

Vijay Kumar @ Vijay and anr. Vs. State

Vijay Kumar @ Vijay and anr. Vs. State

SooperKanoon Citation : sooperkanoon.com/920943

Court : Delhi

Decided On : Oct-03-2011

Judge : Badar Durrez Ahmed; Manmohan Singh, Jj.

Acts : Indian Penal Code (IPC) - Sections 302, 308, 380, 34; Code of Criminal Procedure (CrPC) - Sections 82, 83, 313, 161

Appeal No. : CRL.A. 589/2010; CRL.A. 822/2010

Appellant : Vijay Kumar @ Vijay and anr.

Respondent : State

Advocate for Def. : Mr Sanjay Lao, Adv.

Advocate for Pet/Ap. : Mr Anurag Jain; Mr S.C. Jain, Adv.

Judgement :

1. These two appeals are directed against the judgment dated 27.03.2010 and order on sentence dated 30.03.2010 delivered by the Addl. Sessions Judge, Delhi in Sessions Case No. 109/2009 whereby both the appellants were directed to undergo rigorous imprisonment for life and further sentenced to pay a fine of Rs. 5,000/- each under Section 302 IPC and in case of default in payment of fine to further undergo simple imprisonment for six months each. The appellants were further directed to undergo rigorous imprisonment for three years and to pay a fine of Rs. 3,000/- each under Section 380 IPC and in case of default of payment of

fine, to further undergo simple imprisonment for three months each. Both the sentences were directed to run concurrently.

2. On 16.2.2002 two dead bodies, which were later on identified as of Prem (Driver) and Sanjay (cleaner/helper), were found in an abandoned truck bearing No.HR-38-8021 at Lawrence Road, Delhi. During investigation, it was revealed that the said truck belongs to a Transport Company at Hodal, Haryana and the deceased were seen lastly by the prosecution witness Kanahiya at Hodal, Haryana in the company of the accused persons.

3. The said truck was loaded with 300 bags of wheat which was to be delivered at FCI Godown, Maya Puri from Hodal, Haryana.

4. The said truck was found empty and on investigation, it was revealed that 300 bags of wheat were sold to one Kailash and 80 bags of wheat were recovered from the place of said Kailash at the instance of the accused persons.

5. Accused Om Parkash and Thakur Dass were acquitted and the appellants were convicted under Sections 302/380/34 IPC vide order dated 27.03.2010.

6. Being aggrieved by the said order of conviction dated 27.3.2010 and order of sentence passed on 30.3.2010 the appellants filed the present appeals, inter alia, on the grounds raised by the appellants which can be summarized as follows : (i) There was no eye witness to this case. This case rests upon circumstantial evidence of the last seen evidence and of the recovery of the stolen wheat bags. And the circumstantial evidence led by the prosecution is not sufficient to convict the appellants as it was a case of blind murder.

(ii) That the police did not investigate the case fairly. The prosecution witnesses were planted and in no way connected to the said incident.

(iii) That the prosecution failed to establish beyond reasonable doubt that the deceased persons were last seen in the company of the accused persons as out of the two witnesses of the said incident, only one witness i.e. PW-26 Kanhaiya supported the prosecution case and the other turned hostile.

(iv) That the learned Additional Sessions Judge did not take into consideration the material contradictions in the statement of witnesses produced by the prosecution which show that they were not reliable witnesses and the trial court still relied upon their statements and convicted the appellants.

(v) That the prosecution has not discharged its initial burden of proving its case beyond reasonable doubt against the appellants thus the impugned order is liable to be set aside as offences were not proved by the prosecution to have been committed by the appellants.

7. The case of the prosecution before the Trial Court was as under:

a. That on 16.02.2002, Duty Officer, PS Keshav Puram received wireless message through PCR at about 6.17 p.m. through wireless operator that in front of C-Block, 36/6, Lawrence Road, a truck No. HR 38 8021 near water tank was parked containing a dead body. DD No.20A was handed over to SI Vikram Singh. SI Vikram Singh along with Constable Surender went to the spot. SI Vikram Singh found that a truck was parked near C-36/6, Industrial Area, Lawrence Road, Delhi, having face towards MIG Flats, Rampura and at the left side window in the cabin behind the driver seat, two dead bodies were lying having wrapped in their neck. Both dead bodies were having swelling and bad smell was coming out. On this DD, rukka was prepared and sent for registration of FIR under Section 302 IPC. Constable Surender took the ruqqa and got registered the FIR. Further investigation was conducted by Inspector R.K. Budhiraja, who went to the spot and prepared site plan. The photographer took the photographs. The crime team was also called for finger prints. Truck and dead bodies were inspected by him. On the truck, a telephone No.36284, Union Hodal was written. A call was made on this telephone number. It was found that the owner of the truck had gone to Delhi in search of the truck.

