

(2010) 05 DEL CK 0281

In the Delhi High Court

Case No : Criminal Appeal No. 18 of 2010

Rampal

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 13-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2010) 05 DEL CK 0281

Hon'ble Judges : Ajit Bharihoke, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Dalip Singh, for the Appellant; Pawan Sharma, for the Respondent

Judgement

Ajit Bharihoke, J.—This appeal is preferred against the impugned judgment dated 27.08.2009 in Sessions Case 229/2006, FIR No. 53/2004, P.S. Narela, vide which the appellant and his co-accused Dharambir have been convicted for the offence of committing the murder of Sanjay Kumar u/s 302/34 IPC as also against the consequent order on sentence of the even date, sentencing the appellant and co-accused Dharambir to undergo imprisonment for life and to pay fine of Rs. 5000/- each, in default to undergo further RI for six months.

2. As per the prosecution story, Sanjay Kumar (hereinafter referred to as "deceased") and the complainant Anil Kumar (PW17) were brothers who were running a grocery shop at Shivaji Nagar, Narela. The deceased used to collect payment from the customers. On 08.02.2004, at around 6 pm, the deceased left to collect payment from their customers on scooter No. DL-8SE-1595. On the same day at around 7.30 pm, when the complainant was going to his house, he met the deceased near the gate of Shivaji Nagar. The deceased was on his scooter and accused Dharambir was sitting on the Pillion. The appellant Rampal was also present there on another scooter No. DL-8SL-6363. The deceased told the complainant that appellant Rampal was taking him to Swatantar Nagar for collection of some payment. Thereafter, the complainant went to his house and

the deceased left with the appellant and co-accused Dharambir. The deceased did not return home that night. On the next day, i.e. 09.02.2004, when the deceased still had not returned, the complainant and his father, alongwith 3-4 other persons went to the police station to lodge a missing persons report with regard to the deceased. At the police station, the duty officer told them that a dead body of around the same age group as his brother has been found near Bharat Mata School on Bawana Road and suggested that they should go there for identification of the dead body.

3. The complainant Anil Kumar (PW17), alongwith his father reached near Bharat Mata School and on reaching there, they were met with several police officers, including the Investigating Officer SHO Mahipal Singh (PW19), who had reached at the spot on receipt of DD No. 2A recorded at P.S. Narela. The complainant identified the dead body as that of his brother. The Investigating Officer recorded the statement Ex.PW17/A of the complainant, wherein PW17 Anil Kumar detailed the above mentioned facts and expressed his suspicion against the appellant Rampal and his co-accused Dharambir. The Investigating Officer put his endorsement Ex.PW19/A on the said statement and sent it to the police station through Constable Shiv Bodh for the registration of the case. On the basis of the said rukka, the formal FIR was registered.

4. PW19 SHO Mahipal Singh inspected the spot and took into possession the blood stained earth, control earth and sample of blood found at the spot after sealing them into separate parcels. He also seized one blood stained jersey containing some hairs, one blood stained stone, one pair of shoes, one blood stained muffler and a woollen cap from the spot after sealing and converting them into separate parcels. All these exhibits were seized vide memo Ex.PW8/A. He also got the spot photographed and summoned the crime team to inspect the place of occurrence. He carried out the inquest proceedings and sent the dead body for post-mortem examination. Thereafter, the Investigating Officer went to the houses of both the appellant and his co-accused in Swatantar Nagar and Sanjay Colony respectively, but was told that they had not returned home since 08.02.2004.

5. On 10.02.2004 at about 1.45 pm, the Investigating Officer, alongwith SI Parveen Kumar (PW16), HC Joginder (PW5), HC Dilbagh and Constable Satish left for the investigation of this case. They were joined by the complainant Anil Kumar (PW17) and reached Singhu Border, where PW17 pointed out towards the appellant and co-accused Dharambir standing there. On his pointing out the appellant and the co-accused were arrested vide memo Ex.PW17/D and Ex.PW17/F. The appellant Rampal and co-accused Dharambir were interrogated and they made disclosure statements Ex.PW5/A and Ex.PW5/B respectively. Pursuant to his disclosure statement, accused Dharambir got recovered scooter No. DL-8SE-1595 as well as the clothes he was wearing at the time of commission of offence and these articles were sealed and taken into possession. Appellant Rampal also got recovered the clothes he was wearing at the time of commission

of offence as well as Scooter No. DL-8SL-6363, which contained two diaries of the deceased containing details of the business. These articles were also sealed and taken into possession by the Investigating Officer. The Investigating Officer also sent the case property to CFSL for serological examination and also recorded the statements of various witnesses. On completion of the investigation, he filed the challan against the appellants in the court.

6. On completion of the investigation, both the accused persons were charged for the offence punishable u/s 302 IPC read with Section 34 IPC. The appellant Rampal and the co-accused Dharambir pleaded innocence and claimed to be tried.

