

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

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Reserved on: 01st November, 2022

Pronounced on: 11th November, 2022

CRL. A. 384/2022

DEVENDER KUMAR

..... Appellant

Represented by: Mr. Dinesh Malik (DHCLSC)
with Mr. Akash Saini & Mr.
Puneet Jain, Advocates.

versus

STATE (NCT OF DELHI)

....Respondent

Represented by: Mr. Prithu Garg, APP for the
State with Insp. D.K. Tejwan, P.S.
Sarita Vihar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This appeal assails the impugned judgment dated 10th February, 2011 convicting the appellant for the offence punishable under Section 302/365/392/201 IPC and order on sentence dated 15th February, 2011 sentencing the appellant for imprisonment for life and a fine of Rs.3000/- (simple imprisonment for six months in default of payment of fine) for offence punishable under Section 302 IPC, simple imprisonment for five years and a fine of Rs.1000/- (simple imprisonment for one month in default of payment of fine) for offence punishable under Section 365 IPC, rigorous imprisonment for seven years and fine of Rs.2000/- (simple imprisonment for three months in default of payment of fine) for offence punishable under Section 392 IPC and simple imprisonment for five years and a fine of Rs.1000/-

(simple imprisonment for one month in default of payment of fine) for offence punishable under Section 201 IPC. All sentences were to run concurrently.

The Incident

2. As per the case of the prosecution on 28th January, 2004, a complaint Ex. PW-2/A was made by Sh. Charanjit Singh alleging that on 23rd January, 2004 at about 12:00 p.m. car No. HR-38FT-3125 (Tata Indica) from his taxi stand was hired by a person stating that he was going to Narora, District Bulandshahr, U.P. and the customer mentioned his address as J-124, Sarita Vihar. The customer mentioned that he would go to National Thermal Plant, Narora and would come back by the evening. The Indica car was driven by Dinesh Sharma (mobile No.9810623545). The driver and the car did not return back by the evening and upon enquiries by the complainant, it was found that nobody from J-124, Sarita Vihar had hired any vehicle. The complainant suspected that the driver had been kidnapped alongwith the car and said he could identify the customer. On his complaint, an endorsement Ex. PW-7/A was made and FIR No. 55/2004 was registered under Section 365 IPC (Ex. PW-5/A). As per the call details of the driver's mobile Ex. PW-7/DA, the last call was recorded at 12:44 p.m. and the last location on 25th January, 2004 was found at Sikanderabad, District Aligarh in Alpha Sector. Based on information by the brother of the deceased PW-3, Yagya Dev Sharma from a newspaper regarding the recovery of dead bodies from Hazara Nahar, the police party alongwith PW-2 and PW-3 reached PS Dholna and found two dead bodies recovered on 23rd January, 2004 and one dead body recovered on 25th January, 2004. PW-3 identified the photograph of the dead body recovered on 25th January, 2004 as that of his brother. *Post mortem* was

conducted and a *post mortem* report Ex. PW-3/A was prepared and the investigation was handed over to SI Hari Prakash. On 12th March, 2004, PW-2 met the IO and presented a black and white photo of the appellant who had been arrested in FIR No. Nil/04 under Sections 302/201 IPC at PS Atroli, District Aligarh. PW-2 alongwith PW-4 and PW-6, the other witnesses who were at the taxi stand when the Indica had been booked, identified the person in the photograph to be the same as the one who had booked the Indica on 23rd January, 2004. The photograph Ex. P-1 was seized by the police *vide* seizure memo Ex. PW-2/D and production warrants were issued against the appellant. It was found that appellant Devender was involved in a number of similar cases and despite production warrants, he was not produced. The IO received a letter from the appellant dated 24th April, 2004 Ex. PW-16/F where the appellant expressed to disclose entire facts to the case and requested to send production warrants to Bulandshahr. On 13th June, 2005, the appellant was produced in the Court of learned MM, New Delhi and was arrested *vide* arrest memo Ex. PW-8/A. Pursuant to his disclosure statements, the appellant also pointed out the place where the dead body was thrown. Even though PW-2 identified the appellant as the person who had taken the Indica car on 23rd January, 2004, the car itself was not recovered. A charge-sheet under Section 365/392/302/201/120B/34 IPC was filed and charges were framed to which the appellant pleaded not guilty and claimed trial. The prosecution examined 16 witnesses in support of their case, statement of the appellant was recorded under Section 313 Cr.P.C. and no evidence was led in defence. Since the appellant was involved in several cases, he could not be produced in the Trial Court for more than two years.

