

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

% *Judgment Reserved on: 8th September, 2009*
Judgment Delivered on: 11th September, 2009

+ **CRL.A.562/2001**

BRIJ MOHAN @ BIRJU Appellant
Through: Mr.Mohit Mathur, Advocate.

Versus

STATE Respondent
Through: Ms. Richa Kapoor, APP.

AND

+ **CRL.A.798/2000**

KANWAR PAL Appellant
Through: Mr.Mohit Mathur, Advocate.

Versus

STATE Respondent
Through: Ms. Richa Kapoor, APP.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. On 7.3.1997 DD No.95B Ex.PW-4/A was recorded that at A Block, New Seelampur near the Government Boys Middle School

an unclaimed dead body was found lying. This DD was received in the local police station Seelampur at 6.25 AM and was handed over to SI Ram Avtar PW-22; armed with this information PW-22 along with Const.Satish Kumar PW-20 reached the spot. The dead body had blood on its forehead and on its left side; broken pieces of a half bottle of whisky and one half brick were also found lying near the body; dead body was identified by Ram Swaroop PW-2, uncle of the deceased vide memo Ex.PW-2/D and Ex.PW-2/E as that of one Amar Singh resident of A Block, New Seelampur. PW-22 made the endorsement Ex.PW-22/A on Ex.PW-4/A and through PW-20 it was sent to the local police station for the registration of the FIR. This was at 10.00 AM on 7.3.1997. FIR was registered under Section 302 of the IPC.

2. Const.Ved Prakash PW-5, the photographer was summoned who took eight photographs of the scene of crime Ex.PW-5/9 to Ex.PW-5/16. From the spot earth control, the blood stained brick, broken pieces of the whisky bottle as also some hairs lying near the dead body were seized and sealed. Statement of witnesses Mahinder PW-8, Mintoo PW-9 and Rajinder PW-6 had revealed that the deceased Amar Singh had been last seen in the company of Kanwar Pal and Brij Mohan. The police party made a search for the aforesaid persons but they were not traceable.

3. On 8.3.1997, post-mortem on the dead body was conducted by Dr.Anil Kohli PW-15 who noted eleven ante-mortem injuries. The cause of death was opined as ante-mortem head injuries produced as a result of blunt force impact. The viscera had been preserved for analysis. The time since death was reported to be one and a half days i.e. relating back to about 10.00 PM on the intervening night of 6.3.1997–7.3.1997. Vide report dated 11.12.1997 of the CFSL Ex.PW-27/A, the viscera of the deceased had been examined by the Scientific Officer, Toxicology Division who noted ethyl alcohol in its contents. This has been duly testified on oath by Mr.Rajpal Singh PW-27, the Assistant Chemical Examiner.

4. On the same day i.e. on 8.3.1997 secret information was received that the accused persons would be coming towards the jhuggis at Calcatiya gate. At the pointing out of the secret informer the accused Kanwar Pal and Brij Mohan were apprehended and interrogated. Personal search of accused Kanwar Pal was conducted vide memo Ex.PW8/H; he made his disclosure statement Ex.PW-8/E; pursuant thereto accused Kanwar Pal got one green coloured polythene bag containing a pant and a shirt recovered from under the dari on which the accused persons were found sitting; the pant was of Badami

colour and printed shirt was of black and yellow colour having blood stains on its left shoulder. The said articles were seized vide memo Ex.PW-8/A. The personal search memo of co-accused Brij Mohan is Ex.PW-8/G. He made a disclosure statement Ex.PW-8/F; pursuant thereto accused Brij Mohan also got recovered a polythene bag of yellow colour containing a black coloured pant and a green coloured shirt which were also lying under the dari where the accused persons had been found sitting. These articles were taken into possession vide memo Ex.PW-8/B. These recoveries had been effected in the presence of Smt.Sukho PW-10. Site plan of the place of recovery Ex.PW-22/F was prepared. The place of occurrence i.e. A Block, New Seelampur was pointed out by the accused by respective memos; pointing out memo by accused Kanwar Pal is Ex.PW-8/C and the pointing out memo by accused Brij Mohan is Ex.PW-8/D.

5. This was admittedly a case of circumstantial evidence. The Trial Court had convicted the accused primarily on the evidence of the accused and the deceased having been last seen together on the intervening night of 6.3.1997-7.3.1997 which had been spelt out in the versions of Rajinder PW-6, Mahinder PW-8 and Mintoo PW-9. Version of Raju PW-1 had been rejected on this score. The subsequent recovery of their blood stained clothes by

the accused persons was the additional incriminating circumstance which had been taken into account to sustain the conviction of the accused.

