

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**Date of decision: May 28, 2018
CRA-D-1167-DB of 2013 (O&M)**

Ranbir alias Raman alias Vishal alias Tutu

.....Appellant

Versus

State of Haryana

....Respondent

CRA-D-1427-DB of 2013 (O&M)

Sandeep Sharma alias Sameer

.....Appellant

Versus

State of Haryana

....Respondent

**CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI
HON'BLE MR. JUSTICE B.S. WALIA**

Present: Mr. Nagendra Rai, Senior Advocate with
Mr. Nitin Narula, Advocate
for the appellant (in CRA-D-1167-DB of 2013).

Mr. Vimal Kumar Gupta, Advocate
for the appellant (in CRA-D-1427-DB of 2013).

Mr. Siddharth Sanwaria, DAG Haryana.

A.B. CHAUDHARI, J

By this common order, above said both the appeals are being
disposed of.

2. Being aggrieved by judgment/order dated
06.08.2013/08.08.2013 passed by the learned Additional Sessions Judge,
Faridabad, in Sessions Case No.53 of 2011, by which the appellants, namely
Sandeep Sharma alias Sameer and Ranbir alias Raman alias Vishal alias
Tutu, were convicted for commission of offence punishable under Sections

302 read with Section 34 of Indian Penal Code, 1860 (for short 'IPC') and were sentenced to undergo Rigorous Imprisonment for life, with fine in the sum of ₹10,000/- each; in default of payment of fine, to further undergo rigorous Imprisonment for three months; and further convicted for commission of offence punishable under Section 201 read with Section 34 IPC, with fine in the sum of ₹1,000/- each; in default of payment of fine, to further undergo rigorous Imprisonment for one and a half months, the present appeals have been filed by the appellants in this Court.

FACTS

3. Briefly stated, the prosecution case was that on 16.02.2011, ASI Om Parkash was on patrolling duty. The Complainant-Ram Babu met him and told him that at about 7:00 A.M. on fateful day, he was going to Pahladpur and when he reached Rajhans T Point, he saw dead-body of a young boy lying on the road-side parking area with face of the deceased crushed under the tyre of a vehicle. FIR was registered under Sections 279/304-A IPC. Investigation was undertaken. During investigation, dead body of the deceased was identified as of Gaurav Gupta son of Satish Gupta. On 24.02.2011, SI Gianender of Crime Branch, Prashant Vihar, Delhi informed the investigating officer that accused Sandeep alias Sameer and Ranbir alias Raman alias Vishal alias Tutu had made disclosure statement that they had committed the murder of Gaurav Gupta on the intervening night of 15/16.02.2011. That they had taken Gaurav Gupta in a Zen Car and killed him by inflicting injuries on his head and threw his dead-body on the road and crushed under the car. Pursuant to which, offence under Section

302 IPC was added to the FIR. During investigation, Sandeep alias Sameer and and Ranbir were taken into custody, who discovered Maruti Zen car bearing registration No.DL 6CD 1385 and mobile phone. Postmortem was conducted. Statement of witnesses under Section 161 of Code of Criminal Procedure, 1973 (for short 'Cr. P.C.') were recorded. Investigation was completed and final report under Section 173 Cr. P.C. was prepared and challan was filed in the Court. Accused were, thereafter, charged and the prosecution led its evidence before the trial Court. It examined various witnesses. Learned trial Court, after hearing the evidence recorded the conviction as stated above and sentenced the appellant to life imprisonment. Hence, this appeal.

ARGUMENTS

4. In support of the appeal, learned Senior counsel for the appellants submitted that admittedly, prosecution does not have any direct evidence in the present case. The prosecution does not even have indirect evidence except circumstantial evidence. The prosecution and the trial Court stated that there was evidence in the form of 'last seen', but then the evidence is stated to be of 'last heard' and not 'last seen'. Learned Senior counsel submitted that such evidence of telephonic conversation, in the first place, was not admissible and in secondly, the same was not proved at all to be the voice of the deceased as claimed. At any rate, the evidence of widow of the deceased, if seen, clearly shows that her 'last heard' theory propounded by the learned trial Judge, even, does not take the case of the prosecution any further. Then, there is no iota of evidence on record to record conviction of

the appellants. The findings recorded by the learned trial Court is based on imagination, if at all the case of the prosecution is said to be based on circumstantial evidence. The law is well settled that the benefit of doubt goes to the accused rather than prosecution in the absence of incomplete chain of prosecution evidence. Learned Senior counsel, therefore, submitted that the appellants could not have been convicted and are required to be acquitted.

