

Ashok Kumar Vs. State

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Court : Delhi

Decided On : Nov-10-1987

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Judge : Charanjit Talwar and; M.K. Chawla, JJ.

Acts : [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 100(4)

Appeal No. : Criminal Appeal Nos. 110 and 127 of 1985

Appellant : Ashok Kumar

Respondent : State

Advocate for Pet/Ap. : V.K. Malik and; K.K. Bakshi, Advs

Judgement :

M.K. Chawla, J.

(1) On 23-8-1980 at about 8.15 P.M . Shri Brahm Sarup, a Junior Clerk in the electricity Branch, District-I, Chandni Chowk, came to the police Station, Seelampur and lodged the report that he was residing at house No A-31/52/7. Bhatia Gali, Police Station Seelampur, Delhi, and Shri Ghanshyam Dass Aggarwal was a tenant in the said house. He left the house early in the morning after putting a lock on his room. He (complainant)' had left the house at about 9.30 A.M. for going to his office at Chandni Chowk, leaving behind his. wife, Smt Rani Devi all alone. His son, Santosh Kumar aged 9 years and daughter Sushma aged 7 years had already left for their school at about 7 A M Shri Chhote Lal, is brother-in-law who was staying with him had also left the house in the morning for going to the house of his (complainants) real uncle in Gali No.6 '

(2) When he returned home from the office at about 6.45 P.M. he found many persons present outside his house. On reaching near the house, he was informed that someone has committed murder of his wife and son Santosh Kumar. On peeping through the 'window and also through the door of residential room he found that blood was flowing in the room and his wife Rani Devi and son Santosh Kumar were lying dead on the floor smeared with blood. The household articles were also lying scattered on the cot lying in the room. At that time 'his wife was eight months pregnant. He reported that on seeing this, he got upset and immediately came to the police station to make the report about the murder of his wife Rani Devi and his son Santosh Kumar. It appeared to him that the crime had been committed at about 6.30 P.M. He thus sought immediate action to be taken.

(3) Public Witness . 6 Head Constable Suraj Mal was the duty officer at Police Station, Seelampur who got registered the case F.I.R. No. 679180 under Section 302 Indian Penal Code . on the statement of Brahm Swarup. Suraj Mal immediately sent a copy of the said Fir to Shri Sudarshan Kumar, Sub Inspector for conducting the investigation through Constable Chand Ram. Copies of the F.I.R. were sent through Constable Harpal Singh, Motor Cycle Rider for being delivered to additional C.P' D.C.P. (East) and at the residence of the

Ilaqa Magistrate. After delivering the copies of the F.I.R. to the said officers, Public Witness . 7 Constable Harpal Singh came back to the police Station at about 2.50 A.M.

(4) In the meanwhile Constable Hari Kishan had delivered the copy of the F.I.R. to Sub-Inspector Sudarshan Kumar at about 8.25 P.M., while he was on .patrol duty near Canal Pushta in Seelampur. The S.I. went to the spot where he met Brahm Sarup and his tenant Ghanshyam Dass. He noticed a number of persons collected outside as well as in the courtyard of the house. Before he actually started the spot inspection. the S.H.O. of the area. the crime team and police photographer reached there. Under his direction, the photographer took the photographs of the place of occurrence from various angles. The crime team performed their part of duty. The Dog Squad could lead to nowhere. After inspecting the spot and observing; the various articles lying scattered on the charpoy and in the room, the S.I. prepared the rough site plan Ex. PW-20A. Thereafter, he prepared the Inquest report'- Ex PW-1/H and Ex. PW-1/J in respect of the dead bodies of the (deceased Santosh kumar and Rani Devi respectively The dead bodies were sent to Police Station Sabzi mandi Delhi for post-mortem examination through PW-8 Constable Hot? Lal. The post-mortem examination on the dead bodies was conducted on 24-8-80, and thereafter the dead bodies were Banded over to Shri Brahm Sarup for performing the last rites.

(5) From the spot, the Sub-Inspector took into possession the blood-stained green bed-sheet having foot marks from the charpoy, , blood-stained clothes hanging on the bolt, the blood-stained shirt hanging on the peg, the blood-stained broken glass bangle pieces and the blood-stained bidi piece and the glass chimney having some finger prints. He also took into possession the palta with its handle in bent condition from the charpoy. All these items were converted into separate sealed parcels and taken into possession. The S I. also picked up the blood and blood-stained earth from near the dead bodies and converted them into sealed phials.

