

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

DECIDED ON: 22.03.2012

+ CRL. A. 5/2012, Crl.M. (Bail) No.11/2012

RAHUL KUMAR Appellant
Through: Ms. Saahila Lamba, Advocate.

versus

STATE Respondent
Through: Ms. Richa Kapoor, APP.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% 1. According to the allegations of the prosecution on 16.07.2010 Kishan Mohan Prasad (the deceased), had, as was usual, gone to his place of work at Sadar Bazar. But he did not return home that evening. When his relatives made inquiries from his employer, they were told that he had left the shop (where he worked) in the evening. A search was carried out for the deceased but he could not be traced. The next day, i.e., on 17.07.2010, since he was still nowhere to be found, his cousin, Pankaj Kumar, lodged a “missing person” report with the police. On 19.07.2010, when the position still stood thus, the same cousin had lodged a written complaint in which he voiced suspicion against the appellant Rahul Kumar. On the basis of the complaint, a

case under Section 365 IPC was registered by concerned Police Station.

2. The prosecution alleged that the Appellant was interrogated by the Police and arrested. His statement was recorded where it was revealed that he was in love with the deceased's wife and this compelled him to murder the deceased. Pursuant to an alleged disclosure statement (of the accused), the body of the deceased was recovered from a jungle abutting the Ring Road; it was then sent for post mortem. Upon completion of the investigation, the accused was charged under Section 302/365 IPC, and the case was tried by the Court of Sessions. The Appellant/accused denied guilt, and claimed trial.

3. The prosecution, to prove its case, examined 21 public witnesses and the material evidence brought on record, which also included documents such as the post mortem report, etc. On an overall consideration of all these, the Trial Court held the accused guilty of the charge under Section 302 IPC for which he was sentenced to rigorous imprisonment for life with Rs. 50,000/- fine, in default of which he was to undergo simple imprisonment for 6 months. However, with respect to the charge under Section 365 IPC, the Trial Court held that the prosecution could not prove its allegations, and therefore, acquitted the accused on that count.

4. Learned counsel for the Appellant urged that the prosecution story was utterly implausible, and the materials placed on the record of the Trial Court did not justify a conviction. It was argued that there was no reason for the complainant, PW-11 to suspect the accused, a

fact testified by the record itself. Concededly, when the deceased went missing on 16-7-2010, there was no suspicion in the minds of any of his relatives. The position remained unchanged till 19-7-2010, when all on a sudden, the complaint was lodged; it translated into an FIR, and the police managed to acquire all the leads and even solved the case within few hours. It was submitted that this story was incredible, and the Trial Court fell into error in not scrutinizing the various prosecution witnesses, and evidence with the care needed in a criminal case.

5. It was argued that there was nothing on record to substantiate the allegation that the motive for the commission of the offence was that the accused was in love with the wife of the deceased. The Trial court erred in construing the testimony of the wife of the deceased so as to read into it motive for the commission of the offence. The accused had not made any advances towards her or threatened or harmed any of her family members. There was nothing to suggest that the appellant was nurturing a grudge against the deceased. This was entirely based on conjectures, and the Trial Court acted on surmises and suspicions. It was emphasized that being a circumstantial evidence based prosecution, the Court had to keep in mind the prosecution's duty to conclusively prove each circumstance, and every link connecting each of them; furthermore, the prosecution had to prove beyond reasonable doubt that it was the appellant and none else responsible for the crime and lastly every hypothesis of his innocence had to be ruled out. It was argued that there were no eye witnesses present and that the Trial Court had arrived at the finding of guilt on

insufficient circumstantial evidence. Counsel argued that PW-11, the complainant stated that there was no animosity between the accused and the deceased and that he had even stated that he was not aware of there being any illicit relations between the wife of the deceased and the accused.

6. Arguing that the recoveries and the lightning speed with which the case was apparently solved cast grave doubts on the prosecution version, it was submitted that there were no public witnesses during any of the recoveries. In this respect, it was highlighted that there was no reason to suddenly go to the STD booth of PW-8 and attempt to find out whether the accused had made any calls. It was emphasized that nothing in the statement of PW-11, the complainant, suggested that the accused had been using the STD booth to contact the deceased. Moreover, it was submitted that the deposition of PW-8, the PCO service provider, regarding identification was highly improbable, if not downright unbelievable. It was submitted that a PCO booth owner would be seeing at least a hundred people on an average each day. Most of them would make one or two phone calls and leave the premises. At best, the occasion to see such users would be for a fleeting duration. In these circumstances, for the witness to claim that he observed the accused carefully or that the latter betrayed signs of nervousness was improbable. The Court, submitted learned counsel, should have altogether discarded his testimony.