6. On behalf of the accused it had been urged that the witnesses to the theory of last seen have not supported the version of the prosecution and all of them ie. PW-1, PW-6, PW-8 and PW-9 have resiled from their earlier statements which they had given to the Investigating Officer. No reliance can thus be placed on this circumstance. It is further submitted that the recovery by the accused persons of the alleged blood stained clothes worn by them at the time of the offence is demolished in view of the testimony of PW-10 from whose jhuggi this recovery had been effected; she has not supported the version of the prosecution on this count and the testimony of the police witnesses by themselves unsupported by the version of the public witnesses demolishes this recovery. Benefit of doubt has accrued to the accused persons who are entitled to an acquittal.

7. We have perused the record and noted the submissions.

8. Rajinder PW-6 has deposed that in the year 1997, he used to work with Amar Singh; on 6.3.1997 after finishing his work he along with Amar Singh left for the house at about 9.30 PM; both of them i.e. PW-6 and the deceased Amar Singh had had a little

liquor; they reached the toilet of A Block, Seelampur at about 10.15 PM; they met the accused persons who told them that since they i.e. PW-6 and the deceased had had a drink they should also be given some drink; on this, Amar Singh retorted that he will give them a drink but charge them money for the same; PW-6 thereafter left leaving all three i.e. both the accused persons and the deceased Amar Singh together. On the next day, he found a crowd collected in the school opposite his house and on reaching there he saw Amar Singh's body lying on the chowk. In his cross-examination he has stated that Mahinder is his real brother; at about 7.30 AM Mahinder and Mintoo had also reached there; 4-5 police officials had also come there. He has further stated that the dead body of Amar Singh was lying 15 to 20 steps away from the main gate of the school in the chowk. He reiterated that when he left for his house he had left Amar Singh in the company of both the accused persons and at that time they were having talks of having a drinking session together. Amar Singh was having a quarter bottle of liquor with him. He has further stated that on 6.3.1997 he had been confined in the police station for two days and had been given beatings. He, however, denied the suggestion that he is deposing falsely at the behest of the police.

9. Mahinder Singh PW-8 has deposed that on the fateful day at about 8.30 PM when he was returning back from his house he saw Kanwar Pal, Amar Singh and Brij standing near the corner of the chowk; he did not see anybody fighting. He thereafter returned back to his house. He admitted his signatures on the seizure memos Ex.PW-8/A and Ex.PW-8/B both of which are dated 8.3.1997 i.e. the seizures relating to the recovery of the blood stained clothes effected by both the accused persons i.e. accused Kanwar Pal and accused Brij Mohan. This witness, however, did not support the entire version of the prosecution and he was permitted to be cross-examined by the learned public prosecutor but nothing material has emerged therein. In his cross-examination by the learned defence counsel he has stated that he cannot remember as to whether in his first version recorded under Section 161 of the Cr.P.C. he had told the Investigating Officer that he had seen Kanwar Pal, Amar Singh and Birju near the corner of the shop.

10. Mintoo PW-9 has deposed on the same lines as PW-8 and has corroborated him to the extent that on the fateful day at about 8.30 PM when he was returning back from his work he saw Birju, Kanwar Pal and Amar Singh near the toilet of A Block, Seelampur; thereafter he went back to his house; he did not

notice any quarrel between the said persons. PW-9 has also admitted his signatures on seizure memo Ex.PW-8/A and Ex.PW-8/B. This witness also did not support the entire version of the prosecution and he was permitted to be cross-examined by the learned public prosecutor wherein he has stated that when he was going home he had seen the accused persons and Amar Singh near the door of Government Boys Middle School. In his cross-examination by the learned defence counsel he has stated that he cannot remember where he had signed the aforesaid memos.

11. From the aforestated versions it is borne out that on 6.3.1997 Amar Singh had been last seen together with Kanwar Pal and Brij Mohan near the toilet of A Block, Seelampur which was close to the gate of the Government Boys Middle School. This had been witnessed by PW-6, PW-8 and PW-9 between 8.30 PM to 9.30 PM. On this score all the three witnesses i.e. Rajinder, Mahinder and Mintoo are corroborative of one another; Amar Singh had had a drink and their conversation was steered towards a drinking session between all three of them. Amar Singh was also holding a quarter bottle of liquor with him. The post-mortem report Ex.PW-15/A has evidenced that death had taken place on the intervening night of 6.3.1997–7.3.1997 at

about 10.00 PM. The CFSL after examination of the viscera vide its report Ex.PW-27/A had opined that ethyl alcohol is contained in its contents.

12. This scientific evidence advances the versions of the aforementioned witnesses that the deceased Amar Singh had had alcohol and further talks of having a drinking session were on between the deceased and the accused persons. The medical evidence which is the post-mortem report has evidenced that the deceased had died at about 10.00 PM on the intervening night of 6.3.1997–7.3.1997.

