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

Judgment reserved on: August 20, 2018

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Judgment delivered on: September 14, 2018

+ **CRL. A. 107/2016**

1. NIRMAL @ LUCKY

....Appellant

Through: Mr. Sumeet Verma with Ms. Preeti
Jakhar, Advocates.

Versus

STATE

....Respondent

Through: Ms. Kusum Dhalla, APP with Ms.
Preeti, Advocate
Inspector Devendra Singh, PS
Nangloi.

+ **CRL. A. 856/2015**

2. SHAHID AHMED

....Appellant

Through: Mr. Sumeet Verma with Ms. Preeti
Jakhar, Advocates.

Versus

STATE

....Respondent

Through: Ms. Kusum Dhalla, APP with Ms.
Preeti, Advocate
Inspector Devendra Singh, PS
Nangloi.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE I.S.MEHTA

JUDGEMENT
14.09.2018

I.S.Mehta, J.

1. The Appellant Nirmal @ Lucky and Shahid Ahmed have preferred two separate appeals i.e. Crl. A. 107/2016 & Crl. A. 856/2015 respectively under Section 374(2) Read with Section 482 Cr.P.C., against the common judgment and order on sentence dated 19.02.2015 and 23.03.2015 respectively by which both the Appellants have been convicted under Section 302/34 IPC and were sentenced to life imprisonment and a fine of Rs. 5,000/- each and in default of payment of fine to further undergo six months imprisonment.

2. Brief facts stated are that a PCR call vide DD No. 7A dated 24.01.2011 was received at the Police Station Nangloi, Delhi. As per the PCR call a dead body of male was found lying in front of House No. C-550, Camp 2, Nangloi, Delhi. On receiving the said call ASI Shiv Narayan alongwith Ct. Ashok reached to the spot and thereafter Inspector Ramphal Singh too reached the spot. They found the dead body of Rakesh S/o Shyam. The father of the deceased Rakesh was also present at the spot and his statement was recorded vide Ex.PW3/A :

PW3 stated in his said statement that he is residing at C-109, Camp 2, Nangloi, Delhi and runs a stall of *biri*-Cigarettes in front of Lokesh Cinema.

He is having five children. Rakesh @ Anda 24 years old was his eldest son and he too worked at that stall with him. The deceased Rakesh @ Anda had fallen in bad company. He started taking intoxicating substances, he also used to steal money from the stall and Rakesh did not pay any heed to his advices and on inquiry about the expenditure, he used to tell him that Accused Nirmal @ Lucky has taken money from him and that Nirmal will return the same. However, the money was not returned despite many reminders to him. PW3 stated that on the previous night, he told Rakesh in frustration that he will not get any money from him until he recovers the money which was given to Nirmal by Rakesh. On this, Rakesh got annoyed and left the house at 11:00 PM and told PW3 that he will recover the money from Nirmal on the same night itself. Rakesh did not return to home that night. In the morning at about 6:00 AM, one Anu, a distant relative told him that Rakesh is lying dead in the street near dispensary. He visited the spot alongwith Anu and saw the dead body of Rakesh lying in the street adjacent to the dispensary, and was having a cut on his throat. At that time, one of his nephew Sunil (PW2) informed him that he saw Rakesh in the company of Nirmal @ Lucky at about 11:30 PM on the previous night on the street in the corner of the dispensary, where both were arguing with each other. PW3 stated that he suspects involvement of Nirmal in committing murder of his son.

3. On the basis of the said statement, FIR No. 20/11 was registered. Investigation was undertaken. In the evening, on the basis of secret information, the accused Nirmal was apprehended, interrogated and then was arrested. Nirmal's disclosure statement was recorded and in pursuance to his disclosure statement a blood stained dagger with cover Ex.P-2 was

recovered from underneath the railway track stones towards Bahadurgarh site from Nangloi station. In furtherance to the disclosure statement Nirmal led the police party to house No. C-234/235, Camp 2, Nangloi, Delhi and got recovered his clothes– including black pants, green shirt and one track suit upper jacket and maroon coloured vest having blood stains Ex.P-5. The search of the pant revealed a blood stained surgical blade Ex.P-3. He then led the police party to the house of the co-accused Shahid, but he was not available there. However, he was apprehended on the next day from his house and was interrogated and then arrested and his disclosure statement was got recorded. In pursuance to his disclosure statement, his blood stained clothes and shoes were recovered. Accused also identified the place of occurrence of the incident.

