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

**Date of decision: May 04, 2018
CRA-D-674-DB of 2011 (O&M)**

Shyam Lal

.....Appellant

Versus

State of Haryana

....Respondent

**CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI
HON'BLE MR. JUSTICE INDERJIT SINGH**

Present: Ms. Baljit Mann, Advocate for the appellant.

Mr. Siddharth Sanwaria, DAG Haryana.

A.B. CHAUDHARI, J

Being aggrieved by the judgment/order dated 09.06.2011/11.06.2011 passed by the learned Sessions Judge, Faridabad, in Sessions Case No.103 of 15.09.2010, by which the appellant, namely Shyam Lal, was convicted for commission of offence punishable under 302 of Indian Penal Code, 1860 (for short 'IPC') and was sentenced to undergo Rigorous Imprisonment for life and to pay fine in the sum of ₹10,000/-; in default of payment of fine, to further undergo Rigorous Imprisonment for six months, the present appeal has been preferred by him.

FACTS

Briefly stated, the prosecution case is that the complainant Hemant Kumar, on 16.06.2010 filed an application before SI Sanjeev Kumar that his younger brother Ajay aged about 21/22 years, on

14.06.2010 at about 6:00 P.M., had gone to the shop to fetch sewing machine, but did not return back and missing report was lodged on 15.06.2010 at Police Station Badarpur, Delhi. Search was made for him. Their neighbourer Subhash son of Ogharnath, resident of Moladband, Delhi disclosed that on 14.06.2010 at about 7:00 p.m., he had seen Ajay with accused Shyam Lal, *naanwala* who was running *Rehri* of *naan* at Meethapur Chowk, going towards liquorvend near Durga Builders, Agwanpur. Acting on his information, the complainant and family members went to the house of Shyam Lal on the previous night at 11:00 P.M. and asked him the whereabouts of Ajay. Shyam Lal disclosed nothing in the first instance, but when he was threatened by them about approaching the police, he disclosed that he and Ajay had purchased beer and thereafter, went near the open ground of Durga Builders. They had beer in the open ground and there were hot words exchanged between them. Ajay slapped him, upon which he became angry and with the help of cloth *parna*, he strangulated Ajay to death and screened his dead body in the nearby dirty water. Shyam Lal then escaped from the rear door of his house. They search him but he was not traced. Upon his disclosure, they tried to search Ajay and they found his dead body in the dirty water. Report was made to the police station. Police came and registered the case. Police then started investigation, got conducted the postmortem of the dead body, statements of witnesses were recorded and Shyam Lal arrested on 17.06.2010. During interrogation, Shyam Lal demarcated the place of occurrence and got recovered the clothes worn by him at the time of

occurrence. Thereafter, investigation was completed and challan was filed. The prosecution examined 16 witnesses in support of its case and also tendered other evidence. The trial Court heard the parties and convicted the appellant-Shyam Lal.

ARGUMENTS

In support of the appeal, learned counsel for the appellant assailed the impugned judgment and order and submitted that the trial Court committed an error in convicting the appellant instead of giving benefit of doubt as prosecution had failed to prove its case beyond reasonable doubt. Counsel then contended that the trial Court committed an error in relying on the alleged extra-judicial confession of PW13-Raju as Raju himself stated in the examination-in-chief that he had put Shyam Lal in the fear of police and it was thereafter, the extra-judicial confession was given to him. Such confession could not have been relied upon.

Learned counsel then submitted that the body of the deceased was discovered by the family members themselves and not by the appellant that too in accordance with Section 27 of the Evidence Act, 1872 (for short 'Evidence Act') and it was visible to one and all in a ditch behind the Durga Builders, Faridabad. The motive alleged by the prosecution is highly improbable in the present case namely that he had refused to give *naan* free of cost to the deceased-Ajay. There is no direct evidence against the appellant. The cause of death is said to be due to strangulation. Learned counsel for the appellant then submitted that the case in question is based on circumstantial evidence and except the

evidence of alleged extra-judicial confession, there is no other evidence on the basis of which conviction could have been recorded by the trial Court. The trial Court committed an error treating the testimony of the witnesses as last seen in the company of the deceased Ajay, which is wholly irrational. The prosecution did not complete chain of circumstances. In so far as the last seen theory is concerned, the trial Court relied on the evidence of PW11-Subhash whose evidence does not inspire confidence and at any rate, Raju, Subhash and PW12-Teka Nath are close relatives. Finally, learned counsel for the appellant prayed for acquittal as according to her, there is no reliable evidence.

