

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

**RESERVED ON: 22.03.2011
PRONOUNCED ON: 28.03.2011**

+ CRL. A. 993/2001

STATE Appellant

Through: Mr. Lovkesh Sawhney, APP

versus

MOHD. MUKHTIAR Respondent

Through: Ms. Aishwarya Rao, Amicus Curae

CORAM:

**MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL**

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| 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 |

MR. JUSTICE S.RAVINDRA BHAT

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1. This judgment disposes off the State's appeal - by leave- against the judgment and order of learned Additional Sessions Judge dated 8th May, 2001 in Sessions Case No.82/1997. The Trial Court by its judgment acquitted the respondent of the charge of having committed the offence punishable under Section 302 IPC.

2. The prosecution allege that Shri Krishan Kumar Tandon ("the deceased"), a retired teacher residing in House No. K-6C, SFS Flats, Saket, New Delhi, was murdered in the evening

of 25th August, 1997. It was alleged that around 9:00 P.M. on that day, information was received at the Police Post Saket that one Vijay Mathur (resident of K-36C) had telephoned intimating about an attempt to commit murder. The information was processed and SI Anil Kumar (In-charge of the Police Post and IO in the case, who deposed as PW-15) went to the site where he found the deceased in the drawing room of his flat. A piece of yellow electric wire was found near the dead body. The prosecution alleged that subsequent investigations revealed that at the time of occurrence of the incident there was nobody else in the house. The statements of two of the deceased's sisters Smt. Krishna (PW-1 who used to live with the deceased in the same flat) and Lajwanti (PW-4) both of whom had allegedly seen him last alive, were recorded. The prosecution alleged that the respondent was the last to have been seen with the accused. It was alleged that the respondent was a floor grinder who had visited the deceased's house the previous evening i.e. 24th August, 1997 at about 7:00 P.M. revealing his identity and asked for a rope for pulling the (Floor Grinding) machine. A wire was given to him by PW-1. The respondent allegedly cut the wire in two and kept one piece in the balcony after knotting it and the other piece, for pulling the machine. It was alleged that the grinding machine did not reach the flat that day and the respondent stayed on till late. At the time he left the flat on 24.08.1992, PW-1 gave him an umbrella.

3. It was alleged that the next day i.e. 25.08.1997, also the respondent visited the deceased's flat; it happened to be *Janamastami*. It was further alleged that the deceased's two sisters PW-1 and PW-4 left him (the deceased) to visit the nearby temple. The respondent also left around the same time. While returning they noticed the respondent in the vicinity of the bus stand. They entered the house and discovered the deceased was lying with a yellow electric wire around his neck. The *almairah* allegedly was found open; neither PW-1 nor PW-4 could state if any contents were missing. On the basis of these facts and further investigations, the prosecution filed a final report; the respondent was charged with committing murder of the deceased. He entered the plea of not guilty and claimed trial.

4. In the impugned judgment the learned Additional Sessions Judge after reviewing the evidence led before him in the form of 18 prosecution witnesses and other materials, concluded that there was insufficient basis to hold the accused guilty of offence. The trial court noticed that even though the prosecution alleged that the respondent had visited the deceased flat claiming to be employed by Raju, (the same was also deposed to by PW-1 and PW-4) the deposition of Raju

was not recorded and the testimony of the other two witnesses was not helpful on this aspect. The Court also concluded that the witnesses' nearest and proximate in point of time to have deposed that the respondent was last seen with the accused, made conflicting statements in their depositions. The Court further stated that the reliance on recovery of yellow electric wire stated to have been used as a weapon of offence, was doubtful and that the whole prosecution version about the respondent continuing to be in the vicinity of the flat at the time of the two eye witnesses return was inherently implausible.

5. The learned APP submitted that the Trial Court fell into error in not holding that all the circumstances requisite for approving the guilt of the respondent had been established. It was submitted that post mortem report conclusively showed that death was caused by suffocation and strangulation and the ligature marks around the neck were the result of such strangulation. It was further submitted that the prosecution established that the respondent was present in the deceased's flat on 24.08.1997 and was provided with the yellow electric wire, which was cut by him into two pieces. That yellow wire was found tightened around the neck of the deceased and this fact was spoken to by PW-1 and PW-4. Further the respondent left just before or around the time when PW-1 and PW-4 left the deceased's flat. The deceased was alone at that time in his premises. When they returned, the respondent had not left the vicinity and was close by, in a bus stand. The accused's presence was also spoken to by PW-1 who mentioned that a neighbour, Mrs. Kaju had heard him talking to the deceased after the two witnesses had left the premises. It was further argued that the Trial Court not only did not notice these events but also ignored crucial recovery made from the respondent pursuant to his disclosure statement. That was recovery of blood stained shirt, which contained the stains of the same blood group as the deceased.

