

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

Reserved on : 07.03.2012

Decided on : 13.04.2012

+ **CRL.A. 322/2011, Crl. M. (Bail) 432/2011**

VIRENDER SINGH @ PODHA @ TICKET Appellant

Through : Ms. Saahila Lamba, Advocate.

versus

STATE (GOVT OF NCT) OF DELHI Respondent

Through : Sh. Sanjay Lao, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. The Appellant impugns the judgment and order dated 09.09.2010 in S.C. No. 132/2008 by which he was convicted for the offence punishable under Section 302 IPC. He was sentenced to undergo life imprisonment and to pay a fine of ₹5000/- and in default to further undergo simple imprisonment for six months.

2. The case prosecution case, in brief, is that on 14.01.2006 at about 08:08 AM Insp. Satish Kumar Sharma (PW-22), received information through a wireless operator about the murder of one Vinod, in Gali No. 13 Ashok Nagar. On receipt of information, PW-22 and Constable Ashok Pathak (PW-4) and the driver reached House No. D-1/589, Gali No.13, Ashok Nagar. SI Jaswant Singh (PW-17) and Const. Devender Kumar (PW-15) too reached the spot on receipt of DD No. 2-A. On reaching the spot IO, PW-22 found Pramod Verma (PW-3), Ravinder Verma (PW-1), SI Jaswant Singh (PW-17), Const. Devender Kumar (PW-15) and some

neighbors present in the house. The body of Vinod was lying in a room in the house; it was identified by Pramod Verma and Ravinder Verma. A light pink colored shirt was lying near the deceased's neck.

3. PW-22 recorded the statement of Ravinder Verma (Ex.PW-1/A) who said that Vinod was working in his photo studio and had gone to his village on 11.01.2006. He returned on 13.01.2006 along with Virender (the accused). PW-1 further stated that on 13.01.2006 at about 8/8:30 PM, he with his friends Arvind and Amit went for dinner to the deceased Vinod's house. They left Vinod's house at about 09:30/09:45 PM. At that time, Vinod, Virender and the driver Dinesh were in the premises. On 14.01.2006 i.e. the next day, Dinesh went to his house at about 7/7:30 AM and told him that a pink coloured shirt was wrapped around Vinod's neck and that he was not waking up. PW-1 also told the IO that he went to Vinod's house and saw him lying on the cot and the pink coloured shirt was lying near his neck. He noticed that the golden chain and rings the deceased used to wear, were missing; he also observed that ₹ 50,000/- were missing. He informed the IO that he suspected that Virender had committed Vinod's murder and had absconded from the spot, after robbing the golden chain, rings and cash. On the basis of PW-1's statement, a *rukka* was prepared (Ex.PW-22/A) and the case was registered through Const. Ashok Pathak; the prosecution relied on FIR No.15/2006 (Ex. PW-12/A). On 26.01.2006 Virender was arrested from Shamli Railway Station on being pointing out by Ravinder Verma. The arrest memo Ex.PW-1/G was prepared. Virender's disclosure statement, led to recovery of two gold rings and from his personal search ₹ 21,365/- cash, an election card and the deceased's driving license along with a few visiting cards were recovered. After completion of the investigations, PW-22 filed a charge-sheet. The Appellant pleaded not guilty and claimed trial.

4. The learned counsel for the accused submitted that on the night of 13.01.2006 at about 09:30 PM when PW-1 left Vinod's house along with Amit and Arvind, Virender and driver Dinesh were still at Vinod's house; Dinesh and Virender both stayed the night at the deceased's house. The Counsel further submitted that the whereabouts of Dinesh are not known and he also did not appear before this court which clearly raises a doubt upon the conduct of Dinesh who has not been produced before this court despite repeated efforts and therefore it cannot be said with reasonable doubt that accused Virender committed the murder of the deceased Vinod.

5. Counsel for the Appellant urged that it was the prosecution case that the recovery of the purse containing ₹ 21,265 on 26.01.2006 from the accused proves that he had stolen ₹ 50,000/- from the deceased. This, submitted the counsel, cannot be believed as there is no way of proving that the notes recovered from the accused were the same as those which the deceased had possessed. Furthermore the recovery of the deceased's driving license and election card from the accused after 12 days of the incident is also unbelievable. There is no reason why the accused should have held onto the deceased's driving license and election card after 12 days of the incident.

