
(2013) 03 DEL CK 0037

In the Delhi High Court

Case No : Criminal Appeal No. 1200 of 2011

Dharmender Kumar Pal

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 07-03-2013

Acts Referred:

Arms Act, 1959 — Section 27
Evidence Act, 1872 — Section 114(a)
Penal Code, 1860 (IPC) — Section 302, 392, 397

Citation : (2013) 03 DEL CK 0037

Hon'ble Judges : Siddharth Mridul, J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Anu Narula, for the Appellant; Richa Kapoor, APP, for the Respondent

Final Decision : Dismissed

Judgement

Siddharth Mridul, J.—Dharmender Kumar Pal impugns his conviction under Sections 302 and 392 /397 of the Indian Penal Code, 1860 (for short "IPC") vide judgment dated 07.02.2011. By order dated 11.02.2011, the appellant has been sentenced to rigorous imprisonment for a term of 7 years for the offence punishable u/s 392 /397 IPC and fine of Rs. 5,000/- and in default thereof, to undergo simple imprisonment of two months. For the offence u/s 302 IPC, the appellant has been sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 20,000/- and in default of payment of fine, simple imprisonment for nine months. The appellant is further sentenced to rigorous imprisonment for a term of 5 years u/s 27 Arms Act 1959 and a fine of Rs. 5,000/- and in default of payment of fine, simple imprisonment for two months. All the sentences are to operate concurrently. The case of the prosecution, which has been accepted by the trial court, is that on 14.05.2007, the appellant was deputed as Gunman/Guard at NDPL Zonal Office, Tibia College, New Rohtak Road, Delhi. Between 3:00-3:40 p.m., the appellant in order to commit theft, caused death of Cashier Parmod Pathak by firing at him and also removed Rs. 2,75,000/- from the said office. The weapon of offence i.e. rifle was found lying at the spot itself and was

seized during the investigation. The FIR (Ex. PW-1/A) was registered at 12:40 a.m. on 15.05.2007. The appellant was apprehended at around 5:00 a.m. on 15.05.2007 vide arrest memo Ex. PW-4/J and recovery of cash of Rs. 2,75,000/- was effected from him which was seized by virtue of Ex. PW-4/G.

2. The homicidal death of the deceased is undisputed and stands proved by the statement of PW-7, Dr. Vinod, Assistant Professor, Department of Forensic Medicine, Santosh Medical College, Ghaziabad, U.P. PW-7 has conducted the post-mortem and as per the post-mortem report (Ex. PW-7/A) the deceased had sustained following injuries:-

i) Fire arm entry wound 1.0 cm x 0.8 cm x cavity deep present over back of right side of chest with margins inverted and present in 5th intercostals space.

ii) Fire arm exit wound 3.4 cm x 2.8 cm x cavity deep present over front of right side of chest 7.2 cm above and inner to right nipple with margins averted and present in second inter costal space.

3. PW. 7 Dr. Vinod opined that the death was due to hemorrhage and shock consequent upon fire arm injuries via injury Nos. 1 and 2. All injuries were ante-mortem in nature. Fresh in duration they could be caused due to rifled fire arm. Injury Nos. 1 and 2 were sufficient to cause death in ordinary course of nature.

4. The next question is whether the appellant had caused the said injuries on Parmod Pathak, the deceased. The factum of appellant's employment is established by the contract of employment vide Ex. P-15 and the testimony of PW-4 Sh. Vanesh Tyagi who has stated that the appellant was deputed with NDPL office on the date of occurrence.

