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IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON : 25.04.2012

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CRL.A.608/2009

KAMAL @ MANU

....Appellant

Through : Mr.Bhupesh Narula, Advocate.

versus

STATE OF NCT OF DELHI

....Respondent

Through : Ms.Richa Kapoor, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P.GARG

S.P.Garg, J. (Open Court)

1. The present appeal is directed against the judgment dated 13.04.2009 and order on sentence dated 21.04.2009 of learned Additional Sessions Judge in SC No.32/2008 by which the Appellant-Kamal was convicted for committing the offence punishable under Section 302 IPC and sentenced to undergo imprisonment for life with fine of ₹5,000/-.

2. The prosecution alleged that on 19.04.2005, Kamal and Badri had gone to Siri Fort Sports Complex where construction work was going on. The contractor-Kuldeep had employed them to work at the construction site. They took lunch together at 02.00 P.M. there. At about 05.30 P.M. the accused was seen alone at the site. When he (the accused) returned to the house in the evening at about 07.00 P.M., his room-

mates/friends enquired regarding the whereabouts of Badri and he informed them that he (Badri) had gone to Ashram to meet the contractor. It is also alleged that at that time, the accused was frightened/scared and perplexed. He told them that he would leave Delhi to go to his village as he was unwell and at about 07.00 A.M. the next day, he left the house to go to Bihar.

3. On 20.04.2005 at about 08.30 A.M. PW-7 (Madan Lal) reached the spot and found Badri lying dead inside the bathroom where, he used to work. He informed the contractor (Kuldeep) who reported the matter to the police. ASI Mukti recorded Daily Diary (DD) entry No.11-A (Ex.PW-9/A) at 10.57 A.M. on getting information from control room in this regard. The investigation was assigned to SI Vijay Pal Dhaiya who with Constable Purushottam reached the spot. Additional SHO Amrik Singh (IO) also reached the spot and recorded the statement of Madan Lal who suspected 'Manu' of committing Badri's murder. The IO made an endorsement and sent the rukka through Constable Balbir for registering the case under Section 302 IPC. He summoned the crime team and got the scene of incident photographed. The body was sent for post-mortem. Dr.Sanjeev Lalwani conducted the post-mortem of the body. Since the complaint had indicted the accused, the police set out to apprehend him. On 25.04.2005, the accused was arrested from platform No.4, New Delhi Railway Station at the pointing out of the complainant. Pursuant to his disclosure statement, the accused led the police team to the spot and got recovered the weapon of offence i.e., hammer from the basement near the conference hall, Siri Fort Sports Complex. During the investigation, the IO recorded the statements of witnesses conversant with the facts. He sent

the exhibits to forensic laboratory and subsequently, collected its report. After completion of the investigations, a charge-sheet was filed against the accused for committing the offence under Section 302 IPC and he was duly charged and brought to trial.

4. To prove the charges, the prosecution examined twenty four witnesses. In the statement recorded under Section 313 Cr.P.C. the accused pleaded false implication. After appreciation of the evidence and considering the rival contentions of both the parties, the Trial Court convicted the accused under Section 302 IPC. Aggrieved by the impugned judgment, the Appellant has filed the present appeal.

5. The learned counsel for the Appellant argued that the Trial Court failed to appreciate the evidence of the prosecution witnesses in its true and proper perspective. The accused had no motive to murder his colleague with whom he had no prior animosity. The circumstances relied upon by the prosecution were not established and the chain of evidence furnished by those circumstances is not complete, to rule out innocence of the accused. The Trial Court, urged the counsel, did not consider that there was a huge gap between the time when the deceased was seen alive in the company of the accused and when the death occurred. He further contended that no incriminating article was recovered at the instance of the accused to connect him with the crime. The prosecution witnesses narrated inconsistent versions about his arrest. The fact that the accused was apprehended from Delhi, falsifies the prosecution version about his abscondance to Bihar after the crime.

6. On the other hand, learned APP supported the judgment and argued that it did not call for any interference. The prosecution established

that the deceased was last seen alive in the company of the accused at about 02.00 P.M. at the place of work. However, at about 05.30 P.M. the deceased was not seen with the accused and he alone returned to the house. The failure on the part of the accused to satisfactorily account for the disappearance or whereabouts of the deceased or when he departed from his company is a strong incriminating circumstance to infer his guilt. The prosecution witnesses had no ill-will to falsely depose that the accused was found in perplexed state of mind and exhibited unnatural conduct when he without apparent reason went to his village.

