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IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl. A.700/2011 - RESERVED ON: 17.11.2011

Crl.A.1093/2011 - RESERVED ON: 24.11.2011

BOTH PRONOUNCED ON: 28.11.2011

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CRIMINAL APPEALS-700 & 1093/2011

CRL. APPEAL-700/2011

Raju @ Ranthu @ Raju Kr.

CRL. APPEAL-1093/2011

Sanjay Kumar

...Appellants

Versus

STATE

... Respondent in both the appeals

Appearance: Mr. Vivek Sood, Adv. for appellant in
Crl.A.700/2011.

Ms. Sahilaa Lamba, Adv. for appellant in Crl.A.1093/2011.

Mr. Sanjay Lao, APP on behalf of State in both the appeals.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MS. JUSTICE PRATIBHA RANI

MR. JUSTICE S.RAVINDRA BHAT

% 1. In these Appeals, the judgment and order of the learned
Additional Sessions Judge dated 09.12.2010 in SC No. 126/2008 has

been challenged. By the impugned judgment, the Trial Court convicted the present Appellants for committing the offences punishable under Sections 302/34 IPC and sentenced them to life imprisonment.

2. According to the prosecution, P.S. Kapasahera received DD No.11A on 11.08.2008 at 07.10 AM, intimating about a dead body in Gali No.4, behind service station, near Mandu Ram's plot. Inspector S.D. Meena, along with Inspector Lakhinder Singh, SHO, P.S. Kapasahera, HC Zile Singh, Const. Dharmender, Const. Dharambir, Const. Kamal and Const. Naveen went to the spot and found the dead body of an unidentified man, aged about 25/30 years clothed in blue jeans, red T-shirt and mustard underwear. A black thread bearing the image of Christ hung around the neck of the body. The dead man had a black and yellow belt; his height was about 5 feet 7 inches, slim and dark. The body had a stab wound in the abdomen and there was also a cut in the T-shirt. FIR No.176/08 was registered in the police station u/s.302 IPC. The body could not be identified and was sent to DDU Hospital for preservation. Posters were distributed in the whole area and were pasted in public places. The police started showing the photograph of the body to shopkeepers and *rehriwalas* for identification purposes. One Bhola, Proprietor of Satyam Communication, on Old Gurgaon Road, Kapasahera, identified the photograph to be that of Saul, who worked at Gopal's *rehri*. He also showed the *rehri* to the police. Gopal confirmed that the photograph

was Saual's; he was the son of Sh. Silvester, R/o Village Jamdoli, P.S. Dumri, Distt. Gumla, Jharkhand. He also identified the dead body as that of Saual and further told the police that the deceased had been working on his *rehri* selling Chole Bhature for the past about one and a half years. He said that Saual had left with two boys named Sanjay and Raju on 10.08.2008 at about 4.30 or 5 P.M.; those boys used to meet him and also used to meet him earlier also. He further told the police that Saual did not return till the morning of 11.08.2008, due to which he dialed Saual's mobile, i.e. 9810341036, but the phone was answered by someone else, who claimed that Saual was in the bathroom and thereafter switched it off. He suspected Sanjay and Raju of having committed Saual's murder.

3. The two accused were later arrested; they made their disclosure statements which led to recovery of the weapon of offence i.e. stainless steel knife, slippers (chappals) of the deceased worn by him at the time of the incident and Sanjay's blood stained *baniyan*, all from different places. It was also alleged that the two accused revealed, to the police, that they belonged to Jharkhand and had been working in a private company in Gurgaon. They used to take Chole Bhature from the Kapashera border, while returning from their place of work and had developed friendship with deceased Saual as he too belonged to Jharkhand. Raju had borrowed a sum of ₹ 50/- from Saual on the assurance that he would return it within one or two days, but he did not do so, even after 10 or 15 days. A dispute leading to

Raju being beat up by Saual for not returning his money, had taken place; Raju therefore, bore a grudge against Saual. The two of them (accused) took Saual with them, on 10.08.2008 from his *rehri* for eating and drinking. They bought liquor from a nearby vendor and went to Room No.77 and consumed liquor. They made Saual drink excessively. When they reached a secluded place in Gali No.4, Raju stabbed Saual in the abdomen with a knife, which he had brought out from his room hidden in a towel. Saual shouted and fell, whereupon Raju became terrified and left the spot after throwing the knife down, on the spot. Sanjay threw the slippers worn by Saual in a nearby vacant plot and also hide the knife in some other plot. He thereafter went to Anup's room, where he kept his *baniyan* with blood stains in a polythene bag and threw it on the roof of the room.

