

(2020) 03 DEL CK 0171

In the Delhi High Court

Case No : Criminal Leave Petition No. 548 Of 2019

State Of Nct Of Delhi

APPELLANT

Vs

Rajesh Rai

RESPONDENT

Date of Decision : 11-03-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 378(1)

Indian Penal Code, 1860 — Section 302

Evidence Act, 1872 — Section 25, 27, 65, 65B

Citation : (2020) 03 DEL CK 0171

Hon'ble Judges : Vipin Sanghi, J;Rajnish Bhatnagar, J

Bench : Division Bench

Advocate : Ravi Nayak

Final Decision : Dismissed

Judgement

Rajnish Bhatnagar, J

CrI. M.A. 37665/2019 (delay of 41 days)

For the reasons stated in the application, delay in filing the appeal is condoned.

The application stands disposed of.

CrI. L.P.548/2019

1. The present leave to appeal under Section 378(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C'), has been instituted on behalf of the State, to seek leave to appeal against the order of acquittal of the respondent dated 8.5.2019 rendered by the Additional Sessions Judge-II (North West), Rohini Courts in FIR No. 6/17, Police Station Kanjhawala for the charges framed against him for the commission of offence under Section 302 IPC.

2. The brief facts of the case of the prosecution are that on 7.1.2017 at about 11.32 am, on receipt of DD No. 16A SI Robin Tyagi, along with Head Constable Rakesh, reached at Gram Sabha Village Nizampur, Delhi where one male dead

body was found lying on the vacant land. There was a wound mark on the head of the dead body and one muffler/gamcha was also entangled on its neck. Some blood was scattered near the place of incident and slippers of the deceased were also lying there. On enquiry, the name of deceased was revealed as one Shankar. Crime team also reached the spot; took the photographs of the crime scene, and thereafter, the present FIR was registered. Exhibits were lifted from the spot by Inspector Dinesh Kumar and thereafter the dead body was preserved in the mortuary of SGM Hospital. Investigation went underway and during the investigation, it was revealed that the murder was committed by his brother Rajesh who is the present respondent and he was thereafter arrested. According to the prosecution, the respondent led the police party to the back side of the factory and from beneath the log of layered wood, he got recovered one mobile phone. He also got recovered blood stained brick, by which it is alleged he had hit the deceased. According to the prosecution, the respondent also led the police party to the house of one Vishwajeet from where he got recovered the bill/invoice of the mobile phone of the deceased. During investigation, role of one CCL Prabhu cropped up, and SI Om Prakash undertook separate proceedings with regard to him.

3. The trial court vide order dated 14.7.2017, framed charge against the respondent under Section 302 IPC to which he pleaded not guilty and claimed trial.

4. To prove its case, the prosecution has examined 20 witnesses.

5. Mr. Ravi Nayak, learned APP appearing in support of the leave to appeal petition, argued that the impugned judgment had not appreciated the evidence in its right perspective. He further argued that there is enough material on record to establish the guilt of the accused. He further argued that the trial court has failed to appreciate the testimony of PW-16 who had fully supported the case of the prosecution and has also deposed about the last seen evidence; quarrel; and employment of the accused and deceased as labourers. He further argued that relying upon minor contradictions, the trial court has acquitted the accused.

6. The present case is based on circumstantial evidence and the law with regard to circumstantial evidence is well settled. The principles of law governing the proof of a criminal charge by circumstantial evidence need hardly any reiteration. From the several decisions of the Supreme Court available on the issue, the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance against the accused beyond all reasonable doubt, but the said circumstances must give rise to only one conclusion to the exclusion of all others, namely, that it is the accused and nobody else who had committed the crime. The circumstances proved must form a complete chain to establish the guilt of the accused.

7. The 5 principles of law laid down by the Hon'ble Supreme court in Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116 are as follows:-

"(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 Sahebrao Bobade Vs. State of Maharashtra where the following 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 fact 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."

8. These five golden principles, if we may say so, constitute the panchsheel of the required proof of a case based on circumstantial evidence and the same have been followed in Tanviben Pankajkumar Divetia Vs. State of Gujrat (1997) 7 SCC 156, Vikram Singh Vs. State of Punjab (2010) 3 SCC 56, Aftab Ahmad Ansari Vs. State of Uttaranchal (2010) 2 SCC 583, Sanatan Naskar and Anr. Vs. State of West Bengal (2010) 8 SCC 249 and Mohd. Arif alias Asshfaq Vs. State (NCT of Delhi) (2011) 13 SCC 621.