4. After completion of the investigation, Chargesheet under Section 302/34 IPC was filed to which they pleaded not guilty.

5. Argument on charge was heard and charges under Section 302/34 were framed qua both the Appellant/accused on 25.04.2012.

6. The prosecution in order to prove its case has examined 19 witnesses. Of these, Sh. Sunil (PW2), Sh. Shyam (PW3), Sh. Anu (PW4), Smt. Pushplata (PW6), and Sh. Chhatar Singh (PW7) were the independent witnesses. The remaining were the police/ formal witnesses. Thereafter, the statement of both Appellant/accused was recorded under Section 313 Cr.P.C. on 19.09.2014.

7. After conclusion of arguments, the Trial Court vide judgment dated 19.02.2015 and order on sentence dated 23.03.2015 convicted both the Appellant under Section 302/34 IPC. Hence, the present appeals.

8. The submission of Mr. Sumeet Verma, learned counsel for the

appellants, firstly, is that the present is a case based on circumstantial evidence. Thus, it was essential for the prosecution to conclusively prove all the circumstances and also to establish that the said circumstances form a complete chain which leads to the only conclusion of the appellants guilty in the commission of the crime. He submits that the prosecution has failed in this respect.

9. Mr. Sumeet Verma submits that the prosecution's theory of "last seen" is not proved, as statement of Sunil (PW2) was that he had seen the deceased in company of A-1 on a busy road i.e. a public place at about 11:30 PM - 11:45 PM on 24.01.2011, whereas the time of death of the deceased was estimated to be around 02:30 AM on 24.01.2011 (The post mortem was conducted at 02:30 PM on 24.01.2011 and time since death was stated to be 12 hours vide Ex. PW5/A). As such, seeing the deceased at a public place with A-1, and that too nearly 3 hours before his death, does not establish the last seen theory of the prosecution. He submits that in *State of Goa v. Sanjay Thakran*, 2007 (3) SCALE 740, the time lag of 2 ½ hours between the last seen together, and the time of death was held to be sufficient to discard the evidence.

10. Mr. Verma submits that Sunil (PW2) also stated that he saw the deceased moving on the road with A-1 where a marriage procession was going on that road. When the *baraat* reached there, PW2 left the place. Hence, the possibility of the deceased going with some other person, and of some other person being the assailant, cannot be ruled out. He places reliance on *Deepak Chadha v. State*, 2012 (1) JCC 540 and *Sanjay Thakran* (supra).

11. Mr. Verma submits that unless the incriminating circumstance of last

seen together is established, the onus of proof by resort to Section 106 of the Evidence Act, cannot be shifted upon the accused to explain as to how and when he parted with the company of the deceased.

12. Mr. Verma submits that PW3, father of the deceased, who was the maker of the FIR had repeatedly deposed that on 23.01.2011, his deceased son left home at about 11:00 PM saying that he would quarrel with Kariya, as Kariya had beaten him up and at that time the deceased was in a fit of anger. He points out that during his cross examination by the learned APP for the State, had clarified that the police did not record his statement when he told them about Kariya. For this reason, there is no mention of Kariya in the FIR. Mr. Verma further points out that PW19, the I.O. acknowledged that the father of the deceased i.e., PW3 moved an application in the police station, mentioning the names of six suspected persons for killing of his son. There is no explanation by the prosecution as to why investigation was not undertaken into the said allegations of PW3.

13. Mr. Verma also submits that the recovery of blood stained weapons and clothes at the instance of the accused persons, by themselves, are insufficient to sustain the charge of murder against the accused. In this reliance is placed on *Deepak Chadha* (supra) and *Prabhoo V. State of U.P.*, AIR 1963 SC 1113.

14. On the other hand, learned Assistant Public Prosecutor, Ms. Kusum Dhalla has submitted that the deceased Rakesh was lastly seen in the company of Nirmal (A-1) at Aggarwal Chowk on the road near Lokesh Cinema by Sunil (PW2).

15. She has further submitted that weapon of offence i.e. blood stained dagger, blood stained surgical blade and blood stained clothes recovered

from the accused were sent to the FSL, Rohini, Delhi. The FSL reports Ex.PX, Ex.PY and Ex.PZ also show that blood of the deceased was found on the weapon of offence and clothes which connects A-1 to the crime.