6. It was emphasized that the evidence of PW-3, the brother of Raju, reveals that the work of floor grinding and polishing of the deceased's flat was given to PW-5, i.e. Lajpat Paharia. PW-5 on the other hand stated that he never deputed the respondent for doing such work and had given him some work about 15 days earlier. The learned APP stated that significantly, PW-5 had deposed about the respondent revealing his identity and name as Sanjay and not Mukhtiar. As to the motive, it was argued that even though there was no recovery pursuant to the disclosure or evidence from the respondent premises of any valuables, the fact remains that on the day of occurrence, the *almairah* in the deceased's house were ransacked. However, the deceased's

sisters could not pin point any missing article as they were unfamiliar with the contents of the *almairah*. This however, did not detract from the strong circumstance of the respondent having exploited the situation whereby the deceased was alone, taken advantage of it, killing him and having ransacked and fled with valuable articles. There was a clear connection with the wire which was undoubtedly the weapon that caused death and the respondent who had been handed over the same on the previous day. He had cut the wire into two pieces. The evidence lead before the Court also established that a larger piece measuring about 56 inches was in fact the one used to strangle the deceased. Both PW-1 and PW-4 spoke about having seen it tied around the neck of the deceased and removed it thereafter. Having regard to these totality of facts, there was no doubt that the only hypothesis which the evidence points out was that of the guilt of the respondent and every possibility of his innocence stood excluded.

7. The learned Amicus appearing on behalf of the respondent argued that the Trial Court findings should not be disturbed as they are sound and well reasoned. It was urged that the most important witness who could have substantiated the prosecution story about whether the respondent had in fact been deployed to work in the deceased's flat was Raju. Concededly, Raju was not examined. Both PW-1 and PW-4 spoke about the respondent having mentioned that Raju had employed him to do the floor grinding work in the flat. PW-3's evidence is therefore irrelevant. As regards the evidence of PW-5 Paharia, it was submitted that his allegation about misrepresentation of the respondent's identity is unfounded. Furthermore, the prosecution never stated that PW-5 had been hired or had hired the respondent to work in the flat.

8. It was next submitted that besides Raju's testimony the prosecution also did not consider it important to examine Mrs. Kaju who claimed to have seen or heard the respondent talking to the deceased after both his sisters (PW-1 and PW-4) left his flat in the evening of 25th August, 1997. The prosecution also did not examine the first informant i.e. Mr. Vijay Mathur who had intimated the police in the earliest diary entry being Ex. PW7/A. If indeed the respondent was involved, nothing should have prevented the police from examining Mrs. Kaju who would have been the last person to have seen the deceased in the company of respondent. This omission was significant and also fatal to the prosecution story.

9. The learned Amicus further argued that the entire prosecution story about the respondent working for Raju is riddled with inconsistencies and inadequacies, and also has to be tested in the light of what is mentioned in the recorded disclosure statement Ex. PW 15/C which

unambiguously states that the respondent had revealed that Bablu had sent him to work in the flat. Furthermore the learned Amicus states that there are serious infirmities in the two versions of the prosecution witnesses PW-1 and PW-4. Whereas the former stated that the respondent left the flat on the previous day i.e. 24.08.1997 around 12.00 PM, PW-4 stated that he left that day at 9.00 PM. More importantly, PW-1 stated in her evidence that she noticed the respondent in Raju's shop when she left along with PW-4 to the temple on 25.08.1997. Further, PW-4 stated that the respondent was in the staircase when both of them (i.e. she and PW-1) left for the temple on that day.

10. It was further emphasized that the prosecution was not able to establish any blood marks on the wire nor did it prove presence of blood at the site. Referring to the CFSL report, learned Amicus submitted that the wire's examination did not disclose any blood on the article. More fundamentally, submitted the learned Amicus that there was no blood on the deceased's body. In these circumstances, the allegation about the deceased's blood stains being found on the accused's clothes was not believable. The absence of any recovery further weakened the prosecution case as no motive was established on the appellant's part, for him to indulge in such an extreme act of murder. The complete absence, of any independent witness to support the prosecution case falsified its story. It was argued, in summing up that the prosecution story about the accused having been seen last in the company of the deceased was utterly unbelievable and the Trial Court acted reasonably in acquitting the respondent of the charges leveled against him.

11. The prosecution case, as noticed earlier was that the deceased died of strangulation. It alleged that the respondent was "last seen" with the deceased. It relied heavily on the testimonies of PW-1 and PW-4, the deceased's sisters. PW-1 lived with him (the deceased). The respondent, it was alleged, had used the brief opportunity when the two sisters went out to a temple, to strangle the deceased with a yellow wire, which had been provided by them (PW-1 and PW-4) a day before the incident, to enable him to grind or polish the floor in the flat. The prosecution alleged that he was also noticed when the two witnesses were returning; he was at a bus stop.

