

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

Date of Hearing & decision: 13th October, 2011

+ **CRL.A No.825/2011**

ASHIQ AHMED @ RAJU APPELLANT
Through: Mr. Hanif Mohammad, Advocate.
Versus

STATE RESPONDENT
Through: Mr. M.N. Dudeja, APP for the State.

AND

+ **CRL.A No.1109/2011**

ZAKIR ALI APPELLANT
Through: Mr. Siddharth Aggarwal Advocate with
Mr. Aditya Wadhwa, Advocate.
Versus

STATE RESPONDENT
Through: Mr. M.N. Dudeja, APP for the State.

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? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported in the Digest? | Yes |

J U D G M E N T

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The present judgment will dispose of two appeals preferred by the Appellants Ashiq Ahmed @ Raju and Zakir Ali challenging the judgment of the learned Additional Sessions Judge dated 07.05.2011 and the order on sentence dated 10.05.2011 by which they were convicted for having committed the offence punishable under Section 302/201/34 of the Indian Penal Code (IPC). They were directed to undergo life imprisonment along with fine besides other sentences, which are to run concurrently.

2. The facts briefly alleged by the prosecution are that the police received intimation through DD No.7-A (Ex.PW-15/A) during the trial, at about 6:50 AM on 11.06.2006, intimating that the dead body of a young male was lying in a well at Uttam Nagar. Police reached the spot and during the course of investigation, IO said to have been informed that the deceased name was Bablu Khan, nephew of PW-3 Ashaf Beg (wife's sister's son). PW-3 was present at that time. On the basis of the information available contemporaneously the rukka PW-4/B was prepared. The First Information Report (FIR) Ex.PW-4/A was registered later at 9:45 AM at Police Station Uttam Nagar. Later, during the day, police recorded the statement of PW-3. On the basis of the statements of other witnesses including of PW-22 Aftab and PW-5, the police arrested both the Appellants as well as Mahesh Chand on suspicion of having committed the offence. On 12.06.2006, after conclusion of the investigation, the accused were charged for having committed the offences; they denied any involvement in the crime and claimed trial.
3. The prosecution relied upon the testimony of 22 witnesses besides other materials produced on record in the form of exhibits. After conclusion of the prosecution evidence, the accused were questioned on the incriminating circumstances that emerged during the trial, on record under Section 313 Cr.P.C. After answering queries of the Court, the Appellants and Mahesh Chand relied upon the testimonies of two witnesses DW-1 HC Harphool and DW-2 HC Ajeet Singh. Upon consideration of the entire materials on record, the Trial Court concluded that the Appellants were guilty for the offence they were charged with. Mahesh Chand was also held guilty for the offence punishable under Section 201 IPC and sentenced to undergo five years imprisonment. He has not challenged the findings of the Court before us.
4. The learned counsel for the Appellants urged that the conviction recorded by the Trial Court is unsustainable because it is predominantly based on the theory of "last seen" allegedly proved by PW-3. It was pointed by the counsel for the Appellants that the testimony of PW-3 is unreliable because he was considered to be present when the IO PW-20 ACP Ashok Gera visited the spot and recorded the initial intimation (rukka Ex.PW-4/A). It is urged by learned counsel that this document describes the presence of PW-3 and even recorded his version as to the circumstances in which the deceased Bablu Khan left his premises at 8:30 PM the previous night. Subsequently, neither the rukka nor the FIR mentioned any accused or revealed their identity. Further, it was

argued that the testimony of PW-3 showed that he was allegedly aware of the previous fight between the accused (specially Zakir) and the deceased sometime before the disappearance of the later and even cautioned the deceased from desisting further association with the said Appellant Zakir. Despite this allegation, PW-3 did not protest when Zakir and Ashiq Ahmed alleged visited him and the deceased went with them. It was also urged that the testimony of PW-3 revealed that he made half hearted attempt to search for the deceased around 11:30 PM on 10.06.2006 after which he appear to have been gone to sleep. It was only in the morning when he went out for a walk that he discovered about the deceased's body found. It was urged that the omission by PW-3 to mention the identity of the assailants/accused or even reveal that two people had accompanied the deceased, is fatal to the prosecution story in its entirety. It was urged that this has to be seen in the background of the circumstance that the body was discovered at 6:50 AM in the morning and the FIR the most contemporaneous document was recorded at 9:45 AM. Even during this time, the uncle PW-3 was silent as to his suspicion and he alleged voiced much later.