5. *Per contra*, learned State counsel vehemently opposed the appeal and submitted that the prosecution has brought on record the best circumstantial evidence and the same has rightly been accepted by the trial Court. The Zen car was recovered at the behest of the appellants having blood stained therein and the trial Court has rightly come to the conclusion that after commission of murder, the accused persons had made a scene of accident by crushing the head of the deceased under the car. He, therefore, submitted that the appeal is required to be dismissed by upholding the impugned judgment/order of the learned trial Court.

CONSIDERATION

6. We have heard learned counsel for the rival parties at length. We have perused the entire evidence tendered by the prosecution before the trial Court. We have also seen reasons given by the trial Court for recording conviction.

7. At the outset, we find that it is an admitted position that there is no direct evidence with the prosecution in the present case. The prosecution relied on circumstantial evidence in the form of alleged telephonic

conversation of the deceased with his wife-Minakshi and the recovery of Zen car. The trial Court also applied presumption of Section 106 of the Evidence Act, 1872 (for short 'Evidence Act'), which, in our opinion is totally misplaced and misconceived. It is strange that in the facts of the present case, how the trial Court applied the principle of Section 106 of the Evidence Act. We then proceed to analyse the prosecution evidence.

8. It is seen that there was registration of the offence under Section 279, 304-A IPC as a case of accident. The trial Court ignored the fact that the brother of the deceased Anurag Gupta had lodged report (Exhibit D1) to the Police Station and the same reads thus:-

“Time 4.15 p.m. person khana no. 2 came in police station and got recorded his statement that his younger brother Gorav Gupta son of Satish Gupta r/o H. No.74/1 Maidan Garhi Ext. Chatarpur, New Delhi-74, age 23 years dated 15.2.2011 at 11.00 night was called at PVR and have some talk with me and he was sent by his brother in a Auto to house but his brother did not return. He searched at his own. His brother was blakish in colour, height 5,6”, thin body, tall face, black hair and wearing brown colour jacket and blue colour jeans and printed shirt and black shoes. He was searched by me and other family members in the relations but not found and they have no doubt on any person regarding missing of his brother. His brother may be searched. Anurag Gupta Sd/- Virender Singh. Found the information at true and made signature in English and copy was given to him. Information of missing was given on 100 number on which constable Babli 3685/PCR took copy and for munadi and further investigation would be conducted by SI Jitender Kashyap. HC/I.O.”

9. It is clear from the reading of the above entry that his brother

was missing and he had no doubt on any person regarding missing of his brother. He was examined as PW14 and in the cross-examination, he stated that the said information given by him to the police was on the basis of the information given by his brother's wife-Minakshi and also admitted that it was Minakshi, who had told him about the alleged involvement of the accused persons and that initially, they did not have any suspicion against anybody. In other words, Minakshi, widow of the deceased as well as Anurag both had no suspicion on anybody about the incident. In so far as the 'last heard' theory propounded by the learned trial Court is concerned, we reproduce the evidence of PW18-Minakshi, widow of the deceased, which reads thus:-

“Stated that on 15.2.2011 I was present in my house within the area of Chhaturpur Delhi. My husband had left the house at about 7 pm on that date. I continued trying to contact him on phone unsuccessfully. After some time he pick-up the phone and told me that he is with his friends. He told me name of friends Ranbir and Sandeep and thereafter he cut the phone. Thereafter his phone was switch off and I could not contact him..... On 20.2.2011 we went to PS Saket and reported the matter to police with regard to missing of my husband.....

