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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A.1000/2017

Reserved on: January 09, 2018

Decided on: February 09, 2018

PRAHLAD

..... Appellant

Through: Mr. Dhruva Bhagat with Mrs. Ashna Bhagat, Advocates.

Versus

STATE

..... Respondent

Through: Ms.Radhika Kolluru, APP.

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CRL.A.1104/2017 & CRL.M (B) 2140/2017

DEVANAND @ DEVA

..... Appellant

Through: Mr. Azhad Qayam, Advocate.

Versus

STATE

..... Respondent

Through: Ms.Radhika Kolluru, APP.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE I.S. MEHTA**

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. These appeals are directed against the impugned judgment dated 20th July 2017 passed by the learned Additional Sessions Judge-05 West, Delhi

(‘ASJ’) in Sessions Case No. 56739 of 2016 arising out of FIR No. 477 of 2013 registered at Police Station (PS) Khyala convicting the Appellants, Prahlad and Devanand @ Deva, for the offence under Sections 302 read with Section 34 IPC and the order on sentence dated 31st July 2017 whereby both the Appellants were sentenced to undergo rigorous imprisonment (RI) for life and to pay a fine of Rs. 10,000 each and in default of payment of fine, to undergo further simple imprisonment (SI) for one year each. The trial Court also declined to extend the benefit of Section 428 CrPC for both the offences.

Case of the prosecution

2. The prosecution case begins with Dharam Pal (PW-4) who was working as *chowkidar* (watchman) at Chameli Park, Raghubir Nagar, Delhi on a shift from 5 pm to 9 am, stating to the police at PS Khyala that at around 7 am on 19th November 2013, when he was taking a round inside the Chameli Park he noticed the dead body of a young boy aged about 20 years on the side of the wall near Ambedkar market.

3. On this basis DD No. 14A was recorded at PS Khyala and handed over to Sub Inspector (SI) Nafe Singh (PW-21). Accompanied by Constable (Ct.) Subhash Chand (PW-17) and PW-4, PW-21 proceeded to the spot. Statement of PW-4 was recorded by Head Constable (HC) Amit Kumar (PW-8). Station House Officer (SHO) Inspector Tanvir Ashraf (PW-23) was informed of the above happening by PW-8. Thereafter PW-23 along with Ct. Praveen Kumar left for the spot.

4. PW-23 along with PW-21 and PW-17 found that a dead male body was

lying in Chameli Park at a spot where the boundary wall of the park was broken. The dead person was aged about 20-22 years. The head of the deceased was lying towards the west side and his feet were towards the east. The head was found partly crushed. PW-23 noticed that one blood stained pentagonal slab was lying by the side of the deceased. One blood stained blue shirt was also lying near the body. The pants worn by the deceased had slipped down to his knees. A crime team was called at the spot and a photographer from the crime team clicked the photographs from different angles.

5. Even while PW-23 was trying to get the dead body identified, Mangti Devi (PW-3), grandmother of the deceased came to the spot and identified the dead body to be that of her grandson Cheeku. PW-23 then prepared the *rukka* and sent it for registration of FIR to the PS Khyala. A blood stained pentagonal slab, blood stained blue colour shirt of the deceased, blood sample from the blood lying on the spot on gauze, and blood soaked earth control were seized from the spot along with earth control for sample which was also kept in the plastic box. PW-23 prepared the rough site plan (Ex.PW-23/B) at the instance of PW-3. The dead body of the deceased was then sent to the mortuary through PW-21.

Statement of PW-3

6. PW-23 recorded the statement of PW-3 under Section 161 Cr PC on 19th November 2013. She stated that she used to sell old clothes. The deceased, her grandson, was doing the same work. He was residing with his parents in Kishan Garh, Rajasthan, and would travel back to his home in the evening

after selling old clothes at Ghorewala Mandir, Delhi. On 18th/19th November 2013 the deceased had come to Raghubir Nagar Mandi for selling old clothes.

