

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

Decided on : 25.08.2011

+ CRL.A. 532/2011 & CRL. M. (BAIL) 702/2011

RAM SUNDER @ RAMU

..... Appellant

Through: Mr. Kamal Katyan, Mr. Kapil Dhaka
and Mr. Amit Baisoya, Advocates.

versus

STATE

..... Respondent

Through: Mr. Sanjay Lau, APP.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE 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 (OPEN COURT)

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1. This appeal impugns the judgment and order of the learned Additional Sessions Judge dated 31.01.2011, in SC No.65/2009 holding the Appellant guilty for committing offence punishable under Section-302, IPC and sentencing him to life imprisonment.

2. The prosecution's case was that on 13.07.2005, an intimation (i.e. D.D. No.10/A marked as Ex.PW-20/A) was received at 7:12 AM regarding the dead body of Girish. The body was found at the CPWD Enquiry Office/Complex, Netaji Nagar. The prosecution alleged that police officials PW-16 and 17 reached the spot and were later followed by PW-10 and PW-21. The deceased Girish was lying face down in the pool of

blood; a thick bamboo danda with blood stains also lay beside his body. It was alleged that blood stains could be seen on the wall, window pane and switch board. Certain personal articles such as a red colour purse, two papers etc. were lying around. An aluminum vessel was also found; it contained a glass tumbler and a half bottle of “Classic” brand whiskey. The bottle had a small quantity of liquor. The prosecution alleged that PW-1 met the police and his statement PW-1/A was recorded. He claimed having seen the deceased in the company of the Appellant in front of the Pump House at 9:00 PM on 12.7.2005. They were having liquor inside the Pump House. PW-1 stated that he did not disturb the two and went inside his house. Later, next morning around 7:00 AM when he went out of his house to take the scooter, he noticed the Pump House entry open and blood coming out of there. He opened the door and found Girish lying face downwards and also bleeding from the head. He noticed a bamboo stick with blood stains. He rushed to the Junior Engineer Jai Ram Yadav and informed the police.

3. The prosecution alleged that on the basis of this information, investigation was carried out and the Appellant was arrested. It seized the articles which included the bamboo *danda* and also lifted finger prints from the site and sent them for analysis to the Finger Print Bureau. The deceased’s body was sent for Postmortem examination. After conclusion of the investigation, the Appellant was charged with committing Girish’s murder; he denied the charge and claimed trial.

4. The prosecution examined 22 witnesses and relied on several exhibits including *danda* and other material objects. The Trial Court by the impugned judgment held the appellant guilty for having committed the offence and handed down the punishment mentioned earlier.

5. It was submitted that the Trial Court had noticed that three incriminating circumstances that were alleged by the prosecution, i.e., evidence of the deceased “last seen” in the company of the appellant; the report of finger print examination and the recovery of objects at the behest of the appellant. Counsel submitted that the Trial Court disbelieved the prosecution evidence pertaining to appellant’s finger prints match with those found at the site. It was urged that the Trial Court also disbelieved the recoveries and the reliance placed on them by the prosecution. It, however, relied upon the

prosecution's version that the appellant was last seen in the company of the deceased. Arguing that this circumstance alone was insufficient to implicate and fix the criminal responsibility on the appellant, counsel submitted that even though the impugned judgment noticed the nature of burden to prove placed upon the prosecution in circumstantial evidence cases i.e. need to prove each and every link in the evidence conclusively and also equally prove the chain of circumstances conclusively, the judgment did not follow that approach and relied on the probabilities.

6. It was submitted that the circumstance regarding the appellant having been last seen by the prosecution witnesses was primarily deposed to by PW-1 and PW-2. Counsel emphasized that PW-2 Pradeep Singh merely stated having seen the appellant along with the deceased near the Enquiry Office at Netaji Nagar around 9:00-09:15 PM on 12.07.2005. PW-1 said the same thing. However, he also mentioned that both of them were drinking at that time. Counsel argued that the evidence of PW-1 established that the scene of occurrence was not in an open area and within the compound. It was argued that a very important circumstance was lost sight of by the Trial Court i.e. that the entire compound had 3 Watchmen - Munna Lal, Sudershan and Arun - all of whom were named by PW-1. Besides these three individuals, PW-1 also mentioned the presence of J.E. Jai Ram. None of them were examined, even though they were material and could have thrown much light on the crime. Further it was emphasized that having regard to these and the depositions of PW-1 that the Pump House was accessible to one and all without any difficulty, the last seen circumstance, in this case was insufficient to implicate the appellant.

