

(2017) 11 DEL CK 0360

In the Delhi High Court

Case No : Criminal Appeal No. 1107 Of 2015

Umesh Prasad

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 17-11-2017

Acts Referred:

Indian Penal Code, 1860 — Section 201, 302
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2017) 11 DEL CK 0360

Hon'ble Judges : S.P.Garg, J;C.Hari Shankar, J

Bench : Division Bench

Advocate : Ajay Verma, Upendra, Aashaa Tiwari

Final Decision : Allowed

Judgement

S.P.Garg, J

1. Challenge in this appeal is a judgment dated 03.07.2015 of learned Additional Sessions Judge in Sessions Case No.21/14 (Old SC No.52/11) arising

out of FIR No.207/11 registered at Police Station Hari Nagar by which the appellant-Umesh Prasad was held guilty for committing offence punishable

under Section 302/201 IPC. By an order dated 8.7.2015, the appellant was sentenced to undergo imprisonment for life with fine Rs. 40,000/- under

Section 302 IPC and Rigorous Imprisonment for five years with fine Rs. 5,000/- under Section 201 IPC. Both the sentences were to run concurrently.

2. The prosecution case, as reflected in the charge-sheet, was that before 16.05.2011 on the roof of 2nd floor of House No.MS-104, Hari Nagar,

Delhi, the appellant committed murder of Sadanand and concealed his body underneath the woods with intention to screen himself from legal

punishment. Information of the incident was conveyed to the police on

15.05.2011 and DD No.34 (Mark PW-15/A) came to be recorded at Police

Post Hari Nagar at around 8.55 p.m. It was informed that a foul smell was emanating from the roof of the said house. The investigation was assigned

to ASI Virender Kumar who along with Ct.Sanjay went to the spot. PW-5 (Rajender Kumar Batra) and PW-4 (Gurvinder Singh) were present at the

spot. Dead body of an individual, aged around 25 years, in decomposed condition was found underneath the wooden ballis. The crime team was

summoned. The articles lying near the spot were examined and fingerprints were lifted. The FIR was lodged; the dead body was sent for post-mortem

examination; it remained unidentified.

3. On 19.05.2011, the victim's parents visited the police post and informed that their son Sadanand was missing; they subsequently identified the

body recovered on 15.05.2011 at mortuary. Post-mortem examination was conducted and body was handed over to the legal heirs of the deceased.

4. During investigation, the Investigating Officer recorded statements of the several witnesses conversant with the facts. On 24.05.2011, the appellant

was arrested and certain recoveries were effected at his instance. The exhibits collected during investigation were sent for Forensic Science

Laboratory for examination. Upon completion of investigation, a charge-sheet for commission of offence under Sections 302/201 IPC was filed

against the appellant.

5. To establish its case, the prosecution in all examined 29 witnesses. In 313 statement, the appellant denied his involvement in the crime and pleaded

false implication. He did not examine any witness in defence. After considering the evidence and documents on record and on appreciation of the

contentions raised by the learned counsel for the parties, the trial resulted in appellant's conviction, as mentioned previously. Being aggrieved and

dissatisfied, the instant appeal has been preferred.

6. We have heard the learned counsel for the parties and have examined the file minutely. At the outset, it may be mentioned that the entire case of

the prosecution is based upon circumstantial evidence. The prosecution has primarily relied upon the circumstance of last seen to connect the appellant

with the crime. On scanning the testimonies of various witnesses examined by the prosecution, we are of the view that the prosecution has failed to

establish the circumstance beyond reasonable doubt.

7. Admitted position is that the deceased Sadanand used to work at an injection molding factory located at Maya Puri; he used to live in a juggi at

Maya Puri. The investigation agency did not collect any credible evidence from the place of work where the deceased used to attend his duties to

ascertain as till which date, he (deceased) had performed his duties there. No plausible explanation has been offered by the Investigating Officer as to

why the factory owner/employer was not examined and the relevant record showing his presence on the relevant dates was not seized. It is unclear

as to till which date and time, the victim was present at his place of work. It is also unclear as to what was the exact time and date of the death of the

victim. The police machinery was put into motion on 15.05.2011 when PW-5 (Rajender Kumar Batra), the contractor to construct the floors on the

plot in question went to the site at around 7.00 p.m. and the neighbours complained that foul smell was coming from the top floor. The dead body was

found decomposed and unidentified. When victim's parents approached the police on 19.05.2011, only then the victim's identity could be

established/known. During this period, no 'missing' report of the victim was lodged by his family members/roommate or neighbours. The

victim's parents were not informed about his disappearance. No police report was lodged suspecting any individual for his disappearance.

