

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

Judgment reserved on: May 10, 2010
Judgment delivered on: May 17, 2010

+ **CRIMINAL APPEAL NO.598/2009**

RAKESH KUMAR **....APPELLANT**

Through: Mr. A.J. Bhambhani, Advocate

Versus

STATE(G.N.C.T.) OF DELHI **.....RESPONDENT**

Through: Mr. Lovkesh Sawhney, APP

WITH

CRIMINAL APPEAL NO.700/2009

DULI CHAND **....APPELLANT**

Through: Ms. Purnima Sethi, Advocate

Versus

STATE(G.N.C.T.) OF DELHI **.....RESPONDENT**

Through: Mr. Lovkesh Sawhney, APP

AND

CRIMINAL APPEAL NO.300/2010

ASHOK **....APPELLANT**

Through: Mr. Ajay Verma, Advocate with Mr. Gaurav
Bhattacharya, Advocate.

Versus

STATE(G.N.C.T.) OF DELHI **.....RESPONDENT**

Through: Mr. Lovkesh Sawhney, APP

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. Rakesh Kumar, Duli Chand and Ashok have preferred these appeals against the impugned judgment dated 23.03.2009 in Sessions Case No.33/07 FIR No.151/03 P.S. Narela, convicting them under Section 302 IPC read with Section 34 IPC for committing murder of Vijender (hereinafter referred to as the “deceased”). They have been sentenced to undergo imprisonment for life and also to fine of Rs.2,000/- each and in default of payment of fine to undergo SI for the period of two months each.

2. Briefly stated, case of the prosecution is that in the morning of 05.05.2003, an information was received at P.S. Narela that dead body of one Vijender was lying in the fields of Om Prakash behind the toilets of Metro Vihar, Phase-II, Holambi Kalan. The information was recorded as daily diary No.3A dated 05.05.2003 and copy thereof was entrusted to SI Rohtash Singh (PW11) for verification.

3. SI Rohtash Singh along with Constable Balinder Singh (PW3) reached at the spot of occurrence where he found the dead body of Vijender lying in the fields. There, he met PW5 Rajni and recorded her statement Ex.PW5/A. One empty cartridge, three wooden patties, copper ring, a slip on which Mobile No.9891221561 was written, a knife and a pepsi bottle were found at the spot of incident. He also found some blood on the earth. SI Rohtash Singh (PW11) lifted sample of the blood-stained earth, earth control, a blood-stained cotton piece from the spot of occurrence.

4. PW5 Rajni in her statement to the police stated that the marriage of her elder sister Kanti (PW7) was scheduled for 05.05.2003. On the night intervening 4th/5th May, 2003, there was *mehandi* ceremony in their house and many guests were present. The appellant Duli Chand along with two boys (later identified as the appellants Rakesh and Ashok) visited their house at around 12:00 in the night and remained there till 1:00 am. During said period, she served them water. They talked with her father (deceased) for some time and they left along with the deceased Vijender at around 1:00 am. In the next morning at about 7:15 am, they came to know that dead body of her father Vijender was lying in the fields. On the receipt of this information, she along with her mother reached the fields where they found the dead body of the deceased lying. She expressed

her suspicion against Duli Chand and said two boys in her statement. On the basis of aforesaid statement, formal FIR was registered.

5. Further investigation of the case was conducted by Inspector Mahipal Singh (PW18), SHO P.S. Narela. On completion of investigation, he challaned the appellants and forwarded them for trial. The appellants were charged for the offence of committing murder of Vijender in furtherance of their common intention punishable under Section 302/34 IPC. All of them pleaded not guilty and claimed to be tried.

6. In order to bring home the guilt of the appellants, prosecution examined 18 witnesses in all. The material witnesses, however, are PW5 Rajni, daughter of the deceased as well as the complainant, PW6 Smt. Sharmvati wife of the deceased and PW17 Ms. Kanti, daughter of the deceased besides Dr. B.N. Acharya (PW14), the Autopsy Surgeon and the Investigating Officer.

7. PW5 Rajni (the complainant) is the daughter of the deceased. She has stated that marriage of her sister Kanti was scheduled for 05.05.2003 and for that purpose their relatives had come to their house. She deposed that on the night of 04.05.2003 at about 12:00 midnight, appellant Duli Chand visited their house along with the appellants Ashok and Rakesh. She served them water. She claimed that the appellants remained there till 1:00 am when they left along with her father Vijender

(the deceased). The deceased did not return in the night and she had gone to sleep. At about 7:15 am in the morning of 05.05.2003, she came to know that dead body of her father was lying in the fields near the toilets. She visited said spot along with her mother Sharmvati where her statement was recorded by the police. She also stated that from the spot, police seized an empty cartridge, a knife, an empty pepsi bottle, an empty water bottle, a ring, a slip bearing phone number of her uncle Sunder besides the sample of blood found at the spot as also the blood-stained earth and control earth. PW6 Sharmvati has also deposed to almost similar effect.