5. Upon careful analysis of the testimonies of witnesses PW-2 Satish Yadav, PW-3 Om Dutt and PW-4 Vanesh Tyagi, the sequence of events that emerge from the prosecution version is that around 3:30 pm, the appellant was seen leaving the Cash Centre. PW-3 has deposed that thereafter, the cash collection team came to the centre and after sometime went away. After passage of some more time, the cash collection team came again and an attempt was made to open the room of the cashier but to no avail. PW-2 has deposed that around 7:15 pm he received information at his office at UP Samaj Parwana Road, Pitampura that the cashier and the gunman at Tibiya College Cash Collection Zone 423 were not reported to be there and the cash collection centre was closed. He was directed to look into the matter. He informed PW-4 of the same and asked him to reach the spot. PW-4 has deposed that he reached the spot at around 8:30 pm where he met PW-3 and a call was made to the police. The police arrived at the spot and efforts were made to break open the lock. Once the lock was opened, the deceased was identified and PW-23, IO Umesh Singh recorded statement of PW-2 and prepared the rukka Ex PW 23/A. PW-16 HC Balram took the rukka to PS at about 12:30 am and the FIR was registered at 12:40 am on 15.05.07.

6. On perusal of the documents produced by the prosecution on the aspect of

registration of FIR, we find no infirmity arising from the same and their evidence inspires confidence. The crucial documents which set the criminal justice investigation into motion such as the Fardbayan, Tehrir and the Seizure Memo of the rifle (Ex. PW-4/E) and the cartridges have been prepared with promptitude and are contemporaneous documents which rule out the scope of confabulations consequent to false implication.

7. The prosecution relies upon statement of Om Dutt PW-3, to prove the last seen allegation to incriminate the appellant. Reliance has been placed on the statement of Sunil Kumar PW-10, who claims to have seen only the appellant in the company of the deceased, soon before the occurrence.

LAST SEEN EVIDENCE

8. PW-3, Om Dutt has deposed that on the date of occurrence at about 3:30 p.m., he saw the appellant come out from the cashier cabin and pass through the complaint centre. He was having 2 bags with him at the time and he was not in uniform. Thereafter, the cash collection team arrived but went away on finding the Cashier's room to be shut. An attempt was made to contact the Cashier, Pramod Pathak on his mobile but without success. However, the ring of the mobile could be heard from outside the Cashier's door. Since the room was locked, the police was called and cashier room was opened by breaking the handle of the door. Pramod Pathak was found lying dead on his chair.

9. PW-10 has deposed that he saw the appellant on the date of incident. PW-10 is a cashier at the ATM machine at NDPL Office and at around 3:00 p.m., a cash collecting team had come to the cash section and after collecting the cash from the other centre left from there. PW-10 has categorically stated that at that time he saw the appellant and the deceased, Pramod Pathak at the second cash counter. The appellant was not in his uniform and was carrying a gun different from the one he carried on a daily basis.

10. Learned Counsel for the appellant has submitted that it is improbable that PW-3 would not have heard the gun shot when it was fired and alternately heard the mobile phone ringing from inside the room when attempt was made to contact the deceased.

11. It was also urged by the learned counsel for the appellant that both the witnesses have stated that the appellant was not in uniform. It is pointed out that it has been consistently stated by PW-3, PW-4 and PW-10 that the guards on duty were required to be in uniform and the appellant had been identified to be in civil clothes on the date of the incident.

12. With reference to the contention that PW-3 must have heard the gun shot at the time of occurrence, PW-3 has stated in his cross examination that the room of the Cashier being sound proof and he did not hear the gun shot being fired. PW-3 has also stated that the distance from where he was present and the spot from where he saw the appellant coming out from the Cashier's cabin was about

30-40 metres.

13. We have perused the scaled site plan Ex. PW-14/A. The cashier's cabin is at some distance from the complaint centre from where PW-3 last saw the appellant. It is not inconceivable that he did not hear the gun shot being fired. Distance can be a relevant factor, as it has been explained by PW-3 by stating that the room was sound proof. When attempts were made to contact the deceased through his phone, PW-3 was right outside the cabin door and it is possible that he had heard the mobile phone ringing.