8. The post-mortem examination was conducted by PW-2 (Dr.Komal Singh) on 19.05.2011 from 3.15 p.m. to 4.15 p.m. The cause of death could not

be commented. Time since death was opined approximately 12 days prior to the post-mortem examination; it came to be on 7.5.2011 or so.

9. Reliance was placed on PW-6 Mantu Kumar's testimony to establish the circumstance of last seen. His statement under Section 161 Cr.P.C.

came to be recorded only on 19.05.2011 after recovery of the body. Prior to that, he did not inform victim's parents or his roommates if the victim

had stopped attending his duty at the factory. In his court statement, he testified that one day in the evening at around 8.00 p.m., the victim Sadanand

told him to be going for some party. On enquiry about the party, Sadanand informed him that it was a liquor party. The deceased did not turn up next

day. On the third day his roommate came to enquire about the victim's whereabouts and he apprised him about his absence after he had gone for

the party. After some days, he was contacted by victim's father and he divulged the facts to him. In the examination-in-chief itself, the victim did

not specify any definite date when he had conversation with the victim and was informed of his intention to go for a liquor party at around 8.00 p.m.

He did not reveal the name of the victim's roommate who had contacted him on the third day to ascertain the victim's whereabouts. He

categorically stated that he was unable to identify the appellant as he had never seen him; the victim's roommate was an old man. Learned

Additional Public Prosecutor cross-examined the witness after court's permission as he had resiled from the previous statement. In the cross-

examination, he reiterated that he did not know the name of the victim's roommate; he did not know if there used to be quarrels between the

deceased and the appellant or that the victim's roommate had fled the spot after the occurrence.

10. The witness was not cross-examined by the learned Additional Public Prosecutor as to what were the timings of the victim at the said factory.

Nothing was enquired from the witness as to who had called the victim to attend the liquor party and if so by what mode i.e. personally or

telephonically. It is not clear as to what were the timings of the victim at the factory and who else used to work along with him at the said factory.

The PW did not give any reason as to why he did not inform his employer or why no missing report was lodged with the police.

11. PW-29 (Khushi Ram Thakur) travelled from Doha Qatar, U.A.E. to record his statement before court on 15.04.2015. As per his testimony, he

stayed at Mayapuri for about three months with Sadanand. He further deposed that Sadanand and Umesh Prashad used to live in the same jhuggi;

they used to cook food jointly and he cooked his food separately. He further deposed that on 7.5.2011, the victim came from his factory in the evening

at about 5.30 p.m. and told him that he was going to the factory again to do overtime. On the next morning i.e. 08.05.2011 Sadanand did not return.

When he went to the factory to know about Sadanand, he came to know that Sadanand had gone to a party of some Bhaiya (kisi bhaiya ki party mein

gaya hai); he did not know anything else. After 8.5.2011 Sadanand did not meet him nor he came to the jhuggi. After about a week, the victim's

mother came to jhuggi and visited Police Station Mayapuri. From there, she was sent to Police Station Hari Nagar where she identified the

victim's body. He further deposed that one Raj Kumar, jija of Umesh and his frined were detained by the police along with him. This witness was

cross-examined by the learned APP after seeking court's permission as he had deposed facts contrary to the statement recorded under Section

161 Cr.P.C. In the cross-examination by the learned Addl.PP, he denied the contents of statement Ex.PW-29/PX given to the police.

12. PW-29's testimony is in contradiction to PW-6's statement. PW-6 did not depose if the victim had come again in the factory to do

overtime. As observed above, no relevant record was collected from the employer to ascertain as to for what time/duration on 7.5.2011, the victim

had performed his duty. PW-29 (Khushi Ram Thakur) did not testify if the victim had any plan to attend liquor party on 7.5.2011. PW-6 did not depose

if PW-29 Khushi Ram Thakir had visited him next day i.e. 8.5.2011 to enquire about the victim's whereabouts. Neither PW-6 nor PW-29 were

aware as to who was the individual whose liquor party the victim was to attend and if so at what time and at which place. PW-1 (Vidya Devi)

narrated all inconsistent version that Mantu Kumar (PW-6) had informed her that her son was taken by the appellant for a liquor party from the

factory itself.

