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Court : Delhi

Decided On : Oct-12-2015

Judge : Sanjiv Khanna & R.K. Gauba

Appeal No. : Criminal Appeal No. 185 of 2000

Appellant : Jogeshwar and Another

Respondent : State

Judgement :

Sanjiv Khanna, J.

Oral:

1. These two appeals by Bihari Lal and Jogeshwar challenge their conviction by the impugned judgment dated 19th November, 1999 for murder of Parmanand in the intervening night between 23rd and 24th March, 1997. The said judgment arises out of charge-sheet filed by the police in FIR No. 225/1997 registered at Police Station Paschim Vihar.

2. By order on sentence dated 20th November, 1999, the two appellants have been sentenced to imprisonment for life, fine of Rs.10,000/- each and in default of payment of fine, to undergo rigorous imprisonment for six months. Section 428 of the Code of Criminal Procedure Code, 1973 (Cr.P.C., for short) would apply.

3. We accept the prosecution version that the deceased Parmanand had suffered a homicidal death. It has been proved beyond doubt that the dead body of an unknown person was found lying near a drain at Paschim Vihar, at about 10.10 A.M. on 24th March, 1997. The said factum is deposed to by Constable Dilbagh Singh (PW-10) who has testified about a call made by SI Ratan Singh (PW-17) at 10.10 A.M. on 24th March, 1997 regarding one dead body lying on the *patri* of *ganda nala*. The information was recorded as DD entry No. 9B at Police Station Paschim Vihar. Constable Dilbagh Singh (PW-10) has testified that the dead body had injuries on the neck caused by a sharp-edged weapon. Photographs of the dead body were taken and blood and other incriminating evidence were lifted from the spot. The dead body was identified to be that of Parmanand by the brother of the deceased, Ramanand (PW7).

4. SI Ratan Singh (PW-17) has similarly deposed that he was handed over DD No. 9B for investigation and had seen the dead body of a young man lying in a pool of blood on the *patri* of the *ganda nala*. Inspector Jai Singh (PW18), Police Station Paschim Vihar, who had reached the spot on getting information, has similarly deposed that a dead body of an unidentified male was lying on the footpath in a pool of blood, which had dried. The dead body had injuries on the neck caused by a sharp-edged weapon. PW-18 has testified that the dead body was identified by Ramanand (PW-7) to be that of his younger brother Parmanand. We shall be referring to the testimony of Ramanand (PW-7) subsequently.

5. Post-mortem on the dead body of Parmanand was conducted by Dr. K.L. Sharma (PW-3) on 25th March, 1997 at 1.30 P.M. after the dead body was received in the mortuary on 24th March, 1997 at 7.45 P.M. Inquest papers were received on 25th March, 1997 at 9 A.M. Dr. K.L. Sharma (PW-3) proved his post mortem report marked Exhibit PW-3/A and has deposed that on examination of the dead body, the following external injuries were noticed:-

1. Depressed abrasion 1.5x1.5 cm over right side upper part forehead.
2. Incised wound 5x2 cm, bevelled cut, transverse in disposition over right side border of chin.

