

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

% *Judgment reserved on: 24.07.2013*  
*Judgment delivered on: 29.07.2013*

+ CRL.A. 105/2011  
BRIJ RAJ TRIPATHI @ RAJU

..... Appellant  
Through: Ms. Aashaa Tiwari, Advocate

versus

STATE

..... Respondent  
Through: Mr. Sunil Sharma, Additional  
Public Prosecutor for the State

**CORAM:**

**HON'BLE MR. JUSTICE KAILASH GAMBHIR**  
**HON'BLE MS. JUSTICE INDERMEET KAUR**

**INDERMEET KAUR, J.**

1 On 08.08.2003, information was received in the afternoon at 01:30 PM in the local police station Pashchim Vihar that Mohini Srivastava had been murdered at her residence i.e. flat No. 17-C, Second Floor, Green Apartments, Pashchim Vihar. This information had been conveyed in the local police station by Asit Srivastava (PW-3) nephew of the victim. On reaching the spot the victim was found lying in a pool of blood with a sharp stab wound noted on her breast. Signs of strangulation on the neck of the victim were also noted. The walls of the room were also smeared with blood.

2 On the statement of PW-3, rukka Ex.PW-3/A was sent and the FIR Ex.PW-1/A was registered. His version was to the effect that his flat (18-C) was adjacent to the flat of his uncle N.N. Srivastava (PW-8) where their servant Janardhan was also living. After his uncle had left for work, at about 11:30 AM PW-3 was informed by his bhabhi Preeti (PW-4) that despite repeated pressing of the bell at their uncle's house neither Mohini (victim) nor the servant were answering the call. Meanwhile, Janardhan who was on the balcony came outside and stated that the door of the flat appeared to be bolted from inside. PW-3 went to the front gate of his uncle's flat where he noticed that the wooden entry of the flat was ajar and the wire mesh was broken. On entering the room, he saw his aunt lying in a pool of blood; articles were also scattered around.

3 Police was informed. DD No. 20-B (Ex.PW-20/A) was marked to ASI Chattar Singh (PW-20) who along with Constable Ramesh (PW-12) reached the spot. PW-3 and his father Mr. R.N. Srivastava (PW-5) were found there; Janardhan @ Chotu was also present. The dead body was inspected. Stab wounds on the chest and ligature mark on her neck had been noted. Blood was oozing out from her injuries and dragging marks on the floor where the dead body was lying were also noted. Broken bangles and a blood stained foot mat were taken into possession and sealed vide memo Ex PW-3/B.

4 Statement of PW-3 (Ex.PW-3/A) was recorded pursuant to which FIR Ex. PW-1/A under Section 302 of the IPC was registered. Inquest proceedings were initiated. Crime team was summoned. It prepared its

CrI. Appeal No. 105/2011

report Ex.PW-10/A. 11 photographs were taken by HC Jai Veen Singh (PW-11) which were proved as Ex.PW-11/1 to Ex. PW-11/11.

5 The dead body was taken to the mortuary by PW-12. Post mortem on the deceased was conducted by Dr. R.K. Punia and Dr. V.K. Jha (PW-9) and the post mortem report has been proved as Ex. PW-9/A.

Following injuries were noted upon her person:-

*“1. Ligature pressure mark present all around neck at lower 1/3 width of ligature mark is 0.5 CM, skin over ligature mark is soft and red. On dissection of injury No. 1, it was observed that blood and blood clots present underneath of ligature mark.*

*2. Stab incised wound present over front of (L) side chest 2.5 CM X 1 CM X chest cavity deep slightly obliquely placed situated, 2 CM (L) to interior middle and 22 CM below left clavicle upper and inner end is sharp and lower end is blunt. On dissection of injury No. 2 there are a track perforae skin muscle fifth intercostals space and perforates pericardial and left ventricle wall. “*

6 Cause of death was opined as pressure over neck structure (ligature strangulation) and stab injury on the heart. Both the injuries were sufficient to cause death in the ordinary course of nature individually and collectively.

7 The statement of Janardhan @ Chotu the servant was recorded. Nothing material was elicited in the said statement; he appeared to be vacillating.