13. What is the theory of last seen? It is the circumstance of the fact of the accused and the deceased having been last seen in the company of one another pertaining to the place, the time and the distance between the place where the deceased was last seen alive and the dead body was found and the time-gap of the two events which all need to be noted.

14. The site plan Ex.PW-26/A shows that the dead body had been found recovered at point A with blood and broken pieces of glass lying around it; this is an open ground/chowk in front of the Government Boys Middle School, New Seelampur. This document corroborates the ocular versions of PW-6, PW-8 and PW-9 that the accused persons and the deceased were last seen

together near the corner of the chowk in front of the Government Boys Middle school at New Seelampur. This was also the place where the dead body was found recovered on the following morning at 6.25 AM which had been recorded in Ex.PW-4/A.

15. In Bodhraj @ Bodha & Ors. Vs. State of Jammu & Kashmir (2002) 8 SCC 45, the last seen theory has been explicitly explained. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

16. In State of W.B. vs. Mir Mohammad Omar & Ors. 2000 (8) SCC 382, the Supreme Court while debating on the evidence on of the theory of last seen had held that the presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved.

17. The legislative foundation to the said rule of inference was located in Section 114 of the Evidence Act which empowers the court to presume the existence of any fact which is likely to have happened having regard to the common course of natural events, human conduct etc. in relation to the facts of the case. There is yet another legal principle on which the aforesaid

inference can be founded and this is contained in Section 106 of the Evidence Act. This postulates that where a fact is especially within the knowledge of any person, the burden of proving that fact is upon him; based on the philosophy that a knowledge of a person rests in his brain or his mind which can never be accessed or exposed by the opposite party.

18. In the instant case, the proximity of the time and place between the deceased having last been seen in the company of the accused and the death of the deceased coupled with the distance of the place where the dead body was subsequently recovered are what is relevant in order to justify the inference that the time-gap between the deceased and the accused having last been seen together and the deceased dying therein was so small that the possibility of any person other than the accused being the author of the crime has become impossible. It has been proved that the accused and the deceased were last seen together between 9.00 to 9.30 PM. The medical evidence establishes that the deceased died at about 10.00 PM. The time-gap between the deceased and the accused persons last being in the company of one another and the subsequent death of the deceased is so small that the possibility of a third person being the offender has reasonably been ruled out. Proximity of place is

also a relevant factor. As per the testimonies of PW-6, PW-8 and PW-9 the deceased and the accused persons were last seen together near the corner of the chowk at New Seelampur in front of the Government Boys Middle school. Hereafter it was for the accused persons to have explained about what happened thereafter; no such explanation was forthcoming in their statements under Section 313 of the Cr.P.C. This was also the place where the dead body was found recovered on the following morning in the early hours at 6.25 AM; these versions are fully corroborated by the site plan. The deceased and the accused persons were known to one another; deceased had already had a drink; they were debating on a further drinking session; the deceased also had a quarter bottle of a whisky with him; broken pieces of glass and a broken whisky bottle were also found lying near the dead body.

19. The accused Kanwar Pal after his arrest and pursuant to his disclosure statement had got recovered his blood stained clothes from A 147, New Seelampur from a polythene bag lying under the dari and were taken into possession vide memo Ex.PW-8/A. The witnesses to this document Mahinder PW-8 and Mintoo PW-9 have not supported the recovery but they have admitted their signatures on this document. Accused Brij Mohan had got his

blood stained clothes recovered from the same place i.e. from the jhuggi A147, New Seelampur from under the dari and these clothes were taken into possession vide memo Ex.PW-8/B. The recovery witnesses Mahinder PW-8 and Minto PW-9 have admitted their signatures on this document as well. The police personnel i.e. HC Mohd.Usman PW-16, Const.Samay Singh PW-19, Const.Puran Mal PW-21 and SI Ram Avtar PW-22 were also witnesses to this recovery. They have all corroborated one another on all scores and nothing has been elicited in their cross-examination to discard their versions. Recovery of these blood stained clothes at the hand of the accused thus stand established.

20. We are satisfied that the judgment of the Trial Court calls for no inference. It has been established by clear and cogent evidence that the accused persons and the deceased were last seen together at about 9.00 PM to 9.30 PM on intervening night of 6.3.1997-7.3.1997; within the next one hour the deceased had died. Dead body was recovered from the chowk in front of the Government Boys Middle School which was also the place where the accused persons had last been seen together with the deceased. Accused and the deceased were having conversation on having liquor together; deceased had already consumed

liquor; his viscera had detected alcohol in its contents. The respective recovery of their blood stained clothes at their instance has further incriminated them.

21. There is no merit in the appeal. It is dismissed. Accused are on bail; their bail bonds and surety bonds stand cancelled; they shall surrender forthwith to suffer the remaining sentence.

(INDERMEET KAUR)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

11th September, 2009
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