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

% Date of Decision: 16th December, 2015

+ **CRL.A. 1314/2015 & CrI.M.B.No.8306/2015**
RAJESH KUMAR

..... Appellant
Through Ms. Saahila Lamba, Adv.

versus

STATE

..... Respondent
Through Ms. Aashaa Tiwari, APP with Insp.
Vinod Kuamr and Insp. Kunwar
Sahab Singh-PS Darya Ganj

+ **CRL.A. 996/2015 & CrI.M.B.No.7781/2015**
GOPAL

..... Appellant
Through Mr. Harsh Prabhakar and Mr.
Anirudh Tawwar, Advs.

versus

STATE

..... Respondent
Through Ms. Aashaa Tiwari, APP with Insp.
Vinod Kumar and Insp. Kunwar
Sahab Singh-PS Darya Ganj

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

R.K.GAUBA, J (ORAL)

1. Both appellants stood trial in sessions case No.125/14 on the basis of report under Section 173 of the code of Criminal Procedure, 1973

("Cr.P.C.") submitted on conclusion of the investigation into FIR 358/14 of Police Station Darya Ganj on the charge that on 18.07.2014 at about 08.15 PM at a place near divider of the public way known as Asaf Ali Road in front of Old Delhi Stock Exchange, Darya Ganj, they, in furtherance of their common intention with an accomplice named Chhutva (absconding), committed murder of a young male, aged about 20 years, whose identity could not be established, by intentionally causing a cut incised wound on his neck. By judgment dated 17.07.2015, they were held guilty, as charged, and convicted. By order dated 30.07.2015, the learned trial court awarded imprisonment for life with fine of ₹5,000/- and directed that in case of default in the payment of fine the appellants would undergo simple imprisonment for six months, also granting benefit of set off for the period of detention already undergone in terms of Section 428 Cr.P.C.

2. Feeling aggrieved both the appellants have come up to this Court assailing the view taken by the trial court in the impugned judgment.

3. As indicated above, the identity of the deceased could not be established during the investigation. There is only some reference coming in the evidence of Anand Kumar (PW-4), the first informant of the case that he (the victim) was a rag-picker seen earlier around the place of occurrence. The appellants are also described similarly as rag-pickers, which is again the description of their alleged accomplices, who could not be identified or located.

4. The fact that the deceased had been seriously wounded came to light sometime around 08.30 PM when Constable Munni Lal (PW-10)

and Constable Amit (PW14), both posted in local police station Darya Ganj and patrolling in the area came on the scene. They found the victim lying with bleeding from his neck. The former (PW-10) deputed the latter (PW-14) to guard the scene and shifted the victim in an auto rickshaw (TSR) to the nearby Lok Nayak Jai Prakash Narayan Hospital (“hospital”) for immediate medical aid. He informed the police station telephonically about this event. The intimation was recorded at 08.35 PM vide DD No.32A (Ex.PW-1/A). The victim was brought in the casualty of the hospital at 08.44 PM on the same night and the medico legal certificate (MLC) recorded by Dr. Vikash, the Chief Medical Officer (vide Ex.P-A) notes that the victim was found dead on arrival.

5. The matter was initially inquired into by SI Ajay Singh (PW-17) who had reached the place of occurrence, after paying a visit to the hospital and having learnt about the death of the victim. At the scene of crime, he searched for an eye-witness and pursuant to that effort came across Anand Kumar (PW-4) described by him as *Chowkidar* deputed at the main gate of Old Delhi Stock Exchange, in front of which the victim had been found in the aforementioned state. Anand Kumar (PW-4) gave a statement (Ex.PW-4/A) before PW-17 which indicated that he had seen the persons in whose company the victim had been earlier indulging in drinking alcohol for quite some time. The statement of Anand Kumar (PW-4) before the Investigating Officer revealed that he was familiar with the victim, and 4-5 other rag-pickers who, as per the prosecution case, included the two appellants from before, albeit only by their faces and general description and not by names. According to his said version,

the said 4-5 persons had got together, as per their recent practice of 2-3 days, at the place and had collected money which was passed on by them to the deceased who had fetched liquor from a nearby liquor vend and thereafter all of them, including the appellants and the deceased, had started consuming liquor at the said pavement. The first informant (PW-4) also stated in the statement to PW-17 that since the time of his duty was coming to an end (8 PM), he had gone inside the premises of Old Delhi Stock Exchange to change his dress and had come out at about 08.15 PM to find a large crowd having gathered and the victim (the boy who had fetched liquor earlier) lying with bleeding cut injury on his throat. He also stated that the 4-5 persons in whose company the victim had been earlier consuming liquor had fled away from the scene by that time and, in his opinion, the said persons would have committed the fatal assault on the person of the victim.

6. The FIR (Ex.PW-1/B) was registered on the basis of the aforementioned statement upon which SI Ajay Singh (PW-17) had made his endorsement (Ex.PW-17/A).

7. During the initial investigative steps, Inspector Kunwar Sahib Singh (PW-18), the Investigating Officer, collected the evidence in the form of blood stained earth, earth control and other material objects connected to the deceased from the spot. The dead body, after inquest proceedings, was shifted to the mortuary of Maulana Azad Medical College where it was subjected to the post-mortem examination on 21.07.2014 by Dr. Rishi Solanki (PW-9) who proved the post-mortem examination report (vide Ex.PW-9/A) at the trial.

8. Having regard to the facts and circumstances in which the deceased was found lying with cut injury on his neck, and the contents of the autopsy report (Ex.PW-9/A), there can be no doubt as to the fact that the injury was inflicted by the perpetrator(s) intentionally with the object of bringing about the death. Thus, the prosecution has proved that it is a case of culpable homicide amounting to murder. The moot question, however, is as to who had committed the murder of the victim.