5. Learned counsel next urged that the theory of last seen propounded by the prosecution by relying on the testimony of PW-3 is unworthy of credence in this case because the deceased went allegedly left his residence at 8:30 PM the previous evening. The body was discovered at 6:50 AM in the morning. The Postmortem report Ex.PW-17/A revealed that the time of death was around 1:00 AM to 3:00 AM on 11.06.2006. This deduction drawn on the basis of the contents of the postmortem report Ex.PW-17/A which stated that the time of death was approximately 2 ½ days from the time of the commencement of postmortem examination i.e. 1:10 PM on 13.06.2006. It was urged that the authorities are consistent with the last seen being inherently weak kind of circumstance to implicate an accused for the commission of murder, can be examined and relied upon if the time lag between the disappearance of the deceased and the discovery of the body or the possible time of death is very narrow. Emphasizing this point, it was urged that in the present case the time interval was not less than five hours.
6. It was next argued that the Trial Court's conclusion about existence of motive on the part of the accused, to which the previous altercation which took place between Zakir and the deceased Bablu Khan's count, it was allegedly spoken about by PW-2 (but, however, did not support the prosecution during trial), is unbelievable. It was urged

- that the evidence in this regard was not only inconclusive but was utterly vague and the Trial Court fell into error in concluding as it did that the accused had a motive to kill the deceased.
7. Learned counsel for the Appellants urged that the three circumstances i.e. recovery of the objects such as blood stained clothes, from the premises of Zakir and Ashiq Ahmed, in no way links them with the crime. It was urged that the Trial Court's reliance on the report of the FSL Ex.PW-20/C to PW-20/E was misplaced. These documents had stated that the clothes recovered from the Appellants' premises contained bloodstains of O group blood and the deceased's blood group matched with the blood group in those clothes. It was urged that the instances of those with the similar Group O blood group is not less than 40% and for this argument, the learned counsel relied upon the extract of *Modi's Medical Jurisprudence* at Page 490 in Table 9. It was urged that besides this, the prosecution could not rule out the Appellants' blood group itself being 'O' type. In these circumstances, argued counsel, even if the recovery were to be believed, the existence of bloodstained clothes with 'O' blood group on them could not be considered incriminating as they per se could not have connected the Appellants with the crime. It was also urged that the clothes allegedly recovered from the Appellants' premises were not identified as belonging to them or has having been worn by them, by any prosecution witnesses, particularly, PW-3.
 8. It was lastly urged that the other circumstance relied upon by the Trial Court to hold Appellants guilty i.e. alleged abscondence, could not be said to have been established by the prosecution. In this regard, it was emphasized that none of the prosecution witnesses stated that any attempt was made to arrest the accused or even question them in the aftermath of the crime. Furthermore, they were arrested from the same locality i.e. Uttam Nagar area park.
 9. Learned counsel relied upon the decision reported as *State of Goa v. Sanjay Thakran 2007 (3) SCC 755* to say that having regard to the overall facts, the theory of last seen in the present case could not be said to have been established and that the prosecution did not discharge primarily onus of proving the circumstance so as to eliminate the possibility of Appellants innocence in the present case.
 10. Mr. M.N. Dudeja, learned APP for the State urged that this Court should not disturb the findings of the Trial Court as the conviction and sentence were based on sound reasoning. It was submitted that a careful scrutiny of PW-3's testimony would reveal

that he did not in any manner contradict himself or any other witness in regard to any material particular. The learned APP highlighted that PW-3 was consistent in the statement under Section 161 Cr.P.C. as well as in his deposition in the Court that the deceased had left his premises with the two Appellants. Learned counsel argued that the fact that PW-3 did not mention Mahesh Chand's name and went on implicating only the Appellants, established that he was a truthful witness; this led to the acquittal of the third accused. Counsel argued that the mere circumstance that the rukka did not mention the names of the accused cannot be a flaw in the Trial Court's reasoning. It was argued in this context that the IO PW-20 ACP Ashok Gera visited the spot as is evident from the testimony of PW-3 itself, he was not even aware of their names or identified before their visit when they took away the deceased. Having regard to this fact, it was quite natural for him to have forgotten to mention them or their role at this stage of recording of the FIR as well as the rukka. However, later during the day at the earliest opportunity, he revealed their identities and names and they were subsequently arrested.

