

(2007) 04 DEL CK 0044

In the Delhi High Court

Case No : Criminal Appeal No's. 533 and 640 of 1999

Dalip Ram

APPELLANT

Vs

State (NCT of Delhi)
 Sunil Kumar Vs State

RESPONDENT

Date of Decision : 26-04-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173, 313
Penal Code, 1860 (IPC) — Section 302, 34, 395, 396, 397

Citation : (2007) 96 DRJ 70 : (2007) 2 ILR Delhi 423

Hon'ble Judges : R.S. Sodhi, J;H.R. Malhotra, J

Bench : Division Bench

Advocate : Sudha Nalwa, in Criminal Appeal No. 533/1999, Rajesh Mahajan, in Criminal Appeal No. 640/1999 and B.S. Rajesh Agrajit and Indu Bala, in Criminal Appeal No. 482/199, for the Appellant; Richa Kapur, for the Respondent

Final Decision : Allowed

Judgement

H.R. Malhotra, J.—By this judgment we are disposing of three appeals being appeal Nos.533/1999, 640/1999 and 582/1999 as all the three appeals arise out of common judgment rendered by Additional Sessions Judge dated 26th July, 1999 convicting the appellants Sunil, Sushil Kumar @ Navin, and Dalip Ram and others two, namely, Ganga Dhar and Lalit (proclaimed offenders) for commission of offences punishable u/s 302/34 IPC and also u/s 396/34 IPC and sentenced them vide order dated 27th July, 1999 to undergo life imprisonment besides imposing a fine of Rs. 5,000/- each and in default of payment to undergo further sentence of imprisonment of six months.

2. Feeling aggrieved, by the Judgment these three appellants have preferred the present appeals assailing the impugned judgment of conviction and the sentence claiming themselves to be innocent.

3. Prosecution case as set out in the charge sheet sent u/s 173 Cr.P.C. and also incorporated in the impugned judgment by Additional Sessions Judge is that two Sadhvis, viz, Ma Nirmal Jyoti and Ma Kamal Jyoti used to reside in Nirmal Sadhna

Ashram, situated at 656, Ganesh Nagar-II, Shakarpur, Delhi where accused Sunil also used to work as domestic servant and he continued working there for 8/10 months. Though he left the job after that but he would visit the Ashram to meet Ma Nirmal Jyoti and Ma Kamal Jyoti.

4. On 2nd December, 1994 accused Sunil came to the Ashram in the evening along with 4/5 other boys and met Ma Nirmal Jyoti and Kamal Jyoti and sought their permission to stay in the Ashram for the night. On that night accused Sunil introduced one of the boys as Sushil @ Navin and told Matajis that he knew all kind of domestic work including cooking.

5. Accused Sushil along with other boys stayed in the Ashram on that night i.e. 2nd December, 1994 but left the Ashram in the morning.

6. On the morning of 4th December, 1994, two Sadhvis, namely, Ma Nirmal Jyoti and Ma Kamal Jyoti were found dead in their room. PW-25 Pandit Ravi Prakash who used to sleep out side their room and used to awake them up was told by Pandit Vinod Jha that Ma Nirmal Jyoti was not responding to the awakening call, on this Pandit Ravi Prakash along with Pandit Vinod Jha, Avadesh, and other residents of Ashram went to the room of Matajis and knocked the door but there was no response from Matajis. Thereafter PW-25 went to the house of Veena Arora who was the closed relation of Mataji and called her. On peeping through the window, they saw that Matajis were lying on the floor covered with quilt. It was noticed that door of the room was closed from inside and other door which opened in the hall of the Mandir was also found locked. Immediately the police of police station Shakarpur was informed who in turn recorded DD No. 8 and inspector Niranjana Singh along with other police officials reached there and they also saw through the window and noticed the dead bodies but since the door was closed from inside, Therefore, they made forced entry into the room after breaking open the window of the room and on entering the room, police found Ma Nirmal Jyoti and Ma Kamal Jyoti lying dead and their belongings were lying scattered in the room.

7. Further, the police officials found that an electric wire was tied around the neck of Ma Nirmal Jyoti along with cotton cord and the electric wire was also found wrapped around the neck of Ma Kamal Jyoti. Thereafter investigation commenced and Inspector Niranjana Singh recorded statement of Veena Arora on the basis of which a case u/s 302/34 IPC was registered. Police came into action and proceeded to carry out further investigation including getting the site photographed and taking into possession the articles lying scattered in the room and also electric wire and the cord. The bodies were sent for postmortem examination where doctor opined that the cause of death was due to asphyxia resulting from strangulation.

