

(2012) 02 SHI CK 0054

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 127 of 2007

State of Himachal Pradesh

APPELLANT

Vs

Diwakar Raj alias Palas Pathak and Deepu Biswas alias
Chhotu

RESPONDENT

Date of Decision : 29-02-2012

Acts Referred:

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

Citation : (2012) 02 SHI CK 0054

Hon'ble Judges : Sanjay Karol, J;R.B. Misra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Justice Sanjay Karol, J.—For an offence, which is alleged to have been committed on 24th November, 2005, accused were put to trial. In terms of judgment dated 10.01.2007 passed by Sessions Judge, Shimla, H.P., in Sessions Trial No. 5-S/7 of 2006, titled as State of H.P. vs. Diwakar & Another, accused stand acquitted of the charged offences. It is the case of prosecution that information was received at Police Post, Fagu, about the death of one doctor, who was having his Clinic in village Tiwali. The information was given by Up-Pradhan Jai Ram and Rajinder Singh at about 10.15 AM. Entry in the Rapat Rojnamcha (Ex. PW. 19/A) was made by Inspector Ramesh Sharma (PW. 22), who was posted as SHO Police Station, Theog. He sent the Ruqua through Constable Jawahar Lal (PW. 13) to the Police, on the basis of which FIR No. 162/2005 dated 24.11.2005 (Ex. PW. 18/A) was registered at Police Station, Theog by ASI Kirpa Ram (PW. 18). Inspector Ramesh Sharma proceeded to the spot where he recorded statement (Ex. PW. 1/A) of Rajinder Singh (PW. 1). Ramesh Sharma contacted senior Police Officers and Forensic science experts were requested to visit the spot. Accordingly doctor Gian Thakur (PW. 21) visited the spot along with Doctor Piyush Kapila (PW. 11). After inspection of the spot and conduct of preliminary investigation, inquest report was prepared and dead body was sent for postmortem to IGMC hospital at

Shimla, where postmortem was conducted by doctor Piyush Kapila (PW. 11), who issued postmortem report (Ex. PW. 11/E).

2. Investigation revealed that on 23.11.2005, the accused had visited the Clinic of the deceased Hari Charan Goldar. Their presence was witnessed by Mangat Ram (PW. 3) and Keshav Ram (PW. 4), who happened to be present on the spot. The deceased arranged for alcohol and thereafter accused along with deceased consumed the same and had dinner in the house of deceased which was just behind the Clinic. The residence was hired by the deceased from Rajinder Singh (PW. 1). Sh. Anand Kumar (PW. 5), brother of the deceased a registered medical practitioner who had also opened his clinic in the nearby area, was informed about the death of the deceased. Investigation revealed that after having dinner accused murdered the deceased and as such on 27.11.2005, Ramesh Sharma (PW. 22) arrested the accused from Naga Dhar. To establish the identity of the accused, police conducted the test identification parade on 30.11.2005 and Mangat Ram (PW. 3) identified the accused to be the persons present in the clinic of the deceased on 23.11.2005. Test identification parade was got conducted in the presence of Judicial Magistrate Sh. Ajay Mehta (PW. 14). Prior to the same, on 29.11.2005 during police remand accused made disclosure statements in the presence of Ajay Kumar (PW. 10) and Anand Kumar (PW. 5). Disclosure statement of Diwakar Raj is 4 Ex. PW. 5/D and that of accused Deepu is Ex. PW. 5/E. The accused had not only murdered the deceased but also robbed him of his belongings and assets. A bag belonging to the deceased was taken away by them and handed over to Gautam Goldar (PW. 7). They also stole a sum of Rs. 2700/- which were entrusted to Partho (PW. 6). Investigation revealed that Partho (PW. 6) and Gautam (PW. 7) also belonged to the area from where the deceased and accused hailed i.e. West Bengal. Report of the Forensic Science Laboratory was obtained by the police and statement of the relevant witnesses recorded. With the completion of investigation, challan was presented in the Court for trial.

3. Accused were charged for having committed offences punishable under Sections 302 read with Section 34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined 22 witnesses and statements of the accused u/s 313 Cr.P.C. were recorded, in which they pleaded innocence and false implication.