b. On information, the owner came at the spot and identified the dead bodies of Prem Chand and Sanjay. Some documents were taken out from the clothes of the dead bodies and both the deceased were sent to BJRM Hospital Mortuary. On 17.02.2002, both dead bodies were identified and postmortem conducted and later on the same were handed over to the relatives. Exhibits were seized, which were

handed over by the doctor. On 20.02.2002, Investigation Officer Mr R.K. Budhiraja recorded statement of one Kanhaiya Lal under Section 161 Cr.P.C. He named one Vijay and Pappu Vayapari. As per statement made by him, on 13.02.2002 at about 8.45 p.m., he had seen the deceased and the said two persons along with two other persons. All the four persons boarded in the truck as they wanted to go to Palwal. Investigation Officer started search of accused persons. On 25.02.2002, on the basis of secret information accused Vijay Kumar was arrested. His disclosure statement was recorded, in which, he named co-accused Narender @ Pappu. He led the police party to broker Kailash Chand and got recovered 80 bags of wheat. Thereafter, co-accused Narender @ Pappu was arrested on 26.02.2002 at the instance of Vijay Kumar and his disclosure statement was also recorded.

c. The investigation was entrusted to O.P. Yadav as Inspector R.K. Budhiraja was transferred. Mr Yadav made search for accused Virender Singh and proceedings under Section 82/83 Cr.P.C. conducted against him. The exhibits were deposited at FSL, Malviya Nagar. In the meanwhile, the postmortem report was received. As per this report, doctor stated the cause of death due to ligature strangulation. The chance prints were sent for comparison but result was not received.

d. On 20.07.2002, accused Virender Singh surrendered in the Court. He was arrested and disclosure statement was recorded. On 30.07.2002, TIP proceedings were conducted at Tihar Jail. The witness Kanhaiya Lal did not identify the accused Virender Singh. Constable Vishnu Dutt, PS City Palwal, Haryana, came to PS Keshav Puram on 27.07.2002 and informed that accused Thakur Dass @ Pappu was arrested in FIR No.3../02 under Section 406/407/302/201/392 IPC, PS City Palwal and he had made a disclosure statement. On 23.08.2002, accused Thakur Dass was arrested after issuance of production warrants. His disclosure statement was recorded. Similarly, accused Om Prakash @ Oma was arrested after issuance of production warrants. TIP proceedings of accused Thakur Dass @ Pappu and Om Prakash @ Oma were to be conducted but they refused to join the TIP proceedings.

e. After completion of investigation, supplementary charge sheet was filed. In the charge sheet, it was prayed that if Court deems fit, then accused Virender Singh

may be discharged.

f. Charge sheet was filed before the concerned Magistrate after completion of investigation for trial initially against two accused persons Narender @ Pappu and Vijay Kumar. Later on, supplementary charge sheet was committed for trial of accused persons Om Prakash and Thakur Dass.

g. Vide order dated 12.07.2002, the trial court framed the charge against accused Vijay Kumar and Narender @ Pappu for trial of the offence under Section 302/380/34 IPC. Both the accused pleaded not guilty and claimed trial.

h. Vide order dated 16.12.2002, the trial court also framed the charge against accused Om Prakash @ Oma and Thakur Dass for trial of the offence under Section 302/380/34 IPC. Both the accused pleaded not guilty and claimed trial.

8. Prosecution, in order to prove charges, examined 37 witnesses in total.

9. Statement of all the four accused persons was recorded under Section 313 Cr.P.C. All of them stated that they were innocent.

10. Four defence witnesses were examined. The defence witnesses DW-1 Veer Pal and DW-2 Kailash Chand were examined on behalf of accused Narender @ Pappu and DW-3 Kishan Singh and DW-4 Basanta were examined on behalf of accused Vijay Kumar in support of their defence.