8. The investigation pointed out the involvement of the accused persons as the police worked on the theory that these five persons had come in the Ashram the preceding night and stayed there that night with a view to commit robbery and

they had committed murder of these two sadhvis (hereinafter referred to as deceased). Since these three accused and their two accomplices were not found the following morning needle of suspicion pointed to these two persons and they started looking for the accused persons.

9. On 19th July, 1995 accused Sunil and Sushil @ Navin were arrested by the police of District Darbhanga, Bihar and accused Dalip Ram was subsequently arrested by Inspector Ram Chander. During the course of investigation, accused Sunil and Sushil got recovered one suitcase containing articles stolen from the room of the deceased. Third accused Dalip Ram also during the investigation broke down and got recovered belongings of the deceased.

10. On completion of investigation, the charge sheet was filed in the court of Metropolitan Magistrate who in turn committed the same to the court of sessions, it being triable by the Sessions Court.

11. The appellants having denied charges framed against them, prosecution proceeded to substantiate their case and examined as many as 26 witnesses. Believing the testimonies of these witnesses, Sessions Judge recorded his finding and convicted the appellants.

12. We have heard Learned Counsel appearing for the appellants and also Learned Counsel for the State. We have also looked into the entire evidence adduced by the prosecution which included public witnesses, police officials and doctor. The statements of the appellants recorded u/s 313 Cr.P.C. have also been perused where the accused while claiming themselves innocent termed the prosecution case as false and foisted upon them.

13. This is a case where nobody had seen commission of crime, Therefore, this case is based on circumstantial evidence. In order to sustain conviction in a case hinges on circumstantial evidence, it is settled law that circumstantial evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused and thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. That is to say the circumstances should be incapable of Explanation on any reasonable hypothesis save that of the accused's guilt. We are saying so on the strength of judgment rendered by Apex Court reported in Chandmal and Another Vs. State of Rajasthan, titled as Chandmal and Anr. v. The State of Rajasthan

14. In the light of this judgment and also another Judgment rendered by Division Bench of this Court reported in 2005 (1) JCC 346 titled as Mohd. Zaffir v. State on this aspect, this Court has to decide whether prosecution has been able to bring their case within the four corners of these cardinal principle of law where from it can be concluded that only these accused persons were responsible for commission of crime and none else.

15. The prosecution case primarily revolves around the presence of the appellants on 2nd December, 1994 in the Ashram. It has come in evidence of PW-1 that accused Sunil had already been working in the Ashram for about 8/10 months and about rest of the accused persons these witnesses completely denied having seen them on the fateful night or even prior to that in the Ashram. Since this witness did not support the prosecution case, prosecutor had sought permission to cross-examine this witness. He was thoroughly cross-examined on the aspect of establishing the presence of the rest of the two accused. This witness stuck to his testimony by deposing that he had not made statement before the police stating that accused Sunil, Sushil and Dalip Ram along with two more persons had stayed in Ashram on 2nd December, 1994. Similarly, PW-2 Smt.Aruna was able to identify accused Sunil only as he has been working there for quite some time but as regards the rest of the accused she completely denied the factum of their presence on that night. She further deposed in his examination-in-chief that many persons used to visit the Ashram and, Therefore, she cannot say if any of the accused persons present in court one day or two days prior to the 4th December, 1994. She too was cross-examined by the prosecutor but of no avail to the prosecution. These two witnesses seem to have been cross-examined by the prosecutor with a view to establish that these were the persons who were last seen in the company of deceased before commission of murder and that they escaped immediately thereafter and, Therefore, their conduct shows that they were responsible for commission of crime.

16. Besides these two witnesses prosecution also examined PW-13 Avdesh, PW-14 Satan Dass. Similarly, PW-9 Veena Arora and PW-25 Ravi Prakash were also the witnesses of the last seen evidence. PW-3, 4, 6 were examined for the purposes of proving the recovery of the robbed articles, whereas rest of the witnesses i.e. PW-7, PW-8 and PW-12 are formal witnesses. They are photographer, doctor, draftsman and other members of the crime team. Their testimonies have not been crucial and important, it is not being dealt with as the prosecution case primarily hinges on the evidence of the persons who had seen accused persons immediately prior to the murder i.e. last seen evidence and also other witnesses in whose presence recoveries have been effected.

