

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

Judgment reserved on : February 01, 2010
Judgment delivered on: February 11, 2010

+ **CRIMINAL APPEAL NO.298/2000**

KRISHAN MURARI **..... APPELLANT**

Through: Ms. Ritu Gauba, Advocate/
Amicus Curiae

Versus

STATE **..... RESPONDENT**

Through: Mr. Manoj Ohri, Advocate

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. This appeal is directed against the impugned judgment in Sessions Case No.28/1997 emanating from FIR No.343/1997 P.S. Gokalpuri convicting the appellant Krishan Murari on the charge of Section 302 IPC for having committed murder of Brij Lal and the consequent order on sentence of even date sentencing the appellant

to imprisonment for life and also to pay a fine of Rs.5,000/- and in default of payment of fine to undergo simple imprisonment for a period of one month.

2. Briefly stated, case of the prosecution is that Brij Lal (hereinafter referred to as 'deceased') was a '*pheriwala*'(street vendor) who used to sell sarees in the area of Karawal Nagar, Sonia Vihar. On 9th May 1997 at around 9.00 am, Brij Lal left the house of his brother-in-law Amar Singh for work, carrying sarees worth Rs.10,000/- to Rs.12,000/- He, however, did not return back. His brother PW-6 Suraj searched for him and when Suraj failed to locate the deceased, he made a missing report to the Police Control Room, which information was conveyed to the Police Station Gokalpuri and was recorded as DD 36-B at 3.20 pm on 10th May 1997. On 11th May 1997 at 11.50 am, an information was received from wireless operator PCR that a dead body was found at a distance of 1 km from village Samapur in the farms near the '*baandh*'. The information was recorded as DD No.7-A, ExPW16/A at Police Station Gokal Puri and a copy thereof was sent to S.I. Rajiv Sinha through Home Guard Constable Subhash. The Additional SHO Inspector Safdar Ali PW-20 also left for the spot in the official vehicle. On

reaching the spot, Inspector Safdar Ali PW-20 and Sub-Inspector Vikramajit Singh PW-16 found a dead body wrapped in a gunny bag (taat bori) lying on the 5th pushta. The dead body, found wrapped in a multi-coloured khadi cloth, was taken out from the gunny bag. The body was in a very bad shape and could not be identified. Inspector Safdar Ali appended his endorsement Ex. PW-3/A on the DD report Ex.PW-16/A and sent it to the police station through Constable Pradeep Kumar, on the basis of which formal FIR Ex.PW-3/B was recorded.

3. The Investigating Officer got the dead body as well the spot of occurrence photographed from various angles. He also prepared a rough site plan Ex.PW-20/A. He took into possession the gunny bag Ex.PX-1, multi coloured cloth Ex.PX-5, a key ring Ex.PX-1 with two keys PX-2 and PX-3 vide memo Ex.PW-3/C after converting those articles into sealed parcels. On the same day, the dead body of the deceased was identified by his brothers PW-5 Tota Ram and PW-6 Suraj. The Investigating Officer sent the dead body for post mortem examination which was conducted by PW-2 Dr.N.K.Aggarwal, who, on examination of the body found two stab wounds on the

neck of the deceased and a lacerated wound on the front right side of the head. The doctor opined the time of death was three days from the time of commencement of post mortem examination and that the cause of death was shock due to haemorrhage. All the injuries were found to be ante mortem and sufficient to cause death in the ordinary course of nature. The doctor also observed that the dead body was highly decomposed.

