

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

PRONOUNCED ON: 21.02.2012

+ **CRL.A. No. 1491/2011 & CrI.M.B. 2108/2011 &**

RAMPADARATH GAMI & ANR. Appellants

Through : Mr. Mayank Goel, Advocate

CRL.A.No. 1516/2011 & CRL.M(B) 2167/2011

ASHOK KUMAR Appellant

Through : Mr. Jitendra Sarin, Advocate

Versus

STATE OF NCT OF DELHI Respondent

Through : Ms. Richa Kapoor, APP for the State

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The appellants, Ram Padarth Gami (“Gami”) and his sons, Manoj and Ashok impugn a judgment and order of the Additional Sessions Judge dated 29.09.2011 in SC No.3/2010. The impugned judgment convicted the appellants for the offence punishable under Sections 302/34 IPC and also sentenced them to undergo imprisonment for life together with other sentences. All the sentences were directed to run concurrently.

2. The prosecution had alleged that Dharmender (the complainant) and his friend, Manish Kumar, were drinking juice, in Gami’s shop on 13-10-2009, at

09:00 PM, when they saw the shutters of Ashok's adjoining cycle repair shop suddenly being opened. Both saw Gami, Manoj and Ashok strangulating Dinesh, his (the complainant's) brother, with a wire, inside the shop. Dharmender recognized the victim, Dinesh and tried to intervene, by rushing into the shop and shouting out aloud for help. The accused fled the spot. Dharmender went with Dinesh and his friend, Manish to the hospital, where he was brought dead. The police registered a first information report (FIR) based on Dharmender's complaint, and his statement was recorded and despatched to the police station, at 02:10 AM in the morning of 14-10-2009. The FIR (Ex. PW-1/A) was recorded at 02:35 AM.

3. The police conducted THE investigations, during which the accused were arrested, exhibits collected, and after conclusion of the proceedings, the charge sheet was filed. The Sessions Court charged the accused for the crimes; they pleaded not guilty, and claimed trial. After considering the testimonies of 18 prosecution witnesses, the exhibits, and other materials on record, the Trial Court, by its impugned judgment, convicted the Appellants.

4. It is argued by learned counsel for the appellants that a conviction could not have been recorded by the Trial Court. Counsel submitted that PW-11 Dharmender's initial version was that the death was caused by hanging with cycle wire; the first intimation, i.e., the MLC also recorded that death occurred as a result of "*history of hanging*". This was confirmed by PW-3, the doctor who prepared the MLC. Yet, the doctor who conducted the post-mortem examination, i.e., PW-13, stated that death was as a result of asphyxia caused by strangulation. In this regard, counsel also relied on the post-mortem report, Ex. PW-13/A, which stated that death was due to asphyxia, resulting from constriction of the throat. The doctor had obtained his degree from a Russian University, according to his admission, and conceded during cross examination

that the brief history received in the case did not make any mention of strangulation due to a metallic object, contrary to what he had deposed during the examination in chief.

5. Learned Counsel highlighted the discrepancy in the evidence about the nature and cause of death and submitted that contrary to PW-11's earlier version about the death as a resulting of hanging, his deposition in court was that the deceased was strangled. It was argued that if in fact the story of hanging was correct, no explanation was given by the prosecution as to why the witness was unable to save his brother. Furthermore, PW-11's consistent version was that another individual, Manish, his friend, also witnessed the incident; however, the prosecution made no attempt to trace him, or make him testify in the proceeding. It was emphasized that the absence of a potential independent witness was a significant omission which undermined the prosecution version, about the narration, and the culpability of the appellants.

6. The appellant's counsel next submitted that the impugned judgment fell into error in believing the prosecution story, because the FIR was recorded, after an inordinate delay. It was submitted that even though the incident allegedly occurred at 09:00 PM, and police had intimation about it by 10:00 PM, the FIR was recorded after 4 hours, i.e., 02:35 AM on 14-10-2009. There was no explanation. On the other hand, the deposition of PW-14 also proved that a copy of the FIR was allegedly dispatched and received by the magistrate, at 12:00 AM, midnight, on 13-10-2009, even though it was recorded at 02:35 AM the next morning. In fact the report to the special magistrate was not proved, or placed on the record, and the prosecution eyewitness admitted to that fact.

7. Counsel stressed the fact that the prosecution version could not have been blindly accepted, as there appears to have been an effort to foist PW-11 as an eyewitness, even though he was not there. It was submitted that this witness

conduct is unnatural because how he suddenly got to see his brother, and happened to be where he claimed to be, at the precise moment when the shutter of Ashok's shop was opened, has not been explained. Further, argued counsel, there are material contradictions in this witness's version about the manner of death, i.e., in the statement recorded under Section 161, he mentioned that the deceased had been hanged by the accused, whereas before court, he said that death was caused by strangulation. Similarly, the death report mentioned that death was by strangulation, whereas the earliest intimation, i.e., the MLC stated that hanging was the cause has not been explained. The medical evidence too gave conflicting versions. All these pointed to the accused having been implicated falsely, and to the fact of the eyewitness having been introduced one, even though he had not seen the incident, nor had he been present during or at the time of the occurrence.

