

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.05.2011

+ 1. **CRL.A. No. 230/2010**

RAM CHANDER @ GANJU

..... Appellant

versus

STATE OF DELHI

.... Respondent

+ 2. **CRL.A. No. 537/2010**

VIJAY KUMAR @ MANDIYA & ANR

..... Appellants

versus

THE STATE (GOVT OF NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:-

For the Appellant : Mr Anupam S. Sharma along with Mr Javed Akhtar,
Advocates for appellant in CRL.A.230/2010.
Mr R.K. Jha for appellants in CRL.A. 537/2010.

For the Respondent : Mr Sanjay Lao, APP.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MS JUSTICE VEENA BIRBAL

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 the Digest? Yes

BADAR DURREZ AHMED, J (ORAL)

1. These appeals have been filed against the judgment passed by the learned Additional Sessions Judge, North District, Delhi, in Sessions Case No.67/2006, arising out of FIR No.421/2005, registered at Police Station Ashok Vihar, registered under Sections 394/397/302/34 IPC. By virtue of the impugned judgment, the present appellants, namely, Ram Chander @ Ganju, Vijay Kumar @ Mandiya and Sunil @ Nalia have been convicted under Sections 394/302 IPC. The appellants are also aggrieved by the order on sentence dated 04.02.2010 whereby the appellants were sentenced to rigorous imprisonment for 7 years and a fine in the sum of Rs 1000/- each was imposed in respect of the offence under Section 394 IPC. In default of payment of fine, the convicts were also required to undergo a further period of simple imprisonment of one month each. With regard to the offence punishable under Section 302 IPC, all the appellants were sentenced to imprisonment for life as also to a fine in the sum of Rs 1000/- each and in default of payment whereof they were to undergo simple imprisonment of one month each. The sentences were directed to run concurrently.

2. We may point out, at the outset, that there were four accused in the present case, the fourth being one Sanju, who has been declared to be a proclaimed offender. According to the prosecution, the deceased

Pawan Kumar, who was on friendly terms with the appellants, was called by them and Sanju in the night of 24.06.2005, between 9-10 pm, on the pretext of taking a stroll in the park. According to the prosecution, Pawan left with the appellants from his residence and this fact was seen or witnessed by his brothers, namely, PW-2 Parvesh Kumar and PW-3 Satish Kumar. Thus, according to the prosecution, the deceased Pawan was last seen alive in the company of the appellants between 9-10 pm on 24.06.2005. The dead body of Pawan was discovered next morning, that is, on 25.06.2005 at about 6.30 am by one Sarju (PW-5) who is the chowkidar of the park. On discovering the dead body of Pawan Kumar, which was lying in the nursery, Sarju informed Mordhwaj (PW-1), who was the supervisor of the nursery. Thereafter, the said supervisor informed J.J. Colony Police Post through his mobile phone and the information was recorded as DD No.35 (Ex.PW12/A). Thereupon, SI Mohar Singh (PW-15) and other police officials reached the spot where the dead body was lying. The crime team was also summoned to the spot and photographs were taken. In the meanwhile, the deceased Pawan's brothers, namely, PW-2 Parvesh Kumar and PW-3 Satish Kumar, also arrived at the spot and identified the body as that of their brother Pawan Kumar. SI Mohar Singh noted that there were injuries on the head of the deceased and also found some broken pieces of earthen

pots lying near the body. Thereafter, inquest proceedings were conducted, ruqqa was sent and the FIR (Ex.PW8/A) was registered. All other formalities with regard to the investigation were completed and, ultimately, the appellants were charged of having committed the offence mentioned above.

