

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

% Date of Judgment: 10th September, 2009.

+ **CRL.A.595/2001**

DURGA PRASAD Appellant
Through: Ms. Charu Verma, Adv.

versus

STATE Respondent
Through: Ms. Richa Kapoor, APP

+ **CRL.A.23/2002**

LALLA Appellant
Through: Ms. Charu Verma, Adv.

versus

STATE Respondent
Through: Ms. Richa Kapoor, APP.

+ **CRL.A.730/2002**

JHURRAI Appellant
Through: Ms. Charu Verma, Adv.

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. (ORAL)

1. Vide judgment and order dated 31.3.2001 all the three accused namely Durga Prasad, Lalla and Jhurrai have been convicted for the offence under Sections 302/404/34 of the IPC. They have been sentenced to undergo imprisonment for life and a fine of Rs.5000/-, in default of payment of fine SI for two years for the offence under Section 302 of the IPC; for the offence under Section 404 of the IPC they have been sentenced to undergo RI for two years and a fine of Rs.1000/-, in default of payment of fine SI for six months.

2. On 19.5.1997 D.D.No.69B Ex.PW-15A was recorded in Police Station Sultanpuri that a foul smell was emanating from house no.S-2/14, Pooth Rithala, Budh Vihar. SI Sita Ram PW-14 along with Const.Rajbir reached the spot where they found an iron gate on the house. The house was locked. On entry they found two dead bodies lying there. The photographer HC Sajjan Kumar PW-16 took ten photographs Exs.PW-16/A1 to A10 of the scene. The dead bodies were of two young male persons lying in a supine position with their intestine protruding out. Rukka was sent for

registration of the FIR under Section 302 of the IPC. Investigation was handed over to Inspector Rajinder Singh PW-20.

3. The dead bodies were identified by Surinder PW-5 as that of his deceased brother namely Mahender Kumar and Swarn Kumar. The owner of the house was his elder brother Ram Samaru PW-3 who was out of station; he returned back on 22.5.1997 when he was examined by the Investigating Officer. Statements of other witnesses i.e. Ram Kishore PW-1 and Jitender PW-6 were recorded, which were to the effect that they had last seen the accused persons together in the house where the deceased i.e. Mahender and Swarn were living being the house of their elder brother.

4. The post mortem on the dead bodies was conducted by Dr.K.Goyal PW-7 who had opined the cause of death as asphyxia as a result of choking; time since death was reported to be six days which would roughly relate back to 16.5.1997.

5. Accused Durga Prasad and Lala Ram were arrested on 23.5.1997 from House No.T-2008, First Floor, Kotla Mubarakpur. Their personal search was conducted vide memos Ex.PW-3/A and Ex.PW-3/B. Accused Durga Prasad made a disclosure statement Ex.PW-3/C. The disclosure statement of accused Lala Ram is Ex.PW-3/D. Pursuant to their disclosure statements both the accused persons led the police party to the Nehru Park, D.D.A. where under

a stone in the park a plastic 'thailee' containing Rs.4750/-, a silver clip, a silver 'dastband', a pair of silver ear tops, wrist watch and a leaf of a cheque signed by Ram Samaru in the name of Mahender, was retrieved. These articles were taken into possession vide memo Ex.PW-3/E. The place of occurrence was pointed vide memo Ex.PW-3/J.

6. On 25.5.1997 accused Jhurrai was arrested from the same place i.e. the House No.T-2008, First Floor, Kotla Mubarakpur. His personal search was conducted vide memo Ex.PW-3/L. His disclosure statement Ex.PW-3/B was recorded. The clothes of the accused which included his pant, shirt and underwear were seized and taken into possession vide memo Ex.PW-3/K. He disclosed that he had received injury and got himself medically treated. His medical papers were taken into possession vide memo Ex.PW-20/X.

