

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

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Reserved on: 28th October, 2017
Decided on: 25th November, 2017

+ **CRL.A. 339/2014**

ANIL @ RAJESH

..... Appellant

Represented by: Mr. Ajay Verma, Mr. Upendra
Yogesh, Advs.

versus

STATE

..... Respondent

Represented by: Ms. Rajni Gupta, APP with
Insp. Ajay Kumar, Kalyanpuri.

+ **CRL.A. 301/2014**

GAREEBA

..... Appellant

Represented by: Ms. Saahila Lamba, Adv.

versus

STATE

..... Respondent

Represented by: Ms. Rajni Gupta, APP with
Insp. Ajay Kumar, Kalyanpuri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. FIR No.262/2010 was registered at PS Kalyan Puri vide Ex.PW-1/A on 30th July, 2010 at 4:30 AM on the statement of one Ravi Bhushan Mishra (PW-2) who stated that he was driving Tata Sumo UP17-T-0356 of Ganga Tourism and used to pick and drop passengers from call centres. On the night of 29-30th July, 2010 at around 11:40 PM while he was going to Sector-58, Noida from Kondli, he saw one person at Kondli Pul whose clothes were blood-stained and was asking for help. He had an injury on his chest and requested that he be taken to the hospital or else he would die.

When Ravi Bhushan Mishra inquired from the injured, he stated that 3-4 persons have inflicted knife injury on him. Ravi Bhushan Mishra immediately took him to Lal Bahadur Shastri Hospital where the doctor on checking found the person as dead. On the right hand of the deceased Sompal was written. Ravi Bhushan Mishra tried calling 100 number but could not contact and thus he left from the hospital. However, in his presence, the doctor seized ₹4100 and two rings and on the seizure memo Ravi Bhushan Mishra also signed. FIR was registered under Section 302/34 IPC on the said statement.

2. Searching the whereabouts of the deceased, his family members reached the Police Station and from there to mortuary where they identified the body of the deceased. Statement of Kishan (PW-9), brother-in-law of the deceased Sompal Singh, was recorded who stated that Sompal Singh used to do the work of money lending and in connection of this work, the deceased used to visit Kalyan Puri and Trilok Puri. On 29th July, 2010, the deceased had come to his house and had left at about 11:20 PM. The deceased did not take dinner at his house and left stating that his family members were waiting. He noticed that the accused persons (Anil, Gareeba & Birju) followed the deceased but thought that they will do no harm to the deceased as they knew that the deceased was his brother-in-law. On 30th July, 2010, he was informed by his nephews Sanjay Kumar (PW-6) and Vikas (PW-3) that the deceased had not reached his house and they enquired about the deceased from him. Thereafter, three of them made the search for the deceased. They informed the police that his brother-in-law was missing, who gave description of a dead body that was found and the description matched with his brother-in-law. He along with his nephews went to the

mortuary at LBS Hospital and identified the dead body. He also stated that the deceased was wearing a wrist watch of RICOH company gifted by him and two rings when the deceased had visited his house. He also stated that both the articles were not present on the dead body of the deceased. He stated to Police that he doubted the neighbour and his associates (accused persons) to have committed the offence as they followed the deceased when the deceased had left his house.

3. On the statement of Kishan recorded on 30th July, 2010 itself Anil @ Rajesh, Gareeba and Birju S/o Attar Singh were arrested. During investigation, investigating officer claimed to recover wrist watch of the deceased at the instance of Gareeba and a knife and his blood stained T-shirt at the instance of Anil. Kishan identified the wrist watch recovered to be that of the deceased. After completion of investigation, charge-sheet was filed and the prosecution examined 23 witnesses. Statements of three accused were recorded under Section 313 Cr.P.C., however they rendered no explanation and stated that they were falsely implicated. The three accused did not lead any evidence.

4. Learned Additional Sessions Judge vide the impugned Judgment dated 7th December, 2013 convicted Anil and Gareeba for offences punishable under Section 302/394/34 IPC and Anil for offence punishable under Section 397 IPC as well, however, acquitted Birju on the ground that besides the last seen evidence there was no evidence connecting Birju to the offence. Vide the order on sentence dated 17th December, 2013 learned ASJ awarded sentence of rigorous imprisonment for life and to pay a fine of ₹10,000/- in default whereof to undergo simple imprisonment for three months for offence punishable under Section 302 IPC, rigorous

imprisonment for 7 years and a fine of ₹10,000/- in default whereof to undergo simple imprisonment for three months for offence punishable under Section 394 IPC to both Anil and Gareeba. Anil was also sentenced under Section 397 IPC to rigorous imprisonment for 10 years and to pay a fine of ₹10,000/- in default whereof to undergo simple imprisonment for three months.

