

*

IN THE HIGH COURT OF DELHI

%

Judgment reserved on: 03.08.2009

Judgment delivered on:06.08.2009

+

CRL. APPEAL 11/2001

MANTORI @ NOOR MOHD. ...Appellant
Through : Mr. K.B.Andley, Sr. Adv. with
Mr. M.Shamikh, Advocate

versus

STATE (GOVT. OF NCT OF DELHI) ...Respondent
Through : Mr.Pawan Sharma, Advocate

CRL. APPEAL 103/2001

BABU KHAN ...Appellant
Through : Mr. Riaz Mohd., Advocate

versus

STATE (GOVT. OF NCT OF DELHI) ...Respondent
Through : Mr.Pawan Sharma, Advocate

CRL. APPEAL 24/2001

LACHHO @ BIJLI ...Appellant
Through : Ms. Ritu Gauba, Advocate

versus

STATE (GOVT. OF NCT OF DELHI) ...Respondent
Through : Mr.Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

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

: PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 2.12.2000, appellants Babu Ram and Mantori have been convicted for the offence of murdering Rekha. All appellants have been convicted for the offence of conspiracy to murder Rekha. Vide order of sentence dated 5.12.2000, the appellants have been convicted to undergo sentence for life and to pay a fine in sum of Rs.500/- each.

2. The case of the prosecution, which as per the impugned judgment, stands established in the light of the evidence led, has been very finely summarized in para 43 of the impugned decision and we can do no better other than to reproduce the findings pertaining to the incriminating circumstances noted by the learned Trial Judge. The same are as under:-

“43. In my considered view, the prosecution has successfully brought home beyond pale of all doubts, the following facts:-

(a) the deceased Rekha, a eunuch was disciple of A-1 Lachho, another eunuch;

(b) the deceased was living in the area of Pahar Ganj with other eunuches, in particular PW5 Meena and PW6 Anita. She was living a life in style, would enjoy good clothes, sport a scooter fitted with stereo, thus indicating she had a very good income. She had adopted a child of about 3/3.5 years. The evidence indicates A-1 had cause of grudge against the deceased;

(c) on 1.10.89, A-1 Lachho brought four persons, including A-2 Mantori @ Noor Mohammad and A-3 Babu Khan to Dargah Nazaria Peer near Mehrauli and at her request Kale Baba Khan, the then Khitmadgar of the Dargah allowed the said four persons including A-2 to A-3 to stay as guests in the Dargah;

(d) on 3.10.89 A-1 Lachho came to the house of the deceased in the morning, took lunch with her and asked her (the deceased) to take her (A-1) to Qutub, Dargah Nazaria Peer, Chhatarpur Mandir, etc. on her scooter. At this request, the deceased took A-1 Lachho on her scooter towards Qutab, also taking along her adopted child;

(e) at about 3/3.30 p.m. A-1 Lachho came to Dargah Nazaria Peer with the adopted child of the deceased and talked in secrecy with A-2 and A-3 besides two others staying there as guests at her instance, whereupon, the said four persons went towards Qutab Dargah which was to take them on a route leading into the jungle.

(f) After about half an hour, at 4.00 p.m. or so on 3.10.89, A-1 came out of Dargah Nazaria Peer leaving a message with PW4 to the effect that if Rekha (the deceased) was to come there, she was to be told that A-1 Lachho had gone to Qutab Dargah. Instead of going towards the Qutab, A-1 Lachho was seen proceeding in opposite direction i.e., towards Katwaria Sarai;

(g) Just as A-1 Lachho had set out towards the Katwaria Sarai, the four persons mentioned above, which would include A-2 and A-3, were seen coming running in a nervous state and badly perspiring, and immediately on arrival of the said persons A-1 snatched the child from the arms of PW4 and ran with the said four persons towards Katwaria Sarai;

(h) A-1 Lachho returned the adopted child of the deceased Rekha at her residence to PW6 Anita at about 5/5.30 p.m. on 3.10.89 with the message that Rekha had stayed back for the night at Mehrauli;

(i) On 4.10.89 at about 8.45 a.m. PW2 Sukhbir during his patrolling in the jungle as Chowkidar

stumbled upon the scooter Ex.PX of the deceased and her dead body lying at some distance with a cut injury in the neck. After information was lodged with the police, during inspection of the scene of crime, besides the personal effects of the deceased, a dagger blood stained Ex.P11 and angocha Ex.P10A were also found lying in close vicinity of the scene of crime, with angocha being positively identified as in use of A-2 Mantori ;

(j) upon arrest on the basis of disclosure made during interrogation by A-2 Mantori and A-3 Babu Khan their respective clothes including shirt Ex.P12 and tehmad Ex.P13 of A-2, and shirt Ex.P14 and tehmad Ex.P15 of A-3 Babu Khan, were recovered from the bushes very close to the scene of crime on 7.10.89 and 18.10.89. All these clothes had blood stains which have been found by the CFSL to be of Group "A" (human origin, the same as blood Group of the deceased).