6. As far as the recovery of the two golden rings at the instance of the accused is concerned, counsel for the accused submitted that the recoveries have not been proved. PW5 Atul Kumar during his examination in chief clearly stated that he could not identify the accused; he had gone along with the police to his shop; he stated that he could not even identify the ring. He further stated that one Munshi (court clerk) of an Advocate of Muzaffarnagar Courts went to his shop and sold the ring to him. During his cross-examination by Ld. APP for the State, he denied the suggestion that accused present in the court had sold the ring to him. He further denied stating to the police that the Appellant sold the ring to him and he gave him

the market value of the ring. PW-8 Kapil Verma proprietor of Verma Jewellers during his cross examination specifically stated that when the accused sold the ring in question, he was accompanied by a person namely Babli but Babli was not examined or made a witness to the case by the prosecution. PW8 further stated that he had not issued any receipt to the accused. He also stated that he did not make any entry in his record/diary for purchasing the ring from accused Virender. The appellant's counsel therefore submitted that the recovery of the two golden rings at his alleged instance was doubtful and therefore unbelievable.

7. The Learned Counsel for the appellant submitted that the prosecution failed to prove its case beyond reasonable doubt. Counsel submitted that the present case was registered on the basis of statement of PW-1. He stated (in Ex. PW1/A) that on the day of the incident, at about 7/7:30 AM Dinesh went to his house and told him that Vinod was not waking up and that a pink coloured shirt was wrapped (tied) on Vinod's neck, which he removed. On hearing this, PW-1 reached Vinod's house and found him dead on the cot and a pink coloured shirt was found there. The Counsel submitted that Dinesh was the first witness at the spot and not PW-1 and the facts deposed by PW-1 regarding Vinod not waking up were on the basis of information given by Dinesh Kumar. However Dinesh was not examined in this case and without his examination the testimony of PW-1 Ravinder Verma cannot be taken into consideration to decide the case. The Counsel urged that Dinesh informed PW-1 about the murder of Vinod at about 7/7:30 AM and the police officials reached the spot at about 8/8:30 AM. However the dead body was taken to GTB hospital only at about 11:00 AM i.e. after a gap of four hours which on the face of it appears to be impossible.

8. Learned counsel urged that even the testimony of prosecution witnesses proved the fact that the deceased was not alone in the company of the Appellant; Dinesh was with them. Such being the case, the prosecution could not train its guns

upon the Appellant, and fix him with sole criminal responsibility to the exclusion of others. It was argued that the “last seen” theory could be applied when the Court is convinced that having regard to all the established facts and circumstances, it was the accused alone, and none else, who committed the offence, and after satisfactorily ruling out the possibility of the accused’s innocence. Here, that could hardly be said to arise, since the accused, i.e the appellant was, even according to the prosecution, seen last with the deceased and another, i.e Dinesh.

9. The Learned APP submitted that the prosecution had proved its case against the accused Virender beyond reasonable doubt. The prosecution had proved the complete chain of circumstances and succeeded in proving its case. The testimony of PW-1 established that the deceased was last seen alive with accused Virender and driver Dinesh. Driver Dinesh is the one who informed PW-1 about the murder of Vinod whereas the accused Virender was absconding. Thereafter on 26.01.2006 when the accused was arrested, a gold ring, one election card and driving license belonging to the deceased were recovered from his possession. Further two gold rings belonging to the deceased, sold to jewelers PW-5 and PW-8, were also recovered from their shops. PW-8 specifically deposed that the accused had sold him the ring on 24.01.2006; it was taken into possession by seizure memo Ex.PW-8/A. PW-8 identified the ring in court as the same article seized by the police from his shop. Further the accused Virender was unable to explain the reason for his absconding from the house of the deceased.

