

(2014) 07 DEL CK 0269

In the Delhi High Court

Case No : Crl. Appeal Nos. 390 and 738/2005

Prem Singh

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 18-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161

Evidence Act, 1872 — Section 47

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2014) 3 JCC 1901

Hon'ble Judges : Sanjiv Khanna, J;G.P. Mittal, J

Bench : Division Bench

Advocate : Anupam S. Sharma, Javed Akhtar, Vipul Sharma, Virender Pratap Singh Charak, Pushpender Charak, Shubhra Parashar and R.P.S. Tomar, Advocate for the Appellant; Rajdipa Behura, APP, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sanjiv Khanna, J.—These appeals by Prem Singh @ Fauzi and Samson @ Raju arise out of a common judgment dated 29th March, 2005 convicting them u/s 302 read with Section 34 IPC for murder of deceased Aditya. The aforesaid judgment arises out of FIR 204/1998 P.S. Timarpur. By order on the point of sentence dated 31st March, 2005, appellants have been sentenced to undergo life imprisonment and pay a fine of Rs. 5000/- each, in default of payment of which they have to undergo rigorous imprisonment for one year.

2. By another judgment passed by the same Additional Sessions Judge dated 29th March, 2005, the two appellants were also convicted for murder of Agastya, brother of deceased Aditya in a case arising out of FIR No. 126/98 P.S. Alipur. The conviction of appellants Prem Singh and Samson in the said case was set aside by this Court vide judgment dated 22nd May, 2007 reported in 2000 III AD (Crl.)(DHC) 463.

3. We have at the outset referred to this decision of Delhi High Court in the case

of Agastya as it is the contention of the appellants that the reasons and grounds given in the said judgment are equally applicable to the present appeals, whereas it is the contention of the State that the aforesaid decision should not be followed and/or the said decision proceeded on its own peculiar facts.

4. We note and record that homicidal death of deceased Aditya has not been challenged or disputed by the counsel for the appellants. The post mortem report Ex. PW19/A opines the cause of death as asphyxia consequent to mechanical obstruction of air passages by ligature strangulation and the injury over testicles causing vagal inhibition. The said report was proved by Dr. K.L. Sharma (PW19) who had conducted the post mortem on the body of an unknown male aged about 25 years on 27th April, 1998 at about 4.45 PM. In his court deposition, PW19 has referred to multiple bruises and the ligature mark as well as internal injuries and stated that the said injuries were ante mortem in nature. Hair on the head of the deceased Aditya had been shaved before death. Post mortem report (Ex. PW19/A) and deposition of Dr. K.L. Sharma (PW19) mentions that the time of death was between 5 to 7 PM on 26th April, 1998 and the scrotal injury was caused by a hard flexible object like cane.

5. Investigating Officer in the present case Insp. Sandeep Byala (PW30) has deposed that he was posted as Additional S.H.O. Timarpur and on 26th April, 1998 while patrolling, he received an information that a dead body was lying near Pump House, Gandhi Vihar. He reached the spot along with other officers and found that the information conveyed was correct and he was thereafter entrusted with the investigation. On 28th April, 1998, Rajiv and Parshant, who had appeared and deposed as PW29 and PW27 respectively, came to Insp. Sandeep Byala (PW30) and informed him that they and their friends had learnt from a newspaper report about death of the two brothers and then they identified deceased Aditya and Agastya on the basis of photographs. They were taken to the mortuary where they identified dead body of Aditya and stated that they were related to him and father of deceased Aditya had already been informed by them. Learned counsel appearing for the appellant Prem Singh had drawn our attention to the newspaper clipping placed by the prosecution on the trial court record, which refers to two unknown naked dead bodies possibly of two brothers with identical injuries, being found on 26th April, 1998. It was highlighted that the two, it appeared were killed in a similar manner and by the same culprits. Further, the identity of the deceased Aditya and of the perpetrators was unknown. The submission is that the appellants should be acquitted for they have been absolved on same or identical evidence for murder of Agastya.

