

Arun @ Khadak Singh Vs State

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Court : Delhi

Decided On : Aug-05-2010

Judge : Mr. Badar Durrez Ahdmed ; Mr. V.K. Jain. J J

Appeal No. : CRL.A. 1052/2009

Appellant : Arun @ Khadak Singh

Respondent : State

Advocate for Def. : Ms Richa Kapoor, Adv.

Advocate for Pet/Ap. : Mr Akhilesh Kr Pandey, Mr D.Pattnaik, Mr Surinder Singh. 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

ORDER

1. This appeal is directed against the judgment dated 10th September 2009 and Order on Sentence dated 15th September 2009, whereby the appellant was convicted under Section 302 of IPC and was sentenced to imprisonment for life

and to pay fine of Rs 20,000/- or to undergo S.I. for two months in default.

2. On 13th February 2008, an information was received at Police Control Room that a male dead body was lying near E-14, Railway Line in Wazirpur Industrial Area. The information was conveyed to Police Station Ashok Vihar. On reaching the spot, police officers found the half naked dead body of a young man lying there. They also found a brick and a concrete stone stained with blood, lying near the dead body. On search of the pant of the deceased, it was found to contain a paper slip bearing the address of Updater Services Pvt. Ltd, C-154, Ground Floor, Lajpat Nagar, New Delhi. One mobile number was also found written on the paper slip. On contacting the person, whose mobile number was found written on the slip, he reached the spot and identified the dead body to be of his employee Sonu. The family members of the deceased were informed and they reached the mortuary where statements of the brother and mother of the deceased were recorded. They claimed that the deceased had left with the appellant at about 5.00 PM on 12th February 2008 and had not returned thereafter. The case of the prosecution is that the murder of the deceased Sonu was committed by the appellant Arun @ Khadag Singh.

3. The prosecution examined 15 witnesses in support of its case. No witness was examined in defence. MHC(M) of Police Station Ashok Vihar was examined as a Court witness. The learned Trial Court based the conviction of the appellant on the following circumstances:-

"A) Recovery of dead body of deceased Sonu @ Deepak at about 8.15 AM on 13.2.2008 near Railway under bridge, Ashok Vihar, Phase-II, Wazirpur Industrial Area, Delhi near C-14 Railway Line with its head and mouth smashed and blood was found scattered and the recovery of weapon of offence i.e. one brick Ex. P1 and concrete stone Ex.P-2.

B) Going of deceased Sonu @ Deepak on 12/2/2008 at about 5.00PM with the accused from his jhuggi no.A/35, S.S. Nagar, Wazirpur Industrial Area, Delhi.

C) Presence of PW4 Dayawati at her jhuggi alongwith deceased when accused came to their jhuggi and asked the deceased to accompany him for brining bicycle

from his working place.

D) In the presence of PW5 Vijay Kumar, visit of deceased Sonu alongwith accused Arun @ Khadag Singh and one Phool Chand to his working place at Reliance Shop at Rana Pratap Bagh on 12/2/2008 at about 7.00 PM for taking his bicycle left there on previous day and the absence of the deceased on the said date of duty because of ill-health.

E) Leaving of the accused and the deceased from the said Reliance shop at Rana Pratap Bagh alongwith bicycle at about 7.30 PM in haste and insistence of accused for an earlier departure from there.

F) Previous enmity between accused and deceased because of a quarrel about 8 months before this incident and infliction of blade injury by the accused to PW3 Mahipal Singh, brother of deceased who had intervened in the quarrel between them and registration of a criminal case in that regard.

G) Arrest of accused on 13/2/2008 at about 5.00 PM and his making of disclosure statement Ex.PW4/F stating that on the spot of occurrence he alongwith deceased consumed liquor and while deceased was urinating, he hit upon head with the weapon of offence Ex.P1 and Ex.P2.

H) While causing injury to the deceased with Ex.P1 and Ex.P2, spreading of blood on the clothes and the shoes of the accused.

