

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

+ **Bail Appn. No. 2585/2008**

% Date of reserve: 20.03.2009
Date of decision: 01.04.2009

MAHESH GUPTA ...PETITIONER
Through: Mr. Prem Kumar, Mr. Nitesh
Sawhney, Ms. Priya Bhatia, Adv.

Versus

STATE ...RESPONDENT
Through: Mr. Navin Sharma, APP

**CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG**

- | | | |
|----|---|-----|
| 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 |

MOOL CHAND GARG, J.

1. This order shall dispose of a bail application filed by the petitioner under Section 439 Cr.P.C. who is facing trial in FIR No.100/2008 under Section 365/302/201 IPC, P.S. Punjabi Bagh, West District, Delhi. The petitioner is in judicial custody since 19.03.2008, i.e., from the date of his arrest.
2. The case of the prosecution started with an FIR lodged by the wife of the deceased on 13.03.2008 alleging that the whereabouts of the deceased was not available since 09.03.2008 when the deceased called his wife at about 4:30 pm.
3. On the basis of the statement made by the wife of the deceased an FIR was registered under Section 365 IPC wherein the police added the offences under Section 302/201/34 IPC despite the fact that the dead body of the deceased has not yet been recovered, the petitioner

was arrested on 19.03.2008 without there being any direct evidence about his involvement in the aforesaid case. It is his case of the appellant that there is not even an iota of evidence collected by the Investigating Officer which might show that either the accused kidnapped or abducted Dr. Tipa Rapu Bhikshapati with intent to cause him to be secretly and wrongfully confined or to kill him nor there is anything to show that the deceased has actually died. It is submitted that a bail application was filed before the learned ASJ who dismissed the same without application of mind and made observations that the guilt of the petitioner may be established by the circumstantial evidence which have been narrated by him in in the following manner:

- i) Recovery of three diaries of the deceased and the recording of statement of Sh. Sunil Kumar, driver of official car of the deceased to prove illicit relationship of deceased with Babita.
- ii) Recovery of Scooty from Janak Puri Metro Station parking at the instance of accused Mahesh Gupta.
- iii) Recovery of pant and shirt of the deceased from Hiran Kudna Road Nala at the instance of the petitioner and their identification by the wife of the deceased.
- iv) Recovery of mobile phone and rings at the instance of co-accused Neeraj Bindal, also identified by the wife of the deceased.
- v) Call details made from mobile phone of accused and the victim showing that on 09.03.2008, three calls were exchanged on the mobile phones of accused and Dr. T.R. Bhikshapati. Two calls were made to the deceased from his mobile phone. Last call was made from the mobile phone of the deceased to accused Mahesh Gupta and deceased T.R. Bhiksha Pati was of Nangloi, where shop of accused is situated.

4. It is submitted that the recovery of three diaries of the deceased

and the statement of Sh. Sunil Kumar, driver of official car of the deceased at the most goes to prove that the deceased had illicit relationship with one Babita. It is also stated that recovery of scooty from Janak Puri Metro Station which is a normal parking site neither suggests nor prove the guilt of the petitioner for which he has been charged.

5. As regards the recovery of pant and shirt of the deceased, it is submitted that the pant and shirt so recovered does not contain any blood stain and the same has only been identified by the wife of the deceased without any judicial TIP or anyother evidence to corroborate that the pant and shirt of the deceased was in fact left at the place from where it has been recovered after committing anything wrong with the deceased. More over such pant and shirt can always be purchased from the market and could have been supplied by the wife of the deceased at the time of their recovery. It is also submitted that none of the recoveries affected by the prosecution have been witnessed by independent witnesses.

6. It is also stated that in the absence of any charge of conspiracy between the petitioner and his co-accused mere recovery of mobile and two finger rings at the instance of the co-accused does not connect the petitioner with the crime and therefore the petitioner is entitled to bail.

7. The petitioner has also relied upon a judgment delivered by the Supreme Court in Sattatiya @ Satish Rajanna Kartalia Vs. State of Maharashtra 2008 (1) CC Cases (SC) 226 wherein on the basis of similar circumstantial evidence, the Supreme Court held that no case was made out against the accused who was also prosecuted on the

basis of the circumstantial evidence. Relevant observations made in the said judgment are reproduced hereunder:

2. On 1.10.1994, PW1 Dr. Rasiklal Dwarkadas Dani, a resident of Pratap Building 173, Dadiseth Agyari Lane, Mumbai, telephonically informed Assistant Police Inspector (API), PW14 R.R. Gaekwad of Police Station Tilak Nagar that a man, who was later on, identified as Satish, was lying on the right side of the stairs of the building in a pool of blood. API Gaekwad reached the spot and removed that person to G.T. Hospital, where he was declared brought dead. PW14 recorded the information given by Dr. Dani as Ex.P6 and treated the same as FIR. He then handed over the investigation to PW13 Shamsheer Khan Wazir Khan Pathan, who was acting as night Police Inspector at L.T. Marg Police Station. The latter prepared Panchnama of the dead body. From the papers found in the pocket of the clothes of the deceased, the police contacted his brother, PW3 Rajaiyya Pochyya Bandapalli on 1-10-1994 itself and recorded his statement. After two days, the appellant and one Devabhuma Badapatti were arrested. On the day of his arrest i.e. 3-10-1994, the appellant is said to have made a statement and then took the police to Room No.45 of the third floor of the building known as Ganesh Bhuvan Dadiseth Agyari Lane, Mumbai and got recovered his pant and shirt which were said to be having stains of blood. On 4-10-1994, the appellant was medically examined by PW10 Shiv Narain Daund, who found that the thumb and index finger of the appellants right hand had been injured sometime back. On the next day i.e., 5-10-1994, the appellant took the police to PW7 Mohd. Farid Abdul Gani, who claims to have sold the handkerchief, which was found near the body of the deceased. On 6-10-1994, the appellant is said to have given some more information to the police and got recovered half blade (marked as Article 7) which was lying under the wooden platform in front of Ganesh Bhuvan. The clothes of the deceased, the pant and shirt belonging to the appellant and blade were sent for chemical examination. As per the Chemical Examiners Report, the clothes of the deceased were having human blood of O group. The pant and shirt, allegedly recovered at the instance of the appellant also had blood stains, but it could not be established whether the same was human blood of O group. The stain on the blade was also said to be of human blood but its identity could not be established by the chemical examiner.

