

Mahender Kumar Vs State.

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Court : Delhi

Decided On : Sep-13-2010

Judge : Mr.V.K. Jain ; Mr. Badar Durrez Ahmed. JJ.

Acts : Indian Penal Code (IPC) - Section 302, 120-B

Appeal No. : CRL.A. 308/1997 ; 316/1997 .

Appellant : Mahender KumA.

Respondent : State.

Advocate for Def. : Mr Sanjay Lao, Adv.

Advocate for Pet/Ap. : Mr D.K. Thakur ; Mr M.C. Adv.

Judgement :

1. Whether Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in Digest? YES V.K. JAIN, J

1. Both these appeals are directed against the judgment dated 28.07.1997 and Order on Sentence dated 29.07.1997 whereby Mahender Kumar, appellant in Criminal Appeal No. 308/1997 was convicted under Section 302 of IPC read with Section 120-B thereof whereas Ramshree, appellant in Criminal Appeal No. 316/1997 was convicted under Section 120-B of IPC and were sentenced to

imprisonment for life and to pay fine of ` 2000/- each or to undergo one year in default.

2. On 8th February 1988, at about 9:20 AM, an information was received at Police Station Trilok Puri that a dead body was lying by the side of National Highway leading towards Country Liquor Shop from Gazipur. On receipt of copy of DD, whereby this information was recorded, SI Chander Bhan reached the spot and found a dead body lying there. From the Driving License recovered from the pocket of the pant worn by the deceased, it was found that he was Om Prakash, resident of E-273, Dev Nagar. Since this was an apparent case of murder, the FIR under Section 302 of IPC was registered on the endorsement made by the Police Officer on the copy of DD. The appellant Ramshree is the wife of the deceased whereas her co-convict Mahender Kumar used to ply an auto-rickshaw owned by the deceased. The case of the prosecution is that there was an illicit relationship between the appellants, which led to a conspiracy being hatched by them for committing murder of the deceased and pursuant to that conspiracy the deceased was murdered by the appellant Mahender Kumar and his accomplices Raj Kumar and Raju who have been acquitted by the trial court.

3. The prosecution examined 19 witnesses in support of its case. No witness was examined in defence.

4. There is no direct witness of the murder and the case of the prosecution against the appellants rests solely on the circumstantial evidence. The following circumstances are alleged against the appellants:-

(i) The deceased was last seen when he left along with the appellant Mahender Kumar and his accomplices Raj Kumar and Raju in the evening of 7th February 1988.

(ii) There was an illicit relationship between appellants Mahender Kumar and Ramshree.

(iii) Pursuant to a disclosure statement made by the appellant Mahender Kumar, while in the police custody, his bloodstained clothes were recovered from the

jhuggi of his accomplice Raju.

(iv) The blood group of the deceased matched the group of the blood found on the clothes of the appellant Mahender Kumar.

(v) Bloodstains were found in the auto-rickshaw of the deceased which the appellant Mahender Kumar used to ply.

(vi) Blood group of the deceased matched with the group of the blood found in the auto-rickshaw. Circumstance No.(i)

5. PW-1 Chander Wati, mother of the deceased Om Prakash stated that her son, who was employed in P&T; Department, had purchased an auto-rickshaw from his brother Kishan Lal, which the appellant Mahender Kumar used to ply during day time. Mahender Kumar used to bring the auto-rickshaw back by 7:00 PM. She also claimed that her jhuggi was near the jhuggi of the deceased. She further stated that on 7th February 1988, at about 7:00 PM, Mahender Kumar, Raj Kumar and Raju Madrasi came and talked to Om Prakash. They told him that a sum of ` 7000/- had been given as earnest money for purchase of a TSR at Kalyan Puri and asked him to accompany them, since he was aware of scooter mechanics. Om Prakash thereupon accompanied them. When he sat in the scooter, he was flanked by Mahender Kumar on one side and Raj Kumar on the other side whereas Raju Madrasi was at the wheel. Om Prakash was not seen thereafter. Next day, at about 8:00 AM the appellant Mahender Kumar returned and parked the auto-rickshaw. On being enquired about Om Prakash, he stated that he had gone on duty and would come back. She expressed her concern to the appellant Ramshree that Om Prakash had not come, but, Ramshree asked her to keep quiet, saying that he would come. When she told Ramshree that Mahender Kumar used to ply the scooter in the day, but was not taking it on that day, she stated that since he had driven the scooter in the night he would not take it again in the day. She further stated that Kishan Lal came at about 7:00 PM in the evening and told them about the murder of Om Prakash. She along with her son Vijay Kumar and Kishan Lal went to the mortuary.

