

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

Date of Hearing: 4th February, 2011

Date of Decision: 31, March, 2011

+ **CRL. A. 883/2005**

SUBHASH

...APPELLANT

Through: Mr. Madhusudan Bhayana, Advocate
with Mr. R.N. Yadav, Advocate.

Versus

STATE

...RESPONDENT

Through: Mr. Lovkesh Sawhney, APP.

AND

+ **CRL. A. 165/2005**

RAMESH @ BORI

...APPELLANT

Through: Ms. Ritu Gauba, Advocate.

Versus

STATE

...RESPONDENT

Through: Mr. Lovkesh Sawhney, APP.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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| 1. Whether reporters of local papers may be
allowed to see the Order? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported
in the Digest? | Yes |

J U D G M E N T

G.P. MITTAL, J.

CRL. A. 883/2005

1. This is an Appeal against the judgment dated 18.10.2004 and order dated 25.10.2004 whereby the Appellant was held guilty of the offence punishable under Section 302/34 of the Indian Penal Code ('the Code') and was sentenced to

undergo imprisonment for life and to pay a fine of Rs.5,000/- or in default to undergo Rigorous Imprisonment for a period of one year.

2. According to the prosecution on telephonic information from one Satish Kumar son of Late Kundal Lal DD No.36 Ex.PW-12/A was recorded by PW-12 Constable Sudesh Kumar in Police Post Tis Hazari, Police Station (PS) Subzi Mandi. The intimation was that a person was murdered in the Gole Canteen, Civil Side, Tis Hazari Court. Constable Sudesh Kumar (PW-12) handed over the DD entry to ASI Joga Singh for inquiry and transmitted the information to the SHO as well as Additional SHO, PS Subzi Mandi. ASI Joga Singh, Constable Narender and Constable Zilajeet immediately proceeded to the Gole Canteen. In the meanwhile, Inspector Jai Bhagwan also reached the spot and recorded statement of Ramesh (PW-3), an eye witness to the incident. It was revealed that the Appellant and co-accused Ramesh @ Bori had initially grappled with deceased Mukesh, struck his head against a bench and the floor. Thereafter, they put a PVC pipe around the neck of Mukesh and pulled it, as a result of which Mukesh fell down. He was dragged inside the Canteen by pulling the PVC pipe which was tied around his neck, like a loop. PW-3 Ramesh also informed Inspector Jai Bhagwan that Subhash used to work in the *Chana Bhatoora* shop and was resident of Village Devpura, District Sidharth Nagar, U.P. whereas co-accused Ramesh @ Bori used to work in the juice shop and was also resident of Village Devpura, District Sidharth Nagar, U.P.

3. Inspector Jai Bhagwan forwarded the statement of PW-3 Ramesh to the Duty Officer with his endorsement for registration of the case under Section 302/34 of the Code and proceeded to lift control earth, blood, bloodstained earth, seize the dead body and complete other formalities.

4. The dead body was forwarded to the mortuary with instructions to the doctor to preserve it for 72 hours. Accused Ramesh @ Bori was arrested from ISBT Anand Vihar on 12.11.2001 whereas Appellant Subhash was arrested on 13.11.2001. The appellant Subhash made a disclosure statement Ex.PW-15/F

leading to recovery of his blood stained shirt from the *Chana Bhatoora* shop, which blood group later found to have matched with the blood group of the deceased (i.e. Group 'B'). Similarly, co-accused Ramesh @ Bori also made a disclosure statement Ex.PW-15/D leading to recovery of a shirt. Co-accused Ramesh @ Bori, on the other hand, got recovered blood stained shirt worn by him at that of the incident from the house of his cousin Pujari in Sonia Vihar. Again blood stains on the shirt were found to be contain 'B' Group.

5. During trial, the prosecution examined as many as 16 witnesses. Out of which, PW-3 Ramesh Singh @ Tinku, PW-5 Satish Kapoor, contractor of Gole Canteen, PW-7 Constable Ramesh Kumar, PW-15 SI Khalid Akhtar, who was associated in the investigation of the case and PW-16 Inspector Jai Bhagwan, Investigating Officer of the case, are the material witnesses.

