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IN THE HIGH COURT OF DELHI

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Judgment Reserved On: 2nd March, 2009

Date of Decision : 05th March 2009

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CRL.A.682/2008

SANTOSH @ BHURE Appellant
Through: Mr. Anish Dhingra, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

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CRL.A.316/2008

NEERAJ Appellant
Through: Mr.S.P.Singh Chaudhary &
Mr. Y.R.Sharma, Advocates

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

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. On 12.9.2000 at around 10:39 AM a call was received from one Ramesh Chand at PCR Control Room

informing that a tenant has been murdered at House No. D-156 J.J. Colony, Khayala. The message was noted and the information was flashed on the district net.

2. At 10:46 AM the information was received at Police Station Tilak Nagar by the wireless operator Mange Ram PW-21. Lady HC Kusum PW-12, recorded DD No. 6A, Ex.PW-12/A. DD No. 6A was handed over to SI Rajesh Kumar PW-15, who proceeded to the spot along with HC Ranvir PW-8, Ct. Satpal PW-5 and Ct. David. They found a dead body on a folding bed with injuries on the stomach and chest. A piece of cloth was tied around the neck of the dead body. The body was lying on a bed with three bed sheets and one shawl; blood was spread on the floor under the bed. A stool was lying in a corner of the room. A steel plate, having some salad; a glass; a steel bowl with some salted snacks and a quarter bottle of whisky with 1/4th portion of liquor in it was seen. The dead body was seized and personal search yielded a letter Ex.PW-15/F from the left pocket of the trouser of the deceased which was seized vide seizure memo Ex.PW-3/J.

3. SI J.L.Meena PW-28 the additional SHO of the police station who received the information also reached the spot

and met Ramesh Chand PW-3, the owner of House No.D-156, J.J.Colony, Khayala. He recorded his statement Ex.PW-3/A as per which he informed that on the recommendation of Raj Kumar PW-4, his tenant on the first floor of the house, he had inducted accused Santosh @ Bhoora as a tenant on the second floor of the premises four months prior to the date of the incident. That on 11.09.2000 at about 12 noon, accused Santosh @ Bhoora came to his shop to purchase some snacks and cigarette. That accused Bhoora informed him that a guest had come to his house and they were having snacks and drinks together. That thereafter at about 4.00 p.m., he saw accused Bhoora leave his house in a nervous condition carrying a bundle (gathri) in his hands. That today i.e. 12.09.2000 at about 10:30 a.m. the elder son of Raj Kumar informed him at his shop that a dead body from which foul smell was emanating was lying in Bhoora's room. That he informed the Police. SI J.L.Meena made an endorsement Ex.PW-28/A on the statement Ex.PW-3/A and sent Ct. David to the police station for registration of the FIR. Lady HC Kusum recorded the FIR Ex.PW-12/B on receipt of the rukka.

4. A photographer Rahul PW-17 was summoned who took photographs Ex.PW-17/A1 to Ex.PW-17/A4 of the place of

occurrence. The dead body was seized and sent to the mortuary at DDU Hospital.

5. SI Rajesh Kumar lifted the blood stained clothes i.e. three bedsheets and a shawl and seized them vide Seizure Memo, Ex.PW-3/B. The folding bed was seized vide Seizure Memo Ex.PW-3/C. The blood (sample) on the floor was lifted vide Seizure Memo Ex.PW-3/B. The utensils found near the folding bed were seized vide Seizure Memo Ex.PW-3/G.

6. The post-mortem of the deceased was conducted on 13.09.2000 by Dr.M.M.Narnaware, the post-mortem report, Ex.PW-27/A, records the following injuries on the person of the deceased:-

“(i) One perforating injury on sterna region vertically placed, located at 10 cms left to right nipple and 9 cms below sterna, size 3 cms x 1.1 cms x cavity deep.

(ii) Another penetrating injury on left side of chest, 6 cms left to injury No.1, placed vertically located 1.5 cms above left nipple and 6.5 cms left to mid-sternal line, size 4 cms x 1.8 cms x cavity deep.

(iii) Another penetrating injury on left side of abdomen horizontally placed, located at 14.4 cms below right nipple, 4 cms from mid-abdominal line, size 3.8 cms x 1.4 cms x cavity deep.

(iv) Another penetrating injury on right abdomen 5.8 cms below injury No.3 horizontally placed, size 4.6 cms x 2.1 cms x cavity deep.