Per contra, learned State counsel vehemently opposed the appeal and supported the impugned judgment and order. He submitted that there is enough evidence on record and the trial Court has therefore, rightly convicted the appellant-Shyam Lal. There is no reason for interfering with the order of conviction. He therefore, prayed for dismissal of the appeal.

CONSIDERATION

Heard learned counsel for the rival parties, perused the impugned judgment and order so also the reasons recorded therein. Perused the entire evidence with the assistance of the learned counsel for the rival parties.

At the outset, it is not in dispute that the dead body of the deceased was fished out from the dirty water in a ditch. Some of the relatives, who have been examined by the prosecution before the trial

Court, have also deposed accordingly that they had gone to the spot and recovered the dead body from the dirty water. The prosecution case is that the appellant-Shyam Lal was running a *naan* shop at Meethapur. He had refused to part with a *naan* free of cost to Ajay for which he slapped appellant. That was the motive of commission of murder. It is not in dispute that the prosecution had challaned two persons, namely, Shyam Lal and the other accused, namely Manish. The trial Court has acquitted Manish. The prosecution had charged Manish for offence in question, obviously, on the basis of the alleged last seen theory purported by PW11-Subhash. In that context, it would be appropriate to see the evidence of Subhash carefully. He is said to be the star witness on the last seen theory. The relevant part of evidence of PW11-Subhash, in examination-in-chief and cross-examination reads thus:-

“State that I know Ajay (since deceased). On 14.06.2010 at about 7:30 P.M., I was coming from Durga Builder area for my personal work. I saw Ajay, Shyam Lal and one more person in an auto standing near wine shop situated in the area of Durga Builders. On 15.06.2010, I told this fact to the family members of deceased. Accused are present in Court.

On 16.6.2010 on receipt of intimation, I went to Durga Builder area where dead body of Ajay was lying. Police had also reached there. Three empty bear canes and chappels of black colour were lying there. Police was busy in doing the police proceedings.

xxxxxxx Sh. C.P. Gaur, defence counsel for accused Shyam Lal.

Ajay since deceased was my cousin and he was son of my real mousi. Ajay asked me to join the party but I refused. I

*had gone in search of some work in the Durga Builder area.
All the three were having beer in their hands.....”*

It is clear from the above evidence that he had seen the deceased Ajay with appellant-Shyam Lal and one more person standing near the wine shop situated near Durga Builders. In the cross-examination, he also stated that Ajay asked him to join the party, but he did not do so. He also said that all the three persons were having beer in their hands. It is thus, clear that it was not Shyam Lal alone, but one more person, namely Manish who were together near the wine shop in an auto-rickshaw. Therefore, it cannot be said that it was only Shyam Lal who was seen with Ajay. On the contrary, prosecution case itself is that one more person, along with Shyam Lal and Ajay was seen, and the other person was Manish who has been acquitted by the trial Court. The prosecution has not anywhere explained as to on what basis, it could be definitely held that the other person, namely Manish did not commit the murder or that it was only Shyam Lal who committed the murder. In a case of circumstantial evidence, the prosecution cannot rely on probabilities. In so far as the last seen theory, and the deposition of PW11-Subhash, the star witness of prosecution, is concerned, we are not prepared to believe that it was Shyam Lal who must have committed the murder, because Subhash himself deposed that one more person was with them consuming liquor. The prosecution does not have any other evidence to nail Shyam Lal as murderer. But the prosecution relied on the evidence of extra-judicial confession by Shyam Lal to the number of witnesses. In this connection, it

is not in dispute that all these witnesses who are said to have gone to the house of Shyam Lal were all relatives and that they together gone to his house with so many persons. Not only that, when Shyam Lal refused to speak whereabouts of Ajay, the witnesses put him in fear that they would approach the police and therefore, he had given extra-judicial confession and after sometime, he ran away from the backside of the house. It is not necessary for us to quote the evidence of all the witnesses, but the evidence of PW13-Raju, who deposed in that behalf the same, reads as under:-