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..... I had entered the profession of prostitution but not at the instance of Gaurav. It was because of my compelling circumstances that I enter in the profession but Gaurav never took me to anybody for my this profession. I had only one man with whom I had illicit relation because of my that profession. My customers were 5/10 and there were other brokers also who use to take broker money as share of my income. I used to charge Rs.500/- per time for one time sexual intercourse. I used

not to give any share of my income to Gaurav but used to give it to my parents. Sandeep had asked me to remove Gaurav from the scene so that this money earned by me may not go to Gaurav but should be adopted by me to myself and Sandeep. After the death of Gaurav I left for Aasam, after six months. In Suraj Kund police station I was not shown any photograph of my husband for identification. Only clothes were shown to me. I had not told to my jeth that Sandeep and Ranbir had been in the company of my husband, as was told to me by my husband before this death on telephone. We had travelled to PS Saket in Metro. It was about 12 noon when we reached PS Saket on 20.2.2011. I do not know the time when the report was recorded in that police station. It was about 2/3 pm when we were free from the police station. In that report recorded with the PS Saket dated 20.02.2011 at the instance of my jeth, in my presence, it was not stated that we had any suspicion against anybody. Rather we had stated that we had no suspicion against anybody. During this period from 15.2.2011 to 20.2.2011 I remained at the house of my in-laws and therefore I used to talk to my husband daily in this respect. During this period of one week between 15.2.2011 to 22.2.2011 I did not disclose upon anybody that my husband had told me that it were Sandeep and Ranbir with whom he had been on that day.”

10. From the perusal of her evidence, it is clear that she herself had lodged the report along with Anurag, on 22.2.2011 with PS Saket about missing of her husband. She did not have any suspicion on anybody. The earlier part of her evidence shows that she had talked with the deceased on his phone and he had told her that he was with Ranbir and Sandeep, and thereafter, he had cut the phone. Thus, as on 15.02.2011, she was knowing that her husband was with Ranbir and Sandeep. It is the mysterious as to

why she did not inform the police about it on 22.02.2011 when she had lodged the report about missing of her husband. The prosecution has tendered no explanation. Apart from that, her cross-examination as stated above shows that she did not have any suspicion against anybody. Her character has been brought on record by the cross-examiner but we do not want to say anything further about it. Suffice to say, so far as her evidence is concerned, there is clear admission that she had not disclosed the names of the accused persons to anybody and on the contrary, she stated that the police had told her that her husband was killed by the appellants. Thus, there is no evidence about theory of 'last seen' but the trial Court has imagined the theory of 'last heard'. The prosecution has not proved by evidence the alleged talk. We are, therefore, unable to accept the findings recorded by the trial Court about the 'last heard' theory.

11. As stated earlier, the second aspect about presumption under Section 106 of the Evidence Act, we have perused the findings of the trial Court. We find that the trial Court has recorded the said finding only on the ground that there was theory of 'last heard'. Therefore, he held that the appellants were obliged to explain whereabouts of the deceased. The finding is wholly wrong and illegal.

12. Last but not the least, the prosecution did not rule out the theory of accident. The same could also be possible. In the result, we find that the judgment of the trial Court is illegal and as such, liable to be set aside. In the result, we make the following order:-

ORDER

- (i) **CRA-D-1167-DB of 2013** filed by the appellant, Ranbir alias Raman alias Vishal alias Tutu, and **CRA-D-1427-DB of 2013** filed by the appellant, namely Sandeep Sharma alias Sameer, are allowed;
- (ii) Impugned judgment/order dated 06.08.2013/08.08.2013 passed by the learned Additional Sessions Judge, Faridabad, in Sessions Case No.53 of 2011, is set aside;
- (iii) The appellants, Ranbir alias Raman alias Vishal alias Tutu and Sandeep Sharma alias Sameer are acquitted of the charge framed against them;
- (iv) Fine, if any paid, be refunded to them.

(A.B. CHAUDHARI)
JUDGE

(B.S. WALIA)
JUDGE

May 28, 2018
mahavir

Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No