Submissions on behalf of the Appellant

3. The appellant through its appeal and submissions on his behalf by learned counsel submitted that the prosecution had been unable to prove the guilt of the appellant beyond reasonable doubt. There was no record that the Tata Indica car was hired by the appellant and no register for the entry of the car given or hired was exhibited before the learned Trial Court. PW-2 did not give a description of the person who hired the car in his complaint Ex. PW-2/1. The identification of the appellant through a photograph produced by PW-2 is shrouded in mystery and he has not stated who showed him the photograph of the appellant. In view of the photograph of the appellant already with PW-2, the identification of the appellant by PW-4 and PW-6 is not admissible. It was not revealed as to before which police officer at PS Atroli, U.P did PW-2 identify the appellant. Moreover, the call records of the deceased are also doubtful since they were submitted for the period 01st January, 2004 to 23rd January, 2004 and not beyond that date. As per the *post mortem* report, the autopsy was done on 25th January, 2004 and the time since death was around four days, thus crystallizing the death of the deceased as prior to 23rd January, 2004. It was submitted by the counsel for the appellant that even though the appellant had been implicated in a number of similar cases but had been acquitted in all matters except this case. There was no direct evidence in this case and was based on purely circumstantial evidence. In support of its contentions, the counsel for the appellant relied upon ***Raju v. State of Rajasthan***, 2022 SCC OnLine SC 1242 and ***Munikrishna v. State***, 2022 SCC OnLine SC 1449 on the issue of circumstantial evidence and relied upon ***N.J. Suraj v. State***, (2004) 11 SCC 346 on the issue of test identification parade (TIP).

Submissions on behalf of the Prosecution

4. The learned Additional Public Prosecutor (APP) on behalf of the State countered the submissions of the appellant and stated that PW-2 had stated in his complaint that he could give the description that could identify the customer of the Tata Indica car on being shown to him and he had himself been making enquiries himself until the day of the filing of the complaint. The learned APP contended that the fact of booking of the Tata Indica car driven by the deceased driver, by the appellant on 23rd January, 2004 was proved by witnesses PW-2, PW-4 and PW-6. All of them had seen the appellant on 23rd January, 2004 at about 12:00 p.m. at the taxi stand when he had come to hire the car. The complainant had also produced the booking register Mark-16/X showing the booking of the car no. 3125 for Narora on 23rd January, 2004 where the name of the deceased driver is recorded and the address of the customer as J-124, Sarita Vihar. PW-11 had proved the registration of the car in the name of the complainant PW-2. The delay in registration of the FIR was due to the fact that the complainant was making his own personal enquiries on 24th January, 2004 onwards in trying to trace the car and the missing driver. The cause of the death was asphyxia due to strangulation and as per the deposition of PW-13 Dr. Dubey a rope was found tied around the neck of the deceased. As regards the arrest of the appellant, the learned APP submitted that PW-1, Inspector Chaudhary had deposed that on 06th February, 2004 while he was posted as SHO, PS Atroli, District Aligarh, U.P. the appellant was apprehended in a Tata Indica car bearing No. DL-4C-7076 and a dead body recovered in the rear seat and FIR was prepared and lodged immediately. PW-1 further deposed that after 7-8 days, the complainant visited the police station and wanted to see the photograph of the appellant, on seeing the said photograph the

