

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

% *Judgment Reserved On: 5th March, 2010*
Judgment Delivered On: 7th April, 2010

+ **CRL.APPEAL 262/2010**

MAHESH CHANDER Appellant
Through: Mr.K.B.Andley, Sr. Advocate with
Mr.M.L.Yadav, Advocate

versus

STATE Respondent
Through: Mr.M.N.Dudeja, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J.

1. Holding that the testimony of Ms.Suman PW-3, the wife of the deceased named Inderpal, established that the deceased was in the company of the appellant a little before the deceased was found grievously injured on a public street; the appellant absconding and the car of the deceased as also the key thereof and the mobile phone of the deceased being

recovered after the appellant was apprehended and the investigating officer recorded his disclosure statement and the appellant got the recoveries effected; notwithstanding motive not being proved, vide impugned judgment and order dated 28.1.2010 the appellant has been convicted for the offence of having murdered Inderpal. Vide order dated 30.1.2010, the appellant has been sentenced to undergo imprisonment for life.

2. When examined under Section 313 Cr.P.C. the appellant admitted visiting the house of the deceased at 11:00 AM on 17.7.2007 and the two i.e. the appellant and the deceased having gone to Noida and then returning to the house of the deceased accompanied by the wife of the appellant and his children along with one Jairam. But, denied that his wife and children remained behind in the house of the deceased and he i.e. the appellant accompanied by the deceased and Jairam left the house of the deceased and after sometime the appellant and the deceased returned to the house of the deceased, followed by the deceased and the appellant, along with the wife and children of the appellant having left the house of the deceased. As per the appellant, after he i.e. the appellant, the deceased, Jairam, the wife and children of the appellant came to the house of the deceased in

the evening of 17.7.2007, all of them left the house of the deceased. As per the appellant, Inderpal and Jairam dropped the appellant and his family a little away from their house and he left for Chandigarh along with a party in a private vehicle owned by a person. He returned to Delhi on 3.8.2007 when he was falsely implicated.

3. It may be noted at the outset that as deposed to by SI Harpal PW-23, the appellant was apprehended on 3.8.2007. As deposed to by ACP Rajeshwar Kumar PW-26 who was posted as the SHO PS Kalyan Puri in the month of July 2007 and took over the investigation after the FIR was registered, the appellant was not to be found in his house.

4. The appellant has not disclosed the name of the person whose private car he drove to Chandigarh on 17.7.2007. The appellant has not examined said person. The wife of the appellant named Suman appeared as PW-4 (the wife of the deceased is also named Suman and has deposed as PW-3) and claimed that since her child was not well and since her husband had to go to Chandigarh, she and her children went to her parental house and stayed there for a few days.

5. It is apparent that the fate of the appellant would be decided on the credibility of the testimony of Suman PW-3, the wife of the deceased. It is apparent that the appellant has

admitted quite a few facts deposed to by Suman but has joined issues as noted in para 2 above.

6. That on 17.7.2007 at around 9:30 PM Inderpal was found grievously injured on a street near Block 8, Trilokpuri, Near Bal Vikas School has been deposed to by Digamber Singh PW-6, as per whom when he was on the way he saw a person lying injured at the corner of the road and as he went near the person he could hear groans. He informed the police control room on the No.100 through his mobile phone No.9971610940 and that after sometime a PCR van and a CAT Ambulance reached and removed the injured to the hospital. Nawab Singh PW-7 posted as Assistant Ambulance Officer on Alpha 10 (CATS), has proved that he reached the spot at 9:42 PM on information provided to him by the police control room and he removed the injured to Lal Bahadur Shastri Hospital. That Inderpal was brought to Lal Bahadur Shastri Hospital by Nawab Singh at around 10:10 PM on 17.7.2007 has been proved by Dr.Parvesh Sharma PW-9 who attended on Inderpal and prepared Inderpal's MLC Ex.PW-9/A recording therein that a male whose name was not known was brought by Nawab Singh to the hospital and that the patient was dead.

