

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

% *Judgment reserved on: 07.08.2013*
Judgment delivered on: 14.08.2013

+ CRL.A. 876/2010
RAJ KUMAR @ RAJU Appellant
Through: Ms.Rakhi Dubey, Advocate.

versus

THE STATE OF THE NCT OF DELHI Respondent
Through: Mr.Sunil Sharma, APP along with
Inspector Kishan Kumar, P.S.
Okhla Industrial Area.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR, J

HON'BLE MS. JUSTICE INDERMEET KAUR, J

INDERMEET KAUR, J.

1 The appellant Raj Kumar has been convicted vide the impugned judgment dated 20.04.2010 for the offence of murder punishable under Section 302 of the Indian Penal Code (IPC). Apart from the appellant, two other persons had also been apprehended and tried; both the said persons namely Sanjay Pratap and Adesh being juveniles were challaned before the said Court.

2 Vide order on sentence dated 22.04.2010, the appellant has been sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- for the offence under Section 302 IPC and in default of payment of fine to undergo SI for two months. For the offence under Section 201 of the IPC he has been sentenced to undergo RI for a period

of three years and to pay a fine of Rs.2,000/- and in default of payment of fine, to undergo SI for one month.

3 The appellant is aggrieved by the aforementioned judgment.

4 The version of the prosecution is that on 13.04.2007 pursuant to DD No. 4 (Ex.PW-15/A), Police Post Okhla was informed about missing of a person namely of Rajesh @ Tuntun. This DD had been recorded on a complaint made by his brother Harish Singh @ Haresh (PW-1). His statement (Ex.PW-1/A) was recorded wherein he disclosed that he had suspicion upon the appellant Raj Kumar @ Raju. The appellant was arrested on 14.04.2007. He made a disclosure statement (Ex.PW-19/C). Pursuant to this disclosure statement he got recovered the dead body of the victim from a portion of his house (E-86) which was adjacent and adjoining to the house of the deceased. The motive of the crime as per the prosecution was that the deceased had illicit relations with the bhabhi (Urmila) of the accused which had instigated him to commit this murder.

5 The accused was charge-sheeted. Charges under Section 302/201/34 of the IPC were framed against him. Prosecution in support of its case had examined 20 witnesses.

6 In his statement under Section 313 of the Cr.PC, the appellant had pleaded innocence. His submission being that he had been falsely implicated by the prosecution; he has no connection with the murder.

7 No evidence was led in defence.

8 The Trial Court had believed the version set up by the prosecution and convicted the accused. The Trial Judge had noted that this being a

case of circumstantial evidence, the three circumstances pleaded had been proved by the prosecution against the appellant forming a complete chain and which called for his conviction for the offence of murder. The said circumstances relied upon by the Trial Judge were as under:-

(i) last seen evidence which was sought to be proved through the version of PW-1, the complainant and the brother of the victim.

(ii) recovery of the dead body pursuant to the disclosure statement of the accused which dead body was recovered from the gallery of the house of the accused and which had been dug out by two labourers having been buried 1- 1-½ feet below the earth. This dead body had been identified by both PW-1 and PW-2.

(iii) motive for the same was depicted in the disclosure statement of the accused and in the version of PW-7 (a neighbor) who had stated that in a document signed by the accused it was noted that Urmila bhabhi had illicit relations with the deceased which was the reason for the accused to have committed the murder of the deceased.

9 Learned counsel for the appellant has addressed arguments assailing each of the aforementioned circumstances. Her submission is that the last seen evidence has been totally demolished in view of the fact that PW-1 in his statement on oath in Court has not whispered a word about his brother having been last seen in the company of the accused; the trial Judge relying upon the circumstance of last seen has committed an illegality. The recovery is demolished in view of the version of PW-7 (neighbour and friend) wherein in his cross-examination he has clearly explained that the accused was arrested on 13.04.2007 at about 07:30-

08:00 PM; at about 11:00- 11:30 PM he had gone inside the house of the accused where it was noted that one finger of a foot of the dead body was visible and a foul smell was coming from the portion of the house; it was learnt that a dead body was inside the house; the house was locked from the outside and the police remained seated outside. Learned counsel for the appellant points out that this version of PW-7 clearly shows that the arrest of the accused and his disclosure statement did not lead to discovery of any fact as the factum of the dead body being in the house of the accused was already known. On the question of motive, it is pointed out that it is the settled proposition of law that a disclosure statement of the accused which is made in the custody of the appellant is hit by the bar under Sections 25 & 26 of the Evidence Act and cannot be read in evidence for any purpose; the version of PW-7 also does not support this stand. Vehement submission of the learned counsel for the appellant being that on all counts the version of the prosecution is demolished. The accused is entitled for benefit of doubt and a consequent acquittal.

