

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

Date of Hearing & Decision: 29th July, 2011

+ **CRL.L.P. No.241/2011**

STATE

..... PETITIONER

Through: Mr. Saleem Ahmed, Addl. Standing Counsel.

Versus

SHAILENDER YADAV & ORS.

.....RESPONDENTS

Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G. P. MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Order? | No. |
| 2. To be referred to the Reporter or not? | No. |
| 3. Whether the Order should be reported in the Digest? | No. |

J U D G M E N T

G.P. MITTAL, J. (ORAL)

1. The Petitioner seeks leave to file an appeal against the judgment dated 06.09.2010 whereby the Respondents were acquitted of the charges under Section 365/ 302/ 120B IPC.
2. The facts of the case are extracted from para 2 to 4 of the impugned judgment hereunder: -

“2. In nutshell, the case of the prosecution as unfolded by rukka is that on 20.6.06 DD No.7 regarding missing of Hari Murti Yadav was lodged by his brother Shiv Murti Yadav at PS Mahipal Pur. On 21.6.06 Shiv Murti Yadav made a complaint to the police regarding abduction of his brother Hari Murti Yadav and his friend Dr. Suresh @ Prithvi Pal. In his said statement Shiv Murti Yadav raised suspicion on accused Shailender. He stated that he

was told by Mata Prasad that Hari Murti Yadav left his house on 3.6.06 at about 7 a.m. saying that he was going to Bulandshahar (U.P.) to purchase a tractor along with his friend Dr. Suresh @ Prithvi Pal. It is further alleged that complainant Shiv Murti Yadav met Raj Kumar (brother of deceased Dr. Suresh @ Prithvi Pal) who told him that he had seen accused Shailender at the house of his brother Dr. Suresh @ Prithvi Pal one month prior to the incident and they were talking about the purchase of a tractor. As per the complainant, he along with Raj Kumar and other persons tried to trace accused Shailender but he could not be traced. Complainant suspected accused Shailender to have abducted his brother Hari Murti Yadav and Dr. Suresh @ Prithvi Pal on the pretext of purchasing tractor. On this statement of the complainant initially FIR was registered under Section 365 IPC and the investigation was marked to SI Randheer Singh. During investigation, the statement of Raj Kumar was recorded wherein he stated that on 5.06.06 a telephonic call was received at his house and the caller impersonated himself as Dr. Suresh @ Prithvi Pal. The caller asked Raj Kumar to arrange an amount of ₹ 1.5 lacs for purchasing a tractor.

3. During further investigation on 24.6.06 the accused Shailender was arrested from his village at the instance of Raj Kumar. Accused Shailender made a disclosure statement pursuant to which accused Jaswant was arrested on 24.6.06 itself. On the basis of the disclosure statement made by accused Shailender, on 24.6.06 skeleton of deceased Dr. Suresh @ Prithvi Pal from a dry well was recovered. On the basis of disclosure statement of accused Jaswant, on 24.6.06 skeleton of deceased Hari Murti Yadav from a place near the well was recovered. Both these skeleton were recovered in the presence of village Pradhan, Raj Kumar and Shiv Murti Yadav. Physical clues relating to the crime were also lifted from the spot.

4. It is further the case of the prosecution that on 26.6.2006 postmortem was got conducted on the skeletons of deceased persons at Safdarjang Hospital. Accused Shailender was taken on police remand. He got recovered one mobile phone of deceased Dr. Suresh @ Prithvi Pal on 28.6.2006 from thatched roof of flour mill of his uncle pursuant to his subsequent disclosure statement dated 28.6.2006. During investigation accused Shailender and Jaswant disclosed that accused Ramesh Chand and Mahesh were also with them in committing the double murder. After completing the formality of identification of skeletons by way of DNA test, chargesheet was filed against accused Shailender and Jaswant. On 10.6.2006 co-accused Ramesh and Mahesh surrendered before

the court and they were formally arrested. The supplementary challan was filed in the court against them later on.”