6. Parshant (PW27) and Rajiv (PW29) have affirmed that the deceased Aditya and Agastya were their nephews and they along with their brother Abhay were residing in the house of one Nakul Singh Chauhan at 80, Village Dhaka. Abhay was doing CA and had gone to Bombay (now Mumbai) for audit. On 27th April, 1998 at about 8 AM, one Amod informed PW27, that Aditya and Agastya were

missing and were not present in the house since morning of 26th April, 1998. Thereafter, both of them had gone to the residence of Aditya and Agastya and met Surrender, their kitchen partner and made enquiries. On 28th April, 1998, on reading a newspaper report they came to know about the murder of Aditya and Agastya. They had gone to P.S. Timarpur and were shown photograph of Aditya and identified him. They were also shown dead bodies of Aditya and Agastya in the mortuary. Rajiv (PW29) had stated that Aditya and Agastya were missing from night of 25th April, 1998 and they had informed their father on telephone. We shall be referring to the statement of Rajiv (PW29) later on also.

7. Insp. Jan Mohd. (PW28) SHO, P.S. Bara Hindu Rao in April, 1998, was entrusted with investigation in FIR No. 192/1997. It is accepted that the said case related to murder of Shahdab and Arshad. It is also accepted that the two appellants were tried and have been acquitted by the trial court in the said case but leave to appeal filed by the State has been granted by the High Court and the state appeal is pending. Appellant Prem Singh was arrested in FIR 192/1997 by Insp. Jan Mohd. (PW28) on 29th April, 1998 and Appellant Samson was arrested in the said case on 30th April, 1998. Insp. Jan Mohd. (PW28) has deposed that Prem Singh and Samson had made disclosure statements (Ex. PW26/A & B) during investigation of FIR No. 192/1997, about their involvement in the murder of Aditya and Agastya. We shall be referring to the said disclosure statements subsequently, but record that the purported confessions to a police officer are inadmissible. Suffice it is to notice here that the two appellants were arrested in the present FIR by Insp. Sandeep Byala (PW30) on 5th May, 1998.

8. The prosecution case against the appellants primarily relies on 3 circumstantial circumstances: motive; evidence of last seen i.e. the testimony of Pawan Kumar (PW25); and the recovery of clothes of deceased Aditya and an iron rod pursuant to the disclosure statements mentioned above.

9. On the question of motive, we are in agreement with the prosecution that the appellant Prem Singh had a grievance or a cause against Abhay Singh, brother of deceased Aditya who had eloped with one Sunita, live-in partner of appellant Prem Singh. Insp. Sandeep Byala (PW30) had deposed about the ration card of appellant Prem Singh having name of Sunita as his family member and also bank passbook of Sunita in which she has been described as wife of appellant Prem Singh. The said factum has been deposed by Parshant (PW27) and Rajiv (PW29) also. The aforesaid position is also proved from the two letters written by the deceased Aditya identified by his father Shiveshwar Jha (PW26) marked Ex. PW25/A and 25/B. We do not agree with the counsel for the appellants that the deposition of Shireswar Jha (PW26), father of the deceased Aditya on identification of handwriting of the deceased Aditya, should be discarded as PW26 had not stated that he had seen the deceased Aditya writing and signing and being acquainted with his handwriting. The expression "acquainted" has been explained in explanation to Section 47 of the Evidence Act and even if there is a technical flaw, Shireswar Jha (PW26), deceased's father, could and did

identify the handwriting of his son i.e. deceased Aditya. PW26's deposition on identification of the handwriting should be accepted and we hold that the letters Ex. PW25/A and 25/B were written by deceased Aditya. We also reject the contention of the counsel for the appellants that the letter Ex. PW25/B purportedly dated "21st March, 1997" has been fabricated. The said letter was produced by Shireswar Jha (PW26), father of deceased Aditya and it is apparent that the year 1997 mentioned on the said letter is a typographical error or mistake. The other letter dated 9th April, 1998 was found in the room of Aditya on 28th April, 1998 as deposed to by Insp. Sandeep Byala (PW30) who has also referred to recovery memo (Ex. PW6/A). Pawan Kumar (PW25) in his cross-examination had stated that he had not seen the letter (Ex. PW25B) before he had signed the memo (Ex. PW25/DA). The letter Ex. PW25/B was given by father of the deceased, i.e. Shireswar Jha (PW26). The said letter was addressed to Shireswar Jha (PW26) and PW26 had deposed to the said effect and also that he had given the said letter to the police, who had seized the same vide memo Ex. PW25/DA. The aforesaid factual narration reveals that appellant Prem Singh had a grievance against Abhay, brother of deceased Aditya and Agastya as Abhay eloped with his live in partner Sunita and both of them were absconding and missing.

