

**Sushil @ Jalebi and Others Vs. State**

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**Court :** Delhi

**Decided On :** Nov-03-2015

**Judge :** Sanjiv Khanna & R.K. Gauba

**Appeal No. :** CRL.A. No. 875 of 2014

**Appellant :** Sushil @ Jalebi and Others

**Respondent :** State

**Judgement :**

Sanjiv Khanna, J. (Oral)

1. The appellants Satender @ Satte and Sushil @ Jalebi, by the impugned judgment dated 25.03.2014 have been convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short IPC ?), for having committed murder of Ram Babu @ Ramu between 11:20-11:40 PM on 07.09.2008 near Flat No.D-1/85, Lodhi Colony, New Delhi. Satender @ Satte and Sushil @ Jalebi have also been convicted under Section 397 IPC. Appellant Ram Singh @ Aarami, by the same impugned judgment has been acquitted for the offence punishable under Section 302 IPC, observing that there was no overt act of stabbing attributable to him (for detailed reasoning reference can be made to paragraph no .46 of the impugned judgment). However the appellant Ram Singh stands convicted under Section 394 IPC for participating in the robbery with Satender @ Satte and Sushil @ Jalebi resulting in theft of the mobile phone, which was being used by the

deceased Ram Babu @ Ramu.

2. By order on sentence dated 28.03.2014, the appellants Satender @ Satte and Sushil @ Jalebi have been sentenced to imprisonment for life, fine of Rs. 10,000/- and in default of payment of fine, to undergo Simple Imprisonment of 1 year for the offence under section 302 IPC and Rigorous Imprisonment for 10 years for the offence under section 397 IPC. Appellant Ram Singh @ Aarami has been sentenced to Rigorous Imprisonment for 7 years, fine of Rs. 7,000/- and in default of payment of fine, to undergo Simple Imprisonment of 1 year for the offence under section 394 IPC.

3. Learned counsel appearing for appellant Ram Singh @ Aarami has submitted that there is inherent contradiction in the judgment which acquits Ram Singh @ Aarami for the offence punishable under Section 302 read with Section 34 IPC, but convicts him under Section 394 IPC. Learned counsel for appellant Ram Singh @ Aarami and other appellants have drawn our attention to paragraph no. 41 of the impugned judgment, which reads:-

Section 30 of the Evidence Act deals with confession of co-accused. The law on the point of confession of co-accused is well settled that the said confession should be inculpatory as well as exculpatory in nature so as to be admissible. All the accused persons gave separate disclosure statements which are in consonance with each other. All three of them pointed out the place of incident. Accused Satender @ Satte had stated in his disclosure statement that he had purchased a knife having a hole for firm grip of finger, while Sushil @ Jalebi had a daantedaar knife. They saw a nepali looking man passing from near Sewa Nagar railway crossing hearing songs on his mobile. They planned to rob his mobile. Ram Singh @ Aarami stopped him and demanded his mobile phone and on being refused, he took him near a wall but the victim started to beat him at which Satender @ Satte and Sushil @ Jalebi also intervened. Victim gave a blow on the nose of Satender @ Satte due to which his nose started to bleed and then he and Sushil @ Jalebi repeatedly stabbed him with their knives. The disclosure statements are thus inculpatory and exculpatory in nature and hence are additional material and links to support the prosecution case. ?

Apart from this, the appellants have in particular challenged the findings recorded by the trial court, in paragraph no.35 of the impugned judgement that the chain of circumstances would show that the accused, i.e. three appellants, in furtherance of their common intention, had given beatings to the deceased and then appellants Satender @ Satte and Sushil @ Jalebi had given multiple stab wounds with knife and thereafter fled away. It is stated that this is a case based on circumstantial evidence and the verdict is contrary to the facts proved and established.

4. We agree with the counsel for the appellants that the observations in the impugned judgment in the aforesaid paragraph no.41 are legally untenable and unacceptable. However, we must examine and consider other evidence and material before recording our conclusion and findings on merits.

