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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Hearing & Decision: 11th July, 2011

+ CRL. L.P. 158/2011

STATE OF NCT OF DELHI

....Petitioner

Through: Mr. Jaideep Malik, APP for the State.

versus

OM PRAKASH & ANR.

....Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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

yes .

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. The State seeks leave to appeal against the judgment dated 17.07.2010 passed by the learned Addl. Sessions Judge in Sessions Case No.1107/09 (Unique ID No.02404R0045312006) whereby the Respondent (the accused) Om Prakash @ Prakash @ Raj (hereinafter referred to as Om Prakash) was acquitted of the offence punishable under sections 302, 394, 397, 201 read with section 34 of the Indian Penal Code (IPC) whereas Respondent Atul Kumar was acquitted of all the charges framed against him.

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2. The prosecution case is that on 31.12.2003 DD No.44B was recorded at Police Station (PS) Shalimar Bagh by one Ranjeet Kumar (PW-5) to the effect that on 29.12.2003 at about 12:00 noon his sister's husband (*Jija*) Sanjay Chaudhary (hereinafter Sanjay) went to his shop in Naharpur on his two wheeler Scooter DEV 1389. However, Sanjay neither reached the shop nor returned home. Ranjeet Kumar informed the police that Sanjay was not traceable despite their best efforts. He did not express suspicion about anybody's involvement. It is alleged that Ranjeet Kumar gave information of Sanjay's having gone missing to his father Sureshwar Chaudhary. He reached Delhi on 02.01.2004 from his village Tiwara, District Vaishali (Bihar). He too searched for his missing son and contacted Om Prakash's landlord Amar Nath (PW-7) but did not get any information about Sanjay. He approached the police on 07.01.2004 and lodged a complaint that on 29.12.2003 at about 12:00 noon his son Sanjay had taken his friend Om Prakash from his house to his shop at Naharpur. He tried to contact Sanjay on his mobile No.33183781 but remained unsuccessful; Om Prakash returned but there was no information about Sanjay. The complainant expressed his suspicion that Om Prakash had abducted Sanjay.
3. The initial investigation of the case was done by the local police. Since, no clue about Sanjay and Prakash could be found, further investigation of the case was transferred to the Crime Branch in March, 2004. SI Daya Chand (PW-23) went to village Alipur Dumri, District Vaishali (Bihar), it transpired that an FIR No.117/04 was lodged by Om Prakash's father Nagina Ram against Sanjay Chaudhary and his father under Section 420/ 364 IPC. SI Daya Chand talked to the IO of the said case and opined that a false FIR had been lodged by Nagina Ram. SI Daya Chand visited Om Prakash's house in village Alipur Dumri and met his father. He disclosed that Om Prakash was residing in Mumbai. SI Daya Chand talked to Om Prakash on his mobile phone and came to know that he (Om Prakash) was working as a Tailor in the shop of one Seema Ratan and was

residing at Kalyan. SI Daya Chand returned to Delhi and then proceeded to Mumbai in search of Om Prakash. The SI met Ratan Seth and his wife Seema Ratan. It was confirmed that Om Prakash was working as a Tailor with them since 24.10.2005. Om Prakash was not available at his workplace or his residence.

4. It is alleged that the SI met Om Prakash's wife, who informed him (the SI) that Om Prakash had left for Bihar. On 17.11.2005 SI Daya Chand along with HC Jaya Prakash and Constable Satya Pal left for Vaishali. They reached PS Raja Pakar, District Vaishali and took Sanjeet Kumar, SHO with them. Om Prakash was arrested by memo Ex. PW-19/A from his home. He made a confessional statement Ex. PW-19/C and disclosed that he and co-accused Atul had committed Sanjay's murder on 29.12.2003 to rob him; they robbed him of ₹ 8,000/-. Om Prakash informed the SI that the dead body was thrown in a sewer in Mangolpuri Industrial area. He could get the dead body and the weapon of offence i.e. the scissors recovered from his rented room. In pursuance of Om Prakash's disclosure statement accused Atul was arrested. He too made a confessional/disclosure statement Ex. PW-20/C.
5. On 22.11.2005 SI Daya Chand along with Inspector Mahesh Tholia, ASI Rajbir Singh, HC Jai Prakash, ASI (Photographer) Ramesh, other police officials and the two accused reached Mangolpuri Industrial area. Both the accused pointed out the manhole (of the sewer) where they had dumped Sanjay's dead body. ASI Rajbir Singh arranged for some labourers and digging implements. On opening the manhole and shifting the mud from there, 15 human teeth and some human bones were recovered. The bones and the teeth were put into separate pullandas and sealed by the ASI.
6. On 24.11.2005 in the course of investigation Om Prakash led the police party to house No.B-1072, Avantika, Sector-1, Rohini, Delhi where he got recovered a

pair of scissors from a wooden box of his rented room. SI Daya Chand prepared a sketch Ex. PW-20/H and the scissors were put in a packet and sealed.