8. It was argued that the testimony of the defence witness, DW-2, an eminent forensic scientist and academician, was not discussed or given weightage by the Trial Court. His deposition gave a clear lie to the prosecution version about the cause of death. Nothing could be elicited from him, during cross examination to impeach his credibility about assessment of the medical evidence. Learned counsel submitted that the decision of the Supreme Court in *Dudh Nath Pandey v State of UP* AIR 1981 SC 911 has clearly held that defence witnesses are entitled to same weightage as prosecution witnesses. In these circumstances, the Trial Court could not have ignored the testimony of DW-2, which ruled out the involvement of the appellants.

9. The learned APP argued that the impugned judgment does not call for interference. She said that the testimony of PW-11 is categorical regarding involvement of all the accused; there was nothing unnatural in the presence of the witness, whose testimony could not be discarded as that of a "chance

witness” but had to accepted, regard being had to the fact that he knew all the accused, and was there, in the normal and ordinary course, sipping juice in the shop adjoining to that of the shop where the accused strangled the deceased.

10. Commenting on the submissions made by the appellants, it was argued that there was in fact no discrepancy in the eyewitness testimonies regarding the attack upon the deceased, or the cause of death. PW-13’s testimony, read as a whole in fact proved the prosecution case; he even saw the cable and gave an opinion that it could have caused the death. Further, submitted the APP, there was no delay in recording the FIR, because when the police reached the hospital, the deceased’s body had been taken to the morgue; as a result the IO and the other staff members had to go to PW-11 and record his statement in his house. The whole process was explained by PW-15 in his evidence. The APP argued that if delay in recording the FIR is explained, the Court should not give it undue importance.

11. It was submitted that the evidence in the form of PW-11’s deposition was sufficient for the court to satisfy itself that the Appellants were guilty of the offences they were charged with. In these circumstances, the introduction, or withholding of any other witness, who would have merely added to the record, and repeated the sequence of events, would not have thrown any light. Therefore, exercising his undoubted discretion judiciously, the Public Prosecutor dropped Manish from the list of witnesses.

12. The facts involved in this case are not complex; the attack of the deceased took place at 9:00 PM on 13-10-2009; PW-11 witnessed the incident. He says that whilst sipping juice in a shop, he saw that suddenly the shutters of the adjoining cycle repair shop, owned by the appellant Ashok, were lifted, and he saw his brother being strangled with a cycle chain, by all three appellants, i.e., Gami and his two sons, Manoj and Ashok. He also stated that his friend

Manish was present. Apart from other factors, this witness's testimony requires a close scrutiny, since the prosecution bases its case almost entirely on this ocular deposition. Whilst there is no rule of law that a conviction cannot be based on the solitary ocular testimony of an eyewitness, at the same time, the deposition has to be credible. Here, one recalls the observations of the Supreme Court in *Pandappa Hanumappa Hanamar And Another, Appellants V. State Of Karnataka* 1997 (10) SCC 197:

“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...”

This court is struck by the fact that PW-11 does not explain why he was where he claimed to be, or, in other words, the reason for his presence near the spot. In that sense he is a “*chance witness*”. It is in such cases that the caution given by the Supreme Court about the relatives of a victim being natural witness under certain situations, but chance witnesses, in other cases, and the need for exercising care and due attention, becomes effective. This note of caution was voiced in *Darya Singh v State of Punjab* AIR 1965 SC 328, by saying that relatives of victims cannot be disbelieved,

*“If the criminal Court is satisfied that the **witness who is related to the victim was not a chance** witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised.”*

The next feature is the delay in lodging the FIR. Though the reasons given by PW-15 appear plausible, what stares the Court in the face is the circumstance of the prosecution's inability to prove due compliance with Section 157 Cr. PC, which is a singular mechanism to test whether the incidents narrated were in fact recorded and if so at the earliest opportunity. Here, the judgments in

Mehraj Singh v State of UP 1994 (5) SCC 188, and *Jan Singh v State of Rajasthan* 2001 (9) SCC 704, are clear. They spell out that the mandate of Section 157 is imperative, unless the delay is satisfactorily explained. However, in this case, PW-14 claims that the special report was handed over at 12:00 noon, the next morning, i.e. 14-10-2009. However, he admitted that there was no endorsement regarding that circumstance.