(6) After completing the formalities at .the print, the SJ. contacted number of persons from the nearby area but could not find any clue. He came to the Police Station and deposited the case property in the Malkhana.

(7) The Investigating Officer continued his interrogation throughout the next day but with no tangible result. Towards the evening hours, Brahm Sarup expressed his doubts on one Anil, who used to come and deliver the morning paper at his house, but had not done so far about a week. From investigation, it transpired that Anil Kumar had gone to his in-laws' house at Palam as his wife had delivered a son. From the records of the Police Station, the I.O. came to know that Anil was facing trial in Shahdara courts in a case under Sections 454/380 Indian Penal Code . and the next date of hearing in that case was fixed for 25th August, 1980.

(8) At about 10 A.M. on the morning of 25-8-80. Brahm Sarup Along with his companion Rameshwar Dayal came to the Police Station and they Along with the T.O. left for Shahdara courts. At about 11-15/11.30 A.M. Anil was found standing near the cold water trillium the compound of Shahdara courts. On the pointing of Brahm Sarup. he was apprehended and brought to the house of Brahm Sarup his interrogation started and it continued till 8 P.M., when Brahm Sarup identified the pajama which Anil Kumar was wearing as that of His brother-in-law (wife's brother) Public Witness Chhote Lal. On that information he formally arrested. The accused (Anil Kumar) could not give a satisfactory Explanationn for wearing the said pajama. The prosecution case is that he broke down and made the disclosure statement and also led to the arrest of his co-accused Vijay and Ashok. Accused Naresh Kumar could not be arrested at that time. From Anil Kumar's personal search. Ex. PW-1/K, the carbon copy of the pawn receipt dated 24-8-1980 was recovered from the right front pocket of his bushirt.

(9) During interrogation, the accused Ashok Kumar disclosed that he had the blood-stained dao (a heavy broad cutting blade with a handle) and a shirt on the bank of the ganda nallah near kothi Seelampur and had also kept one saree concealed near the bushes. Vijay accused during interrogation disclosed that he had kept one saree hidden near pushta yamuna near the country liquor shop, Seelampur and that he could get the same recovered. Similarly, Anil accused disclosed that the ornaments mentioned in the pawn receipt were

lying with a sarsaf at Ghaziabad and that he could get the same recovered. He also disclosed that he had kept a blood-stained pant and a blood-stained knife in a pit near the Pushta, Yamuna, New Seelampur, and that he could get the same recovered. All the three accused then got recovered the articles from the places mentioned in the disclosure statements one after the other in the presence of Brahm Sarup and Rameshwar Dayal.

(10) On the receipt of a secret information that accused Naresh Kumar was present near Kalyan cinema in Brahm Puri, the Investigating Officer in the company of A.S.I. Bhagwat Singh and two constables reached there and arrested Naresh Kumar from a , outside the said cinema. During investigation, he disclosed that he had kept a blood-stained pant and two blood-stained shorts near the pulley (culvert) near Shastri Park and thereafter got recovered those articles in the presence of Brahm Sarup and Rameshwar Dayal Aggarwal. The S.I. then recorded the statements of the various witnesses, obtained the reports from the office of the C.F.S.L. and after completing the investigation filed the challan. On that basis, all the accused persons were charged for the commission of offence u/s 302 read with Section 34 Indian Penal Code . and u/s 392 Indian Penal Code . Accused Anil Kumar, Ashok Kumar and Naresh Kumar were further charged to stand trial under Sections 452/34 Indian Penal Code .

(11) All of them denied their involvement and pleaded not guilty to the charge. Accused Naresh Kumar led evidence of as many as six witnesses to prove his innocence. He succeeded in his defense and was acquitted. However, on the strength of 20 witnesses, the prosecution got proved the offence against accuser Anil Kumar and Ashok Kumar. Accused Anil Kumar and Ashok Kumar were sentenced to imprisonment for life under Section 302 Indian Penal Code ., R.I. for 7 years under Section 397 I.P.C. R.I. for 3 years under Section 492 Indian Penal Code . and R.L for one year under Section 27 of the Arms Act. VijayKumar accused was convicted under Section 411 Indian Penal Code . but his sentence was reduced to the one -already undergone. He has not preferred any. appeal. Anil Kumar and Ashok Kumar have challenged their convictions and sentence in two different criminal appeals bearing nos 110/85 and 127/85 which are being disposed of by this common judgment.