8 On 20.08.2003 on the suspicion raised by the family members of the deceased, Janardhan @ Chotu was produced in the local police station. The family revealed that in the course of their inquiry, it had

come to light that Janardhan along with co-accused Brij Raj Tripathi @ Raju had committed the crime. Disclosure statement Ex. PW-20/I of Janardhan was recorded. He revealed his complicity in the crime along with his co-accused Brij Jaj. Pursuant to this disclosure statement, he got recovered the looted goods belonging to the deceased family; he led the police party to house No. A-3/17 C, Green Apartment Pashchim Vihar, Delhi from where he took out a carry bag containing a sum of Rs.12,250/- which was taken into possession vide memo Ex.PW-5/C. He also got recovered a briefcase containing a blood stained choori and his blood stained shirt; a white nylon rope as also a blood stained knife were also recovered. These articles were seized vide seizure memo Ex. PW-3/DA. The sketch of the knife revealed its length as 23.3 cm and the blade was 12.8 cm long.

9 Meanwhile since co-accused Brij Raj Tripathi could not be arrested, proceedings under Section 82 & 83 of the Cr.PC had been initiated against him. He was finally arrested on 10.10.2003 vide arrest memo Ex.PW-16/A. His personal search Ex.PW-16/B was recorded. He made a disclosure statement Ex.PW-16/C. Pursuant to his disclosure statement on 15.10.2003, the accused led the police party to house No. G-391-392, Shakarpur, Delhi and from a room of the first floor, he got recovered one cloth potli contained in a 'taand'; the said cloth potli contained money in the sum of Rs.7,220/-; jewellery items including a diamond necklace, one pair of gold bangles, two pair gold jhumkas, one pair gold tops, gold ring, one gold chain; jewellery and money were also seized vide seizure memo Ex.PW-16/E. On 05.11.2003, TIP of the

CrI. Appeal No. 105/2011

aforenoted case property was conducted before the Court of Mr. M.K. Nagpal, (PW-13) learned MM; TIP proceedings were proved as Ex.PW-13/A.

10 Charge-sheet against the accused persons was accordingly filed.

11 Both the accused were charged for the offence of murder as also for the offence of dacoity.

12 The prosecution in support of its case had examined 20 witnesses.

13 Statement of both the accused persons was recorded under Section 313 of the Cr.PC wherein both of them stated that they have been falsely implicated in the present case; they have no connection with the murder of Mohini Srivastava.

14 In defence, accused Brij Raj Tripathi produced two witnesses. DW-1 Lal Bihari was a neighbour living in the village where the parents of the said accused were living. He had deposed that the father of Brij Raj remained as tenant in their house for about five months i.e. w.e.f. October, 2003; his mother later on told him that her son had been apprehended by the Gorakhpur police. In cross-examination, he admitted that he was on visiting terms with the mother of the accused. DW-2 is the mother of the accused. She has deposed that sometime in October, 2003 her son Brij Raj who was suffering from fever was taken to the doctor; she left her son with the compounder as the doctor was not available; on her return, she was picked up by the police. She and her son were both beaten by the police; her son has been falsely implicated. She stuck to her stand in her cross-examination.

15 On the aforenoted evidence adduced by the prosecution, both the

accused persons were convicted under Sections 302/34 of the IPC. They were also convicted under Section 392 of the IPC for having committed robbery in the house of Mohini Srivastava.

16 Vide order of sentence 15.12.2010, both the accused persons were sentenced to undergo imprisonment for life for the offence under Section 302 of the IPC; for the offence under Section 392 of the IPC both the convicts had been sentenced to undergo RI for seven years each and to pay a fine of Rs.2,000/- each and in default of payment of fine, to further undergo SI for six months each.

17 Aggrieved by the aforementioned findings both the convicts have filed separate appeals.

18 In the course of hearing before this Court, accused Janardhan @ Chotu filed an application stating that he was a juvenile on the date of the offence i.e. 08.08.2003. Notice was issued to the State. Inquiry was also ordered to be conducted. The report of the inquiry officer confirmed the fact that the accused Janardhan @ Chotu was a juvenile on the date of the offence; his date of birth as per the record was 05.08.1987; thus making him less than 18 years of age as on the date of the offence. Accused Janardhan already having undergone incarceration for almost 10 years; in view of Section 15 (1) of the Juvenile Justice Act, 2000 was entitled to a forthwith release; his appeal (Crl. Appeal No. 207/2013) was accordingly disposed of.

