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Mukesh Vs. State

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Court : Delhi

Decided On : May-31-2010

Judge : A.K. Sikri and; Ajit Bharihoke, JJ.

Acts : Indian Penal Code (IPC) - Sections 34, 201, 302 and 364; ; Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Criminal Appeal No. 242/1997

Appellant : Mukesh

Respondent : State

Advocate for Def. : Pawan Sharma, Standing Counsel

Advocate for Pet/Ap. : Akshai Malik, Adv./ Amicus Curiae

Judgement :

Ajit Bharihoke, J.

1. The appellant Mukesh has been convicted under Sections 364, 302 and 201 IPC in Sessions Case No. 4/96 FIR No. 121/93 Police Station Mansarovar Park in terms of the impugned judgment dated 21.03.1997 on the strength of circumstantial evidence i.e. (a) that Brahamanand (hereinafter referred to as `deceased') was last seen in the company of the appellant while leaving his house on 06.06.93 at around 5.00 p.m. - (b) the appellant visited the factory of the

deceased on 07.06.93 and removed one briefcase containing Rs. 50,000/- or Rs. 60,000/- (c) that the appellant was not found at his house at Kot Gaon, Ghaziabad when the complainant Vijay Singh Sharma(PW-11) visited his village - (d) recovery of the skull and broken jaws of the deceased at the instance of the above appellant on 13.06.93.

2. Briefly stated, case of the prosecution as per the FIR and the evidence on record is that on 06.06.93 at about 5.00 p.m., PW-1 Satish Kumar saw the deceased leaving his house No. 1/4533, Ram Nagar Extension, Shahdara, Delhi with the appellant in Maruti Car No. DL-3CA-3853 belonging to the deceased. The appellant drove the car and they were also seen going in the car by PW-11 Vijay Singh Sharma, who was returning home from the side of Mandoli Road. The deceased did not return thereafter.

3. On 06.06.93 at about 7.00 p.m., the appellant and others, including the deceased visited the arms and ammunition shop of PW-2 Ajay Kumar Gupta at Panipat. The deceased and one Dharmender were introduced to PW-2 Ajay Kumar Gupta by Surender Chaudhary, Advocate (PW-4) who had accompanied the group. PW-2 Ajay Kumar Gupta was told that both the deceased and Dharmender were interested in getting gun licences. PW-2 Ajay Kumar Gupta told them that the concerned person was not available and after contacting him, he would get back to Surender Chaudhary, Advocate. Thereafter, they all left his shop.

4. In the morning of 07.06.93, PW-3 Munish Kumar had gone to the factory of the deceased for some work. At around 9.00 a.m., appellant Mukesh reached at the factory in the Maruti Car belonging to the deceased. PW-3 Munish Kumar has claimed that the appellant was carrying the keys of the office of the deceased. He opened the office and carried away one briefcase containing Rs. 50,000/- or Rs. 60,000/- meant for payment of wages to the workers. While leaving, the appellant is claimed to have told PW-3 Munish Kumar that the deceased would return in the evening. The deceased, however, did not return.

5. On 08.06.93, PW-11 Vijay Singh Sharma is claimed to have visited Kot Gaon to find out about his brother. He, however, could not find his deceased brother,

Surender Chaudhary or the appellant there. PW-11 Vijay Singh Sharma again visited Kot Gaon on 09.06.93 but the appellant was not to be found. Thus, when the deceased did not return by the evening of 10.06.93, PW-11 Vijay Singh Sharma visited the police station to report the matter. His complaint was registered as FIR No. 121/93 and the investigation of the case was entrusted to ASI Balwant Singh (PW-13).