16. Ms. Dhalla further submits that in pursuance to disclosure statement of A-1, Shahid (A-2) was arrested on the next day i.e. 25.01.2011 vide arrest memo Ex.PW13/A. She submits that on his interrogation, A-2 has made disclosure and in pursuance to the disclosure statement, he got recovered blood stained pair of shoes and blood stained clothes Ex.P-6 and same were also sent to the FSL, Rohini.

17. Ms. Dhalla further submits that the present case is based on circumstantial evidence; prosecution has examined 19 witnesses and proved that the deceased was lastly seen in the company of A-1 on the intervening night of 23.01.2011 and 24.01.2011, soon before his death. The FSL reports Ex.PX, Ex.PY and Ex.PZ connect the accused persons to the crime and prosecution has proved its case beyond reasonable doubt. Thus, the court below has rightly convicted both the accused persons.

18. A-1 further submits that the seal of Inspector Ramphal Singh i.e. 'RP' was not handed over to the keeper of the seal and that the recoveries are planted.

19. We have given our thoughtful consideration to the matter in the light of the respective submissions and the evidence brought on record. Instant is a case based on circumstantial evidence. The Supreme Court has consistently laid down that when the case rests squarely on circumstantial evidence, the inferences of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the

innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. Where the case depends upon the conclusion drawn from the circumstances, the cumulative effect of the circumstances must be such as to negate the innocence of the accused and bring home the offences beyond any reasonable doubt.

20. The Supreme Court, in **Gagan Kanojia v. State of Punjab**, (2006) 13 SCC 516, observed :

- " 1) *There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.*
- 2) *Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.*
- 3) *There should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.*
- 4) *On the availability of two inferences, the one in favour of the accused must be accepted.*
- 5) *It cannot be said that prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise."*

21. In **Satpal v. State of Haryana**, (2018) 6 SCC 610, the Supreme Court

opined:

“4. To sustain a conviction on basis of circumstantial evidence, it was necessary that all links in the chain of circumstances must be complete leading to the only hypothesis for guilt of the accused. If there were any missing link in the chain of circumstances and the possibility of innocence cannot be ruled out, the benefit of doubt must be given by acquittal.”

Material Contradiction

22. The Prosecution has examined Shyam (PW3), father of the deceased, who stated that on 23.01.2011 his deceased son Rakesh @ Anda left the home by telling him that he is going to attend marriage of his *Masi* (Shyam's sister in law) and he came back at around 11:00 PM. He told him that one Kariya who is also a resident of Camp 2, Nangloi has beaten him. Thereafter, Rakesh left his house. He alongwith his other son Gaurav chased the deceased but they did not find him. On the next day at about 4:00 AM his nephew Anu (PW4) told him that Rakesh has been murdered and the dead body is lying in front of his house. Meanwhile, someone informed the police and police came at the spot.

23. PW3 was cross examined by the Learned APP with the permission of the court and he has admitted that police had recorded his statement as Ex.PW3/A which bears his signature. He further admitted that on 23.01.2011 at about 11:00 PM his deceased son Rakesh left home in a fit of anger and said that he will return only after recovering money from the accused No.1 Nirmal. PW3 further clarified that both his statements, first— that Rakesh had gone to attend marriage of PW3's Sister-in-law and, second— that deceased had gone to take money from Nirmal @ Lucky are

correct, and he had denied the suggestion that deceased Rakesh did not come back to his house at 11:00 PM.

24. The statement of PW3 is a rukka Ex.PW3/A which is the basis of registration of FIR No. 20/11 which is Ex.PW1/A. The statement of PW3 to the effect that the deceased Rakesh came back to his house i.e. C-109, Camp 2, Nangloi at 11:00 PM after attending the marriage of his *Masi* and his narration of the deceased being beaten by one Kariya, and leaving the house in intoxicated condition at about 11:00 PM is not consistent with the prosecution version as stated in FIR.

25. PW3 during cross examination has clarified that the suspect Kariya was present in the police station on 24.01.2011 at about 10:00 AM. The factum of PW3's suspicion on Kariya's hand in the murder of his son Rakesh is further strengthened by the statement of the I.O. Inspector Ramphal Singh (PW19), where he admitted that PW3 had moved an application disclosing the name of 6 suspects in murder of his son. The said admission is reproduced as under:

"It is correct that father of the deceased Shyam Sonkar moved an application in the Police Station mentioning the names of six suspected persons for the killing of his son."