8. PW17 Kanti, another daughter of the deceased testified in the court that her marriage was fixed for 05.05.2003. On 04.05.2003, there was a "*Manda*" ceremony at her house. The appellants Duli Chand, Rakesh and Ashok visited her house on the night intervening 4th/5th May, 2003 at about 1:00 am and she saw them talking with their father. Thereafter, they left the house along with their father and her father did not return back. In the morning, someone informed them that their father was lying in the field. She along with her mother and sister Rajni and some relatives went to that spot and found her father already dead. There were injuries on his head, eye and mouth and his teeth were broken. She saw an "*Angocha*" around the neck of her father. She stated that she had noticed that "*Angocha*" on the neck of the appellant Duli Chand when he

had visited their house earlier in the night along with other appellants. She also stated that the appellant Rakesh never taunted or threatened her and he never extended a threat that he would not allow anyone else to marry her. However, in cross-examination by learned APP, she admitted the suggestion of learned APP that the appellant used to tease and threaten her by saying: *"Shadi Tere Se Hi Karuga Or Tu Mare Lyea Hi Paidda Hui Hi Or Tera Shadi Kisi Or Se Nahi Hoone Doonga Iske Liya Jo Kuch Bhi Karna Pade Karunga"*

9. PW14 Dr. B.N. Acharya is the Autopsy Surgeon, who conducted post mortem examination on the dead body of the deceased. He testified that on examination, he found one *"Gamcha"* of red colour with black lining border tied around the neck of the deceased with a double reef knot in front and right side below the lower border of mandible above the thyroid cartilage. On removing the *"Gamcha"*, he noticed ligative mark on whole of the neck and deep groov present over the thyroid prominence. He also found 11 injuries on the dead body out of which two injuries were fire arm injuries, one was the entry wound and other was the exit wound. One injury was caused by a sharp object causing incised wound on right upper lip and other 8 injuries were caused by the blunt force. In his opinion, the death was caused due to combined effect of the head injury associated with haemorrhagic shock consequent to injury to heart and to right lung. According to the Autopsy Surgeon, strangulation of neck by

cloth was done just after the death. He fixed the time since death about 34 hours back which fixes the time of death of the deceased somewhere around 1:30 am on the night intervening 4th/5th May, 2003.

10. The appellants when examined under Section 313 Cr.P.C. denied the prosecution evidence and claimed innocence. Appellants Duli Chand and Rakesh Kumar explained that they have been falsely implicated in this case at the instance of one other Duli Chand, who was a resident of nearby jhuggi of Bapu Dham. Both of them submitted that initially during investigation said Duli Chand was detained by the police but later on he was allowed to go. Appellant Ashok Kumar Kumar claimed that he has been falsely implicated by the police. No witness in defence has been examined.

11. Shri A.J. Bhambhani, learned advocate appearing on behalf of the appellant Rakesh Kumar, Ms. Purnima Sethi, learned advocate appearing on behalf the appellant Duli Chand and Mr. Ajay Verma, learned advocate appearing on behalf of the appellant Ashok Kumar have argued on almost similar pattern. For the sake of brevity, we are not reproducing the specific arguments advanced on behalf of the respective appellants.

12. On perusal of the impugned judgment, it transpires that there is no eye witness to the actual occurrence and the case of the prosecution is based on the circumstantial evidence. The learned Additional Sessions

Judge has found the appellants guilty mainly on the strength of following three incriminating circumstances:

(a) That appellant Rakesh Kumar, son of the appellant Duli Chand used to tease Kanti, daughter of the deceased and wanted to marry her and he used to tell Kanti that *“Shadi Tere Se Hi Karuga Or Tu Mare Lyea Hi Paidda Hui Hi Or Tera Shadi Kisi Or Se Nahi Hoone Doonga Iske Liya Jo Kuch Bhi Karna Pade Karunga”*.

(b) That the appellants visited the house of the deceased on the night intervening 4th/5th May, 2003 and the deceased left with them at around 1:00 am and thereafter did not return back and his dead body was found in the nearby fields in the morning of 5th May, 2003.

(c) That appellant Duli Chand was seen wearing an *“Angocha/Gamcha”* when he visited the house of the deceased and said *“Angocha/Gamcha”* was found tied around the neck of the deceased when his dead body was found.

13. Before adverting to the rival contentions of the parties, it would be appropriate to have a look upon 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.”

14. 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.”