7. On the aforesaid evidence, the trial Judge had convicted the accused persons. The testimony of PW-1, PW-6 coupled with the version of PW-3 had been taken into account by the trial Judge to hold that the accused persons and the deceased were last seen in the company of one another on the late evening of 17.5.1997 which was the date of the incident i.e. the murder of Mahender and Swarn. The recovery of cash of Rs.4750/- as also the silver ornaments and a watch pursuant to the disclosure statement of

accused Durga Prasad and Lala Ram have been held to be the second incriminating circumstance against the accused persons, besides the motive of having committed the offence for the purpose of looting the house of Ram Samaru. The absence of the accused from their house in the intervening night of 16-17.5.1997 was also considered by the trial Court; these cumulative circumstances read together had sustained their conviction.

8. On behalf of the accused, it has been argued that the circumstance of last seen which has been heavily relied upon by the prosecution is washed out by the version of PW-1; his testimony on oath in Court is a material improvement qua his earlier statement which he had given to the Investigating Officer wherein he had stated that he had not seen and nor could he recognize the persons who had met the deceased or had gone to their house on 17.5.1997. It is submitted that this version of PW-1 on oath in Court being substantially improved, no reliance can be placed upon such a tainted version. The second witness of the circumstance of last seen is PW-6 whose statement was recorded for the first time by the Investigating Officer on 25.5.1997 i.e. after the arrest of the accused for which there is no explanation and in the absence of any satisfactory reason having been given by the Investigating Officer for this delay no credence can be attached to the version of PW-6

either. It is further submitted that the trial Court had erred in relying upon the version of PW-3 as a circumstance of last seen as, even as per PW-3 he had been told by PW-1 and PW-6 that on 17.5.1997 they had seen the accused persons in his house; this being a 'hear-say', the same has to be discarded. The recovery of the cash, the silver ornaments and the wrist watch were admittedly from an open park i.e. a DDA Park which is a place open and accessible to all and sundry; recovery is also belied. Lastly, it is submitted that the accused persons had admittedly been arrested from their own house and had they been guilty, normal course of conduct would have been for them to flee from the place and not remain stationed there, ready for their arrest. For all the aforestated reasons benefit of doubt has accrued in favour of the accused; they are entitled to an acquittal.

9. We have perused the record and heard the submissions.

10. We note that the trial Judge has relied upon the versions of PW-1 and PW-6 to establish the circumstance of the accused and the deceased persons having been last seen together. Ram Kishore has been examined as PW-1. He has on oath deposed that Ram Samaru resides in his neighbourhood. Mahender and Swarn are his brothers. On 16.5.1997 at about 4.30 PM he was present near the tea shop; he met Ram Samaru and his family members; he told him

that he was going to his village for the 'Mundan' of his son; he met Mahender also on the same day. On 17.5.1997 at about 9.00-915 PM Mahender told him that three persons of his village named Lalla, Jhurrai and Durga Prasad had come to his house; after sometime PW-1 went to the house of Mahender; he saw all the aforesaid persons having liquor in the company of Mahender. On the following day at about 7.00AM when he went outside to urinate he found that the house of Ram Samaru was locked from outside. On 19.5.1997 he was told by some children that a foul smell was coming out from the house of Ram Samaru; someone telephoned the police; dead bodies found inside the house were identified by PW-1 as that of Mahender and Swarn who were the brothers of Ram Samaru. In his cross-examination this witness has been confronted with his earlier version which he had given to the Investigating Officer i.e. his statement recorded under Section 161 Cr.P.C. Ex.DA. There is no mention in this version that the accused persons had gone to the house of Mahender or that he i.e. Ram Kishore had met them there; it, in fact, categorically recites that he had not seen the guests of Mahender and he cannot say who they were. It is also relevant to note that PW-1 has not whispered a word about the presence of Swarn.

11. From this version of PW-1, it is clear that PW-1 has not come to the court with clean hands and he has made material and substantial improvements qua his first version which he had given to the Investigating Officer; in Ex.DA, he had categorically stated that the guests of Mahender were not known to him; he had not met them and he could not recognize them. He has given a totally changed and different version, on oath, in Court which being a core improvement goes to the root of the matter. We are constrained to hold that the PW-1 is not a truthful witness and no reliance can be placed upon this doctored version. His testimony is discarded.