7. According to PW-3, whenever her grandson came to Delhi, he used to sleep on a bundle of old clothes. Accordingly, on the night prior to the fateful day, he had slept near the Ghorewala Mandir. PW-3 stated that she was going towards the clothes market near Ghorewala Mandir on 19th November 2013 at around 5 a.m. when she noticed the present Appellants, Prahlad, Accused No. 1 (A-1) and Devanand (A-2) (who also sold old clothes and who she recognised from before) sitting in a rickshaw with Cheeku being forcibly made to sit between them. She had doubts and she started following the rickshaw. According to PW-3, when she reached Chameli park she noticed that the accused had dragged the deceased into the park through a broken portion of the wall and began to beat him, A-1 with a big stone and A-2 with a *danda* (wooden stick). As a result of the blows by the *silli* (slab), blood spurted out of the deceased's head and smeared the accused. PW-3 claimed that when a scream escaped her throat both accused saw her and she became frightened and ran away from there. After she regained control of herself she went back to Chameli Park at around 8 am when she noticed that the police had already reached there. She noticed the dead body of her grandson near the wall. She was so frightened that she was rendered speechless. She then identified her grandson's body and gave an account of what happened to the IO. ON that basis the *rukka* was prepared and sent to the PS for registration of the FIR. Thereafter, police officials along with PW-3 started searching for the accused in the vicinity.

8. The SHO also recorded the statement of Tara (PW-6), sister of the deceased. She stated that she and her elder brother (deceased) used to come to Delhi to sell old clothes. At that time she used to reside with her grandmother (PW-3) at Raghbir Nagar. According to PW-6, on 18th November 2013 at about 10 pm she was present near Ghorewala Mandir when Prahlad (A-1) came there and asked her where Cheeku was. According to PW-6, after she told him that the deceased had gone to relieve himself, Prahlad sought to volunteer that her brother (the deceased) had stolen Rs. 4,000 belonging to him and that he would kill the deceased. According to PW-6, she did not take this threat seriously and remained busy with her work. She came to know on 19th November 2013 that the accused had murdered her brother in Chameli Park.

Arrest of the accused

9. Both the Appellants were arrested on the day of the incident itself at around 4 pm from the parking of Guru Gobind Singh hospital on being identified by PW-3. Pursuant to their arrest, their personal search was conducted and disclosure statements were recorded. Blood stains were found on both their pants at the time of their arrest. They were seized and converted into separate cloth parcels. A-2 got recovered one *danda* from a place near Chameli Park. These were sealed and deposited in the *malkhana*.

10. On 20th November 2013 the dead body of the deceased was identified at the mortuary by his father, Kalu (PW-7) and his uncle, Kamal (PW-18). The clothes of the deceased, blood in gauze, blood samples were taken into possession.

Post mortem

11. The post-mortem was performed by Dr. Komal Singh (PW-9) between 11.45 am and 12.45 pm on 20th November 2013 at the DDU Hospital, Delhi. The DDU Hospital report (Ex.PW-9/A) reveals the following external injuries:

- “1. Incised wound of six 6 cm x 8 cm present behind right ear over right temporal bone with bevelled margins (starting 4 cm above right mastoid going towards posterior aspect of neck) underneath bone of the base of wound is depressed.
2. Cut through and through present over right pinna with exposed cartilage.”

12. The internal examination of the head revealed the following:

“Head

- A. Scalp: Clotted blood present of about 20 ml present over parieto-temporal region.
- B. Skull: Depressed fractured of the right temporal bone.
- C. Brain, Meninges & Vessels: Haemorrhagic contusions over right parieto-temporal lobe of the brain.
- D. Base of skull: Intact.”

13. The time since death was stated to be approximately 32 hours prior to post-mortem examination. The cause of death was opined to be “cranio cerebral injury (head injury) caused by direct blunt impact over the skull and the injuries were sufficient to cause death in ordinary course of nature.” The death was confirmed to be homicidal.