4. On 9th June 1997, the appellant was arrested by PW-20 Inspector Safdar Ali, who on interrogation made a disclosure statement Ex.PW-7/D and pursuant to the disclosure statement he pointed out the place where the murder was committed. The pointing out memo is Ex.PW-7/A. The Investigating Officer found traces of blood at the spot pointed out by the appellant. He lifted blood samples from the spot. Thereafter, the appellant led the police party to a vacant plot from where he got recovered a '*thapki*' (a wooden bat) which was taken into possession vide memo Ex.PW-7/B. The appellant also led the police to a room in village Gamri and from there he got recovered a rexine bag Ex.P-5 which contained three sarees Ex.P-2 to Ex.P-4 which were taken into possession vide memo Ex.PW19/A. The co-accused of the appellant

Raju(since deceased) was arrested on 12th June 1997 who on interrogation made a disclosure statement Ex.PW-11/A, pursuant to which he got recovered a knife Ex.P-1 from the same vacant spot from where the '*thapki*' was recovered. The Investigating Officer prepared the sketch of the knife and thereafter took it into possession after converting it into a sealed packet. Later the knife Ex.P-1 as well as '*thapki*' Ex.PX were produced before the autopsy surgeon for his opinion and PW-2 N.K. Aggarwal, vide his written opinion Ex.PW-2/B opined that injuries No.1 and 2 found on the person of the deceased were possible with the kitchen knife Ex.P-1 and injury No.3 was possible with the wooden bat (*thapki*) Ex.PX. The Investigating Officer moved an application Ex.PW-4/A for holding the Test Identification Parade to fix the identity of the appellant but the appellant refused to take part in the TIP proceedings. The incriminating articles seized during investigation were sent for serological examination. However, neither the knife Ex.P-1 nor the wooden bat(*thapki*) Ex.PX were sent to CFSL for ascertaining whether or not those purported weapons of offence had traces of blood matching with the blood of the deceased. On completion of the formalities of

investigation, the appellant and his co-accused were sent for trial.

5. The appellant was charged for the offences punishable under Section 302 IPC read with 34 IPC, Section 392 IPC read with 397 IPC and Section 201 IPC read with Section 34 IPC. The appellant pleaded innocence and claimed to be tried.
6. In order to bring home the guilt of the appellant, prosecution examined 23 witnesses. We may note that there is no eye witness to the occurrence or the disposal of dead body and the prosecution case is based on the circumstantial evidence.
7. The appellant Krishan Murari was examined under Section 313 Cr.P.C. to afford him an opportunity to explain the incriminating evidence appearing against him. He denied the prosecution story and claimed to be innocent. He explained that he had come to Delhi to attend the marriage of his cousin Ram Sanwre at village Gamri. There he had an altercation with a rikshaw puller and both of them were taken to the police post on 3rd June 1997. The rikshaw puller was let off after some time but he was detained at the police station till 10th June 1997 and, thereafter, falsely implicated in this case. The

appellant also explained that there was a murder case pending against him and perhaps because of that reason, the police falsely implicated him in this case.

8. On perusal of record, it transpires that there is no eye witness to the occurrence or the disposal of the dead body. The prosecution case rests upon the circumstantial evidence. The main circumstances which form foundation of the conviction are the last seen evidence given by PW-8 Mohd. Rashid, recovery of plastic bag Ex.P-5 and sarees Ex.P-2 to P-4 from a room at village Gamri at the instance of the appellant, recovery of the alleged weapon of offence i.e. 'thapki' (wooden bat) Ex.PX at the instance of appellant and the refusal of the appellant to participate in the Test Identification Parade. The motive for the crime as per the case of prosecution was to rob the deceased of the sarees which he was carrying for sale as a street vendor.
9. Since the case of the prosecution is based upon circumstantial evidence, before adverting to the rival contentions, it would be useful to have a look on the law relating to circumstantial evidence. In the matter of **Padala Veera Reddy v. State of A.P.**, 1989 Supp (2) SCC 706, it was laid down by the Supreme Court that when a case rests

upon circumstantial evidence, such evidence must satisfy the following tests:

“10.(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

10. The above enunciated principle of law was reiterated in the matter of **State of U.P. v. Ashok Kumar Srivastava**, (1992) 2 SCC 86, where the Supreme Court, inter alia, observed thus:

“9. This Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negated on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.”