“Stated that Ajay (since deceased) was my cousin. He was tailor master. He used to reside in village Molarband. On 14.6.2010 at about 6:00 P.M. he had gone from his house but did not return. On 15.6.2010 in the evening we had gone to the house of Subhash but he met on the way. Along with me one Munshi Parsad, Rakesh, Sudhir had gone. Subhash told that he had seen Ajay in the company of Shyam Lal and one more person near wine shop situated in Durga Builders on 14.6.2010 at about 7:00 P.M. Thereafter, we went to the house of Shyam Lal. We inquired from Shyam Lal regarding Ajay but he did not tell anything at first instance. When we had shown the fear of police he told that he (Shyam Lal) along with Manish had taken Ajay to the wine shop situated in Durga Builder. He also disclosed that he had paid a sum of Rs.250/- to purchase bear and thereafter, consumed the same. He further disclosed that thereafter he gave a leg blow on his testicles. He further disclosed that thereafter Manish caught hold of him and he gave 2-3 fist blows on his face and thereafter with the help of his parna he strangled his neck. He also disclosed that thereafter they drown his body under

the water and stood over the same in the dirty water near Durga Water. Thereafter, we went to Durga Builder in the night. But the dead body was found at the time of rising of day. Thereafter police came and carried out the proceedings.”

It is clear from the evidence of this witness that number of persons had gone to the house of Shyam Lal and when he was put in fear of police, he told that he had gone with Manish to wine shop. As it is well settled, the evidence in the nature of extra-judicial confession is a weak piece of evidence. The same requires corroboration. In the present case, there is no corroboration whatsoever. That apart, it is an admitted position that Shyam Lal had been put in fear of police and so many persons had gone to his house. The disclosure that Manish had caught hold of him and Shyam Lal had strangulated his neck will have to be taken with pinch of salt since motive as has been alleged by the prosecution is about refusal by Shyam Lal to give *naan* free of cost to Ajay as against story that there was quarrel as stated by PW13-Raju. All the other witnesses have deposed in the same line, namely the extra-judicial confession. The reliance placed by the trial Court in Para-52 of the impugned judgment that the dead body was recovered on the disclosure made by Shyam Lal, is again absurd. The same is said to be by way of extra-judicial confession when as a matter of fact, his dead body was never discovered as contemplated by law under Section 27 of the Evidence Act, by Shyam Lal as alleged. The trial Court has inserted the evidence which is not there on record. The evidence in the nature of extra-judicial confession has been treated by the trial Court as discovery of dead body by Shyam Lal. That is absurd. The accused

Manish has been acquitted by the trial Court on the ground that his name was not in the FIR and therefore, there was doubt about his participation or identity. In our opinion, looking to the fact that the prosecution case itself is that there was third person with Shyam Lal and the deceased Ajay, the acquittal of Manish would mean that there were only two persons which runs counter to the theory of prosecution that there was third person along with them. The trial Court has not given any reason as to why it believed that third person did not commit murder of Shyam Lal. The trial Court appears to have been impressed by the extra-judicial confession as stated in the evidence of PW13-Raju, but then we have already held that evidence by way of extra-judicial confession is a weak piece of evidence and the benefit of doubt in such circumstances must go to the accused. The prosecution has not been able to prove the line of distinction about Sham Lal 'must have' or 'may have' committed murder.

As stated earlier, the prosecution has failed to explain who was the third person and as to why the benefit of doubt should not be given to the appellant-Shyam Lal. In the result, we find that the impugned judgment and order of conviction will have to be set aside by giving benefit of doubt to the appellant. Hence, we make the following order:-

ORDER

- (i) **CRA-D-674-DB of 2011** filed by the appellant-Shyam Lal, is allowed;
- (ii) The judgment/order dated 09.06.2011/11.06.2011 passed by the learned Sessions Judge, Faridabad, in Sessions Case No.103 of 15.09.2010, by which the appellant, namely Shyam

Lal, was convicted for commission of offence punishable under 302 of IPC and was sentenced to undergo Rigorous Imprisonment for life and to pay fine in the sum of ₹10,000/-; in default of payment of fine, to further undergo Rigorous Imprisonment for six months, is set aside;

- (iii) He is acquitted of the charge framed against him;
- (iv) Fine, if paid, be refunded to him.

(A.B. CHAUDHARI)
JUDGE

(INDERJIT SINGH)
JUDGE

May 04, 2018

mahavir

Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No