4. The accused entered the plea of not guilty, and claimed trial. During those proceedings, the prosecution examined several witnesses, and also relied on documentary evidence. After considering all these, the Trial Court, by the impugned judgment, convicted the Appellants.

5. Mr. Vivek Sood, and Ms. Saahila Lamba, learned counsel for the Appellants, argued that the Trial Court's impugned judgement is not sustainable. It is contended that the findings with regard to the "last seen" circumstance had not been proved in this case. It was urged that the deceased was allegedly taken away by the Appellants around 04.30 P.M. on 10.08.2008. His body was found the next morning

around 07:00 AM. According to counsel, for the prosecution to have established the "last seen" circumstance, the time gap ought to have been so narrow as to rule out the possibility of anyone other than the accused being the perpetrator of the crime. In this case, contended both counsel, the canvas was large since the time gap was nearly 12 hours. Furthermore what cast serious doubts about the role of the Appellants was that the post-mortem report fixed the time of death to be about seven days from the time the procedure was commenced i.e. 12:00 AM on 17.08.2008. This brought in considerable uncertainty about the time of death. Even if it was assumed that the death took place between 12 midnight and 01:00 AM in the night intervening 10/11.08.08, the gap between the last seen time, and the time of death was eight hours. Being daytime, it could not be said with certainty that the deceased was only with the present Appellants and none else.

6. It was next submitted that the eyewitnesses testimony about the crucial aspect regarding last seen circumstance was uninspiring if not dubious. Here Learned counsel pointed out that PW-1 deposed that the accused had taken away the deceased, who was his employee, on 10th or 11th August at 04:30 PM. He was unable to identify who Raju was and who Sanjay was even though he claimed knowledge about their identities, and stated that they used to visit the deceased. On the other hand contended Learned counsel PW-2 gave a completely different version and stated that the Appellants went to see the deceased around 11 AM or 12 noon on 10.08.08. He also stated that

the police had detained him, Surender Verma and Avinash for three days and interrogated them. Commenting on the testimony of PW 5, Learned counsel argued that this witness claimed to have been the landlord of the accused. The police and prosecution alleged that both the accused were arrested in his presence. However he did not support the prosecution version regarding the arrest of Raju. He also did not support the prosecution version with regard to disclosure statement made by Raju and the consequent recovery of articles at his behest. Great stress was laid on the fact that the Trial Court itself disbelieved the prosecution's theory regarding Raju's arrest, in the impugned judgement, in its observations quoted below:

“35. I am constrained to note here that the prosecution has failed to prove that the blood stained shirt and gamcha of accused Raju as well as mobile phone of deceased Saual were recovered at the instance of accused Raju or that accused Raju made a disclosure statement Ex.PW14/L, as the only public witness to the same i.e. PW5 has stated specifically that neither was accused Raju arrested in his presence nor did he make any disclosure statement and nor did he effect any recovery in his presence. “

7. It was argued next that the testimony of PW-5 could not be relied upon to hold the appellants guilty because he was uncertain as to when and even the date regarding having seen the accused and the deceased together. He deposed that two Constables had come on 10.08.2008 to his plot for making enquiries and had showed a

photograph in that regard. Furthermore he claims to have told the police that the person in the photograph had gone to the plot four or five days prior to that (i.e. the date of enquiry). This witness also stated that he was called to the police station on 11 August, 12 to August, 13th August and 15 August 2008. If this statement were correct, the time and date when he saw the deceased became a matter of speculation. Contending that the Court would not have been justified in drawing an inference that the witness saw the deceased four or five days prior to his being called to the police station(as he deposed in the court), it was urged that he then would have seen the deceased and accused together on 07.08.08 or 08.08.08, which could not have led to the finding of his being a witness to the last seen circumstance.

8. It was next argued that the time as well as the date of death, could not be established in a manner as to link the Appellants to the crime. The postmortem report's determination that death occurred about 7 days before the examination of the body was conducted, brought in considerable uncertainty even as to the date, and also to the time. Therefore, the spectrum of time, and also the uncertainty as to when which witness had seen the accused with the deceased, rendered a finding that the accused persons were perpetrators of the crime, untenable. Relying on the decision reported as *Ramjee Rai v State of Bihar* 2006 (13) SCC 229, counsel argued that the time of death cannot be precisely determined, and in such cases, it would be

unsafe for the Court to assume the accused's guilt, and convict him for murder. Learned counsel also emphasized that PW-5 did not support the prosecution version in some particulars, and his deposition was at variance with what was recorded during the investigation. Counsel highlighted the fact that the witness did not mention the time when he saw the deceased- whether it was in the morning or the evening. This assumed importance, because PW-2 deposed to having seen all three together in the morning, whereas PW-1 stated that he saw them at 04:30 in the evening. Therefore, the testimony of PW-5 was crucial and corroborative. He was however, silent as to the time. Having regard to all these circumstances, the Court ought to set aside the conviction recorded in the impugned judgment.