3. Incised multiple superficial cuts four in number, margins contused, transversely oblique over floor of the right side chin.
4. Cut-through injury 11x4 cm over right front, disposition transversely oblique, wound is wider in front of the neck and tapers down to right side cut angle indicates the direction from left to right. Margins were inverted and ragged. Blood was oozing from the wound, lower margins were below the cricoid cartilage. Injury has cut vessels, nerves and muscles down upto cervical column.
5. Cut incised wound over left side back of neck in the middle part, 10.5x2 cm, disposition transversely oblique, margins were inverted and ragged and both angles were acutely cut with multiple superficial cuts above and below the injury. The injury after cutting skin, muscles had cut transverse process of fourth cervical vertebrae. ?
6. On internal examination, it was observed that the neck had been cut through at the level below the cricoid cartilage and the tracheal rings were cut down in the whole thickness. The trachea was drawn inside the chest cavity and the cut was closed with debris of the injured throat tissues. All the injuries were ante-mortem in nature. Injury No. 4 mentioned above was sufficient to cause death in the ordinary course of nature. Injury nos. 2 to 5 were caused by a sharp cutting flat weapon like a knife or dagger. The death was homicidal and had occurred within few minutes following the infliction of injury No. 4. It was opined that the time since death was about 40 hours, which would mean that the offence was committed at about 11-11.30 P.M. on 23rd March, 1997. Dr. K.L. Sharma (PW-3) has also deposed that the stomach had shown the presence of liquids with the smell of alcohol. PW-3, however, testified that he had not separated the viscera as no opinion on the said aspect was required. He agreed that no food was present in the stomach.
7. The trial court, for convicting the two appellants, has primarily relied upon three facts; (i) motive, i.e., previous quarrel between the two appellants and the deceased (ii) last seen evidence and (iii) recovery of the chopper and blood-stained clothes of the appellant Bihari Lal. On the third aspect, reliance is placed on the FSL reports marked Ex.PX and Ex.PY, which state that blood of AB group was detected on the shirt (Ex.P3) and pant (Ex.P2) purportedly recovered at the

behest of Bihari Lal. The blood group of the deceased as per the said report was AB.

8. For proving the first and second incriminating circumstances, the prosecution primarily relies upon the testimony of Ramanand (PW-7). PW-7 has deposed that his brother Parmanand and the two appellants were known to each other for the three were fond of drinking liquor. PW-7 has testified that on 26th June, 1996, the two appellants had quarrelled and fought with Parmanand. Parmanand had then suffered injuries and a police complaint was made. The offence in question, as noticed above, had occurred in the intervening night of 23rd and 24th March, 1997, nearly nine months after the alleged altercation on 26th June, 1996. We do not think that the prosecution has been able to establish that this purported fallout was the motive or the cause for the murder of Parmanand in the intervening night of 23rd and 24th March, 1997. The said witness, i.e., PW-7 has himself narrated that the deceased Parmanand was on friendly terms with the two appellants and all of them used to drink liquor together. It would be presumptuous and far-fetched to hold that the earlier happening, even if we accept PW3's version, was the motive and the underlying reason for the crime which took place in the intervening night of 23rd and 24th March, 1997. The testimony of PW-7 could well justify an inference that there was reconciliation and conviviality had re-developed for the deceased and the appellants used to drink liquor together. In fact, behaviour and conduct of Ramanand (PW-7) on the night of 23rd March, 1997 would indicate that he had no reason to suspect or apprehend that the two appellants would cause harm or injure his brother Parmanand when he went out for drinking with them at night time on 23rd March, 1997.

9. On the aspect of last seen, Ramanand (PW-7) has deposed that he had seen the two appellants and Parmanand drinking liquor on 23rd March, 1997. The appellant Bihari Lal had given money for the purchase of liquor and the deceased Parmanand had brought liquor with him. At about 10 P.M., appellant Bihari Lal had told the deceased Parmanand that they should take some more liquor and all of them went out. Thereafter, the appellants Bihari Lal and Jogeshwar returned, but Parmanand did not return that night. Ramanand (PW-7) had slept and did not go out in search of Parmanand even after the two appellants had returned. Even in