I) In pursuance to the disclosure statement Ex.PW4/F recovery of blood stained of shoes Ex.P4 (Ex. 8 as per PSL report Ex.PW15/B) from the roof of the jhuggi of the accused i.e. A/339, S.S. Wazirpur Industrial Area, Delhi.

J) In pursuance to the disclosure statement Ex.PW4/F, recovery of one jacket, trouser, baniyan (T-Shirt) Ex.7C, Ex.7A and Ex.7B (as per FSL-report Ex.PW15/B), worn by him at the time of commission of offence, from the roof of the jhuggi no.A/339, S.S. Nagar, Wazirpur Industrial Area, Delhi

K) Detection of human blood of group-B as of deceased on Ex.8 as per FSL-report.

L) Detection of ethyl alcohol in the blood of the deceased as per FSL-report dated 26/6/2008 of Chemistry Division of FSL, Rohini with regard to Ex.5 as mentioned in FSL-report Ex.PW15/B.

M) Recovery of Hero Jet bicycle standing on the other side of the railway line, near railway line under bridge Ashok Vihar Phase-II Delhi which belonged to deceased and his brother.

N) Possibility of use of Ex.P1 and Ex.P@ (weapon of offence) in causing injury due to which death occurred as per postmortem report Ex.PW7/A and opinion regarding weapon of offence Ex.PW7/E.

O) Time of death as per postmortem report Ex.PW7/A almost corresponding to the time of possible presence of deceased

on the spot of occurrence and the commission of the offence after 7.30 PM on 12/2/2008.

P) The time gap when the deceased was last seen alive in the company of the accused and his death to be very small and not very large.

Q) Motive of the crime due to previous enmity and pendency of a criminal case vide FIR no.240/07 u/s 324IPC Ex.PW10/A." Circumstance No. (A)

4. Arrest of the appellant near Mother Dairy, recovery of dead body, brick Ex.P-1 and concrete stone Ex.P-2, which are alleged to be the weapons of offence, are only facts of the case and do not in any manner incriminate the appellant or connect him with the murder of the deceased. Circumstance No. (G)

5. The alleged disclosure statement of the appellant Ex. PW4/F, stating therein that he consumed liquor with the deceased and hit upon his head with the weapons Ex.P-1 and P-2, at the time the deceased was urinating, is a confessional statement made before a police officer while in his custody and, therefore, hit by Section 26 of the Evidence Act. The brick and concrete stone Ex. P-1 and P-2, respectively, had already been seized by the police even before the appellant was arrested. No fact was discovered by the police pursuant to this part

of the disclosure statement and, therefore, it is not admissible under Section 27 of Evidence Act. Circumstance No. (L)

6. Presence of methyl alcohol in the blood of the deceased cannot be said to be a circumstance incriminating the appellant, since there is no evidence of the deceased having taken liquor with the appellant. In fact, PW-5 Vijay, brother of the deceased stated that on the date this incident took place, the deceased had not taken any drink due to ill health and he was taking medicine. Circumstance No. (J)

7. No blood stain was found on the clothes Ex. 7A, 7B and 7C, when they were examined by FSL vide its report Ex. PW15/B. Presuming them to be the clothes of the appellant, they do not connect him with the murder of the deceased in any manner. Circumstance No. (M)

8. The case of the prosecution is that one bicycle belonging to the brother of the deceased, which also was being used by the deceased was found near railway line on 13th February 2008. According to PW-14 SI Amar Singh, the bicycle was lying at a distance of about 20-25 yards from the dead body. We fail to appreciate how recovery of this bicycle can be said to be a circumstance incriminating the appellant, when the bicycle had been recovered by the police even before he was arrested. Therefore, recovery of the bicycle does not in any manner connect the appellant with the murder of the deceased. Circumstance No. (N)