12. The second witness examined by the prosecution to establish the circumstance of the accused and the deceased having been last seen in the company of one another is Jitender PW-6. Before adverting to his version, on oath, in Court, we would like to note that his statement under Section 161 Cr. P.C. was recorded on 25.5.1997; the dead bodies had been recovered on 19.5.1997; they had been duly identified on the same day; PW-6 is also a neighbour being a resident of A-16, Budh Vihar. On oath PW-6 has stated that on 16.5.1997 or 17.5.1997, exact date he could not remember, he returned back to his house at 9.00-10.00PM; he saw a light burning in the house of Ram Samaru; he rang the bell where he met Mahender who invited him inside. His other brother Swarn was also

there. One Jhurrai who earlier used to live with Ram Samaru was also present there with two other persons and those two other persons were Durga Prasad and Lalla. He was invited to take food but he declined the invitation. He returned back to his house. In his cross-examination he has stated that when the police had come a lot of people of the locality had collected there; on 17.5.1997 the whole locality was interrogated including himself i.e. PW-6; he was interrogated for about 15-20 minutes at about 8.00-9.00PM. He was again interrogated two or three times and thereafter after about one month he was again queried by the police. He denied the suggestion that he has not seen the accused persons in the house of Ram Samaru in the company of Mahender and Swaran.

13. As per the version of this witness, he had given his statement to the police on the same day when the police had reached the locality i.e. on 19.5.1997 when he was queried along with other persons of the locality. The record, however, speaks otherwise; the only statement of Jitender which was recorded by the Investigating Officer under Section 161 of the Cr. P.C. is dated 25.5.1997; if PW-6 had been interrogated on 19.5.1995, there is no explanation as to why that statement of PW-6 has not been placed on record. Adverse inference that if this statement would have been placed on record the same would have prejudiced the case of

the prosecution cannot be ruled out. Inspector Rajinder PW-20 is the Investigating Officer. He has categorically, on oath, stated that he had recorded the statement of Jitender PW-6 on 25.5.1997. There appears to be a confusion; when was this statement of PW-6 recorded; was it on 19.5.1997 as is the version of PW-6 or was it on 25.5.1997 as is the version of PW-20. On record, we have before us only one statement of PW-6 which is dated 25.5.1997. There is also no explanation for this inordinate delay in recording the version of PW-6 especially keeping in view the fact that he i.e PW-6 being a neighbour and living in the same locality and he having categorically stated that he had met the police on the same day, why the Investigating Officer had penned his version only on 25.5.1997. This throws a doubt on the veracity of this version; there is every possibility that in this intervening period of six days it has been concocted. Version of PW-6 is also suspect.

14. In G.B.Patel v. State of Maharashtra AIR 1979 SC 135, Supreme Court had held that an unwarranted and unexplained delay in recording the statement of a material witness makes such an evidence unreliable.

15. We further note that the trial Judge had erred in placing reliance on the version of PW-3 to substantiate the circumstance of the accused persons and the deceased being last seen in the

company of one another. PW-3 is Ram Samaru who is the owner of the house and the elder brother of the deceased. He was admittedly in the village at the time when the incident had occurred and had returned back to Delhi on 22.5.1997. He was interrogated by the Investigating Officer on three days i.e. 22.5.1997, 23.5.1997 and on 25.5.1997. His having seen the accused and the deceased together on 17.5.1997 could not arise as he was not in station on that day; as per his version he had been told by PW-1 and PW-6 that they i.e. PW-1 and PW-6 had seen his brothers and the accused persons together on 17.5.1997, which version clearly falls in the category of 'hear-say' and thus not admissible in evidence.

16. Circumstance of last seen has failed.

17. All the accused persons had been arrested from the place of their residence i.e. the first floor of House No.T-2008, Kotla Mobarakpur. Accused Durga Prasad and Lalla had pursuant to their disclosure statements vide a joint memo Ex.PW-3/J pointed out the place of recovery; thereafter vide joint recovery memo Ex.PW-3/E got recovered cash of Rs.4750/-, some silver ornaments which included a silver hair clip, a 'dastband', a pair of ear tops and a titan wrist watch besides a cheque issued by Ram Samaru in the name of Mahender. This recovery had been effected on 23.5.1997 from the DDA Park from underneath a stone. As per this document, the

aforestated articles were lying in a polythene bag; the document had been attested by Ram Samaru PW-3 and Surender PW-5.