(k) the post mortem examination of the dead body of Rekha brought out that she died on account of shock as a result of sharp incised big wound present in the neck of the size of 20x10 cms and depth of 15 cms which had cut the internal carotid, other vessels, along with muscles and facia, which was possibly caused with dagger Ex. P11 and which injury had been sustained sometime between 1345 hours to 1745 hours on 3.10.89, which would be proximate to the time when the four guests staying at Dargah at the instance of A-1, including A-2 and A-3, had proceeded into the jungle after talking with her so as to return after half an hour in nervous state."

3. Noting the aforesaid incriminating circumstances and the evidence wherefrom the same has been held to be established, the learned Trial Judge has noted a few decisions pertaining to the principles of law applicable to circumstantial evidence and the law of conspiracy as also the last seen evidence theory. The conclusions have been drawn by the

learned Trial Judge in para 48 and 49 of the decision which read as under:-

“48. Applying the above said principles of law to the facts established by the prosecution in this case, it is found the guilt of the A-1 to A-3 has been brought home beyond all manner of doubts. The evidence indicates A-1 had cause of grudge against the deceased. A-1 had brought A-2 and A-3, along with two others, to Delhi and got them accommodated as guests in Dargah Nazaria Peer sometime in the evening of 1.10.89. A-1 went to the house of the deceased in the morning of 3.10.89 and sweet talked her into accompanying her on the pretext of visiting Qutab, Dargah Nazaria Peer, Chatarpur Mandir etc. on her scooter. On this journey, which proved to be fatal for the deceased, her adopted child of 3/3.5 years was also accompanying her. Sometime around 3/3.30 p.m. on 3.10.89 A-1 came to Dargah Nazaria Peer only with the adopted child of the deceased. This only gives rise to one possibility that she had somehow got separated from the deceased on some pretext or the other in order to arrange, as the circumstances would show, that the deceased to be fatally attacked in the jungles near the Dargah. When A-1 came to Dargah Nazaria Peer at aforesaid time, she was seen talking in secrecy with A-1 and A-3 and two others (absconding) who were staying as guests in the Dargah at her instance whereafter the said four persons went in the direction leading into the jungle where the murder actually took place. Just after half an hour or so of the four said persons having left, they were seen running out in perspiration and in nervous state when A-1 left the scene with them, also carrying along the adopted child of the deceased. These circumstances definitely indicate knowledge about and involvement in the death of Rekha, the eunuch, in the jungle. The adopted child of the deceased was returned by A-1 to PW6 Anita at the house of the deceased sometime around 5/5.30 p.m. with the message that Rekha had stayed back for overnight at Mehrauli. Earlier, A-1 had told PW4 that if Rekha was to come to Dargah, she was to be told that A-1 had gone to Qutab Dargah. Both these assertions by A-1 were false in that A-1 was seen proceeding in an opposite

direction indicating she never intended to go towards Qutab and there was no occasion for A-1 to have told PW6 that Rekha was staying overnight at Mehrauli, since she had already died in the jungles and could not have given that kind of indication if she was yet to meet A-1 at Dargah Nazaria Peer. The false statements given to PW4 and PW6 one after the other conjointly indicate guilty knowledge. The evidence has brought out that the shirts and tehmands of A-2 and A-3 respectively with blood stains were recovered at their instance from near the scene of crime. Besides this, angocha Ex.P10A of A-2 had been recovered from near the dead body. These circumstances along with the conduct of A-2 and A-3 in coming out of the jungle around the same time as the murder took place shows they had played an active role in the commission of the crime. Since they were all along moving and hobnobbing with A-1, under her instructions, it is sufficiently clear that they with A-1, and two said others, were party to a criminal conspiracy to commit the murder of Rekha, the eunuch.