7. The learned APP argued that though the deceased went missing earlier and the complaint in that regard was lodged by PW-11, at that time he did not suspect the accused's hand. By itself, this could not be

held against the prosecution, because PW-11 was the deceased's cousin, and therefore may not have had any immediate reason to suspect the accused. However, since the deceased did not return home, the complainant went to the police and voiced his suspicion. It was then, that the investigations went ahead rapidly and the police was able to trace the accused and solve the case. It was urged that the recovery of the deceased's body at the instance of the accused, was the single most incriminating circumstance, which pointed to his criminal responsibility. His inability to explain that knowledge, coupled with the testimony of the PCO booth owner, PW-8, to the effect that he had indeed made two calls, unerringly pointed to his guilt and no one else's role in the offence. The APP argued that the testimony of PW-8 cannot be disregarded or washed away, because the accused was in the booth for a while, and had even received an incoming call. Since his behavior was unusual, naturally it attracted curiosity and attention, sufficient for the witness to remember him and identify him.

Analysis and Findings

8. PW-11 was the deceased's cousin; he was the complainant. He stated that when the deceased did not return home on 16.07.2010, he called the employer of the deceased, PW-5, who told him that he had already left. The next day, on 17.07.2010, he informed the police and on 19.07.2010, when the deceased had still not returned, he lodged a complaint (Ex. Pw-11/A) with the police, in which he raised suspicion against the accused. Following this, this witness and the police, went to Sadar Bazar to speak to the deceased's employer, after which they went to A-76, Pandava Nagar, at Bara Tooti, where the accused lived.

The accused was apprehended from the first floor, where he lived. When he was interrogated, he first denied involvement, but later admitted that he had murdered the accused. His statement was recorded as Ex. PW-11/B. The witness deposed that the accused revealed that he killed the deceased because he was in love with his wife Kamini. He led the police to a jungle off the Ring Road, where the dead body was recovered (Ex. PW-11/C), as well some hair (Ex. PW-11/E) and soil (Ex. PW-11/D). Then he showed them the stone he had used to kill the deceased, which was lying near an open railway line. (Ex. PW-11/F) This was also recovered; he then took them to a pit near DDA Complex Mayapuri where he had thrown the bag of the accused. This was also recovered and identified by the witness (Ex. PW-11/G). The accused then took them about 50 yards away where broken pieces of the deceased's cell phone were recovered (Ex. PW-11/H). These recoveries were made on 19.07.2010. The postmortem of the body was conducted.

9. PW-11 further deposed that on 21.07.2010, the police and the accused came to his house from where they went to the accused's house, where at his instance the pant and shirt he had been wearing when he had killed the deceased were recovered (Ex. PW-11/J). He then showed them the motorcycle he had used for the commission of the offence (Ex. PW-11/K). The witness deposed that the accused and he lived in the same premises but on different floors. He stated that Kamini's statement was recorded on the 21st as well. The accused was arrested on the 21st July, 2010 by memo Ex PW-11/M. He identified the case property in Court. In his cross examination by the counsel for

the accused, he revealed that the deceased's family and the accused were on good terms and that they lived in the same premises. He said that they did not complain to the police on the 16th July itself since, they were still searching for him. He said that they called the deceased at about 9 PM that day but he did not answer the call. He further stated that he was not aware if the wife of the deceased had been having an affair with the accused. PW-18 Vijay Kumar, brother-in-law of the deceased, corroborated the statement of PW-11 in all material aspects.

10. PW-5 Ramesh Gupta was the deceased's employer, in his establishment, i.e, Classsic Associates, in Rui Mandi, Delhi. He deposed that the deceased had been in his employment for a year until his death. He stated that on 16.07.2010, at about 5 or 5.15 PM, the deceased received a call on his mobile phone, following which, he told the witness to let him go for the day as he had some urgent work. This witness allowed him to go. The deceased, otherwise, ordinarily worked till 6 -6.30 PM. He stated that after this, the deceased did not come back to the shop that evening, and the next he heard of him was when he was informed on 19.07.2010 that he had been murdered. In his cross examination by the Counsel for the accused he stated that he did not know who the maker of the call was, and that he had not asked the deceased about the same.

