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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 81/2015**

Reserved on: March 08, 2018

Decided on: March 23, 2018

GOVIND ...Appellant

Through: Mr. M.L. Yadav, Advocate.

versus

STATE ...Respondent

Through: Mr. Kewal Singh Ahuja, 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. This appeal is directed against the impugned judgment dated 8th December 2014 passed by the learned Additional Sessions Judge-II ('ASJ'), (North-West), Rohini Courts, Delhi in Sessions Case No.147/2013 arising out of FIR No.244/2013 registered at Police Station ('PS') Sultanpuri convicting the Appellant, Govind, for the offence punishable under Section 302 Indian Penal Code ('IPC'), and the order on sentence dated 15th December 2014 whereby he was sentenced to rigorous imprisonment (RI) for life with the further condition that he would spend at least 25 years in actual custody and "shall not be considered for grant of remission till he

undergoes an actual sentence of 25 years” and also a fine for a sum of Rs. 2 lakhs; and in default of payment of fine, to undergo simple imprisonment (SI) for a further period of six months. The fine amount recovered was ordered to be disbursed to the families/LRs of the deceased, Babloo and Ramesh @ Ramesh, as compensation under Section 357 Cr PC.

2. At the outset, it must be noted that the Appellant, Govind (A-1), was sent up for trial along with Anoop @ Lakhan (A-2) and Satish Kumar @ Sonu @ Soda (A-3). The charge against them was that on or before 6th April 2013, all three of them hatched a criminal conspiracy to commit the murder of the deceased, Bablu @ Bhushan and Ramesh @ Lambu, thereby committing the offences under Section 120B IPC; that at around 5.00 pm on 6th April 2013, at the second floor of House No.P1/970, Sultanpuri, Delhi pursuant to the above stated conspiracy, all three of them committed the murder of Babloo @ Bhushan and Ramesh @ Lambu thereby committing offences under Section 302 read with 120B IPC. By the impugned judgment, the trial Court has acquitted A-2 and A-3 of the aforementioned offences.

Case of the prosecution

3. On 6th April 2013, at around 6.28 pm, information was received at PS Sultanpuri regarding a stabbing incident involving two boys at Gali No.5, P-1 Block. This information was noted down as DD No. 47A. Sub Inspector (‘SI’) Vikas Pawar (PW-28) along with Constable (‘Ct.’) Balbir Singh (PW-29) reached the spot and came to know that the incident had taken place inside House No.P-1/970, Second Floor. A large crowd had gathered. The police team found the dead bodies of two males, one on the floor with

head facing towards the northern wall and one on the folding bed with the head facing in the southern direction towards the door. On enquiries being made, the police team learnt that the bodies were of Babloo @ Bhushan and Ramesh @ Lambu both of whom were friends. While Babloo was stated to be residing as a tenant in the same room, Ramesh was a resident of Vijay Vihar. The crime team was called to the spot and inquiries were made from public persons regarding eye-witnesses. However, no one came forward to give information to the police. Both dead bodies were sent to the mortuary for post-mortem examination.

Post-mortem examinations

4. Dr. Manoj Dhingra (PW-17) performed the post-mortem examination of the dead body of Babloo and noticed one stab wound measuring 4 cm x 1.3 cm “cavity deep (upto pancreas and aorta) wedge shaped lying obliquely in epigastrium area”; one incised wound, seen over mid lateral aspect of dorsum of left hand; and an incised wound on the left palm. The death was opined to be due to “shock associated with damage for abdominal structures under Injury No.1” which was deemed to be sufficient to cause death in the ordinary course of nature. Dr. Dhingra was assisted in the exercise by Dr. Vivek Rawat (PW-18).

5. PWs- 17 and 18 also performed the post-mortem examination of Ramesh @ Lambu. They found a stab wound 4 cm x 1.3 cm “cavity deep (upto pancreas and aorta)” and an incised wound situated 3.5 cm inferolateral to injury no.1. There was a reddish coloured abrasion 4 cm x 3 cm over the left knee. Injury No.1 was said to have been sufficient to have caused the death.

6. In respect of both Babloo and Lambu, it was noted in the post-mortem reports that “there was history of chronic alcoholism”. Apparently, the viscera were not preserved to confirm this.

