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

\+ **CRIMINAL APPEAL NO. 372/2015**

Reserved on: 22.05.2015
% Date of Decision: 29.05.2015

ARUN KUMAR @ BIHARI ..... Appellant
Through: Mr.Avninder Singh, Ms.Sumi Anand and Mr.Siddhanth Srivastava, Advocates.

versus

STATE ..... Respondent
Through: Ms.Aasha Tiwari, APP.
Insp.Mukesh Antil, P.S.Anand Parbat.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J:

1. Arun Kumar @ Bihari challenges his conviction vide judgment dated 5.9.2014 passed by the Additional Sessions Judge (Special Judge), NDPS-West Delhi in Sessions Case No.48/2010 (reference FIR No.21/2010, P.S.Anand Parbat) under Section 302/34 and 201/34 of the Indian Penal Code ('IPC' for short) for committing the murder of one Bunty and throwing his dead body in the tank with the help of his associates. The appellant by order on sentence dated 28.10.2014 has been directed to suffer Rigorous Imprisonment for life, pay a fine of Rs.20,000/- and in default of payment of fine, undergo Simple Imprisonment for two months for the offence under Section 302/34 of the IPC. The appellant has been sentenced to Rigorous Imprisonment for

three years, a fine of Rs.10,000/- and in default of payment of fine, Simple Imprisonment for one month for the offence under Section 201/34 of the IPC; the sentences however, have been ordered to run concurrently.

2. There is no eye witness to the occurrence and the prosecution case hinges on certain circumstances namely the discovery of the dead body of Bunty in the dried up water tank of the Jal Board, arrest and disclosure of two of the associates of the appellant (both of whom were Juveniles in conflict with law, 'JCL' for short) on the basis of which the appellant was arrested, subsequent disclosure of the appellant, leading to the recovery of blood stained danda, handkerchief, blood stained twigs and blood stained stones from near and around the place of occurrence. The recoveries as per the prosecution case were effected by the appellant and the two associates (JCLs).

3. Kallu Ram (PW.15) had lodged a missing report on 29.3.2010 vide DD No.63B (Ex.PW.3/A) intimating to the police that his son Bunty (deceased) was missing since 25.3.2010. In the aforesaid report no suspicion was raised against anybody.

4. On 30.3.2010 Constable Satish Kumar (PW.2) was informed by some children who were playing cricket near the water tank that bad smell was emanating from the said water tank. On this information, Constable Satish Kumar (PW.2) went to the roof of the water tank and thereafter he went inside the tank through the stairs. He saw that a dead body was lying there. He gave this information to the police station, (DD

No.16A; Ex.PW.1/A). Immediately thereafter, other police officers namely Sub Inspector Padam Singh (PW.22), Constable Virender (PW.4), Constable Sandeep (PW.20) came to the spot. The dead body was decomposed and maggot eaten. The crime team and the photographer were called. Inside the tank, blood stained stones were found. A human tooth and some hair also were found near the dead body. The wall of the tank was found to be blood-smeared. The blood stains suggested that the dead body was dragged from some distance and was thrown in the tank.

5. Since Kallu Ram (PW.15) had lodged the missing report about his son Bunty on 29.3.2010 (DD No.63B Ex.PW.3/A), he was called to the place where the dead body was found. He identified the dead body to be that of his son on the basis of clothes, bandage, footwear, photograph in the wallet which was found in the pocket of the trouser of the deceased. The incriminating items including the purse and blood control were seized. Pursuant to the recovery of the dead body and identification by Kallu Ram (PW.15) as that of his son Bunty, FIR No.21/2010, Police Station Anand Parbat (Ex.PW.10/A) was registered. A site plan (Ex.PW.23/A) was prepared and the dead body was sent for post mortem.

6. Dr.Amit Sharma (PW.12) conducted the post mortem and opined that the death was due to cranio cerebral damage consequent upon multiple blunt force impacts to the head and face region by some hard and blunt object, which injuries were sufficient to cause death in the ordinary course of nature. PW.12 opined that injuries Nos.1 to 8 were

caused by a blunt object and injury Nos.9 and 10 were caused by sharp object, all of which were ante-mortem. The time of death was about six days prior to the post mortem. The fact that maggots were crawling over the body of the deceased is also a proof of the fact that death had taken place sometime back. Thus Bunty, the deceased, had died a homicidal death is proved and established beyond doubt from the incriminating evidence and material found in and around the water tank. The post mortem report is Ex.PW.12/A.

7. During the course of investigation it was learnt by the police that the deceased had teased one Sonia, daughter of one Satbir and sister of one of the co-accused persons named S (name withheld), juvenile in conflict with law. On the basis of such information said S and M (name withheld), another JCL were apprehended at about 11.30 A.M on 3.4.2010. The arrest memos (Ex.PW.19/A and Ex.PW.19/B) disclose that the arrest was made at 11.30 A.M on 3.4.2010. The aforesaid two juveniles in conflict with law made disclosure statements, confessing their guilt and the involvement of the appellant as well. The appellant was thereafter arrested at 1.55 P.M on the same day i.e. 3.4.2010 and thereupon made a disclosure statement (Ex.PW.9/B).