13. Apart from the suspicion about the delay in recording the FIR, which has not been dispelled by the prosecution, what is also intriguing is that the death report (Ex. PW-15/C) stated that death was due to strangulation. In his statement, PW-11 said that he saw that one of the accused had climbed a bench, and had held a cycle wire around the deceased's throat, while the others were pressing him down from the shoulders. He specifically denied the suggestion of having seen the body hanging, and having taken it down. The prosecution case is that a wire was used as the murder weapon, to throttle or hang the deceased. PW-6, in his crime team report (prepared pursuant to inspection at 10 AM the morning after the incident), Ex.PW-6/A, stated that a "*Cycle break wire (scooter type)*" was at the spot; that was also later seized. The prosecution also stated that a black coloured cable was recovered at the instance of the accused, under Memo Ex. PW-12/K. In his evidence, this was marked as Ex. P-2. However, what was seen by the doctor PW-13, (who deposed about a 129 cm long wire) was a plastic sheathed cycle wire, which could have been the object with which death was caused. There is no explanation as to which was actually used as the murder weapon. Furthermore in the opinion given by PW-13, there is no mention of a plastic sheathed wire. This aspect is important, because DW-1 narrated, in his evidence, about Ashok, the appellant, opening his shop at 07:30 PM on 13-10-2009, and discovering a dead body hanging inside, and crying out "*mar gaya*", the body being taken down with the help of someone who came to the premises, and his taking away the body in an autorickshaw. He

stated during cross examination that the police had recorded his statement, and that he could observe the shop because it was next to his *dhaba*.

14. The testimony of DW-2, a professor in forensic medicine who worked in AIIMS and Safdarjung Hospital, and who had conducted 14,000 post-mortem examinations during his 28 year career, is important. He observed that the post-mortem doctor had not described the injuries, their extent, or their dimensions, or even talked about the nature of fracture of the neck bones. According to him, the post-mortem report indicated a superficial examination.

15. This court is of the opinion that the Trial Court, in this case ought to have been slightly more attentive towards the evidence led in the case as a whole. While the question of nature of injuries and any conflict between the ocular and medical evidence can be handled on the application of settled law, and on the basis of prevailing authorities, yet, an overall perspective of the evidence is vitally necessary before a conviction is recorded. In this context, the objective material in the form of the post mortem report (Ex. PW-13/A) pointed to the time of death being 16 hours from the time when the post mortem was started (i.e 11:30 AM on 14-10-2009). The opinion expressed was that death occurred 16 hours before that time. If that is the case, the time of death, according to PW-13 was 07:30 PM on 13-10-2009. The significance can be seen in the context of DW-2's evidence of having seen Ashok opening the shutter of his shop and seeing the deceased at that time, i.e., 07:30 PM. At the same time, this medical evidence (even if one were to discount about an hour) does not support PW-11's testimony about the time of death; he stated that he saw the incident at 09:00 PM. If one further places this discrepancy in the context of the late recording of the FIR, and non-compliance with the provision of Section 157, the entire prosecution story becomes suspect. Therefore, in the facts of this case, the evidence simply does not corroborate the deposition of the eye witness, PW-11.

16. There can be no doubt that the prosecution has to prove its case, and the court is concerned not with the volume or quantity of evidence, but its quality. Yet, there are certain circumstances, when the omission to examine a witness who was admittedly present at the scene of occurrence (and in this case was concededly independent), i.e., Manish Kumar, becomes determinative. The prosecution's obligation in such cases was explained by the Supreme Court in *State of UP v Jaggo* AIR 1971 SC 1586, where it was held that:

"It is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the "unfolding of the narrative" should be called. This salutary principle in criminal trials has been stressed by this Court in the case of [Habeeb Mohammad v. The State of Hyderabad](#) AIR 1954 SC 51, for eliciting the truth. The absence of Ramesh from the prosecution evidence seriously affects the truth of the prosecution case.

16. This Court in *Habeeb Mohammad's case*, (supra) referred to the observations of Jenkins, C.J. in *Ram Ranjan Roy v. Emperor* ILR 42 Cal 422 : AIR 1915 Cal 545 that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the act-used and the duty of a public prosecutor is to represent the administration of justice so that the testimony of all the available eye-witnesses should be before the Court Lord Roche in *Stephen Seneviratne v. The King* AIR 1936 PC 289, referred to the observations of Jenkins, C.J. and said that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the effect of their testimony is for or against the case for the prosecution. That is why this Court in *Habeeb Mohammad's case*, (supra) said that the absence of an eye witness in the circumstances of the case might affect a fair trial On behalf of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over. In such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the correct facts. If Ramesh were an eye-witness the accused were

entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of the occurrence.”

Similarly, in the judgment reported as *Takhaji Hiraji v Thakore Kubersing Chamansing* 2001 (6) SCC 145, it was observed that:

“if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise.”

Having regard to the above principles and the testimony of PW-11 as well as DW-1 (who too talked about the presence of others at the time of the incident), the failure by the prosecution to examine other witnesses, who either saw the incident, or saw the body being taken out, has to be taken as a circumstance adverse to its case.

17. In view of the above, it is apparent that there are serious doubts, regarding the time of the incident, the manner of death, the murder weapon, the time when the incident was reported, and whether PW-11 was in fact an eyewitness, as he claimed during the trial. These discrepancies are serious enough to be fatal to the prosecution version. As a result, the conviction

recorded by the Trial Court against the appellants cannot be sustained. It is set aside.

18. As a result of the above findings, the appeals, Cr. A. No. 1491/2011 and Cr. A. No. 1516/2011 are allowed; the appellants shall be set at liberty forthwith, unless required in any other case.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

February 21, 2012