Charge sheet

14. On completion of the investigation, the charge sheet was filed. The case made out by the prosecution was that in the intervening night on 17/18th November 2013 Prahlad had slept near the old clothes market at Ghorewala Mandir and when he woke up he noticed that Rs.4,000 that he had had with him had been stolen. He learnt that there were Rs.1000 notes with the deceased (Cheeku) and he began to suspect that Cheeku had stolen his money. This was disclosed by A-1 to his friend Devanand (A-2). In a drunken state, both of them searched for Cheeku but at that time they could not find him. They then informed the deceased's sister Tara (PW-6) that he had stolen Rs. 4,000 and they would not spare him alive. The next morning at around 5 to 5.30 a.m. Cheeku met both of them at Ghorewala Mandir. However, he denied having stolen the money. Both of them in anger then dragged him to Chameli Park to settle the accounts in a rickshaw by making him forcibly sit between them. Even there when they asked the deceased about the money, he did not admit to having A-1's money. Upon this, A-2 picked up a *danda* which was lying there and started beating Cheeku with it. Thereafter, both of them dragged the deceased into the park through a broken portion of the wall. A-1 took a big sharp stone with a view to beating Cheeku with it and hit him on the head several times. This was noticed by Cheeku's grandmother (PW-3). When the accused saw that blood had spurted out from the deceased's head copiously and he was gravely injured, they got scared and ran away from the spot.

Trial

15. The charges were framed against both accused for the offence under

Section 302 IPC read with section 34 IPC. The prosecution examined 23 witnesses.

16. In their respective statements under Section 313 Cr PC both the Appellants claimed innocence. They stated that PW-6 was a planted and an interested witness. They denied being arrested from the parking area of Guru Gobind Hospital. While A-1 stated that he was apprehended from his house, A-2 stated “my mother herself got me arrested due to my habit of heavy drinking.” A-2 also denied that Ex.P-3 was not his pants and the seizure memo in respect thereof was false and fabricated. He stated that “blood had been planted upon the same to falsely implicate me in this case.” He further denied recovery of the *danda* and stated that that too has falsely been shown to have been recovered at his instance. Likewise A-1 also stated that the other weapons were planted. In response to the question that through the blood sample of the deceased drawn from the place of incident, the DNA Finger Print was found matching with the blood stains found on his pants as well as the pants of the co-accused, both of them stated that the blood was sprinkled over their clothes in order to falsely implicate them. When asked if they had anything further to say, A-1 pointed out that there was no motive to kill the deceased; testimony of PW-3 was concocted and unimaginable, that the blood of the deceased was sprinkled over his clothes and that he had been falsely implicated. A-2 also claimed innocence and he stated that he too had been falsely implicated.

17. In the present case, PW-3 was a star witness. She was supposed to have actually seen the commission of crime - both as regards the deceased being

taken away by the accused from the Ghorewala Mandi and then witnessing the assault on the deceased by the two Appellants at the Chameli park.

18. Before the trial Court, it was argued on behalf of the accused that PW-3 was an elderly woman and she could not be expected to be chasing the rickshaw for a distance of 500 metres and this was highly improbable. Further, it was pointed out that the Appellants would not remain in the vicinity of just within 1 km from the crime scene to be easily arrested by the police from an open parking lot of the Guru Gobind Singh hospital. Further, both of them were stated to be wearing the same blood stained shirt and pants at the time of arrest. It was expected of them to have disposed of these incriminating pants. It was pointed out that members of the crime team could not have recorded the details of the victim as 'unknown in the crime team report' if they had in fact proceeded to the spot and PW-3 had also arrived there in their presence.

Impugned judgment of the trial Court

19. In the impugned judgment, the trial Court noted certain anomalies, viz. namely, that PW-3 stated in her cross-examination that she had one grandson Cheeku apart from whom she had another grandson and granddaughter. She denied that she knew Tara (PW-6) who claimed to be her granddaughter. The trial Court then surmised that

“Smt. Tara may be the real granddaughter of PW-3 Smt. Mangti Devi or she might be referring to her as grandmother out of respect. As a matter of fact, she refers to the deceased as her brother and both of them used to come to Delhi for selling old clothes. During their visit to Delhi, they used to stay at the residence of their grandmother at Raghbir Nagar. Here also, there is no reference to any relation

between the deceased and PW-5 by way of consanguinity but it becomes crystal clear on reading the testimony of PW-6 that whenever she refers to the deceased, she refers to him as her brother which is a strong reason for this Court to accept consanguinity amongst them. It is in evidence that the deceased was born to her (PW-3's) real son i.e. PW-7 Sh. Kalu who identified the dead body. This therefore, establishes that Smt. Tara was another granddaughter of PW-3 Smt. Mangti Devi besides the PW-5 Smt. Soni."