10 Arguments have been rebutted. Learned PP points out that the judgment is well reasoned and on no count does it call for any interference. Submission being that PW-7 in his cross examination has elicited information only to help the accused as it has come in his version that both the accused and PW-7 were childhood friends; the date of 13.4.2007 is a typographical error; this part of his version has necessarily to be ignored.

11 Record has been perused. This is a case of circumstantial

evidence. The law on circumstantial evidence is well established; all the links in the chain of circumstances must be proved; each and every circumstance must be so interlinked so as to lead to only one hypothesis and which is the single hypothesis of the guilt of the accused; all other hypothesis must be excluded. It is on this touchstone that the evidence has to be appreciated.

12 **Circumstance of last seen-** The prosecution has projected PW-1 to establish its circumstance of last seen. The PW-1, Harish Singh, the brother of the victim was the complainant in the case. As per his version (Ex.PW-1/A pursuant to which the rukka was sent and the FIR was registered) his brother Rajesh who was working in the Ahuja Radio Company as a casual labourer was not found at home on 08.4.2007 which being a Sunday was a holiday; on the fateful day when he had left for his work he had left his brother in the company of Raju @ Raj Kumar who was his neighbour and living in the adjacent house; however, in spite of all efforts made by him his brother could not be found; accordingly missing report was lodged by him on 13.4.2007. On oath in Court this witness has not whispered a word that he had left his brother in the company of Raju @ Raj Kumar. He is totally silent on this count in this deposition. He has on oath deposed that on 08.4.2007, it being a Sunday and a holiday of Rajesh when PW-1 left for his work at 9.30 AM, his brother Rajesh was in the room; when he returned back at 9.00 PM the room was found locked from outside; on unlocking it, it was found that no food has been cooked by his brother as his brother when he was on duty normally used to cook food but on that fateful day

there was no food cooked by him. Accused Raju was standing outside the door of the room; at that point of time accused tried to hit him with his hand but PW-1 managed to save himself. He made inquiries from his landlady as to whether she had seen his brother; she told him that she had seen him up to 10.00 or 11.00 in the morning but thereafter in spite of inquiries having been made from the neighbours his brother could not be found. On the following day PW-1 went to his duty and returned back at 11.00 PM; still his brother was not in the room. On Tuesday he went to Ahuja Radio Company where his brother was working where he was informed that his brother had not joined his duty either on Monday or on Tuesday. All efforts for search of his brother were futile. After 3-4 days, one Panditji told him that Raju had killed his brother and buried his dead body. Inquiries were made from Raju who asked PW-1 to make inquiries from Dr. Divesh. PW-1 made inquiries from Dr. Divesh upon which Dr. Divesh told him that Raju had taken away Rajesh. He lodged his complaint Ex.PW-1/A.

13 The further testimony of PW-1 (which is not relevant for this circumstance) relates to the recovery of the dead body which as per his version was made on 14.4.2007 at 10.00-11.00 AM in the presence of Raju having been found buried under the staircase of his house. In his cross-examination PW-1 has admitted that he knew accused 2-3 years prior to the incident; house of the accused (E-86) was adjacent of their house; 2-3 more persons were residing with the accused Raj Kumar; one of them was named as Sanjay Pratap. PW-1 further goes on to state that there was no tenant in the house of Raj Kumar and this house was

owned by the accused. PW-1 in another part of his cross-examination stated that he had visited the house of the accused only once where he saw three boys sleeping in the room. He admitted that he had no quarrel with the accused before this incident.

14 This was the sum total of the testimony of PW-1. The Trial Judge while relying upon the circumstance of last seen has gone on to rely upon Ex.PW-1/A (the complaint) noting it to be a second set of evidence which has been adduced by the prosecution. The Trial Judge has committed a grave illegality in relying upon this complaint which did not stand corroborated on oath in Court; in the absence of the complaint having been corroborated on oath in Court this statement only being a statement recorded by the police under Section 161 Cr.P.C. and not being a substantive piece of evidence could not have been relied upon. As noted supra in the entire testimony of PW-1 in court he has not whispered a word about his brother having been last seen or having been last left in the company of the accused.

15 The theory of last seen requires that where deceased is seen alive with the accused and soon thereafter the deceased is found dead or injured and there is no possibility of any other person accessing the deceased; unless the accused explains the circumstance under which the deceased sustained the injuries the accused must own up to the guilt. Applying the aforesaid test, it is clear that the prosecution has failed to establish this circumstance. It does not form a link in the chain of circumstantial evidence sought to be proved by the prosecution. It is accordingly rejected.

