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IN THE HIGH COURT OF DELHI AT NEW DELHI

**Reserved on: 09.11.2011
Pronounced on: 16.11.2011**

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CRL.A. 297/2011 & Crl. M. (Bail) 387/2011

ASHOK KUMAR

..... Appellant

Through: Sh. Deepak Vohra, Advocate.

versus

STATE NCT OF DELHI

..... Respondent

Through: Ms. Richa Kapoor, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MS. JUSTICE PRATIBHA RANI

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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

1. This appeal is directed against a judgment and order of the learned Additional Sessions Judge dated 08.11.2010 in S.C. No.121/2008 whereby the Appellant was convicted for having committed the offence punishable under Section-302, IPC. He was sentenced to undergo life imprisonment and also directed to pay fine.

2. According to the prosecution, on 07.06.2005, Police Station Uttam Nagar received information at 5:50 AM on telephone that a dead body was recovered from a park at Hastals Village, Uttam Nagar near the Government school. After recording the information (Ex.PW-14/A, DD-30A), SI Jassa Singh, PW-19 went to the spot with Constable Gauri Shankar. Inspector Ishwar Singh Beniwal who received information also went to the spot. The police

discovered that the body bore injuries on the face, both hands and neck, apparently caused with a sharp weapon. They also found a wrist watch and a mobile **phone lead** and a handle (lying at a distance of about 3 paces from the body). Blood was oozing from the head of the dead body. Subsequently, the deceased was identified as Mohd. Raza @ Madina by his brother Mohd. Hussain, who deposed as PW-3 in the trial. The FIR was subsequently registered as Ex.PW-8/A. The prosecution further alleged that the statements of witnesses were recorded and that the deceased used to carry on business of managing a juice shop. It was alleged that Rekha (PW-4) had recently stayed with the deceased; he had apparently arranged a rented place and she had left two days prior to the date of incident. The prosecution further alleged that on 06.06.2005 at 10:00 PM, the deceased was seen taking liquor with two persons and had gone towards the park from where his body was subsequently discovered in the early hours of the next morning. The Postmortem report Ex.PW-16/A which was based on the postmortem conducted on 09.06.2005, suggested that the time of death is about 2½ days prior to the date of examination. It, therefore, fixed the time of death at approximately 1-1:30 AM on 07.06.2005. The accused and Arif Ali @ Sagar were suspected by the police, as perpetrators of the crime. It was alleged that the accused were absconding. On 30.06.2005, the present appellant surrendered in the court and was arrested and on the basis of his disclosure statement recovery of certain articles was made. He and Arif Ali @ Sagar were charged for having committed the murder of Mohd. Raza @ Madina. They pleaded not guilty and claimed trial.

3. The prosecution relied upon the testimonies of 19 witnesses besides several material exhibits such as the postmortem report, report of the Forensic Science Laboratory, seizure memo etc. On overall consideration of these, the Trial Court concluded that the appellant was guilty as charged; however, the co-accused Arif Ali @ Sagar was acquitted.

4. Learned counsel for the Appellant urged that the Trial Court's findings are unsustainable because of fatal material contradictions between the testimonies of the prosecution witnesses. Learned counsel emphasized that prosecution's case being entirely based on circumstance of "*last seen*", the State was under an obligation to prove that it was only the Appellant and none else who could have been the author of the crime. It was submitted that the testimonies of PWs-2, 3 and 10 were relied upon to hold that the deceased was last seen with the Appellant. Counsel urged that the testimony of PW-2 Naresh Tyagi

suggested that he was not actually a witness but was later made to depose in favour of the prosecution. It was submitted that according to his testimony, the deceased was last seen with the Appellant and someone else. Their identities were unknown to him at that time. Counsel here highlighted that the time given by PW-2 about his sighting the deceased with the Appellant was 09:30 PM - 10:00 PM. In these circumstances, he could not have been the witness to the circumstance of the deceased's being last seen with the Appellant. As far as PW-3, the brother of the deceased is concerned, counsel urged that all that was suggested was that on 04/05.06.2005, a girl had come to the deceased's shop. The witness had a talk with the deceased and advised him against keeping the girl in his shop. He, however, at no stage mentioned seeing the Appellant.

5. Learned counsel submitted that the most important eye witness for the last seen circumstance i.e. PW-10, the deceased's nephew, claimed to have seen the latter on 06.06.2005 at 11:00 PM when he was leaving the shop. PW-10 mentioned that the deceased had left the shop with two people; he was, however, unable to identify the accused even during the trial, in the Court. Learned counsel submitted that in the course of cross-examination by the prosecutor at the permission of the Court, PW-10 agreed that the two people who had visited the juice shop left at 11:00 PM and also crucially deposed that at around 11:15 PM, the deceased left the shop stating that he would come back shortly thereafter.