Investigation

7. The investigation of the case was taken over by Inspector K.S.N. Subudhi (PW-32) who was posted at PS Sultanpuri as Station House Officer (SHO). When he reached the spot, he found PW-28, PW-29 and Ct. Komesh (PW-30) were already present there. He prepared the site plan (Ex.PW-28/B). PW-28 converted the DD No. 47A into *rukka* and handed it over to Ct. Satish for registration of the FIR. After receipt of the registered FIR, PW-32 lifted various exhibits from the spot including earth control sample.

8. After the post-mortem examinations, the police returned to C-Block, Sultanpuri and the statements of Sagar (PW-12) and Vinod (PW-9) were recorded. PW-12 was only 14 years old and a resident of a *jhuggi* in Block P-1, Sultan Puri. He stated that on 6th April 2013, at around 12.30 pm, he was sitting with PW-9 in the park in Block C-6 of Sultanpuri when he noticed that a quarrel was ongoing between Ramesh and Babloo on one side and Govind, Anoop and Satish Kumar on the other. He saw Ramesh slap Govind. PW-12 claimed that he and PW-9 pacified the parties. He noticed that the present Appellant had a knife and he was snatched by Ramesh. While Ramesh and Babloo thereafter left the park, the Appellant was using abusive language against them. The Appellant is stated to have followed Ramesh and returned with the knife while also muttering, “*aaj hi aaj me*

inhe maroonga”.

9. The statement of Sagar was recorded before the learned Metropolitan Magistrate (‘MM’) (Ex.PX/6) under Section 164 Cr PC on 20th April 2013. In the said statement, he stated that he and PW-9 were, at 12.30 pm on 6th April 2013, proceeding from their house towards the park at Block C-6 when they noticed that Ramesh was with Babloo. Ramesh slapped Govind who had a knife. Ramesh then snatched Govind’s knife. Thereafter, they fought and Govind took back the knife. Thereafter, Babloo went away. He further added that Ramesh had also slapped Satish Kumar. After some time, Anoop, Govind and Satish Kumar are stated to have come to the park and all three of them began abusing Ramesh and Babloo. Govind, Anoop and Satish Kumar were all three stating that they will kill Babloo and Ramesh. Govind is stated to have had a knife with a long iron blade. After some time, the three co-accused as well as PWs- 9 and 12 left. PW-12 also states that Govind had consumed ten *golis* (drugs) and he was giving a large number of the said *golis* to Ramesh and Babloo. He stated that he suspected that it was Govind who, along with Anoop, had killed Ramesh and Babloo.

10. The police also recorded the statement of Vinod (PW-9) under Section 164 Cr PC. In his statement, Vinod (PW-9) stated that a fight ensued between Babloo and Ramesh on the one hand and Govind, Anoop and Satish Kumar on the other hand; Ramesh had slapped Govind, Anoop and Satish Kumar and both PW-9 and 12 had tried to pacify them; that Ramesh had snatched the knife of Govind and Govind forced him to give it back and thereafter, Ramesh and Babloo left from there. Govind was abusing the two

deceased and also threatened to kill them. Anoop and Satish Kumar were also with Govind at the time. According to PW-9, that is all he saw and after that, both of them, i.e. PW-9 and PW-12, left from there and he was not aware as to what happened thereafter.

11. PW-32 stated that on 8th April 2013, he received information that A-2 and A-3 were sitting in the park in Block C-6. He constituted a raiding party and found both A-2 and A-3 in the corner of the park and got both of them apprehended, interrogated, and arrested. Their disclosure statements were recorded. Both stated to have disclosed the name of the third accused, i.e. Govind (A-1), who was injured after he jumped from a roof and was stated to be present in his house.

12. A-1 was thereafter apprehended from his house. He is supposed to have disclosed that he had received the injuries at the time of incident. He had already been medically examined and treated at Jeevan Hospital. He produced treatment papers from Jeevan Hospital. These were taken into possession under seizure memo (Ex.PW-26/I). In his disclosure statement, A-1 is stated to have offered to get the weapon of offence recovered as well as the clothes he was wearing at the time of incident. The clothes were a T-shirt, capri and an underwear. These were converted into a *pullanda* and sealed and taken into possession.

13. Neeraj (PW-16), the son of the landlord of the place of incident, then met the police. He identified all the three accused stating that they were the same persons who had met him on 6th April 2013. The accused then took the

police to the place of incidence and the pointing out memo was drawn up. Thereafter, A-1 is stated to have led the police party towards the *ganda nala*, Block P-1, Sultanpuri and got recovered the knife which was used in the commission of the offence (Ex.PW-16/A).