(v) Another penetrating injury on left side of abdomen, horizontally placed, located at 4.5 cms left to umbilicus and 21 cms below left nipple, size 9 cms, x 3.5 cms x cavity deep.

(vi) One incised wound on sternum, .5 cms right to injury No.1, size 0.3 cms x 0.2 cms x skin deep.

(vii) Another incised wound on abdomen 2.4 cms medial to injury 0.3, size 0.7 cms x 0.4 cms x skin deep.”

7. The doctor handed over a parcel sealed with the seal of LKB containing the clothes of the deceased which were seized vide Seizure Memo Ex.PW-15/A.

8. Inspector J.L.Meena recorded the statement of Raj Kumar PW-4 under Section 161 Cr.P.C. who informed that appellant Neeraj along with appellant Santosh was seen by him sitting with the deceased on the day of the incident. This led the police to look out for the appellants, who also learnt about the fact that the police were on their lookout and hence surrendered in Court. The police remand of the appellants was taken. A disclosure statement of appellant Santosh Ex.PW-28/D was recorded as per which he offered to get recovered two pants, one each of the appellants and his shirt which were disclosed to the police as being stained with the blood of the deceased when Santosh and Neeraj murdered him. He took the police but no recovery was made. He was again

interrogated on 25.9.2000 and another disclosure statement Ex.PW-15/C was recorded and thereafter he was taken out from the police lockup. He took the police to the house where the dead body of the deceased was found. From the roof of the house he got recovered two pants and a shirt stained with blood. Neeraj was interrogated and made a disclosure statement Ex.PW-15/B. He disclosed that he could get recovered the knife used for the offence and led the police to a place behind R.B.Jain Hospital. He dug out a sky-coloured polythene bag from under the bushes containing a dagger which was seized vide seizure memo Ex.PW-13/B and its sketch Ex.PW-13/A was prepared.

9. The letter recovered from the pocket of the deceased reads as under:-

“Shree Ganesha Namah:

Chotte Bhai Devri Niwasi Jogeshwar Prasad,
Putra Chotte Lal, innohone kissi majboori ka
faida uthakar apne buaji ke ladke ka
majboorivash fayda uthakar zavar rakh liya,
jisme mamiji ka mangalsutra, chain wala,
paylien va bachchon ki do haath, itne saman ke
bavjud mein unhone paanch hazaar rupey diye
the. Jiska byaz 500 rupey mahaina diya ja raha
tha, phir bhi meri gali galoch se lekar meri
beizatti ki. Is kaaranvash maine majboor hokar
apni atamahatya ki. Iske zimmedar khud chotte

porwal hain. Marne wale ka naam Hari Shankar Porwal. Marne wale ki majboori ka naam Chhote Porwal.”

10. Since in his disclosure statement Neeraj claimed authorship of the letter. SI J.L.Meena took the specimen handwriting of accused Neeraj and sent the same along with the letter for opinion of a handwriting expert.

11. The opinion Ex.PW-28/I of the hand writing expert was to the effect that the letter was written in the same hand with which the specimen handwriting was written.

12. The two pants and shirt stained with blood recovered at the instance of accused Santosh as also the knife recovered at the instance of Neeraj along with the clothes of the deceased and his blood sample were sent to a serologist for being tested and vide report Ex.PW-28/G it was reported that human blood of group 'B' was detected on the clothes of the deceased and was his blood group and that human blood of same group was found on the two pants and the shirt recovered at the instance of accused Santosh. Blood could not be detected on the knife recovered at the instance of Neeraj.

13. The prosecution had two witnesses namely Ramesh Chand PW-3, the owner of the house where on the second floor whereof the dead body of the deceased named Hari Shankar was recovered by the police on 12.9.2000 and Raj Kumar PW-4, the tenant inducted by Ramesh Chand on the first floor. Citing the two as witnesses and the various police officers associated with the investigation the challan was filed annexing the various recovery memos, the various articles seized and the report of the serologist and the handwriting expert.