(12) Admittedly, there is no eye-witness of the occurrence. It is a case of circumstantial evidence. It is a fundamental principle of criminal jurisprudence that circumstantial evidence should point indubitably to the conclusion that it is the accused and the accused only who is the perpetrator of the crime, and that such evidence should be incompatible with the innocence of the accused. Had the prosecution been able to come up to this standard is the question which is agitating the mind of this court.

(13) Admittedly, the case is largely based on the recoveries of the weapon of offence alleged to have been used in the murder of Smt. Rani Devi and Santosh Kumar, the blood-stained clothes which the accused were allegedly wearing at the time of the commission of offence and the recovery of the clothes belong to Smt. Rani Devi and Chhote Lal besides other incriminating circumstances. Anil Kumar is the first among the accused persons who was apprehended and led to the arrest of his co-accused and the ultimate recoveries of the articles disclosed in their statements.

(14) Learned counsel for the accused persons have challenged the correctness, authenticity and legality of the recording of the disclosure statements of the accused persons inasmuch 'as the same were recorded by the same Investigating Officer at the same place i.e., at the house of Brahm Sarup and in the presence and hearing of each of the accused and the witnesses. The learned lower court has given valid reasons to disbelieve the disclosure and the ultimate recovery of the articles at the instance of Naresh accused. In this view of the matter, it is urged on behalf of the appellants, there is no reason to rely upon the recoveries of the various articles from the present accused on the same facts and circumstances disclosed by the prosecution. Their learned counsel further contend that even the recoveries from the accused were not conducted in accordance with the provisions of Section 100 of the Code of Criminal Procedure inasmuch as no attempt was made by the I.O. to join the respectable witnesses of the locality even though they were available. According to the learned counsel, it is a case of selection of witnesses by choice and once their case qua Naresh accused

has been disbelieved, the recoveries from the other accused must beheld to be doubtful. Learned counsel for the State on the other hand mainly relies upon the evidence of (1) the attesting witnesses to the recovery memos, (2) the Investigating Officer and (3) on the attending circumstances, leading to the involvement of each of the appellants.

(15) It is not disputed that at about 11.15 A.M. on 25-8-1980, accused Anil Kumar was apprehended on the pointing of Shri Brahm Sarup from the compound of Shahdara courts and was brought to the house of Brahm Sarup. Immediately thereafter his interrogation started. Till 8 P.M' the 1.0. was not able to make any headway. At about that time, when the accused not up for urinating, Brahm Sarup noticed that Anil was wearing the pajama belonging to his brother-in-law Chhote LaL He identified it as it was torn from the paunch (leg bottom) of the pajama. It is at this point of time that Anil accused disclosed the names of his companions. He was formally arrested and from his personal search vide memo. Public Witness 1/K. a carbon copy of the pawn receipt bearing S. N. 20 dated 24-8-1980 for leaving pawned some jewellery was received, and taken into possession. At this stage, we may, however, notice that the 1.0. did seal it or deposited the same in the Malkhana, for safe custody as one of the valuable piece of document. Thereafter, Anil led to the arrest of Vijay and Ashok from their respective houses. Naresh could not be found at his house. The 1.0. in the c;ompany of Brahm Sarup and Rameshwar Dayal brought all the three to the house of Brahm Sarup quite late in the night. From the early morning of 26-8-1980, the 1.0. started recording the disclosure statements of all the accused one by one, in the presence and hearing of each of the accused and the witnesses. This part of the case is admitted by the 1.0. as well as the attesting witnesses. This fact even otherwise stands established if one carefully peruses the disclosure statements of these accused, which are in the same language and sequence, except in the difference of the articles and the places of their concealment. On 28-8-1980, S.I. Sudarshan Kumar while on patrol duty received a secret information on Brahmपुरi Road, that accused Naresh bad gone to Kalyan cinema. In consequence of this information, the 1.0. was able to arrest Naresh accused. From personal search, nothing was recovered. During interrogation he made the disclosure statement Ex. PW15/B, staling that he can get recovered the clothes which fell to his share. (This disclosure is on the same lines as of the other accused).

