

(2013) 08 DEL CK 0292
In the Delhi High Court
Case No : Criminal L.P. 83 of 2013

State		APPELLANT
	Vs	
Rakesh		RESPONDENT

Date of Decision : 26-08-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 378(3), 482
Identification of Prisoners Act, 1920 — Section 4, 5
Limitation Act, 1963 — Section 5
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2013) 8 AD 686 : (2013) 4 JCC 2464

Hon'ble Judges : Kailash Gambhir, J; Indermeet Kaur, J

Bench : Division Bench

Advocate : Sunil Sharma, app, for the Appellant;

Final Decision : Dismissed

Judgement

Crl.M.A. 2300/2013

By this application moved u/s 5 of Limitation Act, 1963 read with Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) the applicant seeks condonation of delay of 49 days in filing the appeal. For the reasons stated in the application, delay in filing the appeal is condoned.

The application stands disposed of.

CRL.L.P. 83/2013

1. By this application filed u/s 378(3) of Cr.P.C. the petitioner seeks grant of leave to appeal against the judgment dated 29.09.2012 passed by Hon'ble Sh. Vijay Kumar Dahiya, Addl. Sessions Judge, Dwarka Courts, New Delhi in FIR no. 214/2009 thereby acquitting the accused from the charges framed against him u/s 302 /201 of IPC. Brief facts of the case as per prosecution story, in the nutshell, are that on receipt of DD No. 4B on 17.10.2009 at about 2.35 a.m., regarding fire in a car at Khera Ghumman Hera Road, SI Arvind along with Ct.

Naresh reached at the spot and found one burnt Santro Car bearing registration number DL3CAB-1563 on the side of the main road. The Fire Brigade was also informed which reached the spot and had extinguished the fire. On checking of the Santro Car, one burnt dead human body, having its head on the West side and feet on the East side, was found on the rear seat of the car and one blue coloured blood stained T-Shirt having words ED Hardy TM written on it was found near the bushes and one blood stained baniyan of Lux Venus was found lying near the field. One another white and blue coloured striped T-shirt having blood stains on it was also found near the bushes on the East side of the road. One empty half bottle of Mc Dowells No. 1 and a transparent plastic glass were also found there. Crime team was also called at the spot. Thereafter, SI Arvind Kumar prepared the rukka and sent HC Vinod for getting the case registered. After the registration of the FIR, the investigation of the case was marked to Insp. Vijay Singh who reached the spot and sent the dead body of the deceased for post-mortem. Thereafter, Insp. Vijay Kumar took into possession the white & blue coloured striped half sleeve shirt, blue coloured T-shirt having Ed Hardy TM written on it, the white coloured blood stained baniyan having Lux Venus written on it, half bottle of Mc Dowells No. 1 and a transparent plastic glass. The burnt Santro car was found to be registered in the name of Smt. Ramwati Devi W/o Sh. Chandan Singh, R/o 191, Balmiki Mohalla, Nagli Sakrawati Village, New Delhi, who was the mother of the deceased Rajesh. Smt. Ramwati Devi, mother of the deceased and Smt. Poonam, wife of the deceased identified the burnt Santro car to be the same in which the deceased Rajesh had left home and they told that the deceased had left the house on the night of incident to meet one Kamlesh with whom he had illicit relations. Smt. Kamlesh and Smt. Poonam also identified the dead body of Rajesh.

2. On 18.10.2009, Insp. Vijay Singh arrested the accused Rakesh, s/o. Shri Ompal and recorded his disclosure statement. In his disclosure statement, accused Rakesh stated that the deceased Rajesh had illicit relations with his mother Kamlesh due to which he and his family members were defamed and the deceased used to comment upon him. He stated that being fed up with all these state of affairs, he called the deceased Rajesh at Nangloi Stand on 16.10.2009, purchased one half bottle of Mc Dowells No. 1, met the deceased at Nangloi stand and thereafter sat in his car and reached Ghoomanhera Khaira Road and stopped the car near the village of Kharkhari Nahar and made him drink liquor and when the deceased was under the influence of liquor, he stabbed him with knife due to which the deceased Rajesh entered into a scuffle with the accused (guthamgutha ho gaya) and accused Rakesh also sustained certain injuries on his forehead. He then attacked the deceased with knife and even lifted one brick from the road and attacked with it on the head of the deceased. He further stated that after committing the murder of Rajesh, he, in order to remove the material evidence, put the dead body of Rajesh in the car and set the same on fire and ran away from there. The accused further disclosed that he even had thrown his upper wornclothes, knife and liquor bottle in the bushes and had later

washed the blue coloured jeans which he was wearing at the time of commission of offence.

