

(2007) 03 DEL CK 0183

In the Delhi High Court

Case No : Criminal M.B. 146 of 2007 in Criminal A. 64 of 2007

Shibu Soren

APPELLANT

Vs

C.B.I.

RESPONDENT

Date of Decision : 14-03-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Evidence Act, 1872 — Section 10, 8
Penal Code, 1860 (IPC) — Section 120B, 302, 364

Citation : (2007) 95 DRJ 545

Hon'ble Judges : S.L. Bhayana, J; Manmohan Sarin, J

Bench : Division Bench

Advocate : Dinesh Mathur, Barun K. Sinha, Sanjiv Kumar, Sudhir K. Santoshi and Manish Kumar, for the Appellant; Amarendra Sharan, Addl. Solicitor General, Harish Gulati, Amit Anand Tiwari, A.K. Singh and Rohit Sharma, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan Sarin, J.—Vide judgment dated 28th November, 2006 and order of sentence dated 5th December, 2006, appellant Shibu Soren had been convicted for the offences punishable under Sections 120B read with Section 364/302 IPC. He was sentenced to undergo imprisonment for life and fine of Rs. 5 lakh and in default of payment of fine, additional R.I for one year for the offence u/s 120-B read with Section 364/302 IPC. Appellant preferred an appeal, which was admitted to hearing on 25th January, 2007. Notice was issued in the application for suspension of sentence and conviction. Respondent-CBI has filed a detailed reply to the application on merits.

2. Mr. Dinesh Mathur, learned senior counsel for the appellant as also Mr. Amarendra Sharan, learned Addl. Solicitor General were heard at length.

3. Appellant seeking suspension of sentence assails the impugned judgment as erroneous case being bereft of any evidence of criminal conspiracy implicating

the appellant. Appellant had been charged for the offences punishable u/s 120B read with Section 364/302 IPC for the murder of his Private Secretary Shashi Nath Jha. Two accused Sunil Khaware and Ashish Thakur who had been charged for the offences u/s 120B read with Section 364/302 IPC and for the substantive offence u/s 364 IPC were acquitted.

4. Prosecution claims that appellant had masterminded the conspiracy for abduction and murder of his Private Secretary Shashi Nath Jha. In pursuance to the said conspiracy, accused Sunil Khaware and Ashish Thakur on 22nd May, 1994 at about 11 p.m. abducted Shashi Nath Jha from near Dhaula Kuan, Delhi. The murder of Shashi Nath Jha was committed by striking heavy iron rod on his head by accused Nand Kishore Mehta @ Nandu inside his house in village Tikra Toli, District Ranchi in the last week of May, 1994. Thereafter the dead body of Shashi Nath Jha had been removed by accused Nand Kishore Mehta @ Nandu, Ajay Kumar Mehta @ Dilip, Pashupati Nath Mehta @ Posho, Shalendra Bhattacharya besides one lady who had concealed the dead body by burying it near brick kiln of accused Nand Kishore Mehta @ Nandu. Subsequently, the dead body was removed and buried in the jungle at Piska Bagan, Piska Nagari District Ranchi, from where the remains of dead body were exhumed on 13th August, 1998 by the CBI.

5. Appellant urged that trial court reached the conclusion that there was nothing on record to establish that Ashish Thakur and Sunil Khaware had abducted Shashi Nath Jha from Delhi and handed him over to other accused at Village Tikra Toli for the latter's murder. The tea stall/pan shop vendor Bal Kishan Pandey had failed to identify the two accused. Further, there was no evidence to establish that deceased had been seen in company of these two accused in the last week of May, 1994 or at the party in the house of Nand Kishore Mehta @ Nandu. Resultantly, the trial court held that it was not established that they were abductors of Shashi Nath Jha from Delhi or they were party to the conspiracy for abduction and murder of Shashi Nath Jha.

6. Mr.Mathur on behalf of appellant submits that once case against accused who were charged substantively for the offence u/s 364 IPC was not established, of necessity, the same had to fail against the appellant, who is sought to be implicated for abduction and murder on the basis of Section 120B IPC.