10. This brings us to the second circumstance relied upon by the prosecution i.e. evidence of last seen. Prosecution in this regard, relies upon one sole witness Pawan Kumar (PW25). Pawan Kumar had appeared as PW28 in Sessions Case arising out of FIR No. 126/1998 P.S. Alipur, relating to murder of Agastya and his testimony was disbelieved by the High Court, allowing the appeal vide judgment dated 22nd May, 2007 recording the following reasoning:

7. On a careful analysis of the material placed before us, we find PW-28, Pawan Kumar, states that the deceased Agastya and Aditya were known to him and were his nephews. In 1998, he resided in Wazirpur Village, Ashok Vihar, Delhi. On 25.4.1998, the witness had gone to visit Agasthya and Aditya at about 11:30 p.m. at Village Dhaka where he saw Agasthya standing with accused Raju in the street. He enquired of his well being and went ahead. Thereafter, he saw Aditya coming with accused Prem Singh. The witness told Aditya that he had come to visit him on which Aditya informed him that it would not be possible to meet on that date and that the witness should come some other time. Both Aditya and Agastya left the spot in white Maruti car along with Prem Singh and Raju. The witness goes on to say that on 29.4.1998, he came to know that both Agastya and Aditya had been murdered. This information was given to him at the mortuary by one Rakesh. In the mortuary, he identified the dead bodies of Agastya and Aditya. On 27.6.1998, he identified the clothes of both the deceased Agastya and Aditya in the court of learned Metropolitan Magistrate. He testifies to the seizure memo taking into possession Exhibit PW 26/C and PW 26/A. In cross-examination, this witness states that on 7.7.1998, he visited Tis Hazari Court and saw both the accused persons in custody of Inspector Sandeep Byala. He identified the accused persons in the court. He admits to the suggestion that he

identified the persons on the asking of Inspector Byala and that the police had recorded his statement when he had identified the accused persons on 7.7.1998.

8. From an analysis of the deposition of PW-28, Pawan Kumar, what emerges is that the witness, for the first time, narrates the fact that he saw the deceased and the accused together on 25.4.1998, to the police on 7.7.1998. In other words, prior to 7.7.1998, this witness had not named the accused persons nor had stated that they were last seen with the deceased on 25.4.1998. We repeatedly made inquiries from the learned Public Prosecutor to be sure on this fact of the matter. The learned Public Prosecutor conceded that it was only on 7.7.1998 that this witness informed the police that the deceased were seen with the accused on 25.4.1998. It is rather strange that this witness, who claims to have identified the dead bodies of Agastya and Aditya on 29.4.1998 in the mortuary, did not state this fact of the deceased being in the company of the accused on 25.4.1998. This strange recollection on 7.7.1998, to say the least, is not credible and does not inspire confidence. PW-28, Pawan Kumar, is allegedly the only witness of this last seen circumstance. Having found PW-28 not to be a reliable witness, the circumstance of last seen remains unproved.

11. Submission made by the learned counsel for the prosecution is that in the present case, statement of Pawan Kumar u/s 161 Cr. P.C. as per the case diary and as per records was recorded on 28th April, 1998 and, therefore, the reasoning given above, disbelieving Pawan Kumar's deposition on the ground that his statement in FIR 128/98 was recorded on 7th July, 1998, is inapplicable and not relevant. To this extent, learned counsel for the State is correct but there are several reasons and grounds why we feel that statement of Pawan Kumar (PW25) on the question of last seen is not reliable or rather untrustworthy and undependable. He, it is claimed was a chance witness. Pawan Kumar in the present case had appeared as PW25 and has deposed that on 25th April, 1998 at about 11.30 PM at night, he had gone to meet his relatives deceased Aditya and Agastya at village Dhakka. He was then living in Delhi in Village Wazirpur, Delhi. He had seen appellant Samson sitting with deceased Agastya in the street and he had enquired about his well being and proceeded further. Thereupon he met deceased Aditya who was sitting with the appellant Prem Singh. Pawan (PW25) informed deceased Aditya that he had come to see him. Deceased Aditya told him to come afterwards as he was going out with appellant Prem Singh. Thereafter on 28th April, 1998, he came to know that Aditya and Agastya had been murdered. He met Insp. Sandeep Byala (PW30) and disclosed the aforesaid facts to him.