6. Learned counsel urged that the so-called recovery of the article with which the death is alleged to have been caused i.e. *tawa* (pan) cannot be believed. It was urged that if the prosecution's case was that the Appellant and the co-accused left the juice shop with the deceased around 11:00 PM in the night of 06.06.2005 and further that he was killed with the *tawa*, the entire prosecution version failed the test of credibility. It was argued that the prosecution witnesses were silent as to whether the accused had any article similar to a *tawa* when they left the juice shop. If it were assumed that the deceased was taken indoors or that the *tawa* was brought from somewhere and used to beat the deceased, there would have been no occasion for the Appellant or for the attackers to have left it near the body.

7. Learned counsel argued that the recovery could not also have been connected with the Appellant because in a case entirely based on circumstantial evidence, no conviction can be founded on the recovery of a common article and that too from an open area. Lastly, it was

urged that even otherwise the prosecution had alleged that *tawa* was seized from an open park and a seal with the letters “RS” was fixed on the package, after it was sealed. This found mention in the seizure memo - Ex.PW9/D. Learned counsel submitted that the seal mentioned in the FSL report (which described the parcel Ex.6- in the report), however, mentioned that the seal bore the letters “ISB”. This mismatch or discrepancy went to the root of the matter, according to the counsel for the Appellant, because the prosecution could not prove that there was no scope for manipulation and planting of an article.

8. The learned APP relied upon the findings of the Trial Court and argued that they are well reasoned. It was emphasized that PW-2 is actually a witness to the last seen circumstance and he clearly mentioned having seen the deceased alive. He was also aware of his identity and could point out the Appellant. Learned counsel submitted that the reasoning in the impugned judgment i.e. that in view of the clear identification of the Appellant by PW-2 as the last man to have been seen with the deceased and the proximity of time i.e. about two hours (the deceased having been seen around 10-10:30 PM and the time of death being about 1-1:30 AM), prosecution had successfully established the Appellant’s complicity.

9. Learned APP submitted that so far as the recovery of the *tawa* is concerned, it was supported by the testimonies of PWs-2, 9 and 18. There was no reason to disbelieve the version of at least PW-2 in this regard. Learned APP highlighted that PW-9, the attesting witness to the seizure stated that the Appellant had pointed out to the place where the *tawa* was eventually recovered from. The Appellant significantly did not cross-examine the witness. It was submitted that the Trial Court adopted the correct approach by basing its conclusion on the broad test of probability and after observing further that the *tawa* was in fact hidden from public view in some bushes.

10. It can be seen from the above discussion that the prosecution’s case was based entirely on circumstantial evidence. In such cases, the Court has to satisfy itself that the prosecution proves each circumstance alleged against the accused beyond reasonable doubt and also further proves that each link in the chain of circumstances, equally, beyond reasonable doubt. Further, the Court has to always bear in mind that the circumstances proved should be so strong as to unerringly point to the guilt of the accused and none else and lastly that even a single hypothesis of innocence is ruled out (*Hanumant v. The State of Madhya Pradesh*, AIR 1952 SC 343 and *Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116). In

cases where the prosecution relies upon the theory of the accused being last seen in the company of the deceased - species of cases based on circumstantial evidence - the obligation to prove each circumstance which includes the motive becomes crucial. So far as cases based on the last seen theory are concerned, the Supreme Court had repeatedly emphasized that the time gap between the sighting of the accused and the deceased together and the death of the deceased should be so narrow as to rule out the possibility of any other person's involvement.

11. In this case, the prosecution relied for its "last seen" theory on the testimonies of PWs-2 and 10. PW-2 was a property dealer who claimed to have known the deceased Madina. According to the witness, Madina used to manage the juice shop near his residence. His testimony clearly is that he saw Madina with the Appellant around 09:30-10:00 PM after finishing his dinner in a *dhaba*. He deposed that Madina and two others were taking liquor in the juice shop; he even identified the Appellant as one of those. PW-2 claims to have taken a small quantity of liquor and gone home. Now, the medical evidence in the form of the postmortem report fixes the time of death to be around 1:30 AM on 07.06.2005. The testimony of PW-2 if taken in its entirety amounts to his having seen the deceased and the Appellant together around 10-10:30 PM on 06.06.2005. The other witness PW-10, the deceased's nephew (Mohd. Aleem) deposed to living in the juice shop. He deposed that he came to Delhi for three months in 2006 and stayed with his *chacha* i.e. the deceased. He also deposed that one day a TSR driver brought a girl to the shop where she stayed with the deceased. He further stated Mohd. Hussain, PW-3 rebuked the deceased about this incident; later on the deceased rented a separate room for the girl. The witness did not mention having seen the Appellant; he was also unable to identify him. The prosecution sought and was granted leave to cross-examine PW-10. During the course of that part of his deposition, he stated as follows: -