11. Prosecution examined PW-1 Om Prakash Jagid and PW-9 Jawahar Lal, partners of M/s Krishna Transport, Hadal and registered owner of truck bearing No.HR 38 8021. PW-2 Maan Singh identified the dead body of his son deceased Sanjay, helper, and PW- 3 Mohinder Singh Panchal identified the dead body of deceased Prem Chand, driver. Three witnesses are examined in regard to loading of 300 wheat bags on 12.02.2002 in truck No. HR 38 8021 at FCI, Hodal, Haryana for transportation to FCI, Mayapuri, Delhi. PW-4 Vishnu Kumar, transport contractor for FCI, PW-6 Om Prakash, who was Depot Incharge at Hodal on 12.02.2002 and PW-13 Sunder, driver of the truck on that day, in whose name gate pass was issued. PW-5 Tejpal, another driver, who was on truck No. HR 38 C 7141 of the same owner but not present at the time of loading of wheat bags as he

was ill and on leave. In his absence, driver Surinder was plying the truck. PW-7 Dr. B.L. Acharya conducted postmortem examination of deceased Prem and proved his report Ex. PW-7/A. PW-15 Dr. Vinay Kumar Singh conducted postmortem examination of deceased Sanjay and proved his report Ex. PW-15/A. The star witnesses examined by prosecution were PW-6 Kanhaiya, „last seen' witness and PW-10 Kailash Chand, recovery witness and his partner PW-27 Surinder Kumar was declared as hostile witness. Police witnesses PW-8 SI Shiv Raj Singh made effort to trace accused Narender @ Pappu, PW-11 ASI Harjeet Singh, Duty Officer, who recorded Ex. PW-11/B, PW-12 Constable Prem Nath, who delivered FIR to senior police officials and area Magistrate, PW-17 ASI Subhash Chander, who lifted the chance finger prints on 16.02.2002 and prepared his report Ex. PW-17/A, PW-22 learned MM Sh. Ashwani Sarpal, who proved TIP proceedings of accused Narender @ Pappu Ex. PW-22/A, PW-23 ASI Radheyshyam, PCR Official, who passed the information of recovery of dead bodies in truck No. HR 38 8021 at C-Block, Industrial Area, Lawrence Road, PW-24 SI Manohar Lal, Draftsman, who prepared scaled site plan Ex. PW- 23/A, PW-25 Inspector O.P. Yadav, who sent the exhibits to FSL and arrested accused Virender, not summoned, on 20.07.2002. PW-14 Constable Sunder Pal, PW-28 SI Vikram Singh and PW-37 ACP R.K. Budhiraja, Investigation Officer to prove the initial investigation regarding the truck No. HR 38 8021 and recovery of two dead bodies who also conducted the initial investigation. PW-21 Sukhram Pal and PW-31 Ajay Pal are the two main witnesses of investigation, who along with PW-37 Investigation Officer arrested the accused Vijay Kumar and Narender @ Pappu and also witnessed the recovery of wheat bags. PW-36 Constable Rajbir joined the investigation at the time of postmortem examination of deceased Prem Chand and Sanjay.

12. PW-19 Constable Azad Singh and PW-20 Inspector Om Parkash are the two witnesses of the arrest of accused Om Prakash @ Oma on 05.09.2002 and accused Thakur Dass @ Pappu on 23.08.2002, when they were produced before the learned MM of PS Keshav Puram. PW-33 Constable Richpal Singh and PW-34 SI Jagdish Singh were the witnesses in case pertaining to City Palwal, Haryana vide FIR No.373/2002 under Section 302/201/292 IPC, in which, accused Om Prakash @ Oma and accused Pappu @ Thakur Dass were arrested. PW-35

Tularam was one of the witnesses of arrest in the FIR No.373/2002 PS City Palwal, Haryana and proved disclosure statement Ex.PW-34/A of accused Thakur Dass.

13. There is no eye witness to the murder and case revolves on circumstantial evidence of last seen and recovery of stolen wheat.

14. The case of the prosecution against the appellants was based on circumstantial evidence. It is settled law that in the case of circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The Supreme Court in various cases laid down the principle that where the fate of the accused depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offence home beyond any reasonable doubt.

15. In the case of C. Chenga Reddy and Ors. Vs. State of A.P., 1996 (3) RCR (Criminal) 793; (1996) SCC 193, the Supreme Court observed as under :

"In a case based on circumstantial evidence, the settled law is that the circumstances from within the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with its innocence....."

16. The following circumstances were alleged by the prosecution against the appellants:

(a) That the truck No.HR 38 8021 was loaded at FCI, Hodal for delivering 300 wheat bags to FCI, Mayapuri, Delhi.

(b) That owner of truck bearing No.HR 38 8021 was M/s. Krishna Transport at Hodal, Haryana and Jawahar Lal was a partner.

(c) That on 12/13.02.2002 night, the truck driver was deceased Prem Chand and conductor was deceased Sanjay.

(d) The cause of death of deceased Prem Chand and deceased Sanjay.

(e) That on 16.02.2002, the truck No.HR 38 8021 was found in front of C-36/6, Lawrence Road, New Delhi containing two dead bodies.

