

(2015) 07 DEL CK 0137

In the Delhi High Court

Case No : Criminal A. 1009/2012 and 700 of 2013

Rajnish and Others

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 22-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 201, 304, 34, 35

Citation : (2015) 07 DEL CK 0137

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Rakhi Dubey, for the Appellant; Pramod Saxena, APP and Rajpal, ASI, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Indermeet Kaur, J—These are two appeals filed by the two co-convicts Rajnish and Hans Raj. Vide the impugned judgment and order of sentence dated 12.4.2012 and 24.4.2012 both the convicts stood convicted under Sections 304 Part-I and 201 of the IPC. Each of them had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs. 5000/-, in default, to undergo SI for a period of 1 month for the offence under Section 304 Part I of the IPC. For their second conviction they had been sentenced to undergo RI for 2 years and to pay a fine of Rs. 1000/-, in default, to undergo SI for 15 days. Both the sentences were to run concurrently. Apart from the aforementioned two convicts there was a third person namely Shobha Devi (wife of Rajnish) who was also convicted under Section 201 of the IPC. This Court has been informed that she has undergone the sentence which had been imposed upon her and she has since been released.

2. The version of the prosecution is that on 17.5.2010 at about 5.38 AM an information was received from the PCR that a dead body was lying at Lal Bagh, Kaushal Puri, Delhi pursuant to which DD No. 8A was recorded. Constable Naveen (PW-9) reached the spot. The dead body was lying wrapped in a "gathri"

which was of a boy aged 16-17 years. Blood clots were found near the mouth. Injuries and strangulation marks were found near the neck. Inspector Brij Pal (PW-21) had also reached the spot. The dead body was identified by Pintoo Yadav (PW-13), the brother of the deceased, as that of his deceased brother. The two other brothers of the deceased namely Sushil Yadav (PW-12) and Chhotey Yadav (PW16) also reached the spot. Their statements were recorded. As per the version of the three brothers their deceased brother was last seen in the company of Rajnish and Hans Raj. In the course of investigation, statement of Sudama (PW-14) was also recorded. His version was that he had seen the appellants i.e. Rajnish and Hans Raj on the previous night i.e. on the intervening night of 16-17.5.2010 at 1.30 - 2.00AM carrying a "gathri". Efforts to trace the accused did not materialize. They were apprehended on 21.5.2010 from Anand Vihar Bus Stand vide arrest memo Ex. PW-16/A and Ex. 16/B respectively. Their disclosure statements were recorded vide memo Ex. PW-16/E and Ex. PW-16/F respectively. The name of the third co-accused Shobha Devi surfaced in their disclosure statement. She was also apprehended and arrested vide memo Ex. PW-17/B. Pursuant to the disclosure statement of Rajnish, he had got recovered the articles of the deceased including the purse of the deceased which was taken into possession vide memo Ex. PW-19/A. Pursuant to the disclosure statement of Shobha Devi she had got recovered a salwar which was alleged to be the weapon of offence i.e. the cloth by virtue of which the deceased had been strangled. This was taken into possession vide memo Ex. PW-17/F. Crime team had been called to the spot and photographs of the spot and dead body were taken by PW-11 (Inder Pal); the photographs were proved as Ex. PW-11/X. Constable Parvinder Singh (PW-3) had also taken the photographs of the dead body. This was under the directions of SI Matadin Meena (PW-1). Constable Subhash (PW-8) was also a part of the crime team. SI Manohar Lal (PW-2) had prepared the scaled site plan Ex. PW-2/A. The medical evidence included the report of the post mortem doctor Dr. Kul Bhushan Goel (PW-7) of the BJRM Hospital. The cause of death was asphyxia consequent to a ligature strangulation. Four injuries were noted. All injuries noted were reported to be ante-mortem in nature. The time of death was recorded as 1.00 AM on the intervening night of 16-17.5.2010. Four injuries were noted. The scientific evidence was proved through Ms. Poonam Sharma, the Senior Scientific Officer (PW-10) vide her reports Ex. PW-10/A and Ex. PW-10/B.

3. In the statement of the accused under Section 313 Cr.P.C. both of them had pleaded innocence. They stated that they had been falsely implicated.