12. The Trial Court found that the two witnesses relied on by the prosecution, i.e. PW-3 and PW-5 alleged that the respondent had not been deployed by them to work in the deceased's flat. PW-3 was Raju (the contractor's) brother. He said that the respondent was not sent by Raju to work in the flat, and that PW-5 had been engaged for that purpose. PW-5, on the other hand,

stated that the respondent was not sent by him, and that he had given him some work about 15 days before the date (of incident). He also deposed that the respondent had introduced himself as Sanjay. Now, as regards deploying the respondent, the prosecution had clearly alleged that he told the two witnesses (PW-1 and PW-4) about having been sent by Raju. That individual did not depose in court. Therefore, the version of whether the respondent was employed or not, spoken to by PW-3 or PW-5 is irrelevant. Their understanding about the respondent being given the assignment, cannot be said to have proved that fact. Furthermore, as stated by the *amicus*, PW-15/A records that the respondent had been sent by Babloo. Although the document is inadmissible to prove anything, it certainly throws light on a certain understanding that there were several versions as to who had sent the respondent.

12. As regards the “last seen” theory propounded by the prosecution, this court notices that there are some inconsistencies, between the testimonies of PW-1 and PW-4. The former had stated that on the previous day, the respondent stayed in the premises till 12:00 midnight; PW-4 stated that he stayed till 9 PM. Similarly, there is a crucial contradiction between the version of the two witnesses, as to where they saw him, when they left the flat on the day of the incident – one said that he was in Raju’s shop; the other deposed that he was in the staircase of the same building. As if these were not enough, the prosecution has, intriguingly, not cared to examine the neighbour of the deceased, Ms. Kaju, who had allegedly seen the respondent conversing with the deceased, *after* PW-1 and PW-4 left for the temple. This incident, and the identity of Ms. Kaju, was deposed to by PW-1. If that were really the position, it was imperative for the prosecution to have produced that witness, as she would undoubtedly have been the last one to see the respondent with the deceased; concededly, the other two witnesses, PW-1 and PW-4 had not seen the respondent *with* the deceased, or in the same premises. The entire hypothesis of “last seen” is built on the opportunity that the respondent had in entering the house, and killing the deceased.

13. Speaking about the rule of caution which the courts should adopt while dealing with a prosecution based on the “last seen” rule, the Supreme Court, in *State of U.P. v. Satish* 2005 (3) SCC 114 held as follows:

"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the

deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW 2."

14. Besides the above flaw in the prosecution case, what is improbable, is that the respondent allegedly continued to remain in the vicinity after committing the crime, and was allegedly noticed by PW-1 and PW-4. It is logic defying to say that a murderer, after committing his foul deed, would continue to remain near the scene of crime, and risk being noticed. The other aspect which this court cannot ignore is that there is singular lack of motive, on the part of the respondent, by the prosecution. On the one hand, it is alleged that the *almairah* in the deceased's house was ransacked. However, no recovery has been shown; the prosecution also does not allege that any disclosure about a stolen article was made by the respondent. Now, in cases like the present, where the prosecution banks on circumstantial evidence, it is well established that while proving each circumstance, and proving its link with each other, one important component is motive. In the circumstances, the lack of any evidence about motive is a strong weakening factor to the prosecution hypothesis about the respondent's complicity in the crime.

15. Next, it would be necessary to examine the soundness of the Trial Court's findings regarding the wire, said to be the murder weapon, and recovered from the premises. The Trial Court found that to be a doubtful fact, and not believable. It reasoned that when the wire was removed by the two sisters, upon their return to the flat, the police visited the site, and had the spot and the body photographed. The wire was found only in one photograph, but was missing in the others. The Trial Court also noticed that the wire had been given to Raju, as per the evidence of PW-1. The Court also noted a major discrepancy in the depositions of PW-15 and PW-17 about the place where the wire pieces were recovered from. Furthermore, the court also notices that there was no mention of any blood, on the wire; in the circumstances, the question of the blood stained shirt belonging to the respondent, containing the deceased's blood, is doubtful.

16. It has been held that in circumstantial evidence based cases, the prosecution has to establish each circumstance, which unerringly points to the accused's involvement in the crime, the circumstances, taken cumulatively, forming a complete chain leading to the conclusion that within all human probability, the accused was guilty of the offence. The rule was explained, in *Padala Veera Reddy v. State of A.P.*, 1989 Supp. (2) SCC 706, as follows:

"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."*

The rule was explained yet again, in *State of U.P. v. Ashok Kumar Srivastava*, (1992) 2 SCC 86, 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."

17. In the present case, the prosecution was unable to establish all the circumstances, which could have supported only the hypothesis of the respondent's guilt. It did not also prove show that cumulatively, the evidence ruled out every possibility of his innocence. Furthermore, the impugned judgment does not require to be interfered with, because the appellant has not been able to demonstrate any substantial ground for interference. A verdict of acquittal is the affirmation of an accused's innocence, and parliamentary intention in not ordinarily allowing an

appeal to the prosecution, in such cases, means that *sans* such compelling or substantial reasons, the appellate court should display a circumspect approach in reversing such findings.

18. For the above reasons, this Court finds no merit in the appeal. It is therefore, dismissed.

S.RAVINDRA BHAT
(JUDGE)

March 28, 2011

G.P. MITTAL
(JUDGE)