16 **Circumstance of recovery of dead body** - The prosecution has next heavily relied upon the circumstance of the accused having got the dead body recovered pursuant to his disclosure statement. This dead body as per the version of the prosecution was the dead body of the victim and had been duly identified by PW-1, his brother, as also his cousin PW-2. The dead body had been recovered on 14.4.2007 in the pre-noon hour and was found buried about 1-1 ½' below the earth in the gallery of Ex-86, Harkesh Nagar which is admittedly the house in which accused Raju was residing. The recovery memo of the dead body (Ex.PW-1/B) evidences the date of the recovery as 14.4.2007. It was witnessed by five persons of whom the public witnesses were PW-1, the brother of the victim, PW-11 the Executive Magistrate and PW-16 Dr.Sanjeev Lalwani. The version of the prosecution is that this recovery had been effected pursuant to the disclosure statement of accused (Ex. PW-19/C). PW-20, the Investigating Officer, Inspector Prakash Chand had recorded this disclosure statement of the accused. As per his deposition on oath, pursuant to this disclosure statement the accused had got recovered the dead body of the deceased Rajesh which he had buried in the ditch of the stair case of his house. The accused was taken to the spot in the presence of PW-11 who had been accompanied by the SDM C.M. Dhingra. The dead body was recovered in the presence of the accused by digging underneath the staircase of E-86 , Harkesh Nagar. PW-16 who was the Head of the Department of Forensic Medicine AIIMS had also been summoned at the spot. Exhumation of the dead body took place in his presence. Digging work was done by two labourers of

whom one Raj Kumar was examined as PW-17; digging was done with a “farsa and kassi”. PW-6 Sultan Ahmed , PW-7 Ved Prakash were also witnesses to the recovery of this dead body although they have not signed this seizure memo. They were witnesses to the seizure memo Ex. PW-6/A vide which the weapon of offence (dumble) three wooden dandas were recovered along with the dead body.

17 Testimony of PW-7 is relevant. PW-7 although was only a witness to the recovery of the aforementioned articles which had been seized vide Ex.PW-6/A, in his cross-examination has admitted that on 13.4.2007 he remained in the house of accused Raj Kumar up to 2.00 AM in the morning. The police had met him in connection with this case on the said date; police remained at the spot throughout the night; Raj Kumar was arrested on 13.4.2007 between 07:30 -08:00 pm; police officers were also present; they had gone inside the house and in the gallery which was about 7 ft x 3 ft and a finger of the foot was visible; foul smell was emanating; this was at 10:00-11:30 pm; they learnt that a dead body was lying inside the house; the door was then locked from outside and police including PW-7 remained seated outside; dead body was removed from the spot on the following day at about 11.30 or 12.00 noon.

18 This version of PW-7 in his cross-examination has demolished the case set up by the prosecution that the recovery of the dead body was effected pursuant to the disclosure statement of the accused. This version establishes that the police had arrested the appellant on 13.4.2007 between 7.30 to 8.00 PM on 13.4.2007; at about 11.00– 11.30

PM having noticed a foul smell coming from his house where the finger of a foot of the dead body was visible; the police at that point of time came to know that there was a dead body inside the house; they accordingly locked the house from outside and kept a vigil from the outside.

19 Further case of the prosecution is that the disclosure statement of the accused was recorded on the following day i.e. on 14.4.2007 and this is also evident from Ex.PW-19/C. Submission of the learned prosecutor that this part of the version of PW-7 may be ignored is an unacceptable proposition; testimony of a witness has to be read in its entirety; the date of 13.04.2007 has appeared in the version of this witness on four different occasions; it thus cannot be a typographical error as had been urged by the learned prosecutor. This deposition clearly establishes that the appellant was arrested on 13.04.2007 at 07:30-08:00 PM and on that day itself the fact of the dead body being in the house was known to the police.

20 When this fact about the dead body being in the house was already in the knowledge of the police on 13.4.2007 the recovery effected from the spot on the following day i.e. on 14.04.2007 is no recovery in the eye of law. It does not fall within the parameters of Section 27 of the Evidence Act.

21 Under Section 27 of the said Act, if an information is given by the accused which leads to a disclosure of a fact it will be a piece of evidence but if this fact has already been discovered, it would not be any evidence in the eye of law. In order to attract this provision the

prosecution must prove that the fact disclosed by the accused was previously not within the knowledge of the investigating officer or the fact disclosed was of such a nature which was only in the knowledge of the accused and was not within the knowledge of any other person from whom the investigating officer may have received this information.

22 This test is not satisfied in view of the aforementioned clear deposition of PW-7.

23 In (1997) 6 SCC 171 Vijender Vs. State of Delhi the Apex Court while elaborating on the provisions of the aforementioned provision of law had noted that where the dead body was already within the knowledge of the investigating officer, it could not be said that the recovery of the dead body was discovery of a fact falling within the purview of Section 27 of the said Act.