(16) In consequence of his disclosure statement, Naresh led the Police party to the pulia near ganda nallah in Shastri Park and pointed out the place from where Constable Hari Kishan recovered one used pant, P-20 and two shirts P-21 and P-22. They were converted into sealed parcels and taken into possession. As already observed earlier, from the place of occurrencs, the 1.0. had already seized a glass chimney Ex. P-7 fixed on the lamp, lying in the almira which had fingerprints on it. During investigation, the 1.0. had obtained the specimen thumb impression of all the four accused. According to the opinion of Dr. P. S. Nayyar, handwriting and fingerprint expert of C.F.S.L., the chance fingerprints lifted from the chimney P-7 tallied wish the specimen fingerprints of right index finger of Naresh accused. The learned lower court on consideration of the material on record not only disbelieved the recoveries of the articles at the instance of Naresh accused but also doubted the seizure of the chimney. The trial court was of the opinion that there was every possibility that the 1.0. might have obtained the fingerprints of Naresh accused on the chimney subsequently at the Police Station. As regards the recovery of the pant 'P-20) and the shirts (P-21) and (P-22), the learned lower court observed that these recoveries do not connect the accused with the crime. It now sounds that in fact these clothes did not belong to any other person living in the house of Brahm Sarup. For that reason Brahm Sarup was not able to identify any of the clothes to prove the ownership. The court was further of the opinion that there was no possibility of this accused being present at the house of Brahm Sarup on the date, place and time of the occurrence inasmuch as that point of time he has been proved to be attending the Fourth ceremony of his father as per the evidence of the defense witnesses. This finding has not been challenged by the State.

(17) The court below has accepted the testimony of the 1.0. and the attesting witnesses qua the recoveries from the accused Anil and Ashok while disbelieved the same set of witnesses qua the recovery from Naresh accused. This piquant situation cannot be allowed to stand. Learned counsel for the State in spite of his best

efforts has not been able to reconcile the two divergent findings. On this score alone, the alleged recoveries from the present appellants become doubtful. Our doubts stand further confirmed after the learned counsel referred to and dealt with the individual recoveries from each of the accused.

(18) First of all, we propose to deal with the recoveries of the articles at the instance of each of the accused except the recovery of the jewellery at the pointing out of Anil accused.

(19) Ex, PW-1/M, N and O are the disclosure statements of Anil Kumar Misra, Ashok Kumar and Vijay Kumar. According to the Investigating Officer and the attesting witnesses, these disclosures were recorded on the same day at the same time and place, and in the presence of and within the hearing of the accused and the attesting witnesses. The bare perusal of these statements would show that even the narration of facts and the language used is exactly similar to one another. Their statements indicate that they entered the house of Brahm Sarup together in the evening hours of that fateful Saturday, and removed the ear-rings, nose-rings and panzer made of silver from the person of Rani Devi. Besides that a sum of Rs. 500 in cash was taken out from a box after removing its bolt with the help of a kada. They had also taken away with them two sarees, one of pink colour and the other of blue colour, three shirts, one pajama, one khaki pant and the other of blue colour from there. Anil Kumar Along with Vijay and Naresh Kumar had pawned the aforesaid ornaments for a sum of Rs. 250 on 24-8-1980 with a gold-smith at Ghaziabad. Thereafter one saree was kept by Vijay while the other was taken away by Ashok Kumar. After removing the blood-stained pant from his person, accused Anil Kumar put on a pajama at the place of occurrence itself. Naresh Kumar had taken away with him one pant of blue colour and two shirts. Anil Kumar had kept concealed the knife and his Hood-stained pant in a pit outside the Yamuna pushta near village Usmanpur. Ashok Kumar in the similar tone admitted the removal of the articles and their distribution as disclosed in the disclosure statements of Anil Kumar. Further on he stated that he had kept concealed the blood-stained iron dao, and one bushirt carrying floral designs which he was wearing at the time of the commission of the offence and one pant on the bank of canal ganda nallah near kothi Seelampur and that he could get the same recovered. Similarly, Vijay Kumar accused agreed to get recovered one saree of pink colour which had come to his share from near Theka Sharab, Seelampur.