5. Challenging the conviction of Anil @ Rajesh, learned counsel for the appellant contends that the present is a case of circumstantial evidence with no eye-witness to the alleged offence. The chain of circumstances has not been proved by the prosecution case. No motive has been proved as ₹4100/- and two rings had not been removed from the deceased. The blood-stained T-shirt has been planted on Anil. No public witness was associated with the alleged recovery of knife and T-shirt. The recovery of knife in any case is not connected with the injury committed. No person has witnessed that Anil inflicted the single injury or used the weapon of offence, hence his conviction under Section 397 IPC is not made out which is based solely on the confessional statement which is inadmissible in evidence. Constable Mahender PW-11 who is a witness to the recovery of the knife and the T-shirt does not know the size of the house or the room of the appellant. For the same offence co-accused Birju has been acquitted, however, the appellant has been convicted. In the alternative, it is contended that even in case offences are made against Anil @ Rakesh, the offence committed by him at best would be punishable under Section 304 IPC and not one under Section 302 IPC. Hence, he be released on the period already undergone.

6. Supplementing the arguments of learned counsel for Anil, learned counsel for Gareeba contends that the only recovery from Gareeba is of

wrist watch for which no test identification parade was got conducted. The watch recovered is easily available and has been planted on the appellant and he has been falsely implicated.

7. Learned APP for the State, countering the arguments of the learned counsels for the appellants, submits that PW-9 Kishan is the witness of the last seen, a wholly reliable witness from whose house the deceased left and soon after the deceased left the house of PW-9, the appellants and the co-accused who were following him inflicted injury with the motive of taking away his articles and succeeded in removing the watch. The appellants and their accomplice could not rob and inflict injuries further as is evident from the version of Ravi Bhushan Mishra who stated that he saw the injured coming to him for help and two persons running away from the spot. From the watch recovered, the motive of the offence is evident. The single injury inflicted on the deceased Sompal was on a vital part of the body, hence no case for acquittal of the appellants nor a case for converting offence from one punishable under Section 302 IPC to Section 304 IPC is made out.

8. Generally the last seen evidence required to be proved by the prosecution is that soon before the time of death, the accused was seen in the company of the deceased where after the onus shifts on the accused to explain how the deceased died. In the present case version of Kishan (PW-9) is not that the deceased Sompal was seen in the company of the appellants, rather at around 11:20 PM on the 29th July, 2010 when deceased left the house of Kishan at H.No. 248, B-18 Indira Camp, Kalyan Puri, he saw the two appellants and their accomplice following the deceased. However, he thought that knowing that the deceased Sompal was the brother-in-law of Kishan, the appellants and their accomplice would not

harm him. In the normal course person(s) following someone may not be sufficient evidence of last seen, however, in the present case as per Kishan (PW-9) the appellants along with their accomplice followed Sompal at 11:20 PM in the night, when there would not be many other people on the road. Soon near the house of Kishan, Ravi Bhushan Mishra at around the same time i.e. 11:40 PM found Sompal in an injured condition, thus, bringing the presence of the appellants and the receiving of injury by Sompal in close proximity ruling out that any other person inflicted injuries to the deceased.

9. Version of Ravi Bhushan Mishra (PW-2) that he saw the injured around 11:40 PM is corroborated by the fact that by 12:20 AM on 30th July, 2010 the injured had been admitted in Lal Bahadur Shastri Hospital, Khichripur where the doctor declared him brought dead. Further no manipulation can be expected in the statement of Kishan (PW-9) for the reason soon after the incident, as Sompal did not reach his home, Sompal's children Vikas and Sanjay came to enquire from Kishan where after they went to the Police and the mortuary. Pursuant to the statement of Kishan recorded on 30th July, 2010 itself, on the same day the two appellants were arrested. Thus, the last seen evidence has been proved beyond reasonable doubt by the prosecution.

10. As regards the evidence of motive, it may be noted that as per Kishan, the RICOH watch which the deceased was wearing was presented by his family and thus he was in a position to identify the same. The RICOH watch has been recovered from Gareeba. Since the watch was recovered in the presence of Kishan, no test identification parade of the watch was required to be conducted. The identification of the watch by Kishan and

recovery thereof even in the absence of any independent public witness is required to be relied upon.