10. The Learned APP submitted that failure to give any explanation as to why the appellant absconded is sufficient to prove the guilt of the accused. Therefore, submitted the Learned APP, recovery of election card and driving license, belonging to the deceased, from the accused and recovery of two golden rings which he sold combined with his conduct in absconding proves the Appellant’s guilt.

11. It was also argued by the APP that PW-7 Dr. Arvind Kumar who conducted the post-mortem examination in his subsequent opinion dated 31.01.2006, Ex.PW-7/B, stated,

“That ligature mark present over the neck could be possible by ligature material (shirt) under examination.”

PW-7 also deposed that he saw FSL Report No. 2006/C-046, dated 12.07.2007 and on the basis of the report he was of the opinion that the cause of death in this case was due to asphyxia as a result of *ante mortem* ligature strangulation.

12. In the course of the trial the prosecution examined 22 witnesses. The testimony of PW-1 Ravinder Verma, the complainant is crucial to the prosecution case. He deposed that he and his brother Pramod Verma (PW-3) were running a shop-cum photo studio in the name of Sawan Properties and Sawan Photo Studio on the ground floor of House no. D1/12 Ashok Nagar and that Vinod (deceased) was working with him in his studio. On 11.01.2006 the deceased had gone to his native village and had returned to his studio on 13.01.2006 along with Virender @ Podha @ Ticket. He correctly identified the accused present in the court. He further deposed that during the whole day the accused remained with Vinod at his photo studio and at about 7:00 PM the accused demanded ₹ 200/- from Vinod as he did not have money for dinner. The deceased asked PW-1 to give ₹ 200/- to the accused; the accused, and Dinesh went out for dinner. He (the Appellant) and Dinesh returned to his shop and both were under the influence of liquor. On being asked they said that they had only taken liquor and did not have dinner. Thereafter both of them went for dinner. He further deposed that after shutting the shop he, Vinod, Amit and Arvind went to Vinod's house, had some liquor and their dinner. At about 09:30 PM the accused Virender and Dinesh reached Vinod's house after their dinner; the accused brought one liter milk in a polythene bag. Thereafter he,

Amit and Arvind left Vinod's house. Virender and Dinesh were left behind with Vinod in his room.

13. PW-1 also deposed that next morning at about 7/7:30 AM Dinesh came to him saying that Vinod lay on the floor after falling from the cot and that a pink coloured shirt was tied around his neck which he had untied. On hearing this, he rushed with Dinesh to Vinod's house and saw that the latter had died. He informed his elder brother Pramod (PW-3) on the telephone. PW-3 reached the deceased's house with four-five neighbours. The Police was informed and his statement was recorded. Three gold rings and one gold chain which the deceased used to wear were missing. The money, which the deceased had brought with him from his in-laws house (i.e. cash to the extent of ₹50,000/-) was also missing. The wrist watch which the deceased used to wear was taken into possession by seizure memo Ex. PW1/B. Three steel glasses, one *patila/bhagona*, one half bottle of country made liquor (*Shokeen* brand) having a small quantity of rum were all taken in possession by seizure memos Ex. PW1/C. The pink coloured shirt and 14 tablets of Eptoin were also taken into possession by seizure memos Ex. PW1/E and Ex. PW-1/F.

14. PW-1 also deposed that on 26.01.2006 he again joined the investigation of this case with the IO; that day the accused was arrested near the parking area in Shamli Railway Station. He identified the accused in the court. He further deposed that he had seen the arrest memo of the accused Ex. PW-1/G, personal search memo Ex. PW-1/H and the disclosure statement of the accused Ex. PW-1/J. He deposed that one purse containing ₹ 21,365/-, some Ativon 2mg tablets; one election identity card, driving license and one ring belonging to deceased Vinod, were also recovered during the personal search of the accused.

15. During the cross examination, PW-1 deposed that Dinesh went to his house at about 7 AM and told him that Vinod was lying unconscious and he had vomited and a shirt was tied around his neck. He went to the house and informed the

neighbours, PW-3 and the police. The police took Vinod to the hospital at about 11 AM. He also admitted that in the night of 13.01.2006 the Appellant, the deceased and Dinesh had slept in that room. He further stated Dinesh was with him when the police reached the room and thereafter the police recorded his statement. First, at about 8/9:00 AM and thereafter the statement of Dinesh was recorded. He also stated that the articles were sealed in *pullandas* but he did not know the initial of the seal and also did not know to whom the seal was handed over after use. He also admitted that there was some material lying on the floor of the room but he did not know whether that was the material of vomiting or feces. He further stated that he had seen ₹ 50,000/- in the possession of Vinod, which he had brought from his in-law's place to purchase a TSR, on 13.01.2006 at about 2:00 PM.

