

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

% Reserved on: 09.11.2009
Date of decision: 27.11.2009

+ Crl. A. No.503 of 2009

STATE ...APPELLANT
Through: Mr. Pawan Sharma, Advocate.

Versus

NIKHIL @ RAHUL ...RESPONDENT
Through: Mr. Ramesh Sharma, Sr. Adv.
with Mr. Bharat Sharma &
Mr. Sumit Arora, Advocates.

+ Crl. REV. P. No.499 of 2007

PRADEEP KUMAR ...PETITIONER/
REVISIONIST
Through: Mr. Ajay Veer Singh Jain, Adv.

Versus

NIKHIL @ RAHUL ...RESPONDENT
Through: Mr. Ramesh Sharma, Sr. Adv.
with Mr. Bharat Sharma &
Mr. Sumit Arora, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

SANJAY KISHAN KAUL, J.

1. The respondent charged with the murder of Ms. Kanchan (deceased) was acquitted by the trial court in terms of the impugned judgement dated 24.3.2007 giving rise to the State appeal. The father of the deceased has separately filed a Revision Petition and both these matters were taken up together for hearing.
2. The case of the prosecution is that on 17.7.2004 the dead body of a girl was found lying in the drain near the enclosure of Bengal Tiger in the National Zoological Park, New Delhi. Dr. Manoj Kumar, PW-2, Biological Assistant at the Park at the relevant time, on being alerted of this fact by a visitor, informed the police. On the basis of the said information received, DD No.7A (exhibit PW-1/B-14) was recorded and the matter was handed over to A.S.I. Sarwar Singh (PW-9) who along with Constable Balwan Singh rushed to the spot, which was behind the cage of "Neel Gai". The body of a girl was found lying in the drain facing downward having incise wound on her neck. The girl was already dead and her clothes were smeared with blood. No eye-witness was found at the spot and the statement of PW-2 was recorded. On the statement being so recorded FIR No.411/04 was registered under Section 302 IPC with P.S. Hazrat Nizamuddin. The investigation was thereafter handed over to Inspector Sehdev Singh (PW-20). PW-20 summoned the crime team to the spot. The site was inspected and a site plan (exhibit PW-1/B-13) was prepared.

The blood stained concrete and earth control lifted from the spot were kept in separate jars and sealed in two separate pulandas with the seal of SS. The leaves of the bushes which were blood stained were also seized from near the cage of Neel Gai (cow) and the jewellery worn by the deceased was removed. The dead body was sent to the mortuary of AIIMS.

3. On the same day, i.e. 17.7.2004, date of the incident, Shri Pradeep Kumar, PW-8, had gone looking out for his missing daughter, Kanchan, and lodged a complaint at P.S. Daryaganj whereupon he was informed that the description of his missing daughter seemed to match with the body discovered from the Zoo. The body of the deceased, thus, came to be identified by her father, Shri Pradeep Kumar, at AIIMS whereafter the body was sent for postmortem. The suspicion arose on the respondent and he was arrested on 18.7.2004. The disclosure statement of the respondent (exhibit PW-10/A) was recorded. It is the case of the prosecution that on the basis of the disclosure statement the weapon of the crime being a razor (exhibit P-1) was recovered from the bushes near the cage of Bengal Tiger. The clothes worn by the respondent at the time of incident were also seized from his house. The prosecution claims that the respondent parked his motorcycle bearing No.6765 in the Zoo parking and thus parking receipt book (counter foils) was seized vide exhibit PW-4/A. The number of the motorcycle of the respondent was verified from the

Regional Transport Authority as 'DL 6S Q 6765'. On completion of investigation challan was filed against the appellant. He was charged under Section 302 IPC to which he pleaded not guilty.

4. The case of the prosecution is based on circumstantial evidence since there is no eye-witness. The prosecution sought to bring home the guilt of the respondent by seeking to establish a motive for the crime, the factum of the parking receipt, the recovery of the weapon of offence at the behest of the respondent and the disclosure statement and the testimonies of other witnesses. On the other hand, the respondent pleaded that there was no direct evidence connecting him to the crime and it was a case of mere suspicion. The respondent pleaded not guilty to the charge and claimed trial.
5. The trial court has found that the testimony of Dr. Chitranjan Behra, PW-1, from AIIMS who conducted the postmortem on the dead body established the cause of death as the neck injury which was in turn caused by a sharp edged weapon. The injury was sufficient to cause death in the ordinary course of nature and thus the question arose as to who had caused the death for which the burden was on the prosecution to prove the case beyond reasonable doubt.
6. The first aspect to be analysed in this behalf is the motive for the crime. It is the case of the prosecution that the respondent had a crush on the deceased. He was a