6. PW-3 Ramesh Singh @ Tinku deposed that on 11.11.2001 he was working in Gole Canteen, Civil Wing, District Court, Tis Hazari and used to prepare tea and coffee. The deceased Mukesh used to work in the Central Canteen, Tis Hazari for service in the Canteen. He was a resident of Bihar. The appellant Subhash used to work at the *Chana Bhatoora* shop near the Tis Hazari Court entrance whereas accused Ramesh used to sell tea near the *Chaatwala* Shop. On the said date both the accused and deceased Mukesh consumed liquor at the *Chholewala* Shop, and in front of Seat No.12,13 opposite Gole Canteen. At about 8:00 P.M. both the accused/Appellants quarreled with Mukesh and grappled with him. Thereafter, both of them with the help of a (flexible) pipe strangled Mukesh and banged him on the ground. Thereafter, they dragged Mukesh in the Gole Canteen and ran away. He telephoned Satish, the Canteen owner. Satish reached the Canteen and informed the police about the incident. The police reached and recorded his statement Ex.PW-3/A. Kuldeep his *Mausi's* son who used to work as a waiter at Central Canteen was also with him at the time of the incident. On cross examination, PW-3 denied that he had not told his employer that the accused persons had inflicted injuries on the deceased. He came at Gole Canteen at about 7:45 P.M. He raised alarm when the accused were beating

Mukesh. He did not try to save the deceased from the clutches of the accused persons. He stated that the incident occurred for about 30/45 minutes. He could not say as to on which parts of the body the deceased had sustained injuries. He denied the suggestion that the incident was already over when he reached the spot.

7. PW-5 Satish Kapoor (Canteen owner) corroborated the testimony of PW-3 and deposed that on the night intervening 11-12.11.2001 at about 8:30 / 9:00 P.M. PW-3 informed him on telephone that Ramesh and Subhash (Appellants) had beaten Mukesh and killed him by strangulation. He reached the Gole Canteen and saw Mukesh lying dead near the entrance inside the Canteen. He noticed one PVC pipe around Mukesh's neck. He immediately informed the Police Post Tis Hazari about Mukesh's murder. The police reached the spot. In the meantime, the PCR van also reached there. The police recorded the statement of Ramesh Singh and registered the case. He then deposed about the lifting of the blood, earth control, the blood stained earth and preparation of Memos Ex.PW-3/B and Ex.PW-3/C. When cross examined, PW-5 deposed that PW-3 had not given the names of the Appellants on telephone. He also admitted that PW-3 had not told him on telephone how the deceased was lying at the spot. He stated that he remained at the spot with the police for about half an hour and after 11:30 P.M. he left the spot. He admitted that guards are deputed at the entrance gate of Tis Hazari Court Complex. He denied the suggestion that he had not joined the investigation or that signatures were obtained by the police at the Police Post.

8. PW-15 SI Khalid Akhtar had accompanied Inspector Jai Bhagwan, Additional SHO Police Station Subzi Mandi to the spot. He deposed that he accompanied Additional SHO Jai Bhagwan on 11.11.2001 to Gole Canteen, Civil Wing, Tis Hazari at about 8:30 / 9:00 P.M. They found the dead body of a male lying near the Canteen gate where ASI Joga Singh and Constable Narender were present. He deposed to recording the statement of witness Ramesh and sending "rukka" to the Police Station through Constable Narender for registration of the case. Inspector Jai Bhagwan conducted the inquest proceedings and the scene of

occurrence was photographed. He also deposed about lifting of blood, control earth etc. from the spot.

9. He stated that on 12.11.2001 he, along with Inspector Jai Bhagwan and other staff members were present at ISBT Kahsmere Gate in connection with the search of the accused. Inspector Jai Bhagwan was informed by an informer that accused/Appellant Ramesh would go to his village from ISBT Anand Vihar. They reached there and arrested Ramesh at the instance of the informer. He was arrested, and his personal search was taken by memo Ex.PW-15/E. On 13.11.2001 he was interrogated and his disclosure statement Ex.PW-15/D was recorded. He then deposed about the arrest of accused/Appellant Subhash on 13.11.2001 at the main entrance of the old Delhi Railway Station. He proved his arrest by Memo Ex.PW-15/A and recording of his disclosure statement through Memo Ex.PW-15/F.

10. During cross examination, PW-15 admitted that no other public person was joined as a witness in the case. He stated that he had prepared the seizure memo, site plan etc. and recorded the statements of some witnesses under Section 161 Cr.P.C. on the directions of the Investigating Officer. He denied the suggestion that statement of PW-3 Ramesh @ Tinku was recorded on the next day at 6:00/7:00 A.M.

11. PW-16 Inspector Jai Bhagwan who was Additional SHO of Police Station Subzi Mandi at the relevant time was the Investigating Officer of the case. He deposed on the lines of PW-15 SI Khalid Akhtar.

