
(2009) 02 DEL CK 0295
In the Delhi High Court
Case No : Criminal Appeal 215 of 2004

Tillu Sahu

APPELLANT

Vs

The State (Govt. of NCT) Delhi

RESPONDENT

Date of Decision : 06-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 25, 27
Penal Code, 1860 (IPC) — Section 302, 307

Citation : (2009) 02 DEL CK 0295

Hon'ble Judges : Pradeep Nandrajog, J;Aruna Suresh, J

Bench : Division Bench

Advocate : Rajesh Mahajan, for the Appellant; Pawan Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—At 11.01 PM on 28.2.2002, DD No. 33-A was recorded at PS Vasant Kunj to the effect that a telephone call has been received from telephone No. 6155381 and the caller has informed that somebody has been murdered in House No. 427, Kusumpur Pahari.

2. SI P.C. Yadav PW-14, accompanied by Const. Banwari Lal PW-6, left for the spot and found the place to be a jhuggi wherefrom an injured person had already been removed by the PCR to the hospital.

3. Const. Banwari Lal stayed back and SI P.C. Yadav went to Safdarjung hospital and found that the injured was not fit for statement. He obtained a copy of the MLC, Ex.PW-15/1 of the injured recorded by Dr. Parvez. Returning to the jhuggi which had fresh blood spread over the floor and on the walls, SI P.C.Yadav made an endorsement Ex.PW-14/1 on the copy of the DD entry and forwarded the same for registration of an FIR. At the police station, SI Raghubir Singh PW-7, registered the FIR, Ex.PW-7/1, u/s 307 IPC at 10.15 AM.

4. At the spot, SI P.C.Yadav summoned the crime team and prepared the site plan Ex.PW-14/3. He seized plastic foam stained with blood from the wooden bed inside the jhuggi as per seizure memo Ex.PW-6/1. A blood-stained rod was also seized from the jhuggi as per seizure memo Ex.PW-6/2. The accused i.e. the appellant met SI P.C.Yadav at the spot. He was wearing a blue-black shirt which was found to be stained with blood. The same was seized vide seizure memo Ex.PW- 6/1. The appellant was arrested as per arrest memo Ex.PW- 14/6 from outside the jhuggi.

5. Const. Ravinder PW-13, took photographs Ex.PW- 13/1 to PW-13/8 of the jhuggi; negatives whereof are Ex.PW- 13/9 to PW-13/16.

6. The injured died a few hours after he was admitted at the hospital. Thus the offence punishable u/s 302 IPC was added in the FIR. His body was sent for post-mortem. Dr. A.K. Sharma PW-2, conducted the post-mortem on 2.3.2002 and recorded the following external and internal injuries on the deceased:

External Ante mortem injuries:

Left eye was black Avulsed contused lacerated wound of size 14x4 cm obliquely placed on the left lateral side of head, face and neck region. It is upper end ran downwards from left temporal region, cutting half of the anterior of pinna of left ear. It continued downwards anteriority along the left lateral part of the neck just behind the angle of the left mandible and terminated just short of the root of the neck on the left lateral side. Its depth in the region of angle of mandible was about 5 cm. It had caused continued downwards anteriority along the left lateral part of the neck just behind the angle of the left mandible and terminated just sort of the root of the neck on the left lateral side. Its depth in the region of angle of mandible was about 5 cm. It had caused damage to the tissue, muscle and small vessels in that area. Blood was oozing from the wound. Internal Examination:

- . Scalp: effusion of blood was found in left frontal region.
- . Skull: Depressed fracture of size 2.5x2.5 cms on the left frontal region.
- . Brain was pale.
- . Neck injuries were already described as above. Effusion of blood was found in the neck tissues.
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7. He opined that the deceased die due to haemorrhage and shock following injuries to neck caused by blunt force impact and that injury No. 2 was sufficient to cause death in ordinary course of nature. The blood-stained clothes of the deceased and a gauze containing blood of the deceased were handed over by him to the police. A few days later i.e. on 19.4.2002 SI Madan Pal PW-3, a draftsman, went to the site and prepared the site plan to scale, Ex.PW-3/1.