49. The above facts and circumstances collectively indicate that it can reasonably be inferred that A-1 intended to cause the death of Rekha, the eunuch and had arranged A-2 and A-3 with two others to come at Dargah Nazaria Peer, and had also made Rekha the eunuch to take the fatful journey in the direction of Qutab on 3.10.89 so that she could be way-laid by her said 6 conspirators and done to death in the jungle. The conduct of co-conspirators in going into the jungle immediately after talking to A-1 in secrecy when she arrived at Dargah Nazaria Peer at about 3/3.30 p.m. just before the death took place; and then rushing out of the jungle in a nervous state badly perspiring, and fleeing away from the scene is relevant even as against A-1 by virtue of section 10 Evidence Act. On the basis of same principle, the conduct of A-1 in giving false messages to PW4 and PW6 as mentioned above, and her conduct in arranging the availability of the deceased in the area where the murder took place are relevant also as against A-2 and A-3, who were her co-conspirators. The circumstances proved are consistent only the hypothesis of the guilt of A-1 to A-3 and they are not explainable on any other

hypothesis including that of innocence of any of these three accused persons. The circumstances proved show a complete chain that in all human probability, the murder had been committed by A-2 and A-3 with two others (absconders), in furtherance of common object to achieve that end, pursuant to the criminal conspiracy in which each of them was a party. These are the only rational deductions possible, as against mere fantastic possibilities of freak inferences to the contrary, based on probative force of facts and circumstances (State of UP Vs Hari Mohan 2000 VII A8 (SC) 389 relied upon). The case is distinguishable on facts from Saju Vs. State of Kerala 2000 III AD(Cr.) SC 433."

4. At the hearing of the appeals, learned counsel for the appellants urged that Rekha being murdered in a forest area near Idgah Mehraulli on 3.10.1989 is not disputed by them. Learned counsel urged that what the appellants dispute is that they were responsible for the murder of Rekha. Thus, learned counsel submitted that such evidence which proves the commission of the crime in the forest area and the victim being Rekha, need not be looked into. Counsel agreed that only such evidence be considered which has been held to be inculpatory of the appellants.

5. Learned counsel urged that testimony of Sukhbir PW-2, Sayeed Munir PW-4, Meena PW-5 and Anita PW-6 besides that of the investigating officer namely Insp.Bheem Singh PW-17 and Insp.Satish Sharma PW-16 needs to be considered.

6. It all commenced when on 4.10.1989 Sukhbir PW-2 employed as a chowkidar by DDA reported for duty at 8:00 AM and proceeded to the forest area near Idgah Mehraulli. (It appears that the duty of PW-2 was to keep a watch for unauthorized encroachment in land belonging to DDA in Mehraulli, where, huge illegal encroachments used to take place and as of today have assumed alarming proportions). He saw an abandoned two-wheeler scooter and the dead body of a woman with pieces of cloth of a saree scattered around the body. He went to PS Mehraulli and reported the said fact which was entered in the daily diary vide DD No.3A Ex.PW-2/A.

7. Insp.Bheem Singh PW-17, posted as the SHO of the police station proceeded to the spot in the company of Sukhbir and took along with him Const.Mahender Singh PW-13 and Const.Kuldeep Singh PW-14. The three police officers reached the spot along with Sukhbir. Indeed, they found a dead body which was not of a woman but an eunuch. Insp.Bheem Singh immediately made an endorsement Ex.PW-17/A beneath the copy DD No.3A and sent Const.Kuldeep Singh PW-14 to the police station for registration of an FIR for the offence of murder as the neck of the person killed had been slit and it was apparent that the deceased had been murdered. The FIR was immediately registered. Crime team, a photographer and a dog squad was summoned. The crime team could detect

nothing worthy of lifting from the spot. The dog squad got no clues as the sniffer dogs simply sniffed around the dead body and a few meters here and there. HC Dharamvir Singh PW-3 a photographer took 11 photographs of the place of occurrence being Ex.PW-3/1 to Ex.PW-3/11.

8. Insp.Bheem Singh collected torn pieces of saree, collectively exhibited as Ex.P-1. A cup Ex.P-2. A pair of two chappals Ex.P-3 and Ex.P-4. Two empty bottles Ex.P-5 and Ex.P-6. A nose pin Ex.P-7. Pieces of broken bangles Ex.P-8. A hair pin Ex.P-9. A wrist watch Ex.P-10 and a gamcha Ex.P-10A from near the dead body and recorded the said fact in the seizure memo Ex.PW-2/B. He lifted blood stained soil and soil sample from the spot as recorded in the memo Ex.PW-2/C. A dagger Ex.P-11 was lifted a few meters away from the dead body and was seized vide seizure memo Ex.PW-2/F. Its sketch Ex.PW-2/E was drawn. A two-wheeler scooter lying nearby bearing registration No.DDM-7512 was seized as recorded in the seizure memo Ex.PW-2/D. The recovery memos were prepared by the investigating officer and were signed by Sukhbir PW-2.

9. News had spread in the area of a dead body recovered in the jungle. As usually happens in India, an inquisitive crowd proceeded to the jungle and in the crowd was

Sayeed Munir and one Kaley Baba Khan who immediately recognized the dead body being that of Rekha.