11. There is merit in the contention of learned APP for the State as Ravi Bhushan Mishra has stated in his evidence that when he saw the deceased in an injured condition and asked him for help he saw two persons running away. It is thus evident that on seeing the vehicle coming towards the road and the deceased reaching out for help, the accused persons fled away and thus could not rob the deceased further of ₹4100/- and the two rings which were in his possession. Hence, the prosecution has been able to prove the evidence of motive as well.

12. As per the prosecution case blood-stained T-shirt of Anil was recovered at his instance which was found to be blood-stained. As per the FSL report, the T-shirt contained 'B' group blood which matched to that of the deceased. Mere non-association of public witness to the recovery of the T-shirt cannot be held to be fatal and from the testimony of the Police witnesses and other witnesses, the prosecution has proved the recovery of both the blood stained T-shirt and knife from Anil.

13. However, though the prosecution has been able to prove that a knife has been recovered at the instance of Anil, it has not been able to link the knife with the injury caused for the reason there is no witness who has identified Anil using the said knife, nor the knife was found to be stained with the blood which tallied with that of the deceased nor any opinion of the post-mortem doctor taken that the injury caused was possible by the said knife. It is well settled that the weapon of offence can be connected to the injuries caused by either the opinion of the doctor that the injuries are possible by the said weapon or by the witness identifying the weapon of

offence from which the injuries are caused or in case it is found to be stained with the blood of the injured/ deceased. [See Gulzari Lal Vs. State 2011 II AD (DELHI) 772.]

14. Considering the evidence on record, the prosecution has proved beyond reasonable doubt commission of offence punishable under Section 394/34 IPC against Anil and Gareeba, however since there is no admissible evidence on record that Anil is the person who inflicted injury to the deceased Sompal i.e. user of a weapon by Anil having not been proved by the prosecution his conviction for offence punishable under Section 397 IPC is set aside.

15. Dr. Vinay Kumar Singh who conducted the post-mortem on the dead body of Sompal appeared as PW-5 and exhibited his report as Ex-PW-5/A which noted as under:

“External injury:

Incised stab wound, 2x 0.7 cm, chest cavity deep, obliquely placed, over Left side of the chest in the 6th inter coastal space. 113 cm above heel and 4 cms from the midline and 5 cm below nipple. Margins sharp and regular, lower end acute, directed downwards inwards from left to right.

On internal examination

In chest about 2 ½ litres of blood was present in cavity. In continuation to injury No.1, after incising skin, subcutaneous tissue, intercoastal muscles, 7th rib upper border, pericardium left ventricle of heart 6 cm away from apex, cavity deep all layers of heart muscles incised. Chambers empty.

Stomach was empty, internal organs, small intestine, liver and kidney were pale.”

16. As per the opinion of Dr. Vinay Kumar Singh, cause of death was haemorrhagic shock consequent upon the incised stab wound caused upon chest by single edged knife/weapon. The injuries were ante-mortem in nature, recent in duration and injury No.1 was sufficient to cause death in the ordinary course of nature.

17. Even though single injury has been inflicted but the injury having been inflicted on the vital portion of the body leaving the heart muscles incised besides affecting the intercostal muscles, upper border of the pericardium, 7th rib etc., it cannot be said that while inflicting the injury there was no intention to cause death. It is not a rule of universal application that whenever one blow is given Section 302 IPC is ruled out. [See Andhra Bank Vs. Bhanu Engineering Corporation & Ors. (2005) 10 SCC 593; Pappu Vs. State of M.P. (2006) 7 SCC 391 and Gurmukh Singh Vs. State of Haryana (2009) 15 SCC 635.]

18. The appellants cannot also take advantage of any of the exceptions as no evidence has been led to show that there was either a sudden fight or there was a sudden or grave provocation or that the appellants inflicted injury in self-defence.

19. In view of the discussion aforesaid, acquitting Anil for offence punishable under Section 397 IPC, conviction of Anil and Gareeba for offences punishable under Sections 302/394/34 IPC and the sentence awarded on the said counts are upheld.

20. Consequently, CRL.A. 301/2014 filed by Gareeba is dismissed and CRL.A. 339/2014 filed by Anil @ Rajesh is partly allowed.

21. Copy of this order be sent to Superintendent Central Jail, Tihar for updation of Jail record.

22. TCR be returned.

(MUKTA GUPTA)
JUDGE

(NAVIN CHAWLA)
JUDGE

NOVEMBER 25, 2017
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