

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

+ Crl. Appeal No. 189/2015

Reserved on : 21st May, 2015

% Date of Decision: 27th May, 2015

CHHOTE

..... Appellant

Through Mr. V.V. Gautam and Mr.
Akshay Bhatia, Advocates.

versus

STATE

..... Respondent

Through Mr. Varun Goswami, APP for
State with ACP Rajender Gautam and SI
Dhirendra Singh.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J.

Appellant Chhote impugns the judgment dated 12th August, 2014, convicting him for murder of Sarvesh on 17th December, 2012, between 12 noon to 8 P.M. on the first floor of dairy of Ramesh Kumar at Khasra No.705, Nawal Park, Alipur, Delhi. By order on sentence dated 12th August, 2014, the appellant has been sentenced to imprisonment for life, pay fine of Rs.2,000/- and in default of payment of fine, undergo simple imprisonment of two months for the offence under Section 302 of the Indian Penal Code, 1860 (IPC, for short). Benefit under Section 428 of the Code of Criminal Procedure, 1973 (CrPC, for short) stands granted.

2. We have heard the learned counsel for the appellant and the Additional Public Prosecutor. The prosecution case is entirely predicated on circumstantial and 'last seen together' evidence. The prosecution has relied on the testimony of Ramesh Kumar (PW3) who has alleged that the appellant was last seen together with the deceased on the first floor of the dairy belonging to the said witness. Defence on the other hand, has stressed that the prosecution has failed to bring home the guilt of the appellant beyond reasonable doubt.

3. It cannot be doubted that the deceased Sarvesh was the victim who had suffered a homicidal death on the first floor of the dairy of Ramesh Kumar. His dead body was found in a room on the first floor of the dairy in the evening on 18th December, 2008. The issue which arises for consideration in the present appeal is whether the appellant Chhote is liable and culpable for the murder of the deceased Sarvesh. We find merit in the present appeal and proceed to record our findings and reasons for acquitting Chhote after briefly recording the factual position.

4. The facts in brief are as follows. HC Manoj Kumar (PW18) has deposed that he had visited the place of incident along with Ct Dinesh (PW16) after DD No.54B (Ex.PW1/A) was marked to him. The said

DD Entry (Ex.PW1/A) records that a man had closed the door and he was not unlocking the same (*ek aadmi ne darwaaza bund kar liya jo khol nahi raha*). On reaching, PW18 found the room locked from outside and on peeping through the window, he saw a person lying on the bedding on the floor with a cloth (*gamchha*) on his face. He informed the SHO and called for senior officers. ASI Omender Singh (PW-17) and SI Jitender Joshi (PW10) reached the crime scene. SI Jitender Joshi (PW10) broke the lock and entered the room. A dead body was found with blood on his face and pant. PW10 found blood-stained bedding, wooden *paaya* (leg) of a cot (Ex.P1) along with five empty pouches/bottles of country-made liquor (Ex.P2/1 to 5), which were seized vide memo Ex.PW10/E, Ex.PW10/D and Ex.PW10/B, respectively. The sketch of Ex.P1 is marked Ex.PW10/C. SI Jitender Joshi (PW10) called the Crime Team who took photographs. SI Jitender Joshi (PW-10) prepared the *rukka* (Ex.PW10/A) and got FIR No.443/2012 (Ex.PW1/C) registered. A person, namely, Ramesh Kumar had met PW10 at the spot but he was not able to identify the deceased and had informed that the said room had been rented out to one Ajay and only the said Ajay could reveal the identity of the deceased. This factum is relevant as it reflects that initially the said Ramesh Kumar, who has deposed as PW3, had stated that the room in

question was in occupation of one Ajay and had not named the appellant Chhote or any third person. The dead body remained unidentified till 19th December, 2012, when it was identified by Rajoul (PW7). Thereafter, Kailash (PW6), brother of the deceased and Rakesh Kumar (PW8), brother-in-law of the deceased had identified the dead body. Post-mortem of the body was conducted at Babu Jagjivan Ram Memorial Hospital (BJRM Hospital, for short) and the post-mortem report (Ex.PW22/A) dated 21st December, 2012 records the cause of death as craniocerebral damage as a result of blunt force directed upon head, which was sufficient to cause death in ordinary course of nature. It records the time since death as about 4 days.