6. PW-6 Vijay Kumar is the brother of the deceased. He corroborated the deposition of his mother and stated that when Mahender Kumar came in the morning of 8th February 1988 to park the auto-rickshaw and his mother asked him as to how he had plied the auto-rickshaw in night though his normal hours were during day time, the appellant Ramshree got annoyed and asked his mother as to how she was concerned about the time the auto-rickshaw was plied by Mahender Kumar. He further stated that at about 10:00- 11:00 AM, a Police Constable came to Ramshree to find out the address of Om Prakash. In the night he came to know from his brother Kishan Lal that Om Prakash had been murdered.

7. Thus, according to both these witnesses, one of whom is the mother and the other, the brother of the deceased, Om Prakash had left with the appellant Mahender and his accomplices Raj Kumar and Raju Madrasi on 07th February, 1988. Admittedly, no missing report was lodged by them with the police either on 07th February, 1988 or at any time before they received information, on 08th February, 1988, about the murder of the deceased. In the ordinary course of human conduct, the family members of the deceased would have become quite worried if he remained absent from the house, throughout the night, without any intimation and would at least have lodged a missing report early in the morning of 08th February, 1988. It is not their case that earlier also the deceased had spent his nights outside the jhuggi and that was the reason they did not lodge any missing report, when he did not return home on 07th February, 1988 or in the morning of 08th February, 1988.

8. According to these witnesses, when the appellant Mahender Kumar returned alone alongwith the auto-rickshaw in the morning of 08th February, 1988, they made enquiry about the deceased and he told them that he had gone on duty. PW-4 Kishan Lal, brother of the deceased, stated that the deceased was on duty in the night of 07th February, 1988. If that is true, there could be no question of his not returning from duty in the morning of 08th February, 1988. Had the appellant Mahender Kumar told them that the deceased had gone on duty, the first thing they would have done was to call him in his office and ask him as to why he had not returned home, after finishing his night duty. It would be pertinent to note here that the deceased was working in P&T; Department and hence, there could have

been no difficulty in the family members contacting him in his office over the telephone.

9. According to PW-6 Vijay Kumar, deceased Om Prakash was not attending his duty in P&T; Department during those days as he was ill and was very weak. If that is true, his family members would not have believed the appellant Mahender Kumar when he told them that the deceased had gone on duty and they would have at least confirmed from him by calling him in his office as to whether he had actually gone to the office, despite being sick and weak. It is difficult for us to accept that the appellant Mahender Kumar told them that the deceased had gone on duty and they simply believed him, without cross checking with the deceased in his office, despite the fact that he was not expected to go on duty in the morning of 08th February, 1988. Moreover, in normal circumstances, one does not go on duty without coming home, taking bath, changing clothes and taking his breakfast, etc. unless he is called for an urgent work, which compels him to go directly to his office, without coming home for getting ready, despite the fact that he was out of the house since the previous day.

10. It is an admitted case that both these witnesses had come to know about the murder of the deceased on 08th February, 1988. According to PW-4 Kishan Lal, brother of the deceased, information about death of his brother was received by him at about 10-11 AM on 08th February, 1988, in the presence of his mother and other family members, including PW-6 Vijay Kumar and they had gone to the Police Station. He was specific that his mother as well as the appellant Ramshree had accompanied him to the Police Station. Admittedly, neither the mother nor the brother of the deceased informed the police at any time prior to 11th February, 1988 that the deceased had left the house in the evening of 07th February, 1988 alongwith the appellant Mahender Kumar and his accomplices Raj Kumar and Raju Madrasi. We find it extremely difficult to accept that despite coming to know of the murder of Om Prakash, they would not have disclosed this most vital information to the police, immediately on coming to know of the murder. The case of the prosecution is that the appellant Mahender Kumar was having an illicit relation with the appellant Ramshree and this fact was very much in the knowledge of deceased Om Prakash. According to PW-1 Smt. Chander Wati, Om