14. While the police were still at the *ganda nala*, one child, Gaurav (PW-24), came to the spot and identified A-1 as the person who was having injuries on both his legs and A-1 had requested PW-24 for using his mobile phone to call somebody from his family to pick him up. The accused were then sent to SGM hospital for medical examination. They were produced before the Illaka Magistrate and they were remanded to judicial custody. At the end of the investigation, the police filed a charge sheet. By an order dated 27th August 2013, charges were framed as indicated hereinbefore against the three accused.

Statement of the accused under S 313 Cr PC

15. Thirty-three witnesses were examined by the prosecution. In his statement under Section 313 Cr PC, while denying the circumstances put to him, A-1 stated that it is a false case in which he has been falsely implicated and that no recoveries at his instance have been made. He maintained that the police want to save the real culprits and, therefore, had made a false case against him.

16. A supplementary statement was recorded on 27th August 2013 that the accused were admitting the statements made under Section 164 Cr PC of Vinod and Sagar and they had no objection if the learned MM who had recorded the statement is not examined as a witness.

Impugned judgment of the trial Court

17. By the impugned judgment, the learned trial Court came to the following conclusions:

- (i) Neeraj (PW-16) was the landlord of the deceased, Babloo. He confirmed that at around 11.00 am on 6th April 2013, he was leaving his house and he saw that A-1 and A-2 were calling out to Babloo. According to PW-16, he had learnt that Babloo was involved in stealing/theft and was not a man of good character. The grandmother of PW-16 had asked Babloo to vacate the room but Babloo had requested her to permit him to stay explaining that his daughter was studying and her education was continuing in a local school. On the date of the incident, Babloo's minor daughter was not present.
- (ii) The oral testimony of PW-16 and members of the investigation team had confirmed that both the deceased were good friends and that they often consumed alcohol and drugs together; this was confirmed from the post-mortem and viscera reports; A-1, A-2, and A-3 were also addicted to drugs; at the time of incident, A-1 consumed intoxicating pills and was under the influence thereby exhibiting extremely aggressive behaviour.
- (iii) PW-9 and PW-12 had confirmed that both of them were *ganja* addicts and often went to the park at C-Block, Sultanpuri. They witnessed the quarrel between A-1, A-2 and A-3 on the one side and the two deceased on the other at around 12.30 pm. They pacified it.
- (iv) Both PW-9 and PW-12 spoke about A-1 taking out the knife and threatening Ramesh @ Lambu who then snatched knife and walked

away but A-1 followed him and retrieved the knife. He threatened to kill both the deceased on the same day. PW-9 and PW-12 had supported each other on the material aspects. While PW-9 and PW-12 had confirmed the presence of A-2 and A-3, no allegations were made against A-2 or A-3 of having issued any threats.

- (v) On the date of incident, A-1 was found in an injured condition by Gaurav Kumar (PW-24). He was found sitting in front of his house crying in pain. A-1 was sitting on the *chabutra*. Gaurav Kumar was aged about 14 years. A-1 is supposed to have used the mobile phone of the mother of PW-24 for making a call.
- (vi) A-1 did not deny his presence in the area particularly in the front the house of PW-24. He failed to explain why he reached the area, i.e. P-1/84, Sultanpuri situated in the same street where Babloo was residing. Electronic evidence confirmed that A-1 had made a call from the mobile number of the mother of PW-24 at 5.33 pm and A-1 did not deny the same. He, however, claimed that he had met with a motorcycle accident. The killings of the two deceased was discovered soon thereafter. Around 6.30 pm, a call was made to the PCR.
- (vii) As per Section 106 of the Indian Evidence Act ('IEA'), A-1 was the person in the best position to offer an explanation for his injuries. His claim that he met with a motorcycle accident stands demolished due to the medical record (Ex.PW-13/A) which confirms that he had received fractures on both heel bones. Such an injury could only have been sustained on account of a fall from a height and not due to a road accident. This is consistent with the fact that the family members had given the history to Dr. Ashutosh Gupta (PW-13) of Jeevan Hospital

as fall from a height. There was close proximity between when A-1 had come to the house of Babloo looking from him and Ramesh at 11.00 am and the quarrel that took place in C-Block park at 12.30 pm.