12. There are several reasons why we feel that the aforesaid version given by Pawan Kumar (PW25) on the question of last seen is not credible and reliable. Visit by PW25 late at night at 11.30 PM on 25th April, 1998 is not normal but unusual. Further, it is apparent from the letters Ex. PW25/A and 25/B, that both deceased Aditya and Agastya were apprehensive and feared appellant Prem Singh. As per testimony of Pawan Kumar (PW25), deceased Aditya rather stiffly

and unceremoniously asked PW25 to go away and come afterward as he was going with the appellant Prem Singh. He had also seen appellant Samson who was talking to deceased Agastya in the street, late at night. The aforesaid version/statement does not appear to be normal and acceptable in the said circumstances. Pawan Kumar (PW25) has accepted that deceased Aditya was his nephew (bhanja) and he also knew Rajiv (PW29) and Prashant (PW27) who were his uncles. The said Rajiv and Parshant have stated that they came to know about death of Aditya and Agastya on 28th April, 1998 and the fact that Aditya and Agastya were missing even earlier, on 27th April, 1998. Certainly, they would have got in touch with Pawan Kumar (PW25) as it was a serious matter. Moreover, Pawan Kumar (PW25) would have informed and spoken to Parshant Kumar (PW27) and Rajiv (PW29), about his visit late in night at about 11.30 PM on 25th April, 1998. PW27 and PW29 have not deposed about any such conversation or stated that PW25 had met deceased Aditya and Agastya on 26th April, 1998. We have gone through the jimini i.e. the police diary and notice that there was evidence and material to show that both deceased Aditya and Agastya were alive and well till 11.00 PM at 25th April, 1998 as they were seen by several persons and had then gone to sleep in their rooms. Pawan Kumar (PW25) should have certainly looked and ascertained their well being at least on 27th April, 1998, if he had seen deceased Aditya and Agastya with the appellants Prem Singh and Samson two days before. Interestingly, Insp. N.G. Tyagi (PW22) had stated that appellant Prem Singh had been called for interrogation in FIR 192/1997 for about 10 hours on 27th April, 1998, but he was allowed to go. Thereafter he was interrogated on 29th April, 1998 in the morning and subsequently arrested on the same day. In these circumstances, we are inclined to disregard and disbelieve the last seen version as expounded by Pawan Kumar (PW25).

13. This brings us to the third evidence/material i.e. the disclosure statements and recoveries pursuant thereto. As noticed above, the two disclosure statements were recorded in FIR No. 192/97, P.S. Bara Hindu Rao and have been relied upon in the present FIR as well as in the murder case of deceased Agastya arising out of FIR No. 126/98. As per the prosecution version, the disclosure statement of appellant Prem Singh was recorded on 29th April, 1998 and that of appellant Samson was recorded on 29/30th April, 1998. This Court, in criminal appeal arising out of conviction in FIR 126/1998, disbelieved the recoveries which were common to the case of deceased Aditya and Agastya, recording the following reasons:-

10. In the present case, we find that the statement of the accused relied upon as disclosure was recorded on 29.4.1998. The recoveries pursuant to this disclosure were effected on 3.5.1998. The unexplained long delay in effecting recoveries makes the recoveries a suspect. Foul play cannot be ruled out. We also find from the evidence on record that the date in the recovery memos is tampered with, in other words, 3.5.1998 is made to appear as 1.5.1998. Witnesses throughout depose to recoveries having been effected on 1.5.1998 whereas the document

speaks otherwise. A certified copy of the recovery memos was obtained by the accused which did not have the overwriting, however, the original, when inspected by the court, was found to have the interpolation which gives rise to a deduction that the original was tampered with after the certified copy had been obtained by the accused person. The so-called initialing of the cut by the Investigating Officer cannot take the case any further. Added to this is the fact that even though four days had elapsed from the so-called disclosure statement, no public witness was associated to effect the recoveries.

11. Another aspect to which our attention had been drawn is that PW-37, Inspector Jan Mohd., in his statement in court states that both the accused persons got the clothes recovered which indicates that it was a joint recovery. Even otherwise, there is no evidence on record to show that the clothes alleged to have been recovered were worn by the deceased persons, when they were allegedly last seen by PW-28, Pawan Kumar. Another attack to the disclosure statement itself is the contradictions in the statements of PW-17, SI Dinesh Kumar, and PW-37, Inspector Jan Mohd., in respect of the place where the disclosure was recorded. PW-17, SI Dinesh Kumar, says it was at the office of the AATS and not at Police Station Bara Hindu Rao whereas PW-37, Inspector Jan Mohd., says that the same was recorded in the Police Station Bara Hindu Rao and not at AATS.