3. During trial the prosecution examined thirty witnesses. There was no direct evidence regarding commission of the offence by the Respondents. The prosecution largely relied on three circumstances i.e. (i) the two deceased Hari Murti Yadav and Dr. Suresh @ Prithvi Pal being last seen alive in the company of Respondent Shailender on 04.06.2006 at Anand Vihar Bus Stand; (ii) the arrest of Respondent Shailender on 24.06.2006 and a disclosure statement by him leading to arrest of Respondent Jaswant on the same day and in pursuance of the disclosure statements made by the two Respondents, recovery of the skeleton of Dr. Suresh @ Prithvi Pal at the instance of Respondent Shailender from a dry well on 24.06.2006 and recovery of Skeleton of deceased Hari Murti Yadav at the instance of Respondent Jaswant from a place near the earlier mentioned dry well on the same day and (iii) the recovery of mobile phone belonging to Dr. Suresh @ Prithvi Pal at the instance of Respondent Shailender on 28.06.2006.
4. The Trial Court by impugned judgment concluded that three important circumstances were not established against the Respondents beyond reasonable doubt so as to complete a chain to draw an inference that it were the Respondents alone, responsible for committing the offence and that the circumstances established were not compatible with the innocence. Thus, the Respondents were acquitted of the charges framed against them.
5. We have heard Mr. Saleem Ahmed, learned Addl. Standing Counsel for the Petitioner and have perused the record.
6. The observations of the Trial Court while dealing with the three circumstances are extracted hereunder: -

“Circumstance No.2

PW8 Naibu Lal testified that he had seen accused Shailender at Anand Vihar Bus Stand along with both the deceased but the case of the prosecution is that the deceased left their houses on

3.6.2006. The statement of PW2 contradicts the story of prosecution that both the deceased left on 4.6.2006 from their house for purchasing the tractor. PW8 claimed himself to be the cousin of Dr. Suresh @ Prithvi Pal but he could not tell the mobile number of Dr. Suresh @ Prithvi Pal. The chance meeting of PW8 with both the deceased and accused Shailender is doubtful as even PW8 did not know the name of the apartment where Dr. Suresh @ Prithvi Pal was residing. PW8 could not tell whether Dr. Suresh @ Prithvi Pal was residing on the ground floor or first floor or second floor. He could not tell the colour of the clothes worn by his cousin Dr. Suresh @ Prithvi Pal, accused Shailender and deceased Hari Murti Yadav. He admitted during his cross-examination that he did not tell Raj Kumar (PW1) and other family members of Dr. Suresh @ Prithvi Pal that he had seen Dr. Suresh @ Prithvi Pal along with accused Shailender at Anand Vihar Bus Stand. It was also admitted by PW8 in his cross-examination that he made efforts to trace the deceased along with family members of the deceased and he was also present at the time of lodging missing report at PS Mahipal Pur on 20.6.2006 but he did not disclose the said fact of seeing the deceased in the company of accused Shailender on 4.6.06 to the police. The conduct of PW8 in these circumstances is unnatural creating an impression that he had not witnessed the incident. For taking this view I am supported with the judgment Alil Mollah (supra) and Abdul Sattar (supra). Had he seen the deceased in the company of accused Shailender he would have told the said fact immediately to the family members of the deceased and to the police at the earliest opportunity i.e. at the time of lodging of the missing report on 20.6.2006. PW1 Raj Kumar has admitted that PW8 Naibu Lal was present with them at the time of registration of missing report on 20.6.2006. PW1 during his cross-examination admitted that PW8 Naibu Lal did not disclose anything to him regarding his brother Dr. Suresh @ Prithvi Pal when he came to Delhi. In these circumstances, the conduct of PW8 Naibu Lal being a chance witness is highly doubtful and his testimony is not reliable. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen 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. For taking this view I am supported with the judgment Ramreddy (supra). PW19 Gaurav Vinod Jain who conducted the post mortem vide his report Ex.PW19/A has not stated anything regarding the time since death. There is no medical evidence on record which may prove the time since death of deceased Hari Murti Yadav. Thus, the possibility of involvement of any other person cannot be ruled out in the facts

and circumstances of the present case. The evidence of PW8 cannot be treated as a witness of last seen in the given facts and circumstances of this case.