Prakash, when he came to know of his illicit relationship, had asked the appellant Mahender Kumar not to come to his house, but, since he continued visiting his house in his absence, it had also led to a quarrel between him and his wife appellant Ramshree. Once the family members of the deceased had come to know that he had been murdered, they would, in the natural course of human conduct, not only have disclosed to the police that the deceased had left with Mahender, Raj Kumar and Raju Madrasi, but would also have disclosed that the appellant Mahender was having an illicit relationship with the wife of the deceased. They would also have informed the police that the appellant Mahender had given a wrong information to them about the whereabouts of the deceased by saying that he had gone on duty. In fact, the first reaction of the family members of the deceased, in such circumstances, would have been to rush to the house of the appellant Mahender Singh, confront him with the information about the murder of the deceased ask him as to how he had been murdered and take him to the Police Station for necessary action against him. It is not as if the appellant Mahender was not known to them. He was a regular visitor to their jhuggi and used to ply the auto-rickshaw, owned by the deceased. According to Chander Wati and Vijay Kumar, they had come to know of the death of the deceased only in the night of 08th February, 2010. As noted earlier, according to Kishan Lal, the information about the death of his brother was received in their presence, at about 10 or 11 AM. Even otherwise, since the only address police had with them was the address of the jhuggi in Dev Nagar and both Chander Wati as well as Vijay Kumar claim to be residing at that very place, there is no way that they would not have come to know of the murder of the deceased as soon as the news was broken to the family by the police official, who went to their jhuggi. According to Kishan Lal, on receipt of information about the death of his brother Om Prakash, his mother Chander Wati had also accompanied him to the Police Station alongwith the appellant Ramshree. Therefore, at least Chander Wati had met the police on 8th February 1988 itself. Even PW-4 Kishan Lal did not inform the police on 08th February, 1988 that the deceased had left with the appellant Mahender, Raj Kumar and Raju Madrasi on 07th February, 1988 and that the appellant Ramshree had an illicit relationship with the appellant Mahender Kumar though he claims to be aware of these facts.

11. The learned APP tried to explain the delay in disclosing this vital information to the police by contending that the appellant Ramshree had misguided their family members by falsely suspecting Ajay Kumar, brother-in-law of the deceased for his murder. It has come in the deposition of PW-15 SI Chander Bhan that Ramshree and Kishan Lal had suspected Ajay Kumar, brother-in-law of the deceased, for his murder. However, the statement alleged to have been made by Ramshree to SI Chander Bhan is not admissible in evidence in view of the provisions contained in Section 162 of the Code of Criminal Procedure, which provides that the statement made to a police officer, during the course of an investigation, shall not be used for any purpose, except to contradict its maker when he is called as a witness in the prosecution. Admittedly, investigation into death of the deceased Om Prakash had begun prior to the statement alleged to have been made by the appellant Ramshree to PW-15 SI Chander Bhan. According to the witness, the FIR under Section 302 of IPC, was registered on the basis of an endorsement made by him on the copy of Daily Diary given to him at the time he went to the spot on receipt of information about a dead body lying there. The reason for making such an endorsement was that it was an apparent case of murder, the deceased having received a number of stab wounds. As far as Kishan Lal is concerned, though he claims that he had given statement to the police, suspecting his brother Ajay Kumar for the murder of deceased Om Prakash, at the behest of the appellant Ramshree, he was confronted with his statement to the police where he did not say that it was his sister-in-law Ramshree and not he, who was suspecting Ajay Kumar for the murder of the deceased. It has been admitted by the witnesses that a case under Section 498-A of IPC was registered against Ajay Kumar for subjecting their sister to cruelty and/or harassment. In fact, the witness admitted during his cross-examination that in his statement to the police, he had alleged that Ajay had threatened Om Prakash outside the Court. Thus, his claim that he had named Ajay Kumar for the murder of his brother Om Prakash, at the behest of the appellant Ramshree, is nothing but an afterthought.