11. PW-8, Lalit Kumar Bagga owned an STD Booth in Karol Bagh. He stated that on 16.07.2010, the accused Rahul had made a call from his booth at about 4.40-5.00 PM, and that he looked nervous while doing so. He stated that at the time of making the call he did not know his name (i.e., the accused's) but found out later. The second time, this

witness saw the accused when he was brought to his shop by the Police when he identified him. In the cross examination he clarified that he inferred that the accused was nervous from the expression on his face. He also stated that it was a local call but that he could not remember the exact phone number. He deposed that the accused was whispering into the phone and had spoken for about five minutes. He says that he used to get 50-60 customers in a day. When he was asked whether he could identify a person who had visited his shop within four days, he answered saying that he remembered the accused because he (the accused) had even received an incoming call in the shop, though this witness could not recall how many incoming calls he had received.

12. PW-21 Inspector Pramod Gupta deposed that on 19.7.2010, PW-11 came to the Police Station Sadar Bazar where he was posted and informed him about the abduction of his cousin. His statement was recorded as Ex.PW-11/A. Then he, the complainant, and Const. Sant Ram, went to the deceased's place of employment and recorded the statement of his employer PW-5. Then they went to the house of the accused at A-76, Bari Tooti Chowk, who on interrogation revealed that he murdered the deceased near the Ring Road, Dhaula Kuan, opposite a CNG Pump, he revealed that he killed him because he was in love with his wife. He further disclosed that he had disposed the bag and cell phone off the deceased in Mayapuri, near the DDA complex. His disclosure statement was recorded as Ex. PW-11/ B. Following this disclosure, Section 302 was added to the case and the accused was arrested by memo. Thereafter, the accused took them to a

jungle off the Ring Road where he had thrown the dead body. The body was found face down and the relatives of the deceased identified it. The Crime Team collected the necessary evidence and inspected the site (Ex. PW1/A). Despite the fact that members of the public were present at this time, this witness states that all of them refused to join this investigation. Then the accused took them to the place near the railway line where he had thrown the stone he had used to kill the accused. This stone was recovered. Following this, the accused led to the recovery of the bag and the broken phone pieces belonging to the deceased near the DDA Complex. On 20.7.2010, the body which had been sent for postmortem on the 19th was given to the relatives of the deceased. On 21.7.2010, the accused took him to his house A-76 Bara Tooti Chowk, where he showed them the clothes he had worn, and the motorcycle he had used for the commission of the offence, both of which were seized. On the same day he even recorded the statement of the wife of the deceased PW-19 Kamini. The statement of PW-21 and the statement of PW-11 the complainant are consistent with each other.

13. PW-19, Kamini Devi is the wife of the deceased. She stated that the accused used to live on the first floor of the premises with his family and she used to live in the second floor with her husband, children and brother in law. She states that they had moved into the house in January of 2007. She states that first her father in law, and then the other members of her family fell ill, the accused used to take them to the doctor. He even took her once to the hospital. The witness states that this made her uncomfortable, but his relatives assured her

saying that he was a person of helpful disposition. She stated that the accused even used to call her on the phone very frequently and once professed his love for her when she was up on the terrace of their building.

14. PW-4, Dr. S. Lal, conducted the post mortem on the body of the deceased. The body was brought to the Subzi Mandi Mortuary on 19.07.2010 at 2 PM. He states that when he received it, the body was in a highly decomposed condition. He was of the opinion that the cause of death is cranio- cerebral damage consequent upon blunt force impact on head and was sufficient to cause death in the ordinary course of nature. He stated that all injuries were *ante mortem* in nature and that the time since death was 3-4 days. The post mortem report was marked Ex. PW-4/A in evidence. He even stated that the injuries could be possibly inflicted by the recovered weapon of offence, i.e. the stone.

15. The prosecution had relied on certain electronic telephone call particulars. PW-13, R.K. Singh, Nodal officer of Bharti Airtel, proved that the PCO Telephone No. 011 41545420 belonged to Lalit Kumar Bagga PW-8. He also proved the call details of the Ph No. 9910301462. PW-14, Rakesh Soni, Nodal officer of the MTNL proved that Mobile phone No. 9968820489 was in the name of Krishan Mohan Singh, the deceased. PW-16, Raj Kumar, Nodal Officer, Reliance Communications, proved that Ph No. 8010196580 belonged to the accused Rahul Kumar. PW-20 proved that No 9968820489 belonged to the deceased Krishan Mohan Singh.