20. The trial Court then discussed the evidence of Soni (PW-5) who was another granddaughter of PW-3 who stated that when PW-3 arrived at the residence in the morning at about 6.15 am she was in "very perplexed condition". According to the trial Court, one reason for PW-3 denying that she knew Tara "could be her old age and the lengthy cross-examination which she was subjected to." However, the trial Court was not prepared to discredit her entire testimony on that ground.

21. As regards the improvements made by PW-6 (Tara) in her statement about the presence of accused Devanand (A-2) with A-1 on the night of 18th November when A-1 had uttered threats against the deceased, the trial Court preferred to rely on the testimony of PW-5 who remained consistent. PW-5's testimony about her grandmother's condition on 19th November 2013 supplemented by that of PW-23 proved that PW-3 was traumatised and took 1-1/2 to 2 hours to compose herself from the shock.

22. According to the trial Court a conjoint reading of PWs 17, 21 and 23 "proves beyond reasonable doubt that the police party was at the spot of occurrence soon after receipt of information from PW-4 Dharampal after 7.30 am."

23. The trial Court then went into the distance between Ghorewala Mandir and Chameli Park and reconstructed the sequence of events that unfolded. It was noted that the distance between PW-3's house and Ghorewala Mandir was 500 metres, and from there to Chameli Park was another 500 metres. Hence PW-5 "covered the distance of about 1 Km to reach back to her house and reached there at about 06.15 am as per PW-5".

24. The trial Court concluded that when PW-3 referred to her statement being recorded at 8 am, she was referring to the time when she identified the body of the deceased. According to the trial Court, her statement under Section 161 Cr PC was recorded at 9.30 to 9.45 am by the police and this explained the time gap. As regards PW-3 stating in her cross-examination that she narrated the fact of murder of Cheeku "to his sister *Chini*", PW-3 appeared to be "confused here as the evidence strongly suggests that these facts were stated by her to PW-5 Smt. Soni." According to the trial Court, since the defence has not cross-examined Soni (PW-5) regarding the time at which relevant events occurred and the police had recorded her statement, the defence could not claim the entire testimony of PW-5 to be false and that she was planted to cover the alleged delay in lodging the FIR or to complete the chain of evidence.

25. According to the trial Court, the above analysis was sufficient to explain the mental condition of PW-3 at the time of the incident "which definitely seems to have swayed her even at the time of her Court statement as she was re-living the incident while narrating the same in the Court." All other anomalies in her testimony were, therefore, explained. It was held that she

had been consistent in her testimony right from the beginning, i.e., in her statement under Section 161 CrPC, her statement under Section 164 CrPC and her statement in the Court “on the material aspects.”

26. Much of the judgment of the trial Court was taken up with showing that the inconsistencies and the improvements in the testimony of PW-3 were not serious enough to doubt her truthfulness on material aspects. Further, since the medical evidence corroborated the version of PW-3 and since “arrest of the accused persons in the manner stated, cannot be doubted at all”, the trial Court proceeded to convict both the Appellants for the offences with which they were charged.

27. The trial Court held that the conduct of the Appellants in hanging around the place of the incident thereafter, “does not appear to be such an overwhelming instance of imprudent human behaviour that the benefit of it be granted to the accused persons to discredit entire prosecution’s case.” It was noticed that A-2 still smelled positive for “*alcohol*” when his MLC was being prepared soon after his arrest. The police witnesses were believed as far as the arrest of the accused was concerned and the failure to associate public persons was explained as “they have provided cogent and acceptable reasons for it.” The trial Court proceeded to convict and sentence the two Appellants in the manner as indicated hereinabove.