13. PW-6 (Mantu Kumar) did not state if the victim had received telephone call from any specific individual inviting him to the liquor party.

Apparently, neither PW-6 (Mantu Kumar) nor PW-29 (Khushi Ram Thakur) had seen the victim in the appellant's company any time on

7.5.2011.

14. PW-29 (Khushi Ram Thakur) disclosed that the appellant used to reside with the deceased in the jhuggi. He, however, did not reveal as to where

the appellant was employed. The investigating agency did not collect any credible evidence to find out as to where the appellant used to work, it was

not ascertained whether on 7.5.2011 he had gone to work place. Nothing has emerged as to at what time he was present at any particular place on

7.5.2011. It was also not investigated as to when the appellant had purchased the liquor, if so from which shop and for consideration? It is unclear as

to how many individuals were invited at the so called liquor party. After the victim allegedly left the factory at around 8.00 p.m. on getting invitation

for liquor party, his movements have not been ascertained or determined. No evidence has come on record if after departure from the factory where

the victim had gone or when he had met the accused and if so at what place. No

individual had seen both the victim and the appellant together on

7.5.2011 before Sadanand met with homicidal death. In the absence of definite evidence that the appellant and the deceased were last seen together

and when the time gap is long, it would be dangerous to come to the conclusion that the appellant was responsible for the murder of Sadanand. In

view of the time gap when the victim had left the factory and the recovery of the body, possibility of others intervening cannot be ruled out.

15. In another recent judgment, *Anjan Kumar Sarma v State of Assam*, 2017 SCC Online SC 622, the Supreme Court, relying on its earlier decision in

State of Goa v Sanjay Thakran, (2007) 3 SCC 775, expostulated thus, on the 'last seen theory':

'22. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the

guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes

the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory

explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr. Venkataramani do not take a

different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in *State of Goa v. Sanjay Thakran*, (2007)

3 SCC 755 in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there

was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in

the intervening period. It was held in the above judgment as under:'

'34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for

finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time

when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any

other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the

deceased and the detection of the crime would be a material consideration for

appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.â??

(Emphasis supplied)

16. The prosecution further relied upon the other incriminating circumstance of appellantâ??s chance prints found on the articles recovered at the spot. PW-12 HC Udham Singh from Mobile Crime Team disclosed that he tried to lift chance prints from all the articles including the wine bottle lying in the water tank. Only four chance print could be lifted from the wine bottle lying in the water tank. PW-10 (SI Shubhash Chand) examined the chance prints with the help of magnifying glass; compared the questioned chance prints and specimen and gave his report (Ex.PW-10/A). Perusal of the report reveals that only one chance print matched. The Trial Court came to

the conclusion that it established the appellant's presence at the spot on that night.

17. Photographs were taken of various articles at the spot. PW-11 (Ct. Anil Kumar) took 17 photographs from different angles (Ex.PW11/A1 to Ex.PW11/A17). Strange enough, the articles from where chance prints were lifted were not photographed. It is so admitted by PW-28 (Inspector Harpal Singh) in the cross-examination. It has not been investigated as to on which specific date any liquor party was held at the spot; how many individuals were present there; when the appellant left the spot and where he remained prior to his arrest; the prosecution witnesses revealed that three plastic glasses were recovered at the spot. It was not ascertained as to for whom the third plastic glass meant. No finger prints of the deceased were lifted from the articles lying at the spot. It is also not clear as to what was the duration between putting of the finger prints on the wine-bottle and its recovery. Pertinent to note is that PW-4 (Gurvinder Singh) and PW-5 (Rajinder Kumar Batra) are conspicuously silent if any finger prints were lifted that day. PW-16 (ASI Virender Kumar) initial Investigating Officer too deposes on similar lines. This circumstance alone, in our view, is not sufficient to connect the appellant with the crime.