(f) The recovery of wheat bags at the instance of accused Vijay, his arrest and arrest of accused Narender @ Pappu.

(g) The last seen witness.

17. Let us now examine the case on the basis of the facts of the case proved by the prosecution as well as the findings given by the trial court in the matter.

(a) That the truck No.HR 38 8021 loaded at FCI, Hodal for delivering 300 wheat bags to FCI, Mayapuri, Delhi.

18. The trial court gave its finding on this issue in favour of the prosecution while accepting the testimonies of PW-13 and PW-4 to PW-6. PW-13 Sunder, who was the driver of the impugned truck bearing No. HR 38 8021, deposed that he went to FCI Godown, Hodal where 300 wheat bags were loaded. There was another truck bearing No. HR 38C 7141 also loaded with 400 bags of wheat, whose driver was Teajpal was not well on that day. He took the truck NO. HR 38C 7141 to Mayapuri, Delhi. He unloaded the truck at FCI Godown, Mayapuri and took the empty truck to Kirti Nagar and loaded empty glass bottles there and unloaded the empty glass bottled in a factory at Hatin and left the truck at transport company, Hodal. He also established that the gate pass No. E-34491 mark „A' was also issued after loading of 300 bags of wheat in his name. In the cross- examination, he stated that he was driver of the truck No. HR 38 8021 for about 3 months. The document was prepared in his presence. The gate pass was issued by the brother of the owner Jawahar Lal. He himself had seen the driver Tejpal in ill-condition. PW-4 Vishnu Kumar was also examined by prosecution, who was the transport contractor for FCI at Gurgaon and runs his business in the name and style of M/s Tirupati Balaji Rice and Oil Mill at Bunarana Road, Hodal, Haryana. He deposed that on

12.02.2002, truck No. HR 38 8021 was arranged at FCI Godown, Hodal where 300 bags of wheat were loaded. He proved the GR No. 723, which was seized by police vide memo Ex. PW-4/A. Though in his cross-examination, he admitted that the duplicate copy of gate pass mark „A' does not bear his signature and explained that duplicate copies are generally signed by his Munshi Satbir. PW-5 Tejpal, another driver was examined by prosecution, who further corroborated these facts that he was driving truck No. HR 38C 7141 for about 4-5 months but he fell ill and had taken leave and thereafter, he went to his home and also testified that the truck No. HR 38C 7141 was driven by one Surinder of Village Jaroli in his absence. PW-6 Om Prakash, Depot Incharge at Hodal, Haryana, examined by prosecution, corroborated the fact that on 12.02.2002, 300 bags of wheat were loaded in the truck bearing No. HR 38 8021 from FCI, Hodal Depot. He further proved the gate pass mark „A' issued in the name of driver Sunder and issued a receipt mark „B' of Rahul Dharam Kanta showing the weight mentioning of 300 bags of wheat. The wheat bags were having seal of FCI or Haryana Agro State Warehouse Corporation and on some bags, HAFED, Haryana. In his deposition, he has not denied the fact that the gate pass was issued in the name of Sunder who was driving the truck.

19. In view of the testimonies of the witnesses as referred to above, we concur with the finding of learned trial judge that the truck No. HR 38 8021 was loaded with 300 bags of wheat for transportation to FCI, Mayapuri, Delhi and prosecution had proved beyond reasonable doubt the first circumstance. (b). That owner of truck bearing No.HR 38 8021 was M/s. Krishna Transport at Hodal, Haryana and it is owned by partner Jawahar Lal.

20. The above circumstance was about the ownership of truck in question, bearing No. HR 38 8021, of M/s. Krishna Transport at Hodal, Haryana. As per the case of the prosecution, the said truck was owned by partner Jawahar Lal. The prosecution relied on the testimony of PW-1 Om Prakash Jagid, who deposed that Jawahar Lal is the registered owner of the said truck. Jawahar Lal, PW-9, himself appeared in the witness box and testified that he is the owner of the truck. He further proved that during investigation, the documents pertaining to the truck were seized by the police vide memo Ex. PW- 9/B. The documents were certificate of

fitness, registration certificate, permit and insurance Ex. PW-9/C to PW-9/F. He also stated that the truck was released to him on Superdari. He also identified the truck during his examination as Ex. PX. So, nothing contrary has come in the cross-examination of PW-1 and PW-9. Thus, the prosecution had been able to prove the second circumstance beyond reasonable doubt.

(c) That on 12/13.02.2002 night, the truck driver was deceased Prem Chand and conductor was deceased Sanjay.