7. From the testimony of Digamber Singh PW-6 it is apparent that the deceased was alive at around 9:30 PM but

was very seriously injured and could not even speak. It is apparent that the deceased was grievously injured a few minutes prior to 9:30 PM. This is reconfirmed when we look at the post-mortem report Ex.PW-19/A of the deceased, proved by Dr.Mukta Rani PW-19, the author of the report, which lists 12 injuries on the person of the deceased, all of which are directed towards the neck. The incised, the lacerated and the abrasion wounds are on the chin, cheek, mouth and the neck of the deceased. The internal jugular veins as also the internal carotid artery were cut. It is apparent that there was excessive blood loss due to the artery and the veins in the neck being cut. The nature of the injuries on the person of the deceased show that the deceased could not have lived for too long after he was injured. Thus, we have on record the fact that the deceased was injured just a few minutes prior to 9:30 PM.

8. Proximity of time and the place of the deceased being last seen alive in the company of the accused and the death of the deceased and the attendant circumstances enwombing the last seen evidence are of importance in a case of circumstantial evidence where last seen evidence is a crucial link.

9. A Division Bench of this Court, of which one of us, namely Pradeep Nandrajog, J. was a member of, had an

occasion to deal with the law of what is commonly known as last seen evidence and taking note of as many as 16 authoritative pronouncements of the Supreme Court being (2002) 6 SCC 715 Mohibur Rehman Vs. State of Assam, 2000 (8) SCC 382 State of West Bengal Vs. Mir Mohammad Omar, AIR 1955 SC 801 Deonandan Mishra Vs. State of Bihar, 1993 SCC (Cri.) 520 Anant Bhujangrao Vs. State of Maharashtra, (2002) 8 SCC 45 Bodhraj Vs. State of Jammu & Kashmir, (2003) 7 SCC 37 Babu S/o Raveendran Vs. Babu S/o Bahuleya & Anr., 2003 (8) SCC 93 Amit Vs. State of Maharashtra, (2005) 3 SCC 114 State of UP Vs. Satish, AIR 2006 SC 1708 Deepak Chanderkant Pail Vs. State of Maharashtra, AIR 2006 SC 1712 State of UP Vs. Deshraj, 2006 (3) SCALE 452 Ramreddy Rajeshkhanna Reddy & Anr. Vs. State of Andhra Pradesh 2006 (12) SCALE 321 Vikramjit Singh @ Vicky Vs. State of Punjab, 2007 (3) SCALE 740 State of Goa Vs. Sanjay Thakran & Anr., 2008 (9) SCALE 319 Venkatesan Vs. State of Tamilnadu, 2009 (3) SCALE 327 Vithal Eknath Adlinge Vs. State of Maharashtra and 2009 (8) SCALE 743 State of Uttar Pradesh Vs. Shyam Bihari & Anr. summarized the law, in para 103 of the decision in Crl.A.No.362/2001 decided on 10.8.2009 Arvind @ Chottu Vs. State as under:-

“103. We may summarize the legal position as under:-

(i) Last-seen is a specie of circumstantial evidence and the principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last-seen theory has to be applied.

(ii) It is not necessary that in each and every case corroboration by further evidence is required.

(iii) The single circumstance of last-seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last-seen.

(iv) Proximity of time between the deceased being last seen in the company of the accused and the death of the deceased is important and if the time gap is so small that the possibility of a third person being the offender is reasonably ruled out, on the solitary circumstance of last-seen, a conviction can be sustained.

(v) Proximity of place i.e. the place where the deceased and the accused were last seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.

(vi) Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the circumstance of proximity of time and proximity of place while applying the last-seen theory.

(vii) The relationship of the accused and the deceased, the place where they were last seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place

of the crime is the matrimonial house and the time the husband and wife were last seen was the early hours of the night would require said three factors to be kept in mind while applying the last-seen theory.

The above circumstances are illustrative and not exhaustive. At the foundation of the last-seen theory, principles of probability and cause and connection, wherefrom a reasonable and a logical mind would unhesitatingly point the finger of guilt at the accused, whenever attracted, would make applicable the theory of last-seen evidence and standing alone would be sufficient to sustain a conviction."

10. Suman PW-3, the wife of the deceased deposed that on 17.7.2007 at around 11:00 AM Mahesh i.e. the appellant came to their house and left in the company of her husband in their Maruti Car which was driven by the appellant as her husband did not know how to drive. They returned at around 6:30 PM and were accompanied by Jai Ram, the wife of the appellant and his children. She served cold drinks to all and thereafter the appellant, Jai Ram and her husband left the house in the same Maruti Car. The wife and children of the appellant stayed back with her. She spent some time with the wife and children of the appellant and went out to purchase vegetables and on return saw that the appellant and her husband had returned. Thereafter, her husband, accompanied by the appellant and his family left at around 8:30 PM. She handed over Rs.1,000/- to her husband. She telephoned two or three times to contact her husband on his mobile phone but

received the message that the phone was switched off. At around 10:30 PM she received a telephone call from the police informing her that her husband was admitted at Lal Bahadur Shastri Hospital. She reached the hospital and found her husband dead. She deposed that the mobile phone Ex.P-1 and the key ring containing a bunch of keys Ex.P-3 belonged to her husband and that the keys were of their Maruti Car.