7. Learned Counsel for the appellant urged that with this, the very genesis, the theory and edifice of criminal conspiracy sought to be built implicating the appellant stood demolished. There is no evidence on record with regard to any planning and meeting of the alleged conspirators.

8. The next limb of the appellant's submission was questioning and raising doubts on the corpus delicti. It was highly doubtful that the skeleton recovered four years after the alleged incident, belonged to the deceased Shashi Nath Jha. Available evidence on record, pointed to the exhumed skeleton as not belonging to the deceased Shashi Nath Jha. In this connection, reliance was placed on the

recovery of silver tooth and a kara being found with the skeleton. The relations of the deceased had deposed that deceased did not have any silver tooth and was not found to be wearing kara. Mr. Mathur laid great emphasis on the DNA tests reports. He submitted that prosecution itself had sought directions from the court for blood samples of the mother, brother and daughter of the deceased being taken for DNA tests so as to fix identity of the skeleton beyond doubt. The relations of the deceased earlier refused to give their blood samples. Subsequently, they had relented and under court's directions, blood samples of relations other than the mother were taken at AIIMS. The DNA could not be extracted from the skull of the skeleton as it had denatured. DNA finger printing were then got done from femur and other bones. The report received was a negative one and the prosecution itself had applied to the court for obtaining a second opinion on the issue. Mr. Mathur urged that in the circumstances CBI could not be permitted to do a volte face and urge that DNA reports were neither exhibited nor experts examined and hence could not be referred to. Criticizing the reliance placed by the CBI on the expert's opinion obtained on the basis of test of super imposition of the skeleton being of the deceased Shashi Nath Jha, Mr. Mathur submitted that test was not definite and determinative. It only refers to a possibility of the skull belonging to an individual in the photograph. The test is used and adopted for negative assessment rather than positive affirmation. Mr. Mathur submitted that the polygraph test carried on the appellant and the results thereof tend to dispel the theory of conspiracy and any motive.

9. Mr. Mathur next assailed the circumstances and opinion set out in para 25 of the judgment as sub paras 1 to 10 based on which the court reached the conclusion that appellant had masterminded and hatched a conspiracy with other co-accused for abduction and murder of the deceased. It was urged that the learned Judge had drawn wholly unwarranted inferences from trivial and innocuous things and utterances. He also questioned some of the utterances and statements attributed to the appellant. He submitted that a suggestion to the deceased's brother not to go about accusing or naming suspects, could not be interpreted as pointing towards criminal conspiracy rather it could be taken as advice not to name persons as suspects without any basis. The alleged attempt to remain out of Delhi by going to Bokaro which was at a short distance from the alleged scene of murder was neither here nor there. Similarly while questioning the utterances attributed to the appellant of having told the deceased's daughter that deceased was no more, learned Counsel submitted that attribution of the said utterances to the appellant was not justified on reading of the evidence as a whole.

Without prejudice, even if the appellant was attributed the knowledge of death, it alone was not sufficient for criminal conspiracy. He also assailed the finding of the appellant having allegedly offered Rs. 3 to 4 lakhs to Appellant's brother as an erroneous conclusion not reachable on the evidence on record. Similarly the utterances of the appellant that he himself was CBI, could not be taken as an attempt to scotch the investigation. The offer to pay for the day boarding

charges for the children of the deceased again could not be regarded as a link in the alleged criminal conspiracy. It should have been taken as a gesture of help to the children of an employee who had served him well. Similarly the allotment of ticket to Nand Kishore Mehta @ Nandu from Hatiya Constituency could not be taken as token of reward for elimination of the deceased. Mr. Mathur urged that there was no evidence to show that deceased had been demanding Rs. 15 lakhs out of the bribe amount received for voting against the "No Confidence Motion". Mr. Mathur submitted that this had not even put to the appellant as incriminating evidence u/s 313 Cr.P.C and hence could not be used by the court.