8. Shyam Sunder (PW.9) joined the investigation on 3.4.2010. He has deposed that on 3.4.2010 while he was crossing through Street No.8 of Nehru Nagar, he saw a huge crowd. He learnt from the members of the public that three persons were involved in the murder of Bunty. Shyam Sunder has stated that he accompanied the police officers, M, one of the

JCL, his mother and Roshan Lal (uncle of S, another JCL). The appellant was brought near the water tank by another police man. PW.9 testified that the two JCL and the appellant had pointed out towards blood stained pipe and dandas having blood stains which allegedly were used for beating the deceased. On such pointing out, the blood stains on the pipe was scratched and dandas were seized. Some blood stained twigs were also pointed out by the appellant and JCL. A handkerchief with blood was found lying near the water tank. PW.9 and the police party while on their way back from the place of occurrence via the Railway line, were shown blood stained stones, which were also seized in presence of PW.9.

9. PW.9 has signed the arrest memo and the personal search memo (Ex.PW.9/DB and PW.9/BC) on 3.4.2010. He has denied the suggestion that the disclosure statement of the appellant was not recorded in his presence or that he was falsely deposing at the instance of the Investigating Officer.

10. The testimony of PW.9, a public person joining the investigation in this case has to be read with care and caution. Noticeably the dead body was found on 30.3.2010 in a decomposed state by the police officers. Before the FIR was registered, crime team and photographer had reached the place of occurrence. Blood stained articles from near the dead body were recovered. This included the blood stained stones, which can be seen in the photographs taken on 30.3.2010. It does not stand to reason as to why blood stained dandas and handkerchief shown to the police party in presence of PW.9 by the accused persons were not spotted on

30.3.2010, when the dead body was first seen. The place from where the recovery is said to have been made, apart from the same having been fully inspected and searched on 30.3.2010, was open and accessible. Thus the recoveries of danda and handkerchief at the instance of the appellant does not appear to be trustworthy.

11. Relevant would it be in this context to state that on the basis of the disclosure made by the two JCL certain recoveries were made. Such recoveries pursuant to joint disclosures are admissible but *admissibility* and *credibility* of a piece of evidence being two different and distinct facets, recovery in cases of joint disclosure has lesser probative value. The Supreme Court in State (NCT of Delhi) vs. Navjot Sandhu, 2005(11) SCC 600 has observed:-

> ***145.*** *Before parting with the discussion on the subject of confessions under Section 27, we may briefly refer to the legal position as regards joint disclosures. This point assumes relevance in the context of such disclosures made by the first two accused viz. Afzal and Shaukat. The admissibility of information said to have been furnished by both of them leading to the discovery of the hideouts of the deceased terrorists and the recovery of a laptop computer, a mobile phone and cash of Rs 10 lakhs from the truck in which they were found at Srinagar is in issue. Learned Senior Counsel Mr Shanti Bhushan and Mr Sushil Kumar appearing for the accused contend, as was contended before the High Court, that the disclosure and pointing out*

attributed to both cannot fall within the ken of Section 27, whereas it is the contention of Mr Gopal Subramanium that there is no taboo against the admission of such information as incriminating evidence against both the accused informants. Some of the High Courts have taken the view that the wording "a person" excludes the applicability of the section to more than one person. But, that is too narrow a view to be taken. Joint disclosures, to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. "A person accused" need not necessarily be a single person, but it could be plurality of the accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over

the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the police officer), to depose which accused spoke what words and in what sequence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the standpoint of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, as pointed out by Mr Gopal Subramanium. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence. With these prefatory remarks, we have to refer to two decisions of this Court which are relied upon by the learned defence counsel.

In the instant case, the appellant was arrested though on the same day, but after the two JCL were arrested and made their disclosure. The discovery made pursuant to the confession of the appellant therefore loses its significance as disclosure cannot be even said to be a joint

disclosure with the two JCLs. There is a reasonable time gap between the arrest and disclosures of the two JCLs and the appellant. As per the prosecution version, the two JCLs, had disclosed their and the appellant's involvement.

12. In this context it would be apposite to refer to FSL report (Ex.PW.23/XI). The handkerchief, which is item no.17 in the list of exhibits, was found to be stained with human blood of AB group. Even if we assume that the deceased had the same blood group, it cannot be said with certainty that the handkerchief belonged to the appellant. The handkerchief could be of the deceased himself or of the two JCL. In the absence of any identification or special mark, it would be unsafe to link such recovery with the appellant's disclosure.