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Circumstance No.5

As per the case of the prosecution, recoveries of skeletons were effected on 24.6.2006. It is further the case of the prosecution that on 23.6.06 at 1 a.m. (night) the entire team of PS Mahipal Pur headed by Inspector Rampal, SHO along with PW1 and PW4 left the Police Station Mahipal Pur for Kannauj, U.P. for arresting the accused Shailender and they reached Kannauj, U.P. on 24.6.2006. The accused Shailender was arrested on 24.6.06 and accused Jaswant also arrested on 24.6.06 and the recoveries were effected on 24.06.06 itself. All the documents i.e. recovery memos, pointing out memos and arrest memos were prepared on 24.06.06. However, PW1 Raj Kumar and PW4 Shiv Murti Yadav testified in their cross-examination that on 25.6.06 they reached village Shyampur, District Kannauj from where accused Shailender was arrested. As per them, accused Jaswant was also arrested on 25.6.06 and recoveries of skeletons were effected on 25.6.06 PW25 SI Randheer Singh has also testified that they reached on 25.6.06 at Village Shyampur and skeletons were recovered in the presence of public persons PW5 Veer Singh and PW6 Shyam Lal. The testimony of PW1, PW4 and PW25 is contrary to the case set up by the prosecution that the skeletons were recovered on 24.6.06. As per record the recovery memos are dated 24.6.06 and there is no explanation from the side of the prosecution as to how the memos were prepared on 24.6.06 while the oral evidence which has come on record is that the recoveries were effected on 25.6.06. It creates doubt in the story of the prosecution as no recovery memo dated 25.6.06 is on record. It is also pertinent to note that the arrest memo of accused Shailender shows the date and time of his arrest as 25.6.06 at 7.30 a.m. while the arrest memo of accused Jaswant shows his arrest as 24.6.06 at 5.30 p.m. Thus, in view of the arrest memos which are on record, it is practically impossible that accused Jaswant was arrested at the instance of accused Shailender because as per arrest memos accused Shailender was arrested on 25.6.06 while accused Jaswant was arrested on 24.6.06.

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Circumstance No.6

As per the case of the prosecution, mobile was recovered on 28.6.06 at the instance of accused Shailender. PW25 SI Randheer Singh during his cross-examination testified that the police team left the police station on 28.6.06 in the evening and they reached PS Thathia on next day. It goes to show that recovery was effected on 29.6.06. However, PW30 Inspector Rampal Singh has testified that they reached the village along with accused Shailender on 28.6.06 and after recovery of a mobile they came back on 29.6.06. The mobile phone, as per record, was deposited in Malkhana on 28.6.06. This fact contradicts the case of the prosecution. If the police team came to Delhi on 29.6.06, there is no explanation from the side of the prosecution as to how the mobile phone was deposited in Malkhana on 28.6.06. So far as mobile phone of deceased Dr. Suresh @ Prithvi Pal is concerned PW1 has not proved the number of mobile phone which the deceased was having. None of the other witnesses has proved the fact that deceased was having a mobile number 9811964491. PW18 Vivek Bansal only proved a receipt issued in favour of Shyam Garments Pvt. Ltd. by his company. PW18 could not tell the EMI number of the mobile phone which was sold to Shyam Garments Pvt. Ltd. The answer to the leading question put by Ld. APP to PW18 is not admissible in evidence as it was suggested in affirmative form. For taking this view I am supported with the judgment Varkey (supra). Thus, the prosecution has failed to prove beyond reasonable doubt that the mobile phone belonging to Dr. Suresh @ Prithvi Pal was recovered at the instance of accused Shailender.”

7. Thus, it may be noticed that circumstance of “last seen” was primarily disbelieved by the Trial Court, firstly on the ground that the incidental meeting of PW-8 between the two deceased and Respondent Shailender Yadav on 04.06.2006 at Anand Vihar Bus Stand was unbelievable for the reason that PW-8 could not even tell the name of the apartment where deceased Dr. Suresh used to reside which (according to witness) he had gone to see. He could not say whether Dr. Suresh used to reside on the ground, first or the second floor. More importantly, although PW-8 claimed to have seen the two deceased and the Respondent Shailender together on 04.06.2006, he did not disclose this very important fact either to family members of the deceased or to the complainant when he (the complainant) went to the Police Station to lodge a missing person report. In fact, PW-8 claims to be with the complainant when he (the complainant) lodged a

