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

+ **CRL. L.P.861/2018**

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Judgment reserved on: 21st February, 2019

Judgment Pronounced on: 17th May, 2019

STATE

.....Petitioner

Through: Ms Radhika Kolluru, APP for State.
SI Harinder Singh, P.S. Mundka

Versus

SANJAY KASHYAP @ OMI & ORS.

..... Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. By the present Leave Petition filed under Section 378 (1) of the Code of Criminal Procedure, (hereinafter referred as 'Cr.P.C.'), the State seeks leave to appeal against the judgment dated 28.09.2018 passed by the learned Trial Court in Session Case No. 56475/16, whereby all the respondents (accused before the Trial Court) were acquitted of the charge punishable under Sections 302/120-B/380/411 of the Indian Penal Code (hereinafter referred as 'IPC').
2. Brief facts of the case are: -

“(i) That DD No. 22-A was registered at Police Station Mundka on 24.09.2011, in receipt of the information that a person has been murdered, the said DD was marked to ASI Balwan Singh and accordingly ASI Balwan Singh along with other police officials arrived at the spot i.e.

H.No. 464, Near Bhagat Singh Park, Village Mundka, Delhi. The statement of the complainant i.e. daughter-in-law of deceased namely Pooja was recorded wherein she stated that at about 2.30 pm her father-in-law had come along with two boys and one boy had come after sometime with bread pakora, as these were the same boys who were frequently visiting her father-in-law for the last 3-4 days. She further stated that at about 4.00 pm her daughter asked her to take her to her grandfather's room and on arriving in his room she found that the deceased was lying on the bed with his mouth covered with a 'chadar'. On receiving no response from her father-in-law, she removed the chadar and found that his neck was slitted, subsequent to which, she informed her neighbours and someone from them had called 100 number.

(ii) Based on her statement recorded, FIR No. 177/11 under Sections 302/120-B/380/411 of the Indian Penal Code was registered. During the course of investigation, it was discovered that one person namely Sanjay Kashyap had taken a loan of Rs. 20,000/- from the deceased for a period of three month on 20.07.2011. Since the borrower was not in the position to return the money, he conjointly conspired with co-accused Mohd. Murtaza, Gulrej @ Gullu and Mohd Saleem in committing the aforesaid crime."

(iii) After the completion of investigation, the charge sheet was filed and after committal, arguments on the point of charge were heard and charges U/s302/120-B/380/411 of IPC, were framed against the accused, to which they pleaded not guilty and claimed trial."

3. To bring home the guilt of the accused persons the prosecution examined 36 witnesses in all out of which the daughter-in-law, PW-3 (Pooja) is the star witness. Statements of the accused persons were recorded under Section 313 of Cr.P.C wherein they reiterated their innocence and stated that they have been falsely implicated in

the present case and examined one witness in their defence.

4. After hearing the counsels for both the sides and on appreciation of entire evidence available on record, the learned Trial Court acquitted the respondents for the charged offences.
5. Ms. Radhika Kolluru learned counsel appearing for the State contended that the impugned judgment dated 28.09.2018 is based on conjectures and surmises. She further contended that the learned Trial Court had not appreciated the fact that the present case is based on circumstantial evidence and the prosecution has completed the chain of circumstances and has been able to prove the guilt of the accused persons beyond reasonable shadow of doubt.
6. Learned counsel for the State further contended that the learned Trial court had failed to acknowledge the testimony of the star witness PW-3 (Pooja) which was relied upon to prove the conspiracy in question and establishing the last seen evidence. Whereas the learned Trial court placed undue weightage on the minor discrepancies in her testimonies, contrary to which her deposition is consistent and corroborative in nature.
7. Learned counsel for the State further contended that the Trial Court erred in disregarding the medical evidence i.e. post mortem report of the deceased, which evidently reveals that the death was caused due to asphyxia haemorrhage with *cut throat injury*.
8. Learned counsel for the State further contended that the learned trial Court failed to take notice of the recovery of the mobile phone of the deceased from the co-accused Mohd. Murtaza which proves the guilt of the accused persons.

9. We have given our anxious consideration to the submissions advanced on behalf of counsel for the State and also perused the material available on record.
10. Criminal Jurisprudence and a plethora of judicial precedents which place the basic principles not to convict a person on the basis of last seen theory because it is a very weak kind of circumstantial evidence and it is very well affected by a number of factors i.e. *the gap between last seen, the time of death and other surrounding factors*. The last seen theory is required to be proved by established facts before the same can be actually weighed for the purpose of its relevance for ascertaining the guilt of the accused persons. ‘*Last seen together*’ can only be treated as an additional link in the chain of circumstances because the prosecution has to establish an unbroken chain of circumstances, which leads to only one conclusion, which is the guilt and culpability of the accused persons.
11. The Hon’ble Apex Court in *Nizam and Ors. v. State of Rajasthan* reported in **(2016) 1 SCC 550**, has held that *the conviction on the basis of ‘last seen theory’* should be enforced keeping in mind the circumstances that precede the alleged incident. The germane portion of the judgment is extracted below:

*“Undoubtedly, “last seen theory” is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this **Court that it is not prudent to base the conviction solely on “last seen theory”.** “Last seen*

theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.”