- (viii) The recovery of the knife at the instance of A-1 was also believed. This was witnessed by PW-25 as well as an independent witness. There was human blood on the t-shirt of the Appellant.
- (ix) It was argued before the learned trial Court that the Appellant was under the influence of drugs having consumed intoxicating pills and was, therefore, incapable of knowing the nature of the act or that what he was doing is contrary to the law. After referring to Section 85 and 86 IPC, the trial Court held that Sections 85 and 86 protected only such offenders being intoxicated “without knowledge or against their will”. It was held that such a defence does not come to the aid of an offender who “voluntary consumes alcohol or other intoxicating substances like drugs etc. and then commits the offence”. Even otherwise, A-1 was fully conscious and aware of the consequences of his act. It is for this reason that after committing the double murder he panicked and in order to save himself and avoid detection, he jumped from the window of the bathroom attached to the room of the deceased onto the roof of the lower floor which is how he sustained the injuries on his ankles. It was held that no person can be permitted to voluntarily consume drugs/intoxicants and then wreak havoc by going on a killing spree and claim the same as a defence.

18. Accordingly, the trial Court proceeded to acquit A-2 and A-3 while convicting A-1 for the offence under Section 302 IPC and sentenced him by a separate order on sentence in the manner indicated hereinbefore.

19. This Court has heard the submissions of Mr. M.L. Yadav, learned counsel for the Appellant and Mr. Kewal Singh Ahuja, learned APP for the State.

Last seen

20. It is submitted by Mr. Yadav, learned counsel for the Appellant that there was no actual evidence of 'last seen' because PW-16 saw the accused outside the house of the deceased at 11.00 am and thereafter, PWs- 9 and 12 spoke about his presence in the park at 12.30 pm whereas the deaths are supposed to have occurred around 5.00 pm. On account of the time gap between the time of death and the time of 'last seen' and also on account of the fact that the place of 'last seen' was not the same as the place where the dead body was found, the evidence of PWs- 16, 9, and 12 cannot be said to be 'last seen' evidence.

21. The statement of PW-12 statement under Section 164 Cr PC was recorded on 20th April 2013 itself. He speaks of the presence of the deceased in the park at around 12.30 pm quarrelling with A-1, A-2 and A-3. This is fully corroborated by PW-9. Both their statements under Section 164 Cr PC were not challenged by the accused in terms of the

statement recorded by the trial Court on 27th August 2013. Therefore, it clearly shows that there was a quarrel preceding the incident but not immediately prior to the time of death. There was sufficient time for the accused to commit the murder of the two deceased. Neither PW-9 nor PW-12 has been shaken in their cross-examination.

22. As pointed out by the trial Court, both these witnesses proved that the two deceased and the three accused were also drug addicts. Even PW-16 has confirmed that the deceased used to consume drugs and Babloo was not of a good character. He also noticed A-1 and A-2 outside the house where the offence occurred at 11.00 am.

23. Although there is a time gap between when the quarrel involving the two deceased and the three co-accused took place and the time of deaths, i.e. 5.00 pm, in the absence of evidence which would probablise the presence of either the Appellant or the two deceased elsewhere, such evidence can be taken to be evidence of 'last seen'. This circumstance is therefore conclusively proved by the prosecution.

Presence of Appellant at the scene of crime

24. There is no direct evidence to prove the presence of the Appellant at the scene of crime. However, PW-24 spoke of the presence of the Appellant at the *chabutra* in front of his house at around 5.30 pm which is not far from the house of the deceased. The case of the prosecution is that the Appellant panicked after having committed the

murders of the two deceased and jumped first on to the roof of the the first floor and thereafter again on the street thereby fracturing both his heels.

25. Strangely, the Appellant does not deny that he was on the *chabutra*. The explanation given by him for being found there is strange. In answer to question 21 regarding the evidence of PW-24, he said that “the alleged incident has nothing to do with the offence. The injuries sustained by me were due to road accident”. The Appellant also did not deny that he had used the mobile phone bearing the number 8743977286 “to inform the family members about my accident”. He did not know about the owner of the mobile phone “but some boy gave me the mobile phone”. Therefore, he did not deny that he was in fact on the *chabutra* and borrowed the phone from PW-24 to call his family.