The case of the prosecution rests on the following circumstances:-

- i. The deceased Pawan was last seen alive in the company of the appellants by PW-2 Parvesh Kumar and PW-3 Satish Kumar around 9-10 pm on 24.06.2005;
 - ii. The dead body of Pawan was discovered at about 6.30 am on 25.06.2005;
 - iii. As per the post mortem report (Ex.PW10/A), the time of death has been indicated to be 12 hours prior to the recording of the post mortem report. The post mortem report indicates that it was recorded at 1 pm on 25.06.2005 and, therefore, the approximate time of death would be around 1 am on 25.06.2005;
 - iv. The recovery of a purse from the house of the appellant Vijay Kumar @ Mandiya, at his instance, from his almirah which contained a photograph of the deceased Pawan;
 - v. The fact that the appellants were absconding after the alleged commission of the crime.
3. The learned counsel for the appellant submitted that before the appellants could be convicted for having committed the murder after having robbed the deceased Pawan Kumar, each of the circumstances

have to be established beyond reasonable doubt. It is only if the circumstances themselves are established and a complete chain emerges, that the appellants could be convicted. In this backdrop, the learned counsel for the appellants submitted that the allegation of the prosecution that the brothers of the deceased, namely, PW-2 Parvesh Kumar and PW-3 Satish Kumar had last seen the deceased in the company of the appellants, is an afterthought. He submitted that this can be easily discerned from the fact that in the ruqqa, which formed the basis of the FIR and which, in turn, was prepared on the basis of what was stated by PW-2 Parvesh Kumar, there is no mention of his deceased brother Pawan having been last seen in the company of the appellants. The ruqqa only mentions that he identified the dead body of his brother Pawan and also stated that Pawan was a smack addict. The rukka was sent at 8.45 am on 25.06.2005.

4. The learned counsel for the appellants further submitted that in the brief facts recorded in the inquest proceedings (Ex. PW15/C) also, there is no mention of any last seen evidence. It was further stated in the 'brief facts' that there was no eye-witness and that no witness of the incident was available. During the inquest proceedings, both Parvesh Kumar and Satish Kumar were present and, therefore, according to the learned counsel for the appellants, a clear inference can be made that the

evidence of 'last seen' was also not available at that point of time. The inquest papers were received at the mortuary on 25.06.2005 at about 12.30 pm. Thus, according to the learned counsel for the appellants, the entire story of the last seen evidence is an afterthought.

5. The learned counsel for the appellants further submits that even if it is to be assumed that the said PWs, namely, Parvesh Kumar and Satish Kumar had, in fact, last seen the deceased Pawan in the company of appellants at about 9-10 pm, that, by itself, would not be sufficient to return a finding of guilt. He submitted that the last seen evidence, in any event, is a very weak kind of evidence and requires solid corroboration from other circumstances, which have to be clearly established. He submitted that the time gap between PWs 2 and 3 last seeing Pawan Kumar alive in the company of the appellants and the point of time when the dead body was recovered, was too wide to reach a conclusion that there was no other person or persons who could have caused death of Pawan Kumar. He submitted that the body was discovered at 6.30 am in the morning and that he was allegedly last seen alive at about 9-10 pm on the previous night. He further submitted that even if the time of death, as indicated by the post mortem Doctor (PW-10), is taken into consideration, the time of death would be around 1.00 am on 25.06.2005, which would mean that there was a time gap of 3 to 4 hours between the

actual death and when the deceased Pawan Kumar was last seen alive in the company of the appellants. Even this time gap, according to the learned counsel for the appellants, was sufficiently large and could not rule out the possibility of any other intervening circumstances or other persons causing the death of deceased Pawan Kumar.

6. Apart from this, learned counsel for the appellants also submitted that the prosecution has not brought out any motive of the alleged crime. The only motive which was suggested was that of stealing the money which Pawan Kumar allegedly had with him. He, however, submitted that this has not been established by the evidence brought on record.