9. Mr. Sanjay Lao, appearing on behalf of the prosecution, contended that the last seen evidence stands clearly established in the sense that both PW-1 and PW-5 deposed that the deceased left in the company of the appellants. PW-1 was the deceased's employer, and he also deposed that both appellants used to visit him; PW-5 was in fact their land lord. Both of them were independent witnesses, and had no reason to depose falsely. Both of them stated that they saw the deceased alive in the company of the appellants on 10.08.2008. The learned counsel submitted that even if the appellants had parted company with the deceased, 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 furnished an explanation which was patently

false, such as denying the tenancy under Sanjay Yadav, would be a circumstance which could be taken against them.

10. Mr. Lao also submitted that though the recovery of articles such as mobile phone were not believed, yet the recovery of the knife was established, and the doctor in his report Ex. PW-3/B stated that the said knife was probably used to kill the deceased. The Appellants had no explanation to the blood stained shirt recovered through Ex. PW-14/I, which was duly established. The deposition of PW-5 was sufficient to link the accused with these articles; under the circumstances, they owed a duty to explain these incriminating circumstances, which they could not, during the trial. Counsel also stated that the confusion about dates, i.e. whether PW-5 was approached on 10th or 12th August, 2008, is not material, because many times witnesses are unable to recollect dates or time, with precision. Moreover, the disclosure statements and recovery memos exhibited, proved that the articles were seized on 15th August, 2008.

11. Thus, according to the learned counsel for the State, the circumstance of the deceased being last seen in the company of the appellants as well as the fact that the death had occurred shortly thereafter and that his death was not under natural circumstances, coupled with the factum of recovery of the blood stained clothes, pursuant to the disclosure statement of Sanjay, and the knife, which was hidden, in a place known only to them, 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 34 IPC. He contended that the impugned judgment and order on sentence ought not to be interfered with.

12. The last seen theory is based on the premise that in a case, having regard to all the other circumstance, the victim's being last seen with the accused, if proved through unimpeachable evidence, and all the circumstances likewise are proved, would lead the court to conclude that it was only the accused, and no one else who was the perpetrator of the crime. 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. 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 held that in cases of 'last seen', the courts should look for some corroboration. The judgment in *State of U.P. v. Satish* (supra) was reiterated. In *Kulvinder Singh and Another v. State*

of Haryana, 2011 (5) SCC 258, decided by the Supreme Court, it was held that:

“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.”

Reasoning:

13. The prosecution case is that the deceased Saual's body was found at 07:10 AM on 11.08.2008; telephonic information was received in that regard. It appears that the police were able to identify the name of the deceased on account of the statement of PW-14, who claims to have sold a mobile phone to Saual. The postmortem in this case was conducted much later, on 17.08.2008; the proceedings started at 12:00 AM; the time of death was fixed approximately 7 days

before that. Even if one were to give a wide margin in this case, the time of death possibly could have been any time between the afternoon and late night. This brings in an element of uncertainty; the Court would, therefore, have to go by the broad probability that the murder was committed in the latter part of 10.08.2008 or early 11.08.2008. At this point, the corroboration by the witnesses or even the proof of circumstances, such as the *last seen*, becomes very crucial. The prosecution relied upon the testimony of PW-1, Saual's employer. He deposed having seen the accused on 10.08.2008/11.08.2008. Even if one were to ignore the confusion in date on account of lapse of memory, this witness claims to have seen the appellants around 04:30 PM on 10.08.2008 when they went away with the deceased. He claims to know about the appellants since they were deceased's friends. The deceased used to work on the *rehri* selling *chholey bhature* owned by PW-1. PW-2 was the deceased's co-worker; he supported PW-1 to the extent that the appellants were friends of the deceased. However, he did not support the prosecution story at all about the timing, and stated that that deceased and both the appellants were seen together on 10.08.2008 around 11.00 am and 12.00 am. The prosecution furthermore had to confront him with the statement recorded by him under Section 161, through suggestions and leading questions submitted by the Court.