3. Accused Rakesh had got recovered the blue coloured jeans worn by him at the time of commission of offence from his residence and he also got recovered the knife used in the commission of offence, keys of burnt car and blood stained brick. Thereafter, post-mortem was conducted and the dead body of the deceased Rajesh was handed over to his family members. In the post-mortem, doctor had opined that the cause of death was due to head injury (craniocerebral injury). External Injury no. 1 was ante mortem and caused by blunt force impact against a hard surface/object. External Injury no. 2 was ante mortem and caused by a single edged sharp weapon/object. Thereafter, I.O./Insp. Vijay Singh also took the subsequent opinion of the doctor regarding the knife recovered at the instance of accused and the doctor opined that the injury stated in the post mortem of deceased Rajesh can be caused by the knife or a similar object/weapon. During investigation, I.O./Insp. Vijay Singh also got examined the burnt Santro car from FSL Rohini and obtained the expert opinion. After the transfer of I.O./ Insp. Vijay Singh, the investigation was handed over to Insp. Sandeep Gupta who got prepared the scaled site plan at the pointing out of SI Arvind Kumar and deposited the DNA Samples at FSL. On the basis of investigation, charge-sheet u/s 302 /201 IPC was prepared and the same was filed in the Court.

4. After due deliberation, charge u/s 302 /201 IPC was framed against the accused to which he pleaded not guilty and claimed trial.

5. Prosecution tendered 31 witnesses in support of its case. After hearing the arguments in the case, the learned trial court passed an order of acquittal against the accused u/s 302 /201 IPC vide its judgment dated 29.9.2012 and hence the present criminal leave to appeal by the State.

6. Assailing the said judgment, Mr. Sunil Sharma, APP for the State submits that the learned Trial Court failed to appreciate that there was a clear motive on the part of the accused behind murder of the deceased Rajesh, which fact was proved on record through the testimonies of PW-12 Smt. Ramwati, mother of the deceased and PW-15 Smt. Poonam, wife of the deceased wherein they have clearly stated that the deceased had illicit relationship with the mother of the accused and the accused had threatened he deceased manier times in that regard. Counsel further argues that the learned Trial Court also fell in grave error by not appreciating the fact that the accused himself had received injuries during the scuffle with the deceased. Counsel further argues that the learned trial court also fell in error in not appreciating the recoveries made at the instance of the accused. Counsel also argues that the fact that the deceased had received a telephone call from the mobile of the accused before the deceased had left his house clearly indicates that the deceased had gone to meet the accused at his request on the fateful day. Counsel also argued that the learned Trial Court failed to appreciate that there were finger prints of the accused on the half bottle of liquor that was found lying in the burnt car.

7. We have heard learned counsel for the petitioner/State and have also carefully perused the trial court record.

8. It is a settled law that criminal jurisprudence begins with the presumption that unless otherwise proved the person facing the trial would be deemed to be innocent. The burden to prove the charge against the accused is on the prosecution and not on the accused. The prosecution, if fails to connect the act of the accused with the ultimate crime and where the material links constituting the evidence are found missing then the benefit of the same goes in favour of the accused. Also, in a case based on circumstantial evidence, the settled legal position is that the circumstances from which the conclusion of guilt is drawn should be fully proved and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. As observed by the Apex Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, the following five golden principles constitute the panchsheel of the proof of a case based on circumstantial evidence:-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

9. Adverting to the facts of the present case, the case of the prosecution rests on circumstantial evidence as there is no eye witness to the commission of crime. As per the case of the prosecution on 17.10.2009 at about 2.35 a.m. an information was received by the police regarding fire in a car at Khera Ghumman Hera Road,