28. This Court has heard the submissions of Mr. Dhruva Bhagat and Mr. Azhad Qayam, learned counsel for both the Appellants and Ms. Radhika Kolluru, learned APP for the State.

Analysis of the evidence of PW-3

29. Much of the focus of learned counsel on both the sides was on the evidence of PW-3. She is stated to be an eye-witness not only to the dragging away of the deceased by the two Appellants from the Ghorewala Mandir in a cycle rickshaw but also to their assaulting the deceased with *danda* and the *silli* at Chameli Park.

30. PW-3 is the grandmother of the deceased. At the time of her deposition, she was about 75 years of age. She used to sell plastic items/utensils against her old clothes. Her son Kalu (PW-7) along with his wife and his son (Cheeku) were residing in Kishan Garh, Rajasthan. PW-3 herself was residing in Delhi. She disclosed that her grandson used to purchase plastic/utensils from Ghorewala Mandir, Delhi and take them to Kishan Garh, Rajasthan where he used to sell the said plastic utensils against old clothes. He used to bring old clothes and sell them in Ghorewala Mandir and then again he would purchase plastic utensils. In the evening he would return to Kishan Garh.

31. PW-3 being related to the deceased is undoubtedly an interested witness. As explained by the Supreme Court in ***Jayabalan v. UT of Pondicherry (2010) 1 SCC 199*** where a Court is called upon to deal with the evidence of interested witnesses, its approach must not be pedantic. "The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency."

32. What happened in the early hours of 19th November 2013 is narrated first by PW-3 to the police in her statement under Section 161 Cr PC, which was recorded by PW-23, the Investigating Officer (IO) Inspector Tanvir Ashraf. This has been set out in some detail in para 7 of this judgment and need not be repeated. However, the time of recording the said statement is not known. Thereafter, the statement of PW-3 was also recorded before the learned Metropolitan Magistrate (MM) on 12th December 2013 under Section 164 Cr PC. In this statement PW-3 stated that on 18th November 2013 Cheeku had visited her house and told her that he was leaving. She assumed that he had got utensils in return for old clothes and was taking them back to Kishan Garh. On 19th November 2013 at around 5 am in the morning when she went towards the *mandi* for selling old clothes, she noticed that two Appellants had made Cheeku sit in a rickshaw between them and were taking him somewhere. She then called out to Cheeku but he did not reply, as a result of which she then got scared and started chasing them. The three of them had alighted outside Chameli Park. She then noticed that both the Appellants dragged the deceased inside the park. When she reached the park she noticed A-2 was having a *danda* in his hand and was beating the deceased with it. A-1 had a huge cement slab in his hand and even as she was watching, A-1 smashed the head of the deceased with it and blood spurted out of the head of Cheeku. PW-3 then became scared and did not go forward apprehending that the two Appellants would also pull her inside and kill her. She ran away from the spot and reached her house. She loudly shouted that Cheeku had been murdered. At that point people in the locality gathered at her house and they all went to the PS and lodged a complaint. She stated that the accused wanted to take away her grandson's

money since he had sold his clothes and was returning to Ajmer.

33. It is seen that there is an improvement between the previous statement to the police under Section 161 Cr PC and the statement made by PW-3 before the learned MM under Section 164 Cr PC. In her statement under Section 161 CrPC she does not mention that she called out to the deceased and he did not reply. What is consistent is that she saw the two accused beating the deceased with the *danda* and stone in the Chameli Park. One major difference between the two statements is what she did when she ran away from that spot. In her statement to the police, PW-3 states that she regained her senses after having reached her home at around 8 am and had gone back to the Chameli Park where she identified the dead body of the grandson. She stated that by this time the police officials had already reached Chameli Park. However, in her statement under Section 164 Cr PC, PW-3 claims to have gone to the police station with other people from the locality and lodged a report. In both statements she makes no mention of speaking to anyone when she returned home.