9. The case of the prosecution is that the brick Ex. P-1 and concrete stone Ex. P-2 could have been used for committing murder of the deceased. According to PW-7 Dr Kulbhushan Goel the possibility of use of these two objects in causing injuries mentioned in postmortem report Ex. PW7/A cannot be ruled out. Since these objects had been recovered before arrest of the appellant and were not recovered pursuant to any information supplied by him to the police, they do not in any manner connect him with the murder of the deceased. Circumstances No. (B) and (C)

10. PW-3 Mahipal Singh, brother of the deceased and PW-4 Dayawati, mother of the deceased are the two witnesses produced by the prosecution to prove these circumstances alleged against the appellant. According to Mahipal Singh, he knew

the appellant, he being their neighbour. On 12th February 2008 at about 5.00 PM the appellant came to their jhuggi and took his younger brother Sonu with him on the pretext of having a round and bringing the bicycle, which the deceased had left at his duty place. His mother and other family members were also present at the jhuggi at that time. The deceased left with the appellant saying that he will come in the evening, along with the bicycle. He, however, did not return till night and they searched for him at 3-4 places, but, he was not traceable. In cross-examination, he stated that the deceased used to leave for his work at 8.00 AM and return at 4.00 PM. He further stated that on that day deceased Sonu did not go to work, due to his ill health. About himself, the witness stated that he used to leave for work at about 9.30 AM and return at 6.00 PM, but on that day he returned early due to absence of work. Probably what he meant to say was that he had returned early because he had no work to do at his work place. PW-4 Dayawati stated that on 12th February 2008 at about 5.00 PM the appellant Khadag Singh came to their house and took her deceased son Sonu with him for a round. Sonu, however, did not return till late night. At that time her son Mahipal was also present in the jhuggi. In cross- examination, she stated that Sonu had gone to work on that day, but had returned by 4.30 PM.

11. PW-3 and PW-4 have contradicted each other on as to whether deceased Sonu had gone for his work on 12th February 2008 or not. The contradiction cannot be said to be insignificant or on a peripheral issue, unconnected with the core part of the testimony of the witnesses. Whether Sonu had actually gone to work on that day or not was a very material fact, particularly because according to Dayawati at the time of this incident Sonu used to return from work by 10.00 PM. No attempt was made by the Investigating Officer to ascertain, from the employer of the deceased, as to whether he had attended his duty on 12th February 2008 or not and in case he had attended the duty, at what time he had returned on that day. Therefore, we cannot say whether the deceased had gone for duty on that day or not and if he had gone there, at what time he had returned from duty on that day.

12. According to PW-3 Mahipal Singh, during the night they did not lodge any complaint with the police regarding non return of Sonu. According to PW-4

Dayawati they waited till 11.00 PM, but did not make any complaint in the night about Sonu in returning home. She also stated that deceased never remained absent from the house on any night on any earlier occasion. It has come in the deposition of PW-3 Mahipal Singh that the appellant was their neighbour. Had the deceased gone with the appellant, as claimed by PW-3 and PW-4, the first thing they would have done, when he did not return till late in the night, was to go to the jhuggi of the appellant and ask him as to where the deceased was. Neither PW-3 nor PW-5 claim that they had gone to the jhuggi of the appellant to enquire about the deceased. There is absolutely no explanation for the family members of the deceased conducting themselves contrary to the normal course of human conduct in this regard. The family members of the deceased not going to the jhuggi of the appellant to enquire about the deceased becomes all important, considering the fact that the appellant admittedly was already facing a criminal trial for causing injury to PW-3 Mahipal, brother of the deceased. According to Mahipal, the deceased had opposed the pressure put by the appellant on him to compromise the matter. If the deceased was opposing compromise in that matter, his relations with the appellant could not have been cordial and consequently the chances of the family members allowing him to accompany the appellant were rather remote. If a person leaves his house with a person, who is not on good terms with him and does not return home till late in the night, his family members would either go to the house of the person whom the missing family member had accompanied, apprehensive as they would be about his safety and well being or they would straightaway go to the police and lodge a report, naming the person whom the deceased accompanied, as a suspect. In the present case, neither course was adopted by the family members of the deceased. In fact they did not lodge any report with the police even in the morning of 13th February 2008 and till the police discovered the dead body of the deceased near railway line. In these circumstances, we find it difficult to accept that the deceased had accompanied the appellant in the evening of 12th February, 2008.