7. On perusal of the record, it transpires that there is no eye witness to the occurrence. Prosecution case is based upon circumstantial evidence and to prove the same, the prosecution is heavily relying upon the testimony of PW17 Anil Kumar. Therefore, before adverting to the submissions made on behalf of the appellant Rampal, it would be appropriate to have a look upon his testimony.

8. PW17 Anil Kumar has testified that the deceased used to help him in his grocery shop business at Shivaji Nagar and it was his duty to collect payment from the customers to whom the goods were supplied from their shop. Sometimes, he also used to go and collect payments from the customers. He has claimed that on 08.02.2004 at around 6:00 pm, the deceased left the shop on scooter No. DL8SE-1595 for collecting payments from the customers. On the same day, when he was returning to his house, he met the deceased near the gate of Shivaji Nagar, who stopped his scooter and told him that he was going with Rampal to Swatantar Nagar for collecting some payment. At that time, Dharambir was sitting on the pillion of the scooter of the deceased and Rampal appellant was on his separate scooter No. DL-8SL-6363, who stopped his scooter near him (witness). PW17 Anil Kumar further stated that thereafter the deceased proceeded towards Swatantar Nagar and the appellant Rampal also followed his scooter. The deceased did not return home on that night. In the morning when he found that the deceased had not returned home, he made enquiry in the neighbourhood and thereafter went to the police station along with his father and 3/4 neighbours to lodge a missing report. There he was told by the duty officer that a dead body of a person of the same age group as that of his deceased brother was found near Bharat Mata School on Bawana Road. He, thus, went to that spot where the police officials were already present. He identified the dead body of his brother Sanjay and his statement Ex.PW17/A was recorded by the police.

9. Other important witnesses are the police officials who were part of the raiding party which arrested the appellant and his co-accused and who witnessed the disclosure statements made by the accused persons as well as recovery of incriminating articles at their instance.

10. The appellant, when examined u/s 313 Cr.P.C. to explain the incriminating evidence appearing against him, denied the prosecution case and claimed that he

was lifted from his house and claimed that he has been falsely implicated in this case. He declined to lead evidence in defence.

11. At the outset, we may note that before proceeding to hear arguments on this appeal, we asked learned Standing Counsel for the State to find out if the co-accused Dharambir had also preferred appeal against the impugned judgment. Learned standing counsel for the State, after making enquiry, has informed that till now, Dharambir has not preferred any appeal. Therefore, we have proceeded to hear the appeal filed by Rampal. Otherwise also, the case of Rampal, though based upon the circumstantial evidence, is distinct from the case of Dharambir as the recoveries made at their instance are different and as per the case of prosecution even when the appellant and Dharambir were last seen with the deceased, appellant Rampal was on a different scooter, whereas Dharambir was sitting on the pillion of the scooter of the deceased.

12. Since the case of the prosecution is based upon the circumstantial evidence, it would be useful to have a look upon the law relating to circumstantial evidence. In the matter of Sharad Birdhichand Sarda Vs. State of Maharashtra, , the Supreme Court has, inter alia, observed thus:

153. the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

13. The above enunciated principles of law have been reiterated by the Supreme Court in the matter of Tanviben Pankaj Kumar Divetia Vs. State of Gujarat, wherein it was observed thus:

45. The principle for basing a conviction on the basis of circumstantial evidences has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions.

14. In the light of above enunciated principles of law, we now proceed to analyse whether the prosecution has been able to satisfy the above enunciated tests.

15. Learned Counsel for the appellant has submitted that an important aspect of this case is the motive for commission of crime. The learned Additional Sessions Judge has discussed the evidence relating to motive in paras 30 to 32 of the impugned judgment and on consideration of the evidence, he has rightly come to the conclusion that the prosecution has failed to establish the motive on the part of the appellant or his co-convict for the commission of offence.

16. Learned Counsel for the appellant has submitted that the first incriminating circumstance relied upon by the learned Trial Court is that the deceased was last seen with the accused at around 7:30 pm by PW17 Anil Kumar when the deceased told him after stopping his two-wheeler scooter that he was going to Swatantar Nagar along with the appellant Rampal for collecting payment. Learned Counsel submitted that aforesaid circumstance is of no help to the prosecution as it fails to firmly establish that the deceased actually accompanied that appellant to Swatantar Nagar after his meeting with PW17 Anil Kumar. Learned Standing Counsel for the State, on the other hand, has submitted that PW17 Anil Kumar is a natural witness and he has withstood the test of cross-examination, therefore, there is no reason to suspect his version regarding the above referred last seen circumstance, which version he also gave at the outset

to the Investigating Officer in the morning of 09.02.2004 in his statement Ex.PW17/A, which formed basis for the registration of the case.