34. Now turning to her deposition in the Court PW-3 introduced another version by stating that while he was sitting between the accused in the rickshaw, the deceased was saying “*Mere Paise le lo mujhe Chameli Park mat le jao*”. One reason for this as rightly pointed out by learned counsel for the Appellants is that even if PW-3 had seen the two Appellants with the deceased in the rickshaw, she could not have known where they were taking him. Chameli Park is at a distance of at least 500 metres from Ghorewala Mandir. For a lady who was 75 years old, it would not be easy to simply

chase the rickshaw without knowing where it was headed towards. Also, if there was no exchange of words between the Appellants and the deceased at that point in time she may not have suspected what the issue was or if there was any issue between them at all. She could not have known why they were taking him somewhere unless those words were not spoken by the deceased. The fact that this was not mentioned either in the statement under Section 161 Cr PC or Section 164 Cr PC makes it highly doubtful that she in fact heard such words. This is a major and material improvement in her version which should have alerted the trial Court about the truthfulness of her version.

35. In the court, PW-3 further stated that she called to the deceased to stop the rickshaw but both the Appellants “asked the rickshaw puller not to stop the rickshaw and they also asked to move fast.” This is again an improvement which is not spoken of by her in either of her two earlier statements. For a lady of her age to be chasing a rickshaw which is speeding away is extremely unrealistic. The other improvement she made in the Court was stating:

“The small portion of the wall of Chameli Park was lying broken from where both the accused persons took my grandson Cheeku to Chameli Park. I saw that the pant of Cheeku was put off and buttons of shirt of Cheeku was opened.

36. PW-3 added in her deposition that after seeing her grandson being attacked in the park in the manner mentioned, she ran away from there and reached her house and that “no one was present at my house” and then again “rushed to Chameli Park.” She at this stage did not mention anything about being traumatised or there being a lapse of time before she regained her

senses. PW-3 states that when she returned to Chameli Park she found the police present there and an ambulance also present. She identified the dead body of her grandson and thereafter she became unconscious. Thereby, she also departed from her statement under Section 164 Cr PC where she had stated that she had gone to the police station with people from her locality to lodge a report.

37. In her cross-examination, PW-3 was confronted with all the above improvements. She was also confronted with not earlier stating that “I put both my bundles on the ground and started chasing the rickshaw”. She mentioned in her cross-examination that “I had narrated the fact of murder of Cheeku to his sister Chini. She resides at Ghaziabad” and further that “I had stated to the police the fact that I had narrated the fact of murder of Cheeku to his sister Chini.” Clearly at this point in time, the APP did not seek any clarification that when she mentioned “Chini”, she in fact meant Soni (PW-5) as surmised by the trial Court.

38. Strangely, in her cross-examination by learned counsel for A-2, PW-3 stated that she had one grandson and one granddaughter apart from the deceased and that “I do not know Tara. I also even do not know where she resides.” This is most strange considering that Tara is none other than the real sister of the deceased Cheeku. In fact, Tara (PW-6) in her deposition stated how she too along with Cheeku would live with their grandmother (PW-3) during their visits to Delhi and she herself had on 18th November 2013 come along with Cheeku to Delhi for selling old clothes. In fact she is the witness who is supposed to have been confronted by the two Appellants

on the night of 18th November 2013 when the two Appellants had conveyed that Cheeku had stolen Rs. 4,000 belonging to A-1 and that A-1 would “commit his murder.” If indeed the Appellants had gone to the house of PW-3 to meet PW-6 there on the night of 18th November 2013, it is inexplicable that PW-3 would say “I do not know Tara.” In her statement under Section 164 CrPC she claimed to have shouted even whilst she was at Chameli Park and saw that Cheeku had been grievously wounded whereas in the Court she did not say so.

39. With there being such glaring lapses in the different statements of PW-3, it would be safe to conclude that these inconsistencies and contradictions were material enough to discredit her testimony.