12. The case of the prosecution is majorly based on testimony of PW-3 (Pooja) who had last seen the accused persons with the deceased. The moot point involved in the present leave petition is whether evidence adduced by the prosecution, particularly the testimony of the star witness (PW-3) is trustworthy, credible and worthy of reliance who had “last seen” the accused persons with the deceased. PW-3 (Pooja) during her examination-in-chief has deposed as under:

“I along with my husband and one daughter used to reside at the ground floor on aforesaid residence. At the first floor, my father in law namely Mangal Singh aged about 58 years and my brother in law (Devar) namely Pradeep @ Vicky, aged about 26-27 years used to reside. My father in law was working as ATI in DTC and he also used to give money on interest. My father in law also used to drink in his room. For the purpose of taking money on rent, people used to come to meet my father in law at the first floor. For the last 3-4 days, two boys were visiting my father in law. On one or two occasions, those two boys used to come in the absence of my father in law and they used to ask about him. I used to say that my father in law is not present and then those boys used to visit later on and used to meet my father in law. On one occasion, those boys had taken the mobile phone of my father in law.

On 24.09.2011 at about 2-2:15 PM, those two boys came and they asked about my father in law. Again said, it was at about 1-1:15 PM, when those two boys came and after asking about my father in law, went away from there and at about 2-2:30 PM,

those two boys on the same day came along with my father in law and thereafter all the three went at the first floor in the room of my father in law. My father in law used to eat Bread Pakoda. I heard that one of the boy was getting down from the first floor for bringing Bread Pakoda for my father in law. On 24.09.2011 at about 4 PM, my daughter Ishika asked me to take her to my father in law and I along with my daughter went at the first floor. I noticed that TV kept in the room of my father in law, was on and it was having maximum sound at that time. I knocked the door twice but there was no response from inside the room. I entered inside the room and I saw that my father in law was sleeping on the bed and one bedsheet was there on his body. I asked my father in law as to why the TV is on and that to be in such a loud volume. But there was no response of my father in law. I noticed that one bowl having pieces of guava was in turtled position. There was no sign of respiration. I touched the hand of my father in law and I noticed that there was no response from the vein of his hand. Face of my father in law was covered with the bedsheet and I asked as to why he has put the bedsheet on his face. I removed the bedsheet from his face and I noticed that the neck of my father in law was slitted/cut. I was quite perplexed. I along with my daughter came down and I went in front of my house where one lady used to reside to whom I used to call Chachi. I stated about the occurrence to Chachi. Chacha and his son were also present in their house and they both and other neighbours also came at our house and went at the first floor. Some other person informed the police. After some time, police reached at the spot. I was enquired upon by the police official and my statement was recorded. I have seen my statement Ex.PW3/A, which bears my signatures at point A.

13. During her cross examination she deposed as under:

*“When I went inside the room of my father-in-law, there was **a bedsheet on his body covering his body upto neck. I removed the bedsheet as he was not giving any response to me. Then only I came to know that he was expired. After seeing the dead body of my father-in-law, I became perplexed and I went in front of my house and called the lady whom I used to call my Chachi I also made a call to my husband and Devar regarding the same.***

When I went inside the room, I saw that my father in law was lying on the bed. Drinks were lying on the table.

Accused persons used to visit at our residence to meet my father-in-law but I cannot tell all the dates of their visit per to the occurrence. Accused person even visited on one day prior to the occurrence. Accused persons used to enquire about my father in law. I never asked from the accused persons as to why they were enquiring about my father-in-law and they also did not state anything to me...”

14. As per the case of the prosecution, death had occurred at 4:00 pm and PW-3 (Pooja) had last seen the accused persons at 2-2.30 pm. PW-3 (Pooja) during her examination in chief deposed that ‘*I heard that one boy was getting down from first floor to bring bread pakoda*’, but PW-3 (Pooja) has nowhere mentioned that out of the two accused persons who came down from the stairs to bring the bread pakoda. PW-3 (Pooja) further failed to mention the time when she heard that the accused was getting down from the stairs and when the accused came back.
15. The site plan (**Ex.PW-26/A**) refers to two doors on the ground floor, however, it has not brought on record whether both the doors were

locked or not and who bolted the door when the accused person came back after buying the bread pakoda. It also remained unexplained by the prosecution as to whether the entry can be gained from both the doors or from only one door i.e, the door from where the accused persons first met PW-3 (Pooja) at 1:15 pm.