11. The cross-examination of Suman PW-3 is as under:-

“It is correct that earlier, we used to stay in Kondli. Accused Mahesh did not come to my house on 17.7.2007 for the first time. My husband Inderpal and Jai Ram had not known each other for long. I do not know as to whether Jai Ram has also been staying in Kondli, where we used to live earlier. I do not remember as to whether I stated in my statement to the police that Jai Ram was residing in New Kondli. Confronted with portion. A to A of statement Ex.PW-1/D-1, where it is so recorded. My husband did not misbehave with the wife of the accused in my presence on 17.2.2007. Wife of the accused also never complained to me for any misbehavior of my deceased husband. It is incorrect to suggest that my deceased husband, Jai Ram, accused Mahesh and his wife with their children had together left my house on 17.2.2007 at about 7.00/7.15 pm. Vol. Jai Ram had left earlier and it was my husband, Mahesh, his wife and their children only left together at 7.00/7.15 pm. On that day, in my presence, no arguments took place between my deceased husband and the accused. It is correct that when they left, ‘Yeh Khushi-Khushi Gaye’. Prior to the date of incident, the wife and children of accused Mahesh had never visited my house. I had also never visited their house earlier.

I do not remember as to how many times, police recorded my statement. It is incorrect to suggest that my husband knew driving car. Police recorded my statement at the PS. It is incorrect to suggest that the

accused has been falsely implicated by me in collusion with the police. It is also incorrect to suggest that I am deposing falsely." (The date 17.2.2007 appears to be typographic mistake for the reason the date of occurrence is 17.7.2007 and nothing happened on 17.2.2007).

12. Suffice would it be to state that the only variation in the testimony of Suman vis-à-vis her statement recorded under Section 161 Cr.P.C. is that she did not tell the investigating officer that Jai Ram was a resident of New Kondli. The same is irrelevant for the reason it is inconsequential. Whether Jai Ram resided at New Kondli or not has no bearing on the issue.

13. Thus, one can safely say that Suman PW-3 has stood the test of credibility and her sworn testimony has not been shaken on cross-examination.

14. The testimony of Suman shows that Jai Ram had parted company when her husband and the appellant left in the late evening. Thereafter, her husband and the appellant returned to their house and left thereafter at around 8:30 PM when the wife and children of the appellant also left the house. Thus, it stands proved that the deceased left his house in the company of the appellant and the wife and children of the appellant at around 8:30 PM. They left New Kondli colony which is in East Delhi and the destination was Mayur Vihar, where the appellant resided (a fact stated by him while answering the last question put to him when examined under

Section 313 Cr.P.C.), which is also a colony in East Delhi. Though not on record, but with reference to the map of Delhi the distance between the two colonies is about four kilometers. The testimony of Digamber Singh PW-6 and Nawab Singh PW-7 prove that the deceased was found grievously injured at Block-8, Trilokpuri, near Bal Vikas School. Trilokpuri is also a colony in East Delhi at a distance of about 2 kilometers from New Kondli as also Mayur Vihar.

15. Thus, there is proximity of time and place when the deceased, when alive, was seen in the company of the appellant and the time and place where he was found injured.

16. The defence of the appellant that when he, his wife and children left the house of the deceased, not only the deceased but even Jai Ram was with them, is false. It is contrary to what Suman PW-3 has deposed to.

17. Nothing has been brought out to show that Suman PW-3 was inimical towards the appellant and therefore did not depose truthfully. If indeed, even Jai Ram was present when the appellant, his wife and children and the deceased left the house of the deceased, we see no reason why Suman would not say so. We see no reason why Suman would exclude the presence of Jai Ram.

