

State Vs. Arun

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Court : Delhi

Decided On : Aug-14-2013

Judge : Kailash Gambhir

Appellant : State

Respondent : Arun

Advocate for Pet/Ap. : Mr. Dayan Krishnan

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.L.P. 120/2012 Date of Decision:

14. 08.2013 STATE Petitioner Through: Mr. Dayan Krishnan, Addl. Standing Counsel versus ARUN Respondent Through: None. CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE INDERMEET KAUR KAILASH GAMBHIR, J.

1. The present Criminal Leave to Appeal has been preferred by the petitioner/State under Section 378 Cr.P.C. to challenge the judgment dated 08.10.2010 passed by the learned Additional Sessions Judge, Rohini Courts, New Delhi whereby the learned Additional Sessions Judge has acquitted the respondent from all the charges framed against him under Sections 363/ 364/ 365/ 302 of the Indian Penal Code, 1806 (hereinafter referred to as IPC).

2. Mr. Dayan Krishnan, Additional Standing Counsel appearing for the petitioner/ State, submits that the learned Trial Judge has failed to appreciate that the prosecution has been able to prove that the deceased was lastly seen with the accused by the PW-1, PW-2, PW-3 and PW-4, when he took the deceased in a white coloured Maruti car. The contention raised by the learned counsel for the petitioner is that once it was proved on record by the prosecution that the deceased was lastly seen in the company of the accused and thereafter, the deceased was found dead on 20.01.2001 at 6.50 a.m., then the onus shifts on the accused to explain the circumstances which led to the death of the victim and on failure of the accused to offer any explanation or if the explanation rendered by the accused is found to be false, then the possible inference can be drawn against the accused in the commission of the crime. Counsel further submits that the learned Trial Judge has committed an error in giving benefit of doubt to the respondent even though PW-1 / Deepak, PW-2 / Mayawati, PW-3 / Anita and PW-4 Chinta have unflinchingly deposed against the respondent that he took the deceased in a white coloured Maruti car for a stroll and it was thereafter, that the body of the deceased was found near Kali Bari Mandir near Police Station Mandir Marg, New Delhi. Counsel further submits that at the time of lodging of the FIR, the complainant had no knowledge that sheepak has been murdered by the respondent and therefore, the FIR was registered under Sections 363/365 IPC and in the said FIR, the respondent was named by the complainant. Counsel also submits that the learned Trial Judge has given undue weightage to the minor discrepancies and variance in the Court depositions of PW-1, PW-2, PW-3 and PW-4 without appreciating the fact that the said witnesses were consistent in their stand on material facts. The contention raised by the learned counsel for the petitioner is that the discrepancies crept in the deposition of the said witnesses were comparatively minor in nature and the same did not impinge the prosecution version and even otherwise such minor discrepancies are bound to take place due to lapse of time and memory.

3. In support of his arguments counsel for the petitioner placed reliance on a judgment of the Apex Court in the case of State of West Bengal v. Mir Mohd Omar and Others., (2000) 8 SC 308.

4. We have heard learned counsel for the petitioner/ State.

5. It is a settled law that criminal jurisprudence begins with the presumption that unless otherwise proved the person facing the trial would be deemed to be innocent. The burden to prove the charge against the accused is on the prosecution and not on the accused. The prosecution, if fails to connect the act of the accused with ultimate crime and where the material links constituting the evidence are found missing then the benefit of the same goes in favour of the accused.

6. Coming to the case at hand, this case was registered against the accused U/s. 363/365 of IPC, on the statement of Mewati Devi/ PW 2. About four months back, one Arun, son of Rajender Rai was residing as tenant in their house. On 19/01/2001 at about 5.00 pm., accused Arun came in a white coloured Maruti Car and took her son Sheepak, aged about 13/14 years, by alluring him in his car and obscured and confined him at some unknown place. During investigation, rough site plan was prepared. Message was sent on all India basis regarding missing person. PCR was informed. A request was also given for publishing the particulars of kidnapped boy in the leading newspapers. Another request was made for broadcasting the photo and other particulars of kidnapped boy. Missing person pamphlet was also obtained.