4. No evidence was led in defence.

5. In view of the evidence discussed supra collected by the prosecution the accused persons stood convicted and sentenced as aforementioned.

6. Arguments have been heard in detail. Submission and counter submission of the parties have been noted.

7. This is a case of circumstantial evidence. It is now well settled by a catena of judgments of the Apex Court that all links in the chain of circumstances must clearly point to the guilt of the accused. The evidence collected must be so closely associated with the fact in issue that taken together to form a complete chain from which the existence of the principal fact can be legally inferred. All the circumstances must be incompatible with the innocence of the accused or the guilt of any other person. It is only then that a conviction can be founded.

8. The circumstances relied upon by the prosecution are several.

"i. The last seen theory

ii. The recovery of the salwar and the articles of the deceased including his purse pursuant to the disclosure statement of accused No. 3.

iii. Medical evidence

iv. Abscondence of the accused

v. Motive"

9. Cumulative effect of all these circumstances and evidence had led to the conviction of the accused. This Court shall now discuss which of them and the arguments propounded by the learned counsels for the parties on this score.

10. The last seen theory comes into play with the "time gap" between the point of time when the accused and deceased were last seen alive together and the deceased was found, it is so small that possibility of any other person other than accused being the author of the crime becomes impossible. The "time gap" is most relevant. In this regard, testimony of PW-12, PW-13 as also PW-16 is relevant. PW-12, PW-13 and PW-16 were the brothers of the deceased.

11. PW-12 had deposed that on 16.5.2010 he had returned to his house at about 9.00PM. On asking about his deceased brother (Rohit) he was informed by his other brother Chhotey Yadav (PW-16) that Rohit had gone towards the station. PW-12 along with PW-16 went towards the station for a walk. There they noticed that appellants Hans Raj and Rajnish (both of them who were known and were friends of their deceased brother) were talking to their deceased brother. The three of them were walking towards Kaushal Puri, Lal Bagh. PW-12 and PW-16 returned home. On the following day PW-12 learnt about the dead body of his brother lying near the station. He identified his dead body. In his cross-examination PW-12 admitted that his deceased brother was in bad company and he used to wander and loiter around the station most of the time. He sometimes used to sleep at the station and sometimes with the accused. He admitted that the accused were also good friends of their deceased brother. PW-12 stated that both - the appellant Hans Raj used to ply a rickshaw; so also PW-12. They were all known to one another. He denied the suggestion that he is falsely implicating the accused.

12. PW-13 Pintoo Yadav, the second brother of the deceased had also deposed

on the same lines as that of PW-12. He had disclosed that they were five brothers including the deceased. PW-13 and PW-16 used to work in Azad Pur Mandi and their other brothers including PW-12 used to ply rickshaw. The deceased Rohit was jobless; he was having bad habits and also was in the habit of drinking. On 16.5.2010 he had gone out to sleep and on the following morning on 17.5.2010 he learnt about the dead body of his brother lying near the railway station. He was informed by his brother i.e. PW-12 and PW-16 that they had seen their deceased brother last in the company of the appellants on the intervening night of 16-17/5/2010 when they had come to their house. In the cross-examination they admitted that their house is near the Railway Station. On some occasions after taking a drink Rohit used to sleep at Railway Station. They were aware of this fact. He admitted that on most occasions he had seen the appellants and Rohit in the company of one another. He denied the suggestion that they had falsely implicated the appellants and that PW-12 and PW-16 had not told him that they had last seen Rohit in the company of the appellants.

13. Testimony of the third brother Chhotey Yadav (PW-16) is also on the same lines as that of PW-12. He deposed that they were all living as a family at Kaushal Puri, Lal Bagh. The deceased was their elder brother and he used to take liquor very often. He used to stay in the house of Hans Raj. The appellants Hans Raj and Rajnish were friends of his brother. On the fateful night of 16.5.2010 Rajnish and Hans Raj had come to their house at 9.30 p.m. to call Rohit. At that time Rohit was not present at the house and he told them that his brother was not present at the house and might be sitting at the Railway Station. Rajnish and Hans Raj left his house. After sometime PW-16 and PW-12 went for a walk towards the railway bridge where they found their brother in the company of Rajnish and Hans Raj. In the following morning he was informed by his brother that the dead body of their brother was found near the house of Rajnish wrapped in a shawl. In his lengthy cross-examination he admitted that his brother was in bad habit and was also habitual of committing petty offence and theft but no case was registered against him. He admitted that he had seen the accused persons along with his brother near Ticket Ghar on the intervening night of 16-17.5.2010. He did not intervene in their talks. He denied the suggestion that he is deposing falsely.