10. The dead body was seized and sent to the mortuary at AIIMS where Dr.R.K.Sharma conducted post-mortem on 5.10.1989. The post-mortem commenced at 11:45 AM and the post-mortem report Ex.PW-9/A was drawn up by Dr.R.K.Sharma after the post-mortem in which he opined that the time of death was about 42 to 46 hours prior to the post-mortem. He noted a sharp incised cut in the neck cutting through the blood vessels, internal carotid and the neck muscles. He also noted multiple contusions on the left and the right thigh as also the lumbar region. He opined that the cause of death was immediate and the result of injury No.1. He noted that the body was of an eunuch. Penis was absent. Small vagina and atrophic clitoris was seen. It was subsequently opined by Dr.R.K.Sharma that the injuries could possibly be inflicted with the dagger Ex.P-11.

11. The investigating officer recorded the statements of Sayeed Munir and Kale Baba as per which both of them stated that they were khidmatgars/sewadars at the dargah Nazaria Pir, Mehraulli, and that appellant Lachho was a visitor at the dargah. Deceased Rekha, a disciple of Lachho used to visit the dargah for offering prayers. On 1.10.1989 at around 8:30/9:00 PM in the night, Lachho came with four persons at the dargah.

Said persons had stayed at the dargah at the asking of Lachho who gave Rs.100/- to Kale Baba for their expenses. The said persons stayed at the dargah on 2.10.1989. Whereas Kale Baba further informed that he left the dargah in the afternoon on 3.10.1989 and learnt on 4.10.1989 about a dead body being found in the forest area, Sayeed Munir gave further information that on 3.10.1989 Lachho had come to the dargah with a small child in the late afternoon and had spoken with the said three persons in a hushed manner by taking them to a corner. After the talk, the four persons went towards Kutub Dargah and half an hour thereafter, Lachho and the small child left. Before leaving, Lachho told Sayeed Munir to tell Rekha that she i.e. Lachho had gone to Kutub Dargah. He accompanied Lachho to some distance and since Lachho was limping he carried the child in his arms. Lachho did not proceed in the direction towards Kutub Dargah but started walking towards Katwaria Sarai. They had hardly moved a little distance, when the four persons who had stayed at the Dargah and had left a few hours earlier came running in a nervous state. The moment Lachho saw them, she snatched the child from his arms and all of them ran towards Katwaria Sarai. He was perplexed by their conduct but left it at that. Next day he heard about a dead body being found and curiosity took him to the jungle. He saw the dead body and

realized that Rekha had been murdered. Both, Kale Khan and Sayeed Munir stated that if the four persons who had stayed at the Dargah at the request of appellant Lachho were brought before them they could recognize them. The investigating officer contacted Meena PW-5 and Anita PW-6 and recorded their statements as per which Meena informed that she was the disciple of Rekha who was, in the past, a disciple of Lachho. Rekha was a popular eunuch and had a lavish life style. Lachho was envious of Rekha. In the morning of 3.10.1989 Lachho took Rekha and a child treated as a son by Rekha to an Idgah in Mehraulli. In the evening at around 5/5:30 PM Lachho left the child back telling Meena and Anita that Rekha would come the next day as she had decided to spend the night at the Dargah in Mehraulli.

12. Obviously, Lachho was the person whose identity was made known to the investigating officer and as per the information given by Kale Khan and Sayeed Munir she was a suspect. Only she could give the identity of the others named as the ones who had stayed at her request in the Dargah where Sayeed Munir and Kale Khan were working as khidmatgars. Lachho was apprehended and so were appellants Babu Khan and Mantori. The involvement, by name of co-accused Raju @ Yakub (proclaimed offender) was made

known to the police as per the disclosure statement of Lachho. The fourth person could not be identified.

13. As per the prosecution, appellant Mantori and Babu Khan confessed to the crime and got recovered their shirt and tehmad; being Ex.P-12 and Ex.P-13 belonging to Mantori and Ex.P-14 and Ex.P-15 belonging to Babu Khan, from near the bushes close to the place of the incident after the two were arrested. The shirt and the tehmad Ex.P-12 and Ex.P-13 respectively of Mantori were recovered on 7.10.1989. The shirt and the tehmad Ex.P-14 and Ex.P-15 of Babu Khan were recovered on 18.10.1989. The report Ex.PX-A of the serologist is that human blood of group 'AB' i.e. the blood group of the deceased was detected on the said two shirts and the tehmad.

14. As per the learned Trial Judge, the recovery of the two shirts and the two tehmad is pursuant to the disclosure statement of Mantori and Babu Khan followed by the two leading the police to the spot wherefrom the same were recovered and the fact that the shirts and the tehmad were stained with human blood of the same group as of the deceased was a piece of incriminating evidence against appellant Mantori and appellant Babu Khan.