14. In view of these circumstances, the testimony of PW-5 about knowing that the Appellants visited the deceased becomes vital. He

curiously stated having joined the investigation on 10.08.2008 itself when the police went to him. Like in the case of PW-1, this may be put down to confusion. However, the subsequent claims of having been called by the police on later dates, such as on 12th, 13th and 15th of August 2008, cannot be ignored. This is because the witness stated that 4 or 5 days before he was called to the Police Station, he had seen the appellants along with the deceased. Now another significant aspect about this witness is that even though he supported the recoveries allegedly made on the disclosure statements recorded by the appellant Sanjay, he completely disclaimed association with the prosecution *vis-à-vis* the discovery and the recoveries made by Raju. The latter part was accepted by the Trial Court which disbelieved the prosecution regarding the recoveries at the behest of Raju.

15. The testimony of PW-5, in the opinion of the Court, cannot be conclusive as regards the “last seen” theory. The witness was not clear as to which date he had seen the accused and the deceased together. If one were to calculate 4-5 days from 12th/13th August 2008, the conclusion would be that his observation pertained to a time prior to the occurrence of the crime. If the Court were to assume that he in fact was joined the investigation and recorded his statement on 15.08.2008 - when the police claims to have recorded it - the date when he claims to have seen the accused and the deceased, would be 10.08.2008. Though this apparently supports the prosecution, a closer scrutiny would reveal that PW-5 does not specify any time at all. Unlike PW-1

and PW-2, who were clear about the time when they allegedly saw all the three together, PW-5's testimony is utterly vague and general about the time when he claims to have seen all the three. This injects considerable uncertainty and casts doubts on the entire prosecution version of the deceased having been seen along with the appellants.

16. As discussed previously in this judgments, the *last seen* theory kicks in – (if one may use that expression) - only when the prosecution can establish that the possibility of others being with the accused can be ruled-out altogether and more crucially, the time-gap between the death and the *last seen* circumstance is so narrow as to rule out involvement of anyone else with certainty. In this case, the time as to when various witnesses saw the deceased with the accused is confused and conflicting. One of the prosecution's star witness, PW-5 did not support it with regard to the recoveries allegedly made at the behest of Raju. Even the Trial Court discounted the prosecution version in this regard. The entire allegation, therefore, hinged on whether PW-5 was in fact a witness to the *last seen* circumstance. His silence about the time when he saw the appellants and the deceased, therefore, is very crucial; the Court is left guessing as to whether it was in the morning, as deposed to by PW-1 or after 4:30 as testified by PW-2. Moreover, the death in this case - according to the postmortem report (procedure having been conducted 7 days after the incident) was around 12.00 pm. Having regard to all these factors and the nature of the uncertainties which have emerged, the Court is of the

opinion that the Trial Court could not have convicted the appellants for the charges under Section 302/34. The prosecution had sought to rely upon the motive which was to be deposed by some of those witnesses. However, this aspect was not supported during the trial. In a case like the present one where the prosecution relied on circumstantial evidence, particularly the *last seen* circumstance, motive assumed a rather dominant position. The prosecution's inability to prove it, is a serious flaw. We further note that some of the prosecution witnesses were examined and their statement recorded on 12.08.2008. PW-20, the IO stated that PW-5's statement was recorded on 15.08.2008. However, that witness did not support this fact and instead deposed that his statement was recorded on 12th and that he had been called to the Police Station on successive dates. Having regard to the further circumstance that the recoveries claimed to have been made at the behest of Sanjay were from the roof of the building on a plot adjacent to their premises, which was owned by PW-5 – a circumstance which by itself cannot implicate the accused where the basic facts are not proved, in the absence of any testimony by any independent witness, that cannot be read as an incriminating fact.

17. As discussed previously, the prosecution's burden was to prove each circumstance conclusively and beyond reasonable doubt as well as the proof which linked all circumstances by the same degree of proof and establish beyond any doubt that it was the accused alone who could be the author of the crime and that every hypothesis of his

innocence had to be ruled-out. This is a case where the prosecution cannot be said to have discharged it. For these reasons, this Court is of the opinion that the judgment and order impugned in this appeal cannot be sustained. It is accordingly set-aside. The appeals are consequently allowed. The Appellants shall be released forthwith.

**S. RAVINDRA BHAT
(JUDGE)**

**PRATIBHA RANI
(JUDGE)**

NOVEMBER 28, 2011