8. Proceeding to investigate as to what had happened, SI P.C.Yadav recorded the statement of the wife of the deceased Smt. Sangita PW-1, who told the police that on 28.2.2002 at around 8.30 PM the appellant had come to her jhuggi at C-250, Kusumpur Pahari and left with her husband Raju (the deceased). She stated that her husband did not return and at around 1.00 AM she learnt from the police that her husband had sustained injuries and was admitted to the hospital. She informed the police that there used to be quarrel between her husband and the accused and that 2-3 days prior to 28.2.2002 the accused had threatened to kill her husband in her presence. Sanjay Charan PW-4, brother-in-law of the deceased, also informed the police that about four days prior to the incident there was a quarrel between the deceased and the appellant.

9. One Bhompal PW-10, informed the police that he was running a provision store at C-186, Kusumpur Pahari and that at around 11.00 PM on 28.2.2002, from his telephone No. 6155380, the accused had made a call at No. 100 and he had heard him tell the police that he had murdered somebody in his house and that he was waiting on the road near the shop so that the police can come and pick him up.

10. The blood-stained shirt of the appellant; blood- stained rod; blood-stained foam sheet lifted from the place of the occurrence and the blood-stained clothes of the deceased and the gauze containing the blood sample of the deceased were sent to the Forensic Science Laboratory, Malviya Nagar for serology examination.

11. On 28.6.2002 a report was submitted by the Laboratory to the effect that the blood-stained gauze, the pant and the underwear of the deceased had blood of human origin and was of "A" group.

12. The pipe was found to be having human blood which gave no reaction when tested to identify the group thereof. The shirt worn by the appellant was detected with blood of human origin and group was "A". The foam sheet was detected with blood of human origin but gave no reaction when tested for the group thereof.

13. Armed with the aforesaid material and citing the various police officers associated with the registration of the FIR and in particular citing P.C.Yadav, who conducted the investigation, the charge-sheet was filed listing the wife and the brother-in-law of the deceased as also Bhompal as witnesses of the prosecution. The FSL report, the MLC of the deceased and the post-mortem report of the deceased were also relied upon.

14. The wife of the deceased examined as PW-1, deposed the facts aforementioned which she had informed to the police. Therefore, we are not re-noting what she had deposed, save and except to note that during cross-examination she stated that her husband used to do polishing work in houses and that the appellant was a plumber. That a quarrel had taken place between her husband and the accused on some issue at the place where both were working. In cross- examination, she stated that her husband and the appellant used to consume liquor and that there

used to be quarrel between the two even earlier on.

15. Sanjay Charan PW-4, brother-in-law of the deceased stated that four days prior to the incident he was a witness to a quarrel between the appellant and the deceased.

16. Bhompal PW-10, deposed of running a provision shop at Kusumpur Pahari and being the subscriber of telephone No. 6155380 from which telephone, the appellant was stated by him to have made a telephone call to the police informing of having committed murder of somebody and requiring the police to come to the shop so that he can be apprehended by the police.

17. SI P.C.Yadav deposed about reaching the jhuggi when he received DD No. 33 and the further facts pertaining to the investigation conducted by him, and as noted by us, while narrating the sequence of events. Const. Banwari Lal PW-6 corroborated SI P.C.Yadav of having seen fresh blood stains on the floor and the walls of the jhuggi as also on the rod and a foam mattress on the bed inside the jhuggi.

18. The appellant has been convicted by the learned trial judge for having murdered Raju. The evidence relied upon by the learned trial judge is the deposition of the wife of the deceased to the effect that her husband was last seen with the appellant at around 8.30 PM, coupled with the fact that the deceased was found dead at 12.35 AM the next day.