15. In our opinion the recovery of the shirt and the tehmad at the instance of appellant Mantori as also the

recovery of another shirt and a tehmad at the instance of appellant Babu Khan inspires no confidence and unfortunately, the learned Trial Judge has glossed over the circumstances and the manner under which the same have been recovered.

16. What has been overlooked by the learned Trial Judge is that the two recovery memos i.e. the recovery memo Ex.PW-16/A dated 7.10.1989 pertaining to the recovery of the shirt and the tehmad at the instance of appellant Mantori shows that the shirt and the tehmad were recovered from within the bushes in the jungle at a distance of about 500 meters from the place where the dead body of Rekha was recovered on 3.10.1989. Similarly, the recovery memo Ex.PW-8/C dated 18.10.1989 pertaining to the recovery of the shirt and the tehmad at the instance of appellant Babu Khan shows that the shirt and the tehmad were recovered from within the bushes in the jungle at a distance of about 200 yards from the place where the dead body of Rekha was recovered on 3.10.1989. The learned Trial Judge has glossed over the admission made by Insp.Bheem Singh PW-17, who during cross examination, admitted that a dog squad was brought at the spot on 4.10.1989 and that the sniffer dog could pick up no clues. We agree with the contention urged by learned counsel for the appellants that under the circumstances i.e. the recoveries being from a place accessible to the public and the

sniffer dogs being unable to pick up any leads on 4.10.1989, the recoveries do not inspire any confidence. Surely, the sniffer dogs would have detected the presence of blood stained clothes lying in the vicinity of 200 yards to 500 meters from where the dead body of Rekha was found, if they were there. Further, the site plan Ex.PW-17/B shows that the place where the dead body of the deceased was found is adjoining two kachha rastas which lead to the Dargah in Mehraulli i.e. is a place accessible to the public at large. Recoveries of common objects from a place accessible to the public at large have always been treated with a pinch of salt by Courts.

17. That takes us to the crux of the matter. The testimony of the persons whose statements were recorded by the investigating officer during investigation.

18. We find that in the list of witnesses filed along with the charge sheet, the name of Kale Baba has been entered at serial No.6. Along with the charge sheet his statement under Section 161 Cr.P.C. has been filed. But, Kale Baba has not been examined as a witness. A reason is forthcoming. It is in the testimony of Sayeed Munir PW-4, that Kale Baba left the Dargah.

19. This takes care of the submission made by Ms.Ritu Gauba learned counsel for appellant Lachho that the prosecution has withheld a vital witness for reasons best

known to the prosecution and therefore an adverse inference should be drawn against the prosecution and benefit should be given to her client. No doubt, where a crucial witness is withheld by the prosecution, and evidence led is shaky, benefit has to be given to the accused as held in the decisions reported as AIR 1981 SC 911 Dudh Nath Pandey Vs. State of U.P. and 2000 SCC (Cri.) 703 Rangbahadur Singh Vs. State of U.P. But, if a witness is not traceable and the prosecution has not deliberately withheld the production of a witness, no such adverse inference can be drawn.

20. Since, the prosecution has not deliberately withheld Kale Baba as its witness, we hold that nothing adverse can be drawn against the prosecution on said point.

21. Sayeed Munir PW-4 deposed as under:-

“I had come to Dargah, Nazaria Peer, Mehrauli, three four months before the incident in question. One Kaley Babe Khan was a Sevdar in the same Dargah. Accused Lachho present in the court and deceased Rekha used to come to that Dargah in my presence. They used to meet me and Kaley Baba Khan during their visits. On 1.10.1989, at about 5.30 PM, all the accused persons present in the court, came to the Dargah. Accused-Lachho told Kaley Babe Khan that the other accused persons present in the court were her guests and that they would stay in the Dargah for some days. Accused Lachho gave Rs.100/- to Kaley Babe Khan for their expenses. Accused-Lachho went away, while the three accused persons stayed behind. On 2.10.1989, the three accused persons, namely, Raju @Yakub, Mantoori and Babu Khan were present in the Dargah. On 3.10.1989, accused Lachho came to the Dargah with a small child at about 3/3.30 PM. She talked to the other three

