibility of deceased playing with the appellants is remote. If this be so, learned Counsel urged in unison that Vijay Sharma PW-2 had obviously been tutored to state something which he had never seen.

23. The last submission made is that in his statement Ex.PW-3/A and even before the Court, Sita Ram, the father of the deceased has stated that his son Arjun went out to play. He never said that even Vijay had gone out to play. Thus,

it was urged that Sita Ram had discredited Vijay Sharma as regards Vijay Sharma leaving the house together with his brother Arjun to go and play outside.

24. Learned Counsel for the accused Jitender and Devender submitted that even believing Vijay Sharma, the evidence of last seen was not enough to justify the conviction of their clients. Learned Counsel urged that the said appellants may have parted company at any point of time and the possibility of accused Pramod alone being the assailant cannot be ruled out. In fact, submission made was that all three appellants may have left and thereafter somebody else coming into contact with the deceased and committing the crime cannot be ruled out.

25. In the decisions reported as *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*, and *Mohibur Rahman and Another Vs. State of Assam*, it was held that where a deceased is last seen with the accused and the time gap of the dead body being found is so small that the possibility of someone else being the author of the crime becomes impossible and where due to close proximity of the time a rational mind is persuaded to reach an irresistible conclusion that either he should explain or own up liability, the evidence of last seen is sufficient to convict the accused unless the accused leads evidence and establishes of having parted company with the deceased when the deceased was alive.

26. The law of last seen is clear. The facts and circumstances of each case would have to be properly noted and carefully considered. Thereafter the Court has to determine whether without any hiccup or hesitation the conclusion of guilt can be drawn or not. The time gap, though relevant may assume little significance if the circumstances so warrant.

27. Let us take an example of an accused snatching a child from the arms of his mother and fleeing. There being good evidence to establish the same. The dead body of the child is found after 10 days in a field. The post-mortem report shows that the child died a day prior to the dead body being found. The accused is apprehended. He leads no evidence to show that after fleeing with the child he abandoned him. The circumstances of the case i.e. the snatching of the child by the accused and fleeing away with the child is sufficient enough to hold that the accused is the author of the crime because the accused and the child were last seen together in a hostile circumstance viz-a-viz the child. Similarly where a child is entrusted with an adult to be safely escorted to the school and both of them disappear and the child is found dead after 4 days, the adult escort would be presumed to be guilty of the crime of murder if it is found that the child was murdered, unless the adult can satisfactorily explain having parted company with the child.

28. The first submission urged by Sh. O.N.Vohra learned senior counsel for accused Pramod does not merit much consideration for the reason it is not to have established that the blood group of Pramod was not of group "B" for the reason Pramod did not explain as to how his pant and shoes were stained with

blood. Now, there was no injury on the person of Pramod. Had Pramod been injured it would have assumed significance to find out as to what was the blood group of Pramod. Since Pramod has not explained as to how his pant was stained with blood and how his shoes were stained with blood, the presence of human blood on his shoes and his pant and the blood of group "B" being detected on his pant is incriminating evidence against Pramod for the reason undisputably that the blood group of the deceased was group "B".

29. That the appellants are not students of the school and there is an age gap of 11 years between the age of the deceased and the appellant is of no significance because it is not unheard of to see a 14 year old boy play with elderly boys or even young man in the age group of 20 years to 25 years.

30. The submission that father of the deceased did not depose that both his sons left together to play outside and only Vijay deposed said fact shows that Vijay was improving upon the case of the prosecution is neither here nor there as the same is premised as if there are material contradictions or variations in the deposition of Vijay and his father Sita Ram.

31. It is possible that a father sees only one child leaving the house and not the other. It is possible that Vijay left the house a minute or two after his brother or a minute or two before. It is possible that when this happened the father happened not to see Vijay leave the house. We find that Vijay has not been cross examined minutely on this aspect. We note that the only suggestion put to Vijay is that he is deposing falsely.

32. Why should Vijay be lying? No motive has been attributed to Vijay.

33. We have perused the testimony of Vijay. He was aged 12 years when he deposed on 28.7.2000. Keeping in view his age we find that he has deposed truthfully. He has been cross examined and has withstood the test of cross examination.

34. The triple evidence against accused Pramod of being seen with the deceased at 3:00 PM by Vijay Sharma, the post- mortem report which shows that the deceased died between 2:00 PM to 4:00 PM (obviously has to be between 3:00 PM to 4:00 PM) and the presence of human blood on the pant and the shoes of Pramod and blood group on the pant being of group "B", the same of the deceased completes the chain of circumstances to hold that Pramod is guilty of having murdered young Arjun.

35. Qua accused Jitender and Devender, the only admissible evidence is that of their presence along with Pramod with the deceased at 3:00 PM. Tested on the law pertaining to last seen evidence as explained in the two decisions of the Supreme Court noted hereinabove, we are of the opinion that it would be unsafe to convict Jitender and Devender for the offence of having murdered Arjun inasmuch as it cannot be said that there is no possibility of these two leaving the play field and accused Pramod being left playing with the deceased.

36. It would not be out of significance to record that the doctor who conducted the post-mortem did not report a definite opinion that the asbestos sheet found at the spot was used to batter the deceased. He was firm in the opinion that the blood stained brick could be the object used to batter the young boy. Though human blood of group "B" was detected on the asbestos sheet, the possibility of the sheet being stained with the blood of the deceased when it got splattered cannot be ruled out; meaning thereby there is no clinching evidence to show that two people have acted in concert to cause the injuries. This is an additional circumstance requiring benefit of doubt to be given to appellants Jitender and Devender.

37. For the reasons noted above, Crl. Appeal No. 275/2003 and Crl. Appeal No. 808/2005 filed by appellants Jitender and Devender are allowed. Their conviction is set aside. The order of sentence imposed upon them is also set aside. Directions are issued to the Superintendent, Central Jail, Tihar to release Jitender and Devender if not required in any other case. The appeal filed by Pramod i.e. Crl. Appeal No. 24/2002 is dismissed.