12. Thus, there is absolutely no worthwhile explanation for not disclosing to the police that the deceased had left with the appellant Mahender Kumar and his accomplices Raj Kumar and Raju Madrasi and that Mahender had returned alone with the auto-rickshaw in the morning of 08th February, 1988 and had also given

them a false information by claiming that the deceased had gone on duty. This was despite the fact that Mahender was very well known to him, he being a regular visitor to their house and in fact was also having inimical relations with the deceased. Another important aspect in this regard is that though the evidence of last seen was common against the appellant Mahender as well as Raj Kumar and Raju Madrasi, who were also prosecuted alongwith the appellant, both Raj Kumar and Raju Madrasi have been given benefit of doubt and have been acquitted, without giving a finding that it was the appellant Mahender alone who had taken the deceased with him in the evening of 07th February, 1988.

13. It has come in the deposition of PW-6 Vijay Kumar that the appellant Mahender Kumar had returned alone alongwith the auto-rickshaw in the morning of 08th February, 1988 and was not accompanied by the deceased, and when his mother asked him as to how he had plied the auto- rickshaw in night though his normal hours were during day times, on hearing this, the appellant Ramshree had snubbed his mother by asking her how she was concerned as to at what time the auto-rickshaw was plied by Mahender. According to PW-1 Chander Wati, when the appellant Mahender returned alone, without being accompanied by the deceased in the morning of 08th February, 1988 and she expressed her concern about the deceased not coming with him, the appellant Ramshree asked her to keep quite saying that he (deceased) would come. We, however, feel that far from convincing PW-1 Chander Wati and PW-6 Vijay Kumar, such an interjection by the appellant Ramshree would only have aroused their suspicion since being wife of the deceased, she was supposed to be at least equally concerned about the welfare of the deceased and in that event, they would not have believed the excuse given by the appellant Mahender and would at least have cross checked by calling the deceased in his office. In any case, such a conduct, on the part of the appellant, would definitely have prompted them to disclose this fact to the police on 08th February, 1988. Even otherwise, if the appellant Mahender Kumar was to commit murder of the deceased pursuant to a conspiracy with his co-appellant Ramshree and others, as the case of the prosecution is, he would not have been so foolish as to take him along, in the presence of his family members, including his mother and his brother, all of whom knew him very well, he being a daily visitor to their jhuggi and then return alone to their jhuggi. It is more so when

he also knows that the family members of the deceased knew about his illicit relationship with the wife of the deceased. He knew that in the event of his returning alone, he would be asked as to where Om Parkash was and on discovery of his dead body, he would be the prime suspect for his murder. Even if he was to take that much risk, he would not have remained present at his residence and would have absconded, in order to avoid being arrested for the murder. A conspiracy necessarily involves pre-planning and pre-meditation and therefore the persons who are party to the conspiracy are in a position to plan out their strategy. The appellant Mahender Kumar could easily have avoided the grave risk involved in taking the deceased with him, in the presence of his mother and brother, simply by meeting the deceased, sometime when he was outside his jhuggi. We, therefore, are unable to accept the evidence of last seen produced by the prosecution. Circumstance No. (ii)

14. PW-1 Chander Wati, when she came in the witness box, stated that she had seen Ramshree having illicit relations with Mahender Kumar. She further stated that deceased Om Prakash had also come to know of this relationship of his wife and had stopped the appellant Mahender Kumar from coming to his house. Mahender Kumar, however, did not do so and used to visit the house of Om Prakash in his absence, which had led to quarrel between him and Ramshree.

15. PW-6 Vijay Kumar stated that his brother deceased Om Prakash used to reprimand his wife Ramshree, who used to call the appellant Mahender Kumar to their house. He had asked Ramshree not to call Mahender Kumar to their house. Ramshree, however, did not pay any heed to his instructions and Mahender Kumar, Raj Kumar and Raju continued visiting her in the absence of Om Prakash. He further stated that Om Prakash used to suspect the fidelity of Ramshree. According to him, Ramshree had developed illicit relations with Mahender Kumar because Om Prakash was a weak and feeble man. He claimed to have witnessed Ramshree and Mahender Kumar lying and sitting on one cot. He also stated that he did not disclose this fact to Om Prakash so as to avoid quarrel between the couple.