19 On behalf of the appellant Brij Raj Tripathi arguments have been addressed by learned counsel Ms. Aashaa Tiwari. It is argued that he is not in any manner connected with the crime. Even as per the Crl. Appeal No. 105/2011

prosecution, Janardhan was the main culprit as he was working in the house of the victim. Brij Raj Tripathi was never working in their house. He was arrested two months after the date of offence i.e. on 10.10.2003. No public witness was joined in his arrest. The alleged recovery of jewellery effected pursuant to his disclosure statement had been planted upon him. The recovery memo Ex. PW-16/E has also not been signed by any public witness; the witnesses of the prosecution were not clear as to whether the recovery has been effected from house No. B-91-92 or from G-391-392. TIP was also an eye-wash as no detail of the jewellery alleged to have been looted in the incident had been disclosed and as such identification of the jewellery in the TIP proceedings was an empty formality. Reliance of Illustration (a) of Section 114 of the Evidence Act has been wrongly made; appellant in the absence of a complete chain of circumstances could not have been convicted for murder; at best the offence under Section 411 of the IPC was made out.

20 Arguments have been rebutted by the learned APP. The learned APP points out that this is a case of circumstantial evidence and there is nothing to disbelieve the version of the prosecution; there was ample evidence to nail the accused Brij Raj Tripathi.

21 Perusal of the record shows that the offence had occurred on 08.08.2003. The FIR had been registered on the statement of PW-3, the nephew of the victim who was living in the adjacent house. On the suspicion of the family members of the victim, accused Janardhan @ Chotu had been apprehended and arrested. He was working as a domestic servant at that time in the house of the victim. Although in the

Crl. Appeal No. 105/2011

beginning, vacillating and conflicting statements had been given by him but in his disclosure statement recorded on 20.08.2003 he had implicated his co-partner i.e. accused Brij Raj Tripathi; he had disclosed his own role as well. It was in this version that the name of the appellant had occurred for the first time.

22 Appellant was arrested on 10.10.2003 from his village at Gorakhpur. For this purpose, Delhi Police had taken the assistance of the Gorakhpur Police. (PW-16) Constable Ami Lal along with (PW-20) ASI Chatar Singh had gone to Gorakhpur for execution of process under Section 82 of the Cr.PC against the appellant. He was apprehended and arrested vide memo Ex.PW-16/A on 10.10.2003. His disclosure statement Ex.PW-16/C was recorded. He was taken on police remand under the permission of the Court and from house No. G-91-92, First floor, Shakarpur, he got recovered one cloth potli from a 'taand' by lifting it from there. Cloth parcel contained a brown purse containing Rs.7,220/- and valuable jewellery articles. As per the version of PW-16, the jewellery articles included one diamond necklace, one pair of gold bangles, two pair gold jhumkas, two gold tops of which one was broken, ladies gold ring and one gold chain. Same were taken into possession vide memo Ex. PW-16/E. In Court these articles when produced did not match and the diamond necklace appeared to be missing. The police had taken into possession a diamond necklace as is evident from the version of PW-16 but the same was not produced at the time of identification. In cross-examination, PW-16 denied the suggestion that the recovery had been planted upon the accused.

23 PW-17, ACP Raghubir Prasad was also a witness to this recovery. He had given the number of the tenanted room at first floor of G-391-92 whereas PW-16 has mentioned the number as G-91-92. This was subsequently clarified in the version of PW-16 who has disclosed that actual number of the house is 391-92 but outside the house B-91-92 had been written.

24 PW-18 Smt. Sukhvinder Kaur was the owner of the house where the aforementioned recovery had been effected; her testimony is to the effect that the parents of Brij Raj Tripathi were residing as tenants in the said house. She had stuck to her stand in her cross-examination.