(20) These disclosure statements were reduced into writing sometime between midnight and the early hours of 26-8-1980. The recoveries were effected in the morning of that day, i.e., 26th August, 1980 and taken into possession vide memos. from the places disclosed in the disclosure statements of the accused.

(21) The submission of the learned counsel for the appellants is that neither such recoveries inspire confidence nor they in any way connect them with the offences charged with. There is some substance in their contention. The cross-examination of Brahm Sarup and Rameshwar Dayal, the attesting witness to the disclosure and recovery of articles leads us to definite conclusion that the recoveries are not genuine. Straightaway a doubt is created in our mind about the authenticity of the recording of disclosure statements leading to the recoveries. In the case of Vijay accused Brahm Sarup admitted that Saree Ex. P-16 at the time of its recovery was not converted into a sealed parcel. He also admitted that his wife had never used this saree and it always retained lying in the trunk. There is no special mark of Identity on it. Almost similar in his statement with regard to the saree Ex. P-15 recovered at the pointing out of Ashok accused. He was not able to give any mark of identification on the saree. According to him, such like sarees are easily available in the market. Though at the time of its recovery, it was found wrapped in a newspaper, but it was neither converted into a sealed parcel nor the paper was kept in safe custody. It was not even deposited in the Malkhana. At the time of the production in court, the witness was not able to point out any distinctive mark indicating that this saree belongs to his wife, nor the 1.0. was able to produce the newspaper in which it was found wrapped.

(22) It is the prosecution, case that Brahm Sarup is a very close friend of Rameshwar Dayal. Both of them are not only the neighbours but also working in the office of D .E. S.U., Chandni Chowk, Delhi. Both Brahm Sarup and Rameshwar Dayal were frank enough to concede that except the two of them, the 1,0. had not asked any person to join the investigation or to be an attesting witness to the recoveries, even though many persons were going about near the place of recoveries. Besides that. there was a lot of traffic on the nearby road. The

1.0. neither himself made any attempt nor asked them to call any neighbour of the locality at the time of the recording of the disclosure statements or join any respectable persons of the area at the time of the recoveries, although many of them were available. They also admitted that the places from where the recoveries were affected are situated at a thoroughfare where anybody and everybody can have access. It is not a secluded or guarded place.

(23) The net result of the admission of both these witnesses so far as the recovery of the articles from the accused persons is concerned, is that such recoveries are not genuine and an attempt ' has been made to foist the articles on each of the accused. Even otherwise, the recoveries are not in accordance with the provisions of sub-sections (4) and (5) of Section 100 of the Code of Criminal Procedure which lays down that before making the search, the officer shall be duty-bound to call upon two or more independent and respectable inhabitants of the locality in which the place is to be searched, to be available as witnesses of the search. This section at least requires an honest effort on the part of the officer in charge of the search to secure the presence of respectable witnesses of the locality. These provisions are quite stringent and meant to be strictly followed inasmuch as the refusal or neglect to attend and witness a search when called upon to do so by an order in writing has been expressly made an offence under Section 187 of the Indian Penal Code. As observed earlier, the 1.0. has not even made any attempt to join the witnesses of the area even when available nor has he taken the trouble of requiring the complainant and his companion to request any person living in the nearby houses to join and associate himself with all the important recoveries.

(24) Now let us concentrate on the recovery of the knife and the dao at the instance of accused Anil and Ashok. The case was that the knife at the time of its recovery was having blood- stains on it besides some mud. After preparing the sketch, it was converted into a sealed parcel. Similarly, the blood-stained dao was got recovered by accused Ashok and taken into possession vide memo. Ex. PW-1/R. Both these weapons of offence were sent to the office of the C.F.S.L. for report. Blood- stains could not be detected on the dao while the blood on the knife was found too small for serological analysis. These recoveries though suffer from the vices of the non-joining of the independent witnesses, even if be assumed for the sake of arguments to be correct, these do not in any way connect the accused with the commission of the offence alleged against them. Similarly, the blood-stained pant could not be connected with the blood group of the deceased or any of the accused. The arms even if believed to have been taken possession of do not lead us anywhere.