The aforesaid application is not part of investigation which gives rise to the doubts of the possible involvement of others in the crime, and also raises doubt with regard to the involvement of the accused.

Last seen theory

26. The doctrine of last seen comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive

together, and the point when the deceased died is so small that the possibility of any person, other than the accused, being the author of the crime becomes absolutely impossible. In that situation, such a circumstance would lead to show that the crime was committed only by the accused and no one else.

27. In the instant case Sunil (PW2) has seen the deceased in the company of the accused on 23.01.2011 at about 11:30 PM on the Road at Aggarwal Chowk near Lokesh Cinema, where a marriage procession was going on and they were arguing and talking to each other. As per the Post Mortem Report Ex.PW5/A the deceased died at around 2:30 AM on 24.01.2011. The time gap in between is about 3 hours.

28. Admittedly, the road was a public place, where a marriage procession was going on at that relevant point of time. It is possible that accused might have left the company of the deceased on that road, and deceased might have further gone in company of some other person. Inference cannot be drawn against A-1 of his being the perpetrator of the crime, only on the basis that he was seen on the road i.e. public place, in the company of the deceased, and that too three hours before his death. Here, paragraph 16 in ***Deepak Chadha v. State*** (supra) is relevant. The Supreme Court observed:

“16. In the decision reported as 2007 (3)SCALE 740 State of Goa vs. Sanjay Thakarn & Anr., Supreme Court had categorically held that where the place of last-seen and the place where the dead body is found are at a distance or if place was the same, but there was a considerable time lag between when the accused and the deceased were last seen at the place and when the deceased was found dead, the evidence of last seen in both circumstances would lose its incriminating character if the place was a public place for the reason in both circumstances the possibility of somebody

else being the assailant could not be ruled out”

As such, it cannot be concluded that Rakesh remained in the company of A-1 till his being fatally injured. The last seen evidence, in our view is not strong enough to be considered as incriminating.

Recoveries

Recovery at the instance of Nirmal @ Lucky (A-1)

29. I.O. Inspector Ramphal Singh (PW19) has stated that on 24.01.2011 after conducting the post mortem, the dead body of Rakesh @ Anda was handed over to the relatives of the deceased. The sealed *pulanda* having viscera and other case property was handed over to the I.O. and was seized vide seizure memo Ex.PW9/A with the seal of 'RP' and the said case property was deposited in the *Malkhana*. Thereafter, Inspector Ramphal Singh (PW19) searched for the accused A-1 and he received a secret information and on the basis of that secret information he constituted a team of ASI Shiv Narayan (PW18) and Ct. Ashok (PW9) and himself and apprehended the accused Nirmal @ Lucky near Rajdhani park Metro station. He conducted his personal search vide personal search memo Ex.PW19/C. Nirmal (A-1) made disclosure statement vide Ex.PW9/D. Accused A-1 in pursuance to his disclosure statement got recovered weapon of offence i.e. blood stained dagger Ex.P.2 from underneath the Railway station track stones towards Bahadurgarh, Nangloi Station. Same was seized vide seizure memo Ex.PW9/F with the seal of 'RP'. Thereafter, Accused A-1 in pursuance to his disclosure statement led them to his open house, house number C-234/235, Camp 2, Nangloi, Delhi which is situated in a very

thickly populated area and mother of the accused was already present there. He got recovered blood stained clothes i.e. black pant, green shirt and one track suit upper jacket and maroon colour *banyan* Ex.P.5(colly) and out of the one black colour pant, one blood stained surgical blade Ex.P.3 was found and same were seized vide seizure memo Ex.PW9/G. Inspector Ramphal Singh (PW19) sealed clothes and surgical blade in two separate *pullanda* with the seal of 'RP' and same was seized vide seizure memo Ex.PW9/H.