5. Before elaborately referring to the testimony of Ramesh Kumar (PW3), owner of the dairy in question in detail, we would like to concisely examine testimonies of other witnesses.

6. Rajoul (PW7) has stated that he was a tenant of one Ramesh Kumar (PW5) in House No.1284, Gali No.2, Bada Shiv Mandir, Alipur, Delhi and deceased Sarvesh used to also reside with him. It may be noted that the said Ramesh Kumar (PW5) is different and not the same as the Ramesh Kumar (PW3) who was the owner of the dairy at Nawal Park, Alipur, Delhi. Rajoul (PW7) has stated that the

deceased Sarvesh was a resident of village Asani, Nawada and used to work as a labourer in Delhi. On 17th December, 2012, the deceased Sarvesh had told him that he would be going to his native village to bring his family. PW7 left for his work at about 9 A.M. and when he returned, Sarvesh was not to be found in the house. Thereafter, PW7 came to know about the deceased Sarvesh on 19th December, 2012, when the police had come to his house, made inquiries and took him to the mortuary at BJRM Hospital, where he had identified the dead body of Sarvesh. Rajoul (PW7) has expressly and categorically deposed that he did not know the appellant Chhote nor could he identify him. PW7 did not identify the appellant Chhote in the Court stating that he had never seen him and that the appellant had never come to meet Sarvesh in his rented accommodation. PW7 was cross-examined by the Additional Public Prosecutor, but resolutely denied the suggestions put to him including his statement under Section 161 Cr.P.C. (Ex.PW-7/X1). He specifically denied the suggestion that on 17th December, 2012, the deceased and appellant were present in the rented room at Gali No.2, Bada Shiv Mandir, Alipur, Delhi.

7. Ajay Kumar (PW12) and Naval (PW14) have deposed in seriatim that they used to reside in Delhi and were working in the steel factory of one Kaalu at Alipur and had taken a room on rent in a house

at Garhi near Dairy in Alipur along with Sudhir (PW13). PW12 has deposed that Sudhir's father also used to stay with them. The said Sudhir (PW13) was working in another factory. Ajay (PW12) had stated that they used to pay Rs.600/- per month as rent and share other expenses like electricity, etc. On the date of the incident, Ajay Kumar (PW12) along with Naval (PW14) and Sudhir (PW13) had gone to their respective factories at about 8.30 AM.

8. PW12 deposed that he did not know the appellant Chhotu or the deceased Sarvesh and had never seen them in the rented house. He was cross-examined by the Additional Public Prosecutor but denied all suggestions given to him. He even denied the fact that the appellant Chhote used to reside in the rented accommodation. PW14 accepted that he knew the appellant Chhote as he belonged to the village of his brother-in-law (*jija*). But he deposed that he did not know the deceased Sarvesh and had never seen him in the rented accommodation. He was also cross-examined by the Additional Public Prosecutor but he remained steadfast and did not accept the prosecution version.

9. Sudhir (PW13) has corroborated that he along with Ajay (PW12) and Naval (PW14) were residing on rent at Garhi near Dairy,

Alipur, Delhi. On 17th of a month in a year, which he did not remember, he (PW13), Ajay (PW12) and Naval (PW14) had gone to their respective factories at about 8.30 A.M. However, as the employer refused to raise his salary, he left the job on that day to go to his native village. He identified the appellant Chhote as they belonged to the same village. PW13 has stated that the appellant Chhote was not residing with them. He did not know the deceased Sarvesh and had not seen him in the said house. He was cross-examined by the Additional Public Prosecutor, but he too did not support the prosecution's version.

10. The prosecution had also led evidence of Sunil Aggarwal (PW2) and Hanuman Aggarwal (PW4), the employers of Ajay (PW12), Naval (PW14) and Sudhir (PW13). Sunil Aggarwal (PW2) has deposed that on 17th December, 2012, Ajay (PW12) and Naval (PW14) had joined duty at about 9.30 A.M. and had left the factory at about 8 P.M. On 18th December, 2012, neither Ajay (PW12) nor Naval (PW14) came to the factory without any information. Hanuman Aggarwal (PW4) has stated that Sudhir (PW13) had worked in his factory on 17th December, 2012 between 9 A.M. to 8 P.M. After 17th December, 2012, Sudhir (PW13) did not report for work.