16. Admittedly, the appellant Mahender used to ply the auto-rickshaw, owned by the deceased, on a regular basis. He used to take the auto-rickshaw in the morning and bring it back every day in the evening. It is also the case of the prosecution that the deceased knew about the alleged illicit relationship and this had also resulted in quarrel between him and his wife appellant Ramshree. We find it difficult to accept that despite having come to know of the alleged illicit relationship, the deceased would have permitted the appellant to continue to ply his auto-rickshaw on a daily basis. He knew it very well that if the appellant Mahender plies his auto-rickshaw, he will come to his house at least twice a day, once for taking the auto-rickshaw and then for leaving it at his jhuggi. If the husband is aware of the illicit relationship of a person, he would be the last person to give him an opportunity to come to his house and that too on a daily basis since he knows it very well that by doing so, he would be affording an opportunity to him to meet his paramour on a daily basis. No husband is likely to behave in a manner as would give such a ready opportunity to meet his wife and her paramour on a regular basis. His attempt would be to ensure that such a person gets absolutely no opportunity to meet his wife.

17. According to PW-6 Vijay Kumar, he had seen the appellants Mahender and Ramshree lying on the bed a number of times in a compromising position. We cannot accept that he would not have shared this information with his brother deceased Om Prakash. In fact, if the brother-in-law sees his sister-in-law in compromising position with an outsider, he will not only report it to his brother, but will also react there and then, by rebuking her or at least sending away the person with whom she is found in a compromising position. Had this witness actually seen the appellants in compromising position and that too a number of times, he, in our view, would not have withheld this information from deceased Om Prakash, who, in turn, would then have ensured that the appellant Mahender stops visiting his house. In fact, according to PW-1, Smt. Chander Wati, Om Prakash had actually stopped the appellant from coming to his house. Therefore, if the appellant Mahender Kumar was coming to his house on a daily basis, that would negate the testimony of PW- 1 Chander Wati and PW-6 Vijay Kumar about the alleged illicit relationship between the appellants. Even PW-4 Kishan Lal did not disclose the alleged illicit relationship to the police on 08th February, 1988, though he claims

that the alleged relationship was very much in his knowledge. In these circumstances and also considering the fact that the alleged illicit relationship was not disclosed to the police at any time before 11th February, 1988, despite the claim of the witnesses that it was the appellant Mahender and his two accomplices who had taken the deceased with them in the evening of 07th February, 1988, we are not inclined to believe the alleged illicit relationship. Circumstance No.(iii) & (iv)

18. It has come in the evidence that while in police custody, the appellant Mahender Kumar disclosed to the police that his bloodstains clothes were kept by him in the jhuggi of Raju and thereafter those clothes were recovered from the jhuggi of Raju. The disclosure statement alleged to have been made by Mahender is admissible under Section 27 of the Evidence Act only to the extent that some clothes were kept in the jhuggi of Raju, since pursuant to this statement some clothes were actually recovered by the police from that jhuggi. Section 27 of the Evidence Act, to the extent it is relevant, provides that the information which relates distinctly to the fact that discovered, by the police in consequence of that information, may be proved. The words "so much of such information" as relates distinctly to the facts thereby discovered are very important and constitute the core part of the section. The extent of the information admissible under the section would depend on the exact nature of the fact discovered, to which such information is required to relate. "The fact discovered" is not equivalent to the object produced by the accused or recovered by the police. It embraces the place from which the object is produced or recovered and knowledge of the accused as to this. The statement made by the accused, which is not directly or necessarily connected with the fact discovered, is not admissible in evidence. If the accused makes a compound statement, the court needs to divide it into various parts and admit only that part which has led to discovery of a particular fact. The rest of the statement needs to be rejected. Of course, the information which is admissible under section 27 of the Evidence Act cannot be truncated to such an extent as to make it insensible or incomprehensible. The narrative connected with the information, or any explanation as to how the object came to be there, or what any person said or did in connection thereto, must necessarily be rejected. The disclosure statement cannot be used by the prosecution to prove that the clothes alleged to have been recovered from the jhuggi of Raju were the clothes of the