14. We have also perused through the photographs of the crime scene. It is noticed through Ex. PW-17/17, Ex. PW-17/18 and Ex. PW-17/19 that the Cashier's Cabin was partially in glass walls. It may be probable that a person just outside the cabin on putting his ear next to the glass window could have heard the mobile ringing. Sound of a gunshot may not have been audible to a person at a distance of 30-40 metres. In fact the gunshot was not heard. However, it cannot be denied that the rifle found at the place of occurrence was fired and the deceased Promod Pathak had died because of the gun shot wound. It is noticed that no suggestion was put to PW-3 to the effect that the cashier's room was not sound proof and his testimony remains unchallenged on the said aspect.

15. Coming to the aspect of the appellant being described as being in civilian clothes on the date of occurrence, what is relevant is the fact that he was categorically identified by PW-3 and PW-10. The testimonies of PW-17, PW-23 and PW-27 demonstrate that there was a change room at the NDPL Centre where the guards used to change into their uniform. Even otherwise nothing turns on the contention that the appellant was not in uniform at the time. It is not the case of the appellant that these witnesses saw someone other than the appellant on the date of occurrence and neither have they been cross examined in this regard. Both PW-3 and PW-10 are persons who have met and seen the appellant at previous occasions as well. They could not have wrongly identified the appellant merely because he was not in uniform.

16. All the witnesses to the last seen evidence are natural and probable witnesses to the presence of the appellant. They bear no animus against the appellant and neither has he alleged the same. The name of the appellant was mentioned in the FIR itself which was recorded soon after discovery of the offence.

17. In the case reported as Arvind (a), Chhotu and Ors. v. State: CrI. A. 362/2001 decided on 10.08.2009, this High Court has discussed the significance of last seen theory and observed:-

25. The last seen theory relates to evidence which is not direct evidence i.e. is circumstantial evidence. It is settled law that to sustain a conviction on circumstantial evidence, the chain of circumstances has to be so complete that the finger of accusation unerringly points towards the guilt of the accused and

rules out the innocence.

26. The foundation of the last seen theory is based on principles of probability and cause and connection.

27. Where a fact has occurred with a series of acts, preceding or accompanying it, it can safely be presumed that the fact was possible as a direct cause of the preceding or accompanying acts, unless there exists a fact which breaks the chain upon which the inference depends.

28. As observed in the decisions reported as Mohibur Rahman and Another Vs. State of Assam, , there may be cases where a single circumstance is of a kind that 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 or should own the responsibility for homicide.

29. Thus, at the heart of the matter of a circumstantial evidence is the principle: of a rational mind being persuaded to reach an irresistible conclusion qua the guilt of the accused.

30. It is the quality of evidence and not the number which matters. A criminal trial is not a race at which the winner is determined with reference to the length run by the prosecution or the defence. It is also not a number game where the number of circumstances would determine the guilt or otherwise.

18. It is therefore, observed that there is no material infirmity, contradiction or variation in the testimony of PW-3, the telephone operator at the NDPL Office and PW-10 whose presence at the scene of crime is not doubted. Therefore, the evidence proving presence of the appellant to be last seen with the deceased stands established.

WEAPON OF OFFENCE

19. It was contended by the Learned Counsel for the appellant that the weapon of offence did not belong to the appellant and therefore his involvement in the crime can be doubtful. Perusal of post-mortem report Ex. PW-7/A makes clear that the death of the deceased has been consequent upon fire arm injuries that were caused from near range fire with a rifled firearm. The weapon of offence Ex P-5 was lying at the spot and was seized during the investigation. The bullet lead Ex P-4 was also found and lifted from the spot. The weapon of offence was issued to Ajay Kumar PW-20 who was also working as a guard at NDPL office but was on leave on 14.05.2007.

20. Ajay Kumar, PW-20 has stated that he had left his rifle in the almirah at NDPL office, Keshav Puram on 10.5.2007. One key of the said almirah used to remain with the appellant and one with himself. Thus, both the appellant and PW-20 used to leave their rifles in the almirah at the NDPL Office. According to PW-20, there were three live cartridges in his rifle when he left the said rifle in the almirah on 10.05.2007. Vide Ex. PW-4/E the said rifle Ex P-5 was seized from the

spot and at the time it was carrying two live cartridges. On 17.5.2007, the gun of the appellant and four live cartridges were recovered from his almirah from NDPL office, Keshav Puram vide seizure memo Ex. PW-18/A.