12. In their examination under Section 313 Cr.P.C. the accused/Appellants merely denied the prosecution allegations, and pleaded their false implication.

13. The appellant Subhash produced one Amit in his defence to prove that he was not arrested by the police from Old Delhi Railway Station but had been produced by him before the police. The appellant Ramesh @ Bori, however, preferred not to produce any evidence in defence.

14. The learned Additional Sessions Judge, by the impugned judgment found that PW-3 Ramesh Singh @ Tinku was a truthful witness: though the FIR may have been received by the learned Metropolitan Magistrate at 7:20 A.M. on the next day, yet it was established that the FIR was recorded (completed) at 12:30 A.M. on 12.11.2001. He found the discrepancies to be inconsequential. Thus, relying upon the testimony of the witnesses produced during trial he held the accused/Appellants guilty for the offence punishable under Section 302/34 of the Code, convicted and sentenced them as aforesaid.

15. Following contentions have been raised on behalf of the Appellants:-

- (1) This was a blind murder. The police had no clue about the assailants. The FIR was recorded after a considerable delay and due deliberation and the Appellants were implicated falsely, merely on suspicion.
- (2) The story of arrest of the Appellant Subhash on 13.11.2001 from Old Delhi Railway Station, his alleged disclosure statement Ex.PW-15/F and the recovery of a bloodstained shirt pursuant to the statement is not believable as no public witness was joined at the time of arrest and alleged recovery.
- (3) There are contradictions and discrepancies in the testimony of the so-called eye witness PW-3 Ramesh Singh and PW-5 Satish Kapoor, Contractor of the Canteen which create grave doubts in the case of the prosecution. Conduct of PW-3 Ramesh was unnatural in not coming to the rescue of the deceased.
- (4) According to PW-3 Ramesh Singh there were other witnesses to the occurrence but except Kuldeep none of them was cited which makes the case of the prosecution doubtful. Even Kuldeep has not been produced.

16. On the other hand, it has been urged by Mr. Lovkesh Sawhney, learned Additional Public Prosecutor for the State that there was no delay in recording the

FIR. The names of the assailants were mentioned in the FIR which gives credence to the case of the prosecution. There was no motive for the Investigating Officer to create or manipulate false evidence regarding the arrest of the Appellants. The Appellant Subhash was arrested from Old Delhi Railway Station in the presence of SI Khalid Akhtar and other official witnesses. The recovery of bloodstained shirts in pursuance of the disclosure statement of the Appellant was found to contain blood group 'B' which tallied with the blood group of the deceased corroborated the prosecution story and thus, the prosecution had established its case against the Appellants beyond the shadow of all reasonable doubt. Learned Additional Public Prosecutor defended the judgement of the trial Court and urged that the Appeal is liable to be dismissed.

DELAY IN LODGING THE FIR

17. It has been urged by the learned counsel for the Appellant that according to the prosecution Mukesh's murder took place at about 8:00 P.M. The Investigating Officer had reached the scene of crime at about 9:30 P.M. on 11.11.2001. As per endorsement on the FIR Ex.PW-4/A it was received by the Illaqa Magistrate on 12.11.2001 at 7:20 AM. It has come in the prosecution evidence that Illaqa Magistrate was a resident of Gurgaon which was at a distance of 27 kms. The FIR was dispatched to him at 12:30 AM in the night through the motorcycle rider PW-7 Constable Ramesh Kumar. If this was correct, the FIR ought to have reached the learned Illaqa Magistrate by 1:30 / 2:00 AM in the night.

18. The dead body was sent to the mortuary for conducting postmortem examination on 12.11.2001 at 2:20 A.M. whereas inquest papers were received only on 14.11.2001 at 11:00 A.M. It is urged that since the inquest papers were not sent along with the dead body on 12.11.2001 even till 2:20 AM. This would show that the police have still involved in deliberations to record the FIR.

19. The learned APP for the State has drawn our attention to the testimonies of various witnesses and has referred to the documents to support his argument

that that it is established from the record is that the FIR was recorded on the night intervening 11-12.11.2001 at 12:30 A.M. His contention, therefore, is that the prompt recording of the FIR containing the names of the assailants would remove any doubt regarding any deliberation in recording of the FIR. We would like to refer to the evidence relied upon by the learned counsel for the parties in this regard. A perusal of the FIR Ex. PW-4/A shows that it was recorded at 11:50 P.M. on 11.11.2001. There is no dispute that the FIR bears the endorsement in the handwriting of the learned Illaqa Magistrate that the FIR was received by him at 7:20 A.M. This by itself would not show that the FIR was ante timed.