19. With respect to the testimony of the wife and the brother-in-law of the deceased, learned trial judge has held that there was evidence of motive i.e. there was a fight between the appellant and the deceased a few days prior. The next incriminating evidence relied upon by the learned trial judge is the appellant going to the shop of PW-10 and informing the police of having committed a murder i.e. the disclosure of the appellant to the police, inculcating himself. The next incriminating evidence found by the learned trial judge is that, blood of group "A" was that of the deceased evidenced by the report of the forensic science laboratory and that blood of same group was found on the shirt of the appellant and that the appellant had not explained the presence thereof on his shirt.

20. Learned Counsel for the appellant had urged that the learned trial judge could not have relied upon the testimony of PW-10 and what was disclosed by the appellant to the police over the telephone because the said information is given to the police and every part thereof is inadmissible in evidence, save and except what is protected by Section 27 of the Evidence Act. Learned Counsel urged that no witness was examined to prove that Raju was removed from the jhuggi of the appellant and was in an injured condition. Further submission made by learned Counsel for the appellant was that the FSL report could not be used as evidence against the appellant for the reason, while examining the appellant u/s 313 Cr.PC the said report was not put to the appellant as a piece of incriminating evidence and hence the appellant did not have any opportunity to

explain the same.

21. Learned Counsel urged that if the said two pieces of evidence is removed, the only evidence against the appellant is of being last seen with the deceased at 8.30 PM and in the absence of any further incriminating evidence, no conviction can be sustained on last seen evidence alone.

22. With respect to an inculpatory statement made by an accused to the police the law is clear.

23. In the decision reported as Aghnoo Nagesia Vs. State of Bihar, it was held that the bar of Section 25 of the Evidence Act does not come into play, only when a statement is made by the accused in custody before a police officer. A statement made to a police officer would also be hit by the bar of Section 25 of the Evidence Act even when the accused is not in police custody or is nowhere near the police.

24. Only that part of the inculpatory statement would be admissible which comes within the trappings of Section 27 of the Evidence Act i.e. results in the recovery of an object and the discovery of a fact pursuant to the statement made by the accused to the police officer.

25. The decision was followed, with approval, in the decision reported as AIR 1972 SC 92 Khatri Hem Raj v. State of Gujrat.

26. Thus, what ever was disclosed by the appellant to the police when he rang up from the telephone of PW-10 is inadmissible in evidence inasmuch as the same is an admission of guilt made to a police officer.

27. However, as noted in the two decisions of the Supreme Court hereinabove, same can be used, limited to the proof of the fact that the informant was the appellant and that he made a telephone call to the police from the shop of PW-10 and that he was present at the shop of PW-10 when the call was made at around 11.00 PM.

28. Indeed, the FSL report has not been put to the appellant as a piece of incriminating evidence and hence the prosecution cannot rely upon the same.

29. It is unfortunate that the learned trial judge was not live when the appellant was examined u/s 313 Cr.PC, as a result, a very vital piece of evidence has to be discarded by us.

30. Unfortunately, no police officer or any public witness has been examined to prove that Raju was removed to the hospital from the jhuggi of the appellant.

31. What does that leave us with?

32. We are left with evidence that at 11.00 PM on 28.2.2002, the appellant had made a call from the shop of PW- 10, i.e. at 11.00 PM he was in Kusumpur Pahari at the shop of PW-10.

33. We are left with the testimony of PW-1 and PW-4, to the effect that a few days prior to the date of the incident there was a quarrel between the appellant and the deceased. We are left with the evidence of PW-1 of having last seen her husband with the appellant at 8.30 PM and further evidence that both of them left the jhuggi where the deceased resided. We are left with the evidence of the photographs Ex.PW-13/1 to 13/8. We are also left with the evidence of P.C.Yadav PW- 14, who has categorically deposed that when he reached the jhuggi he found fresh blood stains on the walls of the jhuggi as also the floor. We also are left with the testimony of Const. Banwari Lal PW-6, who had accompanied SI P.C.Yadav, who deposed that fresh blood was noted both on the floor and on the bed as also on a pipe when they reached the jhuggi.