11. Learned counsel for the appellant has submitted that the impugned judgment of conviction is bad in law as well as facts and it is self-contradictory. After referring to the principles of law relating to circumstantial evidence enunciated in ***Padala Veera Reddy v. State of A.P.(supra)***, learned counsel submitted that though learned trial Judge has convicted the appellant on the basis of circumstantial evidence, he has ignored the fact that none of the incriminating circumstances have been firmly established by the prosecution and the so called incriminating circumstances taken into consideration by the learned trial Judge do not link the appellant with the death of the deceased. She further submitted that even the identity of the dead body has not been firmly established.
12. Expanding on the argument, learned counsel for the appellant firstly submitted that perusal of Rukka Ex.PW-3/A, the death report Ex.PW-20/C, the request for post mortem Ex.PW-20/D, brief statement of facts prepared by the Additional SHO Ex.PW-20/E and the post mortem report Ex.PW-2/A reveals that the dead body found at Yamuna Pushta was in highly decomposed condition. The face and right hand of the body was eaten away by maggots and

there were blisters on almost entire body and the face was therefore unidentifiable. Learned counsel has submitted that under these circumstances, it is highly improbable that the brothers of the deceased, namely, PW-5 Tota Ram and PW-6 Suraj could have identified that unidentifiable body as that of their brother Brij Lal (deceased).

13. We do not find merit in this contention because PW-5 Tota Ram and PW-6 Suraj are categorical that the dead body belonged to their brother Brij Lal and they have not been cross examined by the appellant on the aforesaid aspect of the case. Otherwise also, as per the testimony of PW-20 Inspector Safdar Ali, one key ring Ex.PX-1 with two keys Ex.PX-2 and Ex.PX-3 was found in the pocket of pant of the deceased. It is possible that PW-5 and PW-6 might have identified the dead body on the basis of the clothes on the dead body and the key ring as well two keys Ex.PX-1 to Ex.PX-3 respectively. Had they been asked about the basis of identification they perhaps would have explained the basis. Thus, we find no reason to doubt the testimony of PW-5 and PW-6 regarding the identity of the dead body.
14. The second contention of learned counsel for the appellant is that from the impugned judgment, it transpires that the main circumstance taken against the appellant by the

learned trial Judge is the recovery of the '*thapki*' (wooden bat) Ex.PX and three sarees contained in a Rexine bag Ex.P-2 to Ex.P-5 at the instance of the appellant. Learned counsel submitted that though the recovery of the aforesaid articles at the instance of the appellant is also doubtful, the aforesaid incriminating articles are not even linked with the crime. He submitted that the case of the prosecution is that '*thapki*' Ex.PX is the weapon of offence but there is no cogent evidence to establish this fact. Learned counsel pointed out that such wooden bats are common house hold implements used in washing of the clothes. Therefore, recovery of wooden bat from a residential room in Gamri village by itself cannot lead to an inference that it is the weapon of offence. Regarding the sarees Ex.P-2 to Ex.P-4 and Rexine bag Ex.P-5, learned counsel has submitted that those articles, as per the case of the prosecution, are part of the goods robbed from the deceased but there is no evidence whatsoever to establish that the Rexine bag Ex.P-5 and the aforesaid sarees Ex.P-2 to Ex.P-4 actually belonged to the deceased Brij Lal. Learned counsel further submitted that once it is doubtful that aforesaid articles are stolen property, the circumstance of recovery ought not to have been taken as a link in the chain of circumstances

