

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.L.P. 422/2012**

Reserved on: 16th January, 2015
Date of decision: 22nd January, 2015

STATE OF NCT OF DELHI **..... Appellant**

Through: Ms. Aashaa Tiwari, APP for the
State.

versus

DAMODAR SINGH **..... Respondent**

Through: Mr. Rabindra Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

This is a petition under Section 378(1) of the Code of Criminal Procedure, 1973 seeking leave to appeal against the judgment dated 7.10.2011 passed by learned Additional Sessions Judge (East), FTC, Karkardooma Courts, Delhi, acquitting the Respondent for the charges under Section 302/404 IPC.

2. Dead body of one male with gunshot injuries was found near Sabzi Mandi, near House No.B-453 on 26.2.2010. The deceased had a bullet entry wound on the chest and exit wound on the back. Photographs of the scene

of crime and chance finger prints were obtained. The dead body was later identified to be that of Dinesh Prasad. First Information Report No.75/2010 was registered at Police Station, New Ashok Nagar.

3. The Respondent herein was prosecuted under Section 302/404 IPC, inter alia, relying upon testimonies of Jagdish Prasad (PW-2) and Narender (PW10) (uncles of the deceased) on having been seen, extra judicial confession before Ganesh Kumar Gund (PW-3), abscondance after the occurrence; and recovery of certain articles, namely, a silver ring and a chain stated to be belonging to the deceased on the disclosure of the Respondent.

4. We have gone through the Trial Court records, evidence and the testimonies. Jagdish Prasad (PW2) uncle of the deceased, deposed that he had asked one of his cousin Sanjay to send the deceased Dinesh, his nephew, with some money. The deceased came to him at about 9:30 P.M. on 25.2.2010, with the Respondent. The Respondent had worked with Narender (PW-10) for some time as a painter. The Respondent and the deceased went to purchase liquor; and thereafter, they and PW-10 sat on a cot and had liquor at 11:30 P.M. in front of the room of Jagdish Prasad (PW-2). The deceased had taken his food with the Respondent and subsequently

the deceased also took his bedding outside. PW-2 thereafter went to sleep. At about 2.00-2:30 A.M., PW-2 got up for attending to the call of nature, but did not notice the deceased on the cot outside. PW-2 went back to sleep sensing that the deceased may have slept somewhere else. Next morning, he got up at 08:00 A.M. and inquired about the deceased. He had sent PW-10 to the house of the Respondent. PW-2 was informed by PW-10 that on enquiry from the wife of the Respondent, he (PW-10) had learnt that the Respondent had not returned home last night.

5. The testimony of PW-10, in some parts, is divergent and different from what has been deposed by PW-2. He testified that the deceased and Respondent knew each other, and on the date wanted to drink liquor. In fact the Respondent had already drunk liquor. They left and went from place to place in search of liquor. PW-10 suffered a dog bite, and did not proceed further and accompany them to Kalyan Puri in search of liquor. Later on, the Respondent and the deceased came and had liquor outside the house of PW-2 on a cot. The deceased and Respondent had food and PW-10 also had a peg with them. The deceased asked him to go to sleep, and he would go and drop the Respondent. Next day in the morning, the deceased was missing. He had searched for the deceased at the house of the Respondent,

who was also missing. The Respondent's phone was switched off. Wife of the Respondent, informed him, that Respondent had not returned home, that night.

6. We shall be examining the question of last seen subsequently, after we have examined other evidence.

7. The Respondent is stated to have made an extra judicial confession before Ganesh Kumar Gund (PW-3) on 06.03.2010. On going through the testimony of PW-3, it would appear that no reliance could be placed on his statement that the Respondent stated before him that the deceased was murdered by him. The meeting of the Respondent with PW-3 was per chance and PW-3 was absolutely silent about as to what was further narrated by the Respondent.

8. The law with regard to extra judicial confession is very clear. It is a weak type of evidence, nonetheless, it could be made use of if the credibility of the witnesses stating about such confession is unimpeachable; if the time of the disclosure and the nature of circumstances are in consonance with such voluntary disclosure having been made before a third party and whether there was any occasion for the accused to have made such confession. These are some of the factors which need to be taken into

account while accepting the extra judicial confession and taking it into consideration for deciding the guilt of the accused.

9. We find that PW-3 is just about known to the Respondent. It has been stated by PW-3 that he knew the Respondent for about 1½ years only. The Respondent is stated to have met him on way near an over bridge, where such a disclosure of the Respondent having killed the deceased was made by him. PW-3 did not show any interest with respect to the cause and the aftermath of such an action by the Respondent. This fact makes his statement redolent with doubt and suspicion.

10. Considering the fact that PW-3 was rather a new acquaintance of the Respondent and hardly a person with whom the Respondent would confide, it would not be safe to accept the story that the Respondent made such a disclosure before him. Why such a disclosure would be made by the Respondent to PW-3 is also an issue which remains unanswered. The Trial Court in our opinion rightly disbelieved “the extra judicial confession,” recording the following reasons:-

“22. Coming back to this case, testimony of PW3 does not inspire confidence due to following reasons:-

I). PW3 has only stated that accused met him and confessed " Mere Sey Dinesh Ka Murder Ho Gaya Hai". What else conversations took place between them, the

testimony of PW3 is dead silent regarding that. The deposition of PW3 is unnatural as in such circumstances, the person to whom extra judicial confession is made will definitely ask the question regarding the detail of the incident and he will definitely try to probe into the confession.