11. It was argued that the Trial Court justifiably held that the Appellants had a motive to kill the deceased. In this regard, the learned APP relied upon testimony of PW-3 and stated that the said witness mentioned about the previous incident which led to injuries being inflicted upon the Appellant Zakir on 11.05.2006; an MLC was also recorded and even the statement of Zakir Ex.PW-5/A was relied upon. The learned APP highlighted that this injury was the result of the previous fight between Zakir and the deceased Bablu Khan, which had apparently led to a compromise. Learned APP stated that if this deposition of PW-3 were to be read along with that of PW-5, the motive of the Appellants to do away with the deceased had been established by the prosecution.
12. Learned counsel next argued that recovery of the axe was disbelieved by the Trial Court, yet its use was held to have been established. Learned APP argued that if the testimony of PW-17 Dr. B.N. Mitra, the doctor who examined the dead body, clearly showed the twelve injuries out of which four were sufficient individually to have caused the death. All these were cranio-cerebral damage consequent to injuries and sufficient individually as well as collectively to cause death in the ordinary course of nature. Learned APP highlighted the fact that the doctor stated that the injuries could have been inflicted by the axe, which was produced during the trial. It was also urged

that there is no reason to disbelieve the recovery of bloodstained clothes from the premises of the Appellants as these were testified by the prosecution witnesses. The Appellant, on the other hand, did not explain why such blood stains were found on the clothes if indeed their argument that their own blood could have been responsible for it, were to be believed.

13. The above discussion would reveal that the prosecution in this case was dependant on circumstantial evidence to implicate the Appellants. Its principal witness was PW-3, the deceased's uncle. PW-3 deposed in the Court about the involvement of the Appellants in a previous fight. He also mentioned that the deceased had been cautioned not to associate himself with the Appellants. PW-3 was clearly not in a position to identify Zakir and Ashiq Ahmed. Later in the cross-examination PW-3 stated that *"I had seen them for the first time when they had come to my house."* If such were the background, there is no reason why – particularly in view of PW-3's previous statement in the examination-in-chief of his having counsel the three boys to maintain peace – he did not reveal any suspicion about their involvement in the earliest available opportunity when the rukka Ex.PW-4/B and FIR Ex.PW-4/A were recorded around 9:45 AM. This omission has fatal – not merely serious implications because PW-3 was sufficiently composed to describe all details regarding how the deceased left the house, but inexplicably omitted who accompanied him; at the time the FIR and rukka were recorded. When the case is based on the theory of last seen evidence, the prosecution has to prove each circumstance conclusively as well as prove each link which form the chain of circumstance completely and conclusively. Besides, the prosecution also is under the burden to prove that it was only the accused and nobody else who could have been the perpetrator of the crime, Again, the circumstances should be of a conclusive nature and tendency as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. (*Hanumant Govind Nargundkar vs. The State of Madhya Pradesh AIR 1952 SC 343; Sharad Birdhichand Sarda v. State of Maharashtra, 1984 (4) SCC 116*)

14. As far as the last seen circumstance is concerned, the Court have generally commented with these inherently weak kind of case and the criminal Court has to be

cautious in accepting these to be the primary or sole basis to convict the accused of a crime. (See *Bodh Raj @ Bodha & Ors. v. State of Jammu & Kashmir*, 2002 (8) SCC 45; *Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh*, 2006 (10) SCC 172; *State of U.P. v. State*, 2005 (3) SCC 114).