10. He argued that the edifice of criminal conspiracy had been built on conjectures, surmises etc. Counsel referred to the *Dasari Siva Prasad Reddy v. The Public Prosecutor High Court of A.P.* reported at 2004 (3) JCC 1243 in urging that even if there was strong suspicion, it could not be the basis of conviction to meet the standard of proof required in a criminal case. It is not necessary for the purpose of application for suspension of sentence to deal any further with these submissions and some of the other authorities relied on by the appellant's counsel.

11. Learned Additional Solicitor General, Mr. Amarendra Sharan, in opposition to the prayer for suspension of conviction and sentence, submitted that the appellant had been convicted and sentenced only in December, 2006 after a full-fledged trial by a detailed reasoned judgment running into more than 200 pages. There were no grounds or reasons for suspension of sentence at this stage much less any sound reason. Appellant had a streak of criminality and was already facing prosecution in 16 criminal cases including cases u/s 302 IPC. This factor itself should weigh against consideration of prayer for suspension of sentence at this juncture when he had barely undergone imprisonment for three months.

12. Learned ASG submitted that direct evidence for criminal conspiracy was hardly ever available and the prior and subsequent conduct of the accused and parties was relevant under Sections 8 and 10 of the Indian Evidence Act. The acquittal of Sunil Khaware and Ashish Thakur was a result of the failure to identify them by the witness, i.e tea stall/ pan shop vendor, Balkishan Pandey. However, the factum of abduction of the deceased and being pushed into the car by the abductors otherwise stood established from his examination-in-chief. Accordingly, the acquittal should not undermine the case of criminal conspiracy against the appellant.

13. Criticizing the doubts sought to be raised merely on the statement of the mother of the deceased that CBI officials had told her that the skeleton had a silver tooth, the learned ASG submitted that the same was not borne out by the record. The silver tooth was neither mentioned in the recovery in the panchnamas nor in the testimony of the panch witnesses. The DNA test, on which reliance was sought to be placed by the appellant, has not been exhibited nor the experts have been examined and hence the same could not be relied on so as to dilute or undermine the opinion of the expert, PW-16, who after

following the technique of superimposition had opined that the skeleton was that of the deceased Shashi Nath Jha. The post mortem report confirms that the fractured skull could be caused by an iron rod, which was the case of prosecution.

14. Learned ASG also urged that the bogey of doubt sought to be raised regarding the skeleton was misplaced. He submitted that the factum of death and murder could be proved even in the absence of recovery of the dead body.

15. He submitted that in the instant case there was sufficient ocular evidence available and the statements of the eye-witnesses, who had witnessed the assault and were rightly believed by the trial court. The statement of PW-4 recorded u/s 164 of Cr.PC duly identified the photograph of the deceased, Shashi Nath Jha thus clearly establishing that it was the deceased Shashi Nath Jha, who had been killed. The said PW-4 had not been cross-examined on this aspect of having identified the photograph of the deceased as the person who was brought in in the last week of May by Nand Kishore Mehta. He referred to the depositions of PW-28 and PW-4, which clearly established that the person killed was the deceased, i.e., Shashi Nath Jha.

16. Learned ASG submitted that for appreciating the existence of criminal conspiracy and appellant's complicity therein, the following deserves to be kept in mind.

The deceased Shashi Nath Jha was a close confidant for over 15 years of the appellant being his Private Secretary. The deceased has nearly three months prior to his death mentioned to his mother that his life was in danger and he feared danger from his employer. The factum of deposit of the bribe money in the account was part of the findings in a judgment and hence was admissible to be read in evidence. The said bribe money together with the evidence regarding the deceased allegedly demanding share in the same coupled with the apprehension of danger to his life expressed to his mother showed that the relationship between the appellant and the deceased had soured on account of demand of a share in the money received. The learned ASG submitted that this provided the motive for the crime. Besides from the statements of the mother of the deceased, his wife and two daughters, who had gone to meet the appellant and the conversation, they had with the appellant clearly proved that the appellant had knowledge of the deceased's death. Besides an offer for compensation would emanate only if there was knowledge that the person had died and appellant was party to the crime.