6. In the morning of 11.06.93, ASI Balwant Singh along with the police party and PW-11 visited Kot Gaon, Ghaziabad. There he met an informer who told him that the appellant and Surender Chaudhary might be available in Bulandshahar. He thus proceeded to Bulandshahar and reported his arrival at P.S. Kotwali. Two Sub-Inspectors of local police joined him and they proceeded towards Kalla Am Crossing and the appellant was apprehended on the pointing of the complainant Vijay Singh Sharma (PW-11). The Transit Remand of appellant was obtained on the same day from CJM, Bulandshahar and he was brought to P.S. Mansarovar Park. On interrogation, the appellant made a disclosure statement disclosing his complicity in the offence and stated that after killing the deceased, his head was chopped off and his chopped head was buried in a pit in the jungle at the bank of Ganga Canal after putting it in a polythene bag and sprinkling some salt on it. As regards the headless torso, he disclosed that after removing all his clothes, the torso was thrown into the Ganga Canal and the belongings of the deceased were thrown in the way while leaving the said spot where the head was buried. Pursuant to the said disclosure statement, it is claimed that the appellant got recovered the skull of deceased and his broken jaw and hairs which were badly eaten by animals and there was no flesh on the skull. It is claimed that the said skull and piece of jaw were identified by the brothers of the deceased, namely, PW-3 Munish Kumar and PW-11 Vijay Singh Sharma who had accompanied the police party for recovery.

7. The skull was sent for post mortem examination to ascertain whether it was a human skull and if so whether it belonged to a male or a female and also to fix the age of the person to whom the skull belonged and the cause of death. As per the Autopsy Surgeon who conducted post mortem, the skull belonged to a human male, aged around 30 years. The doctor, however, opined that it was difficult to

ascertain the cause of death or the nature of weapon with which the skull was severed from the body.

8. On completion of necessary formalities of investigation, the challan was filed against the appellant and others. The appellant, along with his co-accused Vinod and Ashok Fauji, was charged for the offences punishable under Sections 302/34, 364/34 and 201/34 IPC. The appellant as well as the other co-accused pleaded not guilty and claimed to be tried.

9. In order to bring home the guilt of the appellant and his co- accused, prosecution has examined as many as 13 witnesses.

10. The stand taken by the appellant in his examination under Section 313 Cr.P.C. is of total denial of the prosecution case. According to him, he is innocent and he has been falsely implicated in this case.

11. In defence, the appellant has examined six witnesses. DW-1 to DW-4 are the police officials who have been examined to prove the daily diary reports of police station Mansarovar Park and the log books pertaining to the movement of the official vehicles available at the police station during the relevant period. DW-5 Smt. Chander Wati is the mother of the appellant. She has stated that in the month of June, 1993, two police officials including one Sikh gentleman had visited her house to enquire about her son Mukesh. She further stated that Mukesh was available at his house during said period, i.e., from 07.06.93 to 10.06.93 and during that period no-one except the two said police officials had visited her to enquire about Mukesh. DW-6 Bhawar Singh also deposed to similar effect.

12. The learned Additional Sessions Judge has adopted a peculiar procedure in this case. Though the appellant was tried jointly with his co-accused Vinod Kumar and Ashok Fauji, the learned Additional Sessions Judge, after recording of entire prosecution evidence, opted to split the trial of the appellant from the trial of other two accused persons who were acquitted vide a separate judgment dated 05.03.97 and on the said date of hearing, the trial court recorded supplementary statement of the appellant under Section 313 Cr.P.C. and adjourned the case for recording of further defence evidence by the appellant Mukesh. On consideration

of the evidence on record, the learned Additional Sessions Judge found the appellant guilty of offences punishable under Sections 364, 302 and 201 IPC and convicted him vide impugned Judgment, followed by the consequent order on sentence dated 3 1.03.97.