II). Pw3 was a fellow painter as like accused and deceased. Accused was only known to him for the last 1^{1/2} years. It is not a case of the prosecution that PW3 regularly used to meet accused. Under these circumstances, it is not found convincing that accused may have made extra judicial confession to PW3.

III). The alleged place where accused is stated to have made confession to PW3 also put shadow of doubt on credibility of PW3. As per PW3, it was a chance meeting on the bridge on drain at road No. 57 while coming to the KKD Courts where accused met him. As per PW3, he was going to Saini Enclave, he boarded the bus from Welcome and got down at Kakardooma Courts Stand. No documentary proof like ticket has been produced by PW3 to support his contentions that in fact he had traveled by the bus on that day. 10 PW19 during his cross has admitted that in his PC remand, on 08.03.10 it was not mentioned by him that accused had made extra judicial confession made before PW3 Ganesh Gund. As per PW19 on 06.03.10 i.e. day of the alleged confession, an application of accused for surrender came up for hearing but accused did not surrender. Accused only surrendered on 08.03.10. All these factors create doubt on the credibility of PW3.”

11. The element of motive introduced by the prosecution, namely, the wife of the Respondent having an illicit relationship with the deceased could

not be proved before the Trial Court. The theory of robbery and theft also does not appear to have been established.

12. Though it is alleged that there was recovery of silver coloured ring and gold chain from behind the bushes at Gazipur, but considering the value of the articles, it cannot be treated as a primary incriminating circumstances to be read against the Respondent. The identification of such articles as being of the deceased by PW-10 also appears to be doubtful. No distinctive mark or specific make of such articles have been stated or is expected to have been gauged by PW-2. The recovery, therefore, has elements of doubt.

13. The conduct of the Respondent who surrendered before the Court on 8.3.2010 also cannot be treated as a substantive evidence of disclosing guilt. The occurrence is stated to have taken place in the night intervening between 25th and 26th February, 2010. The Trial Court has rightly treated the abscondance as controversial and questionable after referring to the Respondent's statement under section 313 Cr.P.C. The relevant portion of the judgment reads:-

“23. The conduct of the accused after the incident is another relevant point to be considered. As per PW10, next day i.e. 26.02.10 he rang up phone of the accused but it was switched off. He went to the house of accused and his wife told that accused had not come to the house during night. As already discussed, accused finally surrendered in court on 08.03.10. Regarding his absence

from the house, accused had given explanation in his statement recorded under Section 313 Cr.PC, stating that police came to his house at about 9.30 AM, seeing the police from a distance, he inquired from his neighbours and he came to know that a person has been murdered and police has come to arrest a tenant named Damodar, due to his reason, he got scared and ran away from there. Even if explanation given by accused is taken as an afterthought, law is settled that merely because of the subsequent conduct of the accused by absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction.”

Reference was made to *Paramjeet Singh @ Pamma vs. State of Uttarakhand* 2011 CrL.L.J. 663.

14. The principle of last seen is applied when there is proximity in time where the accused and the deceased were last seen together and the occurrence i.e. the place where the occurrence had taken place resulting in the death of the deceased. Depending upon the factual matrix, the court should be able to draw an inference between the offence i.e. the time and place where the offence had taken place and the presence of the accused. When the aforesaid factum is established, explanation of the accused becomes relevant. While examining the said principle, the courts proceed consciously to rule out possibility of a third party's involvement. This

would depend upon the place of occurrence and the time when the occurrence took place and the other surrounding factors and circumstances. Sometime the said factum can be treated as an incriminating circumstance along with other proved facts to establish an offence. We have already noted the reasoning given by the trial court on the question of abscondance as also the assertion made by the Respondent as to why he had absconded. Even when we accept and proceed on the basis of testimony of Jagdish Prasad (PW2) and Narender (PW10) that the deceased and the Respondent had liquor together outside the house of PW2 and further deposition by Narender (PW10), the deceased had gone with the Respondent to drop the Respondent to his house, we do not think the principle of last seen would be sufficient to implicate and prove the offence of murder. We have agreed with the findings of the trial court on the question of abscondance. Once we accept the explanation that the Respondent absconded only after seeing the police from a distance and that the police wanted to arrest him, which scared him as plausible, then the possibility that the deceased may have been murdered on the way back after dropping the Respondent at his house cannot be ruled out. The said probability is plausible especially in view of the fact that the weapon of offence i.e. the fire arm used in the present case

was never recovered. PW2 and PW10 have not deposed as to the presence of fire arm with the Respondent earlier during the evening/ night. As per testimony of Narender (PW10), he along with the deceased and the Respondent had moved and searched for liquor but he did not see any fire arm with the Respondent.

15. Thus, the circumstances viz. the Respondent having been seen last with the deceased; alleged recovery of small personal items pursuant to the disclosure, but no recovery of any weapon of offence and disbelieving the extra judicial confession of the Respondent before PW-3, cumulatively do not lead to an irresistible conclusion about the Respondent having killed the deceased.

16. For appreciating circumstantial evidence, the postulate enunciated is that the evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence.

17. Who killed the deceased in the night intervening between 25.2.2010 and 26.2.2010 thus remains a mystery.

18. After giving anxious consideration over the pros and cons of the case, we are of the view that the Trial Court has rightly declined to hold the Respondent guilty. Accordingly, the leave to appeal by the State is declined.

19. Application is dismissed.
20. Trial Court record be sent back forthwith.

(ASHUTOSH KUMAR)
Judge

(SANJIV KHANNA)
Judge

JANUARY 22, 2015
Bisht/kkb