16. According to the doctor, PW-7, who conducted the post-mortem, the cause of death was ligature strangulation; death had occurred about one and a half days before the commencement of post-mortem. PW-2, brother of the deceased, claimed to have identified the rings seized and marked Ex. P-13 and Ex. P-15. One of them was engraved 'VK' the deceased's initials. The other had some *nugs*. Both these were identified by the witness; according to his deposition, they belonged to the deceased Vinod. PW-2 further testified that when he had gone to the village, he took ₹ 50,000/-. That was missing when the body was discovered.

17. The first one to see the deceased was Dinesh Pal. The appellant's main argument is that the most crucial witness was Dinesh Pal, the driver of PW-1; he was not examined during trial. PW-1 stated in his deposition that Dinesh's statement was recorded after the police recorded his statement under Section 161 Cr. PC. The Trial Court record reveals that Dinesh's statement was recorded; his name was also reflected in the list of witnesses. However, the list also scored off his name, with the remark "Died". It is no doubt a settled proposition that the prosecution has to examine all the material witnesses, and not merely those who

further its case. At the same time, it is the quality, rather than the quantity of evidence which is material in a criminal trial. Therefore, a finding of guilt can be sustained even on the basis of ocular testimony of a single eyewitness (*Ref. Vadivelu Thevar v. The State of Madras*, AIR 1957 SC 614; *Sunil Kumar v. State Govt. of NCT of Delhi*, (2003) 11 SCC 367; *Namdeo v. State of Maharashtra*, (2007) 14 SCC 150; and *Bipin Kumar Mondal v. State of West Bengal*, AIR 2010 SC 3638).

18. It is important to also see, in this context that the testimony of the witness which the Court relies on to rest a conviction, should be credible and trustworthy (*Ref. Pandappa Hanumappa Hanamar And Another, Appellants V. State Of Karnataka* 1997 (10) SCC 197, where it was held that):

“One of the tests to judge the credibility of a witness is the intrinsic quality and worth of his evidence, independent of other evidence and if such evidence measures up to the Court's satisfaction it can itself form the basis of conviction. It is only when such evidence does not pass muster that the Court seeks corroboration to draw its conclusion therefrom...”

19. The unavailability of Dinesh Pal, in the opinion of the Court is no bar to examining whether the testimony of PW-1 is trustworthy. Here, no motive was ascribed to the witness, to falsely implicate the accused. Vinod, the deceased, was in fact his employee. He mentioned about the events that took place the previous evening, when all of them were together, after which Dinesh, Vinod and the appellant left late night. PW-1 significantly, was aware that the deceased had come back from his native place with a large amount of cash. He mentioned this to the police, in the statement recorded soon after the crime was detected. He was not challenged in cross examination on this score. In fact, when the accused was arrested later, ₹ 21,365/- were recovered at his behest. This aspect is important, because the robbery of a large amount of money was not known to the police, but

for the information given by the witness; this fact was also found pursuant to the disclosure statement recorded by the accused; that portion of the statement, was clearly admissible under Section 27 of the Evidence Act. Similarly, the witness mentioned – in the course of his statement during investigation – about the missing rings and the golden chain that the deceased Vinod used to wear. One of the rings bore the monogram “VK” (presumably the deceased’s initials). It was identified by his brother, PW-2. Furthermore, even though there is some doubt about the testimony of PW-5 and the recovery of articles said to have been sold to him, there can be no doubt about the testimony of PW-8, who clearly stated that the appellant had sold him the ring Ex. P-15 engraved with the initials VK.