15. It has been acknowledged that two important considerations governed by the Court while concluding that the accused is guilty (1) that the time gap between the disappearance of the deceased and the discovery of the dead body or the time of death has to be extremely narrow so as to eliminate the scope of anyone other than the accused being the perpetrator of the crime; (2) the possibility of someone else committing the crime to be eliminated altogether.
16. In view of the settled law on the question, the testimony of PW-3, as to the incident and particularly, the manner in which the deceased went left the premises and accompanied the Appellants is doubtful to say the least. It has been held in several cases that the involvement of anyone in the crime has to be revealed at the earliest available opportunity. Of course, we are aware that even relatives of the victims can be traumatized and are unable to reveal entire sequence of circumstances or facts on account of shock or grief which they may suffer because of a crime. Yet, in the present case PW-3 does not appear to have suffered from any such mental agony. He has given a sufficiently detailed account about disappearance facts under which the deceased left the premises i.e. around 8:30 PM and even mentioned his relationship with the deceased. However, he subsequently omitted mentioning identities of the accused or even the fact that the deceased accompanied anyone at all in the rukka. His statement, however, was recorded later in which he apparently implicate the present Appellants. Having regard the totality of circumstances, we are of the opinion that PW-3 is not a truthful witness and his testimony about last seen is not credible enough so as to implicate the Appellants.
17. So far the motive is concerned, the prosecution attempted to prove by relying upon the testimony of PW-22 Aftab. He, however, did not support the prosecution version.
18. The prosecution relied on the testimony of PW-5 to mention that Zakir had a previous fight with the deceased about a month prior to the date of disappearance of Bablu Khan i.e. on 11.05.2006. In this regard, statement of Zakir (Ex.PW-5/A) was produced and relied upon to say that he had given the detailed account of the attack by Bablu Khan and further that the dispute had been resolved through a compromise.

However, counsel has argued and in our opinion with some merit that PW-5 mentioned about the stabbing incident and having collected the MLC on 11.05.2006. He even mentioned in the deposition in the Court that the statement of Zakir was recorded two days after the MLC (i.e. 11.05.2006) however, the document Ex.PW-5/A on the face of it is dated 11.05.2006 which improbabilises the witnesses' version. In any event if the prosecution version were to be accepted, the motive in the present case has not been shown to be of such an intensity to have led to the Appellants to fatally attack the deceased. Both PW-3 as well as PW-5 mentioned that the parties had compromised; the incident took place one month prior to the disappearance and the death of Bablu Khan.

19. We notice that the Trial Court in the present case completely disbelieved the recovery of the axe, the alleged murder weapon. Apart from this, in the initial intimation of the incident i.e. PCR form mark PW-20/B there is no mention about the axe in the first instance. Yet, the prosecution sought to prove that the axe was recovered at the instance of one of the accused. However, for reasons which are not apparent from the judgment, the Trial Court proceeded to conclude that the very same axe was used as murder weapon and tallied with the circumstance against the present Appellants. We are of the opinion that once the Trial Court concluded that the recovery could not be believed – which is the only conclusion logically possible and which we endorse fully in the present case – it could not have been used the weapon as a circumstance against the Appellants.
20. So far as the other recoveries are concerned, it is well settled that the conviction in a murder case cannot be based only on the recovery of any article; in this case these articles belonged to the Appellants and were allegedly seized from their premises. The learned counsel for the Appellants have argued and, in our opinion with same degree of force, that these clothes were not identified by anyone. More crucially not even by PW-3 who allegedly saw the Appellants. This is a very strong circumstance, in our opinion, to disbelieve the recovery of the two bloodstained clothes from the Appellants premises.
21. We are of the opinion that the Trial Court fell into error in holding that the Appellants had tried to flee justice and absconded. Yet, evidence on record points to their having been arrested almost contemporaneously with the same time i.e. 12.06.2006 and that too within the same locality i.e. Uttam Nagar.

22. In view of the above reasoning, we are of the opinion that the conviction and sentence recorded by the Trial Court in the impugned judgment cannot be sustained. The same are therefore set aside. The Appellants are hereby directed to be released forthwith.
23. The Appeals are accordingly allowed.

(S. RAVINDRA BHAT)
JUDGE

(G.P. MITTAL)
JUDGE

OCTOBER 13, 2011

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