7. On completion of the investigation, a report under section 173 Code of Criminal Procedure was filed against the Respondents.
8. On Respondents' pleading not guilty to the charge, the prosecution examined 24 witnesses. PW-1 Smt. Rani, PW-5 Ranjeet Kumar, PW-6 Virender Kumar and PW-7 Amarnath were examined by the prosecution to prove that Sanjay the deceased was last seen alive in Om Prakash and Atul's company. The prosecution examined PW-15 Ashok Kumar a public witness, PW-5 Ranjeet Kumar, PW-12 SI Ramesh Chand (who videographed the alleged recovery of the teeth and the bones), PW-20 ASI Rajbir Singh, PW-21 Inspector Mahesh Tholia and PW-23 SI Daya Chand to prove recovery of the teeth and bones at the accused's instance. PW-24 Subhash Meena, PW-20 ASI Rajbir Singh and PW-23 SI Daya Chand also deposed about recovery of a pair of scissors at Om Prakash's instance. PW-8 Chaudhary Venkateshwar Gaur was examined to prove DNA analysis in respect of the teeth and the bones and PW-16 Naresh Kumar, Senior Scientific Assisant, FSL, Rohini was examined to prove that the teeth and the bones were of human origin.
9. By the impugned judgment the Trial Court convicted Om Prakash for the offence punishable under section 365 IPC. He was acquitted of the offence punishable under section 302, 201, 394, 397 read with section 34 IPC. Co-accused Atul was acquitted of all the charges. The Trial Court opined that last seen evidence in respect of accused Om Prakash was consistent and credible whereas no evidence of last seen was produced against Atul. The Trial Court disbelieved the recovery of the bones and the teeth as also the scissors.
10. Om Prakash's conviction for the offence punishable under Section 365 IPC is not the subject matter of the present leave petition. We are only concerned with the

acquittal of the accused Atul of all the charges and acquittal of Om Prakash of the charges except under section 365 IPC.

11. We have heard Mr. A. Pathak, learned counsel for the State and have carefully gone through the record.
12. It is argued by the learned counsel that although PW-7 Amarnath did not support the prosecution fully, yet he admitted having seen the deceased leaving the room with the two accused persons. The conduct of Om Prakash in not coming forward for Sanjay's search and falsely representing to PW-5 Ranjeet Kumar when he (PW-5) called him (Om Prakash) on his phone that he was in Ghaziabad. Though he was very much present in Delhi, his subsequent abscondence and recovery of bones and teeth though not connected by DNA, yet were found to be of human origin and were sufficient to connect the accused with the offence of murder and destruction of evidence, to screen the offender. The Trial Court, argued the learned counsel, fell into error in not believing this evidence though the accused had not given any explanation as to how and when they parted with Sanjay's company.
13. First of all, we would deal with the last seen evidence as against accused Atul. The prosecution examined PW-1 Smt. Rani and PW-7 Amarnath on this aspect. Smt. Rani deposed that on 29.12.2003 at about 5:00/ 6:00 PM she received a call at her residence. The caller wanted to speak to Atul, she called Atul and he attended the phone call and returned at about 8:30 P.M. she wanted to go to the doctor as she was unwell. On the way she met Atul, who offered to take her to the doctor. After meeting the doctor they returned and Atul left her house. She deposed that some time later Atul called her up to enquire about her health and also wanted to speak to his mother. She sent some child to call for Atul's brother but she did not turn up. Therefore, she rang off. The witness was permitted to be cross-examined by the learned APP on the ground that she had resiled from her

previous statement. She denied that she had friendly relations with accused Atul. She denied any knowledge that accused Atul was sitting at his friend Om Prakash's house on 29.12.2003. She denied that Sanjay's photographs were ever shown to her. She was confronted with the police statement Ex. PW-1/A. She, however, admitted that Atul had vacated the room and disappeared. Thus, it may be noticed that PW-1 did not depose anything incriminating against the Appellants.