21. It was also contended on behalf of the appellant that there is an inherent contradiction in the testimonies of all the prosecution witnesses on whether the gunmen carried their guns home or whether the same were kept at the NDPL Office. This therefore, creates some doubt regarding the involvement of the appellant. This doubt is further fortified in view of the fact that the weapon of offence belongs to PW-20. Our attention was directed to the testimonies of PW-2, PW-3, PW-4, PW-18, PW-20, PW-23 and PW-27. We do not find any inherent contradiction in the same. PW-2, PW-3 and PW-4 have testified that they did not know where the guards kept their arms and ammunition. PW-27 was employed as a Branch Manager with G4S Company and has deposed that the gunmen carried their guns after duty. There are good reasons to disbelieve and not accept this statement. It would be difficult for anyone to carry his gun in public transport. It could be objectionable and dangerous. PW-27 has also deposed that the gunmen were issued a personal licence for the guns that they used to carry. The law requires that the weapons should be in the custody and possession of the licensee. This explains the version of PW-27.

22. It was difficult for PW-27 to accept that their employees contrary to the terms of the license, used to leave the rifles in the complex. Statement of PW-18 is to the effect that PW-27 had shown the change room where the gunmen kept their rifles. PW-23 has deposed that the gunmen kept their guns in the almirah. PW-20 has stated that guns used to be kept in the almirah after duty and one key each of the almirah remained with him and the appellant. The version of PW-20, PW-23 and PW-18 is correct and should be accepted. The fact is that both guns were found in the premises. When the police inspected the spot, the rifle of the appellant and the weapon of offence were both found and seized from the spot. PW-20, Ajay was on leave and the appellant was missing which clears any doubt or ambiguity regarding the routine of keeping the arms and ammunition within the NDPL premises.

23. On a conjoint reading of the testimony of PW-10 Sunil Kumar, who noticed a different gun in the hands of appellant and PW-20 Ajay Kumar whose gun was used by the appellant, and also in view of CFSL report Ex. PW-23/I, it is clear that the weapon of offence was accessible to the appellant. The recovery of gun of the appellant from NDPL Office Keshav Puram further indicates that the appellant was seen with the rifle of PW-20 Ajay Kumar on the day of occurrence. The appellant was seen with the rifle of PW-20 Ajay Kumar, and used the same while committing the offence.

RECOVERY

24. At the scene of crime, a rifle was seized from the cashier's table and was later identified to be the weapon of offence. The rifle contained two live

cartridges. One pay in slip in duplicate of IDBI Bank, North Delhi was also found lying on the table along with some loose cash.

25. Recovery of the stolen cash, in exact amount with all the currency notes bearing stamp of NDPL of Counter No. 485 with date 14.5.2007, is the next link in the chain of incriminating circumstances pointing towards the guilt of the appellant. The appellant was found in possession of two bags one of which had cash amount of Rs. 2,75,000/- when he was apprehended and arrested vide arrest memo Ex. PW-4/J. A presumption is raised against the appellant u/s 114(a) Indian Evidence Act, 1872 when he is found to be in possession of stolen goods. The appellant has not put forth any explanation to justify the possession of substantial amount of cash with stamp of NDPL.

26. Consequent to the disclosure statement Ex. PW 4-/J, the appellant got recovered the empty cartridge used at the time of occurrence. The empty cartridge was recovered from outside the Cash Collection Centre, NDPL near an electric pole.

27. Learned Counsel for the appellant has urged that there is a discrepancy and contradiction in the recovery of the bullet at the instance of the appellant. While PW-23 IO Umesh Singh has deposed that the empty cartridge was recovered from near the electricity pole outside the office of NDPL, the testimony of PW-26 SI Lekhraj Singh evinces that the cartridge was recovered from House No. 66 A/4, New Rohtak Road.