14. Vehement argument of the learned defence counsel is that the testimony of all the aforementioned witnesses upon which reliance has been placed by the prosecution to establish the circumstance of last seen are, interest witnesses being brothers of the deceased and their evidence cannot be relied upon. This submission of the learned defence counsel is not quite correct. There is no doubt that the testimony of interested witnesses has to be examined with a greater scrutiny and a greater circumspection but it cannot be said that their testimony is to be disregarded for this reason alone. The cumulative effect of their versions has to be taken into account. Moreover, the probability of these witnesses being at home at that time was most natural. As per the version of the prosecution, the appellants had come to call their deceased brother from their home. PW-12,

PW-13, and PW-16 were residing in the same house. Being night time i.e. between 9.00 to 9.30 PM they were all at home. This was most the normal. In such a situation, it cannot in any manner be said that these witnesses were interested witnesses and merely because they were closely related to the victim, would be no ground to per se reject their testimony which is otherwise wholly reliable. They have all consistently deposed that the deceased was on friendly terms with the appellants. They were in bad company and most of the time they used to be found loitering around. Rohit also committed petty offences and often he used to sleep at the railway station sometimes and in the house of Hans Raj. The tenor and manner or the deposition of the witnesses clearly shows that they had no interest in falsely implicating the friends of their brother. It is not the case of the defence that there was any enmity that the witnesses had against the appellants; in fact all categorically stated that their deceased brother was on friendly terms with the appellants.

15. They have honestly deposed upon the circumstance of last seen. PW-12 and PW-13 had last seen their brother at about 10.00 PM at night on the railway track along with appellants. In this context, the medical evidence which is the post mortem report is also an important document. This was proved as Ex. PW-7/A. The time of death was calculated to be about 1.00 AM on the intervening night of 16-17.5.2010. The dead body of the victim was found in the following morning at 5.38 AM near the railway track. The theory of the time gap thus assumes great importance and the intervening gap between the last seen version i.e. the appellants being in the company of the deceased and the dead body having been recovered seven hours later from near around the same vicinity i.e. near the railway track and the time of death as per the medical evidence being 1.00 AM in the morning the onus shifted upon the accused to have explained as to what happened in this intervening period. They have failed to furnish any sufficient explanation. It is also not the defence of the appellants that they were not in the company of one another on that intervening night. It is also not their case that they were not friends and not known to one another. They had simpliciter taken plea of a false implication without any further explanation.

16. That apart the testimony of Sudama (PW-14) is also of extreme relevance. He was an independent eye-witness to this circumstance. He was not related either to the deceased or to the accused persons. In fact he was living in the same vicinity of Lal Bagh. He knew both the appellants and the victim and their family. He deposed that he was the "Pradhan" of the juggi Kaushal Puri, Lal Bagh. He knew the appellants and also their residence. He had deposed that on the intervening night of 16-17.5.2010 at about 1.30 - 2.00 AM he had seen the appellants carrying a "gathri". It was in this "gathri" that the dead body was recovered in the following morning. In his cross-examination he had admitted that the gali from which the appellant had crossed is about 2 1/2 -3 feet wide. The police had recorded his statement on the same day itself i.e. on 17.5.2010. He was not able to identify the colour of the gathri.

17. Vehement reliance has been placed upon this aspect of the cross-examination of PW-14. Learned defence counsel pointed out that the colour of the gathri could not be identified. This was the "gathri" in which the dead body of the victim was recovered by the investigating team. PW-9 had first reached the spot. This was at 5.38 AM. It is not the version of PW-14 that he had suspected the accused at that point of time. His not identifying the gathri which they were carrying in the middle of night would in no manner affect his credible version. At the cost of repetition, it is noted that he was an independent witness and known both to the victim and the appellants.