leading to the inference of guilt of the appellant. Learned Prosecutor, on the other hand, has refuted this contention. He has submitted that PW-6 Suraj has stated that the deceased left the house in the morning of 9th May 1997 along with sarees worth Rs.10,000/- to Rs.12,000/- for selling in the area. He has also deposed that Brij Lal had kept those sarees in a Rexine bag of black and red check. His aforesaid version, according to learned counsel for the State, also finds corroboration from the testimony of PW-11 Kirpal, brother-in-law of the deceased. Besides, learned counsel for the State has also referred to the statements of PW-9 Ashok Jain, Salesman of M/s Shankar Sarees, Ucha Natwa, Chandni Chowk and PW-13 Rajesh Kumar, partner of M/s Rajesh Kumar, Chandni Chowk, who deposed that they had sold some sarees to Brij Lal vide respective cash memos Ex.P-6/C1 to Ex.P-6/C4 and submitted that from the aforesaid oral as well as documentary evidence, it is established that Brij Lal was a pheriwala and he had actually left his house with sarees for sale in the morning of 9th May 1997. Learned counsel also submitted that the recovery of three new sarees in a Rexine bag does link the appellant with the crime. We may note that the '*thapki*' Ex.PX was not even sent for serological examination to

ascertain whether it had traces of blood or some hair of the deceased which could have been the positive evidence to link the '*thapki*' Ex.PX to the crime.

15. We have considered the rival contentions on the aspect of the recovery. In our considered view, the prosecution has failed to link the recovery of Rexine bag Ex.P-5 and three sarees Ex.P-2 to Ex.P-4 with the crime. In order to succeed in establishing this link in the chain, prosecution was required to establish that the recovered Rexine bag and sarees actually constituted a part of the goods belonging to Brij Lal. There is no evidence on record to fix the identity of the aforesaid recovered articles. As per the recovery memo Ex.PW-19/A, the recovered plastic bag was of grey colour whereas according to the testimony of PW-11 Kirpal Singh, Brij Lal had left with the sarees keeping them in a Rexine bag of black and red colour. So far as recovered sarees Ex.P-2 to Ex.P-4 are concerned, those were not shown to either PW-6 Suraj, PW-11 Kirpal Singh, PW-13 Rajesh, saree shop owner or the salesman Ashok Jain PW-9 of the other saree shop for identification to establish that those three sarees were actually out of the lot of sarees sold by them to the deceased. Thus, in our view, neither the Rexine bag Ex.P-5 nor the sarees Ex.P-2 to Ex.P-4 have been linked with

the crime. Even the learned trial Court has not accepted the theory of the prosecution that the recovered Rexine bags and sarees were part of the goods belonging to the deceased because he has acquitted the appellant of the charge of robbery, which implies that he did not take the above referred incriminating articles as stolen goods belonging to Brij Lal.

16. Learned counsel for the appellant further submitted that another important factor which weighed with the learned trial Judge is the last seen account given by PW-8 Mohd. Rashid. She took us through the testimony of PW-8 Mohd. Rashid who deposed that on 9th July 1997, which he later on corrected himself and stated that it was the month of May, at around 2.00 pm, near 3rd Pushta Yamuna Khadar, he noticed three persons, including the appellant, talking with the deceased Brij Lal. They told the appellant that there was a marriage function for which they wanted to purchase sarees and requested him to accompany them to their nearby house and Brij Lal deceased went along with them. In the examination-in-Chief, PW-8 Mohd. Rashid stated that he had given the description i.e. age, height etc. of those persons to the police in a statement under Section 313 Cr.P.C. which implies that the appellant and his so-called

two associates were not earlier known to PW-8. Learned counsel has submitted that it is not safe to rely upon the uncorroborated testimony of Mohd. Rashid regarding the identity of the appellant as one of those three persons. Thus, learned counsel has urged us to reject the testimony of last seen. Learned Prosecutor, on the other hand, has submitted that the Investigating Officer had applied for holding the Test Identification Parade to fix the identity of the deceased and the appellant refused to participate in the Test Identification Parade despite of the warning given by the Metropolitan Magistrate that his refusal to participate in the Test Identification Parade may be used as a circumstance against him in the trial. Thus, learned counsel for the State has submitted that appellant, having refused to participate in the Test Identification Parade, now cannot be permitted to raise a plea that the identification of the appellant by PW-8 Mohd. Rashid in the Court ought not to be relied upon.