25 The case property i.e. the various articles of jewellery including the cash amount of Rs.7,220/- had been put to TIP which proceedings had been conducted by M.K. Nagpal, learned MM examined as PW-13. From his deposition it is clear that these jewellery articles had been mixed, in the absence of investigating officer, with other similar like jewellery pieces and the witness Ms. Shweta Shrivastava (PW-6), the daughter of the deceased had correctly identified the case property; in fact she has taken just 4-5 minutes to see the articles and thereafter to correctly identify them. TIP proceedings had been proved as Ex.PW-13/A.

26 The husband of the victim PW-8 both in his statement under Section 161 of the Cr.PC as also before the Court informed the police that cash amount of Rs. One lac as also jewellery articles including a diamond necklace, diamond ring, ear tops, golden bangles, one golden chain, six golden rings, golden matarmala, mangalsutra, golden nath,

CrI. Appeal No. 105/2011

golden tikka were found missing on the date of the incident. The recovered articles had been taken on superdari by him which he had produced for the purposes of identification in the Court. In his cross-examination, this witness has stuck to his stand.

27 This is admittedly a case of circumstantial evidence. All links in the chain of circumstances must be fully complete before an accused can be nailed. The hypothesis should be single which is of the guilt of the accused. All other possibilities should be excluded. This being the law on circumstantial evidence, the case of the prosecution qua Brij Raj Tripathi had to be tested on this touch stone.

28 The facts of this case as elicited show that the name of the appellant Brij Raj Tripathi surfaced for the first time in the disclosure statement of co-accused Janardhan which was recorded on 20.08.2003. The statement of a co-accused under Section 30 of the Evidence Act is a weak evidence and necessarily requires a corroboration. The accused was finally arrested on 10.10.2003 from his native village at Gorakhpur i.e. two months after the incident. Pursuant to his disclosure statement, five days later i.e. on 15.10.2003, he got recovered the aforementioned jewelley articles and a sum of Rs.7,220/-.

29 In this background, the defence as set up by the accused becomes relevant. There are three stages in a criminal trial where the accused is permitted to disclose his defence. The first would be at the time of cross-examination of the witnesses of the prosecution; the second would be at the stage when he is giving his statement on oath under Section 313 of the Cr.PC; the third stage would be when he is permitted to lead

evidence in defence.

30 A perusal of the cross-examination of the relevant witnesses in this case (PW-6, PW-8, PW-16, PW-17 & PW-19) evidences that the defence sought to be set up by the accused was that the jewellery articles had been planted upon him. These are the suggestions given to all the aforementioned witnesses. In his statement under Section 313 of the Cr.PC, his version is that he had been apprehended from his village and was made to sign on blank papers. It was denied that the jewellery articles were recovered at his instance. The accused had produced two witnesses in defence; both of them related to his arrest.

31 Before this Court while addressing arguments the learned counsel for the appellant has not seriously challenged the recovery. The main thrust of her argument is that a case of murder cannot be foisted upon her client. Illustration (a) of Section 114 of the Evidence Act is not attracted; recovery in this case had been effected more than two months from the date of the incident; at best an offence under Section 411 of the IPC is made out.

32 Relevant would it be extract the provisions of Section 114 Illustration (a) of the Indian Evidence Act. They read herein as under:-

*“114. Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

*Illustrations: The Court may presume-*

*(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.”*

33 This presumption is a discretion which is given to the Court to presume the existence of any fact which having regard to the common course of natural events is likely to happen. Illustration (a) appended to this Section lays down a presumption which is to be drawn in a given situation depending upon the evidence and circumstances of each case. The Apex Court has time and again cautioned the Courts that before drawing a presumption under this provision of law, the nature of the stolen articles and the nature of their identification by the owner, the place and circumstances of its recovery, the intervening period between the date of occurrence and the date of recovery, the explanation of the persons concerned from whom the recovery is made are all factors which have to be taken into consideration in arriving at a final decision whether the presumption should be drawn or not. If there is other evidence to connect the accused with the crime itself howsoever small, the finding of the stolen property with him is a piece of evidence which connects him further with the said crime. Then there would be no question of presumption. However if the gap between the incident and the recovery is too large, the presumption that the accused was concerned with the crime itself may get weakened. The presumption is stronger when the discovery of the fruits of crime is made immediately after the offence having committed. The reason would be obvious.