18. His testimony is extremely relevant and is a closing link in the theory of last seen i.e. brother of the deceased having last seen the accused in the company of their deceased brother at the railway station which was at about 10.00 PM. The dead body having been recovered on the following morning at 5.38 AM. The time of death being reported at about 1.00 AM. The dead body being carried in a gathri and being deposited near the railway station at about 1.30 - 2.00 AM clinches this circumstance. The arguments of the learned defence counsel on this score (detailed supra) have no weight.

19. The appellants could not be apprehended. This was in spite of all efforts made by the investigating team that they were finally arrested only on 21.5.2010. They were absconding.

20. The conduct of the appellant in not joining investigation and trying to flee from the place is also a circumstance which was rightly read against the appellant.

21. The submission of the learned defence counsel that the appellant had gone to attend a wedding has not been explained or answered in any part of the record. There was enough opportunity for the learned defence counsel to pick up this line of defence. Had it been true, it would have found either in the cross-examination of the witnesses and particularly in the cross-examination of the Investigating Officer that the appellants could not be apprehended as they gone to attend a marriage party. Neither in the cross-examination of the witnesses and nor in the statement of the accused persons recorded under Section 313 Cr.P.C., this defence of appellant having gone to attend a wedding party is found. This was also thus an adverse circumstance rightly read against the appellants.

22. The appellants were arrested vide arrest memo Ex. PW-16/A and Ex. PW-16/B. Their disclosure statements were recorded. They had revealed the name of the third co-accused namely Shobha Devi. She is the wife of Rajnish. Pursuant to her disclosure statement Ex. PW-17/D she had got a salwar recovered, which was taken into possession vide memo Ex. PW-17/F. This was from a "Kuredan". The accused Rajnish and Hans Raj had got recovered certain articles belonging to the deceased which included his purse. This was at Parmeshwari Park, Opposite H.P. Petrol Pump, G.T. Karnal Road. The recovery memo of the salwar Ex. PW-17/F was witnessed by H.C. Pritam Chand, Constable Rahul Tyagi and Lady

Constable Minthesh. This was admittedly four days after the incident; it was a public Kudredan and was an open place where people were throwing their garbage. This recovery also stands proved in view of the categorical statement of the recovery witness PW-17.

23. The submission of the learned defence that the articles of the deceased were put to test identification after a period of 10 days; the articles having been allegedly recovered on 21.05.2010 and put to TIP only on 03.6.2010 also throws doubt on the proceedings is also an argument which deserves little merit. The recovery memo has been proved as Ex. PW-19/A. PW-13 Pintoo Yadav had identified these articles and these articles included the purse of the deceased having a diary containing 11 pages.

24. The medical evidence is also another very important circumstance. The post mortem report Ex. PW-7/A had noted four injuries on the person of the deceased. These injuries reads herein as under:

"1. Both lips are bruised all over externally as well as orally.

2. Ligature mark. There is ligature pressure centered abraded mark running horizontally all around the neck on below apple of adam with different margins and linear lines in between the LM width of LM is about 1.5 to 2 cm is parch mentioned.

3. Centered abrasion 3 X 0.75 cm over Rt molar region.

4. Vertical grasing seen over back of Ct Forearm and elbow in total area 22 X 7 CM."

Postmortem anti marks were seen scattered at places over the chest, abdomen, thighs and face etc.

25. Injury No. 1 was bruises over the lips. Injury No. 2 was the ligature mark running horizontally all around the neck on below apple of adam measuring 1.5 to 2 cm. Injury No. 3 is centered abrasion 3 X 0.75 cm over Rt molar region and injury No. 4 was vertical grasing seen over back of left Forearm and elbow. The doctor had opined injury No. 2 to be sufficient to cause death. It had also been opined that a salwar could be the weapon of offence.

26. As noted supra, the post mortem was conducted on 18.5.2010, time since the death was about 35 hours suggesting that the deceased had died at 1.00 a.m. in the intervening night of 16-17.5.2010.

27. The prosecution has been able to establish all the aforementioned circumstances.

28. The motive for the crime was gathered from the attendant circumstances and the disclosure statements of the co-accused namely Shobha Devi; who had stated that the deceased Rohit was trying to force himself upon her and she had raised a hue and cry, her husband Rajnish as also Hans Raj had intervened. This had happened two days ago. This was probably the reason for this offence

having been committed. The accused persons having been decided to take vendetta upon the victim.