17. On careful consideration of the testimony of PW-8 Mohd. Rashid, it transpires that PW-8 Mohd. Rashid in his cross examination stated that prior to his testimony recorded in the Court, he had seen the accused outside the Court of Mrs. Mamta Tayal, Metropolitan Magistrate. Ex.PW-4/A is

the application of the Investigating Officer dated 10th June 1997 requesting for holding of the Test Identification Parade of the appellant. Perusal of this application reveals that it was moved in the Court of Mrs.Mamta Tayal. Therefore, a possibility cannot be ruled out that the appellant was shown to the witness Mohd. Rashid outside the Court of Mrs.Mamta Tayal, Metropolitan Magistrate before the fixing of date for Test Identification Parade. PW-4 Ms.Sarita Birbal, Metropolitan Magistrate, Karkardooma Courts recorded the proceedings pertaining to the request for Test Identification Parade after the above referred application was marked to her by the concerned Magistrate Mrs.Mamta Tayal. She has categorically stated that the appellant refused to participate in the Test Identification Parade on the ground that the police of Police Station Gokalpuri had already taken his photograph when he was in police custody and shown to the witnesses. He also took the plea that local police detained him in the police station on 3rd June 1997 but he was produced in the Court of Magistrate on 10th June 1997. In view of the factual matrix discussed above, we find it difficult to draw any adverse presumption on the basis of refusal of the appellant to participate in the Test Identification Parade, particularly when there is a doubt that

he might have been shown to the witness outside the Court of Mrs.Mamta Tayal. There is one other aspect to the matter. As per the testimony of PW-20 Inspector Safdar Ali, the appellant was arrested on 9th June 1997 on the basis of the secret information. If we go by the testimony of PW-8 Mohd. Rashid, he had not given the name and address of the appellant to the police, he had only given some physical description of those three persons whom he had seen talking with the deceased. In absence of any concrete or particular description, it is a mystery as to how the Investigating Officer managed to fix the identity of the appellant and arrest him. The explanation of the Investigating Officer that he arrested the appellant on the basis of secret information, in our view, is not reliable.

18. Lastly, learned counsel for the appellant has submitted that in a case based upon circumstantial evidence, motive is a very important factor, which is lacking in this case. She has submitted that once the recovered Rexine bag and sarees Ex.P-2 to Ex.P-5 are not identified as the stolen property belonging to Brij Lal, theory of motive fades away and as such the benefit of doubt ought to have been extended to the appellant. On the other hand, learned counsel for the State has submitted that motive in this case was to commit

robbery and the trial Court in Para 29 of its judgment has given a finding that there was a sufficient motive on the part of the appellant.

19. We find substantial force in the submissions made by learned counsel for the appellant. The impugned judgment is self-contradictory. Admittedly, the appellant was also charged for robbery punishable under Section 392 IPC read with 397 IPC and the learned trial Court, in the impugned judgment in Para 29, has observed that robbery of the sarees worth Rs.10,000/- was a sufficient motive on the part of the appellant and his co-accused persons to kill the deceased and in the same breath, in later part of the judgment, he has acquitted the appellant of the offence under Section 392 IPC read with 397 IPC. This circumstance reflects upon the 'couldn't care less' approach of the learned trial Judge and shows that he has dealt with the evidence in this case in a routine manner. The fact that the prosecution has not been able to establish the identity of the Rexine bag and sarees recovered at the instance of the appellant is sufficient to conclude that those recovered articles are not linked with the crime. In view of the aforesaid circumstances, we conclude that the prosecution

has failed to establish even the motive beyond a shadow of reasonable doubt.

20. In view of the above discussion, we find that the prosecution has failed to establish incriminating circumstances forming a chain so complete so as to lead to irrefutable inference of the guilt of the appellant. He is, therefore, entitled to the benefit of doubt. Thus, the impugned conviction cannot be sustained.
21. We accordingly accept the appeal and acquit the appellant.
22. The appellant is in jail. He be released forthwith, if not required in any other case.

AJIT BHARIHOKE, J.

February 11, 2010
Ks

A.K. SIKRI, J.