17. We have perused the testimonies of PW-1, PW-2, PW-13 and PW-14 to find out if these witnesses were really able to prove that they had last seen the accused persons in the Ashram. We may observe here that implicate last seen evidence would not be sufficient to bring home the guilt to the accused persons. Prosecution is also under legal obligation to prove that they had come there with certain motives or that there was enmity between the deceased and the persons who were last seen in the company of the deceased. In the case in hand, reading of the testimonies of PW-1 and PW-2 absolutely belies the theory of the prosecution as these two witnesses did not support their case. They had not seen the rest of the accused persons on that fateful night. They however, admitted that they had seen accused Sunil as he had worked there for 7 or 8 months as domestic. Therefore, the presence of Sunil was natural on that day, he being

employed there.

18. It is urged by Learned Counsel for the appellants that these witnesses did not support the prosecution case and they were declared hostile and cross-examined by the prosecutor and Therefore, testimonies of these witnesses cannot be taken as a truthful evidence of the prosecution. Learned Counsel for the appellants has raised another interesting argument on the aspect of evidentiary value of hostile witnesses. This is with regard to the manner in which the prosecutor ordinarily cross-examine the witnesses. He has urged that instead of putting statement of witness recorded u/s 161 Cr.P.C. in the mouth of the witness at the time of cross-examination for the purposes of confronting them with their earlier statement, question should have been asked in the affirmative putting the prosecution case followed by the suggestions to the witnesses in terms of his statement recorded u/s 161 Cr.P.C. He has supported his arguments on the strength of judgment rendered by our own High Court in *Satish Kumar v. State* 1995(4). In the said judgment his Lordship while appraising the evidence of the hostile witnesses and cross-examining part of the prosecutor observed as under:

We are surprised that the Additional Sessions Judge, who recorded the evidence, had lost sight of such elementary legal principles of taking evidence in a case. The prosecutor who put the questions in this form to elicit the answers was also perhaps completely ignorant of the legal procedure for cross-examining the witness produced by the prosecution itself. The questions which ought to have been put to the witness while cross-examination by the prosecutor, should have elicited facts and not statements made to the police. So, this part of the testimony of the witness has to be completely ignored from consideration as to what she had stated to the police.

19. While applying the principles laid down in the aforesaid case, we find that the witnesses were only confronted with their earlier statement and no affirmative question was asked from them wherefrom presence of the accused persons could be established to prove the last seen evidence. Though, PW-9 Veena Arora testified that she had seen accused persons on 3rd December, 1994 but reading of her examination-in-chief and also cross-examination part makes us to hold that her testimony does not inspire the confidence primarily for the reason that her presence on the night of 3rd December, 1994 in the Ashram has not been fully established. More so, there are certain contradictions noticed between the statement of PW-13 and PW-14. PW-13 stated that Matajis (since deceased) cooked their food themselves whereas PW-14 had stated that Avadesh had cooked food for Matajis. Though, these contradictions may not be of very vital in nature yet caused dent in the prosecution case as it makes the presence of these two witnesses on the night of occurrence doubtful. PW-25 Ravi Prakash who too has been cited as witness of the last seen but his statement was recorded after seven months of occurrence.

20. We may notice that the solitary circumstance of last seen by itself, is not sufficient to bring home the offence of murder in a case based on circumstantial

evidence only. There has to be a complete chain of circumstances leading only to the inference of guilt of the accused and ruling out every hypothesis of their innocence. This we are saying on the strength of various judgments reported in Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir,