7. Learned counsel urged that the postmortem report, PW-3/A and the depositions of the doctor PW-3 established that the death probably occurred about 36 hours prior to the commencement of postmortem (i.e. it was at 11:45 AM on 14.7.2005). If that were correct, the approximate time of death would have been about 12-12:30 AM on 13.7.2005. Having regard to the nature and location of the premises and the high degree of probability that several other residents frequented the compound which was a Government colony and also that there were three watchmen in the vicinity on the lookout throughout the night, the prosecution's version of "last seen" could not have been

the sole basis for convicting the appellant. It was urged that the Appellant lived in the same compound; his father was a government employee and had been allotted a quarter. If indeed he had attacked the deceased Girish, as alleged by the prosecution, some resident or at least the watchmen on duty would have been alerted. Learned counsel emphasized that the postmortem mentions no less than 9 injuries including one on the head. There was nothing suggestive of the fact that the deceased was incapacitated from crying out or defending himself. If indeed, the prosecution's versions were correct and the deceased was beaten to death around 12-12:30 AM, the circumstance of last seen at 9:00 PM, the previous night was insufficient to return the findings of conviction in this case.

8. Learned APP argued that the prosecution had established that the appellant was the only person last seen in the company of the deceased. It was submitted that PW-1 and PW-2 were unanimous on this aspect. Furthermore, submitted the counsel, even though the Trial Court disbelieved the matching of the finger prints that were found at the site, nevertheless this Court should re-appreciate the evidence. Learned counsel argued that the Trial Court resorted to a needless technicality in insisting that the specimen finger prints had to be obtained after orders were sought in this regard from the Magistrate. Counsel urged that if that these findings were disregarded, there was material enough to prove the accused's presence at the site; his finger prints were found on the *danda* and other articles - which matched with the finger prints supplied by him. Learned counsel relied upon the finger prints expert's report marked as Ex.PW-19/A to Ex.PW-19/C.

9. Counsel argued that even though the Trial Court disbelieved the finger print evidence, in substance, shorn of the technicality, the material strongly incriminated the appellant. The appellant did not give any explanation in this regard. This circumstance coupled with the last seen evidence spoken of by PW-1 and PW-2, urged the APP, justified the findings of conviction. It was also urged that at the earliest opportunity i.e. on receipt of the information itself at 7:12 AM, on 13.7.2005, the police rushed to the spot and immediately recorded the statement of PW-1. There was no reason to implicate the appellant falsely; despite cross examination of PW-1, nothing was elicited to show existence of any motive on his part. Having regard to totality of these circumstances,

submitted counsel for prosecution, this Court should not disturb the findings rendered by the Trial Court.

10. We would first deal with the submission regarding the allegation that chance prints developed from the site matched with that of the Appellant's specimen. In this regard, the reasoning which found favour with the Trial Court was the prosecution's inability to prove that the Appellant's specimen finger prints were taken with permission from the Magistrate, during the investigation. Apart from that aspect, we also notice that the Finger print expert's reports – marked as Ex. PW-16/ to PW-16/C mention that two chance prints mentioned with the finger prints of the Appellants, sent on a slip of paper. Interestingly, however, the prosecution was unable to prove who obtained those specimen, and when. Neither the IO in the case, nor any of the police witnesses, stated that the Appellant's specimen handwriting was obtained, nor does the Trial Court record disclose when the prints were obtained. In these circumstances, we see no reason to disturb the findings concerning the lack of credibility about the chance prints found at the site, matching the Appellant's finger prints.

11. The prosecution relied on the recovery of a blood stained pant, at the behest of the Appellant. The blood stains on the pant matched with the blood stains of the deceased. The Trial Court, however rejected this as a circumstance; its reasoning is as follows:

“Thus, though the prosecution has proved the recovery of pant from the possession of accused and it has also proved the blood group of deceased but I consider that this circumstance cannot be read against the accused for two reasons, one, that prosecution has not proved by way of an independent evidence that accused was wearing the same pant at the time of incident and secondly, the IO in his testimony has admitted that he did not ascertain the blood group of the accused. Therefore, this circumstance cannot be read against the accused.”

We find no infirmity with this finding, and concur with it.

12. The most important circumstance which persuaded the Trial Court to hold the Appellant guilty as charged is now discussed. After discussing the testimonies of PW-1 and PW-2, and holding that they both spoke of having seen the deceased and the accused together, the impugned judgment went on to hold as follows:

“9.3 Now if we appreciate the evidence of these two witnesses, both the witnesses have made a consistent and corroborative statement that they had seen

accused and deceased on 12.07.05 during night hours. PW2 has specifically stated that he had seen the accused with the deceased at around 9 or 9:15 pm whereas, PW1 though did not state specifically the time, but he has stated that he saw accused with the deceased inside the pump house when he went there to park his scooter. PW1 was cross examined in detail on the point that he has deposed falsely against the accused on account of personal enmity. Except bald suggestions, accused has not brought any material on the record that PW1 had any enmity with the accused. It is settled proposition that mere suggestions unless supported by some cogent evidence has no evidentiary value. Thus, this court is not ready to believe that PW1 or PW2 have deposed falsely regarding the fact of having seen the accused with the deceased on 12.07.05 at around 9 pm. There is no cogent reason to disbelieve the testimony of PW 1 and PW2.