21. The trial court in its finding also decided the third circumstance in favour of prosecution who proved that on 12/13.02.2002 night, the truck driver was deceased Prem Chand and conductor was deceased Sanjay, the prosecution relied upon the testimony of PW-9 Jawahar Lal, who testified that on 15.02.2002, his truck did not return and then, he came to Delhi on 16.02.2002 and tried to trace the truck. At Lawrence Road, he found the truck, which was empty and having dead bodies of deceased driver Prem Chand and helper Sanjay. He identified the dead bodies before the police. In the cross-examination, he stated that just about 2-3 days prior to the incident, both joined the company. PW-1 Om Prakash Jagid, also testified that he identified the dead body of deceased driver Prem Chand by proving his statement to police Ex. PW-1/A. That the deceased were Prem Chand and Sanjay, is also established on the basis of testimony of PW-2 Maan Singh, who testified that in the month of February 2002, his son Sanjay was working with PW-9 Jawahar. He identified dead body of his son and also proved the statement Ex. PW-2/A. PW-3 Mohinder Singh Panchal, the brother of deceased truck driver Prem Chand also identified the dead body and proved his statement Ex. PW-3/A regarding the identity of deceased driver. Therefore, there is no room for any doubt that third circumstance was duly proved by the prosecution and the findings of the trial court are correct on this issue.

(d) The cause of death of deceased Prem Chand and deceased Sanjay.

22. The sixth circumstance was about the cause of death of deceased Prem Chand and deceased Sanjay, the prosecution relied upon on the testimonies of PW-7 Dr. B.L. Acharya and PW-15 Dr. Vinay Kumar Singh. PW-7 Dr. B.L. Acharya conducted postmortem of deceased Prem and had proved detailed report Ex. PW-

7/A. The opinion for the cause of death reflects that it was due to asphyxia consequent upon ligature strangulation caused by other party. He also proved that one muffler was found tied around the neck with single knot on the right side. He further proved that the cause of death can be due to muffler tied around the neck of the dead body. He also opined the time since death was about 3 ½ to 4 days back and all the injuries were ante-mortem. The other witness PW-15 Dr. Vinay Kumar Singh conducted postmortem of deceased Sanjay who proved the same as Ex. PW-15/A. According to the opinion proved by him, all the injuries were ante mortem in nature and these injuries were sufficient to cause death in ordinary course of nature. The mode of death was homicidal. He further proved that the cause of death was due to ligature strangulation and recovered muffler was used as ligature in strangulating the deceased Sanjay. Before the trial court, the prosecution was able to prove beyond doubt that the cause of death of deceased Prem Chand and Sanjay was due to ligature strangulation.

(e) That on 16.02.2002, the truck No.HR 38 8021 was found in front of C-36/6, Lawrence Road, New Delhi containing two dead bodies.

23. The case of the prosecution is that the truck No. HR 38 8021 was found in front of C-36/6, Lawrence Road, New Delhi, containing two dead bodies on 16.02.2002. The prosecution before the trial court relied on the testimonies of PW-28 SI Vikram Singh, PW-14 Constable Surender Pal and PW-37 ACP R.K. Budhiraja, Investigation Officer. PW-28 SI Vikram Singh testified that on receiving DD No.20A Ex. PW-28/A, he along with PW-14 Constable Surender Pal reached at the spot and found truck No.HR 38 8021 was parked there and on examining, found that a foul smell was emanating from the truck. Two dead bodies were recovered which were covered with a quilt. PW-14 Constable Surender Pal further corroborated the testimony of PW-28 SI Vikram Singh and PW-37 ACP R. K. Budhiraja, Investigation Officer. PW-14 further corroborated the fact that he took the ruqqa Ex. PW-11/A for registration of FIR.

24. PW-28 proved that on searching dead bodies, driving licence, a diary and cash were recovered, he lifted the blood lying in the cabin behind the truck driver's seat and sealed the same with the seal of BS and took it into possession vide memo

Ex. PW-28/B, the quilt was also taken into possession vide memo Ex. PW-28/C, seat covers of the cabin of the truck were also taken into possession vide memo Ex. PW-28/D, two pairs of shoes recovered from the cabin of the truck were also taken into possession vide memo Ex. PW-28/E, two empty bottles of liquor lying inside the cabin were also seized vide memo Ex. PW-28/F, the blood lying on the ground underneath the truck, blood stained earth, earth control sample were lifted, converted into a parcel and sealed with the seal of BS and taken into possession vide memo Ex. PW-28/G. He further proved the seizure memo of diary, driving licence vide memo Ex. PW-28/H and the wheat lying scattered inside the truck were also taken into possession vide memo Ex. PW-28/J so also the truck was taken into possession vide memo Ex. PW-28/K. The earth control was also seized vide memo Ex. PW-28/L. The witness also identified the case property i.e., the articles of the dead bodies and the articles recovered from the spot i.e., the truck Ex. PX1 bearing registration No. HR 38 8021, cash of Rs.40/- Ex. PX2, pocket diary Ex. PX3, driving licence Ex. PX4 and one paper having some telephone numbers and some calculation Ex. PX5, two empty liquor bottles Ex. PX6/1-2 (colly), one quilt Ex. PX7, two pairs of shoes Ex. PX8 and PX9 and two seat covers Ex. PX10 and PX11 and the wheat grains seized vide memo Ex. P-8.