complainant identified the person as the appellant and disclosed that he was the one who had hired his India car. The dead body in the car bearing No.7076 also had a rope tied around his neck and was quite similar to the condition, in which the dead body of the deceased was recovered on 25th January, 2004. The learned APP reiterated that this was not a case of fleeting glimpse but where the witnesses had seen the person who had hired the car at the taxi stand and must had a full-fledged interaction. There was no case of any enmity or ill-will against the appellant to falsely implicate the appellant. Moreover, the appellant had failed to explain any circumstances in his statement recorded under Section 313 Cr.P.C. for the absence of the car and the death of the driver. The learned APP relied upon *Amit v. State of Maharashtra*, (2003) 8 SCC 93 and *Arvind v. State*, 2009 SCC OnLine Del 2332 on the issue of conviction based on last seen theory and relied upon *Daya Singh v. State of Haryana*, (2001) 3 SCC 468 on the issue of test identification parade (TIP).

The Evidence

5. The evidence, relevant and necessary for the assessment of this case, is *inter alia* as under:

5.1 PW-2, Charanjit Singh the owner of the taxi stand of the Bichoda Shahib Taxi Stand, Sarita Vihar, deposed that on 23rd January, 2004 at about 11:30/11:45 a.m. the appellant (whom he identified in Court) wanted to hire a taxi for going to Narora in U.P. on the pretext of visiting Narora Thermal Plant for repair for a machinery, and said he would be back in the evening. Tata Indica No. HR-38FT-3125 with driver Dinesh Sharma was allocated to the appellant who left along with the taxi and the driver at 11:45 a.m. Since neither the taxi nor the driver returned till the evening, PW-2 made enquiries from the residence of the

driver but came to know that he had not returned. PW-2 then made enquiries from J-124, Sarita Vihar, the address provided by the appellant while hiring the taxi but came to know that no one of that name was residing at that address nor any taxi had been hired by the occupants of the house. PW-2 went to PS Sarita Vihar informing about the incident but was advised by the police to search for the car himself. Accordingly, on 24th January, 2004, PW-2 alongwith his brother PW-6 and the brother of the deceased driver PW-3 went to Narora to make enquiries but could not find any clue. On returning to Delhi, they again went to the police station on 26th January, 2004 to inform that the vehicle could not be traced. They tried to contact the driver Dinesh on his mobile No. 9810263545 but it was switched off. PW-2 accompanied the police to the office of Airtel on 27th January, 2004 and the call record was taken out where it was revealed that the mobile phone was being used in the area towards Aligarh. Accordingly, PW-2 went with the police to the office of Escotel, Meerut as Aligarh falls under their jurisdiction and were informed that the mobile was being used in the Kashganj area. PW-2 then lodged a report with PS Sarita Vihar on 28th January, 2004 (Ex. PW-2/A). On the next couple of days PW-2 alongwith the police searched for the car and the driver in the Kashganj area but then came back to Delhi and then resumed their search for another couple of days and kept visiting Kashganj area for the next week. On 05th February, 2004, PW-2 came to know that an Indica car was recovered by the police from Atroli near Aligarh and then got to know that the Indica car was hired by the appellant from Rajouri Garden and the driver had been killed and the body disposed of in Hazara Canal and that the appellant had been arrested. PW-2 went on the spot to see the Indica car but it was not his Indica car. He was shown the photograph of the appellant in

PS Atroli and at that time he identified the photograph as the same person who had hired his Indica car. In the meantime, dead bodies had been recovered from Hazara Canal and PW-2 went to PS Dholna where the photograph of one of the deceased bodies was identified by PW-3, the brother of the deceased and PW-2 as that of the deceased (Ex. PW-2/C and Ex. PW-2/C). Upon the Delhi Police taking the custody of the appellant, his disclosures were recorded wherein the appellant stated that he had killed the driver and thrown the dead body in the canal and sold the Tata Indica for a sum of Rs.35,000/- to one Devender Yadav resident of Etah. However, even upon visiting the person to whom he had sold, they could not find the purchaser of the car. At the instance of the appellant, they were taken to the *bhatta* near Aligarh of Udaibir and the appellant mentioned that he had taken two persons from the said *bhatta* for committing the murder but Udaibir could not be found. In his cross-examination, he stated that his statement before the police at Sarita Vihar was in the handwriting of PW-3, Yagya Dev Sharma brother of the deceased. He further stated that he maintained a register for giving taxis on rent in which they have details of the customer who hires taxis. He stated that information regarding arrest of the accused was given to him by PW-4 and PW-3 who had been searching for the driver in the taxi.

