

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

PRONOUNCED ON: 22.02.2012

+ CRL.A. 398/2011, Crl. M. (Bail) 537/2011 & CRL.A.1076/2011, Crl. M. (Bail) 1519/2011

CRL.A.398/2011, Crl. M. (Bail) 537/2011

MUKESH KUMAR @ PILWA @ CHUHA

..... Appellant

CRL.A.1076/2011, Crl. M. (Bail) 1519/2011

RANJEET

... Appellant

Through: Ms. Nithasha Gupta, proxy for Ms. Anu Narula,
Advocate for appellant in Crl.A.398/2011

Mr. S.B. Dandapani, Advocate for appellant in
Crl.A.1076/2011

versus

STATE

..... Respondent

Through: Ms. Richa Kapoor, APP for State

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. This common order will dispose of the appeals directed against the judgement and order of the Learned Additional Sessions Judge dated 21-09-2010 in SC No. 49/08, by which the appellants were convicted for the offence punishable under Section 302 IPC. They were sentenced to undergo imprisonment for life and also to pay fine.

2. The prosecution had alleged that an information was received on 14-02-2006 that foul smell was emanating from a room in Gali No. 20, East Ram Nagar, Shahdara. PW-14 was deployed; upon his reaching the spot, he found that the room was locked from outside. The police broke open the lock and found that the dead body of an unknown male was lying under the wooden cot, in a decomposed condition. The police recovered an empty bottle of rum, two glasses and another half glass of premium rum. These articles were seized and the crime scene was photographed. The police also discovered a bag near the body; it contained a card of one Deepak Sharma and some other articles. These were also taken into custody. The police alleged that some newspapers and magazines too were found at the spot; they contained the signatures of one Ritesh Kumar Ranjan (hereafter Ranjan). The body was sent to the morgue where it was preserved. The police recorded the statement of PW-6, the landlady of the premises. She stated that the deceased used to go to the room in question and stay with the tenants. It was alleged that she also mentioned the name of one Bhuntan and further stated that one Sachin Agarwal, owner of the bag shop in GT Road, Shahdara, went to the tenanted room some eight or ten days prior to the incident and had a quarrel with the tenants on account of some payment. Sachin was interrogated; it was said that Jyothi Prasad Sahi might knew the address of the tenants. According to the prosecution, the accused Hemant led the police to the house of Omvir, where Ranjan's brother, Naveen alias Tuntun met the police. He allegedly disclosed that his brother Ritesh and his associates were leaving to the native place in Bihar by train. The police rushed to the railway station, where the three accused were arrested. They allegedly made disclosure statements about their involvement in the offence.

This also led to recovery of some articles, which included a wristwatch, a ring and some money.

3. The accused were later charged with having committed the crime, i.e. murder of Anil Kumar, whose body was identified by PW-13. They claimed to be innocent and wished for a trial. During the proceedings, the prosecution examined 22 witnesses and also relied upon several exhibits including the post-mortem report, forensic laboratory report and a Fingerprint expert's report. Upon an overall consideration of these materials, the trial court concluded that the prosecution had proved the appellants' guilt, beyond a reasonable doubt; they were accordingly convicted as charged and imposed with the punishments referred to earlier.

4. Counsel for the appellants urged that there is absolutely no evidence to establish their involvement in the crime. It was argued that the principal star witness for the prosecution was PW-1, the landlady. Her testimony was that she let out two rooms on the upper floor. One "langda" (a lame man) had come and asked her to rent out a room to him which she did. Three persons started residing in that room; one was Langda and the others were Ranjan and Mukesh. The other accused allegedly joined the latter two some other day. All of them left her room one Sunday. The body was recovered on Tuesday, after some children who were playing complained to her about foul smell emanating from the room. She claimed to have called her son Narender; he informed the police, who arrived at the spot, broke open the lock, seized the body and other articles. It was alleged that this statement is utterly vague about identification, and is not trustworthy, since there is no other evidence to corroborate that the accused stayed in the premises, and

were known to the landlady. Counsel also argued that her testimony conflicts with that of PW-2, Narendra, to the extent that the latter categorically deposed that his mother was not interrogated by the police in this case. Further the entire story of letting out the room to 'langda', also named as Madan Giri (according to PW-2), without any clue as to who he was or regarding his whereabouts, was utterly unbelievable. Counsel highlighted the circumstance that the original tenant had mysteriously disappeared and the police made no effort to trace him or join him in the proceedings. It is argued that besides the testimony of PW-1 and PW-2, there was no indication that the accused had any relationship with the premises at all. Furthermore, argued Counsel, PW-1 was an old lady with weak eyesight.