neighbor of the deceased. The deceased used to work with Sai Communication and the respondent used to often pick her up and drop her. To establish the 'motive', the testimony of three witnesses is material – Devender Tomar, PW-5; Shri Pradeep Kumar, PW-8, father of the deceased and Mr. Vishal, PW-12, brother of the deceased. PW-5 used to work at Sai Communication along with the deceased and deposed that the deceased had informed him that the respondent was of suspicious nature and did not like the interaction of the deceased with other men. He stated that the respondent did pick up and drop the deceased often, however, did not categorically depose to the deceased being picked up by the respondent on the motorcycle on the fateful day. The said witness also referred to an incident on the date of *Janmashtami* when the respondent is alleged to have cut a yellow suit of the deceased because he did not like it, as informed by the deceased. The father of the girl, PW-8, has gone further to depose that the respondent used to obstruct the way of the deceased and trouble her despite the deceased not liking it. The incident of *Janmashtami* of the year 2003 was also reiterated by him. We may notice that this deposition seems to contradict the deposition of PW-5 that the respondent used to regularly pick up and drop the deceased, which could not have been possible if the terms between the two were inimical. The testimony of the brother of the deceased, PW-

12, is also on the same lines and the motive is stated to be jealousy.

7. The aforesaid motive has not been believed by the trial court, and in our considered view, rightly so. It is inconceivable to accept that if the respondent had been harassing the deceased, neither the deceased nor the father would have taken any steps to prevent the same. There could, of course, be no question of the deceased frequently travelling on the motorcycle of the respondent if she did not like him. Testimony of the witness that the respondent was jealous of the deceased talking to any other male person is also vague. The alleged suit on which the cut was caused was also never produced in evidence. Otherwise also even if it is assumed that the said incident took place on the *Janmashtami* day of 2003, the incident is too remote to be taken as a circumstance to establish motive. The approach of the trial court, therefore, cannot be faulted with in coming to the conclusion that even if there was a motive, the same would not itself suffice unless the circumstances were able to connect the respondent to the crime.
8. In respect of the aforesaid it is relevant to note that as per the disclosure statement of the respondent he was jealous of the friendship of the deceased with one Shekhar. The disclosure statement should be an instrument to carry out investigation and yet there has been no corroboration of any sort in this direction which would establish any

equation between the deceased and some person called Shekhar. The disclosure statement made to the police *per se* is inadmissible in evidence under Section 27 of the Indian Evidence Act except insofar as it leads to discovery of a new fact. In that event also only that part of the disclosure statement made to the police is admissible which led to the discovery of a new fact. In this behalf it would be useful to reproduce the observations of the Supreme Court in Swamy Sharaddananda @ Murali Manohar Mishra Vs. State of Karnataka AIR 2007 SC 2531, which read as under:

“39. Pulukuri Kottayya v. King Emperor is an authority for the proposition that "fact discovered" envisaged under Section 27 of the Indian Evidence Act, 1872, embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given in that behalf must relate distinctly to that effect, stating:

“The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as related distinctly to the fact thereby discovered may be proved.”

It was further observed:

“In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact.

Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife, knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant.”

“In his statements before the investigating officer, he made a confession; but what was admissible in evidence is only that part which would come within the purview of Section 27 of the Evidence Act and not the rest. The court while analyzing the evidence and appreciating the same cannot take note of confession made before the police.”

9. The first link in the story of the prosecution that the respondent being jealous of the friendship of the deceased with one Shekhar, had killed the deceased at the Zoo is, thus, missing. The next link in the chain was the averment recorded in the disclosure statement of the respondent purchasing two tickets and walking into the Zoo after parking the motorcycle and the factum of the respondent having purchased the razor (exhibit P-1) from Matia Mahal before leading the deceased to a secluded spot and committing the crime. No witness has been examined to establish that the appellant did purchase the entrance tickets. We may notice that the recovery of the razor was made only in pursuance to the disclosure statement made on 18.7.2004 and the earlier search of the area when the body was discovered proved futile insofar as the recovery of the weapon of offence is concerned. No effort was made to establish the purchase of the weapon of offence from the shopkeeper at Matia Mahal by examining the relevant witness, nor was the respondent got identified by the shopkeeper. There was also no effort to inquire about the whereabouts of the respondent from his place of work, Design Studio at Shahpur Jat on the date of the incident.