5.2 PW-3, Yagya Dev Sharma, brother of the deceased, deposed that his brother was working as a driver with PW-2 at the taxi stand in Sarita Vihar and had gone with some passengers to Narora, U.P. on 23rd January, 2004 and did not return back. He accompanied PW-2 to Sarita Vihar to make enquiries but found no clue and also visited the Airtel office on 28th January, 2004 to get the call detail records. PW-3 accompanied the police on further investigation in Aligarh as well. His relatives started searching some old newspapers and found that there was

a photograph of the dead body of his brother in a newspaper dated 26th January, 2004. They went to PS Dholna where a photograph of the dead body was shown and he identified it as that of his brother. He and his relatives were searching for the offenders and around 05th or 06th February, 2004 they received a call that an Indica car was recovered in the area of Atroli. They found the dead body there lying in an Indica car with a rope tied around the neck which was similar to what he had seen in the photograph of his deceased brother. He saw the appellant at the police station and was later identified by PW-2.

5.3 PW-4, Sanjay Kumar also working as a driver with PW-2's taxi stand deposed that on 23rd January, 2004 he was present at the taxi stand when the appellant came asking for hiring a taxi to Narora and driver Dinesh Sharma went with him in the Indica car. Since the car and the driver did not return, he had joined PW-3 and PW-2 in searching for them and he corroborated the sequence of events as stated by PW-2 and PW-3. In his cross-examination, he confirmed that he was cleaning his car when Dinesh Sharma had taken the taxi alongwith the appellant from the stand.

5.4 PW-6, Ajit Singh, brother of PW-2, deposed that he helps his brother in running the taxi stand. On 23rd January, 2004, he was at the taxi stand when the appellant came to hire the taxi when the Indica car with driver Dinesh Sharma was allocated and sent. PW-6 also had been part of the personal search carried out by PW-2 of the driver and taxi since they had not returned. He identified the photograph Ex. P-1 as that of the person who had come to hire the taxi and he also identified him in Court.

5.5 PW-13, Dr. V.K. Dubey, the Surgeon at Ram Manohar Lohia Hospital, Farrukhabad, U.P., conducted the *post mortem* examination on the dead body of an unknown male on 25th January, 2004 and had prepared his report (Ex. PW-13/A). As per him the injuries observed were a ligature mark two rounds all around the neck in the middle of width 1.0 cm each transversely placed with subcutaneous hematoma present on dissection and an abraded contusion 4.0 cm X 3.0 cm on front of the left shoulder. An internal examination revealed that the left cornua of the hyoid bone was fractured which is due to the force of ligature and the stomach was full three-fourths with semi-digested food material. As per his opinion time since death was about 4 days and death was caused due to asphyxia as a result of strangulation.

5.6 PW-1, Inspector Anil Kumar Chaudhary deposed that he was posted as SHO at PS Atroli on 06th February, 2004 on which day the appellant had been apprehended in Tata Indica car DL-4C-7076 in which a dead body was found in the rear seat and an FIR No. Nil/04/302 was registered by him. After about 7-8 days, PW-2 had come to PS Atroli wanting to see the photograph of the appellant and upon seeing the photograph had identified the appellant as the one who had hired his Tata Indica car. The photograph was exhibited as Ex. P-1.