24 Having examined the evidence at hand we are constrained to hold that the recovery of this dead body was not made pursuant to the disclosure statement of the accused. It does not fit within the parameters of Section 27 of the Evidence Act. The knowledge that a dead body was lying in the store room of the house (E-86) of the appellant and a foul smell was emanating therefrom was known to the investigating agency prior to recording his disclosure statement that is why the police kept a vigil outside and locked the room of the house on 13.4.2007 itself.

25 Even otherwise, the recovery could not be foisted upon the accused as the house was not in exclusive control and possession of the appellant. It has come in the version of PW-1 that the house where the accused was living was adjacent to their house; 2-3 more persons were

residing in the house along with accused and one of them perhaps was Sanjay Pratap; he did not know the number of the rooms in that house; on his sole visit to the house of the accused he had noticed that three boys were sleeping in the room.

26 PW-1 was a close relation of the victim being his brother. His version is categorical; it was not the accused who was alone the occupant of the house from where recovery of the dead body was effected. Perusal of the site plan (Ex.PW-5/A) in fact shows that there were four rooms which were built up on the ground floor portion of the house and one room on the terrace; part of the house (E-86) was in occupation of Smt. Urmila (bhabhi of the accused); exclusive possession of the accused qua this house has thus not been established by the prosecution, which if established may have enabled the prosecution to point fingers of guilt at the appellant.

27 **Motive** - The motive set up by the prosecution was to the effect that the accused was having an evil eye on the bhabhi (Urmila) of the deceased. Apart from the fact that this has been elicited only in the disclosure statement of the accused upon which no reliance can be placed; there is no other evidence forthcoming on this count. Reference to a document by PW-7 which mentioned that the deceased was having relations with the bhabhi of the accused was not any information elicited from PW-7; it was only a document which he had purportedly signed. PW-1 in his cross-examination had also admitted that he had no quarrel with the accused before the incident. In a case of circumstantial evidence motive assumes great importance. It is the act of the individual

which permits and incites him to form an opinion or an intention to do an act with a view to achieve that intention. The trial judge in para 35 has returned an illegal finding that for the purposes of motive the disclosure statement of the accused could have been relied upon. This is an illegality; for no purpose whatsoever could the disclosure statement of the accused (which has been recorded in police custody) can be relied upon. The embargo under Sections 25 and 26 of the Evidence Act qua this position is only partially lifted for the purpose and to the extent as contained in Section 27 of the Evidence Act. Where there is no discovery of a fact, the disclosure statement of an accused cannot be relied upon. The prosecution has thus failed to establish any motive in the crime either.

28 **Conduct/Arrest of accused-** Arrest memo (Ex. PW-19/A) of the accused shows that he was arrested from outside Kalkaji Temple on 14.4.2007 at about 10.30 AM. This is also the version of the prosecution which has been elicited through PW-20 Inspector Prakash Chand. PW-20 on oath deposed that it was pursuant to a secret information that a raiding party was organized and at about 10.00 AM outside Kalkaji Temple the accused was apprehended and at the pointing out of the secret informer he was arrested. This version does not match the version of PW-2. PW-2 who is the cousin of victim has in his cross-examination stated that on 13.4.2007 he along with his brother PW-1 had gone to police post where accused Raju and Sanjay Pratap were also there; they were kept separately there; they remained in the police station throughout night. PW-7 has also matched this version; he has

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also stated (as noted supra) that the accused was arrested at 7.30 to 8.00 PM on 13.4.2007 and he remained in the house of the accused up to 2.00 AM; they had locked the room from outside and the police kept a vigil in the house of the accused. PW-7 also remained seated outside.

29 This version of the aforementioned witnesses i.e. PW-2 and PW-7 again throw doubt on the veracity of the version sought to be set up by the prosecution. The prosecution sought to prove that the accused was absconding and had been arrested on 14.4.2007 pursuant to a secret information. This is belied by the close relation of the victim i.e. by PW-2 who has stated that the accused was in the police station throughout the night of 13.4.2007; so also is the version of PW-7. Conduct of the accused in not fleeing from the scene of crime after committing the allegedly dastardly act again throws doubt on the version of the prosecution. Arrest also is thus uncertain.

30 In fact, the entire case as set up by the prosecution has several dents. These dents are glaring; in the absence of the prosecution having been able to fill in these bridges and gaps, the benefit of these bridges and gaps must accrue to the accused.

31 The prosecution has thus failed to establish the links in the chain of evidence sought to be set up by it. Not only is the last seen evidence been discredited; the recovery of the dead body pursuant to the disclosure statement has also been given a go-by; motive has not been established; the arrest of the accused is also doubtful. Case of the prosecution suffers on all counts. The recovery of the weapon of offence in these circumstances is of no value.

32 The accused is accordingly entitled to benefit of doubt and a consequent acquittal. He is acquitted. He is stated to be in judicial custody. He be released forthwith, if not required in any other case.

33 Appeal stands disposed of.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

AUGUST14, 2013

A/nandan