7. According to DD No.31A dated 20/01/2001, at about 6.50 am., Head Constable Harbans Singh from New Delhi Control Room informed that one man was lying unconscious near Kalibari Mandir from PS Mandir Marg towards T.K. Road. It was recorded and was handed over to SI Narpat Singh, who alongwith Constable Ashok went at the spot. According to DD No.6A dated 20/01/2001, SI Narpat Singh alongwith Constable Ashok reached at the spot. PCR van was there. He saw one dead body of a boy, aged 14/15 years. No document regarding identification was found. No visible injury was seen. On the right side of the mouth, dry spot of blood was seen. Photographs of the dead body were taken. He also tried to get identified the dead body and thereafter, it was sent to be kept for 72 hours in RML hospital. Later on, from Lady Harding Mortuary, clothes of deceased were seized by the police of PS Mandir Marg. Death report was prepared (Ex.PW-

6/B). MLC of unknown deceased was obtained. A sealed viscera of deceased was also seized (Ex.PW-19/A). Post mortem on the dead body was also got conducted. Accused Arun was arrested by the police of PS Jahangir Puri. His disclosure statement is also on record (Ex.PW-4/B). He pointed out the place, where he had thrown the dead body of boy Sheepak. Accused Arun pointed out the place i.e. Flat No. 217, M.P. Flats, North Avenue, New Delhi, where he had kept boy Sheepak. Car No. BPK- 1546 was also seized. Accused Arun also pointed out Rahul Medicos, Shop No. BA3/1, Mahendra Park, Jahangir Puri, Delhi, from where he had purchased sleeping tablets. The accused further pointed out the place in Azadpur Subzi Mandi, from where he had purchased rat poison tablets. Accused also pointed out the place i.e. Flat No. 217, M.P. Flats, North Avenue, New Delhi, where he had parked the car No. BPK-1546, which was used by him in committing murder of boy Seepak. Accused also pointed out the place at Baba Kharag Singh Marg, where he had given rat poison to boy Sheepak and committed his murder by strangulating his mouth and throat. He further pointed out the place, where he had given sleeping tablets at a tea shop, while mixing the same in the tea i.e. a tea stall in the backside of RML hospital. Pointing out memo of the place, where dead body was thrown and where the shoes were thrown were also prepared. Rough site plan of the place, from where shoes of Sheepak were recovered, was also prepared. The accused also produced one letter containing four pages to the Investigating Officer during investigation. One Raja Babu also produced one letter, which was written to him by the accused. Case property was sent to FSL. FSL result was obtained. After taking specimen writing of accused Arun, all the exhibits, specimen writing alongwith letter of accused were sent to FSL for expert opinion. Report was also obtained. On completion of investigation, charge-sheet was filed against the accused U/s. 363/364/365/302 of IPC. The case was committed to the Court of Session on 07/06/2001 and it was received on 29/06/2001. Charge U/s. 364/302 of IPC was framed against the accused to which he pleaded not guilty and claimed trial.

8. To prove its case, the prosecution had examined 26 witnesses while no evidence was adduced by the defence. Statement of the accused was recorded under Section 313 Cr.P.C. and he denied the case as set up by the prosecution against him. Seeing the aforesaid factual matrix, there is no document that the

accused had come to the house of the deceased in a white coloured Maruti car and he took PW-1 Deepak, PW-3 Anita and deceased Sheepak to their flat at Swaroop Nagar, Delhi, in the same car and from there they returned at about 5.00 pm when Deepak and Anita got down from the car while deceased Sheepak kept sitting in the car as the accused wanted to take him for a stroll. The deceased did not return but surprisingly no missing report was lodged by the family of the deceased either on the evening of 19.01.2001 or on 20.01.2001 and it is only on 21.01.2001, that a report was lodged with the police by the complainant/ Mewati Devi/ PW-2 herein. During the course of the arguments, learned counsel for the petitioner failed to explain the reasons for not lodging any report by the family of the deceased till 21.01.2001. Learned counsel for the petitioner laid much stress on his argument that under section 106 of the Evidence Act, 1872, it was for the accused to explain special circumstances within his knowledge, as in what circumstances the death of victim Sheepak took place when once it was proved on record by the prosecution that he was last seen in his company. This contention raised by the counsel for the appellant could be appreciated only when the prosecution had succeeded to prove that the deceased Sheepak was lastly seen in the company of the accused. Once the prosecution has not been able to prove this fact then the applicability of Section 106 of the Evidence Act can hardly arise in the aforesaid situation. Even otherwise, it is a settled legal position that the theory of last seen evidence itself is extremely a weak piece of evidence and would not be sufficient to convict the accused particularly where there is no proof of motive. It is significant to point out here that the prosecution has also failed to prove any motive on the part of the accused, which could be the reason for the accused to commit murder of the Sheepak.