25. PW-37 ACP R.K. Budhiraja, Investigation Officer further corroborated the testimony of PW-28 SI Vikram Singh. The prosecution before the court below also proved this circumstance by relying upon the testimony of PW-30 Constable Rampal, who proved the photographs of the spot Ex. PW-30/1-11 and negatives Ex. PW- 30/12-23. In the cross-examination, all these three witnesses denied all the suggestions put to them regarding the material facts of investigation. So, the prosecution has proved this circumstance beyond any doubt.

(f) The recovery of wheat bags at the instance of accused Vijay, his arrest and arrest of accused Narender @ Pappu.

26. On the issue of recovery, the prosecution relied upon the testimony of PW-21 SI Sukhram Pal, PW-31 HC Ajay Pal and PW- 37 ACP R.K. Budhiraja. According to testimony of these three witnesses, on 25.2.2002, accused Vijay was arrested at Hodal Bus Stand. They proved the arrest memo Ex. PW-21/A, personal search

memo Ex. PW-21/B, body inspection memo of accused Ex. PW-21/C and the disclosure statement of accused Vijay recorded Ex. PW-21/D. The accused Vijay Kumar led the police party to B-60, Lawrence Road, New Delhi where the wheat bags were sold to PW-10 Kailash Chand. PW-37 R.K. Budhiraja, Investigation Officer further corroborates that he seized the gate pass receipt of Dharam Kanta vide memo Ex. PW-37/A regarding the loading of truck on 12/13.02.2002 with 300 bags of wheat.

27. The prosecution also relied upon the testimony of PW-10 Kailash Chand who deposed, inter alia, that on 14.02.2002 accused Vijay came to his shop and told him that he had brought the goods of Pappu and asked him to take charge of those goods. PW-10 confirmed that goods of Pappu used to reach him earlier and he was known to him. He testified that accused had brought goods in a truck carrying 300 bags of wheat but on counting there were only 299 bags. When he came down stairs, he found both Vijay and Pappu present there near the truck. The truck was unloaded by the labourers at about 4.00 a.m. and his commission was between Rs.2 to Rs.3 per bag/quintal. He also deposed that later on at about 1.30 p.m. or 2.00 p.m. on 14.02.2002, Pappu again came to his shop to clear accounts and he had recorded an entry to this effect in his account books. Ex. PW10/B is the photocopy of the entries recorded in his account books. The entire payment of Rs.75,000/- was made to the accused Pappu on 14/15.02.2002. PW-10 Kailash Chand admitted that on 25.02.2002 police reached his shop along with Vijay who had got recovered 80 bags of wheat from his shop located in front of Jammu Kashmir State Agro Industries, Lawrence Road, New Delhi. He also deposed that on 13.02.2002 in advance, he received a telephonic message from Pappu about the delivery of goods in question.

28. The accused Narender was arrested on 26.02.2002 after the arrest of accused Vijay when he was in Police remand. The accused Narender was arrested at the instance of accused Vijay from Mithapur, near Badarpur, PW-37 R.K. Budhiraja, Investigation Officer proved the arrest memo Ex. PW-21/A, personal search memo Ex. PW-21/B, body inspection memo Ex. PW-37/D, his disclosure statement also recorded vide Ex. PW-31/A. According to the pointing out by the accused Narender, pointing out memo of the place where truck No.HR 38 8021 was lifted

prepared vide memo Ex.PW-37/E. Thereafter, the place where the truck was left was pointed out by pointing out memo Ex. PW-37/F.

29. He also pointed out the place where the truck was unloaded vide memo Ex. PW-37/G and finally where the truck was parked also pointed out by him vide memo Ex. PW-37/H. The accused Narender was subjected to TIP on the next day. The testimony of Investigation Officer ACP R.K. Budhiraja is further corroborated by PW-21 Sukhram Pal and PW-31 HC Ajay Pal, who joined the investigation on 26.2.2002.