5.7 PW-14, Sanjay Kumar Tyagi, SSI Kotwali Dehat, PS Bulandshahr, U.P. deposed that on 23rd January, 2004 on the information of one Rakesh Kumar two bodies were recovered from Hazara Nahar having ropes around the neck which were originally unidentified. On 25th January, 2004, on getting further information one more dead body was recovered at the same place also with a rope around the neck. The photograph of the dead body was taken and it was sent to *post mortem* and the information was also given in newspaper and to the District

Crime Report Bureau. On 01st February, 2004, the police officials from Delhi came and enquired about the recovery, saw the photographs and PW-3 identified the body recovered on 25th January, 2004 as that of his brother the deceased.

5.8 PW-16, SI H.P. Gulia stated that on 04th March, 2004 when he was posted at PS Sarita Vihar the investigation of the case was handed over to him. And he pursued the investigation further on the basis of the photographs of the appellant which were obtained from PS Atroli and the recovery of the dead body of the deceased. They made attempts to procure the production of the appellant from Aligarh and finally on 13th June, 2005 appellant was produced in the Court of Duty, MM Patiala House.

Analysis

6. Pursuant to examination of the evidence on record and appreciation of the contentions of the parties, this Court is of the considered view that the prosecution has been able to prove the guilt of the appellant beyond reasonable doubt for *inter alia* the following reasons:

6.1 The appellant had been identified by three persons as the person who had hired the Tata Indica car HR-38FT-3125 driven by driver Dinesh Sharma (since deceased) on 23rd January, 2004 at about 12:00 p.m. for visiting Narora, District Bulandshahr, U.P. The testimonies of these three witnesses PW-2, the owner of the taxi stand; PW-6, the brother of PW-2 and present at the taxi stand; and PW-4, another driver working at the taxi stand are clear, cogent, consistent and without any material contradictions. All three identified the appellant as the one who had hired the taxi on that day and also that Dinesh Sharma was the driver

who had left in that taxi and had not returned on that or ever since. Their testimonies were also consistent regarding the appellant having given his address J-124, Sarita Vihar at the time of booking of the taxi but no one was found of that name or description at that address nor had the occupants of that Sarita Vihar address booked any taxi. It was therefore evident that the appellant while booking the taxi had given a false address thereby attempting to conceal his real identity and location to the owners of the taxi stand. The omission in the booking register Mark 16/X to note the name of the customer hiring the taxi (though the address J-124 Sarita Vihar was noted) would not discredit the otherwise consistent testimonies of three eyewitnesses to the fact of hiring the taxi by the appellant. Further, the identification of the appellant through the photograph by PW-2 at PS Atroli is fully corroborated by the testimony of PW-1, the then SHO at PS Atroli who had investigated the other case in which appellant was apprehended. The appellant's contention that PW-2's identification through the photograph lacks particulars and therefore must be discredited is therefore untenable. There is nothing on record to suggest that the witnesses knew the appellant or had any prior connect or enmity or ill-will to accept any suggestion by the appellant of false implication by these witnesses. Hectic and consistent efforts made by PW-2 and his associates, and PW-3 the brother of the deceased was obviously an honest and valiant attempt to locate the car (which belonged to PW-2) and the driver, after both went missing on 23rd January 2004.

6.2 As per the call detail records, Ex. PW-7/DA the last recorded call on the phone number of the deceased 9810623545 was at 12:44:01 on 23rd January, 2004 (outgoing call to a number 9899459385). One other previous call at 12:24:57 which was also to the same number as an

outgoing call were registered after the deceased would have started driving alongwith the appellant post the booking of the taxi at about 12:00 noon. As per the testimony of PW-12, the Nodal Officer of Airtel, there was no call detail available of 23rd January, 2004 after 12:44:01 which was the last call registered on the mobile number of the deceased. It is evident that the deceased was not in a position to use his mobile thereafter.

6.3 The recovery of the dead body of the deceased victim was on 25th January, 2004 from Hazara Nahar by the police team from PS Bulandshahr as is evident from the testimony of PW-14. The dead body was recovered with a rope around the neck and the photograph of that dead body was shown to the police team from Delhi accompanied by PW-3, the brother of the deceased, who identified the body.