Disposal of fruits of a crime requires the finding of a person ready to receive them and sometime the shortness of time and nature of the property which is required to be disposed of, its character and its quantity may be a determining factor as to whether he had the goods in his possession or received them from another person or he himself was the thief or the dacoit. There may be other elements which may point to the way as to how the presumption may be drawn. Each case would depend upon its own facts.

34 The law on the subject has been settled by a catena of judgments. The Supreme Court in Ganesh Lal Vs. State of Rajasthan (2002) 1 SCC 731 has observed that recovery of stolen property from the possession of the accused enables a presumption as to commission of offence other than theft or dacoity to be drawn against the accused so as to hold him a perpetrator of such other offence only on the following tests being satisfied:-

*“15. A review of several decisions of this Court, some of which we have cited hereinabove, leads to the following statement of law. Recovery of stolen property from the possession of accused enables a presumption as to commission of offence other than theft or dacoity being drawn against the accused so as to hold him a perpetrator of such other offences on the following test being satisfied: (i) The offence of criminal misappropriation, theft or dacoity relating to the articles recovered from the possession of the accused and such other offences can reasonably be held to have been committed as an integral part of the same transaction; (ii) the time-gap between the date of commission of the offence and the date of recovery of articles from the accused is not so wide as to snap the link between recovery and commission of the offence; (iii) availability of some piece of*

incriminating evidence or circumstances, other than mere recovery of the articles, connecting the accused with such other offence; (iv) caution on the part of the Court to see that suspicion, howsoever strong, does not take the place of proof. In such cases the explanation offered by the accused for his possession of the stolen property assumes significance. Ordinarily the purpose of Section 313 of Code of Criminal Procedure is to afford the accused an opportunity of offering an explanation of incriminating circumstances appearing in prosecution evidence against him. It is not necessary for the accused to speak and explain. However, when the case rests on circumstances evidence the failure of the accused to offer any satisfactory explanation for his possession of the stolen property though not an incriminating circumstance by itself would yet enable an inference being raised against him because the fact being in the exclusive knowledge of the accused it was for him to have offered an explanation which he failed to do.”

35 The tests (as noted supra) when applied to the facts of the instant situation show that all the jewellery articles which were recovered at the instance of the appellant were valuable yet were recovered after a considerable lapse of time. The details of the jewellery found missing from the house of the victim were in fact not detailed by PW-8; their identity also did not completely match; It also has to be borne in mind that apart from this recovery, there is no other circumstance which could connect the accused with the offence of murder. The chain of circumstances which is required to be proved by the prosecution has not been established.

36 In *Ganesh Lal* (supra) the judgment heavily relied up by the learned prosecutor there were several factors which had been taken into consideration. In that case, a little before the probable time of the

commission of the crime, the accused was last seen near the place of occurrence; the recovery of ornaments worn by the deceased and the weapon of offence used in the commission of the crime had also been recovered at his instance; there was a time gap of just two days between the offence and the recovery. It was in these circumstance that the Court had held that presumption under Section 114 (a) of the Indian Evidence Act needs to be drawn and the accused was held guilty not only of having committed dacoity but of murder as well. The second judgment relied upon by the learned APP for the prosecution Gulab Chand Vs. State of M.P. (1995) 3 SCC 574 is also distinguishable on its own facts. In this case, the recovery of the ornaments of the deceased were recovered from the possession of the accused immediately after the occurrence (3-4 days). This judgment in fact lays down a note of caution by indicating that suspicion should not take the place of proof. In AIR 1954 SC 1 Tulsiram Kanu Vs. State relied upon by the Court in this case, it had been noted that the presumption permitted to be drawn under Section 114 Illustration (a) of the Evidence Act has to be read along with “important time factor” and if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to such a fact.

37 In this factual scenario the accused is convicted for the offence under Section 411 of the IPC. The maximum punishment under Section 411 is up to three years. Record shows that the appellant has already undergone incarceration for more than eight years. He having suffered the sentence is directed to be released forthwith if not required in any

Crl. Appeal No. 105/2011 Page 15 of 16

other case.

38 Copy of this order be sent to the Jail Superintendent for necessary intimation and compliance.

39 The appeals stand modified and disposed of in the above terms.

**INDERMEET KAUR, J**

**KAILASH GAMBHIR, J**

**JULY 29, 2013**

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