26. Then we have the evidence of the treatment received by the Appellant at Jeevan Hospital. This is spoken to by Dr. Ashutosh Gupta (PW-13). He states that at around 7.30 pm the Appellant was brought there to the Jeevan Hospital where he was working as Orthopaedic Surgeon on 6th April 2013. The OPD receipt issued by him is marked as Ex.PW-13/A. As per his deposition, the Appellant was brought there by his mother, Santosh, brother, Bunty, and another brother, Ram Kishan “with alleged history of fall from height”. Therefore, this clearly showed that the explanation offered by the Appellant for the

fractures on both heels being due to a road accident was false. The medical evidence disproved this. There is no cross-examination of PW-13 to suggest that he was speaking falsehood.

Other circumstances

27. The FSL report was proved by Santosh Tripathi (PW-15). The blood samples of the two deceased showed the presence of alcohol, and clearly therefore both the deceased were to in an inebriated state.

28. The Court is satisfied that the Appellant has no valid explanation for the injuries on both heels. He has not cared to examine his own mother and brothers. The medical evidence disproves that he suffered injuries as a result of a road accident.

29. It is argued by Mr. Yadav that the *chabutra* was at a distance from the house of the deceased. He submits that the prosecution has not been able to explain how the Appellant could, in such an injured condition, possibly carry himself to the *chabutra*.

30. On the other hand, the learned APP sought to explain that the Appellant could have dragged himself to the *chabutra* which was down the road where the house of the deceased was. In fact, it was pursuant to his own disclosure that he could reach Jeevan Hospital and collected the medical treatment papers as proved by PW-26, PW-31, and the IO (PW-32).

31. The t-shirt worn by the Appellant also had bloodstains which were of human blood. This is apart from the fact that the knife got recovered at his instance from the *ganda nala*.

Proved circumstances

32. Therefore, the following circumstances can be said to have been proved by the prosecution beyond reasonable doubt:

- (i) The presence of the Appellant outside the house of the deceased at 11.00 am as proved by PW-16;
- (ii) The quarrel that took place in the park between the accused and the deceased as spoken to by PWs- 9 and 12;
- (iii) The fact that the accused was consuming drugs and also giving them to the deceased is again proved by PWs 9 and 12;
- (iv) Homicidal death of the both deceased from the house of Babloo at around 5.00-5.30 pm;
- (v) The accused being found with injuries to his heels at *chabutra* by PW-24 outside the house of PW-24 which is down road from the place where the house of the deceased was located;
- (vi) The accused operating the mobile phone of PW-24 to make a call informing family members at 5.30 pm as proved by the CDR of the said mobile and is not denied by the police;
- (vii) The treatment received by the Appellant at Jeevan Hospital for fractures on both ankles as a result of a fall from a height;

(viii) Recovery of the knife and presence of human blood on the t-shirt of the Appellant.

33. The net result is that the impugned judgment of the trial Court as regards the conviction of the Appellant for the offence under Section 302 IPC is hereby confirmed.

Sentence

34. As regards the sentence awarded to the Appellant, the Supreme Court has repeatedly stressed that while the imprisonment for life is itself a severe punishment it should not be combined with a heavy fine.

35. A reference may be made to the decision of the Supreme Court in ***Palaniappa Gounder v. State of Tamil Nadu (1977) 2 SCC 634***, where the Supreme Court has observed that “the sentence of fine must not be unduly excessive”. It was further observed:

“Though there is power to combine a sentence of death or life imprisonment with a sentence of fine that power is to be sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose.”

36. In ***Shahejadhkan Maheubkhan Pathan v. State of Gujarat (2013) 1 SCC 570*** the Supreme Court reiterated the earlier decision in ***Shantilal v. State of M.P. (2007) 11 SCC 243*** which analysed in detail

the scheme of the provisions in Sections 63 to 70 IPC. The Supreme Court in *Shahejadhkan Mahebubkhan Pathan (supra)* observed:

“It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.”

37. Also, after the judgment in *Union of India v. V. Sriharan (2016) 7 SCC 1*, the trial Court cannot possibly order that the accused will undergo life imprisonment for a certain number of years beyond 14 years without being considered for remission.

38. Consequently, the order on sentence of the trial Court is modified by sentencing the Appellant to imprisonment for life for each of the counts to Section 302 IPC with fine of Rs. 5,000 on each account and upon failure to pay fine, to undergo SI for three months. The sentences shall run concurrently.

39. The appeal is disposed of in the above terms. The trial Court record be returned forthwith with a certified copy of this order.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 23, 2018
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