13. Learned Shri Akshai Malik, Amicus Curiae on behalf of the appellant has submitted that the appellant is innocent and he has been falsely implicated by the police. Learned Amicus Curiae further submitted that the learned Additional Sessions Judge has ignored the fact that in the instant case, neither the motive for crime is established, nor the purported recovery of skull and jaw at the instance of the appellant is above suspicion. Even the arrest of the appellant is shrouded in mystery and the identity of recovered skull and jaw is highly doubtful. Learned Amicus also contended that even the last seen evidence produced by the prosecution is not above suspicion. Thus, learned Amicus has contended that prosecution has miserably failed to prove the incriminating circumstances against the appellant which, when taken together form a chain so complete as to lead to the irrefutable conclusion of guilt of the appellant, ruling out any possibility of his innocence. Therefore, his conviction is not sustainable under law.

14. Learned Counsel for the State, on the other hand, has canvassed in favour of the impugned judgment. He has submitted that from the testimony of prosecution witnesses, the above- referred incriminating circumstances have been fully established and those circumstances, taken together, form a chain so complete as to point towards the guilt of the appellant, leaving no scope for any hypothesis of innocence of the appellant. Thus, he has summed up that the appellant has been rightly convicted by the learned Additional Sessions Judge.

15. Since the case of the prosecution is based upon the circumstantial evidence, it would be appropriate to have a look upon the law on appreciation of circumstantial evidence. In the matter of Padala Veera Reddy v. State of A.P. : 1989 Supp (2) SCC 706, it was laid down by the Supreme Court that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

10.(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

16. The above enunciated principle of law was reiterated in the matter of State of U.P. v. Ashok Kumar Srivastava : (1992) 2 SCC 86, where the Supreme Court, inter alia, observed thus:

9. This Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negatived on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

17. In the light of the above enunciated principle of appreciation of circumstantial evidence, we now proceed to analyse whether the prosecution has been able to establish the relied upon incriminating circumstances against the appellant and, if so, whether the circumstances so established on record form a complete chain pointing towards the guilt of the appellant, leaving no possibility of his innocence.

18. As per the case of prosecution, the deceased left his house on 06.06.1993 along with the appellant in the Maruti car belonging to the deceased at around 5 pm. He was last seen in the company of the appellant and four others purportedly

on 06th June, 1993 at 07:00 p.m. by PW-2 Ajay Kumar Gupta when they visited his arms and ammunition shop. As per PW-2 Ajay Kumar Gupta, Surender Chaudhary, Advocate introduced him to Brahmanand and Devender and explained that they both were interested in getting license for rifle. Learned Amicus Curie has submitted that the aforesaid testimony of PW-2 Ajay Kumar Gupta is not of much help to the prosecution for the reason that Ajay Kumar Gupta in his cross-examination has admitted that apart from Surender Chaudhary, Advocate none of the above five persons were previously known to him. Therefore, in absence of any test identification parade being conducted to fix the identity of the appellant and the other accused persons, dock identification of the appellant by PW-2 Ajay Kumar Gupta is unreliable. On perusal of the record, we find that PW-2 Ajay Kumar Gupta claims that he saw the deceased in the company of the appellant and others at his shop on 06.06.1993 at around 7 pm. His testimony was recorded in the court on 19.02.1996. In view of this, we find it unsafe to rely upon the identification of the appellant done by him in the court after a lapse of almost two and a half years, particularly when as per PW-2 Ajay Kumar Gupta, he was never called by the police to identify any of those persons who had visited his shop on 06.06.1993 and also because of the fact that no test identification parade was got conducted to fix the identity of the appellant and the other accused persons. We may also add that even if PW-2 Ajay Kumar Gupta is believed, his testimony only establishes that one Brahamanand visited his shop in the evening of 6th June, 1993, but it falls short of fixing the identity of said Brahamanand as the deceased because there is the evidence to show that the Investigating Officer, with a view to confirm whether the deceased ever visited the shop of PW-2, showed him a photograph of Brahmanand (deceased) for fixing his identity. Thus, we find that prosecution has failed to firmly establish that the deceased was seen in the company of the appellant and others at Panipat on 06.06.1993 at around 7 pm.