20. PW-4 ASI Nanu Ram was the Duty Officer working in Police Station Subzi Mandi at the relevant time. He testified that DD No.24-A dated 11.11.2001 regarding start of recording of FIR and DD No.2-A dated 12.11.2001 after completion of recording of the FIR, Ex.PW-4/B and PW-4/C were recorded and duly proved by him. He further deposed that copies of the FIR were sent to the Illaqa Magistrate through Constable Ramesh and to senior police officers through Constable Mukesh Kumar.

21. Similarly, PW-7 Constable Ramesh Kumar testified that on the night intervening 11-12.11.2001 he was working as Chittha Munshi at Police Station Subzi Mandi. Duty officer has handed him over a copy of the FIR No.378/2001 at 12:30 A.M. in the night. He took the same to the residence of Shri Rakesh Syal, Metropolitan Magistrate and delivered the same to the learned Metropolitan Magistrate.

22. PW-16 Inspector Jai Bhagwan, Investigating Officer of the case is another important witness on this aspect of the case. During cross examination he stated that the special report was sent to the Illaqa Magistrate at Gurgaon immediately after registration of the case at 12:30 A.M. in the night. When the Constable left for giving special report to Illaqa Magistrate he was present in the Canteen.

23. We have already extracted the testimony of PW-4 ASI Nanu Ram, Duty Officer Police Station Subzi Mandi and PW-7 Constable Ramesh Kumar

regarding registration of the FIR and its delivery at the residence of the learned Metropolitan Magistrate. There was absolutely no challenge to the testimony of these two important witnesses that the recording of the FIR had been completed at 12:30 A.M. or that the special report had been handed over to PW-7 Constable Ramesh Kumar immediately after recording of the FIR.

24. Once it is established that the FIR was recorded at 12:30 A.M. as claimed, it cannot be said that there was any delay in recording of the FIR resulting in any manipulation or introduction of names of the assailants after deliberation.

25. Mr. Lovkesh Sawhney, learned Additional Public Prosecutor for the State has placed reliance on (i) *State of Punjab vs. Phola Singh & Anr.*, (2003) 11 SCC 58; (ii) *Balram Singh & Anr. vs. State of Punjab*, (2003) 11 SCC 286; and (iii) *Kamma Otukunta Ram Naidu vs. Chereddy Pedda Subba Reddy & Anr.*, (2003) 11 SCC 293, where the delay of a few hours in delivery of the special report at the residence of the Illaqa Magistrate was not found to be of any significance.

26. In *Phola Singh*, the High Court had observed that there was unusual delay in lodging the FIR, which was lodged after deliberation. The facts were that the incident had taken place at 5:30 in the morning, the FIR was lodged at 10:45 A.M. and the special report reached the Illaqa Magistrate at 2:40 P.M. on the same day. There was evidence that the distance between the Police Post and the Illaqa Magistrate was about 20 Kms. The Supreme Court held that if any question had been put to the Investigating Officer about the time taken in reaching the special report to the Illaqa Magistrate, the Investigating Officer would have been in a position to explain the delay, if any. Without seeking for a response from the Investigating Officer, it was not open for the accused to allege that there was delay in sending the report.

27. In *Balram Singh*, it was observed by the Supreme Court that if the ocular evidence adduced by the prosecution is worthy of acceptance the element of delay in registering the FIR/complaint or sending the same to the jurisdictional Magistrate by itself would not in any manner weaken the prosecution case.

28. Similarly in *Kamma Otukunta*, the Supreme Court held that where the occurrence had taken place at about 6:30 A.M., the FIR is lodged at 10:30 A.M., receiving of the FIR at 4:15 P.M. would not mean that there was a delay caused in receipt of the FIR in the Court.

29. In the instant case, the FIR had been dispatched to the residence of the learned Metropolitan Magistrate through PW-7 Constable Ramesh Kumar in the dead of night. We do not even know whether the Constable was aware of the residence of the learned Illaqa Magistrate. In any case, in the absence of any cross examination of PW-7 Constable Ramesh Kumar and PW-16 Inspector Jai Bhagwan, the Investigating Officer of the case on this aspect, it cannot be said that there was any undue delay in reaching of the FIR at the residence of the learned Illaqa Magistrate so as to draw an inference that the FIR was ante timed. Thus, we are of the view that there was no delay in recording the FIR in the PS.