16. The conduct of the witness also appears to be unnatural as after seeing the dead body of her father-in-law, she neither informed her husband nor her brother-in-law and instead of informing any public person outside her house, she crossed the gali and informed about the death of her father-in-law to her ‘chacha’ and ‘chachi’, which creates a doubt in the version of the prosecution.
17. The post mortem and FSL report proved that the death was caused due to ‘*asphyxia haemorrhage consequent upon cut throat injury by a sharp weapon*’ and the same was sufficient to cause death in ordinary course of nature but as discussed above, the testimony of PW-3 (Pooja) with regard to the last seen theory is very weak and the prosecution has failed to connect the accused persons with the commission of crime.
18. Learned APP for the State laid emphasis on the recovery of the mobile phone of the deceased from the co-accused Mohd. Murtaza which was recovered by PW-32 (SI Gulshan Nagpal). PW-32 (SI Gulshan Nagpal) during his cross-examination deposed as under:

*“A mobile phone got recovered from the pocket of Mohd. Murtja which was seized by the IO. The personal searched of the accused Mohd. Murtja is **not remember to me at present. No site plan was prepared of the site from where accused Mohd. Murtja arrested and recovery was affected.**”*

19. However, the deposition made by the Investigating Officer with regard to the recovery of mobile phone from Mohd. Murtaza is contrary to record. Samay Pal Atri, S.S.I., P.S. Kotwali Nagar, Muzaffarnagar, UP who was examined by the Court as DW-1 deposed as under:-

*“I have brought the summoned record i.e. DD register (carbon Copy) pertaining to entry made on 05.10.2011 at SI No. 23 at 09:30 am. The Original register has already been destroyed by official order being the document more than five years old. The carbon copy of the said entry is **Ex. DW1/A**. As per the entry ‘Ammad/Rewangi SI Delhi Police, SI Gulshan Kumar, HC Subhash No. 1033, Ct. Yoginder, Ct. Suresh, Murtaza P.S. Mundka Delhi vaste Teftish FIR No. 177/11 U/S 302/34 IPC bataftish rawan kiye gaye. The said arrival and departure entry were made at the same time at SL. NO. 2”*

20. A perusal of the statement of DW-1, shows the departure of SI Gulshan Kumar along with accused Murtaza on 05.10.2011 from Muzaffarnagar, UP(**Ex-DW-1/A**), however, the case of the prosecution is that the accused was arrested on 06.10.2011, vide Arrest Memo (**Ex. PW-8/G**) from Gali No-8, D-Block, Das Garden, Fauzi Dairy, Badrola Vihar, Delhi. The Arrest Memo, (**Ex. PW-8/G**) is contrary to the public document (**Ex-DW-1/A**) produced by Samay Pal Atri, S.S.I., P.S. Kotwali Nagar which proves that the arrest memo of the accused Murtaza from the spot is a fabricated document. There is no iota of doubt that the arrest of accused Murtaza was manipulated and consequently, the recovery of the mobile phone from accused Murtaza at the time of the arrest is also

doubtful. Moreover, there is nothing on record to show that the Investigating Officer has sought participation of an independent witness at the time of arrest nor any cogent explanation has been rendered by the Investigating Officer with regard to participation of Independent witness at the time of arrest.

Conclusion

21. In the present case, on a cumulative reading and appreciation of the entire evidence on record, we are of the considered view that the evidence on record has been held to be unworthy of acceptance as the same is found to be replete with infirmities and are not supported with testimony of any independent witness. There are considerable inconsistencies and discrepancies in the statement of the witnesses, which consequently creates reasonable doubt on the case of prosecution. No motive has been proved on record by the prosecution to substantiate the involvement of the respondents in the present case. For the reasons which we have already discussed above, we regard it unsafe to act upon the testimony of PW-3 (Pooja) alone for convicting the respondents for the offence punishable U/s 302/120-B/380/411 of IPC.
22. It is a settled law that while deciding a leave to appeal petition filed by the State, in case two views are possible, the High Court must not grant leave, if the trial court has taken one of the plausible views, in contrast there to in an appeal filed against acquittal. Upon re-appraisal of evidence and relevant material placed on record, in case, the High Court reaches a conclusion that another view can reasonably be taken, then the view, which favour's the accused,

should be adopted unless the High Court arrives at a definite conclusion that the findings recorded by the trial court are perverse, the High Court would not substitute its own views on a totally different perspective.

23. Having regard to the principles laid down by the Apex Court in the case of *Ghurey Lal vs. State of U.P.*, reported at **2008 (10) SCC 450**, we do not find that there is any illegality or perversity in the reasoning given in the impugned judgment. The learned trial court has taken a holistic view in the matter and carefully analysed the evidence of all the witnesses. Accordingly, no ground to interfere with the impugned judgment is made out and the leave petition is dismissed.

SANGITA DHINGRA SEHGAL, J.

SIDDHARTH MRIDUL, J.

MAY 17, 2019
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