13. We would like to add here that though the case of the prosecution is that the deceased was not well on that day and according to PW-3, Mahipal Singh, he had gone nearby to Dr.Vijay on that day for consultation, the doctor has not been examined to verify this part of the statement of PW-3. Had that been done, we

could at least have confirmed that the deceased was not well and had come to his house at about 5.00 pm on that day. This becomes more relevant, considering that even the employer of the deceased was not examined in this regard.

14. PW-3, Mahipal Singh, has stated that he used to leave for work at about 9.30 am and return by 6.00 pm, but, on that day, he returned early. The employer of the witness was examined to verify this part of his deposition. Had that been done, it could have been confirmed that this witness could be present in his jhuggi at about 05.00 pm on that day. For the reasons stated hereinabove, these circumstances do not stand established beyond reasonable doubt. Circumstances No. (D) and (E)

15. According to PW-5 Vijay, brother of the deceased, he had seen the deceased at the place where he was working at about 07.00 pm on 12th February, 2008 and at that time, the appellant Khadag Singh was accompanying him, alongwith another boy named Phool Chand. According to him, Sonu was not keeping well on that day and had come for taking his balance salary and bicycle. All the three, according to the witness, left at about 07.30 pm. Admittedly, the statement of this witness was recorded by the police after three months. There is absolutely no explanation for not recording the statement of this witness for as much as three months. According to the witness, on 13th February, 2008 itself, he had received a telephonic call at his residence asking him about whereabouts of the deceased and thereafter, he alongwith police, had reached the place of his mother, where he was told that Sonu had been murdered. He further stated that the police took him, his mother and his brother to identify the dead body of Sonu. Thus, not only did the witness come to know about the murder of his brother in the morning of 13th February, 2008, he also met the police officials and accompanied them to hospital to identify the dead body of the deceased. Had he actually seen the deceased leaving with the appellant at about 07.30 pm the previous day, the first thing he would have done was to disclose this fact to the police as well as to his mother and brother. The conduct of this witness in remaining silent for three months, without an iota of explanation, creates very serious doubts on his truthfulness and destroys his credibility as a witness. No one, who saw his deceased brother, accompanying another person only about 14-15 hours before coming to know of

his murder would keep such a material fact to himself. This is more so when the person, whom the deceased accompanied, cannot be said to be on good terms with him and was facing trial for causing injuries to the brother of the deceased and the deceased being opposed to any compromise with him. Another reason as to why we are not inclined to believe this witness is that he has introduced another person, namely, Phool Chand when he deposed in the Court. He did not name Phool Chand when he was examined by the investigating Officer. Phool Chand probably is the co-accused of the appellant in the trial which he is facing for causing injury to PW-3 Mahipal Singh, brother of the deceased. We would also like to note that no evidence has been collected by the Investigating Officer to prove that the deceased actually collected any money on 12th February, 2008.

16. It has come in the deposition of the witnesses that the deceased had gone to his work place in the evening of 12 th February, 2008 to collect the bicycle he had earlier left there. The prosecution has not told the Court as to why in the first place the bicycle was left by the deceased at his work place and why the deceased decided to bring his bicycle back on 12th February, 2008, despite his being sick on that date. No one from the place where the deceased was employed was examined to verify whether the deceased had left his bicycle at his work place on that day and that he had come there in the evening of 12th February, 2008, to collect his bicycle. For the reasons stated hereinabove, we hold that these circumstances are also not proved against the appellant. Circumstances No. (H), (I), (K) and (P)

17. The case of the prosecution is that the appellant was arrested on 13th February, 2008 when he was standing near Mother Dairy and during interrogation, he made disclosure statement Ex.PW-14/F stating therein that he could get the clothes and shoes recovered from the roof of his jhuggi. It is also the case of the prosecution that the appellant took the police to his jhuggi and his clothes as well as his shoes were found lying on the roof. The shoes were found stained with blood. When the shoes were examined by FSL, they were found to contain human blood of group B which was also the blood group of the deceased. No bloodstain was found on the clothes, alleged to have been recovered from the roof of the jhuggi of the appellant.