5. In the present case, there was no eye witness and the prosecution version stands predicated on circumstantial evidence primarily relying upon the testimony of Om Prakash Yadav (PW21), the call detail record (CDR, for short) of the deceased Ram Babu @ Ramu Mark Ex.C1 to C3 which would indicate that the deceased was using a Chinese mobile phone instrument with IMEI no.35658200026437(0) and CDR of Om PrakashYadav (PW21) Mark A-1 to A-13 which could show that on 14.09.2008 at about 09:46 AM, the said Om Prakash Yadav (PW21) had installed a SIM card with no. 9991418747 in a mobile phone instrument with IMEI no.35658200026437(5) and thereafter had used the said instrument till 17.09.2008. It is apparent from the aforesaid narration that the CDRs of Om Prakash Yadav (PW21) and deceased Ram Babu @ Ramu were identified and given mark number and not marked as exhibited documents. However, even if, we take CDRs on record and examine the same, it would reflect that the deceased Ram Babu @ Ramu was using the mobile phone instrument with IMEI no.356582000264370 and had received the last voice call at 11:16 PM on 07.09.2008. Thereafter, a SMS message was received on same mobile phone at about 05:56 AM on 08.09.2008. CDRs Mark A-1 to A-13 would show that Om Prakash Yadav (PW21) was using SIM with mobile phone no.9991418747 which was installed in the mobile phone instrument with IMEI no. 35658200026437 i.e. the instrument used by the deceased Ram Babu @ Ramu, on 14.09.2008 at the time of occurrence. Albeit there is, a substantial time gap between the occurrence

at about 11:30 PM on 07.08.2008, in which Ram Babu @ Ramu had suffered fatal injuries and when the mobile phone instrument was belonging to the deceased was used by Om Prakash Yadav (PW21) for the first time on 14.09.2008 at 09:46 AM. In the interregnum and during this period, the said mobile phone instrument was with someone. The person in possession of the mobile phone instrument immediately after the occurrence, normally would be answerable and would have to explain his possession, for otherwise an assumption can be drawn against him. Questions would therefore arise and we have to determine and decide who was in possession of the said instrument immediately or soon after the occurrence, and did the instrument change hands etc.

6. The prosecution, to show the involvement of the three appellants and especially Satender @ Satte, relies upon the purchase receipt purportedly executed by Satender @ Satte on 10.09.2008 marked Ex.PW21/A. Om Prakash Yadav (PW21), in his deposition has averred that on 20.09.2008, some police officer had interrogated and questioned him at his shop about the mobile phone with the aforesaid IMEI number. PW21 had professed having purchased the mobile phone for Rs.1200/- from Satender @ Satte and after 2-3 days, he had given it to his son. Ex.PW21/A is photocopy of the receipt, purportedly executed by Satender @ Satte, for having sold mobile phone to PW21. The original receipt has been marked Ex.PW37/X-1 as the same was sent to CFSL for examination by a handwriting expert and became subject matter of the report by Dr. Virendra Singh (PW37). Said PW37 has deposed and proved report Ex.PW37/A, opining that the questioned document at portions Q-1 and Q-2 (Q-1 being written portion of the receipt and Q-2 being initials on the receipt) were written by the same person who had also written the specimen standard document S-1 to S-12 (Ex.PW37/X-2 to Ex.PW37/X-13). It is stated that specimen documents S-1 to S-12, were the specimen handwriting and signatures of the appellant.

7. We have difficulty in accepting Ex.PW37/X-1 and Ex.PW21/A as genuine or a document executed in the normal course of events. This difficulty arises from the language and manner, in which the document is executed. It is palpable and apparent that the document uses formal words and legal language which a layman would not use. The document called and headed as a receipt was descriptive and

gave several details. This receipt was purportedly dated 10.09.2008, whereas the CDRs show that PW21 or Sonu, son of Om Prakash Yadav (PW21), who has deposed as PW20 and had first time used this mobile phone instrument on 14.09.2008 at 09:46 AM. There is no explanation and reason forthcoming why PW21 and PW20 did not use the newly purchased mobile phone for 4 days. Satender @ Satte, as per prosecution version, was arrested on 20.09.2008 at about 04:10 PM. Satender @ Satte in his statement under Section 313 of Code of Criminal Procedure, 1973 (in short Cr.P.C ?) in response to question no.18, has stated that investigation officer had written the alleged confession on his own on a blank piece of paper. With regard to the receipt marked Ex.PW21/A and in response to question no.16, Satender @ Satte has stated that receipt was forcibly prepared in the police station by the IO. In these circumstances, in the facts of the present case, we do not think that it would be safe to rely on the receipt Ex.PW21/A or Ex.PW37/X-1 as substantial primary piece of evidence implicating the appellant with the offence in question. We would, therefore, ignore the said receipt.