RECOVERY OF BLOOD STAINED CLOTHES & ARREST

30. It has been urged by the learned counsel for the Appellant that the Investigating Officer invented the story of the Appellant's Subhash arrest from Old Delhi Railway Station on 13.11.2001. Mr. Madhusudan Bhayana, learned counsel for the Appellant Subhash argued that the Appellant Subhash had been produced by DW-1 Amit at Police Post Subzi Mandi on 13.11.2001. It is argued that the story of the prosecution regarding making of the disclosure statement Ex.PW-15/D and recovery of blood stained shirt at the behest of Appellant Subhash from the *Chana Bhatoora* shop is highly unbelievable, particularly, when he had enough time to dispose of / destroy the said shirt. It is contended that the police did not join any independent witness at the time of arrest, the making of the disclosure statement and the alleged recovery. The recovery therefore, becomes suspect.

31. The deceased Mukesh was done to death at about 8:00 P.M. – 8:30 P.M. on 11.11.2001. The FIR was lodged in the late night, that very day. Obviously, Appellant Subhash wanted to escape the law that is why he had fled and was arrested from Old Delhi Railway Station. It is true that no independent witness

was present at the time of arrest, making of disclosure statement Ex.PW-15/F and recovery of blood stained shirt Ex.P-3 at the instance of the Appellant. The police party had visited various places in search of the accused/Appellants Subhash and Ramesh. It cannot be expected of the Investigating Officer to search for the public witnesses instead of gathering information and apprehending the culprits.

32. In *State, Govt. of NCT of Delhi vs. Sunil & Anr.*, (2001) 1 SCC 652, it was held that there is no requirement in law either under Section 27 of the Indian Evidence Act or under Section 161 Cr.P.C. to obtain signatures of independent respectable persons of the locality on the statement made by the accused. We would like to extract Para 19 of the report hereunder:-

*"19. In this context we may point out that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person "and signed by such witnesses". It must be remembered that a search is made to find out a thing or document about which the searching officer has no prior idea as to where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guess work that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts the search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. This Court has indicated the difference between the two processes in the *Transport Commissioner, A.P., Hyderabad v. S. Sardar Ali*, (1983) 4 SCC 245 . Following observations of Chinnappa Reddy, J. can be used to support the said legal proposition: (SCC p.254, para 8)*

“Section 100 of the Criminal Procedure Code to which reference was made by the counsel deals with searches and not seizures. In the very nature of things when property is seized and not recovered during a search, it is not possible to comply with the provisions of Sub-section (4) and (5) of Section 100 of the Criminal Procedure Code. In the case of a seizure under the Motor Vehicles Act, there is no provision for preparing a list of the things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself.””

33. According to prosecution Appellant Subhash was arrested from Old Delhi Railway Station on 13.11.2001. Though DW-1 Amit was produced by the Appellant to show that he (Amit) had produced him before the police when the police was searching for him. Yet a reading of the cross examination of PW-16 Inspector Jai Bhagwan reveals that it was suggested on behalf of the Appellant himself that he was arrested from the Passenger Hall. It is true that DW-1 stated in his examination in chief that he had produced the Appellant before the police when he had gone to his house at about 7:30 P.M. Yet, in cross examination, the witness became ignorant if the Appellant was arrested from Old Delhi Railway Station at the instance of the secret informer.

34. Our attention has been drawn to the Arrest Memo of Appellant Subhash where the date (at the top) is mentioned as 11.11.2001 and no date is mentioned at the bottom. It appears that the Arrest Memo of the Appellant Subhash was not exhibited during trial. But his personal search memo was proved as Ex.PW-15/E. It is true that in the Arrest Memo on the top the date is recorded as 11.11.2001. In fact in the Personal Search Memo Ex.PW-15/E the column of date appears after the FIR and may be on account of some clerical error on the arrest memo also date at the top was mentioned as 11.11.2001. In Column No.6 of this memo which refers to the date of arrest, the date has been specifically mentioned as 13.11.2001. Under these circumstances no value can be attached to this discrepancy.

35. In his statement under Section 313 Cr.P.C. the Appellant no doubt had refuted that he had got recovered any blood stained shirt from the roof of the shop

near the Canteen. However, during cross examination of PW-16 Inspector Jai Bhagwan no suggestion was given that the Appellant had not led to recovery of any bloodstained shirt. It may, however, be mentioned that the document Ex.PW-15/H which was claimed by PW-15 and PW-16 to be the disclosure statement does not make any mention regarding the discovery of any material fact or object by the Appellant. Moreover, in his examination under Section 313 Cr.P.C. it was not put to the Appellant that bloodstains on the shirt Ex.P-3 were found to be of group 'B' which matched with the blood group of the deceased. This piece of evidence, therefore, cannot be used against him. So, what is established is that a bloodstained shirt was recovered at the instance of Appellant Subhash which by itself is of no consequence.