"It is correct that on 06.06.2005 at about 9:00 pm two persons came at the shop and they took liquor with Mohd. Raza. It is correct that one of those persons was aged about 25 years having fair colour and was wearing jeans pant while the other person was aged about 30 years having dark complexion and stout body. It is correct that about 10:00 pm Naresh Tyagi @ Mama who was passing from outside the shop, was also called inside and he also took liquor and that after 15 minutes he went back. It is correct that the other two persons left the shop at about 11:00 pm. It is correct that at about 11.15 pm, Raza also left the shop telling that he would be coming back shortly but did not return in the night. It is correct that next morning at about 6.00 am, the people

told me that my shop owner Raza has been murdered in a park.”

12. It can be immediately discerned that on the juxtaposition of the testimonies of PW-2 and 10 while there is consistency about the former having visited the deceased's shop and that two people had consumed liquor with him, PW-2's testimony merely stated that he left the three people i.e. the two accused and the deceased in the latter's juice shop and went home. Although PW-10 did not fully support the prosecution story initially, he agreed to the suggestion that all the said three people were near the shop or its vicinity till about 11:00 PM. He also agreed that the two people (whom he had seen with PW-2 and the deceased earlier) left the shop at 11:00 PM. Most importantly PW-10, on the suggestion of the P.P., agreed that the deceased left alone after the Appellant and his co-accused at 11:15 PM stating that he would return soon. Thus, the prosecution's allegations were apparently based on the testimony of PW-10, who saw the manner in which accused left the juice shop. He clearly states, on express suggestion by the learned PP - that the deceased left alone after the Appellant and the co-accused had gone away from the juice shop. This testimony undermines and destroys the entire prosecution allegations about the involvement of the Appellant. The other important aspect which this Court cannot lose sight of is that the murder weapon/article in this case is a *tawa*. It was recovered from an open field. However, the prosecution had tried to connect it with the Appellant by saying that *tawa* was recovered from some bushes hidden from public view. Even if that were to be assumed for the moment, there are plenty of authorities to the effect that the recovery of some article without establishing any linkage with the crime or the accused itself would not be an incriminating circumstance and certainly not sufficient in a circumstantial evidence based case to result in a conviction. Furthermore, the Appellant's argument on this aspect is merited; neither PW-2 nor PW-10 mentioned about the *tawa* or that the Appellant or co-accused left with any such article. Now the *tawa* is not the kind of article which normally people move around with; it is only kept in the kitchen. It can be easily noticed, if someone carries it; such behavior would also strike as odd, and attract attention. If in fact it were assumed that either the deceased was taken to some other place indoors or that one of the accused went into some premises and took out the *tawa* and later took it to the park where he was killed, it is highly improbable that the *tawa* would be left near the body.

13. Learned counsel had also urged - which we think has considerable force - that the seal

allegedly affixed on the parcel in which the *tawa* was kept bore the letters “RS”. However, the parcel which was opened by the FSL (called Ex.-6 in the report Ex.PX) bore the letters “ISB”. The prosecution has not explained this discrepancy in the testimony of any of its witnesses. This discrepancy and series of inconsistencies points to manipulation or tampering of the evidence to say the least.

14. We are of the opinion that the evidence as to the last seen circumstance led by the prosecution in this case not only cannot be believed but in fact undermines its entire story altogether. PW-10 who was presented as the witness to the last seen in fact deposed that the deceased left later after the accused. There is no evidence suggesting that the deceased had any prior agreement to meet the Appellant. Having regard to these facts, the conclusion of the Trial Court is, in our opinion, unsupportable from an overall appreciation of evidence on the record. We further notice that the prosecution was unable to establish any motive in the crime. It has been held in some judgments that normally in circumstantial evidence based cases, the prosecution has to prove motive. The absence of motive becomes material in such cases; correspondingly motive is not important in the case of direct or ocular evidence.

15. Having regard to the entirety of facts and circumstances, we are of the opinion that the testimony of PW-10 is fatal to the last seen theory propounded by the prosecution; the prosecution was unable to prove any motive. Furthermore, no link between the article recovered i.e. *tawa* and the appellant was proved. We are also of the opinion that the recovery itself does not connect the Appellant with the crime; even otherwise the recovery of the *tawa* and circumstance in which its alleged to have been used, are unbelievable.

16. In view of the above discussion, we are of the opinion that the impugned judgment requires to be set aside. The appeal, therefore, necessarily succeeds. It is consequently allowed. The Appellant shall be released forthwith.

**S. RAVINDRA BHAT
(JUDGE)**

**PRATIBHA RANI
(JUDGE)**

NOVEMBER 16, 2011