19. Learned Counsel for the State has submitted that even if the dock identification of the appellant by PW-2 Ajay Kumar Gupta does not find favour with the court, then also the prosecution has been able to establish from the testimony of PW-1 Satish Kumar Sharma, PW-3 Munish Kumar and PW-11 Vijay Singh Sharma that the deceased was last seen leaving his house along with the appellant on 06.06.1993 at 5 pm in the Maruti Car belonging to the deceased. In support of this

contention, learned Counsel for the State has taken us through the testimony of above said witnesses. PW-1 Satish Kumar Sharma has categorically stated that on 06.06.1993 at about 5 pm, the appellant visited their house and after some time he left for Kot Gaon to meet one Surender along with the deceased in his car and thereafter, the deceased never returned. Aforesaid version of PW-1 finds corroboration in the testimony of PW-11 Vijay Singh Sharma (complainant), who has testified that in the evening of 06.06.1993 at about 5 pm when he was returning home from the side of Mandoli Road, he saw the appellant driving Maruti Car of his brother Brahmanand and the deceased Brahmanand was sitting by his side on the passenger seat. He also stated that the appellant even wished him. PW-3 Munish Kumar has also stated that on the relevant day, the deceased left his house with the appellant.

20. Learned Amicus Curiae has submitted that the testimony of the above three witnesses regarding the last seen circumstance is unreliable, firstly on the ground that they are interested witnesses being the brothers of the deceased and secondly, their version is not reliable for the reason that despite of the fact that the deceased went missing since 06.06.1993, no missing report or complaint was lodged till 10.06.1993, which circumstance raises a strong doubt that the FIR registered in this case is the result of manipulation and afterthought. As regards the first limb of contention, it is suffice to say that it is trite law that the evidence of a related witness is as good on evidence as that of any other witness. Testimony of a related witness is not liable to be rejected solely on the ground of relationship of the witness with the deceased/victim. If, on careful scrutiny of the evidence, testimony of such a witness is found trustworthy, the Court can always act upon said evidence. In the instant case, the deceased is claimed to have left his house with the appellant. Therefore, PW-1 Satish Kumar Sharma, who is brother of the deceased, being the family member is a natural witness who was expected to see him leaving the house. Therefore, we find no reason to reject his testimony, which is corroborated by the testimony of PW-3 Munish Kumar as well as PW-11 Vijay Singh Sharma. The testimony of PW-11 is criticised by the learned Amicus Curiae on the ground that in the FIR, he has not specifically mentioned that he noticed his brother Brahmanand going in a car with the appellant. In our considered view, the aforesaid discrepancy, i.e., non-mention of the above referred minute details

pointed out by learned Amicus Curiae in the FIR cannot be taken as a reason to reject the testimony of PW-11, which otherwise appears to be consistent and natural. Thus, we do not find any infirmity in the finding of learned Additional Sessions Judge that the deceased was seen leaving his house on 06.06.1993 at 5.00 p.m. along with appellant.

21. Coming to the circumstance (b) which also is projected as motive for crime by the prosecution. On this aspect, the testimony of PW-3 Munish Kumar is relevant. He has stated that in the morning of 07.06.1993, he had visited the factory of his brother Brahmanand (deceased) for some work. At about 9.00 a.m., appellant Mukesh came to the factory in the car of the deceased. He was carrying keys of the office of the deceased. The appellant opened the office with those keys and carried away one briefcase, which as per the witness contained Rs. 50,000/Rs. 60,000/- meant for the payment of wages to the workers and while leaving, told that the deceased would return home in the evening. PW-11 Vijay Singh Sharma(complainant) and PW-1 Satish Kumar Sharma have also testified that earlier the deceased had actually carried said amount to his office in a briefcase.