accused persons for about half an hour by taking them to one corner. There was another person, who had stayed along with the three accused persons in the Dargah. I do not know his name but I can identify in case he is brought before me. While Lachho came inside the Dargah and sat with me, the remaining four persons went away towards the side of Qutab Dargah. After about half an hour, she left the Dargah. Before leaving, she told me to convey to deceased-Rekha that she had gone to Qutub Dargah. I accompanied Lachho to some distance. Since accused-Lachho was limping. I carried the child. Accused-Lachho did not go towards the side of Qutub Dargah but started going towards Katwaria Sarai. She had hardly left, when all other accused persons came running in a nervous state, badly perspiring. The moment, accused Lachoo saw those persons, she snatched the child from me and all of them started running towards Katwaria Sarai. Thereafter, I returned to the Dargah. On 4.10.1989, I came to know from Kaley Babe Khan, that a murder had taken place in a jungle in between our Dargah and Shahi Idgah, Mehrauli. Myself and Kaley Babe Khan went to the spot. At the spot, we noticed a cup, which belonged to our Dargah and a piece of cloth, i.e. Angocha which I had seen around the neck of Mantoori about two days. I also noticed some empty bottles of liquor and torn pieces of sarees. I can identify the cup and that Angocha.

(At this state, a sealed parcel is opened and cup is taken out). Ex.P-2 is the same cup.

(At this stage, another sealed parcel is opened and angocha is taken out). Ex.P10A is the same angocha, which was recovered from the spot, and I identify the same vide memo Ex.PW-4/A, which bears my signatures at point 'A'."

22. Meena PW-5 deposed as under:-

"I knew Rekha, the deceased, for the last about 10 to 12 years from the date of the incident, as she was my Guru. Accused Lachoo present in Court was the Guru of deceased-Rekha. I know accused-Lachoo for the last about 10 to 12 years. Deceased-Rekha and accused-Lachoo used to operate in the same area for

the purposes of seeking 'Inaam' on the birth of a son or daughter. Deceased Rekha was born as eunuch and so is accused-Lachhoo. I am also eunuch by birth. Anita is my disciple. About 5-6 years before the death of Rekha, we all used to live together, i.e. myself, Anita and Rekha. Deceased-Rekha was very popular in the area and had established lot of goodwill. As such, people used to like her and used to give good 'Inaam'/Bakshish to her. Accused-Lachhoo was residing separately. Deceased-Rekha used to live well and in-style. She used to travel in a two-wheeler scooter, fitted with stereo, which was owned by her. She was fond of music, good clothes etc. Her life style evoked jealousy in accused-Lachhoo. About three years ago, in the days of Navratras, on the third instant, accused-Lachhoo came to the place where we were living, at about 9 AM. She asked deceased-Rekha to take her to Qutub, Dargah Peer, Chattarpur Mandir etc., on her scooter. Accused Lachhoo also had lunch with us. Thereafter, deceased-Rekha along with a small child whom she had adopted, took accused-Lachhoo towards Qutub side on her two wheeler. At about 4 PM I also went out of my house to buy vegetables etc. When I returned home, I saw that the small child whom Rekha had taken along with her, was back home. I asked Anita whether Rekha had returned home or not, she told me that Rekha had not returned but the child was left at home by accused-Lachhoo. She also told me that Lachhoo informed her that Rekha was to stay in Mehrauli for the night and would return the next day. Next day, a eunuch came to our house and told us that the dead body of Rekha was found lying in a jungle, near Dargah, Nazaria Peer, Mehrauli. I went to the spot along with that eunuch where I identified the dead body of Rekha. The police carried out the inquest proceedings in my presence. I put my thumb impression at point A and B on the inquest proceedings. Ex.PW-5/A is the inquest proceedings. Thereafter I returned home.

On 6th instant, the police came to our house at about 2:30 PM. The police made inquiries from us about accused Lachhoo. On our telling that she was known to us, they took me to Shahganj Chowk, Masjid Wali Gali, where accused-Lachhoo lived. On reaching

there, we came to know that she had left the house with an old man for Ajmeri Gate. We looked for her in Ajmeri Gate, but on not finding her there, we came towards Darya Ganj and from there to ISBT. At ISBT, near a three wheeler scooter stand, I was able to spot accused-Lachhoo along with one old man and another person. On my pointing out, the police apprehended all the three persons. Accused-Lachhoo tried to draw public attention by clapping in eunuch style, but the crowd was dispersed by the police. Accused-Babu Khan and accused-Mantoori present in the Court were the persons, who were found with accused Lachoo and were apprehended by the police. All the three were brought to the Police Station Mehrauli where, personal search of Mantoori and Lachhoo was taken, vide memo, Ex.PW-5/B and Ex.PW-5/. Both the memos Ex.PW-5/B and C bear my thumb impression at point A. Another eunuch Daya was already in the police station before the accused persons were brought there. On interrogation, accused Lachhoo made a disclosure statement Ex.PW-1/A, which also bears my thumb impressions at point A. In her disclosure statement, accused-Lachhoo stated that she had engaged accused-Raju @ Yakub present in the Court, for Rs.10,000/- to commit murder of Rekha. (Accused-Raju @Yakub has been identified by the witness for the first time in the Court). The dead body of the deceased was handed over to me and her father Wachan Singh, vide memo Ex.PW-5/D. It bears my thumb impressions at point A."