34. Further material which we have is the answer to question No. 9 by the appellant when he was cross-examined u/s 313 Cr.PC. The question is as under:

Q.9 This is also in evidence against you that photographs Ex.PW-13/1 to 8 were taken by PW- 13 in jhuggi No. 427, Kusumpur Pahadi on the night intervening 28.2.02 and 1.3.02. Do you anything to say?

The appellant had responded:

A. It is correct to the extent that the photographs pertain to my jhuggi.

35. Whether evidence of an accused being last seen with the deceased is sufficient to infer that the accused is the offender, unless the accused satisfactorily explains of having parted company with the deceased when the deceased was alive and kicking, appears to be a subject matter of a controversy inasmuch as certain decisions have opined that it is permissible to convict an accused on the basis of his being last seen with the deceased and some decisions adopted the rule of prudence that evidence of last seen with the deceased is not sufficient unless there is some further corroborative evidence linking the accused with the offence.

36. But, a close look at each of the decisions, in relation to the facts thereof, would show that actually there is no divergence of opinion.

37. Where the time gap and the circumstances of last seen is so small that the possibility of someone else being the author of the crime becomes impossible and the facts are such that a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain having parted company or to own up liability; the evidence of last seen with the deceased is sufficient to prove the guilt of the accused.

38. To put it pithily, depending upon the facts and circumstances and in particular where the time gap between last seen and the dead body being recovered is very small, the court has to see whether there could be a possibility of someone else accessing the deceased and hence possibly being the author of the crime.

39. If not, last seen with the deceased would be good enough evidence to infer that the accused is the author of the crime.

40. The aforesaid principle can be culled out from the decision of the Supreme Court reported as:

1 Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir,

2. State of U.P. Vs. Satish,

3. Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh,

4. Mohibur Rahman and Another Vs. State of Assam,

5. State of Goa Vs. Sanjay Thakran and Another,

6. Jaswant Gir v. State of Punjab (2005) 12 SCC 438.

7. State of West Bengal Vs. Mir Mohammad Omar and Others etc.,

8 Manivel and Others Vs. State of Tamil Nadu,

41. Applying the legal principle aforenoted to the facts of the case, it assumes significance that the appellant and the deceased had together left the jhuggi of the deceased at 8.30 PM. Information of the deceased being injured was available with the police at 11.00 PM and as deposed to by P.C.Yadav they had reached the jhuggi at 11.55 PM. The MLC Ex.PW-15/1 evidences that the deceased was brought at the hospital at 12.35 AM on 1.3.2002.

42. Since the FSL report cannot be used by us, we have no evidence as to whether the blood in the jhuggi was of human origin; and of what group. But, we have evidence that the jhuggi was stained with blood. SI P.C.Yadav and Const. Banwari Lal who have deposed said fact have not been cross-examined on this issue. The appellant has not denied that the jhuggi belongs to him. As noted above, the appellant has not denied that photographs Ex.PW-13/1 to 13/8 are of his jhuggi.

43. The appellant has not explained as to wherefrom blood came on the walls of his jhuggi, the floor of his jhuggi and the bed in his jhuggi. He has not said that he has slaughtered an animal inside his jhuggi. He has not said that he had got blood for somebody and the container broke inside the jhuggi.

44. The time between 8.30 PM and 11.00 PM is only 2½ hours and in our opinion proximate enough, wherefrom, in the absence of any explanation from the appellant as to when did he part company with the deceased, it can safely be inferred that the appellant is the author of the crime. In any case, there is corroborative evidence, and as noted above, to link the appellant with the commission of the crime.

45. Indeed, learned Counsel for the appellant conceded that in view of the post-mortem report of the deceased it is obviously a case of murder.

46. The appeal is dismissed.