15. Learned Shri A.J. Bhambhani, advocate, leading the cause of appellants submitted that though the learned Additional Sessions Judge has rightly quoted the law relating to appreciation of evidence in a case based upon circumstantial evidence he, however, has failed to apply the law correctly to the facts of this case. Learned counsels submitted that the learned trial Judge has failed to appreciate that the prosecution has miserably failed to firmly establish either of the above three incriminating circumstances which form basis for the conviction of the appellants. In this regard, learned counsels referred to the various contradictions and infirmities in the prosecution case, which we propose to deal with at the appropriate stage, and pressed for acquittal of the appellants.

16. Learned counsel for the State, on the other hand, has argued in support of the impugned judgment. He submitted that from the consistent testimony of PW5 Rajni, PW6 Sharmvati and PW17 Kanti, daughters and wife of the deceased who are the natural witnesses it is established that the deceased left with the appellants on the fateful night at around 1:00 am and thereafter he did not return back and was found dead in the fields in the morning of 05.05.2003 at 7:15 am. Learned counsel for the State further submitted that even the motive for the crime is also established from the testimony of PW17 Kanti who stated that the appellant Rakesh wanted to marry her and he had been threatening her that he would not allow her to marry anyone else. Learned counsel for

the State further submitted that above stated two circumstances coupled with the recovery of “*Angocha*” which Duli Chand, appellant was seen wearing, found tied round the neck of the dead body, form a complete chain of circumstances leading to an irrefutable inference of guilt of the appellants leaving no scope of any hypothesis of innocence of the appellants. Thus, learned counsel for the State has urged us to dismiss the appeal.

17. We have considered the rival contentions. On perusal of material on record, we find substantial merit in the contentions raised by respective counsels for the appellants.

18. The first circumstance relied upon by the prosecution is the motive. The case of the prosecution is that the appellant Rakesh Kumar who is son of the appellant Duli Chand and friend of appellant Ashok was keen on marrying Kanti, daughter of the deceased and he had on several occasions teased her and expressed his intention to marry her by saying thus: “*Shadi Tere Se Hi Karuga Or Tu Mare Lyea Hi Paidda Hui Hi Or Tera Shadi Kisi Or Se Nahi Hoone Doonga Iske Liya Jo Kuch Bhi Karna Pade Karunga*” and since the marriage of Kanti was fixed with someone else, in order to create obstruction in the marriage, the appellants did away with the deceased. To prove the above motive, the most vital witness is PW17 Kanti herself. She in her examination-in-chief categorically refuted the theory of motive by stating “accused Rakesh never gave any threat and

never taunted me prior to the incident. He never gave threat to me, not to marry with any other person.” If this version is to be believed, then the prosecution story of motive is demolished. Learned counsel for the State submitted that much importance cannot be attached to the above referred version of PW17 Kanti because when she was cross-examined by the learned APP with the permission of the court, she admitted that the appellant Rakesh used to taunt and tease her in the gali and she also stated that she had stated before the police that the accused Rakesh used to exhort *“Shadi Tere Se Hi Karuga Or Tu Mare Lyea Hi Paidda Hui Hi Or Tera Shadi Kisi Or Se Nahi Hoone Doonga Iske Liya Jo Kuch Bhi Karna Pade Karunga”* and that she had told those facts to her parents. Thus, as per the counsel for the State, from the aforesaid version of Kanti which finds corroboration from the testimony of PW5 Rajni and PW6 Sharmvati who also stated that Rakesh used to tease Kanti, the motive for crime is firmly established. We do not find merit in the above contention of learned counsel for the State mainly for the reason that the version of PW17 Kanti regarding teasing and taunting by the appellant Rakesh Kumar has come in response to a leading question put to the witness by learned APP in the form of a suggestion. Secondly, the version of PW17 Kanti that she stated to the police *“Shadi Tere Se Hi Karuga Or Tu Mare Lyea Hi Paidda Hui Hi Or Tera Shadi Kisi Or Se Nahi Hoone Doonga Iske Liya Jo Kuch Bhi Karna Pade Karunga”*, cannot be taken into

consideration as it amounts to a statement made to the police during investigation and is hit by Section 162 of the Code of Criminal Procedure which specifically bars the use of the statement made by a witness to the police under section 161 Cr.P.C. as substantive evidence. Thus, under the circumstances, we are of the view that the evidence of the prosecution regarding the motive is not convincing and the prosecution has failed to establish the motive for crime.