5. Appreciating the evidence adduced on record, the Court below acquitted the accused of the charged offences, hence the present appeal.

6. We have heard Sh. R.K. Sharma, learned Senior Additional Advocate General, duly assisted by Mr. J.S. Guleria, Assistant Advocate General on behalf of the State as also Mr. N.S. Chandel, Advocate on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence placed on record by the prosecution. Having minutely examined the record, we are of the considered view that no case for interference is made out

at all. We find that the judgment rendered by the trial Court is well reasoned and is based on complete and proper appreciation of evidence (documentary and ocular) placed on record. There is neither any illegality/infirmary nor any perversity in the same.

7. It is not in dispute that there is no eye witness to the occurrence of the incident. The prosecution case primarily rests upon the circumstantial evidence.

8. The law on circumstantial evidence is well settled. To base a conviction on circumstantial evidence prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. Suspicion, however, grave, cannot be a substitute for a proof and the courts should take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. [Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh,

9. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and inconsistent with their innocence. Trimukh Maroti Kirkan Vs. State of Maharashtra,

10. In the instant case, prosecution has essentially relied upon three circumstances. The first being that accused were last seen in the company of the deceased on 23.11.2005 at about 5.30-6.00 PM. The second being that accused were identified by one of the person who had lastly seen the accused in the company of the deceased and the third circumstance being the recovery of articles belonging to the deceased, on the basis of disclosure statement, made by accused in the presence of independent witnesses.

11. As already noticed, prosecution has examined 22 witnesses. In our considered view testimonies of only Rajinder Singh (PW. 1), Bansi Lal (PW. 2), Mangat Ram (PW. 3), Keshav Ram (PW. 4), Partho (PW. 6), Gautam Goldar (PW. 7), Ajay Kumar (PW. 10), Ajay Mehta (PW. 14) and Ramesh Sharma (PW. 22) are relevant.

12. With regard to the first circumstance, i.e. accused being seen last in the company of deceased, testimony of Bansi Lal (PW. 2), Mangat Ram (PW. 3) and Keshav Ram (PW. 4) is relevant.

13. PW. 3 states that on 23.11.2005 at about 5.30 PM he had seen the accused talking to the deceased in their native language in the clinic which belonged to the deceased. The deceased had also asked this witness to purchase liquor from

the liquor vend in the village. He bought the liquor and handed it over to the deceased and thereafter went away. Testimony of Keshav Ram (PW. 4) is somewhat to similar effect. He states that he had seen the accused in the clinic of deceased on 23.11.2005 at about 5.30 PM-6.00 PM.

14. In cross-examination, PW. 3 admits that he resides in a different village which is at a distance of 5 kms. Similarly PW. 4 is also resident of another village and his house is at a distance of 3-4 kms from the place of occurrence of the alleged crime. These witnesses are not the patients of the deceased. They have neither disclosed nor sufficiently explained their purpose of visit to village Tiwali on the said date and time. Both these witnesses were not familiar with the accused nor did they disclose the particulars or narrate description of the accused to the police. Undisputedly, Bansilal (PW. 2) is having a shop adjoining to the clinic of the deceased. Tiwali is a small place having few shops. Significantly, he does not state that on 23.11.2005 he had seen the accused present in the clinic of the deceased. On this date his shop was open. This witness admits that Mangat Ram did not purchase any liquor from the liquor vend as is so stated by Mangat Ram. He also does not corroborate presence of PW. 3 or PW. 4 on the spot.

15. It is the case of the prosecution that it was Rajinder Singh (PW. 1), who had noticed that the door of the clinic of the deceased ajar, in the morning of 23.11.2005, when he peeped in, he saw the body of the deceased. This was at about 8.30 AM in the morning. Now prosecution has not been able to lead any evidence to establish that none approached the deceased after 6.00 PM on 23.11.2005 till this time. What transpired after PW. 3 and PW. 4 had left the clinic of the deceased on 23.11.2005 at 6.00 PM and the following morning at 8.30 AM has not been explained. Prosecution has also not been able to establish as to when the accused left the house / clinic of the deceased. It is not the case of the prosecution that none else could have approached the doctor during this time. According to Bansilal (PW. 2), clinic is situated in the bazaar itself and all the shops are open and anyone could have met the doctor during this time. Simply because the accused happened to be present on the spot on 23.11.2005, that fact by itself would not be sufficient to establish the guilt of the accused. Though this does not mean that presence of the accused stands established by the prosecution as we are of the view that testimonies of PW. 3 and PW. 4 otherwise does not inspire confidence. They are not residents of the village. They had no reason to be present there. Police has not arrested local residents to corroborate their version they seem to have been introduced later on.

