

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

Decided on : 27.03.2012

+ **CRL.A.16/2012 & CRL.M.B. 32/2012**

AKHTAR KHAN @ VICKY **APPELLANT**

Through : Mr. K.Singhal with Mr. Siddharth Mittal, Advocates

VS

STATE **RESPONDENT**

Through : Mr. Sanjay Lao, APP

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The appellant was convicted by Learned Additional Sessions Judge, Delhi in SC No. 56/2010 by a judgment dated 14.10.2011 for the offence of murder under Section 302, IPC. By order dated 20.10.2011, he was sentenced to undergo imprisonment for life, and a fine of Rs. 50,000 was also imposed on him, in default of which he was to undergo additional imprisonment for six months.

2. The prosecution case was that on 21.12.2007 at about 8:25 AM, the police received information about some quarrel that had taken place at Gali No.9, Kaushik Enclave, Sant Nagar. PW-19 SI Radhey Shyam left for the spot along with two constables and they found a dead body of a young person, the deceased in this case, near a partially built house at a farm house in Block A, Kaushik Enclave. The body had injury marks on the forehead and chin

which had bled heavily. The FIR, Ex.PW2/A, was recorded on the basis of the *rukka* Ex.PW19/A. Various items viz. a motorcycle (no.DL-8S-AA-8598), blood stained brick, stone, a jacket, blood stained earth and earth sample, country made liquor bottle, glass pieces, and blood found at the spot, were seized by the police. A few strands of hair were found in the right hand of the deceased and were also seized.

3. The prosecution further alleged that the statement of an eye witness Bahadur Rai was recorded. Bahadur Rai was the *chowkidar* (watchman) of the farm house where the body was found. Due to his being untraceable, he was not examined during trial. He had allegedly stated that he was working as Chowkidar at the farm house of Shiv Dass Agarwal. The accused, Akhtar Khan @ Vicky and the deceased, who was identified by him as Sunil Kumar, worked at the farm house and he was friendly with both of them. They used to consume liquor together. On 20.12.2007, Akhtar and Sunil went to the farm house with a bottle of liquor and half kilo of raw fish. They all consumed liquor. After getting drunk, the deceased started talking ill of Akhtar's mother. Akhtar warned him but Sunil did not stop. Akhtar then starting abusing Sunil. They got into a scuffle. Akhtar hit Sunil with a brick, which caused bleeding on Sunil's forehead. Bahadur separated both of them but Akhtar became furious and he removed his jacket and shouted at Sunil that he would not leave him alive today. Akhtar grappled with Sunil again and they had to be separated by Bahadur. Akhtar pushed Bahadur towards the wall causing injury to him. He took Sunil out and pushed him down the floor. He also threw gas cylinder, gas stove and bricks on Sunil from above. Bahadur lost consciousness on account of injuries received by him. When he woke up in the morning, he found Sunil dead while Akhtar had fled the spot. On the basis of Bahadur Rai's statement and upon his identifying the accused, the latter was arrested.

He allegedly made a disclosure statement, which led to the recovery of blood stained clothes from his house.

4. After completion of investigation, the accused was charged with the offence punishable under Section 302, IPC. The accused pleaded not guilty and claimed trial. During trial, the prosecution examined 21 witnesses. The accused did not lead any evidence. Based on an overall appreciation of the evidence, the Trial Court convicted the accused for the offence of murder and sentenced him to rigorous imprisonment for life and imposed a fine of ₹. 50,000 and in default of which an additional imprisonment for six months had to be served by him.

5. The Trial Court's conviction in this case, is based on its finding that the prosecution had proved various incriminating circumstances against the accused. These were, that hair of accused was found in the hands of the deceased; the recovery from the spot of a button from the shirt of the accused which he had worn at the time of the crime; the recovery of the accused's clothes stained with the deceased's blood; the circumstance of "last seen"; and employment of the accused and the deceased, at the farm house, where the crime took place.

6. Learned counsel for the appellant raised an objection to a conviction being based on these grounds. The appellant's counsel firstly contended that on merits, the prosecution had failed to prove its alleged story of murder of the deceased by the appellant. Secondly, the counsel argued that assuming the facts alleged by the prosecution to have been proved, the Trial Court grossly erred in convicting the accused under Section 302, as the present case fell within the exception no 4 of Section 300, IPC.