the morning, PW-7 got up and went to his in "lawshouse to rejoice *Holi* festival. He returned at about 12 noon when he found policemen present in *Jhuggi* no. 27, where he lived. He was taken to the *ganda nala* where he identified the dead body of his brother Parmanand. It is clearly noticeable that on 24th March, 1997, when PW-7 got up, he did not suspect any foul play or felt the need to look for Parmanand, as for his brother had not returned. On the other hand, he went to play *Holi* and only at 12 noon learnt about the presence of an unknown dead body near *ganda nala*, which he identified was that of Parmanand. The aforesaid deposition of Ramanand (PW-7) recorded on 28th August, 1998 would reflect that the two appellants and the deceased Parmanand were taking liquor in the *Jhuggi*, i.e., the residence where Parmanand used to reside. However, Ramanand (PW-7), in his deposition recorded on 6th October, 1998, proclaimed that he had seen the three, i.e., the two appellants and the deceased Parmanand taking liquor near the *nala*. We are inclined to accept the first version given by Ramanand (PW-7) that he had seen the three taking liquor in the *jhuggi*, i.e., the residence of Parmanand and thereafter, they went away from the said spot with the intention and desire to have more alcohol. In his cross-examination on 8th January, 1999, Ramanand (PW-7) accepted that liquor was taken in the house of Parmanand and not at the *ganda nala* and he had not seen Parmanand taking liquor at the *ganda nala*. In his cross-examination, Ramanand (PW-7) has accepted that he had not told the police that the two appellants had forced deceased Parmanand drink more liquor. He was also confronted with his statement under Section 161 Cr.P.C. marked Ex.PW-7/B, wherein the date of the previous quarrel i.e. 26th June, 1996 is not mentioned. What is important is that Ramanand (PW-7) has accepted that there were about 150 *jhuggies* in the cluster which extended till the *nala*. The distance between their *jhuggi* and the *nala* was about 100-75 feet. Four *jhuggis* including the *jhuggi* of Parmanand in the said cluster, belonged to their family members. Parmanand was residing in a separate *jhuggi*. There was only one way of going to and fro from this *jhuggi* of Parmanand. Subsequently, in his cross-examination, PW-7 has testified that the distance between their *jhuggies* and the place where the dead body of Parmanand was found was about 600-700 meters. It is noticeable that the site plans prepared by the police marked E-7 and Ex.PW-1/A (unscaled and scaled site plans) do not indicate the *jhuggi* where the two

appellants and deceased Parmanand had taken liquor and the *jhuggi* of Ramanand (PW-7) or the distance between the said *jhuggies* and the place where the dead body of deceased Parmanand was found. Ramanand (PW-7) has also accepted that he used to go to the place where the dead body was recovered to relieve and attend to call of nature. Interestingly, Ramanand (PW-7) in his cross-examination affirmed that one of the appellants Jogeshwar had slept in the *jhuggi* of his brother Parmanand, for PW-7 has accepted that he had seen Jogeshwar sleeping in the *jhuggi* of Parmanand. It is apparent that the deceased Parmanand had quarrelsome nature and there were others with whom he had bitterness and animosity. Ramanand (PW-7) has accepted that there was an earlier clash between the deceased Parmanand and one Sripat. The said quarrel was settled in the police station. Sripat and his wife, after Parmanand's death, had gone away and returned after 15-20 days. Thereafter, they sold the *jhuggi* and did not return. PW-7 also accepted as correct that whenever Parmanand used to commit any mischief, they used to beat him. Father of the appellant Jogeshwar would intervene at that time.

10. It is apparent that till about 10.10 A.M. on 24th March, 1997, no one had noticed the dead body of Parmanand. Dr. K.L. Sharma (PW-3), in his report Ex.PW-3/A and in his court deposition, has stated that the time since death was about 40 hours at 1.30 P.M. on 25th March, 1997, when the post-mortem was conducted. However, we must recognise and accept the submission that it is impossible to exactly opine on the precise time of death. At best, it is an estimate and guess, as some variation is possible. Learned counsel for the appellant, on the said aspect, has drawn our attention to the brief facts of the case submitted by the Investigating Officer along with the inquest papers marked E-2 and E-3. The said brief facts record the version given by the police on the basis of the statement made by Ramanand (PW-7) that the two appellants and the deceased had left for taking more liquor at about 10.30 P.M. on 23rd March, 1997 and thereafter, Parmanand did not come back and was not seen alive.

11. Evidence of last seen and the evidentiary value or weight to be attached, depends upon the factual matrix of each case. This principle is fact centric and cannot be applied without reference to the surrounding veridicals. The principle is