9. There are two sets of evidence in the present case. One set consists of public witnesses and second set consists of police witnesses. The public witnesses are PW-7, PW-8, PW-10 and PW-14. The remaining witnesses are police witnesses.

10. PW-1 Constable Ashok Kumar had conducted the medical examination of respondent at SGM Hospital.

11. PW-2 Head Constable Shivom is the Photographer in the Crime Team and he proved on record the photographs as Ex.PW2/1 to Ex.PW2/9 and CD as Ex.PW2/10. He proved certificate under Section 65-B Indian Evidence Act as Ex.PW2/11.

12. PW-3 Constable Ashok Kumar and PW-4 Head Constable Narender were posted at PCR Van and they had reached the spot on receiving messages from the control room. PW-4 proved the Call Register in which he had made entries

with regard to the receipt of call as Ex.PW4/A.

13. PW-11 Constable Naveen had prepared the scaled site plan and proved the same as Ex.PW11/A.

14. PW-12 SI Satyadev was Incharge, Crime Team, who had proved the crime team report as Ex.PW12/A.

15. PW-13 ASI Krishna had recorded the DD No.16A and proved the same as Ex.PW13/A. She recorded the FIR and proved the same as Ex.PW13/B and endorsement made by her on rukka Ex.PW13/C.

16. PW-15 ASI Rajbir Singh was MHC(M) and he proved the relevant entries in Register No.19 regarding deposit of pullindas Ex.PW15/A. He proved the copy of RC No.19/21/17 and RC No. 20/21/17 as Ex.PW15/B and Ex.PW15/C respectively.

17. PW-18 SI Harish Chand Pathak who had forwarded the PCR Form bearing 07Jan171240220 being the Nodal Officer, CPCR PHQ, as Ex.PW18/A and certificate given under Section 65 of Indian Evidence Act in this regard as Ex.PW18/B.

18. PW19 SI Robin Tyagi remained involved in investigation with PW-20 Inspector Dinesh Kumar. PW-20 Dinesh Kumar was the IO of the case and he had deposed about the investigation carried out by him in this case.

19. PW-14, Sh. Mukesh, one of the public witnesses who had deposed that a police official showed him a bill and he confirmed that the mobile mentioned in the bill was purchased from his shop in the name of one Shankar Singh and he proved the bill as Ex.PW8/E.

20. PW-8 Sh. Sandeep had deposed that on 7.1.2017 he had gone into the field for grazing his goats and he found that a dead body was lying in the bushes. He made a call at 100 number.

21. PW-9 Dr. Anurag Thapar, SR Department of Forensic Medicine conducted the postmortem on the dead body and proved his report as Ex.PW9/A. In his opinion, cause of death was due to combined effect of asphyxia as a result of ante mortem ligature strangulation and cranio cerebral damage subsequent to blunt force impact on the head.

22. PW-17 Dr. Rajesh had examined the respondent and proved his MLC Ex.PW17/A.

23. PW-5 Sh. Saurabh Pathak, Junior Forensic/Chemical Examiner, FSL, Delhi had proved the FSL report as PW5/A.

24. PW-6 Sh. Naval Kishor Joshi, Senior Scientific Officer had proved his report as Ex.PW6/A and had examined the viscera contents and found that ethyl alcohol in the blood sample.

25. Statement of the accused was also recorded under Section 313 Cr.P.C

wherein he stated that he has been falsely implicated and did not led any evidence in defence.

26. There is no dispute that deceased Shankar had suffered homicidal death. The question is whether the said death was caused by the respondent or not.

27. Now on examination of FSL report trial court found that the deceased was under the influence of alcohol at the relevant time.

28. On further examination of the FSL report regarding the other exhibits, as mentioned in Ex.PW5/A, trial court observed that the blood could not be detected on the shirt of the accused Ex.1, hair of accused Ex.2. Further DNA profile could not be generated from the source of exhibit 7, i.e piece of brick which allegedly was recovered at the instance of the accused. So there was nothing on record to prove that the blood found on the piece of brick Ex.7 was that of the deceased. We also concur with the findings of the trial court that the FSL report Ex PW5/11 is of no help to the prosecution as blood could not be detected on the shirt and hair of the respondent which were examined as exhibit '1' and exhibit '2'. Even as per the prosecution's case DNA profile could be generated from the piece of brick which allegedly was recovered at the instance of the accused and used in the commission of the offence. So the recovered brick and the clothes of the accused cannot be connected with the crime.