23. Anita PW-6 deposed as under:-

"For the last about 5 -6 years, I am living at the abovementioned address with Meena and deceased-Rekha. I know accused-Lachhoo, present in the Court as she was Guru of Rekha. We used to operate in the area of Pahar Ganj for getting Bakshish etc. on the birth of a son or a daughter. About three years ago on 3rd October, deceased-Rekha had left the house along with her adopted son and accused-Lachhoo on her two wheeler scooter, towards Mehrauli side, as was asked by accused-Lachhoo. They left the house at about 12 Noon or 1 PM after taking lunch. Meena had also left the house at about 4 PM and I was, therefore, alone in the house. At about 5/5:30 PM, accused Lachoo came

and left the child in the house. I inquired from her about Rekha whom I used to address as Mummy. Accused-Lachhoo told me that she would stay in Mehrauli for the night and would return the next day. On the next morning, eunuch named-Daya came and informed us that Rekha had been murdered and her dead body was found in a jungle, near Darga Peer, Mehrauli. As such, Meena went with Daya to the place where the dead body was lying.”

24. It is apparent that the testimony of Anita and Meena establishes that appellant Lachho took along with her deceased Rekha and her adopted child in the morning of 3.10.1989. She came back in the evening at around 5/5:30 and returned the adopted child of Rekha and told Anita and Meena that Rekha would return the next day as she had decided to stay overnight at the Dargah in Mehraulli. The post-mortem report Ex.PW-9/A of the deceased establishes that the deceased died somewhere between 12:00 noon to 4:00 PM. Thus, it is apparent that Lachho had something up her sleeve. Rekha had never desired to stay back at the Dargah in Mehraulli and Lachho had clearly told a lie to Anita and Meena. Her conduct is suspicious. Evidence pertaining to her suspicious conduct is admissible and relevant under Section 8 of the Evidence Act.

25. The testimony of Sayeed Munir PW-4 establishes, as held by the learned Trial Judge, that Lachho had spoken suspiciously and with secrecy with appellants Mantori and Babu Khan on 3.10.1989 and by this time the adopted son of

Rekha was in the company of Lachho. The time was around 3/3:30 PM. Lachho stayed back after the talk and appellants Mantori and Babu Khan along with two other person left towards Qutub Dargah i.e. in the direction where Rekha's dead body was found. After about half an hour i.e. around 4:00 PM Lachho left the Mehraulli Dargah informing Sayeed Munir to tell Rekha that she and her son were going to Qutub Dargah. But, Lachho proceeded in the opposite direction towards Katwaria Sarai. Since she was limping and had a child in her lap, to help Lachho, Sayeed Munir took the child in his lap and accompanied her. A short distance was covered when Mantori, Babu Khan and the other two persons came running. They were sweating and were perplexed. Certainly, the conduct of the appellants is suspicious as they were seen running from a direction where Rekha had been murdered and were perplexed. The time corresponds to the time of Rekha being killed as evidenced by the opinion of the doctor who conducted the post-mortem of the deceased. Their further conduct as also the conduct of Lachho of snatching Rekha's son from the arms of Sayeed Munir and running away is also indicative of their guilty mind.

26. Why did Mantori and Babu Khan get perplexed? It appears on seeing Sayeed Munir with Lachho. The timings of the event are important. Lachho spoke to Mantori and Babu

Khan and two other persons at around 3/3:30 PM. The talk was secretive. Lachho stayed back at Mehraulli Dargah. Mantori, Babu Khan and two other persons left. After about half an hour, Lachho and Rekha's son left and around same time Mantoi, Babu Khan and the other two persons came running back. On seeing Sayeed Munir, all five namely Lachho, Mantori, Babu Khan and two other persons ran away.

27. The motive of Lachho to kill Rekha has emerged through the testimony of PW-5 and PW-6 and has rightly been held to be established by the learned Trial Judge.

28. There is another incriminating evidence against appellant Mantori, which unfortunately has apparently been somewhat diluted due to the learned Trial Judge not being vigilant. The same pertains to the testimony of Sayeed Munir qua the Angocha Ex.PW-10/A recovered from the spot where dead body of Rekha was discovered on 4.10.1989. As per Sayeed Munir the said Angocha Ex.P-10 was seen by him around the neck of Mantori on 2.10.1989. We note that in his statement under Section 161 Cr.P.C., Sayeed Munir has so informed the investigating officer. We further note that pertaining to said Angocha and his deposition in Court by way of examination-in-chief, Sayeed Munir was given a suggestion that he did not tell said fact to the police when his statement under Section 161 Cr.P.C. was recorded. He responded that he

did not remember whether he had said so. Surprisingly enough, Sayeed Munir was confronted with his statement Ex.PW-4/DA recorded on 4.10.1989 under Section 161 Cr.P.C., where said fact has been mentioned. We are extremely surprised at the stupidity of said part of the cross examination.