7. Lastly, the learned counsel for the appellants submitted that the only other circumstance which has been alleged by the prosecution is that of the alleged recovery of a purse at the instance of the appellant Vijay Kumar @ Mandiya from an almirah in his house on 01.07.2005, that is, after six days of the date of death of Pawan Kumar. The purse is stated to have contained a photograph of the deceased Pawan Kumar. According to the learned counsel for the appellants, this recovery is not a recovery at all and it was planted by the prosecution. He submitted that, in any event, the conduct would be highly unnatural of keeping an article which would implicate him, in his own house and keeping the said article for so many days after the commission of the offence. Apart from this,

he also submitted that there is no independent recovery witness and the only police witness is PW-2 Parvesh Kumar, who is the brother of the deceased Pawan Kumar. Even, as per his testimony, he has contradicted himself inasmuch as in his examination-in-chief, this witness has stated that money was recovered from the purse, subsequently, he submitted that Rs 600/- was not found in the purse. At one point of time he has stated that the purse was recovered from the accused Vijay Kumar @ Mandiya on 25.06.2005 but, subsequently, on cross-examination by the learned Additional Public Prosecutor he submitted that the purse was recovered on 01.07.2005.

8. The learned counsel for the appellants also pointed out that the recovery of the purse is not free from doubt also because of the fact that PW-2 Parvesh Kumar had stated that the purse was recovered at noon, that is, around 12.00 to 3.00 pm, whereas, the arrest memo of the appellants being Ex. PW2/G, Ex. PW2/H and Ex. PW2/J had indicated the time of arrest to be 8.00 pm (in respect of Sunil @ Nolia), 7.30 pm (in respect of Ram Chander) and 7.00 pm (in respect of Vijay Kumar @ Mandiya) respectively. Therefore, the learned counsel for the appellants submitted that it can be inferred that the purse was recovered before their arrest. This would clearly bely the prosecution's case with regard to the recovery of the purse. Moreover, the learned counsel for the appellants

also submitted that even the circumstances which have been alleged by the prosecution are not established beyond doubt. Therefore, the question of their forming a complete chain does not arise.

9. On the other hand, Mr Sanjay Lao, appearing on behalf of the prosecution, submitted that insofar as the last seen evidence is concerned, that stands clearly established in the sense that both PW-2 and PW-3 have come to the witness box and have clearly stated that the deceased Pawan Kumar left in the company of the appellants and Sanju for a stroll in the park. Both of them have stated that they saw Pawan alive in the company of the appellants at around 9 to 10 pm on 24.06.2005. The learned counsel submitted that even if the appellants had parted company with the deceased Pawan, it was for them to give some explanation in their statements under Section 313 Cr.P.C. He further submitted that the fact that they have furnished no explanation would be a circumstance which could be taken against them. In support, the learned counsel for the State relied upon the following decisions of the Supreme Court:-

1. **State of Rajasthan v. Kashi Ram**: (2006) 12 SCC 254
2. **Joseph v. State of Kerala**: (2000) 5 SCC 197

10. Mr Lao also submitted that the recovery of the purse stands established as per the recovery memo Ex. PW2/B and the testimony of

the recovery witnesses. He submitted that the rexine purse was recovered at the instance of the appellant Vijay Kumar @ Mandiya from an almirah in his house. While it is true that no money was recovered from the said purse, the same contained a photograph of the deceased Pawan Kumar, and, therefore, it was clearly linked with the deceased.

11. Thus, according to the learned counsel for the State, the circumstance of the deceased Pawan Kumar having been last seen in the company of the appellants as well as the fact that the death of Pawan had occurred shortly thereafter and that his death was not under natural circumstances, coupled with the factum of recovery of the purse at the instance of appellant Vijay Kumar @ Mandiya, are clear links which complete the chain of evidence against the appellants and, therefore, according to him, the trial court has rightly convicted the appellants for the offence under Section 302 and 394 IPC. He submitted that the impugned judgment and order on sentence ought not to be interfered with.