30. The aforesaid alleged recoveries do not inspire confidence in the light of A-1's accusations that the same were planted. A-1 has taken the following cogent grounds in support of his said submission:

- i. It is an admitted fact emerging on record that incident had taken place on intervening night of 23.01.2011 and 24.01.2011.
- ii. It is an undisputed fact emerging on record that dead body of deceased Rakesh was found in front of C-550, Camp 2, Nangloi, Delhi as shown in scale site plan Ex.PW16/A at about 6:37 AM on 24.01.2011 vide Ex.PW10/A. No members of the said house were interrogated during the investigation.
- iii. It is further placed on record that A-1 was arrested on the same day vide Arrest Memo Ex.PW9/B at about 8:10 PM from near Rajdhani Park Metro Station.
- iv. It is further coming of record that post mortem of the dead body of deceased Rakesh was conducted at 2:30 PM vide Post Mortem Report Ex.PW5/A on that same day.
- v. The post mortem report shows that the cloth, blood gauze, viscera were preserved and sealed with a sample seal of 'SGMH

Mortuary' and was handed over to I.O. Inspector Ramphal Singh (PW19).

- vi. It is further coming on record that the blood found at the spot of the dead body of deceased Rakesh was lifted and seized vide Seizure Memo Ex.PW18/A and was sealed with the seal of 'RP'.
 - vii. As per Ct. Ashok (PW9) all the seized articles were deposited with the *Malkhana*. However, the *Malkhana* register Ex.PW17/A does not show which articles were deposited at what time. The articles i.e. Blood seized from the spot in the morning Ex.PW18/A should have been deposited with the *Malkhana* first, to exclude any possibility of tampering or planting of the blood. The *Malkhana* register indicates that the blood stained dagger Ex.P.2 and the blood stained clothes Ex.P.5 and blood stained surgical blade Ex.P.3 which were seized vide Ex.PW9/F and Ex.PW9/H respectively were deposited first in *Malkhana*, and blood lifted from the spot was deposited with the *Malkhana* subsequently.
 - viii. At the most, it could be inferred that all the articles seized from the spot, and at the instance of A-1, and was deposited with *Malkhana* simultaneously– which means that I.O. Inspector Ramphal Singh (PW19) throughout the day was in the physical possession of the blood lifted from the spot.
31. The authenticity of seizure of the weapon of offence i.e. blood stained dagger and surgical blade, and the blood stained clothes from A-1 by the I.O. Inspector Ramphal Singh (PW19) with his seal of 'RP' could only be

established through ocular statement, or the deposit of the seal with the *Malkhana*. In the instant case, prosecution has not led any ocular statement to the effect that seal 'RP' after seizing of the articles was handed over either to the team members, or was deposited with *Malkhana*. Further, learned public prosecutor during chief examination of PW19 has not declared him hostile, on this point. Therefore, the very sanctity of seizure of the aforesaid articles with seal of 'RP' remains unestablished on the part of the prosecution. Consequentially FSL Report Ex.PX, Ex.PY and Ex.PZ loses its significance qua A-1.

Recovery at the instance of Shahid (A-2)

32. In pursuance to the disclosure statement of A-1 , Shahid (A-2) got arrested on 25.01.2011 and at his instance the recovery of blood stained shoes and the blood stained dirty clothes were seized.

33. A-2 was apprehended from his house. During interrogation he made his disclosure statement Ex.PW13/C in pursuance to his disclosure A-2 got arrested vide Arrest Memo Ex.PW13/A and his personal search was conducted vide personal search memo Ex.PW13/B and his Disclosure statement Ex.PW13/C was recorded and recovery of his shoes and Pant vide Ex.PW13/D was done. Same was deposited with *Malkhana* and was sent to FSL, Rohini. FSL report is Ex.PX, Ex.PY and Ex.PZ does not connect with the blood group of deceased i.e. 'B Group' .

Conclusion

34. As discussed above, none of the circumstances inspire confidence to show that the crime was committed by the accused persons. The appellants have raised sufficient doubt on the case of the prosecution. As such, we set

aside both the judgment and order on sentence dated 19.02.2015 and 23.03.2015 respectively and acquit both the appellants A-1 and A-2.

35. The appeal is accordingly allowed, with no orders as to costs. Unless wanted in any other case, both the appellant-accused shall be released forthwith. They will comply with the requirement of Section 437A Cr.P.C by furnishing a bond to the satisfaction of the trial court for the amount as may be determined by the Trial Court. Fine amount, if deposited as per the impugned Judgment and order, be refunded to the Appellants.

36. The trial court record be sent back together with a certified copy of this judgment in each of the cases, one copy of this judgment be placed on CRL. A. 856/2015.



**I.S.MEHTA
(JUDGE)**

SEPTEMBER 14, 2018

**VIPIN SANGHI
(JUDGE)**