(25) Now we propose to deal with the recovery of the ornaments alleged to have been pawned by -accused Anil with a jeweller of Ghaziabad. This reveals an interesting story.

(26) EX. P-9 is the alleged carbon copy of the pawned receipt which was recovered from the person of accused Anil Kumar Misra. The story of its possession and recovery prima facie is a doubtful version of the prosecution. As observed earlier, accused Anil Kumar was apprehended from the premises of Shahdara courts on the morning of 25th August, 1980. He was immediately brought to the house of Brahm Sarup and interrogated. It was only at about 8.30 P.M. that Brahm Sarup identified the pajama which the accused was wearing in fact belongings to Chhote Lal. When the accused failed to explain its possession, he was arrested in the case, which led to the apprehension of other accused and the recording of his disclosure statement. It was only in the early hours of 26th August, 1980 that the person of accused Anil was searched for the first time which yielded the recovery of pawned receipt R-9. It is not disputed that when Brahm Sarup expressed his doubts in the involvement of Anil accused to the Police Officer, they had made up their mind to find out and apprehend Anil. In that connection, they not only made enquiries from his house but also searched the record at the Police Station and discovered that on 25th August, 1980, he was supposed to be present in the court compound of Shahdara court to attend the case pending against him. At the pointing of Brahm Sarup, the Investigating Officer apprehended the accused. It is not explained as to why he was not immediately searched at the spot. In the normal course, once the involvement of any accused is doubted or confirmed by the complainant, the first step is to arrest him and conduct his personal search in order to disarm him of any weapon, if at all, on his person or to get hold of any favorable clue which the accused might be carrying with him at that time. We have not been satisfactorily explained as to why this precautionary step was not taken by

the Investigating Officer. We are also not satisfied with the Explanation of the 1.0. and Brahm Sarup that from 10.30 A.M. till 8 P.M., even though the accused remained associated with the interrogation in their presence, Brahm Sarup could not identify the pajama which the accused was wearing as belonging to his brother-in-law. Definitely, a doubt has been created in our mind about the correctness of the search and the recovery of the pawned receipt. We leave this aspect here and will deal with this part of the story at a later stage.

(27) In the disclosure statement, Anil Kumar accused has not disclosed the name of the shop or the proprietor thereof where he is alleged to have pawned the ornaments alleged to have been removed from the person of Smt. Rani Devi. According to Brahm Samp, they came to know of the shop of the jewellers of Ghaziabad from the pawned receipt Ex. P-9. This part of the statement is also not correct inasmuch as the name of the shop is not mentioned on the said receipt. It can be presumed that the accused must have disclosed the name of the jeweller where he had pawned the ornaments to the 1.0. On that basis, we proceed further. PW-4, Rajinder Parkash Bansal is the silver ornaments dealer working in a shop in New Gate Area, Ghaziabad. According to him on 24th August, 1980, Anil Kumar accused had come to his shop and had pawned one pair of silver panzer, one nose-ring made of gold and one pair of ear-rings (balis) made of gold. He had pawned these articles against a sum of Rs. 250, For this transaction, Rajinder Kumar had prepared a receipt in triplicate from the book meant for that purpose. The carbon copy of the receipt was given to Anil Kumar while the second copy was kept with the ornaments and the third remained in the book. He identified his signature on the receipt. These articles were handed over by him to the Police in the presence of Brahm Sarup and Jagan Nath, PW-5 who happened to be present at the shop. He is as area and is carrying on his business near the shop of Rajinder Parkash Bansal. At this stage, it is relevant to mention that the pointing memo and the recovery memo. are in Urdu language with which none of the attesting witnesses or the accused is conversant. These witnesses and the accused persons have signed the memo. in Hindi.