12. PW-34, Inspector K.G. Tyagi, deposed that the disclosure was made at 5 p.m. on 29.4.1998 whereas PW-37, Inspector Jan Mohd., says that it was made at 2 p.m. Surely, with all these discrepancies shrouding the discoveries, make this circumstance not proved beyond doubt.

14. We have examined the said reasons with reference to the evidence on record in the present case which arises out of FIR No. 204/98, P.S. Timarpur and find that the aforesaid reasoning is squarely and equally applicable herein in view of the evidence and material on record. No distinction can be and should be made. It has not been shown that the reasoning given in the aforesaid paragraphs is factually incorrect or wrong. In fact, we would like to add and highlight certain other discrepancies on the question of recoveries.

15. Firstly, as noticed above, the disclosure statements were recorded in FIR 192/1997. The certified copy of the said disclosure statements on the trial court record marked Ex. PW28/DC and 28/DD, when compared with another set of disclosure statements Ex. PW18/B and 18/A, show and reveal material differences indicative of possible interpolation and reflecting on their credibility and authenticity. Certified copy of disclosure statement Ex. PW28/DC does not have signatures of appellant Prem Singh on any of the pages including the last page. Ex. PW28/DC is only signed by Insp. Jan Mohd (PW28). The certified copy of disclosure statement, Ex. PW28/DD is not signed by appellant Samson on any page, except the last page. However, Ex. PW18/A is signed on each and every page by the appellant Prem Singh, and Ins. Jan Mohd (PW28) has signed the said statement on every alternate page. Similarly, appellant Samson has signed

each page of the disclosure statement Ex PW 18/B and Insp. Jan Mohd. (PW28) had signed all pages except page 2. The aforesaid discrepancies were put and confronted to Insp. Jan Mohd. (PW28) during his cross-examination and he has stated as under:-

The sign. of accused Prem Singh was obtained on all the pages of his discl. statement. I have seen the certified copy ex. PW-28/DC of the discl. statement of accused Prem Singh. It is correct that there are no sign. of any witness and that of accused on this documents on any page. I have also seen the certified copy of discl. statement of accused Samson which is ex. PW-28/DD. It is correct that on some pages there are no sign. of accused Samson on this discl. statement. (Volunteered the sign. of the accused Samson have not appeared in the photocopies). It is correct that sign. of K.G. Tyagi do not appear on ex. PW-28/DD.

16. Learned counsel for the appellants has also produced before us copy of Ex. PW22/B which relates to seizure memo of rope on which the date 3/5/1998 has been over written as 1/5/1998 and our attention was drawn to the certified copy obtained from this Court in Crl. L. P. No. 37/2006, State v/s. Prem Singh, in which the date mentioned is 3/5/1998. Our attention was drawn to the discrepancy in respect of date which was mentioned on Ex. PW22/A, i.e. 1st May, 1998, but no date is mentioned in the same document filed in Crl. L.P. 37/06 titled State vs. Prem Singh @ Fauzi and Anr. It is possible that the said dates may have been changed or filled up subsequently and after the photocopies were made and to this extent, the argument of the appellants may not be fully valid and correct, but it does appear that the dates have been changed from 3rd May, 1998 to 1st May, 1998 and the date 1st May, 1998 has been written subsequently. In case the recoveries were made on 3rd May, 1998, there is bound to be a doubt or debate on the said recoveries. As noticed above, Insp. N.G. Tyagi (PW22) had stated that appellant Prem Singh was interrogated for about 10 hours on 27th April, 1998 and then interrogation was conducted on 29th April, 1998 in the morning. There does not appear any logic or reason for the appellants to retain the clothes of the deceased Aditya at appellant Prem Singh's dairy farm even after first interrogation on 27th April, 1998. The clothes, purportedly worn by the deceased Aditya were of no market value but would have implicated appellant Prem Singh. Thus, appellant Prem Singh as per prosecution version had a chance and time to destroy the said clothes.

17. This is a case of circumstantial evidence and the prosecution has been only able to establish possible motive for commission of offence as the brother of the deceased Aditya had eloped with Sunita, live-in-partner of appellant Prem Singh. However, there is no material or evidence to suggest and implicate the appellants as perpetrators of the said crime. It is not possible to uphold the conviction of the appellants only on the basis of aforesaid possible motive. The appeal has to be therefore allowed and the conviction of the appellants is set aside. Appellant Prem Singh is already on bail and therefore, the bail bond executed by him will

stand cancelled. Appellant Samson @ Raju who is in custody will be released forthwith unless he is required to be detained in any other case in accordance with law. The appeals stand disposed of.