14. Ramesh Chand PW-3 deposed that he was the owner of House No.D-156, J.J.Colony, Khayala and that he was running a kiriyana shop on the ground floor. He deposed that Raj Kumar was his tenant in respect of the first floor and that at the asking of Raj Kumar he had inducted Bhoora as a tenant on the second floor. That on 12.9.2000 he was sitting in his shop when a washerwoman told him that some person had been killed on the second floor of his house. Vishal son of Rajkumar also told him the said fact. He went upstairs and saw a dead body on a folding cot. Blood was lying there. He informed the police. Police recorded his statement Ex.PW-3/A and he signed the same at point 'A'. The police took away the

dead body and that nothing happened in his presence. He was declared hostile inasmuch as he disclaimed the facts recording in Ex.PW-3/A that on 12.00 noon on 11.9.2000 Bhoora came to his shop to purchase snacks and informed him that a guest had come to his house and that at 4.00 PM he saw Bhoora leaving the house in a nervous condition. He stuck to his guns when cross-examined by the public prosecutor and denied the recoveries made by the police at the spot save and except the dead body of the deceased being recovered by the police.

15. PW-3 was not cross-examined by the accused. The reason is obvious. He did not inculcate the accused.

16. Rajkumar PW-4 deposed that he was residing as a tenant on the first floor of the house and that Bhoora @Santosh was residing as a tenant on the second floor. One Hari Om was also residing with Bhoora. That he went to the house of Bhoora on 11.9.2000 at around 12.00 noon to take money from him. He met a person named Hari Shankar who was under influence of alcohol who told him that Bhoora was not there. He went to Mathura, UP and returned in the night at around 2.00 AM and learnt that Hari Shankar was murdered. The witness was declared hostile and was cross-examined. He

denied having told the police that even Neeraj was staying in the house. He was confronted with his statement under Section 161 Cr.P.C. where it was so recorded. He denied the same. The witness was tendered for cross-examination but the accused did not cross-examine him for the obvious reason he did not inculcate the appellants.

17. Vide impugned judgment dated 27.2.2008 the learned Trial Judge has held that the testimony of PW-3 and PW-4 establish that Santosh @Bhoora was a tenant on the second floor of the house and that the dead body of Hari Shankar was found in his house and that he was found absconding till he surrendered in Court and that the pant worn by him and Neeraj as also the shirt worn by him soiled with blood was recovered pursuant to his disclosure statement and the blood was not only human but of the same group as that of the deceased was sufficient evidence where from guilt of Santosh could be inferred. Qua Neeraj, the fact that the letter recovered from the pocket of the deceased was opined to be in the handwriting of Neeraj, learned Trial Judge held that an attempt was made to show that the deceased had committed suicide which evidenced the guilt of Neeraj and hence said

evidence was sufficient to indict Neeraj for the offence of murder of Hari Shankar.

18. Unfortunately, for the prosecution, the charge against Neeraj has to fail for the simple reason Neeraj's specimen handwriting was obtained by the police when he was in their custody. No permission was taken from the Court concerned to obtain his specimen handwriting.

19. Learned counsel for the State urges that a Constitution Bench of 11 Judges of the Supreme Court, in the decision reported as 1962 (3) SCR 10 State of Bombay vs. Kathi Kalu Oghad & Ors. has upheld the constitutional validity of compelling an accused to give specimen handwritings. It has been held that the same does not contravene Article 20(3) of the Constitution of India and thus the fact that the police obtained the specimen handwriting of Neeraj when he was in their custody does not invalidate the said act. Learned counsel was at pains to point out that the Constitution Bench of the Supreme Court was considering three references pertaining to three views taken by the High Court of Bombay, Punjab and West Bengal pertaining to compelling an accused to give his specimen handwriting, fingerprints and specimen

signatures respectively and that in the latter two cases the palm and finger print impressions as also the specimen signatures were obtained with the permission of the magistrate concerned but in the first case pertaining to the Bombay High Court the specimen handwritings were taken when the accused was in police custody. Thus, learned counsel urged that the Constitution Bench upheld the action of taking specimen handwriting by the police when the accused was in police custody.

20. It may be noted that the Constitution Bench of the Supreme Court was dealing with the issue whether to compel an accused to give his blood sample, palm and fingerprints impressions, signatures and handwriting etc. would or would not be violative of Article 20(3) of the Constitution of India which made it unconstitutional for a person to be a witness against himself. The Constitution Bench held that to be a witness means to give evidence. It was held that giving handwriting samples or fingerprints or palm impressions did not tantamount to giving evidence and that when a handwriting sample or a fingerprint or a palm impression was obtained by the police it did not amount to compelling an accused to be a witness against himself.