19. Another incriminating circumstance relied upon by the learned trial Judge is the last seen evidence provided by PW5 Rajni, PW6 Sharmvati and PW17 Kanti, daughters and wife of the deceased. PW5 Rajni complainant has stated that on the night intervening 4th/5th May, 2003 i.e. the eve of the marriage of her sister Kanti, the appellants visited their house at around 12:00 midnight. They remained there till 1:00 am when they left along with the deceased who did not return in the night and was later found dead in the fields on the morning of 5th May, 2003 at around 7:15 am. PW6 Sharmvati and PW17 Kanti have also deposed to more or less similar effect. PW17 Kanti had added that on the fateful night, there was "*Manda*" ceremony at her house and the appellants had visited to give *shagun* for her marriage. Aforesaid version of the above witnesses appears to be highly unnatural. Applying the standard of the natural human conduct, it is highly improbable that the deceased, on the eve of marriage of his daughter while "*Manda*" ceremony was going on, would

have left his guests and gone with the appellants without even telling the reason to his wife and children. It is the case of the prosecution that the appellant Rakesh used to tease Kanti and wanted to marry her and he had even threatened Kanti that he would not permit her marriage with any other person. PW5 and PW6 claim in their testimony that they were aware of the aforesaid threat. Even PW17 Kanti has stated that she had told her parents about said threat. If that was the case, it is highly improbable that the deceased and his family members would have welcomed the presence of the appellants including the appellant Rakesh at their house or that the deceased would have left the house in the wee hours of the night along with the appellants. Thus, under the circumstances, we do not find it safe to rely upon the last seen evidence and find that prosecution has failed to firmly establish this circumstance beyond doubt.

20. The next incriminating circumstance relied upon by the learned Additional Sessions Judge is the recovery of "*Angocha*" from the dead body. Case of the prosecution is that the "*Angocha*" which the appellant Duli Chand was purportedly wearing at the house of the deceased was found tied round the neck of the deceased when the dead body was recovered. In order to establish this circumstance, the prosecution is required to establish two facts i.e. (i) that Duli Chand was seen wearing that "*Angocha*" when he visited the house of the deceased and (ii) the

said “*Angocha*” was found tied round the neck of the dead body. As per the case of prosecution, there are three witnesses to establish the presence of the appellant Duli Chand at the house of the deceased at the relevant time. Out of them, PW5 Rajni and PW6 Sharmvati, the daughter and wife of the deceased, are silent about having noticed the appellant Duli Chand wearing an “*Angocha*” on his shoulder or his neck. These witnesses also did not mention about having seen an “*Angocha/Gamcha*” tied round the neck of the body of the deceased when they reached at the spot. PW17 Ms. Kanti, daughter of the deceased, is the only witness who has stated that when appellant Duli Chand visited their house, he was wearing an “*Angocha*” on his neck and that said “*Angocha*” was found tied round the neck of the deceased when she reached at the spot along with her mother and sister as well as some relatives. We do not find it safe to rely upon the aforesaid version of PW17 Kanti for the reason that in the complaint Ex.PW5/A, which formed basis for registration of the case, PW5 Rajni has stated that when they came to know about the dead body of the deceased found lying in the nearby fields, she along with her mother went to the spot and noticed the dead body of the deceased lying there. In the said complaint, she has not stated that PW17 Kanti had also accompanied them to those fields. Thus, it is doubtful that PW17 Kanti had gone to the spot from where the dead body of the deceased was recovered. That being the case, the testimony of PW17 Kanti regarding

the identification of “Angocha” is also suspect. Otherwise also, as per the case of prosecution, on the relevant night, “Mehandi/Manda” ceremony relating to marriage of PW17 Kanti was going on at their house. Therefore, it is highly improbable that PW17 Kanti, who was the star of the night, could have been in a position to notice the visitors. Learned counsel for the State has drawn our attention to the testimony of PW17 Kanti wherein she stated that the appellants had visited her house to give *shagun* for her marriage and submitted that since they had given *shagun* to her she was in a position to see that the appellant Duli Chand was wearing an “Angocha” on his shoulder/neck. We do not find much substance in this contention, firstly because PW17 Ms. Kanti has not clearly stated that the *shagun* was personally given to her. Secondly, had this been true, then PW6 Sharmvati, mother of Kanti would definitely have deposed about this and there would have been some mention of payment of *shagun* in the complaint of Rajni also, which is not the case. Thus, we are of the view that the recovery of “Angocha” belonging to Duli Chand from the neck of the dead body of the deceased is not firmly established.

21. In view of the discussion above, we find the prosecution has failed to establish either of the three incriminating circumstances beyond reasonable doubt. Therefore, we find it difficult to sustain the conviction of the appellants for the murder of Vijender (deceased) punishable under Section 302/34 IPC. We accordingly set aside the impugned judgment of

conviction and consequent order on sentence and acquit the appellants, giving them benefit of doubt.

22. The appellants are in Jail. They be released forthwith, if not wanted in any other case.

AJIT BHARIHOKE, J.

MAY 17, 2010
pst

A.K. SIKRI, J.