DISCREPANCIES IN THE TESTIMONY OF WITNESSES

36. The learned counsel for the Appellant has drawn our attention to cross examination of PW-3 where he has denied the suggestion that he (PW-3) had not told his employer (PW-5) that the Appellants had caused injuries to Mukesh. It has been argued that a perusal of DD No.36, Ex.PW-12/A would show that while passing information Satish Kapoor (PW-5) had not disclosed the names of the assailants to the Duty Officer, whereas PW-3 as stated earlier has denied the suggestion that he had not disclosed names of the assailants. Our attention was also drawn to the opening lines of cross examination of PW-5 where he had categorically stated that Ramesh Singh (PW-3) had not told him the names of the assailants when he received the telephone from him.

37. In our view, this contention of the Appellant is misconceived. PW-3 had nowhere stated, either in his examination in chief, or in his cross examination, that he had disclosed the names of the assailants while giving telephonic information to his employer. He had simply denied the suggestion that he did not tell the names of the assailants to his employer, thereby implying that when PW-5 reached Gole Canteen, the names of the assailants had been disclosed by PW-3 to PW-5.

38. It was pointed out that in his statement in the Court as PW-3 Ramesh Singh had deposed that he did not try to save the deceased from the clutches of the accused whereas in his statement Ex.PW-15/A, on the basis of which the present case was registered, this witness has stated that when he tried to intervene, he was slapped, given a fist blow and threatened.

39. A perusal of the statement of PW-3 recorded before the Trial Court shows that the attention of this witness was not drawn to this discrepancy / improvement. Otherwise also, the discrepancy is not such as would falsify the prosecution case. Similarly, the conduct of the PW-3 in not intervening and saving Mukesh cannot be said to be unnatural as different persons react differently.

40. In *State of U.P. vs. Devender Singh, 2004 (10) SCC 616*, it was held by the Supreme Court that the evidence of a witness cannot be discarded on the ground that he did not react in a particular manner. It was held that human behavior varies from one person to another. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each given case. How a person would react and behave in a situation can never be predicted. Thus, simply because PW-3 did not intervene or did not try to save Mukesh, his testimony cannot be discarded.

NON-EXAMINATION OF OTHER PERSONS BY THE INVESTIGATING OFFICER REGARDING THE INCIDENT

41. It has been urged by the learned counsel for the Appellant that others were in the Canteen, apart from PW-3 Ramesh Singh and Kuldeep. However, Kuldeep had not been produced by the prosecutions whereas other persons were not even questioned by the Investigating Officer. It is thus, argued that it would be unsafe to rely upon the testimony of a solitary witness PW-3 Ramesh Singh @ Tinku.

42. In his examination in chief PW-3 had stated “*my statement is Ex.PW-3/A, (was) thumb marked by me at Point A. Except me and my brother Kuldeep all other (persons) had ran away from the spot.*” PW-16 Investigating Officer of the

case after checking the record stated during his cross examination “*that the name of the other employee was Kuldeep Singh and except three nobody else of the Canteen met me there.*” He denied the suggestion that others had met him in the Canteen, or that they had told him that some unknown persons had caused injuries on the person of the deceased or that they had not been made witness in the case as they had refused to depose falsely at his instance. During cross examination of the Investigating Officer, names of the other employees who had allegedly told the Investigating Officer that some unknown persons had killed the deceased had not been suggested. None of them has been produced in defence. We are therefore not inclined to believe that others eye witnessed the occurrence others had disclosed, to the Investigating Officer that the deceased was killed by unknown persons.

43. The prosecution apart from PW-3 Ramesh Singh had cited Kuldeep Singh as a witness to the occurrence. Unfortunately, PW Kuldeep Singh had become untraceable, as was stated by the Investigating Officer in his deposition. No material or circumstance is forthcoming in cross examination of the Investigating Officer to show that he had lied on this count. We do not see any reason to disbelieve the Investigating Officer on this aspect.