5. It was urged that the entire story about that the police discovered or traced the accused is unbelievable. The prosecution was clueless about the crime, since PW-1 was unable to give any lead; she did not describe the individuals who lived in the premises. She was vague as to who they were; indeed, she was even vague about "langda". That individual had disappeared. The police made no effort to trace him. The prosecution story was that Sachin Agarwal, a shopkeeper was interrogated; this in turn led to Jyoti Prasad Sahi, and eventually the trail led to the accused Hemant. Now, Hemant was acquitted, because one of the prosecution witnesses could not identify him. As far as others were concerned, the prosecution story itself was that Hemant led the police to their arrest. Counsel emphasized the fact that neither during the arrest, nor during the spot inspection by the police, was any member of the public associated in the investigation, despite the admitted fact (spoken to

by PW-2) that about 400-500 persons had gathered there. Most importantly, no effort was made by the police to have the accused identified in a TIP.

6. The appellants' counsel highlighted that during the proceedings, PW-6 deposed to having heard sounds of a quarrel on the evening of 11-02-2006, and that the accused went away from there on 12-02-2006. He also deposed about foul smell and the police going to the premises the same day, i.e 12-02-2006, which plainly contradicted the testimonies of the other witnesses. It was argued further, in this context, that according to the post mortem report (Ex. PW-18/A) the time since death was about 5 days prior to commencement of the post mortem (which was 2:55 PM on 16-02-2006). The death therefore, occurred on 11th of February, 2006 in the afternoon. This did not match with the ocular testimony, which clearly was that PW-1 and PW-2 saw the accused leaving much later. Most importantly, submitted counsel, none of the prosecution witnesses had in fact mentioned having seen the deceased in the company of the accused.

7. Learned counsel argued that the prosecution story was built on surmises. Since this was a circumstantial evidence based case hinging entirely on the "last seen" theory, it was necessary for prosecution witnesses to be consistent about seeing the deceased with the accused. Also, there was no definitive evidence that the accused in fact lived in the premises, and had been seen by anyone in the neighbourhood. The Trial Court lost sight of these salient aspects, while convicting the appellants on slippery foundations. It was urged that the recovery of the articles could not be linked to the crime, because the ring, and wrist watch were common articles, and

they bore no distinguishing mark or feature to set them apart from other articles of the same kind.

8. It was argued that the last seen doctrine premises a case on the assumption that having regard to all the other circumstances, 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. Counsel relied on *State of U.P. v. Satish* 2005 CriLJ 1428, where the Supreme Court cautioned that the last seen theory can be used only 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 anyone other than the accused being the author of the crime becomes impossible. Reliance was also placed on *Ramreddy Rajesh Khanna Reddy v. State of A.P* AIR 2006 SC 1656.

9. The learned APP argued that the so called infirmities highlighted by the appellant were minor discrepancies, which should not be given importance. Counsel submitted that as to the fact that the accused lived in the premises, and were last seen around the time of death of the deceased, there could not be any dispute, because of the clear testimonies of PW-1, PW-2 and PW-6. There was no motive for these witnesses to depose falsely. Similarly, there was no occasion for the witness PW-1 to have falsely implicated the accused, when identifying them in the court.

10. The APP submitted that even though the premises are located in a fairly crowded locality, the absence of any independent witness would not vitiate the trial or findings, if the evidence led about the appellants' guilt is

categorical. The testimony of PW-1, PW-2 and PW-6 was corroborated in particulars. Counsel also urged that the finger print analysis conclusively established the presence of the accused, at the scene of crime.

11. The above discussion would reveal that the FIR in this case was registered after the police received information about complaints of foul smell from the premises. Upon their going to the spot, the door was forced open, and the deceased's body was discovered. At that time, no one knew his identity. The premises were concededly tenanted; PW-1 the landlady mentioned that one "langda" or a physically impaired man had rented the premises about two weeks ago. She also claimed that the accused had started staying with that tenant. The immediate aspect which one notices is that the police did not prove any effort on its part to trace the tenant, who vanished into thin air, around the time of the alleged incident. PW-1, who claims to be the most definitive witness of the last seen theory, was not made to identify the accused, after their arrest. This fact would not have assumed much importance, but for the reason that the prosecution had a duty to show that the accused had a definite link with the tenant and the premises, and were living there. Further, the testimony of PW-1 reveals that she was short sighted and had weak eyesight. The prosecution had a duty to prove positively that the accused used to live in the premises with the tenant. She also admitted to not furnishing the accused's names to the police, when her statement was recorded during the investigation. Her testimony is therefore, weak.

12. As regards PW-2, what strikes this court is that his evidence is virtually a repetition of his mother's testimony, i.e that the accused lived

with the tenant, whom he names as “mamu” and that the latter left the premises 2-3 days before the incident, and that the accused stayed back, and left on Sunday. However, the witness admits, in his cross examination that his mother had routine and day-to-day dealings with the tenants; he was a fair price shop owner. Having regard to these facts, and the circumstance that PW-2 deposed to his living separately from his mother, even though in the same premises, it is doubtful whether he too had witnessed the “last seen” circumstance. So far as PW-6 is concerned, he completely contradicted the testimonies of his brother and mother, and stated that the police were called immediately when the foul smell was detected in the premises. He does not talk of having seen the accused with the deceased anytime.