valuable and credible when the prosecution successfully establishes and shows that the time gap when the accused and the deceased were seen together alive and when the deceased was found dead is so less that the possibility of a third person committing the offence is ruled out. This principle obviously has reference to the time and place where the accused and the deceased were seen together and the place/location of the crime and the time when the crime was committed. The time period cannot be put in a straitjacket for it is dependent upon several factors and necessarily depends upon the evidence led by the prosecution so as to efface and annihilate possibility of any third person meeting the deceased in the intervening period and committing the said offence. In other words, the prosecution must establish on the basis of evidence on record that there is no possibility of a third person being the author of the crime. If there is a long duration between the time when the accused or the deceased were seen together and when the crime was committed, it is a factor which should be taken into consideration (Refer *State of Goa v. Sanjay Thakran and Another*, (2007) 3 SCC 755). Thus, it would be hazardous to convict an accused solely on the basis of last seen evidence especially in cases where possibility of a third person being the author of the crime cannot be ascertained and completely ruled out (see *Jaswant Gir v. State of Punjab*, (2005) 12 SCC 438 and *Ramreddy Rajeshkhanna Reddy and Anr. v. State of Andhra Pradesh*, AIR 2006 SC 1656). A Division Bench of this Court in *Deepak Chadha v. State*, (2012) 1 JCC 540 has observed that the last seen theory is not direct evidence, but circumstantial evidence and the foundation of this principle is on probability, cause and connection. Where a fact has occurred with a series of acts, preceding or accompanying, it can be safely presumed that the fact was possible as a direct cause of preceding or accompanying acts, unless there exist fact or facts, which break the chain upon which such inference depends. Reference was made to decision dated 10th August, 2009 in *Arvind @ Chhotu versus State*, Criminal Appeal No. 362/2001, to demonstrate that the said principle comes into play when the time gap between the time when the accused and the deceased were last seen alive and the deceased was found dead is of the nature and kind that possibility of the accused being the author of the crime is of the highest degree and there possibility of any other person being the author of the said crime stands erased. Thus, the circumstances enwombing the last seen are

important and need to be factored while considering the testimony of the witnesses, who deposed on the subject matter of last seen. This backdrop with reference to time and place of last seen and the time and place of death are relevant and material in determining whether or not last seen evidence is critical and of significance in a particular case.

12. In the facts of the present case, we notice that the two appellants and the deceased Parmanand were addicted to and fond of alcohol. They would drink together. At times and it was not peculiar for Parmanand not to return home, i.e., his *jhuggi*, at night after taking drinks. On 23rd March, 1997, they had liquor in the *jhuggi* of deceased Parmanand and had left the said *jhuggi* at about 10/10.30 P.M. The object and purpose was to drink more liquor. The dead body of Parmanand was subsequently found on the *patri* near *ganda nala* at 10.10 A.M. on 24th March, 1997. Before 10.10 A.M., nobody had noticed the said dead body though there were about 150 *jhuggies* in the cluster next to the *ganda nala*. Residents used to go to *ganda nala* to ease themselves. Even the family members of deceased Parmanand had not noticed dead body of Parmanand till 10.10 A.M. and in fact, Ramanand (PW-7) came to know about the homicidal death of Parmanand only at 12 noon on 24th March, 1997. The distance between the *jhuggi* of deceased Parmanand and the place where the dead body was found has not been established and there is some ambiguity and doubt regarding the same. There is some indication that the distance was about 600/700 yards. In these circumstances, we consider that the last seen evidence in the present case is rather sketchy and not of the highest degree. We cannot with the evidence on record, hold that there was no possibility of a third person's involvement. It is also noticeable that Ramanand (PW-7) has stated that he had seen one of the appellants Jogeshwar sleeping in the *jhuggi* of Parmanand at night. In fact, in his examination-in-chief recorded on 28th August, 1998, Ramanand (PW-7) has stated that after the three (Parmanand, Bihari Lal and Jogeshwar) went out, deceased Parmanand did not return but the appellant Bihari Lal and Jogeshwar had returned. This means that PW-7 had seen the appellants Bihari Lal and Jogeshwar return. PW-7 did not state and specify the time when he had seen them return. It is also apparent that at that time, Parmanand had not seen Bihari Lal and Jogeshwar carrying any weapon of offence. Ramanand (PW-7) has not

deposed having seen any weapon or knife when the three were drinking, had left or when the two appellants had returned. Apparently, Ramanand (PW-7) did not see any blood stains on the clothes worn by Bihari Lal and Jogeshwar when he had seen Jogeshwar sleeping in the *jhuggi* of Parmanand or when he had seen both of them return at night. There was nothing suspicious or doubtful about their behaviour.