29. This theory of the motive sought to be set up by the prosecution however did not find favour with the trial Judge. The Court had noted that if this was the case the incident would not have occurred in the house of Rajnish. The accused persons would have chosen some other place for the purposes of crime. This observation of the trial Judge is not borne out from evidence. The evidence does not suggest that the offence had taken place in the jhuggi of the appellant Rajnish. However, the injury marks on the deceased show that there were signs of a scuffle and his mouth had been pressed; this was probably to ward off his cries. The fact that the salwar which was used as the weapon of strangulation supported by the medical evidence and the injuries on the post mortem are also suggestive of the fact that the offence has probably occurred in the heat of the moment in the sudden fit of passion and without any pre-meditation. Had it been a pre-planned or a premeditated act the weapon of offence probably would not have been a salwar.

30. The trial Judge had also noted that this was not a case of intention on the part of the accused to have committed the murder of the victim. The appellant had been convicted under Section 304 Part-I of the IPC.

31. The evidence on record has established that the victim and the accused persons were known to one another; they were friends. They all had bad habits and often used to drink and also commit petty offences. PW-14 had established that the dead body had been removed by the accused persons in a gathri; he had seen them on the intervening night of the offence. The fact that it was a gathri in which the dead body was removed is again indicative of the fact that the offence was not pre-planned. The weapon of offence being salwar (as discussed supra) is also indicative of no intention on the part of the appellant to commit murder. The signs of a scuffle and pressure and grassing upon the forearm and elbow of the victim and marks on his lips also indicate that there was a struggle between the victim and the appellant. Injury No. 2 which was the ligature mark on the neck of the deceased which was the sole injury sufficient to cause the death of the victim. Offence thus rightly falls in the category of Section 304 of the IPC.

32. Section 304 of the IPC comprises of two parts. Part-I applies to the cases where the accused causes bodily injury with intention to cause death; or with intention to cause such bodily injury as is likely to cause death. Part-II comes into play when death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.

33. This Court is of the view that the evidence collected by the prosecution is suggestive of the fact that only knowledge can be attributed to the accused that their act in the course of scuffle which had ensued between the appellants and

the victim and they having used the salwar which was probably the nearest fabric available with them to press the neck of the victim. It is not an intent to cause the act; knowledge is better attributable.

34. The Supreme Court in *Afrahim Sheikh and Others Vs. State of West Bengal*, AIR 1964 SC 1263 : (1964) CriLJ 350 : (1964) 6 SCR 172 had the occasion to consider the validity and legality of a conviction under Section 304 Part- II read with Section 34 of the IPC and had held that such a conviction can be maintained. In this context the Apex Court had noted as noted herein below:

"The question is whether the second part of S. 304 can be made applicable. The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death was the likely result of beating, the requirement of S. 304, Part II are not satisfied in the case of each of them. If it could be said that knowledge of this type was possible in the case of each one of the appellants, there is no reason why S. 304, Part II cannot be read with S. 34. The common intention is with regard to the criminal act, i.e. the act of bearing. If the result of the beating is the death of the victim, and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, i.e. bearing there is no reason why S. 34 or S. 35 should not be read with the second part of S. 304 to make each liable individually. "

35. In the instant case, the common intention with regard to the criminal act i.e. the act of beating resulting in the death of the victim and each of the appellants having knowledge that death is likely result pursuant to their criminal act i.e. the act of beating and using the salwar to press Rohit's neck; this Court is of the view that the conviction of the appellant should be modified to Part-II of Section 304 of the IPC.

36. The nominal roll of the appellant Rajnish as on 13.5.2015 reflects that he has undergone 4 years 11 months and 20 days besides remissions earned of 1 year 1 month and 18 days meaning thereby he has completed 6 years and 3 months. The nominal roll of the appellant Hans Raj reflects that as on 01.12.2014 he has undergone 4 years 6 months and 8 days besides remissions earned of 9 months and 18 days. As on date he has completed more than 6 years.

37. The sentence suffered by the appellants be treated as the sentence imposed upon them. They be released forthwith, if not, required in any other case.

38. Both the appeals are disposed of in the above terms.

39. A copy of this judgment be sent to Jail Superintendent concerned for compliance.