29. The prosecution has placed reliance on the extra-judicial confession alleged to have been made by the respondent to his landlord Sh. Vishwajeet (PW-8). The learned trial court has observed, and rightly so, that the respondent after his arrest and while he was in custody allegedly confessed his guilt before PW-8 when he was in police station, which is not admissible in evidence. The learned trial court found this confession to be inadmissible in evidence, being hit by Section 25 and 27 of the Evidence Act as having been made by him while he was police custody. We find no infirmity in the observation of the trial court regarding inadmissibility of the extra judicial confession made by the respondent herein as alleged. The respondent was in police custody at that time. Therefore, the same is not admissible as rightly held by the learned trial court being hit by Sections 25 and 27 of the Evidence Act . In cases which are based on circumstantial evidence motive assumes importance. No doubt, mere absence of proof of motive for commission of crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. In the instant case, the learned trial court has returned the finding that the prosecution has failed to prove that the respondent had motive to commit the offence. The observations in this regard are as follows:-

"49. Here, the case of the prosecution is that deceased Shankar @ Samika and accused Rajesh were brothers. Aarti was the wife of Shankar @ Samika and before her marriage with Shankar, she was to be married with Rajesh but in view of the fact that Shankar was the elder brother in the family, Rajesh could not be married with Aarti and due to Aarti's marriage with Rajesh, he started hating

Shanker and during the enquiries made by the police after the commission of offence in question, Sh. Naresh Kumar (PW7) under whom Shanker @ Samika and Rajesh and other people were employed, had expressed his suspicion over Rajesh in his statement to the police.

50. It is relevant here to state that none of the prosecution witnesses has deposed about the said fact that he had started hating his brother Shanker on account of the fact that he could not be married with Aarti and that the said Aarti got married with his brother Shanker. PW7 Sh. Naresh Kumar and other witnesses have not uttered even a single word about it. Infact PW7 Sh. Naresh Kumar was cross-examined by Ld. Addl. PP for the State in which he clearly denied that any such fact was within his notice. He has rather deposed that Shanker @ Samika used to drink heavily quiet often and that Rajesh by nature is a reticent/reserved person and he had not expressed any suspicion over anyone and that he was surprised when Rajesh was arrested by the police in this case on the charges of murder of his brother. Therefore, the prosecution has miserably failed to prove the said circumstance of motive for the accused to commit the said offence."

30. We see no infirmity in the above reasoning adopted by the Trial Court. Therefore, the appellant-State has further failed to prove that the respondent had a motive to do away with the deceased. There is no last seen evidence on record. As far as recoveries are concerned, piece of brick which was allegedly recovered at the instance of the respondent was sent for FSL examination, and it did not contain any blood of human origin. The recovery of mobile phone make Karbonn (black colour) and bill/invoice of the mobile phone which was recovered in pursuance of the disclosure statement of the respondent are very week evidence.

31. It is well settled legal position that the presumption of innocence that obtains in favour of an accused person is further strengthened by the order of acquittal, passed in his favour by the trial court. The appellate court is generally loath to interfere with the findings of fact recorded by the trial court, a fortiori, because the latter has had the advantage of examining in the first person the demeanor of the witnesses. Therefore, when the trial court takes a plausible view of the facts of the case, interference by the appellate court, with the judgment of acquittal, is neither warranted nor justified. It is only when the conclusion arrived at by the trial court appears to be palpably wrong and against the weight of evidence, or predicated on an erroneous view of law, which would result in grave injustice, that the appellate court would interfere with the findings returned. [See Muralidhar @ Gidda and Another vs. State of Karnataka reported as (2014) 5 SCC 730 and Mallikarjun Kodagali (Dead) represented through Legal Representatives vs. State of Karnataka & Ors. reported as AIR 2018 SC 5206].

32. Having examined the records of the case, we do not find any reason to differ with the findings returned by the trial court to the effect that the prosecution has failed to establish the charges against the respondent.

33. In view of the foregoing discussion, we are of the view that the present leave petition is devoid of merit. The same is accordingly dismissed.