11. It is noticeable and important to state here that after the occurrence, Ajay (PW12), Sudhir (PW13) and Naval (PW14) were missing and had absconded. They were traced out and had appeared only on 7th January, 2013. This is an accepted and admitted position. The appellant Chhote was arrested on 28th January, 2013 at 12:40 PM vide arrest memo, Ex.PW10/F.

12. Thus, to establish the guilt of the appellant Chhote, the prosecution is left and has to rely upon the testimony of Ramesh Kumar (PW3), owner of the house in question from where the dead body of Sarvesh was found, i.e. Khasra No.705, Nawal Park, Alipur, Delhi. He deposed that he had a dairy on the ground floor with three rooms on the first floor. The appellant Chhote and his friends, Ajay (PW12), Sudhir (PW13) and Naval (PW14) used to live there. On 17th December, 2012 at about 1.30-2.00 P.M., when PW3 was giving his buffaloes a bath, he had seen the appellant Chhote going upstairs with a polythene bag in his hands. The appellant came down after a while and took upstairs a wooden piece, which was probably a '*charpai ka paaya*' (one leg of a wooden cot). The other occupants of the room had gone for work. After some time, an unknown person came and went upstairs. PW3 had earlier also seen the said person as he used to come to meet the appellant Chhote and others. He claimed that on the

same day, i.e. 17th December, 2012, at about 5.30-6.00 P.M., he noticed that the light was on in the room and had knocked on the door. He could see from the window (*jangla*) that one person was lying in the room, but became suspicious when he did not respond. He had then called the police control room pursuant to which the police had reached there. Ramesh Kumar (PW3) testified that he had not seen the appellant leaving the house. Subsequently, sometimes in January, 2013, the appellant Chhote was brought by the police. PW3 had then identified him. The learned Additional Public Prosecutor was allowed to put leading questions, to which PW3 accepted that on 17th December, 2012 at about 6.30 P.M., he had seen the appellant locking the room and going out alone. He was cross-examined on behalf of the appellant wherein he had accepted that the distance between the room and dairy was about 20-30 feet with common entry gate for the room rented to Ajay (PW12) and the dairy. Ajay (PW12) had been residing there for last three months without proper rent agreement or rent receipts. He denied the suggestion that the appellant Chhote was not residing with Ajay (PW12). He accepted as correct that he did not talk to the appellant Chhote when he had purportedly come there with polythene bag and that he had not heard any noise/scream. On an application under Section 311 Cr.P.C. filed by the prosecution,

Ramesh Kumar (PW3) was recalled for examination when he had corrected the date of making the call to the police as 18th December, 2012 and not on 17th December, 2012. The said examination may be reproduced for convenience,

“In fact I had made a call to police at no. on 18.12.2012 and not on 17.12.2012 after getting suspicious when I had gone upstairs for attending nature call. I had mentioned the date 17.12.2012 inadvertently earlier in my examination in chief.”

He was cross examined by the counsel for the accused to which he gave the following reply,

“I had made a call to the police on 18.12.2012 but I had not noted down the date of incident. Police has not taken any call details from me. It is wrong to suggest that I have changed the date from 17/12/2012 to 18/12/2012 at the instance of the IO. It is further wrong to suggest that I did not make a call on 18.12.2012”

13. Two factual aspects surface and emerge from the testimony of Ramesh Kumar (PW3). First, as per PW3 the room in question was in occupation of the appellant Chhote as well as Ajay (PW12), Sudhir (PW13) and Naval (PW14). Second, he had seen the appellant Chhote going to the room upstairs with a polythene bag and a *paaya of charpai* (Ex.P1) on 17th December, 2012. Subsequently, he had seen the deceased going upstairs. It will not be far-fetched to assume that the deceased had gone to the same room. However, the dead body of

the deceased was found at about 6 P.M. on 18th December, 2012, i.e. after more than 24 hours.

14. The question arising for consideration is whether the aforesaid deposition of Ramesh Kumar (PW3), even if accepted as correct, is sufficient to hold that the appellant Chhote is the perpetrator of the said offence. The answer, we observe, in the facts of the present case, should be in favour of the appellant Chhote. The evidence or deposition of Ramesh Kumar (PW3) fails to meet and by itself satisfy the stringent requirement and is not on a standalone basis, strong and compelling enough to justify conviction of the appellant, Chhote. There are a number of alternate possibilities which the prosecution has failed to disprove and dispel while trying to build its case upon circumstantial evidence.