17. Learned ASG submitted that the appellant's conduct in attempting to scotch the investigation by first suggesting that the deceased's brother should not name any suspect and secondly in advising not to lodge a report with the CBI or the police were indicative of his complicity in the conspiracy. The attempt was to prevent any investigation by the police or CBI by telling the deceased family that he was CBI himself. There was no earthly reason for the appellant to dissuade the deceased's family and relations from lodging a report especially when the

appellant being a Cabinet Minister was in a position to ensure an effective probe and thorough investigation.

The above coupled with the offering money and compensation of Rs. 3-4 lacs to close the issue was demonstrative of his complicity and guilt. Independent witnesses had deposed on the familiarity of the appellant with the actual assailant, Nand Kishore Mehta, appellant socializing with him and being on visiting terms with the appellant. Significantly the appellant himself denied the relationship in his statement u/s 313 Cr.PC. The act of giving a party ticket to Nand Kishore Mehta was a reward for having accomplished the assignment.

In these circumstances, the learned ASG submitted that the conclusions of the trial court holding the appellant guilty were well founded and no case for suspension of the appellant's sentence was not made out.

18. We have heard at length the learned Counsel for the appellant as also the learned ASG in opposition to the prayer for suspension of sentence. We have chosen to record the submissions made by the appellant as also the response of the learned ASG in detail only to bring to the fore the nature of the pleas raised in the appeal and the factual and legal issues which arise for determination. We refrain at this stage from expressing an opinion on the merits of the respective submissions and pleas made by the appellant and respondent lest they tend to prejudice either of the parties save to observe that the pleas and submission sought to be raised by the parties detailed examination of which is not feasible while hearing the application for suspension of sentence and the same can be done appropriately during the hearing of the appeal. It cannot be said at this stage that the case is bereft of any evidence implicating the appellant. It would require, in our view, a detailed and in-depth examination of the medical and documentary evidence as also the evidence of witnesses and eye-witnesses for a final determination on whether the conclusion arrived at by the trial court regarding the existence of criminal conspiracy and appellant's role therein as set out in para 25 of the judgment and in para 26 for other accused can be finally sustained or not.

19. It is during the hearing of the appeal that the effect of each of these circumstances and their cumulative effect would be determined for reaching a finding. While human liberty is sacrosanct, we cannot overlook the fact that the appellant has been convicted after a detailed and elaborate trial only in November, 2006 and sentenced in December, 2006. The appellant, as per CBI, is already undergoing prosecution and trial in numerous cases including cases u/s 302 IPC. Even though, he may be having the benefit of suspension of sentence, the factum of existence of these trials which the Addl. Solicitor General urges, as being demonstrative of streak of criminality, cannot be brushed aside. There are no special or exceptional circumstances warranting suspension of sentence at this stage. Reference may usefully be made to the decision of the Supreme Court in Ramji Prasad Vs. Rattan Kumar Jaiswal and Another,

20. In these circumstances and for the aforesaid reasons, we are not inclined to grant at this stage, prayer for suspension of sentence and the same is accordingly declined and the application is dismissed. We may observe that during the hearing of the application for suspension of sentence, detailed submissions were sought to be made in a manner virtually arguing the appeal on merits, we told the parties that appeal itself can be taken up for hearing as may be mutually convenient to them. However, the learned Counsel for appellant pressed only for disposal of the application for suspension of sentence.

With a view to ensure that appellant does not nurture any grievance of justice eluding him for long on account of pendency of the appeal, we expedite the hearing of the appeal. Respondent-CBI have offered and undertaken to prepare the paper book within 15 days. We accordingly direct them to prepare five sets of paper book and hand over one set to the appellant, who may point out inadequacies, if any.

The appeal be listed for directions on 5th April, 2007 for fixing the date of actual hearing immediately thereafter.