Delhi and on receipt of this information registered vide DD No. 4B, SI Arvind Kumar along with constable Naresh reached at the spot and found one burnt Santro Car bearing registration No. DL3CAB-1563 in which one burnt dead human body was found which was later identified as that of the deceased Rajesh. As per the versions of PW-12, Smt. Ramwati Devi, the mother of the deceased and PW-15, Smt. Poonam, the wife of the deceased, the deceased Rajesh had left home on the night of the incident to meet one Kamlesh with whom he had illicit relationship. The accused Rakesh is the son of Smt. Kamlesh and as per the prosecution there was a clear motive on the part of the accused to physically eliminate the deceased because of the intolerable conduct of the deceased maintaining illicit relationship with his mother. It is also the case of the prosecution that Kamlesh gave a phone call on the mobile phone of the deceased when he was at home. On receiving the call the deceased left for the house of the Kamlesh at about 8.00 p.m. on 16.10.2009 and thereafter at about 2 a.m. his car was found burnt at Khera Ghuman Hera Road. It is also the case of the prosecution that the accused and deceased had consumed liquor and the Mc Dowells No. 1 liquor bottle was also recovered from the spot.

10. The learned Trial Court has not believed the prosecution version as the prosecution has failed to connect the circumstantial evidence so as to form a complete chain without any missing gaps leading to only one hypothesis consistent only with the guilt of the accused and inconsistent with his innocence.

11. PW-12 and PW-15 admitted in their respective depositions that the deceased often used to stay at the residence of Kamlesh and there was cordial relationship between their family and that of the accused. PW-12 had also admitted that the accused used to touch her feet whenever he used to meet her. With such kind of cordial relationship between the two families, we do not find any infirmity or perversity in the reasoning given by the learned Trial Court disbelieving any grudge or motive on the part of the accused to eliminate the deceased because of the alleged illicit relationship between his mother and the deceased.

12. Dealing with the next contention raised by the counsel for the petitioner that the accused himself had received injuries during the scuffle which might have ensued between him and the deceased prior to the alleged commission of crime by him, we are surprised to find that the prosecution failed to prove on record the MLC of the accused. Not even this, no such incriminating evidence was put forth to the accused at the time of recording of his statement u/s 313 Cr.P.C. We, therefore, do not find any force in the arguments raised by counsel for the petitioner with regard to the injuries allegedly sustained by the accused during scuffle.

13. As far as the contention with regard to the alleged recoveries i.e. of the keys of the car and of the weapon of offence namely knife and a blood-stained brick, made at the instance of the accused are concerned, we concur with the observations of the learned Trial Court that as the said recoveries were made from a common place which was easily accessible to public and as no public

witnesses were joined when such recoveries were made at the instance of the accused, such recoveries could not be said to be reliable.

14. With regard to the contention raised by the counsel for the petitioner that the deceased had received a telephonic call from the mobile phone of Smt. Kamlesh before leaving his house, we find from the evidence of PW-30, Nodal Officer, Tata Services Ltd. that the telephone number on which the deceased is alleged to have received the call from the accused, did not belong to the deceased as the same was in the name of one Jitender Singh. The prosecution has failed to even cite the said Jitender as a witness in support of its contention that the mobile number on which the alleged phone call was received by the deceased was in use by the deceased on the fateful day. Even the number that is alleged to have been used by the accused to call the deceased belongs to PW-31, Rajesh, the brother of the accused and not the accused himself. Further, PW-12 and PW-15 in their respective depositions stated that they did not know the mobile phone number of Smt. Kamlesh and even that of the deceased. The prosecution thus failed to prove that any such call was made from the mobile phone of Kamlesh to the deceased.