15. As noticed above, Ramesh Kumar (PW3) initially had only referred to and given the name of Ajay (PW12) as his tenant, a fact which is mentioned in the *rukka* and the FIR marked Ex.PW-1/C. PW3 did not give names of other occupants of the room in question at the initial stage. This is an indication and reflects that PW3 till 18th December, 2012 did not know the name and identity of the other occupants. PW3 apparently had subsequently ascertained and came to

know about the names of the residents. It would be relevant to reproduce the translated extract of Ramesh Kumar's (PW3) initial statement given to the police on 18th December, 2012 as recorded in the *rukka* by the SI Jitender Joshi (PW10) as well as the FIR (Ex.PW1/C),

“The owner of the dairy and the landlord, present at the scene, namely Ramesh Kumar, s/o Late Sh. Jile Singh, r/o H.No.946, Nawal Park, Alipur, Delhi-36, informed that he had given this room on rent to a person named Ajay. The said Ramesh Kumar could not provide elaborate details about the aforesaid unknown dead-body or the tenant Ajay.”

16. The evidence led by the prosecution would only lead to the conclusion that Ajay (PW12), Sudhir (PW13) and Naval (PW14) had gone for work on 17th December, 2012, an accepted and proven fact. However, this would not explain what had happened after Ajay (PW12), Sudhir (PW13) and Naval (PW14) had left the factory and came back and why none of them reported to work on 18th December, 2012. We have noted that five bottles of country-made-liquor (Ex.P2/1 to 5) were found in the room. It is possible and cannot be ruled out that Ajay (PW12), Sudhir (PW13) and Naval (PW14) had consumed liquor in the said room. The probability of involvement of third persons including other occupants of the house or any other person between 17th and 18th December, 2012 cannot be ruled out and is apparent and distinct. The other three occupants had absconded and

could be traced only on 7th January, 2013. They or any other person had the opportunity to commit the crime, but we restrict ourselves on the said aspect only to enumerate different possibilities. It is not proved on record, whether the other three occupants had, not come to the room in question and occupied the same in the intervening night of 17th and 18th December, 2012. Prosecution has failed on this aspect. In case, Ajay (PW12), Sudhir (PW13) and Naval (PW14) had deposed implicating the appellant, the position may have been different. The deponents' version then would have been tested in cross-examination. At best, the testimony of Ramesh Kumar (PW3) puts forth an inconclusive proposition that the appellant *could* be the perpetrator but falls short to prove beyond doubt that the appellant *must* be the perpetrator. The said enunciation would remain a mere possibility lacking conviction and certainty.

17. It is well settled and trite principle of law that in cases of circumstantial evidence, the evidence and material on record must be such that it not only indicates and point towards the accused as the perpetrator of the crime but must also rule out any other hypothesis, or possibility of involvement of a third person. This Court in Crl.A.491/1999 titled ***Rahul Ranahyju versus State of NCT of Delhi***,

decided on 13th April, 2015, referring to *State (NCT of Delhi) versus Navjot Sandhu @ Afsan Guru* (2005) 11 SCC 600, observed,

“The rule governing circumstantial evidence is that each and every incriminating circumstantial evidence must be established by reliable evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion is that the accused is guilty and no other hypothesis against the guilt is possible (See paragraph 97 [of *Navjot Sandhu*’s case]). The inferences must have a foundation of solid and cogent facts, including surrounding circumstances, antecedents and subsequent conduct and all other factors that constitute relevant material. Thus, innocuous, innocent or inadvertent events or incidents should not enter the judicial verdict. The said views have been reiterated time and again (see *John Pandian versus State*, (2010) 14 SCC 129 and *Yakub Abdul Razak Memon versus State of Maharashtra*, (2013) 13 SCC 1, paragraph 125 onwards)”

18. In view of the aforesaid discussion and the factual position, we are inclined to grant the benefit of doubt to the appellant Chhote and set aside his conviction for having committed murder of Sarvesh. He shall be released forthwith, unless required to be detained in accordance with law in any other case.

19. The appeal is disposed of. Trial court record will be sent back.

(SANJIV KHANNA)
JUDGE

(ASHUTOSH KUMAR)
JUDGE

May 27th, 2015/NA