16. Significantly record reveals that accused were arrested by PW. 22 on 27.11.2005. There is nothing on record to establish as to what prompted him to arrest the accused on that day. There was nothing on record to link the accused to the alleged crime. Undisputedly, test identification parade was conducted by the police only on 30.11.2005. Now if identity of the accused was in doubt, then on what basis were the accused arrested. PW. 3 and PW. 4 had given the

description of the accused to the police.

17. Coming to the issue of test identification parade, we find that there is serious lacuna in the same. According to Ramesh Sharma (PW. 22), test identification parade was conducted in the presence of the Judicial magistrate Ajay Mehta (PW. 14) and witnessed by Mangat Ram (PW. 3). Now PW. 22 himself admits that on 28.11.2005, he had moved two applications (Ex. PW. 14/A and Ex. PW. 14/B) before the Court of JMIC, Theog, wherein, he himself had mentioned the names of the accused persons to be connected with the alleged crime. If this were so then obviously test identification parade conducted on 30.11.2005 was a farce. Further PW. 22 admits that he did not arrest any other persons belonging to the native area from where the accused and the deceased hailed, even though, large number of such persons were residing in and around the place of occurrence of the incident. This witness admits that he had been informed about the complicity of the accused by certain residents of the village but then he fails to divulge information/details with regard thereto. He admits that he had also not recorded such fact in his zimini. Obviously here he is not stating the truth. Significantly, the report (Ex. PW. 14/G) prepared by the Judicial Magistrate, recorded the fact that Partho (PW. 6) and Gautam Goldar (PW. 7) were included in the list of persons amongst whom test identification parade was conducted. It only reveals that initially police also suspected involvement of Partho and Gautam in the alleged crime. Further according to PW. 14, the test identification parade was conducted at the time when accused were brought from the lock-up with their faces muffled. Now this procedure adopted by the police is totally contrary to law and unacceptable. If faces of only two persons i.e. the accused were muffled then it was an obvious indication to the witnesses to identify the accused.

18. Coming to the disclosure statements (Ex. PW. 5/D and Ex. PW. 5/E) it is apparent that same were made in the presence of Anand Kumar, who is brother of the deceased. Now significantly, Partho (PW. 6) and Gautam Goldar (PW. 7) do not state that the bag which allegedly belonged to the deceased was identified by them in Court. PW. 5 admits that on 27.11.2005 he was called by the police on telephone and was informed that they had arrested two persons in connection with alleged crime. He admits that shoes and the bag shown to him by the police did not belong to his brother. Now in this connection PW. 6 also admits that he was not associated by the police prior to 30.11.2005 which version of his stands materially contradicted by the report (Ex. PW. 14/A) prepared by Chief Judicial Magistrate, hence testimony of this witness cannot be said to be reliable. He himself was a suspect and it cannot be said that he has truthfully deposed before the Court. Testimony of Gautam Goldar (PW. 7) to our mind also does not inspire confidence. He also admits that on 24.11.2005 he was called by the police at Theog in connection with the alleged crime. Now significantly both PW. 6 and PW. 7 did not disclose it to the police that accused had deposited a bag and currency notes belonging to the deceased with them. Why is it that they kept quiet for more than six days, has not been explained by them. Thus, even this circumstance cannot be said to be established by the prosecution by leading

clear, cogent, convincing and reliable piece of evidence.

19. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The trial Court has fully appreciated the evidence placed on record by the parties. There is yet another aspect which lends credence to the version of the accused. As per the report submitted by Forensic Science Experts, no finger prints of the accused were found on the articles lying in the house / clinic of the deceased. Accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in Md. Ankoos and Others Vs. The Public Prosecutor, High Court of A.P., it cannot be said that Court below has not correctly appreciated the evidence on record or that acquittal of the person has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.