18. The Seizure Memo Ex.PW-14/G does not indicate that the clothes were found washed when they were seized. The report of FSL, Ex.PW-15/B, however, refers to the Ex.PW- 7/A as one dirty pant. This indicates that at least the pant had not been washed before it was seized by the appellant. The report of FSL does not indicate that any of the three clothes of the appellant viz. Ex.PW-7/A, 7/B and 7/C was found to be washed or had some faint trace of blood on them. Even otherwise, the alleged recovery of clothes and shoes, to our mind, is highly doubtful. We must note here that the learned Trial Judge summoned these shoes from the Malkhana and made the appellant wear them. The appellant maintained that the shoes did not belong to him. He, however, was made to wear them and it was observed by the learned Trial Judge that he could easily wear those shoes. The appellant was also made to wear the pant and T-shirt, which the police claimed to have seized from the roof of jhuggi, though he maintained that those clothes did not belong to him. The T-shirt and pant were found to be almost of the size of the appellant. The trouser was, however, found tight on his waist and the learned Trial Judge was of the view that this could be on account of change in the waist line with the passage of time. It was also found that the length of the arm of the jacket, seized by the police, was more than the size of the arm length of the appellant.

19. The bloodstained shoes are alleged to have been recovered in the evening of 13th February, 2008. The appellant was arrested at about 05.00 pm on that day, as is evident from the arrest memo Ex.PW-14/D. The case of the prosecution is that the murder took place at about 09-10 pm on 12th February, 2008. It has also come in the deposition of Investigating Officer that the appellant had washed his clothes before they were seized by the police though it is not so noted in the Seizure Memo. We fail to appreciate why the appellant would not wash his bloodstained shoes if he chose to wash his clothes. The only reason for washing the clothes could be the presence of bloodstains on them. If the appellant noticed bloodstains on his clothes, he would also have noticed them on his shoes when the police officers were able to notice them at the time of their seizure and, therefore, he would have washed not only the clothes, but the shoes as well.

20. The appellant had ample time as well as the opportunity with him to either wash his bloodstained shoes or to just damage or throw them away at a place where they could not be easily found. He could not have been so foolish so as to keep the bloodstained shoes at the roof of his own jhuggi. It is not as if the appellant was absconding after murder of the deceased and, therefore, had no opportunity to wash his shoes, throw them away or otherwise damage them beyond recognition and retrieval. No report had been lodged against him at least till 10.00 am on 13th February, 2008. No one had come to his jhuggi to enquire about the deceased. Therefore, had there been bloodstains on his shoes, he would have either washed or thrown them away. In any case, he would not have been kept them at the roof of jhuggi, in case he had brought the deceased with him as the case of the prosecution is. In case, the appellant had brought the deceased with him, he knew that he would be the prime suspect when the dead body of the deceased would be found. Therefore, the roof of his own jhuggi could not have been chosen by him as the place to conceal the clothes and shoes which he was wearing at the time of committing the murder. If the purpose was to get rid of the bloodstained shoes or conceal them, the appellant would not have kept them at the roof of his jhuggi.