28. We have perused the site plan indicating the place of recovery marked as Ex PW 23/E. The apparent discrepancy stands clarified by the site plan in as much as the empty cartridge is recovered from an electric pole and the said electric pole is just outside House No. 66 A/4. The said spot has also been photographed and appears on record as Ex PW 17/6 and Ex PW 17/7 thereby lending additional authenticity to the recovery at the instance of the appellant. It is also noticed that the proximity between the scene of crime and the place of with the natural line of probabilities that after commission of crime, the appellant disposed of the empty cartridge outside the Cash Centre, NDPL to get rid of the evidence connecting him to the crime.

29. It was further contented that the fact that cash amount of Rs. 37,000 was found on table, belies the allegation that the appellant intended to commit robbery. Also the fact that the license of the appellant was recovered from his residential room is not in consonance with the allegation that the appellant was absconding with cash. PW-2, PW-4, PW-23 and PW-26 have deposed that loose cash was found lying on the table. The appellant was arrested and a cash amount of Rs. 2,75,000 was in his possession at the time. The fact that the appellant did not pick up the amount of Rs. 37,000 does not take away from the fact that the appellant took Rs. 2,75,000. At the time of commission of crime, the goal being to flee as soon as possible, the appellant may have considered it inconvenient to collect the loose cash on the table. Also the fact that the license

of the appellant was recovered from his residential room cannot lead to the conclusion that he was not absconding or his arrest has been wrongly shown.

MEDICAL AND SCIENTIFIC EVIDENCE

30. The medical and scientific evidence brought on record also confirms the version of the prosecution. The reports of autopsy surgeon Ex. PW 7/A and Ballistic expert Ex. PW 23/I connect the other circumstantial evidence established on record. The used cartridge recovered at the instance of appellant was of the rifle (.315 bore) which was used to commit the offence. There is nothing to affect the credibility of medical and scientific evidence which has further strengthened the case of the prosecution.

MOTIVE

31. The motive for the offence completes the link in the chain of incriminating circumstances that stand established against the appellant. The appellant reported for duty on the day of occurrence with a view to commit robbery. In the process of executing this illegal object, he voluntarily caused the death of the deceased.

32. On consideration of entire evidence and material appearing on the record, we find that motive is apparent and also stands reasonably proved. The cash of Rs. 2,75,000/- was found missing from the place of occurrence and the same was recovered from the possession of the appellant shortly thereafter. The appellant has not given any reasonable or plausible explanation about the possession of the cash. The recovery was effected in presence of independent witness PW-4 Vanesh Tyagi, who had no reason to depose against the appellant. His testimony therefore cannot be doubted. It can therefore be concluded that the prosecution has been able to establish that the appellant committed the offence with the clear motive to commit robbery.

DEFENCE OF APPELLANT AND EVIDENCE OF HANDWRITING

33. The appellant has pleaded that he was on leave since 12.05.2007 and that on that on the date of occurrence he was not on duty. He pleads being falsely implicated in this case in order to save the other guard Ajay PW-20, who has relatives in the Delhi Police.

34. Learned Counsel for the appellant has relied upon testimony of Devak Ram CW-1, Senior Scientific Officer FSL, Delhi to support his plea. The attendance register maintained at the NDPL office was seized and sent by the trial Court to FSL for examination. CW-1 has opined in his deposition that the purported signature of the appellant in the attendance register and the admitted signatures of the appellant received by him are not of the same person. In the same breath it was also argued that the supervisors, Pankaj and Bhagat who maintained the attendance register were not examined and this is a serious lacuna in the investigation as it could have afforded clarity on the aspect of marking of attendance.