20. Another important aspect which cannot be ignored in this case is that the deceased did not have any cogent explanation for the ₹ 21,365/- cash recovered from him, at the time of his arrest. It is settled law that the prosecution always labours under the burden of proving the case alleged against the accused; however, if there are special circumstances which the accused is aware of, in respect of aspects or facts which tend to incriminate him, the onus of explaining those features or circumstances is upon him. If the amount genuinely belonged to the accused, nothing prevented him from saying so and leading evidence about its origin. The recovery of the amount, fairly proximate in point of time, along with the recovery of the ring, which belonged to the deceased, are clinching incriminating circumstances. In *Earabhadrapa v State of Karnataka* AIR 1983 SC 1, the Supreme Court held that:

*“This is a case where **murder** and robbery are proved to have been integral parts of one and the same transaction and therefore the presumption arising under Illustration (a) to Section 114 of the Evidence Act is that not only the appellant committed the **murder** of the deceased but also committed robbery of her gold ornaments which form part of the same transaction. The prosecution has led sufficient evidence to connect the appellant with the commission of the crime. The sudden disappearance of the appellant from*

*the house of PW 3 on the morning of March 22, 1979 when it was destroyed that the deceased had been strangled to death and relieved of her gold ornaments coupled with the circumstance that he was absconding for a period of over one year till he was apprehended by PW 26 at village Hosahally on March 29, 1980, taken with the circumstance that he made the statement EX. P-35 immediately upon his arrest leading to the discovery of the stolen articles, must necessarily raise the inference that the appellant alone and no one else guilty of having committed the **murder** of the deceased and robbery of her ornaments. The appellant had no satisfactory explanation to offer for his possession of the stolen property. On the contrary, he denied that the stolen property was recovered from him. The false denial by itself is an incriminating circumstance. The nature of presumption under Illustration (a) to Section 114 must depend upon the nature of the evidence adduced. No fixed limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. There was no lapse of time between the date of his arrest and the stolen property.”*

Similarly, where the accused had taken away valuables after committing murder, and the stolen articles were recovered, the Court held that the presumption under Section 114 (a) of the Evidence Act had to be drawn, in *State of UP v Sukhbasi* AIR 1985 SC 1224, in the following observations:

“Undoubtedly, this was a case where murder and robbery are proved to have been the integral parts of one and the same transaction. As held by us in Earabhadrappa v. State of Karnataka [(1983) 2 SCC 330 : 1983 SCC (Cri) 447] in somewhat similar circumstances where the servant betraying the trust of his employer strangled the mistress of the house and decamped with her gold and silver ornaments which were later recovered, the presumption arising under Illustration (a) to Section 114 of the Evidence Act, 1872 is that not only the accused if their complicity is proved committed the murder of the deceased Bhagwat Dayal and his wife Ramwati Devi but

also committed robbery of the gold and silver ornaments which formed part of the same transaction.”

21. In this case, the accused's disappearance, his being seen last with the deceased (although Dinesh Pal too was with him), recovery of a large amount of cash from him, as well as recovery of valuables at his behest, are undeniably very incriminating circumstances. Even if the testimony of PW-5 is of little use, the deposition of PW-8, the other jeweler, is damaging to the appellant; he was able to say that the appellant visited him, and sold some of the jewelry. Taken together with the testimony of PW-1, the reporting of missing articles which belonged to the deceased, even before they were recovered by the police after the arrest of the accused, the latter disappearing around the time of the crime, establish, beyond any doubt that he was present at the time of the crime, with the deceased. The appellant's silence as to what happened to Dinesh, assuming the latter was for some reason culpable, or that why should Dinesh implicate him, and his lack of explanation how he came to possess a huge amount in cash, fortify to the point of certainty his involvement in the crime. In this case, the prosecution had been able to prove the "last seen" circumstance, and also establish beyond doubt that all the circumstances pointed to the accused's guilt, and ruled out every hypothesis of his innocence, and at the same time ruled out the involvement of others in the crime.

22. In view of the above discussion, this court does not find any infirmity in the impugned judgment. The appeal is accordingly devoid of merit, and therefore dismissed.

S. RAVINDRA BHAT
(JUDGE)

April 13, 2012

S.P. GARG
(JUDGE)