17. We find merit in the above submission of learned Counsel for the appellant. As regards last seen, the version of PW17 Anil Kumar is that on the evening of 08.02.2004 at about 7:30 pm, when he was returning home, the deceased stopped his scooter near the gate of Shivaji Nagar and told him that he was going to Swatantar Nagar along with the appellant Rampal for collecting some payment. He also deposed that at the time, accused Dharambir was sitting on the pillion of the scooter of the deceased and the appellant Rampal was on another scooter and thereafter his brother left for Swatantar Nagar and Rampal also followed him. Even if the above version of PW17 Anil Kumar is taken to be gospel truth, it only establishes that the deceased and the appellant Rampal proceeded from the gate of Shivaji Nagar in the direction of Swatantar Nagar on separate two- wheeler scooters. There is no evidence on record to show that anyone saw them together at Swatantar Nagar or they both went to the same destination on their respective scooters. This evidence of PW17 Anil Kumar leaves much scope for imagination and speculation and a possibility cannot be ruled out that after proceeding from the gate of Shivaji Nagar, appellant Rampal and the deceased parted company and went in different directions. Thus, in our considered view, the last seen circumstance is not firmly established in this case.

18. Another important incriminating circumstance relied upon by the learned trial Judge is the recovery of two diaries belonging to the deceased from the dicky of scooter No. DL-8SL-6363 belonging to the appellant Rampal which was recovered at his instance pursuant to his disclosure statement. The said two diaries are Exhibits P5 and P6. PW19 Inspector Mahipal Singh in his cross- examination has admitted that he could not decipher the entries in those diaries as the handwriting was not legible. He did not even get the handwriting in the diaries compared with some admitted handwriting of the deceased. Even PW17 Anil Kumar has not categorically stated that the entries in those diaries Exhibits P5 and P6 are in the handwriting of the deceased. Otherwise also, if for the sake of argument, it is assumed that Exhibits P5 and P6 are the diaries maintained by the deceased, then also it is highly unnatural that a person who had committed murder of the deceased would retain those diaries in the dicky of his scooter and wait for the police to come and catch him with the incriminating evidence. The natural conduct of an accused in such a circumstance would be either to destroy the diaries or get rid of them instead of keeping them in his possession. Thus, we find that the prosecution case regarding the recovery of incriminating diaries Exhibits P5 and P6 at the instance of the appellant Rampal from the dicky of his scooter is highly doubtful. Thus, even the recovery of incriminating articles is also not firmly established.

19. The next incriminating circumstance against the appellant Rampal is the purported recovery of one white striped shirt and a gray shirt from the bathroom of the house of the appellant at his instance, which as per his disclosure

statement, he was wearing at the time of the alleged incident. This recovery is of no avail to the prosecution because as per the Forensic Science Laboratory report Ex.PW18/A, on chemical examination, no blood was found on those clothes. Thus, the clothes recovered at the instance of the appellant are not linked with the murder of the deceased.

20. Even the arrest of the appellant from Singhu border, as claimed by the prosecution, is shrouded in mystery. As per the Investigating Officer, Inspector Mahipal Singh (PW19), on 10.02.2004 he left the police station along with SI Parveen Kumar and police force in a government vehicle at about 1:45 pm for the investigation of this case. At 2:00 pm, complainant Anil Kumar met them at Anaj Mandi, Narela who was also joined in the investigation. Thereafter, they proceeded to Singhu border, Delhi in search of the accused persons where both the appellant and his co-convict were found standing near AIDS Control Board on G.T. Karnal Road, who were arrested on the pointing of Anil Kumar. This story of the Investigating Officer is highly unnatural. There is no evidence on record that the Investigating Officer or any member of the police party or the complainant had any information about the presence of the appellant and his co-accused at Singhu border. It is not clear as to what prompted the Investigating Officer to go to Singhu Border in search of the appellants. Therefore, we are not inclined to believe the above story pertaining to the arrest of the appellant as well as his co-accused. Once the story pertaining to circumstance of arrest of the appellant and his co-accused becomes doubtful, then we find it difficult to believe the version of the Investigating Officer that he had visited the respective houses of the appellant and his co-accused Dharambir on 09.02.2004 and he was told that they had not returned to their houses since the evening of 08.02.2004.

21. In view of our discussion above, we find that the prosecution has failed to establish either of the incriminating circumstances relied upon by the learned Additional Sessions Judge to convict the appellant. Therefore, we find it difficult to sustain the conviction of the appellant Rampal u/s 302 IPC read with Section 34 IPC. The impugned judgment of the appellant Rampal is accordingly set aside and he is acquitted of the charge u/s 302 IPC, giving him benefit of doubt.

22. The appellant is in custody. He be released forthwith, if not required in any other case.