7. Detailing the first ground of appeal, the appellant argued that the impugned conviction is liable to be set aside on the simple ground of non-

examination of Bahadur Rai, the alleged eye witness. The appellant contended that the entire prosecution story was based on the Section 161, CrPC statement of the alleged eye-witness which was made to the police. He was not only the eye witness but the most material witness to prove the arrest of the appellant as well as the alleged recovery of the blood stained clothes from the possession and at the instance of the appellant. The prosecution had alleged that he had eye-witnessed the incident, and therefore, its omission to examine him was fatal to the case.

8. The appellant contended in the absence of this alleged eye-witness who had allegedly taken liquor with the accused and the deceased on the night of the incident, a presumption is raised in his favour and against the alleged eye-witness as it could have been equally that person (i.e. Bahadur, the eye-witness) who committed the murder of the deceased, and after levelling allegations against the present appellant, he ran away. In this light, appellant also referred to the statement of the accused made under section 313 wherein he stated the following:

“This is a false case. I used to go to work as a labour to the farm house. I was provided the job there by Bahadur working in the farm. I had picked up a quarrel with him as he used to demand money from me in the name of providing job to me. We quarrelled with each other and manhandled as well but I never paid him anything.”

9. The appellant assailed the matching of his hair with the hair allegedly found in the deceased's hand on three grounds. Firstly, there was inconsistency between the testimony of PW-13 and seizure memo of hair of accused (Ex.PW13/A) on the point of the date -of the said seizure. Secondly, according to PW-13, the *pullanda* (package) containing the sample hairs of the appellant was handed over to the SI Radhey Shyam but that officer during

his lengthy examination-in-chief did not say a word about the said medical examination or seizure of hair, of the accused. Thirdly, the investigation officer failed to record the statement of anyone from the hospital who may have conducted the medical examination of the accused. Furthermore, the fact that the Forensic Science Laboratory Report (Ex.PX-3) mentions the hair sample of the accused and those that were found in the hand of the deceased to be similar in only most of their characteristics was emphasized to imply that the hair found in the fist could have been someone else's as well. Had it been the hair of the appellant, the match/similarity would have been complete.

10. As regards the last seen circumstance which was held to be proved against the appellant, learned counsel relied on the Post Mortem Report (Ex.PW-5/A) to argue that there was a substantial gap between the estimated time of death of the deceased and the last time the deceased was allegedly seen with the accused. The post mortem report estimates the time of death to be 2 and a half days before the post mortem examination, which would approximately fix the death around between 10 and 11 PM, on 20.12.2007. PW-9, Anil Kumar, deposed that he saw the accused and the deceased together at the "*sharab ka theka*" at about 7:30 PM on 20.12.2007. It was also contended that Constable Raj Kumar was not examined as a witness, during the trial and that this casts a doubt about the prosecution story. The MLC report (Ex. PW-21/A) reveals that Raj Kumar had taken the accused to Aruna Asaf Ali Hospital for medical examination. The MLC report as well as the testimony of Dr Anubha (PW-21) discloses that the accused had abrasions over left lower jaw, right wrist, right forearm and right elbow.

11. Learned APP appearing for the State, on the other hand, stated that the prosecution story had been proved beyond reasonable doubt; that even

though the examination of eye-witness Bahadur Rai would have bolstered the case of the prosecution, even without it, the prosecution sufficiently proved its case based on the remaining evidence. He argued that fact of hair of the accused being found from right hand of the deceased was proved clearly, and it is a strong incriminating piece of evidence against the accused. He, moreover, contented that the match of the blood group of the blood found on the clothes recovered at the instance of the accused also points to the involvement of the accused in the crime. The learned APP also contended that the credibility of the seizures of button from the crime spot, and the presence of hair in the right hand of the accused was confirmed by its mention in the rukka (Ex. PW 5/A, 19/A, 2/B).