8. Ocular version of Om Prakash Yadav (PW21) would indicate and reflect that he had purchased the mobile phone which was earlier used by the deceased and as per the CDRs, PW21 had started using the said instrument on 14.09.2008 at about 09:46 AM. PW21 professes that he had purchased the instrument from appellant Satender @ Satte. We have noticed and recorded above, there is time gap of about seven days between 07.09.2008 when the occurrence took place and thereafter when the mobile instrument was used for the first time by PW21 on 14.09.2008. There is no evidence and material to show that any of the appellants including Satender @ Satte had used the mobile phone instrument belonging to the deceased at any time between 07.09.2008 and 14.09.2008. During this period, mobile phone could have changed a number of hands. Mobile phones are easily transferrable and change hands from one person to another and old instruments are routinely sold in the market. The mobile phone in question was not expensive and as per the prosecution version PW21 had purchased the instrument in question for Rs. 1200/- only. Even if, we accept the version given by PW21 that he had purchased the phone from Satender @ Satte, it would be incorrect and improper to infer that Satender @ Satte had robbed the said mobile instrument

and murdered the deceased Ram Babu @ Ramu only on the basis of this fact or finding. Statement of Om Prakash Yadav (PW-21) regarding purchase of the phone from Satender @ Satte would not complete the chain and show and establish that Satender @ Satte was one of the participants, who had committed the offence in question. It would be a relevant but not an authoritative or a weighty incriminating circumstance.

9. Our attention was drawn to the MLC of the appellants Satender @ Satte marked Ex.PW3/A and appellant Ram Singh @ Aarami Ex.PW3/B. The appellant Satender @ Satte and Ram Singh @ Aarami were taken to the All India Institute of Medical Sciences for medical examination on 23.09.2008 at about 03:00-03:15 PM. MLC of Satender @ Satte (Ex.PW3/A) refers to two incised wounds over inner aspect of the left palm. Incised wounds were partially healed and tenderness +ve, was present over medial aspect of left palm and below distal little finger fold. Similarly, two incised wounds partially healed were noticed on the right hand. MLC (Ex.PW3/B) of the appellant Ram Singh records multiple skin lesions (partially healed) present over both lower limbs. However, there was no fresh external injury present or noticed over the body. There are difficulties in accepting the said MLC Ex.PW3/A and Ex.PW3/B. Appellant Satender @ Satte was arrested on 20.09.2008 at 04:10 PM and the appellant Ram Singh was arrested on 20.09.2008 at 08:45 PM. The medical examination vide MLCs Ex.PW3/A and Ex.PW3/B in question were conducted after nearly three days on 23.09.2008. Interestingly, MLC of Satender @ Satte (Ex.PW3/A) also records that there was no active bleeding or swelling. On examining the police file, we notice that the appellant Satender @ Satte and Ram Singh @ Aarami were taken for medical examination to the All India Institute of Medical Sciences on 20.09.2008 and 21.09.2008, respectively. A written request was made for their medical examination, and the doctor concerned has recorded that the patient Satender @ Satte was conscious, oriented to time, place and person and was fit for statement. There was no sign of bleeding. It records old scar marks. There was no mention and recording of any recent or partially healed injuries on the hands etc. Ram Singh, was medically examined at 05:10 PM on 21.09.2008 and except for identification marks, no injury fresh or healed wound was noticed. Satender @ Satte and Ram Singh were also medically examined on 22.09.2008 in the All India Institute of Medical Sciences

and the medical reports are silent and do not mention and record any injury/ wounds, fresh, partly, healed or full healed but tender. It is noticeable that the date of arrest of Satender @ Satte is nearly 13 (thirteen) days after the occurrence in question on 07.09.2008. Pertinently, Satender @ Satte, Ram Singh and Sushil @ Jalebi were produced before the Metropolitan Magistrate on 21.09.2008 and were remanded to police custody for a period of three days. The order granting police custody remand does not record any injury on the body of Satender @ Satte or Ram Singh.

10. This leaves us with the evidence of recovery of knife purportedly at the behest of appellant Satender @ Satte on 22.09.2008. As per the FSL report marked (Ex.PW38/A), human blood was found on the recovered knife, but the blood group could not be ascertained. It is noticeably that a knife was recovered from the place or the scene of crime itself. Recovery of knife from the appellant Satender @ Satte is nearly 15 days after the date of occurrence. Aforesaid evidence of recovery of knife besides being doubtful, is again a very weak evidence in the factual background of the present case.