18. Notwithstanding the fact that the learned Trial Judge

has returned a finding that motive for the crime has not been established, but we can sense a motive through the suggestions given to Suman PW-3. A suggestion has been given to her that her husband misbehaved with the wife of the accused in her presence and that the wife of the accused complained to her pertaining to the misbehavior of her husband. Of course, Suman had denied the same. But, the two suggestions by the appellant show that as far as the appellant was concerned, he was definite in his mind that the deceased had misbehaved with his wife.

19. The appellant has not denied that he was not to be found in his house in the night of 17.7.2007. The appellant has also not denied his being apprehended at Delhi on 3.8.2007. Thus, there is proof, through the mouth of the appellant himself that he was not in Delhi between the night of 17.7.2007 and the afternoon of 3.8.2007, when he was apprehended. The appellant has tried to justify his absence by stating that some person had asked him to drive his private vehicle to go to Chandigarh and that he drove the said vehicle to Chandigarh and therefrom to Ludhiana and returned to Delhi on 3.8.2007. The name of said person, the address of said person, the place visited at Chandigarh and then at Ludhiana has not been disclosed by the appellant.

20. Having admitted not being found in his house from the night of 17.7.2007 to 3.8.2007, we are of the opinion that the onus was on the appellant to justify the plea of alibi for the facts relatable thereto were within the special knowledge of the appellant. The fact that the appellant gave no particulars of the person whose vehicle he allegedly drove to Chandigarh require us to hold that the appellant was absconding from his house and the reason for his absconding was to flee from justice.

21. Notwithstanding the fact that Girish Chand PW-13, a witness to the two seizure memos Ex.PW-13/A and Ex.PW-13/B has turned hostile, but we note that Girish Chand, as deposed to by him is the brother of Suman PW-4, the wife of the appellant. Thus, Girish Chand, having a motive not to support the case of the prosecution is writ large. But, SI Harpal PW-23 and ACP Rajeshwar Kumar PW-26 have proved that pursuant to the disclosure statement Ex.PW-23/A, the appellant got recovered the Maruti Car belonging to the deceased as also the mobile phone of the deceased and the key ring containing three keys of the car in question. That the car was lying parked in Noida in an open parking lot and the mobile phone was recovered from an open field, in the facts of the instant case do not make the recovery of the two as untrustworthy for

the reason as deposed to by the wife of the deceased her husband had his mobile phone with him when he left the house. The said mobile phone was not found by the police at the spot where the deceased was found injured. It is apparent that somebody had removed the mobile phone. It is apparent that somebody had thrown away the mobile phone. The question of the police planting the same does not arise for the reason, before it could be planted, it had to be in the custody of somebody who had a motive to plant the same or was in the custody of the police. Similarly, the fact that the Maruti Car was driven away from the house of the deceased proves the fact that the key of the car was in the car at the ignition plug. The said key being planted also does not arise.

22. The plea of learned counsel for the appellant that Jai Ram was not examined as a witness requires an adverse inference to be drawn is rejected for the reason having believed the testimony of Suman PW-3, we see nothing on which Jai Ram could have thrown light upon. As per Suman, Jai Ram had parted company before her husband left the house in the company of the appellant and his family.

23. It was urged that the last seen evidence relates to the deceased being last seen in the company of the appellant, the wife of the appellant and the children of the appellant,

means that anyone of them could have committed the crime and there is nothing to show anything distinct qua the appellant.

24. The plea requires to be noted and rejected for the reason the injuries on the person of the deceased and the opinion of the doctor who conducted the post-mortem of the deceased establishes that a broken beer bottle was the weapon of the offence; indeed, from the spot where the deceased was found injured as entered in the seizure memo Ex.PW-22/C, pieces of a broken bottle of beer were lifted and as per the report Ex.PW-10/1 of the serologist human blood of group 'A' i.e. the same group as that of the deceased was detected. Only a man, not a woman much less a child, could have committed the crime. The post-mortem report of the deceased shows that he was stout built and was 5'7" tall.

25. We agree with the trinity of incriminating circumstances held established against the appellant by the learned Trial Judge and in addition also find a possible motive surfacing, being the suggestions put to the wife of the deceased that the deceased had misbehaved with the wife of the appellant.

26. With reference to the injuries on the deceased, none can argue that he who caused the injuries cannot be saddled

with the liability of intending to cause the death of the deceased.

27. We find no merit in the appeal which is dismissed.

28. Since the appellant is still in jail we direct that a copy of the instant decision be sent to the Superintendent, Central Jail, Tihar for being made available to the appellant.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

APRIL 07, 2010
mm / dk