18. The prosecution further relied upon the Call Details Record. The Trial Court recorded that CDR (Ex.PW-8/A) showed that the deceased received a call in the evening of 7.5.2011 at about 8:14:49 from the appellant's mobile No.9716437414. The appellant had made telephone call at 8860855638, it belonged to the deceased. This Court is of the view that no adverse inference can be drawn on the basis of this solitary call received by the victim on mobile No. 8860855638 at around 8.40-8.49. Apparently, prior to that at around 12.26.13 and 18.53.51 that day, the victim had received a telephonic call from Mobile No.9716437414. The prosecution did not furnish any explanation as to for what connection the said calls were. Even on 5.5.2011, five calls were made at different times. The Investigating Officer did not investigate other numbers with whom the victim was in touch that day particularly 9793719113 with whom the calls were exchanged at odd hours. Since both the victim and the accused lived together and were acquainted with each other, making of a telephone call by the appellant to the victim is not unusual. As observed above, PW-6 did not testify if

prior to his departure from the factory at 8.00 p.m., the victim received any telephone call inviting him to a liquor party.

19. PW-29 (Khushi Ram Thakur) did not make any telephone call to the victim after he went again to the factory to do overtime. It is relevant to note

that mobile No. 8860855638 was obtained on the ID proof of PW-29 (Khushi Ram Thakur). The ID card of the witness was used while filling

Customer Application Form (Ex.PW-3/C). It is unclear as to why ID of PW-29 was used by the victim for taking the SIM. The investigating agency

did not investigate as to what mobile number was being used by PW-29 and if on the fateful day, he was in touch with any individual.

20. No evidence has surfaced to establish as to since when both the appellant and the deceased lived in the jhuggi; when PW-29 (Khushi Ram

Thakur) joined them.

21. The Investigating Officer did not join any witness from the neighbourhood to find out as to how many persons lived in the said jhuggi and since

when. Admittedly no belongings of the appellant were recovered from the jhuggi. PW-1 (Vidya Devi), victim's mother, informed in her court

statement that her son used to live alone in the jhuggi. Subsequently, one Raj Kumar also started living with her son Sadanand. Raj Kumar fled the

spot after the murder of her son. PW-29 (Khushi Ram Thakur) did not talk about Raj Kumar's stay in the said jhuggi. He, however, informed that

Raj Kumar, victim's brother in law (jija) and his friend were detained by the police. Apparently, Raj Kumar was one of the suspects. No

investigation was carried out as to where Raj Kumar was present on the date and time of the incident. Raj Kumar has not been examined or produced

as a witness. Additional Public Prosecutor did not cross examine PW-1(Vidya Devi) to put a suggestion if Raj Kumar did not stay with her son

Sadanand.

22. The appellant was arrested on 24.05.2011, after a gap of about 15 days of the incident. Recovery of the mobile belonging to the deceased without

SIM seems suspect. The mobile phone was of no substantial value to be detained by the appellant in his possession at the time of his apprehension in a

dramatic manner on 24.05.2011. No independent public witness was associated at the time of his arrest and recovery of the mobile. No finger prints

on the mobile were collected.

23. The prosecution was unable to establish appellant's motive to commit the heinous crime of murder of his roommate. Nothing has emerged on record to infer if there was hostility between the appellant and the accused on any issue or any serious quarrel had taken place between them any time forcing the appellant to commit the crime. In the absence of any prior animosity or ill-will, the appellant for no apparent reason was not expected to commit the crime. In a case based on circumstantial evidence, motive plays an important role. If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence lending assurance to the prosecution case. Needless to say even if the prosecution has not been able to prove the motive that will not be a ground to throw away the prosecution case. The absence of proof of motive only demands careful scrutiny and deeper analysis of evidence adduced by the prosecution.

24. In the light of the above discussion, we are of the view that the prosecution has miserably failed to prove that it was the appellant and the appellant alone who had committed the victim's murder on the relevant date. In a case based upon circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. The proved circumstances must be consistent only with the hypotheses of the guilt of the accused and totally inconsistent with his innocence.

25. Considering the deficiencies in the prosecution case referred above, the appellant deserves benefit of doubt. The appeal is, thus, allowed. The conviction and sentence recorded by the Trial Court are set aside. The appellant be released forthwith if not required to be detained in any other case.

26. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back along with a copy of this order.