12. We have heard the arguments from both the parties. The most important question that this Court has to decide is whether a case of circumstantial evidence is made out against the appellant from the facts which have been held proved by the Trial Court. It is a settled position of law that for a case of circumstantial evidence to be successful, the facts so established should be consistent only with the theory of guilt of the accused. There should not be a possibility of any other circumstance except that the accused committed the crime in question and that every hypothesis consistent with his innocence should be ruled out. (Ref. *Sharad Birdhichand Sarda v. State of Maharashtra* AIR 1984 SC 1622, *Hanumant Govind Nargundkar v. State of M.P.* AIR 1952 SC 343, *Dharam Das Wadhwani v. State of UP* 1974 SCC (Crl.) 429 and *State of Haryana v. Jagbir Singh & Anr.* 2004 SCC (Crl.) 126). The Courts have repeatedly emphasized that the court trying the offence has to tread with care and caution while basing a conviction solely on circumstantial evidence, and to avoid the danger of converting suspicion into proof.

13. The prosecution's failure, or omission to produce the witness who claimed to have seen the incident, i.e. Bahadur, amounts to a near fatal dent to its case against the accused. The entire case against the present appellant was built around the account given by Bahadur. What started as an eyewitness based prosecution, however, turned out to be a circumstantial evidence based case, due to this omission. This Court is of opinion that the circumstances of this case are such that the role of Bahadur, who allegedly recorded the statement and then seemingly vanished into thin air, itself is suspicious to say the least. If the prosecution were to be believed that he witnessed the incident, recorded the statement to the police and then, for no rhyme or reason, disappeared. The appellant is right, in contending, in such circumstances, that Bahadur himself may have been the offender. The prosecution has not produced any objective evidence to substantiate that eyewitness's alleged account; even the MLC- if any existed, evidencing Bahadur's injury, which led him to lose consciousness when repeatedly attacked by the appellant (when he tried to separate the latter and the deceased) has not been proved, and marked as an exhibit. This omission, in the Court's opinion, constitutes a grave, if not fatal infirmity, casting suspicions as to the credibility of the prosecution version.

14. The next important piece of evidence is the "last seen" circumstance, spoken to by PW-9, who saw the deceased and the accused in a liquor shop at 7:30 PM. It has been held time and again that the last seen theory comes into play only when the time gap between the accused and the deceased being last seen together alive and the time of death is so small that it is impossible for anybody else being the author of the crime. (*State of U.P. v. Satish*, AIR 2005 SC 1000; *Malleshappa v. State of Karnataka*, AIR 2008 SC 69). It is not merely the time gap but also the close proximity of the

place which is important. There may be cases when there is some time gap between the accused being seen in the deceased's company or in the deceased's house but there is lack of opportunity of anybody else going to the place where the accused and the deceased were alive together. In such cases, the accused has to discharge the responsibility of explaining how and under what circumstances he parted company with the deceased.

15. The circumstances so alleged, and as reproduced above, at most suggest that the accused was present with the deceased earlier, at 7:30 PM on the night of the incident. However, the entire evidence on record has to be considered in light of the fact that an alleged eye-witness Bahadur Rai, who as per the prosecution case, was also drinking along with the deceased and the accused, is untraceable. His presence at the scene, coupled with his sudden and unexplained disappearance leaves room for doubt that instead of the appellant, it could have been him who murdered the deceased. On the last seen circumstance, therefore, the prosecution version that Bahadur too was with the deceased, negates the entire theory. That apart, the post mortem report fixes the time of death at least four hours after such "last seen" circumstance. This is objective evidence, which cannot be brushed aside, and contradicts the prosecution allegations.

16. In view of the above conclusions, this Court is of opinion that the prosecution had failed to prove, beyond reasonable doubt that the accused alone, and no one else was responsible for the crime. As regards the recoveries, it is well settled that the discovery of common place objects from a fairly well accessible area, cannot be solitary circumstances to convict the accused, *sans* a strong link with him or her. Such is not the case in the present appeal. The impugned judgment therefore, cannot be sustained; it is set aside.

The Appellant is directed to be released, if not required in any other case.
Criminal Appeal No.16/2012 is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

March 27, 2012

S.P. GARG
(JUDGE)