21. Now coming to the aspect of recovery of the robbed articles from the accused persons. The accused Sunil was arrested after about eight months of the commission of crime. PW-3 and PW-4 are the witnesses relating to the recovery of articles. He testified that Sunil and Sushil had led the police party to a jhuggi near Kishan Kunj, Yamuna Pushpa and the witnesses had also accompanied them. He further testified that in the Jhuggi one attache was lying there whose key was not with the accused persons and, Therefore, the lock of the attache was broken by the police. He further deposed that there were 4/5 glasses of steel, one murti of Lord Hanuman Ji , one piece of cloth made of rasham of about 8/10 meters and one saree of white colour of Arkandi and some other clothes belonging to the Ashram were recovered. Since this witness did not speak in the line with the prosecution case, Therefore, he was allowed to be cross-examined by the prosecutor in regard to the recovery effected from the accused Sushil. In cross-examination, he denied having made statement to the police that accused Sushil got recovered one old box of iron from the same jhuggi. On further cross-examination by the prosecutor he denied that iron box was opened in his presence. It is highly improbable that the offender would retain the robbed articles with him for about 8 months. In ordinary course of nature the offender would either dispose of the stolen articles in order to make the money or put the same to use and not keep as ornamental in their house particularly knowing that they were robbed articles and could be a piece of evidence against them if arrested in the case. Even otherwise looking to the nature of articles allegedly robbed by the accused persons, it is very difficult to believe that the accused persons would commit murder of two ladies for such a petty articles which in substance had no value at all capable of alluring the accused persons to commit robbery of these articles. More so, the manner in which the recoveries were effected from the accused persons itself caused doubt in the prosecution case as the photographs taken at the spot by the crime team indicate that there were some utensils, clothes and sarees lying scattered in the room where the murder had taken place. If it is so, then the recovery shown from the accused persons of these articles does not inspire confidence. It is also worthwhile to mention here that such articles were never put to test identification to those persons who had occasion to identify such articles confirming that articles shown to them which were recovered from the accused persons were actually belonged to the Ashram and were lying in the room of the deceased persons. Merely on the pointing of the accused persons that they had stolen these articles from the room of the deceased would not suffice as the prosecution was under legal obligation to prove this important and vital aspect in its strict sense which they failed to prove. P.Ws 1,2,3,13,14 and 25 were the persons who were residing in the Ashram. In order to confirm these articles they were required to be got identified

by them but it was not done in this case. What further makes the recovery suspicion is that P.W. Veena Arora at whose instance the first statement was made which was treated as ruka did not say anything about the robbery aspect and perhaps for that reason the FIR was registered only u/s 302 IPC read with Section 34 IPC and Provisions of Sections 395, 396 and 397 were not added in the FIR. PW-6 Munna who was also the recovery witness did not support the case of the prosecution at all as he turned hostile and in his cross-examination nothing beneficial to the prosecution came out. The trial court itself disbelieved such recovery from accused Dalip. For all these reasons, we are of the view that the articles shown to have been recovered from the accused persons lacks genuinity on the part of the prosecution.

22. There are certain more crucial events which create doubt in our mind about the involvement of these accused persons and also make us to believe that there could be some other persons except the accused persons involved in the murder. It has come in evidence that there was tenancy dispute between the deceased and one doctor and in this regard the deceased had discussed with PW-9 at late night i.e. about 11.15 p.m. on that fateful night and that the deceased had asked the husband of PW-9 to stay there for more time in the Ashram because of dispute of land between the deceased and the doctor. The husband of PW-9 was the real brother of Mataji. Was there so serious apprehension to the deceased that some wrong might not happen to her on that night and for that reason they insisted the husband of PW-9 to stay there, as has come in evidence regarding the dispute between Mataji and the doctor relating to the land of Ashram which belongs to the trust and it also came in evidence in the trial court record appearing at page 607 that amongst missing articles certain documents pertaining to the property of the trust were also there. This theory also depicted during the investigation. The Investigators were under legal obligation to work on this theory as well. The Investigators do not seem to have investigated the matter in that directions but made up their mind to focus their investigation on the accused persons as they had left next day of the commission of crime. We may say that even otherwise there was no evidence on record that they were required to stay there for long. It appears to be highly improbable that they will come in the Ashram preceding night and would commit murder of the two ladies without motive. If at all they had to commit this act they would in ordinary course of nature stay there for few days to take stock of the situation and then execute their evil design. Merely because they left same day , cannot be said that they were only persons who committed murder particularly when there was no other clinching evidence on record connecting that with the crime more particularly when another theory also came on record that there were some property dispute between the deceased and one doctor who was never interrogated by the police. Another important facts which remained unanswered by the prosecution is that dead bodies were found in the room which was bolted from inside. How the assailants entered in the room and from which way they had gone after commission of crime is not explained by the prosecution. It has

also come in evidence that the key of the main gate of the Ashram remained with PW-29 who would lock the main gate at night and open the same in the morning. How these accused persons managed to escape has also not been explained by the prosecution. All these relevant factors were required to be proved by the prosecution which they failed to prove.

23. The trial Judge seems to have proceeded on the basis of recovery effected from the accused and the last seen evidence which according to us is very weak type of evidence and such links do not make complete chain of events and, Therefore, the accused persons are entitled to derive benefit of such doubts.

24. Accordingly while allowing the appeals we set aside the impugned judgment and direct that the accused persons be released forthwith if not required in any other case.