12. After having heard the counsel for the parties and having examined the evidence on record, we are of the view that the present appeal is liable to be allowed inasmuch as the appellants are entitled to the benefit of doubt which exists. First of all, let us take the question of recovery of the purse at the instance of Vijay Kumar @ Mandiya. One

of the recovery witnesses is PW-2 Parvesh Kumar, who, as pointed out above, is the brother of deceased Pawan. PW-2 in his examination-in-chief, has stated at one point that the police apprehended Vijay, who took the police to his (Vijay's) house and from there the purse of his brother containing his photograph as well as Rs 600/- were got recovered. The witness, then volunteered to state that Rs 600/- were given to Pawan Kumar in the previous evening but the same were not found in the purse which was recovered at the instance of the accused Vijay Kumar @ Mandiya. Thus, it is seen that this witness, at one point, stated that the money was recovered from the purse and immediately, thereafter, he made a voluntary statement that the money was not found in the purse. Then, later on, in the examination-in-chief, the same witness, that is, PW-2 Parvesh Kumar, stated that the accused persons, namely, Sunil, Ram Chander and Vijay were arrested on 25.06.2005 and the purse was recovered at the instance of the accused Vijay on 25.06.2005. This is in clear contradiction to the recovery memo Ex. PW2/B which indicates that the recovery was effected on 01.07.2005. Furthermore, when PW-2 was cross-examined by the APP, he stated that the recovery of the purse was not on 25.06.2005 but on 01.07.2005 and it is on that date that all the three accused persons were arrested. From the testimony of PW-2, which we have indicated above, it appears that the witness has

contradicted himself at several places. He was unclear about the recovery of the alleged sum of Rs 600/- as also with regard to the date of the recovery.

13. Moreover, in the course of his cross-examination, PW-2 Parvesh Kumar had also made a statement that the purse was recovered in the noon time, that is, between 12.00-3.00 pm. But, as mentioned above, the arrest memos Ex. PW2/G, Ex. PW2/H and Ex. PW2/J had indicated the time of arrest to be 8.00 pm (in respect of Sunil @ Nolia), 7.30 pm (in respect of Ram Chander) and 7.00 pm (in respect of Vijay Kumar @ Mandiya) respectively on 01.07.2005. Thus, if PW-2 is to be believed, then the purse was recovered even before the appellants were arrested! This is certainly not the case of the prosecution. This fact also casts serious doubts on the recovery of the purse at the instance of Vijay Kumar @ Mandiya.

14. Another witness to the recovery was Constable Surender Singh who came to the witness box and testified as PW-16. In his cross-examination, this witness has stated that they went to the house of Vijay Kumar @ Mandiya, but found the house to be locked and, thereafter, they came back to the police station. However, on cross-examination by the learned APP, this witness stated that the black rexine purse was recovered from the house of Vijay Kumar @ Mandiya. This flip-flop in

the testimony of PW-16 also does not inspire confidence. It creates a serious doubt as to the recovery of the purse as alleged by the prosecution.

15. Apart from this, we would also like to point out that it would be highly unnatural on the part of Vijay Kumar @ Mandiya to have kept an empty rexine purse, which apparently had no value, with him in his almirah and, that too, with the photograph of the deceased Pawan Kumar in it. If the intention of the appellants was to rob the deceased Pawan Kumar of Rs 600/-, which he is alleged to have had in his purse, there was no reason for them to have taken the purse with them after they had taken out the Rs 600/- and had distributed it among themselves, as alleged by the prosecution. The purse was not of any value, it was an ordinary black rexine purse and, therefore, there was no reason whatsoever in the natural scheme of the things for the appellants and, particularly, the appellant Vijay Kumar @ Mandiya to have retained the purse and to have carried the same to his house and to have kept it in his almirah, particularly, because it also carried the photograph of the deceased Pawan Kumar. In the normal course of events, any item which could link a perpetrator of a crime with the crime would be disposed of by the criminal at the earliest opportunity. This is not so in the present case and, therefore, it appears to us quite improbable that Vijay Kumar

@ Mandiya would have kept the purse with the photograph of Pawan in his almirah for over six days in his house. For all these reasons, there is a serious doubt with regard to the recovery of the purse. One of the most important circumstances in this case was the recovery of the purse at the instance of Vijay Kumar @ Mandiya. That circumstance has not been established by the prosecution beyond doubt.