22. The above evidence of the witnesses does not inspire confidence, firstly because of the reason that the FIR Ex.PW-11/A was registered four days later in the evening of 10.06.1993 despite of the fact that the deceased did not return home even in the evening of 07.06.1993 as assured by the appellant. Further, perusal of the FIR reveals that there is no mention of the appellant having taken away the briefcase containing Rs. 50,000/Rs. 60,000/- from the office of the deceased in the morning of 07.06.1993. The absence of this material fact in the FIR which was lodged after a delay of four days raises a strong suspicion against the correctness of the version of PW-3 Munish Kumar regarding the visit of the appellant to the factory of the deceased in the morning of 07.06.1993 and taking away the briefcase. The aforesaid suspicion is further compounded by the fact that the prosecution has failed to examine any of the employees of the deceased to prove that the workers were not paid wages on the pay day of June 1993. In view of the above factual matrix, a possibility cannot be ruled out that the story of visit of the appellant to the factory of the deceased and taking away of the briefcase containing money has been introduced on an afterthought after due deliberations

to strengthen the case of the prosecution. Thus, in our considered view, the motive for commission of crime has not been firmly established. This factor goes against the case of the prosecution. We may also mention that as per the inquest report Ex.PW-3/B prepared on 13.06.1993 against the column 'apparent cause of death', the Investigating Officer has recorded 'Mukesh, the accused and his accomplices committed the murder by chopping off the neck due to old enmity'. If we go by this observation, it is apparent that till 13.06.1993 when the inquest report was prepared, there was no mention of the removal of money contained in the briefcase by the appellant Mukesh, otherwise looting of said money would have appeared as reason for killing in the inquest report.

23. The next circumstance relied upon by the prosecution is the absence of the appellant from his house at Kot Gaon, Ghaziabad on 8th and 9th June 1993. In this regard, the prosecution has examined PW-11 Vijay Singh Sharma, the complainant. He has stated that when his brother Brahmanand(deceased) did not return even on 07.06.1993, he visited Kot Gaon in order to find out about the well being of his brother. Neither the appellant nor Surender met him there. He deposed that Sunil, brother of Surender met him at the house of Surender and gave him telephone number of Surender. He telephoned Surender on that number but nobody picked up the call. He further stated that mother of Surender assured him that Surender was expected back in the evening and she would send him to meet him(witness). He further stated that on 09.06.1993, he again visited Kot Gaon and met mother of Surender as well as mother of the appellant. Mother of the appellant was worried and she told him that the appellant might be with Surender and that she would send Mukesh to meet him as soon as he comes home. From the aforesaid evidence, it cannot be inferred that the appellant Mukesh had absconded from his village. From the testimony of PW11, it is obvious that even if he visited Kot Gaon, he did not stay there for a long time and after meeting the relatives of Surender and the appellant, he came back. A possibility cannot be ruled out that during day time, the appellant was away for his work. Thus, in our considered view, even the circumstance (c) referred to above has not been firmly established.

24. The most material incriminating circumstance relied upon by the learned Additional Sessions Judge for conviction of the appellant is the discovery of skull, jaw and hair of the deceased from the jungle at the bank of Ganga Canal at the instance of the appellant. At the outset, we may mention that as per the case of prosecution, the said recovery was effected on 13.06.1993. As per the Investigating Officer, on the said day, the appellant led the police party to a jungle at the bank of Ganga Canal and on his pointing out a human skull, lower jaw and hair were recovered, which were identified by PW-3 Munish Kumar and PW-11 Vijay Singh Sharma, brothers of the deceased as that of the deceased Brahmanand. Perusal of the inquest report Ex.PW-13/B prepared by the Investigating Officer on 13.06.1993 reveals that as per the facts detailed in the report, the flesh of head and eyes of the recovered skull had been eaten away by wild animals. As per the post mortem report dated 14.06.1993 available on the trial court record, though it has not been proved by the prosecution, there was no flesh on the recovered skull. Under these circumstances, we fail to comprehend as to how the complainant Vijay Singh Sharma and PW-3 Munish Kumar managed to identify the said skull and the jaw as that of the deceased Brahmanand. Thus, it is highly doubtful that the aforesaid skull belonged to the deceased. Otherwise also, from the cross examination of the Investigation Officer ASI Balwant Singh (PW-13), it is apparent that a number of persons apart from the brothers of the deceased accompanied the police party for the recovery of the skull of the deceased. Despite that, the Investigating Officer, for reasons best known to him, has opted not to join any independent witness to the recovery, which circumstance raises suspicion against the story of the prosecution regarding recovery of skull and the jaw at the instance of the appellant. Learned Counsel for the State has submitted that non joining of independent witnesses is insignificant because it is common knowledge that public persons generally avoid to have any brush with the investigation conducted by the police. We do not find any force in this contention because of the fact that as per the Investigating Officer, 10/15 persons had accompanied him in the police vehicle. Besides that, there was a private van and 3/4 motorcycles on which public persons had gone to Ganga Canal along with the police party. This version, if true, is indicative of the fact that public persons opted to accompany the police party from Delhi to Bulandshahar for the purpose of

