
(2012) 03 DEL CK 0361

In the Delhi High Court

Case No : Criminal A. No. 734 of 2011 and Criminal M.B. No. 1010 of 2011

Kamal

APPELLANT

Vs

The State (N.C.T. of Delhi)

RESPONDENT

Date of Decision : 28-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 302

Citation : (2012) 3 JCC 1537

Hon'ble Judges : S.P. Garg, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Madhav Khurana, Amicus Curiae with Mr. Danish, for the Appellant;
Sanjay Lao, APP. for the State, for the Respondent

Final Decision : Allowed

Judgement

S.P. Garg, J.—The present appeal is directed against the judgment dated 21.03.2011 and order on sentence dated 22.03.2011 of Ld. ASJ in SC No. 18/2009 by which he was convicted for committing the offence punishable u/s 302 IPC and sentenced to undergo imprisonment for life with a fine of Rs. 2000/-. The prosecution alleges that on 16.08.2005 at about 7.30 A.M. Daily Diary (DD) No. 5 (Ex. PW-17/A) was recorded at police post Sector-4, R.K. Puram, New Delhi on receipt of information from the police control room that a dead body was lying in a park near Masjid, Sector-3, R.K. Puram. The investigation was assigned to ASI Raghubir Singh. Sub Insp. A.K.Singh (PW-17) with Con Rajender reached the spot and found a dead body lying in the park. Since no eye-witness was available at the spot PW-17 (SI A.K.Singh) made an endorsement over DD No. 5 (Ex. PW-17/A) and sent the rukka through Const. Rajender for registering the case u/s 302 IPC. Insp. Om Prakash, SHO, PS R.K. Puram took over the investigation. He summoned the dog squad, crime team and got the scene of incident photographed. He seized a blood stained stone, a pocket diary, blood stained grass and earth, a pair of cream coloured slippers and prepared necessary seizure memos. One Abdul Rehman was contacted as his

mobile number appeared in the pocket diary; he identified the dead body to be that of Kokil Yadav. During the course of investigation, the IO prepared brief facts and sent, the dead body for post-mortem. Dr. Alexander conducted the post-mortem IO recorded the statements of the witnesses conversant with the facts and it emerged that the deceased was last seen alive with accused Kamal on 15.08.2005 at about 7/8 P.M. The police set out to apprehend the accused but he could not be traced.

2. On 17.08.2005, at the pointing out of the secret informer, the accused Kamal was apprehended from near Syndicate Bank, Subji Mandi, Sector-4, R.K. Puram and during personal search (conducted by memo Ex. PW-10/B) Rs. 155/- was recovered. The accused also produced Rs. 7,100/- kept in the inner pocket of his trouser allegedly robbed at the time of commission of murder. The IO also seized the T-Shirt which the accused was wearing at the time of committing the crime. The Investigating Officer also sent the exhibits to CFSL and subsequently, collected its report. After the completion of the investigations, the accused was charge-sheeted for committing the crime u/s 302 IPC and was duly charged and brought to trial.

3. To bring home the charge, the prosecution examined eighteen witnesses. Statement of the accused was recorded u/s 313 Cr. P.C. to afford him an opportunity to explain the incriminating circumstances. The accused denied all incriminating circumstances and stated that a false case was foisted on him.

4. After considering the testimonies of witnesses and the materials placed on record, the Trial Court convicted the appellant for committing the offence punishable u/s 302 IPC. Aggrieved by the said orders, the appellant has filed the present appeal.

5. It is argued on behalf of the-appellant that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the circumstantial evidence which did not form a complete chain to show that in all human probability, the murder was committed by the accused. He further contended that the prosecution failed to prove the circumstances to be of conclusive nature and tendency establishing the guilt of the accused. The Trial Court, counsel urged, did not take notice that there was huge gap between the point of time when both the accused and the deceased were last seen alive and when the dead body was found. The prosecution failed to produce evidence regarding whereabouts of the deceased after 7.30 or 8 P.M. on 15.08.2005 when allegedly he was last seen alive with the accused. The death of the accused occurred in the night intervening 15/16.08.2005 and the prosecution did not collect any evidence to establish that soon before his death the accused was in his company. The accused, who had having a long acquaintance with the deceased had no ulterior motive to murder him for a paltry amount of Rs. 7,100/- allegedly robbed from him. The prosecution, urged the counsel, did not prove that the deceased had a sum of Rs. 7,100/- and it was the same amount recovered from the accused at the time of his arrest. The police failed to

establish the identity of the currency notes as no application was moved during the investigation for conducting last identification proceedings of the case property. The Trial Court, emphasized the counsel failed to consider material contradictions and discrepancies in the statements of the Witnesses and based its conviction on scanty evidence.