13. This court notices that the prosecution has attempted to prove the last seen circumstance through three witnesses; their depositions do not inspire confidence, on account of varying testimonies regarding the material facts, concerned in this case. The case, though based on the last seen theory is essentially a circumstantial evidence based one, in which the prosecution has the burden of proving each circumstance alleged against the accused, in a conclusive manner, and further proving each link to every circumstance so proved. The prosecution also has to prove beyond reasonable doubt that it was only the accused, and none else, who could have committed the offence, and that every hypothesis of his or their innocence is ruled out (*Sharad Birdhi Chand Sarda vs State Of Maharashtra*) AIR 1984 SC 1622.

14. The prosecution case was that the statement of PW-1 led the police to one Bhuttan, and later to one Sachin, and subsequently to one Gopal Sahi,

after whose interrogation, the accused could be arrested. None of these witnesses, nor PW-2's wife (who too lived in the premises owned by PW-1, along with her husband, PW-2) nor any other tenant or neighbor who could have established the link between the premises and the accused, were examined. It is a settled proposition that the court has to see the quality, and not the volume of evidence. Thus, if more than one witness has to testify about a fact, it may be inessential to examine all. Yet, if there are material witnesses, who in cases like the present one, can lend credence and corroboration to the prosecution story and are also mentioned by other witnesses, it is necessary to examine them. An omission in this regard can well invite adverse comment. This was so held in *Habeeb Mohammad vs The State Of Hyderabad* AIR 1954 SC 51, where the Supreme Court observed that:

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In this situation it seems to us that Biabani who was a top-ranking police officer present at the scene was a material witness in the case and it was the bounded duty of the prosecution to examine him, particularly when no allegation was made that if produced, he would not speak the truth; and, in any case, the court would have been well advised to exercise its discretionary powers to examine that witness. The witness was at the time of the trial in charge of the Police Training School and was certainly available. In our opinion, not only does an adverse inference arise against the prosecution case from his non-production as a witness in view of illustration (g) to section 114 of the Indian Evidence Act, but the circumstance of his being withheld from court casts a serious reflection on the fairness of the trial. It seems to us that the appellant was considerably prejudiced in his defense by reason of this omission on the part of the prosecution and on the part of the court. The reason given by the learned Judge for refusing to

summon Biabani do not show that the Judge seriously applied his mind either to the provisions of the section or to the effects of omitting to examine such an important witness. The terms in which the order of the Special Judge is couched exhibit lack of judicial balance in a matter which required serious consideration.

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The above reasoning was echoed in *Ram Prasad and Ors. v. State of U.P.* 1974 [1] SCR 650, where the Supreme Court held that in case the court finds that the prosecution has not examined the witnesses for reasons not tenable or not proper, the court would be justified in drawing an adverse inference against the prosecution. The rule was again reiterated and applied in *State of UP v Punni*, 2008 (11) SCC 153. The omission to examine these witnesses, is a circumstance adverse to the prosecution in this case.

16. The prosecution, in this case was unable to prove with any certainty, motive on the part of the accused. It sought to pin down their role, by alleging that each appellant’s disclosure led to recovery of some article. In the case of Mukesh, a gold coloured ring was recovered; Ranjit Sahi is alleged to have assisted in the recovery of a purse and a bracelet whereas Ritesh’s disclosure led to recovery of a wrist watch. None of these articles was proved to be valuable, or possessing any distinguishing feature marking them out, to enable specific identification. This circumstance therefore, cannot be considered incriminating.

17. Both PW-1 and PW-2 deposed that the accused left the premises on a Sunday; that would have been on 12-02-2006. However, Ex. PW-18/A, the post mortem report, states that the time since death was about 5 days prior to commencement of the post mortem, which was 2:55 PM on 16-02-2006. The

death therefore, occurred, in afternoon of 11-02-2006. There is a clear discrepancy and a long gap which the prosecution has to explain, because it has not been proved that the accused were at home, at that time, or that the tenant had left by then. Besides, none of the witnesses stated that the tenanted premises in this case was so situated that access to others was virtually impossible, and further that it could have been only the accused, and no one else, who had such access. The absence of such definitive evidence, which can be the only basis for a valid confession, renders the prosecution story suspicious and unreliable.

18. In view of the above analysis, this court is of the opinion that the impugned judgment and order of the Trial Court cannot be sustained. The court also notices that the evidence as against the co-accused Ritesh Ranjan Sahi is the same as led against the appellants in this case. We therefore, are of the opinion that the benefit of this judgment should be given to him, though he has not preferred a separate appeal. Resultantly, the appeals are to succeed; the appellants as well as the co-accused Ritesh Ranjan Sahi are acquitted. They shall be released forthwith, unless they are wanted in some other criminal proceeding. The appeals are allowed in these terms.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

FEBRUARY 22, 2012