13. The aforesaid factual position makes the recovery of the shirt and pant of Bihari Lal as well as the chopper recovered at the behest of Bihari Lal a suspect. The said recoveries were made from an open place near the *ganda nala*. It is apparent from the version given by Ramanand (PW-7) that Bihari Lal, Jogeshwar and the deceased Parmanand had drunk a lot and were soused. When they had left the *jhuggi*, PW-7 had not seen anyone carrying the chopper with them. It is unknown nor has been investigated as to wherefrom Bihari Lal or Jogeshwar had got the weapon of offence. We have observed that Ramanand (PW-7) had not noticed the appellants carrying a weapon of offence when they had returned and PW-7 has not testified and averred that the two were wearing blood-stained clothes. Purity of evidence relating to the three recoveries, i.e., shirt, pant and *gandasa* at the behest of the appellant Bihari Lal is, therefore, hovering and doubtful. In *Narsinbhai Haribhai Prajapati v. Chhatrasinh and Others*, AIR 1977 SC 1753, *Surjit Singh v. State of Punjab*, AIR 1994 SC 110, *Deva Singh v. State of Rajasthan*, (1999) Cri. L.J. 265 and *Prabhoo v. State of UP*, AIR 1963 SC 1113, the Supreme Court observes that in the absence of other incriminating circumstance, seizure of blood-stained clothes at the instance of the accused and the recovery of the possible weapon of offence also at the instance of accused is wholly insufficient to sustain a charge of murder.

14. As per the case of the prosecution, the weapon of offence and blood-stained clothes of Bihari Lal were recovered from the bushes near the *ganda nala*. This implies that the appellant Bihari Lal had either carried a second set of clothes before the offence was committed or had returned home with blood stained clothes and changed the same and thereafter proceeded to *ganda nala* to hide the said clothes. No person had seen the appellant Bihari Lal with blood-stained clothes in the intervening night of 23rd and 24th March, 1997. As far as appellant

Jogeshwar is concerned, his clothes did not have any blood stains. Appellant Jogeshwar had also appeared as defence witness DW-4 and has stated that he was working on 23rd March, 1997 and had returned home late at night as he had to repair and deliver a scooter on the said day. On 24th March, 1997, at about 2-2.30 P.M., DW-4 was arrested while taking meals with one Ranjit(DW-2). As per the police version, the two appellants were arrested together after they had absconded. Jogeshwar (DW-4) and Ranjit (DW-2) contradict and reject the prosecution version. Jogeshwar (DW-4) was not cross-examined on the said factual assertion and even Ranjit (DW-2) was not specifically cross-examined by the Public Prosecutor on the said aspect. We also notice that Shankar (DW-1), Ranjit (DW-2) and Chaturbhuj (DW-3) have deposed that appellant-Jogeshwar had continued to work at the workshop till about 10.30 P.M. on 23rd March, 1997, when Chaturbhuj (DW-3), father of Jogeshwar had brought him home. Trial court has disbelieved the said version of DWs-1 to 4 recording that the said witnesses had not made any complaint regarding police torture or informed the police that the appellant Jogeshwar was working till 10.30 P.M on 23rd March, 1997. Be that as it may, the evidence on record is insufficient and the prosecution, in the present case, has not been able to prove the prosecution version beyond reasonable doubt. As noticed above, the evidentiary value of the last seen evidence in the present case is weak and the recoveries allegedly at the behest of the appellant Bihari Lal are also not convincing or sufficient to implicate Bihari Lal. As far as the appellant Jogeshwar is concerned, no recoveries were effected from him.

15. In view of the aforesaid discussion, we allow the present appeals and set aside the conviction of the appellants Bihari Lal and Jogeshwar for the offence under Section 302 IPC for committing murder of Parmanand in the intervening night of 23rd and 24th March, 1997. They are acquitted giving them benefit of doubt.

16. The bail bonds furnished by the appellants are discharged. Copy of this judgment will be sent to the trial court.

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