11. The trial court has relied upon CDRs of appellant Satender @ Satte and Sushil @ Jalebi (Ex.PW25/D and Ex.PW31/C-1 to Ex.PW31/C-7) respectively. Our attention was drawn to the mobile tower charts to highlight that the appellants Satender @ Satte and Sushil @ Jalebi were in touch with each other on mobile phones and at about 11:00 PM on 07.09.2008, they were in the vicinity or near the crime scene. We have examined the CDRs of Satender @ Satte (Ex.PW25/D) and would observe that the said details pertain for the period 05.09.2008 to 20.09.2008. CDRs (Ex.PW25/D) reflect and unhesitatingly show that the appellant Satender @ Satte was mostly connected with mobile towers "ID Nos.16311, 16312 and 16313 during the period. The said mobile towers were located at Aliganj, which is adjacent to Kotla Mubarakpur where the appellant Satender @ Satte would reside as well as Lodhi Colony where the offence had occurred. CDRs of appellant Sushil @ Jalebi (Ex.PW31/C-1 to Ex.PW31/C-7) would reveal that on 07.09.2008 at about 11:40 PM, he was connected with the tower no.8322; at 11:48, he was connected with the tower no.50991 and at 11:55 PM, he was connected with the tower no.50991. The tower no.8322 was located at B. K. Dutt

Colony, Karbala and tower no.50991 was located at Kotla Mubarakpur, New Delhi. The appellant Sushil @ Jalebi was also resident of Kotla Mubarakpur. In these circumstances, the CDRs and the cell tower charts would not indicate and reflect as affirmative evidence and help us in ascertaining the appellants involvement. The appellants were present at or near the place of residence at Kotla Mubarakpur on 07.09.2008 at the time of occurrence. In the given facts, the aforesaid evidence is weak and feeble in nature.

12. In view of the aforesaid discussion the following factual position emerges:

i. Ram Babu had suffered fatal injuries on 07.09.2008 at about 11:30 PM, when he was repeatedly stabbed possibly by two or three persons in Lodhi Colony near flat No.D-1/85. The culprits were unknown.

ii. As per the leads available the deceased Ram Babu @ Ramu, mobile phone instrument with IMEI no.356582000264370 with SIM card no.9811419643 was missing and was looted.

iii. The said SIM card has not been traced and brought on record.

iv. The mobile instrument with IMEI no. 356582000264370 was used by Om Prakash Yadav (PW21) on 14.09.2008 at about 09:46 AM with SIM card with no.9991418747. As per PW21, he had purchased the said mobile phone from appellant Satender @ Satte.

v. We do not have any details of prior use of mobile phone instrument with IMEI no. 356582000264370 between 07.09.2008 and 14.09.2008 and it is not the case of the prosecution that the appellant Satender @ Satte or for that matter the appellant Ram Singh @ Aarami or Sushil @ Jalebi had used this mobile phone instrument belonging to late Ram Babu @ Ramu between 07.09.2008 to 14.09.2008.

vi. In addition to the aforesaid evidence, the prosecution relies upon the alleged recovery of a knife at the behest of Satender @ Satte on 22.09.2008. The recovery itself, we have held, is debatable and the FSL report marked Ex.PW38/B could not connect the blood group, though it states that human blood was found

on the knife. Noticeably, another knife was found at the place of occurrence.

vii. The call details record of both Satender @ Satte and Sushil @ Jalebi and the cell tower location details do not prompt a finding or mandate a positive affirmation that the said appellants were not present in Kotla Mubarakpur or nearby area i.e. the place of their residence. The said reports would be a neutral circumstance and do not connate presence of the two appellants necessarily at the place of occurrence.

viii. We have adversely commented upon the MLCs of Satender @ Satte and Ram Singh @ Aarami (Ex.PW3/A and Ex.PW3/B). Earlier medical reports of both Satender @ Satte and Ram Singh dated 20.09.2008 and 21.09.2009 respectively do not show presence of injuries. MLCs (Ex.PW3/A and Ex.PW3/B) were recorded at 03:00-03:15 PM on 23.09.2008, three days after the arrest of the appellants.

13. In view of the aforesaid discussion, we have to hold that the appellants are entitled to acquittal, and the conviction of the appellants by the impugned judgment cannot be sustained. The appellant Satender will be released forthwith, unless required to be detained in any other case, in accordance with law.

14. Appellants Ram Singh @ Aarami and Sushil @ Jalebi are already on bail. The bonds executed will be discharged.

15. The appeals are allowed.

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