21. In the decision reported as AIR 1980 SC 791 State of UP vs. Rambabu Mishra, with reference to the decision of the Constitution Bench in Kathi Kalu Oghad's case (supra) in para 7 it was observed as under:-

“7. S.73 of the Evidence Act was considered by us in State (Delhi Administration) v. Pali Ram, AIR 1979 SC 14 where we held that a Court holding an enquiry under the Criminal Procedure Code was entitled under S.73 of the Evidence Act to direct an accused person appearing before it to give his specimen handwriting to enable the Court by which he may be tried to compare it with disputed writings. The present question whether such a direction, under S.73 of the Evidence Act, can be given when the matter is still under investigation and there is no proceeding before the Court was expressly left open. The question was also not considered in State of Bombay vs. Kathi Kalu Oghad, AIR 1961 SC 1808, where the question which was actually decided was that no testimonial compulsion under Article 20(3) of the Constitution was involved in a direction to give specimen signature and handwriting for the purpose of comparison.”

22. In para 3 to 6 and para 8 of the decision in Rambabu Mishra's case (supra) it was observed as under:-

“3. Section [73](#) of the Evidence Act is as follows:

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved,

although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications to finger-impressions.

4. The second paragraph of Section 73 enables the Court to direct any person present in Court to give specimen writings "for the purpose of enabling the Court to compare" such writings with writings alleged to have been written by such person. The clear implication of the words "for the purpose of enabling the Court to compare" is that there is some proceeding before the Court in which or as a consequence of which it might be necessary for the Court to compare such writings. The direction is to be given for the purpose of 'enabling the Court to compare' and not for the purpose of enabling the investigating or other agency 'to compare'. If the case is still under investigation there is no present proceeding before the Court in which or as a consequence of which it might be necessary to compare the writings. The language of Section 73 does not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. Further Section 73 of the Evidence Act makes no distinction between a Civil Court and a Criminal Court. Would it be open to a person to seek the assistance of the Civil Court for a direction to some other person to give sample writing under Section 73 of the Evidence Act on the plea that it would help him to decide whether to institute a civil suit in which the question would be whether certain alleged writings are those of the other person or not? Obviously not. If not, why should it make any

difference if the investigating agency seeks the assistance of the Court under Section 73 of the Evidence Act on the plea that a case might be instituted before the Court where it would be necessary to compare the writings?

5. We may also refer here to Section 5 of the Identification of Prisoners Act, 1920, which provides:

5. If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the CrPC, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the first class:

Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

Section 2(a) of the Act defines "measurements" as including "finger impressions and foot print impressions".

6. There are two things to be noticed here. First, signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act and, second, 'finger impressions' are included in both Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. A possible view is that it was thought that Section 73 of the Evidence Act would not take in the stage of investigation and so Section 5 of the Identification of Prisoners Act made special provision for that stage and even while making such

provision, signature and writings were deliberately excluded. As we said, this is a possible view but not one on which we desire to rest our conclusion. Our conclusion rests on the language of Section 73 of the Evidence Act.

xxx xxx

8. The view expressed by us in the earlier paragraphs, on the construction of Section 73, Evidence Act was the view taken by the Madras High Court in T. Subbiah v. S.K.D. Ramaswamy Nadar AIR 1970 Mad. 85, the Calcutta High Court in Farid Ahmed v. the State AIR 1960 Cal 32 (Mitter J., at page 32). and Priti Ranjan Ghosh and Ors. v. The State (1973) 77 Cal WN 865, the High Court of Punjab and Haryana in Dharamvir Singh v. State 1975 CrL. L. J. 884, the High Court of Madhya Pradesh in Brij Bhushan Raghunandan Prasad v. The State AIR 1957 Madhya Pradesh 106, the Orissa High Court in Srikant Rout v. State of Orissa 1972 (2) Cuttack Weekly Reporter 1332 and the Allahabad High Court in the judgment under appeal. A contrary view was taken by the Patna High Court in Gulzar Khan and Ors. v. State AIR 1962 Patna 255 and the High Court of Andhra Pradesh in B. Rami Reddy and Ors. v. State of Andhra Pradesh, 1971 CrL. L.J. 1519 (A.P.). We do not agree with the latter view. We accordingly dismiss the appeal and while doing so we would suggest that suitable legislation may be made on the analogy of Section 5 of the Identification of Prisoners Act and provide for the investiture of Magistrates with the power to issue directions to any person, including an accused person, to give specimen signatures and writings.”