44. So, we are left with the testimony of a solitary eye witness PW-3 Ramesh Singh. He has categorically stated how the occurrence took place. He deposed that on the fateful day, the Appellants and the deceased took liquor at *Chana Bhatoora* shop and in front of Seat No.12 and 13. The Appellants then grappled with him at about 8:00 P.M. and thereafter strangled him with the help of a (flexible) pipe. Thereafter, they dragged Ramesh, in an injured condition in to the Gole Canteen and he informed the owner of the Canteen about the same. PW-5 Satish Kapoor, owner of the Canteen has testified to the receipt of telephonic information in respect of death of Mukesh and then passing of this information to the police Post Tis Hazari. Bloodstained earth, control earth from the spot was lifted by the Investigating Officer and blood on the earth tallied with the blood group of the deceased as per the FSL Report Ex.PW-16/PW-16/K1 and K2.

45. The testimony of PW-3 finds corroboration from the postmortem report Ex.PW-6/A. There were nine injuries including injury No.6. Injury No.6 was ligature mark and was possible by the flexible plastic pipe found in situ around the neck.

46. PW-6 Dr. K. Goel opined that the cause of death was asphyxia consequent to pressure over neck, by ligature. The PM findings were consistent with ligature strangulation and mode of death was homicidal. He opined that pressure over neck by ligature is sufficient to cause death in ordinary course of nature.

47. Of course, the prosecution has examined only one eye witness out of two cited by it, however, we find his testimony to be quite truthful, cogent and convincing. We see no reason to disbelieve him in respect of injuries caused by the Appellant on the person of Mukesh and then putting PVC pipe around the neck of deceased Mukesh and pulling it and strangulating him.

48. In ***Chuhar Singh vs. State of Haryana***, (1976) 1 SCC 879, the three Judges Bench of the Supreme Court held as under:-

“The fact that the prosecution has been able to examine but one eye witnesses to the occurrence cannot detract from the strength of its case. What is important is not how many witnesses have been examined by the prosecution but what is the nature and quality of evidence on which it relies. The evidence of a single witness may fail to support a simple charge of hurt. Since the case must stand or fall by the evidence of the solitary eyewitness it is necessary to examine that evidence critically.”

49. In the instant case too we have thoroughly examined the testimony of PW-3 Ramesh Singh and we see no reason to disbelieve him. He had no reason or motive to falsely implicate the Appellants.

50. It is true that the prosecution has not attributed any motive to the Appellant to cause serious injuries on the person of Mukesh and to murder him. However, when there is ocular evidence regarding commission of crime, the existence of any motive to commit the same pales into insignificance. In

Dhanridhar vs. State of U.P., 2010 (7) SCC 759, it was held by the Supreme Court that when there is positive evidence against the accused regarding commission of the offence motive is not of much importance. Mere absence of motive, even if assumed, will not per se entitle the accused to acquittal if the commission of the crime is proved by cogent and reliable evidence.

51. In view of the forgoing discussion, we are of the considered opinion that the prosecution has been able to establish beyond all reasonable doubt that on 11.11.2001 the Appellant in furtherance of his common intention with co-accused had committed murder of Mukesh. The Appellant has been rightly held guilty and sentenced under Section 302/34 of the Code.

52. We do not find any error or infirmity in the judgment and order impugned in this Appeal. The Appeal is without any merit, and is accordingly dismissed.

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53. India became a signatory to the UN Convention on the Rights of the Child, 1989 and ratified it on 11.12.1992 pursuant to which the Juvenile Justice (Care & Protection of Children) Act, 2000 was conceived and enacted to align the countries domestic laws with the treaty obligations. The Act is a complete Code, prescribing a special procedure, and an entirely different set of standards to be adopted for juveniles (defined as those who have not completed 18 years of age, by Section 2 (k)) “in conflict” with law (i.e. a juvenile alleged to have committed an offence, by Section 2 (l)). By Section 6 (1) the Juvenile Justice Board is entitled to exclusively deal with all matters, including enquiry into allegations of the juveniles alleged to have committed offences. Whenever a Magistrate – who is not empowered under the Act to exercise jurisdiction – is of opinion that the accused brought before him is a juvenile he has to refer such matter and person to the Board.

54. In terms of Sections 14 and 15, Boards have exclusive jurisdiction to hold enquiries into allegations about juveniles having committed any offence. Boards

have various options, to prescribe sanctions, including directing a juvenile to be sent to a special home for a period of three years. Section 15 (1), pertinently enables the Board to:-

“(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against the counseling to the parent or the guardian and the juvenile;

(b) direct the juvenile to participate in group counseling and similar activities;

(c) order the juvenile to perform community service;

(d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

(e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behavior and well-being of the juvenile for any period not exceeding three years;

(g) make an order directing the juvenile to be sent to a special home for a period of three years;

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.”