We need to note the same, which is as under:-

“I do not remember if I had stated before the police that the Angocha recovered at the spot was seen by me around the neck of accused Mantori two days prior to the incident. (Confronted with statement Ex.PW-4/DA where it is not recorded that he had not seen the Angocha around the neck of accused Mantori two days prior to the incident).”

29. We note that in his statement Ex.PW-4/DA, Sayeed Munir has clearly stated that the Angocha Ex.Pw-10/A was seen by him around the neck of Mantori two days prior. The statement has been recorded on 4.10.1989. Two days prior would be 2.10.1989.

30. How has the learned Trial Judge diluted said very incriminating evidence which proves Mantori's presence near the deceased? By not putting said incriminating circumstance to Mantori. Unfortunately, whereas the evidence pertaining to all articles seized from the place of occurrence i.e. Ex.P-1 to Ex.P-10 and Ex.P-11 have been put to Mantori and the other accused, the incriminating evidence of the Angocha Ex.P-10A being recovered from near the dead body of Rekha has not been put to her.

31. Ignoring said evidence, in view of the testimony of PW-4, there is sufficient evidence wherefrom the involvement of Mantori in the crime stands established and thus the dilution in the evidence of Ex.P-10A being a circumstance against Mantori makes no difference.

32. But, we would like to note a decision of not too distance a past of the Supreme Court on the issue as to what should be the approach at a criminal trial where an incriminating circumstance is not put to an accused. The decision is reported as 1976 (4) SCC 355 Ishwar Singh Vs. State of U.P. In para 4 it was noted and observed as under:-

“4. It appears that though Ishwar Singh was convicted under Section 302 simpliciter, the charge on this count framed against Ishwar Singh and Harpal Singh was for an offence punishable under Section 302 read with Section 149. The relevant charge reads:

Fourthly: That you, along with the aforesaid other accused, the same day, at the same time and place, were members of an unlawful assembly, in prosecution of the common object of which, some of the members did commit murder by intentionally causing the death of Chauhal Singh and you are thereby, under Section 149, I.P.C, guilty of causing the said offence punishable under Section 302 of the Indian Penal Code and within the cognizance of the Court of Session.

In his examination under Section 342 of the Criminal Procedure Code also Ishwar Singh was asked no question to enable him to answer the allegation that he struck Chauhal Singh on the chest with a ballam. The question asked was:

Q. 4. The prosecution evidence is that on the aforesaid day, time and place, in furtherance of the common object of the aforesaid unlawful assembly, you along with the other accused persons committed the murder of Chauhal Singh and caused injuries to Mahabir Singh, Ghansham, Satyapal, Jaipal, Pritam and Dharam Pal Have you anything to say about this?

To this the answer was "It is wrong".

Was this an illegality vitiating the trial or was it a curable irregularity having regard to the facts and circumstances of the case? The F.I.R. mentions that Ishwar Singh "gave a thrust with the ballam" to Chauhal Singh which killed him. The eyewitnesses repeat this story. Also, no grievance appears to have been made in the High Court that Ishwar Singh was prejudiced in his defence by being convicted of an offence with which he was not charged. The point was raised for the first time here before us. Considering all the relevant circumstances, we do not think it could be said that the accused was prejudiced in his trial."

33. We note that in view of the statement made by Sayeed Munir PW-4 in his examination in chief that the Angocha PW-10/A recovered from the spot was seen by him around the neck of Mantori two days prior to 4.10.1989, Sayeed Munir was cross examined by counsel for Mantori with reference to his said statement in examination in chief. The cross examination is as noted in para 28 above. Thus, full opportunity was availed by Mantori to cross examine Sayeed Munir on the Angocha Ex.PW-10/A. From a perusal of the impugned decision it is apparent that no grievance appears to have been made before the learned Trial Judge of Mantori being prejudiced in her defence.

34. The view taken by the learned Trial Judge of there being a conspiracy at the behest of Lachho who was the beneficiary of the crime i.e. it was her intention to kill and get rid of Rekha and pursuant thereto the appellants and their companions murdering Rekha is correct in light of the evidence led.

35. We find no merits in the appeals.

36. The appellants are on bail. Their bail bonds and surety bonds are cancelled. The appellants shall surrender and suffer the remaining sentence.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

August 06, 2009
mm