13. The prosecution sought to rely upon Dinesh (PW.13) who had seen the perpetrators at his tea/coffee shop in front of a mosque under the Zakhira flyover. Dinesh (PW.13) has stated that in the month of March, 2010 two boys came to his shop. One of them had purchased water along with the glasses and thereafter they went towards the Railway line. However, he could not identify the appellant in the Court and stated that the boy who had come to his shop was not present in the Court room. He did not implicate the appellant. Thus the attempt of the prosecution to show that the appellant was last seen with the other two JCL or the deceased has miserably failed.

14. Kallu Ram (PW.15), father of the deceased has deposed that his son Bunty (deceased) did not return to the house on 25.3.2010, after he

had gone out. After about 3-4 days of search, a report was lodged on 29.3.2010 vide DD No.63B (Ex.PW.3/A) at Police Station Anand Parbat. On 30.3.2010, PW.15 was called to the place where a dead body was found. The dead body was identified by him as that of his son Bunty. The identification was made through the jeans, sandals and one old bandage in the hand of the deceased. One shirt belonging to the deceased was found to be lying at some distance from the dead body. Kallu Ram (PW.15) has asserted that when he was told by the police that his son had committed suicide, he had objected and insisted that it was a case of murder. Dragging marks and blood stains on the stones were seen by him at the spot. In the wallet of his son, PW.15 recalled, there was a photograph of the deceased. Three-four twigs also were seized by the police in his presence. PW.15 expressed suspicion over nobody, but had told the police that Raju was a close friend of deceased. PW.15 has stated that Raju, when called by the police, disclosed that the deceased was taken by M, one of the JCLs. PW.15 claimed that he could identify M. Raju, the friend of the deceased, had expired a month before the deposition of PW.15 in the Court. The testimony of PW.15 therefore does not throw any light on the participation/involvement of the appellant in the crime.

15. Bimla Devi (PW.16), mother of the deceased, had identified the appellant but has not stated anything so as to ascribe that the appellant had participated in the occurrence or had played any role. Bimla Devi (PW.16) has deposed that her daughter Kajal told her on 3.4.2010 that

Raju (not examined) had informed her that the deceased was called by M, one of the JCL. She had learnt from a neighbour that a quarrel had taken place on 22.3.2010 between the appellant and others and her son. However, her son did not tell her about any such quarrel. Thus, her identification of the appellant is of no help to the prosecution in establishing and proving the case against him. A suggestion was given to PW.13 that she has taken the name of the appellant on the insistence of the police, which she denied.

16. We do not wish to list the cases wherein the law with respect to circumstantial evidence has been crystallized. It is no longer *res-nova* that in a case based on circumstantial evidence, the chain of circumstances should be so complete so as to unerringly point towards the guilt of the accused alone. There are many missing links in the present case.

17. We have no idea about the motive for the crime, though, motive may not be relevant in a case of murder. There is no evidence except for the confession of the JCLs that the deceased had teased the sister of S, one of the JCL. In the absence of any evidence that the appellant and the other two accused persons are closely associated with each other, we cannot presume that in order to assist S in avenging the act of teasing of his sister, the appellant had participated in the crime in question.

18. The appellant in his statement recorded under Section 313 Cr.P.C has categorically denied to have any truck or alliance with the two JCL.

He has stated that he never studied with them or had friendship with them.

19. While responding to the incriminating materials which were put to him, the appellant had stated that the two JCL have since been acquitted. This appears to be factually incorrect. The Trial Court has taken this wrong answer by the appellant as a false plea and has treated such false plea as a strong circumstance against the appellant and has held it to be a suffuse in the missing link in the chain of circumstances. We do not agree with such finding of the Trial Court. A false plea on post occurrence regarding verdict in a proceeding against the two JCL, would not reflect and show the appellant's participation in the crime. A person can take several defences or pleas in his favour. If any one of such statement is found to be factually incorrect, that fact has to be examined in light of the evidence on record and context or question in response to which the said answer was given. A statement under Section 313 is not on oath and any factually incorrect statement, in all situations, need not be read as an incriminating corroboration denouncing the accused. The falsity of a plea taken by the accused, in a situation when there are positive and cogent evidence against him, may be taken as an incriminating material against him. However, in the present case, apart from the belated discovery of a blood stained handkerchief and dandas pursuant to the disclosure first made by the JCLs, there is no other material to fix the guilt on the appellant. Under such circumstances this erroneous statement regarding the verdict in the proceeding against the JCL ought not to have been read

against him. No adverse inference could have been drawn by the Trial Court under Section 114(g) of the Indian Evidence Act. Any such adverse inference on that ground tantamounts to breaching the right to silence of an accused.

20. Thus on the basis of foregoing discussions, it is difficult for us to hold that the appellant had participated in killing the deceased.

21. In the result, we set aside the judgment and order of conviction and direct that the appellant, if not in custody in any other case, be released forthwith.

22. The appeal is allowed.

23. Trial Court records will be sent back forthwith.

(ASHUTOSH KUMAR)
Judge

(SANJIV KHANNA)
Judge

MAY 29, 2015
k