recovery and if those persons had bothered to go with the police upto Bulandshahar, it does not appeal to logic that they would not have preferred to join as witnesses to the recovery. Not only this, as per the Investigating Officer, for the purpose of recovery he left the police station in the morning of 13.06.1993. Thereafter, he went to the house of the complainant Vijay Singh Sharma and took him and his brothers along and on the way they also took along the photographer and proceeded to Ganga Canal. In the cross- examination, A.S.I. Balwant Singh has stated that the skull and jaw were recovered at 2.30 p.m. The aforesaid version is belied by the testimony of PW-5 Girish Kumar, photographer who claims that he had accompanied the police party to a place near Chittor Garh on Hapur Road where he took photographs of the skull and other remains of the deceased. This witness, in his cross-examination, has stated that he was taken by the police from his shop at 3.30 p.m. The aforesaid mismatch about the time of recovery of skull and jaw also compounds the suspicion against the correctness of the prosecution story. Thus, we find it unsafe to believe the evidence of prosecution regarding recovery of skull and jaw at the instance of the appellant Mukesh. Otherwise also, the evidence pertaining to identity of said skull is highly unreliable.

25. Even the arrest of the appellant is shrouded in mystery. As per the case of the prosecution, the appellant was arrested on the pointing of Vijay Singh Sharma (PW11) from the chambry of Kalla Am Crossing, Bulandshahar. The Investigating Officer A.S.I. Balwant Singh has testified that on 11.06.1993 pursuant to secret information received from the informer, he had gone to Bulandshahar and reported his arrival at P.S. Kotwali, Bulandshahar. From there, he took two Sub-Inspectors of local police and went towards the Kalla Am Crossing where the appellant was arrested. Neither the DD entry pertaining to the arrival report of ASI Balwant Singh and party at P.S. Kotwali, Bulandshahar is proved on record, nor any of those Sub-Inspectors have been cited as witnesses to the arrest of the appellant. This circumstance also makes the story of arrest of the appellant suspect.

26. In view of the discussion above, we find that prosecution has been able to establish only the last seen evidence to the effect that on 06.06.1993 at about 5.00 p.m., the deceased left his house along with the appellant. In our considered view, this circumstance by itself is not sufficient to hold the appellant guilty of the

charges of kidnapping, murder and making the evidence disappear, particularly when the investigation in this case has been done in a most unfair manner. The Investigating Officer, as a prudent man with average common sense ought to have known that it is impossible to identify the skull or jaw to fix the identity of the deceased. Despite of that, he took a short cut and did not care to properly investigate the case. Not only this, there is not even a whisper on the record that any attempt whatsoever was made to recover the so-called money which the appellant allegedly took away from the office of the deceased. Thus, we find it difficult to sustain the conviction of the appellant on the charges under Sections 302, 364 and 201 IPC. We, accordingly, set aside the impugned judgment and acquit the appellant of the aforesaid charges, giving him benefit of doubt.

27. The appellant is on bail. His bail-cum-surety bond stands discharged.

28. The appeal is disposed of accordingly.

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