9.5 Law regarding appreciating of evidence is also very well settled. The memory of every individual is different. Some person have a very sharp memory regarding the identification of the articles and some do not have that good memory. While appreciating the evidence, the court is required to take into account the educational background and social status of the witness. The court has also to take into account the fact that when such persons appear in the court, they may not be able to assimilate their thought properly and may not be able to express the things properly. The testimony of a witness has to be read as a whole. The court cannot expect a witness to depose in a parrot like manner. Similarly, certain contradictions in the testimony of prosecution witnesses regarding timings, highlighted by Ld. defence are not material and does not go to the root of the case. One has to be practical while appreciating the evidence and should be able to separate the grain from chaff. I consider the contradictions as highlighted by ld. Defence counsel are not material and does not go to the root of the case. I consider that if the entire law regarding appreciation of evidence and last seen is taken into account, the necessary corollary which is culled out from the fact is that if the witnesses have made cogent, credible and credit worthy statement that the accused was seen in the company of the deceased and the death takes place after sometime and the time gap is very small and there is no possibility of anybody else having committed the offence, then it is a strong circumstance and can be made the basis for recording the conviction.”

It was thereafter held that after an overall consideration of the testimonies of both the witnesses, and the surrounding circumstances, there was no reason to disbelieve their statement. The Appellant was, therefore convicted.

13. It has been repeatedly held that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is to be drawn, are to be cogently and firmly established. Secondly, those circumstances should be of a definite tendency of unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escaping the conclusion that within all human probability the crime was committed by the accused and none else. In other words the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt. (Ref. *Hanumanth Govind Nargundkar & Anr. v. State of M.P.*, AIR 1952 SC 343; *Chandmal and Anr. v. State of Rajasthan*, AIR 1976 SC 917 and *Sharad Birdi Chand Sarda v. State of Maharashtra*, (1984) 4 SCC 116).

14. The evidence of an accused being "last seen" with the deceased is a *species* of cases relying on circumstantial evidence. Several rulings have cautioned the courts on the need to scrutinize this aspect circumspectly, and have evolved broad guidelines to be followed. For the purpose of the present discussion, it would be sufficient to recollect *State of Uttar Pradesh Vs. Shyam Behari & Anr.* 2009 (8) SCALE 743, where the Court, after having discussed detail the law of this point, summarized it as follows:-

"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, is of a kind, where a rational mind is persuaded to reach on 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.”

15. The court trying the offence has to be acutely conscious of the fact that the circumstance of “last seen” is merely a link, in the chain of circumstances, which has to be proved conclusively, along with other links. The Supreme Court, in *Inderjit Singh v. State of Punjab* AIR 1991 SC 1674, held that if no direct evidence to connect the accused is available and no enmity between the accused and deceased is found, then, on the basis of the only circumstance that deceased

was last seen in the company of the accused person, no person can be convicted.

It was observed as follows:

“Among the circumstances relied upon by the prosecution, in the light of these principles we find that except the circumstance No. 1, the other circumstances are not incriminating. In number of cases it has been held that the only circumstance namely that the deceased was last seen in the company of the accused by itself is not sufficient to establish the guilt of the accused. It is no doubt true that the deceased's death was homicidal but since there is no direct witness connecting any of the appellants with the crime we should fall back on the circumstantial evidence and we are of the view that circumstances relied upon by the prosecution are hardly sufficient to establish the guilt of the accused. The circumstance, i.e., the absence of enmity between the accused and the deceased and the witness would also show that the accused also had no enmity against the deceased. Therefore, this circumstance is neutral. However, now coming to the recovery of the gun, the High Court has acquitted him of that charge. The only relevant circumstance as pointed above is that the appellants and the deceased left the house together in a friendly manner for bird-shooting. It is needless to say that no conviction can be passed on this sole circumstance. In the result; the convictions and sentences awarded by the Courts below are set aside. The appeal is allowed.”

16. In the present case, what is apparent is that PW-1 and PW-2 deposed having seen the deceased in the company of the Appellant around 9 PM on 12-7-2005. The deceased was next found dead in the early morning, the next day, by PW-1. However, the Trial Court overlooked certain material aspects, i.e., that the premises where the body was discovered, and in the vicinity of which the Appellant was “last seen” was in a Government residential colony. The spot of occurrence was opposite a Pump house; the entire premises, were enclosed by a compound wall, and had three watchmen. None of them were examined. The premises, i.e., the Pump House, was easily accessible. The Trial Court disbelieved the chance finger prints and the recovery of articles. There is nothing on the record or testimonies of witnesses, suggesting that the Appellant harboured any motive to commit any crime against the deceased, or murder him. Having regard to these circumstances, the mere fact that the two were “last seen” together, three hours back, it would be unsafe to conclude that the Appellant committed the crime.

17. In view of the above discussion, we are of the opinion that the Appeal is entitled to succeed. We set aside the judgment and order of the Trial Court, and acquit the Appellant; he shall be set at liberty forthwith. The Appeal is therefore, allowed.

S. RAVINDRA BHAT, J

G. P. MITTAL, J

AUGUST 25, 2011

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