6.4 The *post mortem* report Ex. PW-13/A dated 25th January, 2004 clearly shows that the death was due to asphyxia as a result of strangulation and since the time of death was about 4 days. The estimate of 4 days would not be exact or totally accurate since the deceased was clearly alive on 23rd January, 2004 when the taxi had been hired by the appellant. It would be safe to assume that the murder of the deceased would have taken place on 23rd January, 2004 itself being approximately 2-3 days prior to the *post mortem*. It is settled law that the time of death indicated in a *post mortem* report is only approximate and can have a range of error [refer to *inter alia A.N. Venkatesh v. State of Karnataka*, (2005) 7 SCC 714, *Arvind Singh v. State of Maharashtra*, (2021) 11 SCC 1]. PW-13 in his cross examination also states that the time of death in his report is only an approximate estimate.

6.5 It is quite evident from the testimony of PW-1, the SHO of PS Atroli that when the appellant was apprehended with another Tata Indica

car having a dead body in the rear seat, the body had a rope “fanda” around the neck. The dead body of the deceased as recovered from the Hazara Nahar also had a rope around the neck when found. Notwithstanding that there was an established chain of circumstance by which the prosecution proved the guilt of the appellant, this Court notes their submission that this could indicate a *modus operandi* of the appellant in hiring cars/taxis, murdering the driver and selling of the cars as noticed throughout these cases.

6.6 Most importantly, the prosecution had been able to present at least three witnesses who were able to give cogent and clear last seen evidence of the hiring of the car by the appellant from the taxi stand of PW-2 viz. PW-2, PW-4 and PW-6. All three had identified the appellant in the Court and PW-2 had originally identified the appellant as the one who had been arrested by PS Atroli, District Aligarh, U.P. This last seen evidence alongwith a lack of explanation by the appellant in his statement recorded under Section 313 Cr.P.C. to present any special circumstances exclusively within his knowledge regarding the fate of the car and the driver which he had hired from PW-2’s taxi stand, on 23rd January, 2004 would clearly inculcate the appellant for the offences for which he is charged by the prosecution.

The learned APP has appropriately relied on a decision of this Court in *Arvind @ Chhotu v. State*, 2009 SCC OnLine Del 2332 where, in Para 103 of the said judgment, it is stated:

“103. We may summarize the legal position as under:-

(i) Last-seen is a specie of circumstantial evidence and the principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last-seen theory has to be applied.

(ii) *It is not necessary that in each and every case corroboration by further evidence is required.*

(iii) *The single circumstance of last-seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last-seen.*

(iv) *Proximity of time between the deceased being last seen in the company of the accused and the death of the deceased is important and if the time gap is so small that the possibility of a third person being the offender is reasonably ruled out, on the solitary circumstance of last-seen, a conviction can be sustained.*

(v) *Proximity of place i.e. the place where the deceased and the accused were last seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.*

(vi) *Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the circumstance of proximity of time and proximity of place while applying the last-seen theory.*

(vii) *The relationship of the accused and the deceased, the place where they were last seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place of the crime is the matrimonial house and the time the husband and wife were last seen was the early hours of the night would require said three factors to be kept in mind while applying the last-seen theory.*

The above circumstances are illustrative and not exhaustive. At the foundation of the last-seen theory, principles of probability and cause and connection, wherefrom a reasonable and a logical mind would unhesitatingly point the finger of guilt at the accused, whenever attracted, would make applicable the theory of last-seen evidence and standing alone would be sufficient to sustain a conviction.”

(emphasis supplied)

Conclusion

7. In light of the above discussion and analysis, this Court finds that the guilt of the appellant for the murder of the deceased has been proved beyond reasonable doubt and duly supported by circumstantial evidence by the prosecution. Consequently, this Court finds no error in the impugned judgment of conviction and order on sentence by the learned Trial Court.

8. Appeal is accordingly dismissed.

9. Copy of this judgment be uploaded on website and be also sent to Superintendent, Tihar Jail for intimation to the appellant and updation of records.

**(ANISH DAYAL)
JUDGE**

**(MUKTA GUPTA)
JUDGE**

NOVEMBER 11, 2022/mk