

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

DECIDED ON: OCTOBER 21, 2011

+ CRL. L.P. 379/2011 and CRL M.A. No. 9251/2011

STATE Appellant
Through: Mr. Sanjay Lao, APP for the State

versus

GAJINDER Respondent
Through: None

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MS. JUSTICE PRATIBHA RANI

- | | | |
|----|---|-----|
| 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)

%

1. By way of this petition, the State has sought leave to appeal against the judgment and order of the learned ASJ dated 17th February, 2011 in SC No. 50/2009. The respondent was charged with having committed an offence punishable under Section 302 IPC.

2. Briefly, the prosecution case was that the body of the deceased Seva Ram was discovered on 23rd January, 2009 at about 9.00 a.m. in Iaspur Village near a Primary

School. He was working as a driver. During the course of investigation, alleged the prosecution, it was learnt that the deceased was initially seen last in the company of the respondent and three others. It was also alleged that PW-13 last saw the deceased in the company of the accused at about 9.00 to 10.00 PM. Apparently, they were quarrelling on account of dismissal/termination of the deceased's services. The statements of various material witnesses were recorded under Section 161 IPC by the prosecution. The statement of PW-12, father of the deceased was recorded on 23rd January, 2009 and whereas that of PW-13, the principal witness to the 'last seen' theory alleged in this case was recorded on 24th January, 2009. The respondent/accused was arrested subsequently on 29th January, 2009 on the charge of having committed the murder of the deceased Seva Ram. The prosecution examined 23 witnesses.

3. The prosecution case before the trial court was that the evidence of PW-13 as corroborated by PW-12 as well as recovery alleged to have been made at the instance of accused/respondent pursuant to the disclosure statement recorded by him to the police. Apparently, blood-stained clothes and gupti (murder weapon) were recovered as a result of that proceeding. Upon consideration of these facts and statements of the parties, the trial court acquitted the respondent/accused of all the charges.

4. The learned APP submits that leave ought to be granted in this case since the trial court materially overlooked the deposition by PW-13 about the last seen circumstance. It is urged that though PW-13 did not fully support his previous statement, recorded during the investigation, the testimony of PW-12, to a large extent, lent credence and corroboration to that version. It was urged that the recovery of the murder weapon i.e. gupti as well as blood-stained clothes implicated the respondent/accused as the perpetrator of crime.

5. We notice that the trial court listed six circumstances made out by the prosecution during the trial in paragraph 10 of the impugned judgment. It based the acquittal on the ground that PW-13, the star witness of the last seen theory, did not support the said case. It was further held that the recovery in this case was doubtful since PW-12 in his deposition admitted to having accompanied the police when the recoveries were made pursuant to the disclosure statement by the accused during the investigation, and yet he

was not a witness to the recovery. The relevant part of the trial court reasoning is abstracted below:-

“13. From deposition of PW12 and PW13 it can be deduced that both of them have merely stated that they had lastly seen Seva Ram in the company of four persons, one of whom was accused Gajender. None of the other said three persons was named as an accused in this case on the basis of last seen theory. Though PW 12 spoke of a heated exchange going on between Seva Ram and Gajender while they were sitting in front of house of Ram Parkash but PW 13 categorically denied it, even when cross examined by Ld. Addl. PP for the State. It is a matter of record as borne out of the statement of PW 13 Jagbir recorded under Section 161 Cr.P.C. that he was actually a relative of deceased Seva Ram and not of accused Gajender. He therefore did not have any reason to depose falsely in favour of accused Gajender or against the deceased and his father. It is further pertinent to note at this juncture that statement of Jagbir was recorded on 24.01.09 by IO wherein the fact of his having seen the deceased in the company of Gajender was recorded but still as admitted by the IO, no sincere attempt was made by him on that day to arrest accused Gajender or even interrogate him thereby rendering it probable that actually PW13 did not make any such statement on 24.01.09 before the IO. Further PW13 in his cross examination replied that on gaining information about murder of Seva Ram, he had told father of Seva Ram on 23.01.09 that he had seen Seva Ram with Gajender on the night of 22.01.2009. However a glance at the statement of PW12 Ram Chander recorded under Section 161 Cr.P.C. by the IO would reveal that he claims to have been informed by Jagbir @ Gulle on the night of 22.01.09 itself that he had seen deceased Seva Ram with Gajender at about 8 pm. No explanation for this vital contradiction is given either by PW12, by PW13 or even by IO.

14. Moreover as regards claim of PW12 that he had also seen deceased Seva Ram sitting with accused Gajender and his three relatives outside house of Ram Parkash on night of 22.01.2009 is concerned, there is no such mention in the statement of PW12 as recorded by IO on 23.01.2009 or thereafter. In fact the said statement is totally contradictory to the deposition of PW12 that he had seen the deceased on that night with accused Gajender is a crucial and significant improvement made by him during his evidence in the court for which no explanation at all has been offered. Obviously no reliance on such statement can be placed. Even otherwise as noted earlier there is not even an iota of evidence on record to suggest that anybody had lastly seen the deceased solely in company of accused Gajender and further that deceased was not seen alive by anyone thereafter. In case the accused was one of four persons with whom deceased was sitting on the night before his murder, admittedly he alone cannot be held liable for murder of Seva Ram on the strength of last seen

theory.