Testimony of PW-5

40. Coming to PW-5 whose deposition is relied upon by the trial Court, it is noticed that she is also another granddaughter of PW-3. She had been living at the house of PW-3 for three-four days prior to the incident. According to her, on 19th November 2013 at 6.15 am she saw PW-3 come into the house in a perplexed condition. PW-5 supposedly asked PW-3 as to what had happened but PW-3 did not tell her anything. Thereafter PW-3 woke up at 7.45 am and then cried and told her that Cheeku had been murdered at Chameli Park. She claims to have gone to Chameli Park with PW-3 and noticed the dead body of Cheeku whom she refers to as “my real brother”.

41. There is no mention made by PW-3 of the presence of PW-5 at all. She does not even acknowledge that she had any granddaughter by the name of Soni or that she was staying with her or that in the morning of 19th

November 2013 PW-5 or anyone else had come back with her to Chameli Park after she had regained her senses. This omission by PW-3 to mention important facts makes her testimony inconsistent with that of PW-5 in a very material way.

42. It is further strange that even PW-6 does not talk of the presence of PW-5 and vice versa. Even if one went through both their depositions carefully, it would appear that the deceased and his two sisters, i.e., PW-5 and PW-6 were staying with PW-3 on the night of 18th November 2013 and even on the morning of 19th November 2013.

PW-6

43. The case of PW-6 is even stranger. In her previous statement to the police she had stated that when she was present at the Ghorewala Mandir on 18th November 2013, A-1 was accompanied by A-2. Now she stated that it was A-1 who met her under the influence of liquor. She denied that he was accompanied by A-2 who was also found under the influence of liquor according to his MLC. In other words, she was thoroughly confused whether the person who met her on 18th November 2013 was A-1 or A-2 or whether it was both of them.

44. PW-6 then stated that “I am not sure whether accused Prahlad met me on 18th November 2013 at 10 pm.” Since she was resiling from her statement, all the above answers had to be elicited from her cross-examination by the APP. She stated that “it is wrong to suggest that on the next day I came to know that my brother was murdered by the accused Devanand also at Chameli Park.” She further stated that “I did not state to my grandmother

that accused Prahlad had given threat to me of murdering my brother Cheeku.” She further stated that on 19th November 2013 “my grandmother did not come to house in my presence. I did not visit the Chameli Park, i.e., the spot.” All of this completely contradicts the testimony of PW-23 himself who recorded that PW-6 had also reached Chameli Park upon knowing that the deceased had been murdered.

45. The Court is not able to reconcile the testimonies of PWs 3, 5 and 6 as no clear and cogent picture emerges therefrom. It does not seem practical that a 75 year old woman could chase the rickshaw over a distance of 500 metres and be able to reach Chameli Park to witness the occurrence and then run back to her house despite being in a shocked and traumatized condition. Importantly, the IO had not drawn the scaled site plan of the entire route from Ghorewala Mandir to Chameli Park to enable the Court to appreciate whether such distance could even be covered by foot as claimed by PW-3. Whether or not PW-3 could return home from the spot and return back there by 8 am or even reach the park within a short while would have been explained by the scaled site plan. This elementary exercise of reconstructing the scene of crime has not been undertaken by the IO at all. What he has placed before the Court does not appear to be credible.

The time line

46. The trial Court has spent a great deal of time in trying to reconstruct the time line. It must be remembered that Dharam Pal (PW-4) came to the PS Khyala and gave information about having found a dead body only at 7 am. Thereupon PW-23 left for the spot in a government Gypsy van and noticed the dead body of the deceased. He called the crime team who also clicked

pictures of the dead body. According to PW-23, even whilst the crime team was there, PW-3 had reached there and identified the dead body. He claims to have prepared *Tehrir* (EX.PW-23/A) at the site itself.

47. However, the report of the crime team (Ex.PW-2/A) shows against the details of the deceased column “unknown male dead body aged about 20-23 years”. This is further repeated below in the said report to the effect that “one unknown male dead body is lying in the above said park inside near wall on right hand injury mark found. Injury found on head, one shirt of deceased found near dead body. One big size stone blood stained found near dead body”. There is no mention of any *danda* anywhere nearby whereas recovery of *danda* allegedly used to assault the deceased took place near the wall subsequently and purportedly at the instance of A-2. It is therefore claimed that as long as the crime team was there, and the time is mentioned “from 8 am to 9 am”, PW-3 had not reached there as claimed by PW-23.