23. In the decision reported as 1994 (5) SCC 152 Sukhvinder Singh & Ors. Vs. State of Punjab, noting that the specimen writing of Sukhvinder Singh was obtained by the police when he was in police custody, notwithstanding the fact

that Sukhvinder Singh had admitted in his statement under Section 313 Cr.P.C. that he gave the specimen handwriting it was held that the opinion of the handwriting expert had to be excluded while considering the evidence against Sukhvinder Singh. We note that the said evidence brought on record inculpatory evidence against Sukhvinder Singh in respect of ransom letters Ex.P-A and Ex.P-C alleged by the prosecution to be in the handwriting of Sukhvinder Singh.

24. Thus, excluding the opinion of the handwriting expert pertaining to the letter recovered by the police from the left pocket of the deceased, we are left with only one piece of evidence against Neeraj. The same is the recovery of a knife at his instance.

25. The said solitary evidence cannot form a complete chain of evidence where from inference of guilt can be drawn against Neeraj for the reason the knife was not found to be stained with human blood and that the only evidence is, as opined by the doctor that the injury on the deceased could possibly be caused by the knife. In the case of a knife, unlike a firearm the only evidence can be that the injury could be

possibly caused by the knife and not that the injury could be caused by that very knife and none else.

26. We note that there is no evidence that Neeraj was residing on the second floor of house No.D-156 J.J.Colony, Khyala and thus nothing turns on Neeraj not being found by the police.

27. Pertaining to accused Santosh we find the following evidence against him:-

(a) He was a tenant on the second floor of house No.D-156 J.J.Colony, Khyala.

(b) Dead body of Hari Shankar was recovered from the said second floor by the police on 12.9.2000 at around 11.00 AM.

(c) Santosh was found absconding and could not be apprehended by the police till he surrendered in Court on 23.9.2000.

(d) Clothes i.e. two pants and a shirt were recovered by the police pursuant to the disclosure statement of Santosh and on Santosh getting the same recovered by leading the police to the spot where from the

recovery was effected. Blood of human origin and of group 'B' i.e. the same group of the deceased was detected on the said clothes.

28. In the decision reported as JT 2008 (12) SC 306 Ramachami vs. State from the circumstance and the evidence that the deceased and the accused used to sleep in the hotel itself in the night and that at 6.00 AM on 4.2.1998 PW-1 and PW-2, employees in the hotel reached the hotel at usual working hours and saw the deceased but could not find the accused who was absconding and that when he was arrested a wooden stick allegedly used to inflict injuries on the deceased was recovered were held to be sufficient circumstances where from the guilt of the accused could be inferred.

29. We wish to add a few words on the conduct of an accused absconding. It is true that even an innocent person fearing false arrest may abscond and thus the act of absconding by itself, though relevant may become a weak evidence, but it cannot be said as a universal rule that the act of absconding would in all circumstances be a weak evidence. It all depends on the quality of the other evidence and depending thereon the weight to be given to the circumstance

of absconding. Where a dead body is recovered from the house of the accused and the accused is found absconding, logic and common sense guides that a simple denial by the accused would raise eye-brows which will drop if the accused furnishes a satisfactory explanation. If further corroborated by evidence pointing towards the guilt of the accused, the raised eye-brows would partake the decision that there are enough circumstances where from the guilt of the accused can be inferred. As in the decision in Ramachami's case (supra) where the alleged weapon of offence is recovered at the instance of the absconding accused, the chain of circumstances may become complete. In the instant case, the recovery of two blood stained pants and a shirt, one pant being allegedly worn by the co-accused and the other by the appellant and the shirt allegedly worn by the appellant on which human blood of group 'B' i.e. the same blood group as that of the deceased was found present add considerable weight to the circumstance of absconding. We simply wish to highlight the fact that what weight has to be given to a particular piece of evidence depends on the circumstances of each case. In a given set of circumstances the same evidence may be less weighty and in a changed circumstances may

assume considerable weight. The facts of each case have to be carefully weighed and analyzed. Of course, guidance can be taken from reported decisions but no more. Indeed, a criminal case can have no precedent as conventionally understood.

30. Crl.Appeal No.682/2008 is dismissed.

31. Crl.Appeal No.316/2008 is allowed. Appellant Neeraj is acquitted of the charge of having murdered Hari Shankar. If not required in any other case he is directed to be set free.

32. Copy of the order be sent to Superintendent, Central Jail, Tihar for compliance.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

March 05, 2009
Dharmender