9. The last seen evidence is not a direct evidence but is a circumstantial evidence. It is a settled law that to sustain a conviction on circumstantial evidence, the chain of circumstances has to be so complete that the finger of accusation unerringly points towards the guilt of the accused and rules out the innocence.

10. In State of U.P. vs. Shyam Behari and Anr. JT2009(11)SC274, the Honble Apex Court elaborating on the last seen theory held that:

6. here must be cases where on account of close proximity of place and time between the event of accused having been last seen with the accused and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.

7. This Court in *Bodhraj @ Bodha and Ors. v. State of Jammu and Kashmir* 2002 CriLJ4664 held as follows: The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult to some cases, to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other person coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases 11. It is needless and trite to say that where the case is based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of conclusive nature and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused (Ref: *Hanumant Govind Nargundkar vs. State of M.P.* AIR 195.SC 343.). The said principles as set up by the Apex court have been reiterated time and again in one or the other form by the various judgments of the Apex Court and of High Courts.

12. In the recent judgment of the Honble Apex Court, in the case of *Rumi Bora Dutta V. State of Assam*, 2013 (7) SCALE 535 it was held that when a case totally hinges on the circumstantial evidence, it is the duty of the Court to see the circumstances which lead towards the guilt of the accused to have been fully

established. The germane portion of the judgment is extracted below:

10. It is seemly to state here that the whole case of the prosecution rests on the circumstantial evidence. The learned trial Judge as well as the High Court has referred to certain circumstances. When a case is totally hinges on the circumstantial evidence, it is the duty of the Court to see that the circumstances which lead towards the guilt of the accused have been fully established and they must lead to a singular conclusion that the accused is guilty of the offence and rule out the probabilities which are likely to allow the presumption of innocence of the accused.

13. In yet another Birdhichand Sarda Vs. landmark judgment, in the case of Sharad State of Maharashtra, AIR 198.SC 1622.the Honble Apex Court held as under:

152. A close analysis of this decision would show that 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 Sahebrao Bobade v. State of Maharashtra MANU/SC/0167/1973 :

1973. riLJ1783 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 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.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

154. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J.

(and concurred by 3 more Judges) in *The King v. Horry* (1952) NZLR 111 thus: Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt : the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.

155. Lord Goddard slightly modified the expression 'morally certain' by 'such circumstances as render the commission of the crime certain'.

156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in *Anant Chintaman Lagu v. State of Bombay* :

1960. CrL J 682. Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases -- Tufail's case : (1969) 3 SCC 19.(supra). Ramgopal's case :

1972. CrL J 47.(supra). *Chandrakant Nyalchand Seth v. State of Bombay* (Criminal Appeal No. 120 of 1957 decided on 19-2-1958), *Dharambir Singh v. State of Punjab* (Criminal Appeal No. 98 of 1958 decided on 4-11-1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in *Naseem Ahmed v. Delhi Administration* :

1974. Cri L J 61., Mohan Lal Pangasa v. State of U. P. :

1974. Cri L J 80., Shankarlal Gyarasilal Dixit v. State of Maharashtra :

1981. Cri L J 32. and M. G. Agarwal v. State of Maharashtra : [1963] 2 SCR 40. a five-Judge Bench decision.

14. It is also a settled legal position that in an appeal against an order of acquittal, the Appellate Court should not normally interfere with the findings of fact arrived at by the learned Trial Court unless the reasoning given by the learned Trial Court is perverse or illegal on the very face of it. The Appellate Court should also bear in mind that with the acquittal of the accused persons by the learned Trial Court, the presumption of innocence of the accused persons has been given the legitimacy. It is also a settled legal position that where there is possibility of arriving at two different conclusions on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal arrived at by the Lower Court merely because the other possible view is a preferred view.

15. The case in hand is based on circumstantial evidence and as per the finding returned by the learned Trial Court the prosecution has not been able to complete the chain of circumstances to prove the guilt of the accused in committing the murder of the victim Sheepak beyond reasonable doubts. On careful reading of the impugned judgment and the material placed on record including the testimonies and depositions of prosecution witnesses, we do not find that there is any illegality, perversity or infirmity in the order passed by the learned Sessions Judge. The present Criminal Leave to Appeal petition preferred by the petitioner/State to challenge the judgment dated 08.10.2010 passed by the learned Additional Sessions Judge, Rohini Courts, New Delhi is therefore dismissed. It is ordered accordingly. KAILASH GAMBHIR, J.

INDERMEET KAUR, J.

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