14. PW-7 Amarnath deposed that he owned house No.F-2/160, Mangolpuri, Delhi. Accused Om Prakash lived as a tenant in one room on the first floor w. e. f. April, 2003 on a rent of Rs.700/- per month. On 29.12.2003 he cleared the account and vacated the room. He deposed that on 02.01.2004 Sukeshwar Chaudhary went to his room along with Ranjeet (PW-5) and he showed him Om Prakash's photograph. He (PW-7) informed him that Om Prakash was his tenant and had vacated the room. The witness was permitted to be cross-examined on behalf of the State as he had resiled from his previous statement. PW-7 denied that the accused Atul and one Sanjay Chaudhary were present with Om Prakash in the room on the night of 29.12.2003. He admitted having stated to the police that the three i.e. Om Prakash, Sanjay and Atul left on a two wheeler at 10:15 PM (on 29.12.2003). He hastened to add that this information was given to him by his sister Pratibha and he passed it on to the police.
15. Pratibha has neither been cited nor examined as a witness by the prosecution. PW-7's testimony, therefore, is only in the nature of hearsay evidence and cannot be used to hold that the deceased was last seen with Atul. As stated earlier, PW-1 Rani's testimony too does not connect accused Atul, in whose company the deceased was allegedly last seen alive.
16. With regard to the recovery of the bones and teeth of human origin at accused Om Prakash and Atul's instance, the Trial Court held thus: -

"It is evident from the material on record that a cleaning of the sewer was conducted by the Municipal authorities a few days earlier to the alleged date of recovery of the bones and teeth from the manhole. This being so, if there was anything present in the manhole the same could have been reported to the authorities by the Municipality which is not the case. This coupled with the manner in which the recovery has been videographed raises a suspicion in the mind of the court and the possibility of the same being stage-managed cannot be ruled out, more so as the recovered teeth and bones have not been connected with that of the deceased."

17. According to the prosecution, Sanjay's murder took place on 29.12.2003 and the dead body was dumped in the sewer through the manhole by the accused. The bones were allegedly recovered at the accused's instance on 22.11.2005 i.e. almost after 2 years of the occurrence. The evidence reveals that cleaning of the sewer was conducted by the Municipal Authorities a few days earlier to the alleged date of recovery of bones and teeth. In fact, cleaning of the manholes regularly takes place, particularly before each monsoon. The depth of the manhole has not been given by the prosecution. It is unbelievable that after almost 2 years the teeth or the bones of a dead body, which is pushed down to a manhole could be retrieved by cleaning the mud.
18. It is well settled that when the case rests only on circumstantial evidence, the circumstances in the first place have to be fully established and secondly the circumstances so established must be such as to prove the prosecution case beyond any reasonable doubt. Moreover, the circumstances so proved should exclude every possible hypothesis except the guilt of the accused.
19. In this case the circumstance of recovery of teeth and bones has not been firmly established. Moreover, the circumstance only leads to a mere possibility that it could be the deceased's bones and teeth. The recovery of *corpus delicti* is not essential to convict an accused for the offence of murder, yet the circumstances

established must show that it was the accused, who had committed the deceased's murder. The only circumstance that was established against accused Om Prakash was that the deceased was last seen alive in his company. In the absence of anything more, an inference of accused Om Prakash having committed the deceased's murder after robbing him cannot be drawn. As far as accused Atul is concerned, the only evidence against him is his confessional statement made to the police, which is not admissible in evidence.

20. While hearing a leave petition or an appeal against an order of acquittal the High Court is normally slow to interfere with the same. The High Court disturbs the finding of acquittal when there are very substantial and compelling reasons to do the same. The substantial and compelling reasons include when the finding is perverse; or the Trial Court decision is based on an erroneous view of law or there is miscarriage of justice. The substantial and compelling reasons have been spelt out by the Supreme Court in *Chandrappa & Others v. State of Karnataka*, (2007) 4 SCC 415 as follows: -

"In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. *The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.*

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

- (i) *The trial court's conclusion with regard to the facts is palpably wrong;*
- (ii) *The trial court's decision was based on an erroneous view of law;*

(iii) *The trial court's judgment is likely to result in "grave miscarriage of justice";*

(iv) *The entire approach of the trial court in dealing with the evidence was patently illegal;*

(v) *The trial court's judgment was manifestly unjust and unreasonable;*

(vi) *The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.*

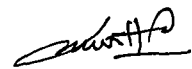
(vii) *This list is intended to be illustrative, not exhaustive.*

2. *The Appellate Court must always give proper weight and consideration to the findings of the trial court.*

3. *If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/ appellate courts must rule in favour of the accused.*

Had the well settled principles been followed by the High Court, the accused would have been set free long ago. Though the appellate court's power is wide and extensive, it must be used with great care and caution."

21. The State is unable to show that there are substantial and good reasons to interfere with the order of acquittal passed by the Trial Court. We do not find any ground to review the finding of acquittal. The leave petition is accordingly dismissed.



G. P. MITTAL, J.



S. RAVINDRA BHAT, J.

JULY 11, 2011

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