16. As far as the sequence of events is concerned, the narrative is consistent between PW-11 the complainant, PW-18 and PW-21 the IO. The submission of the appellant that the testimony of PW-11 to the extent it implicated the accused, cannot be relied on, because the witness voiced suspicion two days after the deceased went missing, is unacceptable. The witness was the deceased's cousin. He deposes about having reported to the police when the deceased did not return home, on the next day after he went missing. However, his formal complaint, and the statement voicing suspicion against the accused, was recorded on 19-7-2010. This cannot be termed as a late reporting of the incident; PW-11 did not say that this was so. Moreover, there cannot be any iron clad rule, stating that if a complaint is recorded by the police later, it is inherently weak. Therefore, the deposition of PW-11 is credible.

17. The next question is the tracking down of the accused. Now, if one looks at the testimony of PW-19, it is clear that the accused was apparently smitten with her, and had even professed his love for her. She was uncomfortable. This angle was the basis for the deceased's relatives airing their views about the possibility of the accused's role. The police, soon after receiving the complaint, visited PW-5, and ascertained that the deceased had left slightly early. They then proceeded to the accused's place, and nabbed him. Till so far, the accused's role was only suspicious. However, once he was interrogated, and he made a statement, and led the police to the deceased's body, the matter acquired an altogether different dimension.

18. Section 27 permits that part of a confessional statement, which is otherwise forbidden from the courts to view, to be seen, if it leads to recovery of an incriminating article, or discovery of an incriminating fact *Pulukuri Kottaya & Ors. Vs. Emperor* (AIR 1947 PC 67). It has been held that recovery of commonplace articles, which themselves do not link a criminal suspect with the crime, cannot be considered incriminating (See *Surjit Singh v State of Punjab*, AIR 1977 SC 1753; *Dera Singh v State of Rajasthan* AIR 1994 SC 110, etc). However, recovery of some articles which have a link with the deceased, or are distinct in some manner, stand on a different footing. The discovery of the dead body, i.e., the *corpus delicti*, as a result of the statement made by the accused is an important factor which would support the prosecution case. It was thus held in *Mohd. Inayatullah v. State of Maharastra*, AIR 1976 SC 483 that:

'The fact discovered includes not only the physical object produced but also the place from which it is produced and the knowledge of the accused as to this'.

Therefore, such a recovery incriminates the person at whose instance the dead body was recovered. This, in the court's opinion formed a strong incriminating circumstance against the appellant. Similarly, the accused's statement about the manner in which he attacked the deceased, the injury inflicted, and the cause of death, are corroborated by the post mortem report. Though the sequence of events narrated by him is inadmissible, the use of a stone to kill the deceased, and the seizure of that stone also incriminates him, because it is a "fact discovered" pursuant to the accused's statement, to the police, which

found corroboration later in the post mortem report. That report also corroborates the prosecution version about the time and manner of death.

19. This court is of the opinion that there are no discrepancies between the testimonies of the different witnesses, which support and corroborate each other. The deposition of witnesses, such as the employer of the deceased, the phone booth owner, and the wife of the deceased support each other's version. There is no false note in the evidence given by these witnesses. Furthermore, the evidence of these witnesses is corroborated by the phone details which show that the accused and the deceased were communicating with each other at the time as mentioned by the phone booth owner and the employer of the deceased, and that shortly after, the deceased left his place of work. As far as identification by PW-8, of the accused goes, the court finds insubstantial the argument that he could not have possibly remembered much less identified him, since every day he would have seen at least a hundred or more people. What strikes an individual, when he observes another, and indelibly imprints itself in his memory, cannot be cast in typical opinions. A gesture, clothes that someone wears, the gait, or even some habits may strike the observer and form a powerful memory which he may preserve and recall. Here, the phone booth owner had more than the normal time, because the accused not only made a call, but also received one. Therefore, the court does not find any reason to discard his testimony.

20. Finally, the existence of motive for the murder. The accused's infatuation with the wife of the deceased, is spoken by her, during the

trial. This ties together all the evidence against the accused and points to his guilt. In these circumstances, we see no infirmity with the impugned judgment and order of the Trial Court. The appeal therefore, fails and is dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

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

MARCH 22, 2012