5. The motive of the crime, as projected by the prosecutions was that the appellant was having illicit relation with Lakshmi wife of the deceased and Devabhuma Badpatti was having animosity with the latter because of the alleged murder of his father. The prosecution relied on the circumstantial evidence of last scene, recovery of blood stained pant and shirt from Room No.45, Ganesh Bhuvan Building, blood stained half blade and handkerchief found near the body of the deceased to prove the appellants involvement in the crime.

27. On the basis of above discussion we held that the

prosecution failed to establish the chain of circumstances which could link the appellant with the crime. The learned Trial Court and the High Court committed a serious error by relying on the circumstantial evidence of last seen, the recovery of pant and shirt from Room No.45 of Ganesh Bhuvan building, half blade from under the wooden board and the sale of the handkerchief by PW7 to the appellant.

28. In the result the appeal is allowed. The judgment under appeal and the one of the Trial Court are set aside and the appellant is acquitted. He shall be released forthwith if not required in connection with any other offence.

8. The petition has been very strongly opposed by the learned APP. According to him there are enough circumstances which connect the petitioner with the crime. He also relied upon a judgment of the Apex Court in Ramjee Rai & Ors. Vs. State of Bihar 2006 VII AD (SC) 481 where despite non-recovery of body, the conviction of the appellant based upon circumstantial evidence was upheld. Some observations made in that case are reproduced for the sake of reference:

31. In Lakshmi and Others v. State of U.P. [(2002) 7 SCC 198], this Court opined:

"Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder. It would depend on the facts and circumstances of each case. A charge of murder may stand established against an accused even in the absence of identification of the body and cause of the death."

9. The aforesaid observations are referral in nature applicability may defer upon the facts of each case. More so because it is not the case of the prosecution that the murder of the deceased had taken place on the basis of a conspiracy hatched between the petitioner and

Neeraj Bindal.

10. The recovery effected at the instance of the petitioner, namely, two wheeler scooter from a parking space which is the normal parking space in the area where the deceased was living is not a circumstance sufficient enough to hold that the petitioner was guilty of committing murder of the deceased.

11. No doubt while framing the charge, the learned trial Court has taken a prima facie view of the matter and has not gone into the sufficiency of the evidence of the prosecution but he has certainly observed:

7. Admittedly, there is no direct evidence in this case. The case is based on circumstantial evidence. The prosecution is bound to establish the circumstances from which the conclusion is drawn, the circumstance should be conclusive in nature and the circumstances so established should be consistent only with the hypotheses of guilt and inconsistent with the innocence. In this case, the body of doctor has not been recovered. It is not at all necessary for a conviction for murder that the carpus delicti be found. Undoubtedly, in the absence of carpus delecti, there must be direct or circumstantial evidence leading to the inescapable conclusion that person had died and that the accused are the persons who committed the murder. In coming to this conclusion in the absence of direct evidence, the court can rely on inferential evidence.

12. As regards the recovery of clothes of the deceased allegedly identified by his wife T. Sremati Devi, the ASJ also made an observation that *"No judicial TIP of colthes was conducted but as stated above, at this stage the court cannot go into the probative value of the evidence collected by the prosecution"*. While dealing with the recovery of Scooty at the instance of the petitioner, the Court further observed that *"Mahesh Gupta had also got recovered the Scooty of the doctor from the parking of Metro Station Janak Puri. The key of the Scooty has not been recovered but the same cannot be regarded as*

circumstances to disbelieve the recovery of Scooty at the instance of accused Mahesh Gupta.” Moreover there is also a contradiction about the place of murder inasmuch as while as per the conventional statement the deceased is stated to have been called by Mahesh Gupta at his shop but as per the disclosure statement of accused Neeraj Bindal when he reached at the shop of Mahesh Gupta, he found the shop closed and thereafter he was asked to reach at Metro Station Janak Puri.

13. In these circumstances, taking into consideration the shortcomings which appears in the case of the prosecution and without commenting upon the merits of the case at this stage, I direct the petitioner to be released on bail on his furnishing bail bond in the sum of Rs.50,000/- (Rupees Fifty Thousand) with one surety in the like amount to the satisfaction of the trial Court subject to the condition that he would not hamper the trial of the case and would not try to influence the witnesses. He would also not leave Delhi without the permission of the Court and in case he has a passport he would surrender the same to the concerned SHO within one week from the date of his release.

14. With these observations the petition is disposed of.

15. A copy of the order be sent to the trial Court concerned.

MOOL CHAND GARG, J.

APRIL 01, 2009
anb