55. If a question as to whether anyone is a juvenile arises, (by virtue of Section 7A) before any Court, it can consider evidence, and return findings in that regard. By reason of Section 7A (2), if the Court holds that the person is a juvenile, it has to forward the matter to the Board for passing appropriate orders or sentence, as the case may be. Section 18 mandates that a juvenile cannot be tried jointly with an adult.

56. Section 20 is an extremely important provision, it prescribes that when a criminal case is pending before a Court in revision or appeal, the Court (wherever the case was pending on the date of coming into force of the Act) can proceed with the matter, but if it is satisfied that the juvenile has committed the offence, refer the matter to the Board for appropriate orders.

57. It has been held in a series of decisions that if the incident occurred when the accused was a juvenile, even if he took that plea after conviction, and in appeal, he would be entitled to the benefit of Section 20 of the Act of 2000 (*Jyoti Prakash Rai v. State of Bihar*, AIR 2008 SC 1696; *Pratap Singh v. State of Jharkhand*, AIR 2005 SC 2731; *Gurpreet Singh v. State of Punjab*, 2005 (12) SCC 615; *Jitender Ram v. State of Jharkhand*, 2006 (9) SCC 428; *Rajnit Singh v. State of Haryana* 2008 (9) SCC 453).

58. In this case, the facts would reveal that the accused juvenile suffered incarceration for over 8 years, i.e. nearly three times the maximum period prescribed under the Act, for sending a juvenile found to have committed an offence, to a special home, (which is 3 years). The report relied on by this Court – which has not been challenged by the State – indicates that he was about 15-16 years as on the date of occurrence. These facts reveal an extremely disturbing picture, pointing to whole sale violation of the procedure established by law, and illegal detention of Ramesh for 5 years. This failure was systemic, because neither the police, nor the prosecution, nor the counsel, or even the Court – all of whom had sufficient opportunity to observe the accused even thought it appropriate to consider, let alone explore the possibility of applying for determination of the age. There was a clear violation of his rights under Article 21 of the Constitution of India.

59. In the instant case an inquiry into juvenility of the Appellant Ramesh @ Bori was ordered to be conducted by order dated 06.08.2009 passed by this Court. A perusal of the order dated 04.08.2010 shows that the age of the Appellant was found to be less than 23 years on 23.11.2009. The Appellant was, therefore, held

to be not more than 18 years. In fact the Appellant was found to be more than 14 years but less than 15 years on the date of commission of the offence and was ordered to be released.

60. As per Section 7A sub-Section (2) of the Act of 2000 if a Court finds a person to be a juvenile on the date of commission of the offence, the juvenile has to be forwarded to the Board for passing an appropriate orders and sentence and the sentence, if any, passed by a Court shall be deemed to have no effect. Unfortunately, the Appellant has already spent over eight years in jail far in excess of the maximum period of three years that too could have been spent by him in a special home as per Section 15 (1)(g) of the Act of 2000. What do we do? Should we again send the Appellant to the Juvenile Justice Board to be dealt with in accordance with the provisions of Section 7-A sub-Section (2) of the Act of 2000 or should we end the proceedings here. We are of the opinion that it would be a great injustice to direct the Appellant to face an inquiry again before the Board.

61. There can be no doubt that when confronted with a fact situation, as the circumstances have unfolded, uniformly court decisions have quashed proceedings, and deemed it appropriate not to remit the matter to the Board, as it would subserve no public interest. In this case too, such an order is the only possible direction in the ends of justice. Yet, the accused would labour under two strong disabilities of not having been exonerated on due determination and having suffered an unlawful detention, for over 8 years. In this case, as a restitutionary measure, the Court is of the opinion that the accused Ramesh should be entitled to some compensation. Having regard to all these circumstances, this Court directs the Govt. of NCT of Delhi to pay ₹ 5,00,000/- to the Appellant as compensation within eight weeks. The Govt. of NCT of Delhi shall file an affidavit indicating compliance with these directions, within ten weeks.

62. Criminal Appeal No.165/2005 therefore succeeds in the above terms; all proceedings against the appellant Ramesh are hereby quashed; in the

circumstances, there shall be no further proceeding against him; he is also entitled to ₹ 5,00,000/- in terms of directions of this Court. The said appeal (Crl. Appeal No.165/2005) is allowed in these terms.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MARCH 31, 2011
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