30. The accused Vijay Kumar, who was arrested on 25.02.2002, and at his instance wheat bags were recovered and on his disclosure statement accused Narender @ Pappu was also arrested on 26.02.2002, therefore, the prosecution has been able to establish its case against the accused Vijay and Narender who shared common intention to commit the crime and they led the police party by pointing out all the places of crime and Vijay got recovered the stolen wheat bags.

(g) The last seen witness.

31. In order to prove its case of last seen witness, the prosecution relied on the testimony of PW-26 Kanyaiya before the trial court. He is the brother of deceased Sanjay. In his testimony, he stated that on 13.2.2002, he had gone along with deceased Prem Chand to Krishna Transport Company, Hodal, who was the driver and reached there at about 8.45 pm. There accused Narender was present and had greeted deceased Prem Chand. On inquiry, Prem told him that Narender was his relative. He came to know that accused Narender wanted to go to Palwal in a truck. There were four to five persons along with accused Narender at that time who were standing in the dock. Driver Prem Chand requested him to call his brother as no other conductor/helper was available. The deceased Sanjay was called by PW-26 Kanhaiya. He deposed before the trial court that all the persons, standing in the dock, boarded the truck No.HR 38 8021. On 20.2.2002, he came to know that his brother Sanjay had been murdered. He came to the Police Station on 27.2.2002 and seen accused Narender and Om Prakash in the Police Station. He identified them. He also deposed that he had gone to Central Jail, Tihar where other co-accused persons were shown to him and he had identified one of them in

Tihar Jail. He also identified the accused persons before the Police in Tis Hazari Court.

32. In the cross-examination, PW-26 Kanyaiya explained that he was serving as driver with one Raj Kumar for last four to five years as a driver and he was residing with five brothers, one sister, parents and his wife etc. in a joint family. He was the driver of truck No. HR 38E-3665 which was used to ply in between Delhi to Mathura and he remained on his truck for 24 hours. He used to go to his house for one or two days after a span of 15-20 days. In the year 2002, he used to drive truck during night and to sleep in the truck during day hours. On 12.02.2002, he came to Hodal, Haryana from Calcutta and on 13.02.2002, he was on duty on his truck which was to go to Delhi. On 13.02.2002, he met his father and asked about his well-being. On that day, he met his brother Sanjay during day hours and again met him when he came to join Prem on his truck to work as his conductor. In fact PW-37 ACP R.K. Budhiraja in his testimony deposed that on 20.02.2002 he went to Hodal to the house of deceased Sanjay where he met PW-26 Kanhaiya and he recorded the statement of Kanhaiya who was the witness of last seen.

33. PW-26 Kanhaiya did not identify the remaining two accused persons Om Prakash and Thakur Dass. Therefore, the benefit was given to them and even the prosecution did not examine any witness against them. The accused Narender @ Pappu was subjected to TIP proceedings proved by MM Sh. Ashwani Sarpal but he refused to join the TIP.

34. The learned counsel appearing on behalf of Narender @ Pappu has argued that in case he had visited the Police Station on 20.02.2002 then why did he not inform the police regarding whatever information he had with him. According to the appellants, PW-26 is not a reliable witness. The argument of the learned counsel for the appellant is without any substance because of the reason that on 20.02.2002, the statement of Kanhaiya was recorded under Section 161 Cr.P.C. wherein he had specifically named Vijay Kumar as well as Pappu.

35. From the statement of PW-26, it appears that accused Narender @ Pappu and Vijay Kumar along with two-three persons were present on 13.02.2002 along with both deceased Prem Chand and Sanjay at Krishna Transport company and PW-

26 had seen them in their company when both were alive.

36. The learned counsel for Narender @ Pappu has pointed out certain contradictions in the deposition of PW-10 as well as the statements of PW-6 and PW-9. His submission is that as per deposition of PW-9 Jawahar Lal, who is the owner of the truck, it is stated that Prem Kumar was driver of his truck and Sanjay was helper with him on 13.02.2002 and the said truck was got loaded with 300 bags of wheat from GCI Godown Hodel and it was sent on 13.02.2002. On the other hand, PW-6 stated in his deposition that on 12.02.2002 he was working in Tour Corporation of India as Depot Incharge at Hodel, Haryana and 300 bags of wheat were loaded in the impugned truck from FCI Hodel Depot or transportation to FCI Depot, Mayapuri, New Delhi. He stated that both the witnesses contradicted each other. Therefore, they are not reliable witnesses but planted witnesses by the prosecution.