16. Coming now to the other important circumstance, that is of PW-2 and 3 having last seen Pawan alive in the company of the appellants, we find that even if we were to accept that PW-2 and PW-3 had, in fact, seen Pawan Kumar for the last time in the company of the appellants between 9-10 pm on 24.06.2005, it cannot be said, on the basis of this fact alone, that it is the appellants only who were responsible for the death of Pawan Kumar. The time gap of three to four hours, as pointed out above, is sufficient to allow intervening circumstances and other persons to have entered into the scene and caused the death of Pawan Kumar. The mere fact that Pawan Kumar left in the company of the appellants, by itself, cannot be regarded as sufficient to enable us to arrive at a conclusion that it is the appellants who must have, inescapably, caused the death of Pawan Kumar.

17. In **State of U.P. v. Satish: 2005 CriLJ 1428**, the Supreme Court observed that 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. The Supreme Court also observed that 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.

18. A similar observation was made by the Supreme Court in the case of **Ramreddy Rajesh Khanna Reddy v. State of A.P.** : AIR 2006 SC 1656. In the latter decision, it was also stated that in cases of ‘last seen’, the courts should look for some corroboration. The decision in the case of **State of U.P. v. Satish** (*supra*) was reiterated in a recent decision of the Supreme Court in the case of **Kulvinder Singh and Another v. State of Haryana**, Criminal Appeal No.916/2005 decided on 11.04.2011. In the latter case, it was also observed as under:-

“16. It is a settled legal proposition that conviction of a person in an offence is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances conviction may also be based solely on circumstantial evidence. The prosecution has to establish its case beyond reasonable doubt and cannot derive any strength from the weakness of the defense put up by the accused. However, a false defense may be called into aid only to lend assurance to the Court where various links in the chain of circumstantial evidence are in themselves complete. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The same

should be of a conclusive nature and exclude all possible hypothesis except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

19. Coming back to the present case, we find that, because of the time gap and the other surrounding factors, we cannot rule out the possibility of any other person having caused the death of Pawan Kumar, particularly, because the recovery of the purse, at the instance of Vijay Kumar @ Mandiya, in our view, is highly suspect. Since there is no corroboration of the prosecution case by virtue of some other established circumstance, it would be extremely hazardous on our part to return a finding of guilt insofar as the appellants are concerned.

20. The proposition urged by the learned counsel for the State that it was open to the appellants to have given an explanation in the course of their statements under Section 313 Cr.P.C, is clearly answered by the observations of the Supreme Court which have been quoted above in the case of **Kulvinder Singh and Another** (*supra*). It is well established that the prosecution is to make out its case beyond reasonable doubt and cannot derive any strength from the weakness of the defence put up by the accused. A false defence, as pointed out by the Supreme Court, may

be called into aid only to lend assurance to the court and, that too, where various links in the chain of circumstantial evidence are in themselves complete. The weakness of the defence cannot, by itself, form a link of the chain, but can only lend support to the other links which in themselves form a complete chain of circumstantial evidence, pointing unerringly towards the guilt of the accused. In the present case, the submission of the learned counsel for the State that the fact that the appellants have not given any explanation ought to be regarded as a link in the chain of circumstances, cannot be accepted in this backdrop. Even if it were to be regarded as a link, it would only remain as a 'link' in an 'incomplete chain'.

21. In view of the foregoing discussion, the appellants are given the benefit of doubt and their appeals are allowed and they are acquitted of all charges against them. The appellants are in custody. They be released immediately, if not required in any other case.

22. A copy of this judgment/order be sent to the concerned Superintendent of the jail.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

MAY 11, 2011

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