9. In order to bring home its case against the appellants, the prosecution relied on the evidence of Anand Kumar (PW-4) as per whose testimony the deceased was “last seen” in the company of the two appellants just before he was found to have suffered the fatal injury. In addition, the prosecution also relied on the evidence of the Investigating Officer (PW-18) about the seizure of the clothes of the two appellants which statedly bore blood stains of human origin, and for which no explanation has been offered. Further, the prosecution case was that the second appellant (Gopal) had also got recovered an iron blade (Ex.P-6) which was found, upon examination in the Forensic Science Laboratory (“FSL”), to be bearing blood stains of human origin of Group ‘A’, same as that of the deceased.

10. The two appellants were arrested, per arrest memos (Ex.PW-8/E and Ex.PW-10/B respectively) on 22.07.2014, after personal search (vide Ex.PW-8/F and Ex.PW-10/C respectively) from the area of Samta Sthal, not very far from the place where the incident took place. Concededly, both the appellants had been operating as rag-pickers in the said area and thereabouts. Having regard to this fact and the evidence of Anand Kumar

(PW-4), whose presence at the scene as the security guard deputed by the agency of Suresh Parit (PW-16) is duly established, we have no hesitation in accepting the prosecution case that PW-4 would be in a position to claim familiarity with the two appellants since they were moving around in the general area of Old Delhi Stock Exchange.

11. On careful appraisal of the evidence of Anand Kumar (PW-4), however, we are not convinced as to the claim of the prosecution about the “last seen” evidence given by Anand Kumar (PW-4). It is clear from his version that he was on guard duty at the main gate of Old Delhi Stock Exchange from 8 AM to 8 PM on 18.07.2014. He may have seen the appellants with 2-3 other persons having converged at the pavement opposite the place of his duty sometime around 6 PM. We also proceed on the assumption that PW-4 may have seen the appellants and their other companions asking the victim to bring liquor from a nearby shop with the money they had collected. We are also inclined to accept his version that the appellants may have started taking alcohol in the company of at least three said other persons and also joining the victim in the session. But the fact remains that PW-4 did not remain at the place of his duty beyond 07.30 PM. He admitted during cross-examination that he had gone inside the premises of Old Delhi Stock Exchange for changing of clothes inasmuch as his duty was coming to an end by 8 PM. It is his admitted position that he had come out of the premises only by 08.15 PM by which time the assault had already been committed and there was no one known to him present around the place except the victim lying with the fatal wound on his neck.

12. In order to rest a case on “last seen” theory, it is the obligation of the prosecution to prove that the victim had been in such exclusive company of the accused, and so proximate to the time of the fatal assault, as to rule out the possibility of any other person having entered upon the scene or to have indulged in the criminal act. PW-4 was not on the scene for three quarters of an hour. The place where offence was committed is thickly populated area, thronged by public in large number. It would be teeming with people particularly around the time the assault is shown to have been committed. There is no evidence indicating as to when the two appellants had left the place. The possibility that they may have not continued to be on the scene till the very end when the victim was fatally wounded cannot be ruled out. There is nothing to exclude the possibility of at least the three other persons, who were also part of the drinking session, to be perpetrators of the assault. Except for the name of one Chhutva (who is stated to be absconding) even the identity of the two others could not be found out.

13. We hold the “last seen” evidence lacks credibility, whilst quoting the following observations of the Supreme Court (in para 34) in case reported as *State of Goa V. Sanjay Thakran* (2007) 3 SCC 755 :

“...There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as

one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

14. In the above noted factual matrix, the evidence about the identification of the appellants by PW-4, including during test identification parade of appellant Rajesh Kumar, is of no consequence.

15. The Investigating Officer, Inspector Kunwar Sahab Singh (PW-18), has testified that at the time of arrest, he had found the clothes worn by the appellants to be bearing blood stains. He seized the said set of clothes formally vide seizure memo (Ex.PW-8/H and Ex.PW-8/G respectively). These clothes were eventually sent to the FSL. The FSL reports (Ex.PW-18/G to Ex.PW-18/I) do indicate that the said clothes bore blood stains of human origin. But, there is nothing to confirm that the said blood stains were those of the deceased inasmuch as the serological analysis would not evince any reaction and, thus, the blood group could not be matched.

16. The prosecution also relied upon the evidence of the Investigating Officer about seizure of broken iron blade (Ex.P-6) vide seizure memo

(Ex.PW-8/J) at the instance of appellant Gopal. In our opinion, this solitary circumstance, of doubtful origin, by itself cannot clinch the issue, particularly when the said recovery is shown to have been made just 100 mts away from the scene of crime on 22.07.2014 i.e. four days after the occurrence. The said weapon was allegedly found lying on the pavement along Asaf Ali Road on the side of MCD Parking opposite Delite Cinema. We presume that after the crime had come to be noted, the investigating police would have made a thorough search of the area around the place of occurrence and if there was indeed any weapon of this nature bearing blood stains locatable in the vicinity, it would not have escaped the notice of the police officers.

17. For the foregoing facts, and in the circumstances, we do not think that the prosecution has proved such circumstances as say form a complete chain or one from which the only hypothesis to be drawn could be that of the guilt of the appellants. Thus, we give benefit of doubts to the appellants. Their appeals are allowed. They stand acquitted. They be released from custody forthwith unless required to be detained in any other case, in accordance with law.

**R.K. GAUBA
(JUDGE)**

**SANJIV KHANNA
(JUDGE)**

DECEMBER 16, 2015/VLD