6. On the other hand, Ld. APP supported the findings recorded by the Trial Court convicting the accused and urged that it did not call for any interference. The prosecution categorically established that the accused was last seen alive with the deceased on 15.08.2005 at about 7/8 P.M. when both left the house of PW-2 (Abdul Rehman) after consuming liquor. The deceased was not seen alive thereafter and his dead body was found on the next morning at about 7.00 A.M. in a park. It was obligatory for the accused to explain how and when, he and the deceased parted company. He failed to explain where the deceased had gone after he was last seen with him by PW-2 (Abdul Rehman). The counsel further argued that the prosecution proved recovery of Rs. 7,100/- from the possession of the accused. The deceased had obtained the cash of Rs. 7,000/- from PW-4 (Sunil Mishra) to distribute, to the labourers as their wages.

The accused failed to give any cogent explanation how and from where, he got Rs. 7,100/-. The accused working as a labourer could not have had this huge amount with him and the police were not expected to plant cash from its own pocket. Counsel further argued that blood group of the deceased was detected on the shirt (Ex. PW-10/P3) which the accused was wearing at the time of occurrence. All these circumstances, argued the counsel, proved beyond reasonable doubt that it was the accused alone who had committed the crime.

7. We have considered the submissions of the parties and have scrutinized the Trial Court records. Before proceeding on merits, it is desirable to highlight that the homicidal death of Kokil Yadav is not under challenge. The deposition of Dr. Alexander (PW-3) who conducted the post mortem on the dead body of the victim leaves no manner of doubt that he suffered a homicidal death. It is also not in dispute that the deceased was a contractor and the accused was a labourer. The entire case of the prosecution hinges upon circumstantial evidence only. The prosecution mainly relied upon the circumstance of last seen, recovery of Rs. 7,100/- from the possession of the accused and FSL report whereby blood group "A" of the deceased was found on the shirt which the accused was wearing at the time of crime. These circumstances are being discussed as under:

(a) Last Seen :

8. To establish the circumstance of last seen the prosecution placed reliance on the testimony of PW-5 (Kameshwar Paswan). In his testimony, the witness stated that on 15.08.2005 at about 5/6 P.M. the deceased went to his house to pay his wages. The accused also reached there after about half an hour. They all took liquor together and thereafter, he (PW-5) dropped both the accused Kamal and the deceased Kokil Yadav at the gate of the construction site at about 7.00/8.00

P.M. He further stated that at that time, Kokil Yadav was under the influence of liquor and was not in a position to move properly. In the cross-examination by Ld. APP after seeking permission from the Court, the witness admitted that he had told the accused Kamal to drop the deceased Kokil Yadav at his Jhuggi.

9. According to the deposition of this independent witness (PW-5) the deceased was last seen at about 7.00/8.00 P.M. at the gate of construction site where PW-5 (Kameshwar Paswan) used to reside in a jhuggi, in the company of accused Kamal. He further deposed about the presence of Rupesh (watchman) at the construction site at that time. However, the prosecution did not examine Rupesh during the trial to corroborate the testimony of PW-5 (Kameshwar Paswan). An adverse inference is to be drawn against the prosecution for withholding this material witness. Even if the testimony of PW-5 (Kameshwar Paswan) is taken as correct, i.e. that the accused was last seen with the deceased at 7.00/8.00 P.M., there is no evidence on record to show that the accused remained with the deceased till his murder. The information about the dead body of the deceased in the park was received at 7.30 A.M. on 16.08.2005. The movements of the deceased during this period were not ascertained by the investigating agency. The exact time of death has not been established. The post-mortem report (Ex. PW-3/A) opined the time since death to be approximately three and half days. PW-3 (Dr. Alexander) conducted post-mortem on 19.08.2005 at 2.25 P.M. The approximate time of death, thus, as per post-mortem report was 2.25 A.M. on the night intervening 15/16.08.2005. However, there is no evidence whatsoever on record that the accused remained with the deceased till that time after allegedly left with him at about 8.00 P.M. on 15.08.2005. The Police did not examine any witness from the neighbourhood of the deceased to ascertain if he had returned to his Jhuggi on that night. PW-5 (Kameshwar Paswan) in the cross-examination disclosed that the police had beaten him in the police station. The prosecution failed to explain why this witness was subjected to beatings, when apparently, he was not a suspect. The statement recorded u/s 161 Cr. P.C. cannot be termed Voluntary" and seems the result of threats. No reliance can be placed on a tainted investigation.

10. In the case of State of Goa Vs. Sanjay Thakran and Another, the Supreme Court noted general principles with reference to the principles of last seen enunciated in Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, as under :

The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to

come to a conclusion of guilt in those cases."

32. In Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, this Court further opined that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.

34..... Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would, be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would, not affect the prosecution case.