35. Per contra the Learned prosecutor has contended that the testimony of CW-1 is by its innate nature is opinion evidence and the same must be accorded judicial acceptance only when it fits in the surrounding circumstances of the case as the science of handwriting is not a perfect science unlike the science of finger printing and therefore, the said evidence cannot be accepted ipse dixit.

36. The attendance register Ex. P8 was not relied upon by the prosecution. PW-4 Vanesh Tyagi is a Revenue Executive at NDPL and has deposed that the staff did not mark their attendance in his presence. The attendance register was kept at NDPL office, but it can be discerned that the said register was not under supervision and control of any person. Therefore, non-examination of Pankaj and Bhagat has not caused any prejudice to the appellant. The appellant and Ajay PW-20 were not employees of NDPL but of the security agency G4S Company. We have perused through the attendance register Ex P8 and it is apparent to the naked eye that there is a difference in signatures. The appellant could have intentionally manipulated his signature on the said register. There is ample ocular evidence in the form of statement of PW-3 Om Dutt, PW-10 Sunil Kumar and PW-27 Panish Dadi that the appellant was present on leave and his attendance is not marked but is blank.

37. Coming to the evidence of the handwriting expert, it cannot be conclusive proof of the fact that he was not on duty on the date of occurrence. Therefore, the only isolated evidence of handwriting expert, which is in the nature of opinion evidence, is not sufficient to shake the credibility of the other incriminating evidence proved against the appellant.

38. Learned Counsel for the appellant has also contended that there were other gunmen deployed at the NDPL Centre at the relevant time and in these circumstances the possibility of involvement of some person other than the appellant cannot be ruled out. In furtherance to this contention it was urged that the keys of the almirah where the guards/gunmen kept their guns was recovered from the very same room where the almirah was there. It was also urged that there are contradictions regarding the exact spot from where the key was recovered. PW-18 has deposed that the key was on the table in the room, PW-23 has stated that the key was lying near the window, PW-27 has deposed that the key was between the table top and drawer and PW-20 has deposed that the key was with him.

39. So far as the argument about other guards being present is concerned, it is by now conclusively established that the appellant was categorically identified by witnesses who were employed at NDPL, leaving the Cash Centre with two bags in his hand. These were the only two armed guards who used to keep their rifles in the almirah. No other person/guard has been named. The fact that the key of the almirah was found in the room where the almirah was kept does not make the prosecution version improbable. The appellant would have left his key in the room after using the gun of PW-20 for the commission of the offence. Nothing turns on the statement that PW-20 had his set of keys with him in view of the

fact that it is now clear that both the appellant and PW-20 had their separate key to the almirah. Regarding the contradictions in the exact spot from where the key was recovered it is difficult to comprehend the effect of such an immaterial contradiction considering the key was recovered from the premises and not from the appellant.

40. It is the case of the appellant that on the fateful day he was on leave and has been falsely implicated shield the real offender Ajay PW-20. The name of the appellant is mentioned in the FIR which was promptly recorded and there is no reference of PW-20. This is demonstrative of the fact that the appellant being on duty on the date of incident on being missing was suspected. PW-20 was also a suspected at that initial stage but the evidence of witnesses shows and proves that he was on leave and not present. Further, the appellant has not lead any defence to prove his presence elsewhere, neither has he made any clarification in his statement before the Court. The prosecution having established his presence at the spot, there is no evidence or material to establish absence of the appellant from the spot. Armed solely with the evidence of the handwriting expert, the appellant has not been able to lead evidence for us to disbelieve his presence at the spot or justify the possession of the cash he was found with.

41. Looking at the nature of evidence that is proved namely the medical evidence confirming homicidal death, the testimony of PW-3 and PW-10 establishing evidence of last seen, scientific evidence establishing the weapon of offence, the recovery effected at the instance of the appellant and the motive for murder of deceased, it can be safely held that the chain of circumstances pointing towards the guilt of the appellant is complete and the possibility of his innocence is ruled out. In view of the aforesaid, we dismiss the appeal and uphold the conviction and sentence awarded to the appellant. The appeal is disposed of.