- missing report regarding deceased Hari Murti Yadav. Obviously, if PW-8 had seen the deceased with Respondent Shailender Yadav, this fact ought to have been mentioned in the missing report and Shailender Yadav would have been the prime suspect at that time. Thus, in our view the reasoning of the Trial Court that the version put forth by PW-8 was improbable, unnatural and unreliable cannot be faulted.
8. The recovery of two skeletons at the instance of Respondents Shailender Yadav and Jaswant appears to have been concocted by the prosecution. As per prosecution version, the Respondent Shailender Yadav was arrested on 24.06.2006, he made disclosure statement leading to the arrest of Respondent Jaswant. However, the arrest memo Ex.PW-1/D reveals that Jaswant was arrested on 24.06.2006 at 5:30 P.M. The arrest memo Ex.PW-1/A shows that Shailender Yadav was arrested on 25.06.2006 at 7:30 A.M. This indicates that the Respondents' arrest was cooked up and the documents were prepared as per convenience of the Police.
9. Similarly, there is contradiction as to when the dead bodies of Hari Murti Yadav and Dr. Suresh were recovered, at the Respondents' instance. According to recovery memo Ex. PW-1/G and PW-1/L the bodies were recovered on 24.06.2006. This was not possible as Shailender Yadav was arrested a day after, i.e. 25.06.2006. Furthermore, PW-1 and PW-4 testified in their cross-examinations having reached village Shyampur on 25.06.2006 from where Respondent Shailender was arrested. PW-22 SI Randhir Singh's testimony is also to the effect that they reached village Shyampur on 25.06.2006. Thus, without even going into aspect that two public persons who witnessed the recovery of the skeletons i.e. PW-5 Veer Singh and PW-6 Shyam Lal did not support the prosecution version, there is no recovery memo dated 25.06.2006 and thus the recovery of the two dead bodies *de hors* the testimony of two public witnesses (who turned hostile) is very suspicious.
10. It is contended by the learned APP that there might be some clerical mistake in

recording the date of arrest and the date of seizure in the seizure memo. This contention cannot be entertained since the prosecution did not try to explain such major contradictions in the recovery memos and the testimonies of PW-1, PW-4 and PW-25. It is, thus, doubtful if the two skeletons were recovered at the instance of the Respondents Shailender and Jaswant.

11. The alleged recovery of deceased Dr. Suresh's mobile phone at the instance of the Respondent Shailender Yadav was also doubted by Trial Court as no evidence was produced by the prosecution that the phone (SIM No.9811964491) belonged to the deceased Dr. Suresh. PW-18 Vivek Bansal was produced by the prosecution to prove the sale of this mobile phone to Dr. Suresh. The witness, however, failed to prove the allegation with documentary evidence. The witness simply deposed that he purchased a few mobile phones from M/s. Telemarket Communication (India) Pvt. Ltd., Pusa Road. The Trial Court rightly held that the same was not sufficient to prove its purchase or possession by Dr. Suresh.
12. Further, there is a discrepancy as to when this mobile phone was recovered. PW-22 SI Randhir Singh deposed in his cross-examination that the police team left the Police Station on 26.06.2006 in the evening and they reached Thathia on the next day. This means that the recovery of mobile phone could not have been effected before 29.06.2006. PW-30 Inspector Ram Pal Singh, however, gave a different version when he deposed that they reached the village along with Respondent Shailender on 28.06.2006 and after recovery of the mobile phone they returned on 29.06.2006. The Trial Court further found another glaring discrepancy that, though the recovery was effected on 29.06.2006 or on 28.06.2006, PW-30 Inspector Ram Pal Singh was specific that they returned to the Police Station on 29.06.2006. Now the question which arises is how the mobile phone could have been deposited in the *Malkhana* on 28.06.2006. This shows that the entire investigation was botched up and in all probability the alleged recoveries were planted on the Appellants.

13. It is settled law that when the prosecution case rests on circumstantial evidence, it

must satisfy the following tests: -

(a) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(b) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(c) 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

(d) 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. [*Hanumanth Govind Nargundkar and Anr. v. State of M.P.*, AIR 1952 SC 343 and *G. Parshwanath v. State of Karnataka*, (2010) 8 SCC 593]

14. From the material produced by the prosecution, it could not be said that the circumstances relied upon by the prosecution were conclusively established and thus the Respondents were rightly given benefit of doubt.

15. 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."

16. In view of the forgoing discussion, we are of the view that the Trial Court's

findings are based on correct appreciation of law and facts and, therefore, does not call for any interference. The State, in the circumstances, is not entitled to the grant of leave. The leave petition is accordingly dismissed.

G. P. MITTAL, J.

S. RAVINDRA BHAT, J.

JULY 29, 2011
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