37. He further stated that PW-9 never produced any document to show that both deceased persons were his employees. Another contradiction referred to by the learned counsel for the appellant is that PW-9 in his examination-in-chief stated that he was due to return on 15.02.2002 but Prem did not report to him, therefore, he came to Delhi on 16.02.2002 and tried to trace him. However, in cross-examination, he stated that he received the information of his truck in Delhi at about 7:30 p.m. on 15.02.2002.

The learned counsel for Narender @ Pappu has further argued that witness PW-10 is not a reliable witness because he bought 300/299 bags of wheat on which stamp of FCI was affixed but he did not inform the police though he was involved in commission agency of food grains since 7-8 years. He pointed out certain discrepancies about the entries made in his account books and also that he did not produce any receipt regarding the payment by him to the accused Narender. Therefore, his testimony is not believable.

38. As regard the production of record of the employment of Prem Kumar and Sanjay is concerned, it is a matter of fact that the appellants did not confront any contrary record of the deceased persons in the cross examination of PW-9 in order to prove that they were not employed by him. Therefore, it does not affect the case

of the prosecution in any manner. Even otherwise, deceased were employed very recently as per the testimony of PW-9.

39. No doubt there are certain contradictions and discrepancies in the testimonies of PW-6 Om Prakash, PW-9 Jawahar Lal and PW-10 Kailash Chand. However, it is settled law that such discrepancies do creep in when a witness deposes in a natural manner and if these do not go to the root of the prosecution story then the same may not be given undue importance. The conviction of the accused can be based even on the testimony of a solitary witness and when the evidence is found to be otherwise reliable, if the discrepancies are not material, the same can be ignored. In the present case, the testimonies of PW-26, last seen witness, PW-10 Kailash Chand, recovery witness, PW-9 Jawahar Lal, owner of the truck and PW-6 Om Prakash, has to be read as a whole and its cumulative effect is to be considered by the Court as evidence. After having gone through the testimonies of these witnesses, we find credibility in their statements and more than that we can infer the guilt of the appellants.

40. We may also mention here that both the appellants had taken the plea of alibi and in support of their defence, four witnesses, i.e., DW-1 to DW-4 were examined by them. DW-1 Veer Pal and DW-2 Kailash Chand were examined by accused Narender @ Pappu. In their testimonies, they deposed that accused Narender was attending the Naamkaran ceremony of a distant relative's son and they proved the invitation card, Ex. DW-1/A. Similarly, DW-3 Kishan Chand and DW-4 Basanta were examined by accused Vijay Kumar.

41. The testimonies of all the four witnesses were rejected on the ground that the said testimonies did not inspire confidence. We concur with the said findings of the trial court as it appears to us, it was done by them in order to hide an offence committed by them. The said plea otherwise does not hold any valid explanation given by the DW-1 to DW-4.

42. Therefore, we concur with the view taken by the learned trial judge that Kanhaiya is the last seen witness of the truck driver Prem Chand and helper Sanjay who had seen them alive in the company of accused Vijay Kumar and Narender @ Pappu.

43. It is a well established legal principle that in a case based on circumstantial evidence where an accused offers a false explanation in his statement under Section 313 Cr.P.C. in respect of an established fact, the said false denial could supply a missing link in the chain of circumstances appearing against him.

44. The following incriminating circumstances appear against accused Vijay Kumar and Narender @ Pappu :

(i) Both accused were seen boarding the truck on 13.02.2002 by the last seen witness PW-26 Kanhaiya.

(ii) That both accused misled the investigating agency by taking the plea of alibi.

(iii) PW-10 Kailash Chand has specifically deposed that both accused Vijay and Pappu were present near the truck on 14.02.2002 when they came to him to sell the stolen property and there was no suggestion in cross-examination on their behalf that they were not available on that date.

45. The well known rules governing circumstantial evidence are that :- (a) the circumstances from which the inference of guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances; (b) the circumstances should be of a determinative tendency unerringly pointing towards the guilt of the accused; and (c) the circumstances, taken collectively, are incapable of leading to any conclusion, on a reasonable hypothesis, other than that of the guilt of the accused.

46. No doubt, the courts have also added two riders to the aforesaid principle namely, (i) there should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links can only be inferred from the proved facts and (ii) it cannot be said that the prosecution must meet each and every hypothesis put forward by the accused however far- fetched and fanciful it may be.

47. From the foregoing discussion, it is clear that the prosecution has been able to establish on record beyond reasonable doubt that the appellants have committed

the offences they were charged with.

48. Under these circumstances, we do not find any reason to interfere with the impugned judgment of conviction dated 27.03.2010 and order of sentence dated 30.03.2010. Both appeals are hereby dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com