11. The Supreme Court in Mohibur Rahman and Another Vs. State of Assam, held :

The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused, who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused, should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place.

12. Considering the factual and legal aspect, no inference can be drawn about the complicity of accused on this aspect.

(b) Recovery of Rs. 7,100/-

13. Alleged recovery of Rs. 7,100/- (Ex. PW-10/P4) from the possession of the accused is of no consequence and cannot be considered an incriminating circumstance. Prior to the arrest and recovery of Rs. 7,100/-, there were no allegations of robbery against the culprit. Even after the alleged recovery of Rs. 7,100/-, the accused was not charged for committing robbery of Rs. 7,100/- from the deceased. In fact, the police had no clue if the deceased was carrying Rs. 7,100/- with him on 15.08.2005. FW-5 (Kameshwar Paswan) with whom the deceased had consumed liquor did not notice the deceased carrying Rs. 7,100/-. PW-4 (Sunil Kumar Mishra) was examined to prove that on 13.08.2005, he had given Rs. 7,000/- to the deceased to distribute wages to the labourer. However, no labourer was produced to show that their wages were paid or not by the

deceased. It is a mystery that after spending money on liquor and making payment of Rs. 100/- to PW-5 on 15.08.2005, the deceased still had Rs. 7,100/- with him. It is unbelievable that the deceased would keep Rs. 7,100/- intact without spending a penny and withhold wages. The recovery of cash of Rs. 7,100/- from the possession of the accused is highly doubtful as at the time of his arrest the Police could recover only Rs. 155/- from his personal search by personal search memo (Ex. PW-10/B). It is improbable that at that time, cash to the tune of Rs. 7,100/- would remain undetected in the inner trouser pocket leaving us to wonder what personal search was undertaken which overlooked a substantial amount of Rs. 7,100/- untouched? This reflects and shows up the casual manner in which the investigation was conducted. Handing over of this amount on his own by the accused shows his bona fide and rules out robbery.

14. Besides, no application for the identification of cash was moved during investigation. PW-4 (Sunil Kumar Mishra) did not identify the currency notes to be the same handed over by him to the deceased. He did not reveal the denomination of the currency notes. No books of accounts were collected from the office of PW-4 (Sunil Kumar Mishra) to corroborate the payment of Rs. 7,000/- to the deceased. The alleged robbed amount was found intact with the accused on his arrest on 17.08.2005. It is surprising that the accused would not spend a single paisa out of the robbed amount and continue to keep in the inner pocket of pant till his arrest.

15. Accused's motive to commit murder for the sake of Rs. 7,100/- has not been established satisfactorily. The accused and deceased had no criminal background and were acquainted with each other since long and they had close relations. No knowledge can be imputed to him about the cash with the deceased; he too was under the influence of liquor. Undoubtedly, the deceased was under the influence of liquor as even after three and a half days of death, strong smell of liquor was detected in the contents of his stomach in the post mortem report. Had there any motive to rob the cash, the accused could have easily stolen it without committing the murder. The circumstance of recovery of cash, thus, cannot be an incriminating one against the accused.

(d) FSL Report:

16. Detection of human blood group of "A" on the T-shirt of the accused, as per FSL report, is not enough to establish the guilt of the accused. It is not believable that the accused would continue to wear the T-shirt having blood stains for two days after committing the crime. No credible evidence is on record to infer if the shirt (Ex. PW-10/P3) belonged to the deceased and he was wearing it on the day of occurrence. PW-5 (Kameshwar Paswan) and PW-2 did not testify if they had seen the accused wearing this T-shirt on 15.08.2005 or prior to that. The prosecution, thus, failed to prove ownership of the T-shirt. Mere detection of blood group "A" on the T-shirt without proof that it was of the deceased alone has no real evidentiary value.

(c) Conclusion :

On account of aforesaid shortcomings, irregularities and lacunae on the part of prosecution, in our considered opinion, the impugned judgment of the Trial Court cannot be sustained and is accordingly set aside. The appeal is allowed and the Appellant is acquitted. He be released forthwith, if not required in any other ease.

CRL. M.B. 1010/2011 in CRL. A. 734/2011

Since the appeal has been allowed, the instant application stands disposed of as infructuous.

By a separate order of the even date, the appeal of the Appellant is succeeded; the impugned judgment and order on sentence is set aside. The Appellant is directed to be released forthwith, if not required in any other case. Release Warrants be issued immediately through the concerned Superintendent Jail.

Delhi High Court Legal Services Committee shall remit Rs. 10,000/- as fee to Mr. Madhav Khurana, Advocate, appointed as Amicus Curiae in the present case by this Court.

Copy of the order be given dasti to the counsel for the parties under the signatures of Court Master; the same shall also be communicated directly to the Jail Superintendent.