15. The next circumstance pleaded by prosecution is the alleged recovery of weapon of offence and blood stained cloths of accused at the instance of accused. The so called recovery is again shrouded in deep mystery and is highly doubtful. As per IO, after the accused was apprehended, he was interrogated on which he made a detailed disclosure statement on 25.01.2009 at the house of his uncle Ram Parkash. At that time Ram Chander, father of the deceased was also with them. He, however, admitted that neither the disclosure statement nor the arrest memo of the accused bear signatures of Ram Chander, father of the deceased. He could not offer any plausible reason for the same. If a public person was with the IO during recovery as claimed herein, it was imperative for IO to have obtained his signatures on the memos to attach sanctity to the recovery. Here the interesting fact to be marked is that PW12 Ram Chander in his cross examination categorically controverted the claim of IO that accused was arrested and interrogated in his presence. He maintained that he neither met the IO before apprehension of accused nor did he accompany the police party to house of Ram Parkash from where accused Gajender was arrested and where the alleged disclosure statement was made by him. This casts a serious doubt as to genuineness of claim made by IO and the story put forth by the police. It is further the claim of police that in the same sequence of events, after the disclosure statement, the accused led the police party to fields. There he first pointed out the spot and then got recovered from there a gupti, the murder weapon. The seizure memo of the said gupti though bears signature of Ram Chander at Sl. No.3, but it still does not invoke any confidence as the pointing out memo of the spot prepared at the same spot preceding the said recovery does not bear signatures of PW12 Ram Chander. It is a mystery as to why he was not asked to sign pointing out memo as witness if he was present there at that time. Actually the signature of Ram Chander appearing even on seizure memo of gupti is in a totally different ink and appear to have been appended subsequently. Besides this, Ram Chander as PW12 in his examination in chief affirmed on oath that he had accompanied the police to house of Ram Parkash when police visited there second time for recovery of blood stained cloths of the accused and in his presence, the accused had got recovered one shirt, jeans and a gersey but in cross examination he replied that on 25.01.2009 i.e. the day of alleged recovery, he never visited house of Ram Parkash at any point of time. This reply of Ram Chander signifies that he was not present at house of Ram Parkash when purported recovery of cloths was done by IO at the instance of accused. It being so, the deposition of PW12 in his examination in chief that the cloths were got recovered by accused Gajender in his presence stands negated and falsified by PW12 himself. In such scenario no sanctity can be attached to recovery of either of so called incriminating articles i.e.

gupti and the cloths. Needless to mention that Hon'ble Superior Courts have repeatedly held that such kind of recoveries are a weak piece of evidence and conviction cannot be recorded solely on such recovery. Here even the said recovery being doubtful, it can obviously not be taken as an incriminating substance against the accused".

6. We have carefully considered the entirety of circumstances as well as the submissions made by the learned APP for the State. We are of the opinion that the trial court reasoned that the prosecution predominantly relied on the testimony of PW-13 who spoke of last seen and that fact could not be said to have been established since he merely deposed in the court about having seen the deceased and the accused in the company of three other persons at 7.15 PM, the previous evening i.e. 22nd January, 2009.

7. However, as regards the other parts of the prosecution case i.e. the deceased and the accused having been seen quarrelling and both leaving together, was not supported by PW-13 during his deposition. This was sought to be elicited by the State, with permission of the court. However, the witness declined to support the suggestions. So far as the testimony of PW-12 is concerned, besides noticing that the witness had contradicted himself and made several improvements which were fatal to his credibility, the court observed subsequently that he admitted having been present when the recoveries were made. Yet in the Seizure Memo, PW-12 was not in any manner shown as a witness to the recovery, raising a serious question as to the veracity of that recovery.

8. It has been held and reiterated in numerous cases by the Supreme Court that the High Court's jurisdiction in examining a petition for leave to appeal is confined to considering whether the judgment impugned before it raises substantial and compelling questions which ought to be gone into for the purpose of granting a leave. The law makers in their wisdom did not permit a State to appeal preferring the instead that the acquittal by a competent court was to be considered as an affirmation of an accused's innocence. In these circumstances, the authorities have primarily ruled that the expression 'substantial and compelling reasons' would extend to only grave misappreciation of evidence, grave misapplication of law and adoption of an approach by the trial court which would lead to miscarriage of justice.

9. On an application of the certain principles, we are of the opinion that the present

petition does not disclose any of these elements. It is unmerited and has to fail. The petition is, therefore, dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**PRATIBHA RANI
(JUDGE)**

**OCTOBER 21, 2011
Sd**