10. The submission of the learned APP was that the two important circumstances ignored by the trial court was the recovery of razor apart from recovery of parking slip. We have, however, discussed aforesaid as to why the trial court was not in error in ignoring the aspect of recovery of razor.
11. Insofar as the second aspect of recovery of parking slip is concerned, we have seen the original parking slip. It is not in dispute that the motorcycle of the respondent bears No.DL 6S Q 6765. Clearly, the parking slip does not record the alphabets but only the digits. But then that is the position for all parking slips. What is material is that the parking slip itself contains an overwriting. The No.6755 is overwritten as 6765. The third digit which is originally written as '5' has been altered to '6'. The person who would have altered this and established the correct number, the relevant parking attendant, has not been examined. The contractor, PW-4, who has been examined by the prosecution before the trial court, of course, could not have thrown any light on this aspect. The contractor has also not deposed as to whether the parking slips for cars and the motorcycles are separate and all that he has stated is that the said parking slip "might" be in respect of the vehicle parked on 17.7.2004. Thus, the second connection with the crime qua the respondent has also not been established. The prosecution has, thus, once again, failed to examine the relevant witness nor the witness

examined being the contractor, PW-4, has thrown any light on the various aspects.

12. Learned APP does not dispute that all the circumstances have been examined by the trial court though the conclusion reached is not favourable. He, however, submits that the recovery of the razor exhibit P-1 from the spot, the respondent and the deceased being of the same age and neighbours, human semen found on the vaginal swab of the deceased, the total denial by the respondent in the statement recorded under Section 313 Cr.P.C. and the false pleas during the trial when witnesses were examined are sufficient. We are unable to agree with the submission of the learned APP.
13. Learned counsel for the respondent also rightly pointed out to the contradictions in the testimony of the witnesses even about the two crucial aspects including of the recovery of the razor for which PW-3, PW-10, PW-19 & PW-20 were examined. Mr. Ravinder Kumar, PW-3, was the Security Supervisor of the Zoo and stated that the respondent was arrested in his presence and the razor was also recovered in his presence from behind the bushes near the enclosure of the Bengal Tiger. He deposed to the razor being seized after sealing it in a packet. S.I. Satbir Singh, PW-10, also deposed to the recovery of razor but does not mention the presence of PW-3 at the time of recovery of razor. Shri B.S. Bonal, PW-19, Director of the Zoo stated that the razor was recovered near the Bengal Tiger

enclosure after engaging the labour who cleared the bushes. While Inspector Sehdev Singh, PW-20 stated that the razor was got recovered at the instance of the respondent from the bushes behind Neel Gai (cow) cage. These contradictions are additional factors to doubt the recovery of the razor.

14. The trial court has also discussed its doubts over the sealing of the razor in pages 55 to 59 of the judgement. PW-3 stated that the razor was sealed in a packet but could not tell the initials which was used. He could not indicate what was written on the handle of the razor nor did he notice any picture or flower on the handle of the razor though he stated that something was written in English and it was not in any other language like Urdu or Hindi. He further stated that the writing was on the both sides of the razor. He admitted that the razor was shown to him in Court and there was something written in Urdu on the one side and one flower was there on the other side. The seal was also not handed over to a public witness but to a police official. The manner of preservation of the razor itself is in doubt since it had been deposed that the same was kept in a plastic jar and then it was sealed in a pulanda while the relevant two witnesses, being PW-3 & PW-19, have eliminated the presence of jar.
15. The testimony of PW-1, the doctor, who conducted the postmortem is that the razor was shown to him which had dried blood. The FSL report (exhibit PW-20/D), however,

shows that blood could not be detected on some of the exhibits including the razor. Thus, it is also not certain that razor (Exhibit P-1) was used in the crime.

16. The manner of commission of the crime stated to have been elucidated in the disclosure statement is that while walking behind the deceased the respondent caught hold of her mouth with left hand and with the help of his right hand in one stretch cut her neck. Though the disclosure statement, so far as it relates to the manner of commission of crime is inadmissible in evidence being a confession made before the police, the consequence of this statement discussed by the trial court as under:

“... If the disclosure statement is believed to be correct then the position in which he had cut the neck of the deceased she should have received injuries on the left side of her neck extending to its right side instead of on the edge of the right side neck below the ear. As such the doctor could have given better opinion about the use of razor Ex. P-1 while conducting the postmortem by actual demonstration of the razor on the neck of the deceased. However, this has not happened due to laxity on the part of the IO. PW-1, Dr. Chitranjan Behra in his cross-examination has admitted that the injuries on the person could have been caused by other weapon of similar size and nature thus it has not been proved beyond reasonable doubt that the neck of the deceased suffered injuries by the use of razor Ex. P-1. Again the blood on both sides of blade of razor at the time of recovery as claimed by the prosecution is doubtful as PW-1, Dr. Chitranjan Behra deposed that razor's metallic part was blood stained on both sides but he admits on the sketch he has not shown that there was blood on the razor. Besides the sketch prepared by him finds no traces of blood and as observed above even if the blood was dry on the razor it ought have left at least some colour on the sketch but again the sketch prepared by the doctor which is Ex. PW-1/B2 is clean and clear, raising doubt that the razor which was produced before him was blood stained. As such prosecution has failed to prove recovery of razor Ex.P-1 at the

instance of accused and that it was used in the incident.”