21. Therefore, we are constrained to hold that the prosecution has failed to establish these circumstances alleged against the appellant. Circumstances No. (O) and (P)

22. Since, we have not believed the evidence that the deceased was last seen in the company of the appellant, either at about 05.00 pm or at about 07.30 pm, the time of his death as well as the gap between the time the appellant is alleged to have taken the deceased with him and the time the death of the deceased becomes immaterial and loses its significance. Circumstances No. (F) and (Q)

23. It has come in the evidence that there was a quarrel between the appellant and PW-3 Mahipal Singh and the appellant was facing trial for causing injuries to Mahipal Singh. The case of the prosecution is that since the deceased was opposed to his brother Mahipal Singh compromising with the appellant in that matter, there was a previous enmity between the appellant and the deceased

motive which was the motive for the appellant to commit his murder. The contention of the learned counsel for the appellant in this regard was that a person facing trial for causing injury to a person was not likely to commit a murder since by doing so, he would be committing a heinous crime, punishment for which is much more than the punishment for causing injury to a person. We, however, need not go into that aspect since even if it is believed that the appellant had a motive to commit murder of the deceased, that by itself, cannot be a sufficient ground for his conviction, in a case based purely on circumstantial evidence.

Conclusion

24. It is a settled proposition of law that in a case based on circumstantial evidence, the circumstances from which a conclusion of guilt is sought to be drawn should be fully and firmly established and should be conclusive in nature and tendency. The circumstances, taken together, must form a chain which is complete, leaving no material gap in between and should be incompatible with any hypothesis other than that of the guilty of the accused. The circumstances established against the accused must show that in all probability, no one, other than him, had committed the crime for which he was indicted.

25. In the present case, the prosecution has failed to prove that the deceased had left his jhuggi with the appellant at about 05.00 pm on 12th February, 2008. The prosecution has also failed to prove that the deceased was seen by his brother PW-5 Vijay at about 07.30 pm on 12th February, 2008. The alleged recovery of bloodstained shoes from the roof of jhuggi of the appellant also does not stand established beyond reasonable doubt.

26. Another reason we doubt the evidence of last seen is that admittedly the appellant was very well known to the family of the deceased. If the appellant was to commit his murder, he was not likely to have come to his house to take him along with him, because he knew that if the deceased is murdered, he would be the prime suspect and would be asked to tell where the deceased was left by him, at what time and under what circumstances. In case he takes that risk, he is most likely to abscond so that he is not made to explain the whereabouts of the deceased. This is not a case where the deceased was seen in the company of the

appellant by an outsider, unknown to either of them. It is, therefore, quite unlikely that the appellant would have taken the deceased with him, committed his murder and also remained present in the locality in which he was residing. This is more so when he also knew that he was bound to be suspected of the murder of the deceased on account of his facing trial for causing injuries to his brother. It is, therefore, difficult to accept the evidence of last seen produced in this regard.

27. EX.PW-7/D are the brief facts prepared by the Investigating Officer on 14th February, 2008. The case of the prosecution is that the statement of PW-3 Mahipal Singh and PW-4 Maya Devi were recorded on 13th February, 2008. In their statements under Section 161 of Cr.P.C, both of them claimed that the appellant had taken the deceased with him from their house at about 5.00 pm on 12th February, 2008. Thus, the Investigating Officer knew, on 13th February, 2008 itself that the appellant was prime suspect in this case. The case of the prosecution is that the appellant had also confessed to his crime and made a disclosure statement on 13th February, 2008 pursuant to which the blood stained shoes were also recovered from the roof of the jhuggi on 13th February, 2008. However, in the brief facts prepared on 14th February, 2008, there is not a word against the appellant. These brief facts not only refer to the recovery of the dead body they also give the name and complete address of the deceased. There is no explanation for not recording, in the brief facts, that the deceased had accompanied the appellant Khadag Singh @ Arun on 12th February, 2008 and he was arrested on 13th February, 2008 for committing his mother. There is no reference to recovery of any clothes or shoes in this document. There may not be any statutory obligation to give these facts in the Brief Notes. But, when the Investigating Officer, despite having an occasion to do, omits to state these material facts, this, when viewed in the other facts and circumstances of the case, creates some doubt on the truthfulness of the story of last seen set up by the prosecution. For the reasons given in the preceding paragraph, the appellant is given benefit of doubt and is hereby acquitted. The impugned judgment and order on sentence are set aside. The appeal stands allowed.