(28) The prosecution version of the stay of the accused at Ghaziabad is sought to be proved from the statement of PW-2 Prem Singh was on duty when at about 9 P.M. on 23rd August, Ghaziabad, and PW-3 Shri Ajay Garg, son of the proprietor. Prem Singh was on duty when at about 9 P.M. on 23rd August, 1980, Anil Kumar allegedly had come to the hotel and stayed there till about 7 A.M. on the morning of 25th August, 1980 This witness proved the entry alleged to have been made by the accused in the Register Ex. PX-1. This witness was not able to identify the accused, who was present in court, when became to the court for his statement. We may notice here that accused were not put up in identification parade during investigation. In the case of Anil, it was essential as he had given a false name as 'Vijay Kumar' in the hotel and was not known to this witness. Similarly, Ajay Garg had not identified the accused and naturally so, as he was not present in the hotel either at the time of the accused checking in or leaving the hotel. Learned counsel for the accused has pointed out that except the entry which is signed by the son of the proprietor, all other entries relating to other customers who left the hotel on 25th August, 1980 bear the signatures of the Manager. Why is it so. no worthwhile Explanation is forthcoming. It is not explained as to why Ajay Garg should sign the entry of this accused when it was not made in his presence. This entry also bears the signature of accused in Hindi.

(29) In order to be sure, about the identity of the accused that he not only stayed in Rainbow Hotel at Ghaziabad From 23rd August, 1980 to 25th August, 1980, but also to prove the fact that he pawned the jewellery with PW-2 and obtained a sum of Rs. 250 from there, the 1.0. obtained the handwriting and signature of the accused with a view to get them compared with the signature of the accused appearing on Ex. P-9 and the entry in the Register Ex. X-1. This would have conclusively established the presence of the accused at Ghaziabad during this period. Unfortunately, the prosecution failed to take advantage of this material which was readily available to prove a crucial circumstance alleged against the accused. No Explanation is forthcoming as to why the admitted signatures of the accused were not sent to the office of the C.F.S.L. for comparison with those appearing on the pawned receipt and the Register, Ex. PW-1. We are not satisfied with the Explanation of the learned counsel for the State that the 1.0. felt convinced about the involvement of the accused from the bare recoveries of the ornaments. This cannot be so. Besides the

recovery of arms, the 1.0. is required to connect the accused with the offence of murder also. In this behalf, they have failed miserably.

(30) At this stage. It may be relevant to mention that Dr. I T. Ramani who conducted the post-mortem examination of the dead bodies of Rani Devi and Santosh Kumar, admitted in cross-examination that when the dead body of Rani Devi was brought to the mortuary, she was wearing three bangles on her wrist, a silver chain around her neck and a silvery toe ring (bichua) on each of her second toe. If it is so then it is surprising that the accused would remove the panzer and not the necklace and bichuas, which items are easily removable and costly. Moreover, these very articles even though handed over to the police by the doctor were not deposited in the Malkhana. Why There is no Explanation. This circumstance also throws doubt On the recovery of the jewellery and its sale by the Anil accused. Even if these jewellery recoveries are held to be genuine, the evidence, as it stands, there is nothing to connect the appellant with the murder of the deceased or even with any assault, the accused may have committed on the deceased oi having robbed her of her ornaments At the most as the ornaments have been alleged to be stolen property received by the appellant, knowing that they were stolen property, the accused can thus be convicted on the basis of presumption under Section 114 of the Evidence Act and under Section 411 of the Indian Penal Code as a receiver of stolen property knowing the same to be stolen. Counsel appearing for the State submitted that as the accused had given no Explanation, therefore, the inference should be drawn that he must have murdered the deceased. We are, however, unable to draw any inference. It is for the prosecution to prove its case affirmatively and it cannot gain any strength from the conduct of the accused in remaining silent. In these circumstances, we do not find any evidence to support the conviction of the appellant under Section 302 or under Section 394 I.F.C.