48. According to PW-23, he prepared the site plan at the spot (Ex.PW-23/B) at which time PW-3 had already regained her senses. He now put the mark ‘E’ being the spot where PW-3 witnessed the occurrence. However, he did not indicate what route she took to run back to her house and where that house was in relation to the park. This is, according to the Court, a serious lapse on the part of the IO and this has been overlooked completely by the trial Court.

49. In reconstruction of the time line, there is no clarity on when exactly PW-3 arrived at the spot and when her statement was recorded. It appears that by the time her statement was recorded, *rukka* had been prepared and

FIR has been registered on her statement. Clearly therefore, recording of statement took place much-much later, i.e., even after 9.45 and 10 am as was surmised by the trial Court. The Court is, therefore, not convinced with the truthfulness of the testimony of PW-23 as regards the steps undertaken by him after reaching the spot. The trial Court has strained itself in trying to make sense of the documents which show a conflicting picture of the sequence of events following the discovery of the dead body at the Chameli Park.

Evidence relating to arrest of the accused

50. As regards the arrest of two Appellants, it is strange that while PW-3 is a witness to the arrest, she is not a witness to further discovery of the *danda* from near the wall of the park. This again has not been explained by the prosecution.

51. The fact that two accused were still waiting around in an open public parking near the Guru Gobind Singh hospital after committing murder and not hiding somewhere is totally unnatural and unbelievable. Further, that there were no public persons who could come forward for witnessing the arrest of the accused with it being a public parking is again not believable at all.

Recoveries

52. The other strange part is that both the Appellants were purportedly wearing the same blood stained jeans they had on at the time of assaulting the deceased. It is interesting to note that in her testimony, PW3 stated that she saw blood spurting out copiously from the head of the deceased but

there were no blood stains on the shirts of the Appellants. That again seems to be totally unrealistic. Why they would leave the torn shirt of the deceased taken away from his body, near his body, leaving the upper part of the body exposed is something that is not explained.

53. The prosecution has also not explained how the blood stains on the slab were unable to be matched with the blood of the deceased. It is only the DNA profile of the blood stains on the pants of the accused that matched with the DNA of the blood of the deceased. However, this was by itself not conclusive because the manner of arrest of the two Appellants and the subsequent disclosures and seizures has not been conclusively proved by the prosecution.

54. It appears that the prosecution has placed extensive reliance on the eye-witness's testimonies and did not pay attention to the corroborating evidence including that of forensic evidence, the evidence relating to arrest and the evidence relating to recovery. None of them corroborated what is stated by these eye-witnesses.

55. The Court is, therefore, unable to agree with the conclusion reached by the trial Court that the medical evidence corroborates the eye-witness versions and links both the accused to the main incident as well as their presence at the spot. In fact the presence of the accused does not stand proved if PW-3 is disbelieved. Merely because the blood of the victim was found on their trousers cannot, as a solitary circumstance, be sufficient to link them to the crime. Why they would continue wearing those trousers and be waiting around to be arrested from an open parking place in the vicinity

has not been explained at all. Why they would not run away after having committed such a heinous crime is not explained. These are two serious questions which cannot be brushed aside as being inconsequential.

Conclusion

56. The Court, is therefore, not able to agree with the trial Court that the prosecution has been able to prove the guilt of the accused beyond reasonable doubt by “leaving no loose ends that would grant the benefit to the accused persons.” Suspicion, howsoever strong, cannot substitute proof.

57. The Court, therefore, acquits both the Appellants for the offences under Section 302/34 IPC. Accordingly, the impugned judgment of the trial Court and the order on sentence are hereby set aside.

58. The appeals are allowed in the above terms. The pending application is disposed of.

59. Both the Appellants are directed to be released forthwith unless wanted in some other case. Each of them shall comply with the requirements of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. The trial Court record be returned together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 09, 2018

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