15. The next circumstantial evidence on which strong reliance was placed by counsel for the petitioner is the finger print impression of the accused on the liquor bottle. The learned Trial Court has dealt with this issue in Paras 64 to 68 of its judgment, which are reproduced as under:-

64. Next circumstantial evidence is the finger print impression of the accused. PW-23 Naresh Kumar Sharma has compared the chance prints mark Q1 to Q5 alongwith specimen finger print Mark S-1 and he found chance print Mark Q1 was identical with the specimen finger print Mark S-1 which was print of right little finger of the accused. However, chance prints mark Q2 to Q5 did not disclose sufficient number of details for comparison in terms of Ex. PW 23/A.

65. Ld. Defence Counsel has contended that this piece of evidence is not admissible as the same has not been taken without following the mandate of provision of the Identification of Prisoners Act 1920 and he had relied upon judgment Suresh @ Suresh Singh Vs. State (NCT) of Delhi, , Mohd. Aman, Babu Khan and another Vs. State of Rajasthan, , Giriraj Vs. State of Rajasthan, , Ashok Kumar @ Govind Vs. State, But this contention raised by the counsel for the accused appears to be attractive but the same is fallacious and is hereby rejected as in the case of Sapan Haldar and Another Vs. State, it has been observed as under:

2. Deciding a reference made to it, vide opinion dated September 30, 2011 in Crl. Appeal No. 1005/2008, "Bhupinder Singh v. State", on the question: "Whether the sample finger prints given by the accused during investigation u/s 4 of the Identification of Prisoners Act, 1920 without prior permission of the Magistrate, u/s 5 of the Act will be a admissible or not?" a Full Bench of this Court overruled the view taken by Division Benches holding against the

admissibility of such evidence and affirmed the view taken by Division Benches holding in favour of admissibility of such evidence but proceeded to decide the reference, as would be evident from a reading of paragraph 18 of the opinion dated September 30, 2011, as if the question referred to the Full Bench embraced even a handwriting or a signature obtained from a person accused of an offence whilst in police custody.

33. Relevant would it be to further note that in relation to offences punishable with death or imprisonment for life, Section 4 of the Identification of Prisoners Act, 1920 would not be applicable because the said provision specifies a prerequisite: that the person concerned is accused of having committed an offence which is punishable with a sentence to undergo rigorous imprisonment for a term of one year or upwards i.e. the sentence must relate to imprisonment for a term and would thus exclude such offences where either capital punishment or imprisonment for life is the sentence contemplated.

66. Therefore, if finger print impression of the accused is taken without getting formal permission of the court, such non compliance of the provision of this act does not render such evidence inadmissible in view of Sapan Haider Case (supra). Therefore, the prosecution is left with this piece of evidence which is admissible in evidence.

67. But now question arises whether the conviction can be sustained and accused can be convicted on the basis of this piece of evidence i.e. finger print impression of the accused. In this regard, I found support from Musheer Khan @ Badshah Khan and Another Vs. State of Madhya Pradesh, wherein it has been observed that:

It will be noticed that under the Indian Evidence Act, the word "admissibility" has very rarely been used. The emphasis is on relevant facts. In a way relevancy and admissibility have been virtually equated under the Indian Evidence Act. But one thing is clear that evidence of finger print expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record.

68. It is settled law that it is not desirable to impose conviction solely on the evidence of expert without corroborative evidence either direct or substantial. In this regard, I found support from K. Sulochana Vs. State

16. The aforesaid reasoning given by learned Trial Court is based on sound judicial principles as it is a settled legal position that the conviction cannot be solely based on the evidence of finger print expert without corroborative evidence either direct or substantial.

17. Even the last seen together evidence led by the prosecution has been rightly rejected by the learned trial court on the ground that PW-4, the person who had last seen the deceased with the accused, turned hostile and nothing in his cross examination could be found supporting the case of the prosecution.

18. The prosecution in the present case has thus failed to bring the motive, the last seen together theory or any other evidence to connect the accused with the said commission of crime and, therefore, we do not find any illegality or perversity in the findings of the learned Trial Court in disbelieving the case of the prosecution. Accordingly, the present application seeking grant of criminal leave to appeal against the order of acquittal dated 29.09.2012 passed by Sh. Vijay Kumar Dahiya, Addl. Sessions Judge, Dwarka Courts, New Delhi u/s 302 /201 of IPC is hereby dismissed. It is ordered accordingly.