(31) Now we deal with the circumstances under which the accused is alleged to have taken possession of the pajama. It is the prosecution case that after the commission of the crime, the pant of the accused Anil Kumar became blood-stained. He discarded the said pant and wore the pajama hanging on the peg. This was in between 6 or 6.30 P.M. on 23rd August, 1980. At the time of his apprehension, on 25th August, 1980, he was wearing the same pajama. The prosecution wants this court to believe that for two days and two nights the accused continued wearing this very pajama. This is just not possible to believe this story. During this interval, it is urged that to begin with this accused must have concealed his weapon of offence and saree near the pushta. We do not know where he disposed of his blood-stained pant. After hiding the incriminating articles, the accused then must have left for Ghaziabad. He reached the Rainbow hotel at about 9 P.M., stayed there for the night and on the next day, he pawned the jeweler at the shop of PW-2, and obtained a sum of Rs. 250. Thereafter he came to- the hotel and remained there till 7 A.M. of 25th August. 1980 and left the hotel in the same clothes in which he had checked in At this stage, it may be noticed that the accused have also stolen a sum of Rs. 500 from the house of Brahm Sarup which was distributed amongst them. A sum of Rs. 150 came to the share of this accused. So it comes to that the accused was having a .sum of near about Rs. 400 when he obtained the amount of pawned jewellery. The accused was fully aware of the fact that the pajama which he was wearing belonged to either Brahm Sarup or any other male member of that family. The first attempt on his part would be to discard that pajama so that he may not be connected with the crime. He had the amount with him but he did not(r) purchase the new set of clothes or tried to discard the pajama. Prima facie, this is against the human conduct. Secondly, the condition of the pajama is such that no person would like to wear it either at the time of the commission of the offence or while staying in a hotel or moving about in the hazars of Ghaziabad. Moreover, with that pajama on, nobody would like to attend a criminal case pending in a court. Thirdly, according to Chhote Lal, the pajama was torn from one of the paunch and he had stitched it with the hand-operated 'needle. We had seen the pajama and do not find any mark or indication that at any point of time the torn portion was ever 25 stitched by hand. The position of the torn portion is such that it cannot be stitched or made wearable by stitching. This fact creates a doubt in our mind if at all the accused was apprehended when he was wearing this pajama. It is just possible that it might have been foisted on him in order to connect him with the offence charged with. Further more, we are baffling as to what happened with the amount of about Rs. 400 which the accused was having. Admittedly at the time of his apprehension and

search, not a single penny was found on his person. It is not comprehensible that a person who travelled from Ghaziabad to Delhi to attend a criminal case would not be having a penny on his person, particularly, when he had no opportunity to spend this amount during this interval at Delhi.

(32) It has also come on record that a day or two prior to the date of the offence, the wife of Anil Kumar had delivered a child at her parents house In Palam area. In the normal circumstances, the accused would certainly like to be with his wife and child rather than roam about in a place like Ghaziabad after pawning the jewellery. This is yet another circumstance which is agitating us about the authenticity of the prosecution version. The sum and substance of the discussions leaves no doubt in our mind that none of the recoveries from any of the accused is a straight forward recovery or can be relied upon to bring home the charge.

(33) Learned counsel for the accused has pointed out yet another circumstance which conclusively establishes the innocence of the accused. It is the case of prosecution that from the scene of occurrence, besides other articles, a bed-sheet spread on the cot showing that some one whose feet were smeared with blood had stepped on it was recovered. The foot-prints were clearly visible. This sheet was taken into possession and converted into a sealed parcel. On the early morning of 24th August, 1980 this case property was deposited in the Malkhana of the Police Station. During the course of investigation and after the arrest of the accused persons, their footprints were obtained so that the identity of the accused could be established after its comparison with the foot-prints on the green bedsheet. In this way, the prosecution acted in the right direction. The report of the C.F.S.L. indicates that on this bed-sheet, there were marks of human blood of Group B. However, the foot-prints on comparison with the specimen left and right foot-prints of all the accused were found to be different. They did not tally with the left or right foot-prints of any of the accused. This report is not under challenge which in fact seals the fate of the prosecution story. It comes to that somebody else was in the room at the time of the commission of the offence. Who could this person be Learned counsel for the accused suggested the presence of Shri Chhote Lal. We are not called upon to comment on this aspect but the fact remains that during this period: he was staying with Brahm Sarup. He is a man of shady character inasmuch as he was involved in a case of murder and convicted and sentenced to life imprisonment. He has other undesirable activities to his credit. His involvement under these circumstances according to the learned counsel cannot be ruled out. At the earliest point of time, he never disclosed to the Police that any of his articles were missing, even though his statement was recorded on 24-8-1980. It was only after the recoveries that he came forward to identify his clothes. His evidence does not inspire confidence.

(34) The net result is that none of the recoveries have been effected in a regular manner, and do not connect any of the accused with the offence charged with: The case is full of discrepancies and missing links.

(35) We, therefore, accept the appeal, set aside the order of conviction and sentence of both the appellants. They be released immediately if not wanted in any other case.

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