7. We have considered the submissions of the parties and have scrutinized the Trial Court records. At the outset, it may be mentioned that the entire case of the prosecution rests on circumstantial evidence. The Trial Court convicted the accused primarily relying the circumstances of a) the last seen of the accused in the company of the deceased, b) abscondance, c) The accused gave false explanation about the whereabouts of deceased and d) The recovery of weapon of offence.

8. Admittedly, on 19.04.2005 both the accused and the deceased, as usual, had gone to their place of work at Sri Fort Sports Complex. It is not in dispute that at about 02.00 P.M. they both took lunch together, at the site. They were not seen together thereafter. When PW-1 (Vinay), PW-2 (Lokesh) and PW-3 (Bharat) other officials on duty there, left the spot in the evening, they saw the accused alone at his place of work at 05.30 P.M. PW-7 (Madan Lal) found Badri dead next morning at 08.30 A.M. Apparently, the incident happened between 02.00 P.M. and 08.30 A.M. the next morning. The exact time of death is not apparent. As per the post-mortem report (Ex.PW-11/A), the time since death was about

2 ½ - 3 days before the procedure started on 22.04.2005 at 12.40 P.M. The approximate time of death is between 19.04.2005 at about 12.40 P.M to 20.04.2005 at 12.40 AM. The post-mortem report gives a wide range of time of death. Apparently, there was huge time gap between the point of time when both were seen last alive and when the deceased was found dead. The Trial Court in para (62) of the judgment, concluded that the time frame mentioned in the post-mortem report corroborated the testimony of the prosecution witnesses to show that the deceased had been killed on 19.04.2005 at about 05.00 P.M. The conclusion is apparently contrary to the record and nowhere has it emerged that the death occurred at 05.00 P.M.

9. PW-1 (Vinay), PW-2 (Lokesh) and PW-3 (Bharat) fairly admitted that they had not seen any quarrel that day between them (the deceased and the accused). They both were doing their work as labourers at two different places. The job of the deceased was to dismantle the floor in the bathroom whereas the accused's task was to mix mortar outside the bathroom. It was not unusual when PW-1, PW-2 and PW-3 saw him alone at his place of work. None of them enquired from the accused regarding whereabouts of the deceased at that time. The prosecution witnesses did not depose if after 02.00 P.M., they had seen the accused going inside the bath room or that they had at any time found him missing/absent from his place of work. After finishing their duties, it was expected from the labourers to inform the employer/contractor and to seek his permission to leave the site. The contractor or his 'munshi' were expected to undertake constant supervision to see if the workers were performing their duties properly at their place of work. PW-7 (Madan Lal) admitted that leaving

the spot at about 04.40 P.M. with contractor (Kuldeep), he had instructed 5/6 electricians on duty there to inform him till what time the workers at the site performed their duties. The electricians examined before the Court did not report till which time the deceased had worked at the site. The prosecution did not examine any witness who allowed the labourers to leave the site after finishing their day's work. No attendance recording the arrival and departure of the labourers/officials was seized to infer as to when the labourers had left the spot that day. Since the accused and the deceased were not regular employees, they were not expected to leave the place without getting their wages for the day. There is no evidence on record to show if the deceased or the accused, had collected their wages that day. The prosecution did not examine the 'chowkidar' or security guard to prove when the accused left the construction site and if so under what circumstances. There is no explanation as to why the security guard did not inquire from the accused at the time of his departure about the whereabouts of the deceased.

10. The circumstance of 'last seen' together does not by itself and necessarily leads to the inference that it was the accused who committed the crime. There must be something to establish the connection between the accused and the crime. The mere fact that the accused was last seen together with the deceased does not necessarily lead to irresistible inference that he committed the crime. In the absence of any positive evidence about the probable time of death, the only circumstance that the accused was seen in the noon time in the company of the deceased and therefore he was culpable cannot be accepted as either clinching or convincing. Presence of the accused with the deceased at 02.00 P.M. was

natural and probable as both of them used to work together at the same spot. Since they both were residing together with their other friends/colleagues, it was nothing unusual for them to lunch together. Hence, the circumstance that both were seen together at 02.00 P.M. is not an incriminating circumstance as the accused continued to remain at his place of work till 05.30 P.M. and was not seen in the company of the accused after 02.00 P.M.