18. PW-3 in his cross-examination has stated that they had reached the MCD Park at 4.00PM; it was a hilly and bushy area; no person was asked to join as a witness; they stayed there for 10-15 minutes; he identified the watch as an HMT watch. PW-5 has stated that they remained at the DDA Park for about one and a half hours; they reached the place of recovery at about 6.30 PM. PW-20 in his cross-examination has stated that some boys and girls were present in the park but he did not think it proper to ask them to join investigation; they remained in the DDA Park for about one hour.

19. From the aforestated versions it is not clear whether it was a DDA park or an MCD park from where the recovery was effected, whether the recovery proceedings continued for 10 to 15 minutes or for more than one hour is also not clear; admittedly public persons were present in the park but none were asked to join the proceedings. The articles recovered i.e. the sum of Rs.4750/- admittedly had no special identification marks which could connect this recovery as belonging to the deceased; they were notes in the denomination of two notes of Rs.500/-, thirty notes of Rs.100/- and three notes of Rs.50/-; testimony of Ram Samaru PW-3 is relevant in this context; in his cross-examination

when confronted with his first version recorded before the Investigating Officer Ex.PW-3/A he admitted that he had not stated that he had while leaving Delhi given a sum of Rs.22000/- to his deceased brother. Subsequent identification by PW-3 of these notes as belonging to him is clearly doubtful. The silver articles i.e. a pair of ear tops, a 'dastband', a silver hair clip and an HMT watch have been identified by PW-3 and his wife Sanjana PW-12 as belonging to them but in their versions before the Investigating Officer they had not given any description of these articles; the weight of the jewellery was not mentioned; the make of the watch was not detailed; recovery memo has described the watch as of Titan make but PW-3 had identified the model as an HMT model; these are also common articles which are readily available in the market. The cheque leaf purported to have been signed by Ram Samaru in the name of Mahender is also suspect; why would the accused persons be holding on to this piece of paper which is valueless for them, is again not clear.

20. The place of recovery is admittedly a public place i.e. the DDA Nehru Park which is miles away from the residence of the accused which is at Kotla Mubarakpur. We also have to keep in mind that the accused persons have been arrested from their residence; they were not absconding; offence had allegedly been

committed on 17.5.1997; yet up to 23.5.1997 they continued to hide all the said articles including the cash of Rs.4750/-; it is difficult to fathom the logic for the same.

21. In Trimbak v. State of M.P. AIR 1954 SC 39 where the articles were recovered from a field which was an open place accessible to all and sundry; the Supreme Court had held that it is difficult to hold that the accused was in exclusive possession of these articles; recovery was, thus, disbelieved.

22. In Karuppa Valayan v. State of Kerala AIR 1960 Kerala 238 it was held that where the statements had been recorded from each of the accused, but they were all on the same pattern and referred to the same articles and all of them stated that they would point out the place where the articles were hidden; it was held that such statements would constitute one composite statement about the same articles which did not serve to fasten an individual guilt as there was no knowing on whose information the material fact had been discovered. So also, are the facts in the instant case.

23. Testimony of the recovery witnesses even otherwise do not inspire confidence; articles are ordinary articles which are readily available in the market; their connectivity with the crime is not established. We are not inclined to accept this recovery. In these circumstances as a consequent corollary the motive of

looting/robbery also fails. We would also like to note that as per the report of Post Mortem Doctor, the deceased had died some time on 16.5.1997; Offence is alleged to have been committed on the intervening night of 17-18.5.1997 which again casts shadows of doubt on the version as sought to be set up by the prosecution.

24. All the links in the chain of evidence are broken; benefit of doubt has accrued in favour of the accused. Appeals are allowed. Accused persons are acquitted; their bail bonds and surety bonds are discharged.

(INDERMEET KAUR)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

September 10, 2009
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