17. The clothes recovered of the respondent are also of not much help as no human blood was detected on them.
18. Shri Pradeep Kumar, PW-8, deposed that when he went with his son, Vishal (PW-12) to the Zoo he met one Sukhbir Singh who told him that his daughter was seen along with one boy who were exchanging hot words and that he could identify the boy. This fact was brought to the knowledge of the I.O. and the SHO, however, Sukhbir Singh was never made a witness and thus not produced before the Court. These are all examples of shoddy investigation.
19. The principles of law to be kept in mind while dealing with the case of circumstantial evidence have been enunciated by the Supreme Court in Kishore Chand Vs. State of H.P. (1991) 1 SCC 286 in the following terms:

“4. The question, therefore, is whether the prosecution proved guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused. The proved circumstances should be of a conclusive nature and definite tendency, unerringly pointing towards the guilt of the accused. They should be such as to exclude every hypothesis but the one proposed to be proved. The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. It is not necessary that each circumstance by itself be conclusive but cumulatively must form unbroken chain of events leading to the proof of the guilt of the accused. If those circumstances or some of them can be explained by any of the reasonable hypothesis then the accused must have the benefit of that hypothesis.

5. In assessing the evidence imaginary possibilities have no role to play. What is to be considered are ordinary human probabilities. In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established. The chain of events furnished by the circumstances should be so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused. If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt.

6. In assessing the evidence to find these principles, it is necessary to distinguish between facts which may be called primary or basic facts on one hand and inference of facts to be drawn from them, on the other. In regard to the proof of basic or primary facts, the court has to judge the evidence in the ordinary way and in appreciation of the evidence in proof of those basic facts or primary facts, there is no scope for the application of the doctrine of benefit of doubt. The court has to consider the evidence and decide whether the evidence proves a particular fact or not. Whether that fact leads to the inference of the guilt of the accused or not is another aspect and in dealing with this aspect of the problem, the doctrine of benefit would apply and an inference of guilt can be drawn only if the proved facts are inconsistent with the innocence of the accused and are consistent only with his guilt. There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused and those circumstances should be of conclusive nature and tendency and they should be such as to exclude all hypothesis but the one proposed to be proved by the prosecution. In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that in all probability the act must have been done by the accused and the accused alone.”

20. In a more recent judgement in Gagan Kanojia Vs. State of Punjab (2006) 13 SCC 516 it was observed as under:

“9. The prosecution case is based on circumstantial evidence. Indisputably, charges

can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is well settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. It is, however, necessary for the courts to remember that there is a long gap between “may be true” and “must be true”. Prosecution case is required to be covered by leading cogent, believable and credible evidence. Whereas the court must raise a presumption that the accused is innocent and in the event two views are possible, one indicating to the guilt of the accused and the other to his innocence, the defence available to the accused should be accepted, but at the same time, the court must not reject the evidence of the prosecution, proceeding on the basis that they are false, not trustworthy, unreliable and made on flimsy grounds or only on the basis of surmises and conjectures. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on record and analyse and assess the same objectively.

10. We would proceed on the well-known principles in regard to appreciation of the circumstantial evidence which were noticed by the High Court in the following terms:

“(1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

(2) Circumstantial evidence can be reasonably made the basis of an accused person’s conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.

(3) There should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.

(4) On the availability of two inferences, the one in favour of the accused must be accepted.

(5) It cannot be said that prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.”

21. If the aforesaid principles are applied to the present case we find that the test laid down to connect an accused to the crime where circumstantial evidence is the basis of the case of the prosecution have not been satisfied. The trial court has considered each and every aspect in a well reasoned judgement and due weightage has to be given to the view of the trial court in matters of appreciation of evidence keeping in mind that it is the appeal of the State against the acquittal by the trial court.
22. We are conscious of the pain and anguish of the revisionist who is the father of the deceased and find it difficult to fathom that no one is found guilty of the offence of murder of his daughter. His suspicion is that the crime was committed by the respondent. Unfortunately such suspicion cannot form the basis of conviction as the prosecution must prove the case beyond reasonable doubts. It is also a question of the life of the respondent. There would be grave consequences for the respondent and thus respondent cannot be convicted in the absence of a complete chain of circumstances consistent with the hypothesis of guilt of the respondent. The trial court has,

thus, rightly given the benefit of doubt to the respondent
acquitting him of the charges albeit the same being a result
of a shoddy investigation.

23. The appeal and the revision are accordingly dismissed.

SANJAY KISHAN KAUL, J.

NOVEMBER 27, 2009
b'nesh

AJIT BHARIHOKE, J.