appellant Mahender Kumar. No evidence has been produced by the prosecution to prove that these clothes belonged to the appellant Mahender Kumar and were worn by him on 07th February, 1988. These clothes were not shown either to PW-1 Chander Wati or to PW-6 Vijay Kumar to prove that the appellant Mahender Kumar, when he came to their jhuggi in the evening of 07th February, 1988, was wearing those clothes. There is no evidence that the appellant Mahender was made to wear those clothes and that they were found to be of his size. No other evidence led by the prosecution to prove that these were the clothes of appellant Mahender. Thus, though we have evidence to prove that some bloodstained clothes were recovered from the jhuggi of Raju, pursuant to the disclosure statement made by the appellant Mahender Kumar, there is no evidence that those were the clothes of the appellant Mahender or that he was wearing them on 07th February, 1988. Since the clothes were recovered from the house of Raj Kumar and not from the house of the appellant Mahender Kumar, the Court cannot presume that the clothes belonged to the appellant Mahender.

19. The murder alleged to have taken place in the night of 07/08th February, 1988, whereas these clothes are alleged to have been recovered by the police on 12th February, 1988. It is difficult for us to accept that the appellant Mahender Kumar and/or his accomplices would not have destroyed or thoroughly washed these clothes, despite having ample time and opportunity for the purpose. If bloodstains come on the clothes of a person, while committing a murder, his first attempt would be to either get rid of those clothes by destroying them or to at least wash them thoroughly, so as to leave no stain of blood on them. The report of CFSL shows that the clothes alleged to have been recovered from the jhuggi of Raju were extensively stained. There is not report of the clothes having been washed or any faint stain of blood having been found on them. This shows that no attempt was made to wash the clothes. Since the prosecution has failed to prove that the clothes recovered from the jhuggi of Raju, pursuant to the statement made by the appellant Mahender Kumar were his clothes, mere presence of blood stains on those clothes does not necessarily connect him with the murder of the deceased. Circumstance No. (v) & (vi)

20. It has come in evidence that on 12th February, 1988 the three wheeler scooter of the deceased, which the appellant Mahender Kumar used to ply, was seized by the police and some blood stains were found under the seat of that auto- rickshaw. It is the case of the prosecution that this auto- rickshaw was parked at the jhuggi of the deceased since morning of 8th February, 1988. PW 15 SI Chander Bhan admitted that on 11th February, 1988 PW 1 Chanderwati had told him that the deceased was taken by the appellant Mahender Kumar in that auto-rickshaw on 7th February, 1988. He also admitted that he had seen the auto-rickshaw lying parked in front of the jhuggi of the deceased on 11th February, 1988. Despite that, the auto-rickshaw was seized only on 12th February, 1988. There is no explanation for not seizing the auto-rickshaw on 11th February, 1988 itself despite the Investigation Officer having come to know on that date, that the deceased was taken in that very auto-rickshaw . This creates some doubt on the case of the prosecution regarding finding of blood stains on the auto-rickshaw. Be that as it may, assuming that blood stains were found on the auto-rickshaw plied by the appellant on 7th February, 1988, that by itself is not sufficient to prove the charge of murder against the appellant Mahender Kumar.

21. It is settled proposition of law that where the case of the prosecution rests solely on the circumstantial evidence, the circumstances from which conclusion of guilt is sought to be drawn against the accused, needs to be fully and firmly established. The circumstances so proved should be consistent only with the hypothesis of the guilt of the accused and should exclude every reasonable hypothesis of his being innocent. Of course, the circumstances proved by the prosecution need not exclude each and every hypothesis suggested by the accused, howsoever remote and farfetched it may be. But, the chain of evidence produced by the prosecution must show that in all human probability the offence was committed by no one other than the accused. Applying these settled principles of law, we are of the view that the circumstances, which the prosecution has been able to prove in this case, do not lead to the conclusion that in all human probability, the appellants Mahender Kumar and Ramshree were party to a criminal conspiracy to commit murder of deceased Om Parkash or that the appellant Mahender Kumar had otherwise committed his murder. Considering that the family members of the deceased suspected an illicit relationship between the

appellants, the possibility of the story of last seen having been concocted at a later date, on account of that suspicion, when the police gave a clean chit to the initial suspect Ajay Kumar, cannot be altogether ruled out.

22. The appellants are given benefit of doubt and are hereby acquitted. Their bail bonds stand discharged.

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