11. Regarding law on the circumstance of last seen, the observation of Supreme Court in ‘*Muhibur Rahman v. State of Assam*’ (2002) 6 SCC 715 are relevant:

“The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place.”

12. In the case of ‘*State of Goa v. Sanjay Thakran*’ (2007) 3 SCC 755 the Supreme Court noted general principles with reference to the principles of last seen together in ‘*Bodhraj v. State of J&K*’ (2002) 8 SCC 45 as under:

“The last seen theory comes into play 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 any person other than the accused

being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”

32. *In Ramreddy Rajesh Khanna Reddy (2006) 10 SCC 172 this Court further opined that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”*

13. So far as motive is concerned, it assumes significance in cases based on circumstantial evidence. In the instant case, the prosecution did not allege or prove strong motive of the accused to murder his colleague/friend at the place of work. Apparently, there was no quarrel between them on that day and both had taken lunch together. The prosecution witnesses did not see any abnormality in the conduct and behaviour of the accused. The prosecution failed to prove what precisely impelled the accused to take the extreme step. The colleagues/room-mates of the accused did not observe hostile relations between the two. PW-4 (Toofani Yadav) did not attribute any motive to the accused for the crime. Only in the cross-examination, he deposed about a dispute between them on account of ₹1200/- taken by him from the deceased to hand over to his mother in the village which he failed to deliver. The said alleged incident took place about a year prior to the incident. It does not emerge from the record that due to non payment of ₹1200/-, the relations between them

were strained/bitter. After the period of a year, there was very little possibility that the accused had murdered the deceased especially since he had not insisted that the accused make the payment immediately. It is not believable that the accused without any criminal antecedents would dare to murder his colleague during the day time at the construction site where a number of other workers and officials were on duty without immediate strong provocation.

14. On 19.04.2005, after finishing his duty at the site, the accused returned to his residence at about 07.00 P.M. When his friends enquired regarding the whereabouts of the deceased, he told them that he had gone to Ashram to meet the contractor. There was no reason to doubt the explanation. When Badri did not return that day or subsequent to that, the natural instinct of his colleagues would have been to contact the contractor to find out whether the deceased had gone to meet him. They did not bother to search for him and continued to perform their jobs. They came to know about his murder only on 22.04.2005 when the deceased's photo was shown to them by the police. During this period, they did not lodge any missing report with the police. They also did not make enquiries from the relatives of the deceased regarding his whereabouts. The accused was arrested on 25.04.2005 from New Delhi Railway Station on the identification of PW-7 (Madan Lal). The circumstances in which his arrest was shown are suspicious. It belies the prosecution version that after committing the crime, the accused had gone to his native place in Bihar. Nothing incriminating was recovered from the possession of the accused at the time of his arrest. The recovery of the hammer, pursuant to his alleged disclosure statement is highly doubtful. The police had already

visited the place of occurrence. It is highly improbable that the police would not recover the weapon of offence lying near the spot accessible to the public at large at that time. There are inconsistent statements of the prosecution witnesses regarding recovery of the articles.

15. PW-4 (Toofani Yadav), PW-5 (Parkash Yadav) and PW-8 (Lallan), in their deposition stated that when the accused returned in the evening, he was perplexed. The alleged distressed state of mind of the accused and his mental turmoil observed by them has no real basis particularly when the accused had categorically told them that he was suffering from jaundice. Under these circumstances, there was every possibility of the accused not being in his natural mood. The accused slept at the house during night and went to his native place the next morning.

16. There are material discrepancies, contradictions and improvements in the statements of the prosecution witnesses which were ignored by the Trial Court. It did not notice why the prosecution did not examine the material witness Kuldeep whom the deceased had allegedly gone to meet at Ashram. The delay in recording the statements of the material witnesses was also not noted. In the complaint, PW-7 (Madan Lal) referred the name of the assailant as 'Munna'. PW-20 (Mantu Singh) gave an entirely inconsistent version about the arrest of the accused and stated that he was arrested from his native place.

17. It is well settled that when a case rests purely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be proved, must be cogently and firmly established. Secondly, the circumstances should be of a definite tendency unerringly pointing towards the guilt of

the accused. Thirdly, the circumstances taken cumulatively, must form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

18. In the light of the above discussion, we are of the considered view that the prosecution has failed to satisfy the above tests and thus, the impugned judgment cannot be sustained and is set aside. The appeal is allowed.

19. Trial court record be sent back forthwith.

(S.P.GARG)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

APRIL 25, 2012

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