

**Rohit Dhingra and anr Vs. State**

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**Court :** Delhi

**Decided On :** Feb-03-2012

**Appellant :** Rohit Dhingra and anr

**Respondent :** State

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on : 16.11.2011  
Decided on : 03.02.2012 + CRL.A. 926/2011 and Crl. M. (Bail) 1302/2011 ROHIT  
DHINGRA and ANR ..... Appellants Through : Sh. Pradeep Chowdhary, Advocate.  
versus STATE ..... Respondent Through : Sh. M.N. Dudeja, APP. CORAM:  
HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MS. JUSTICE  
PRATIBHA RANI MR. JUSTICE S. RAVINDRA BHAT %.

1. The appellants impugn a judgment dated 1.06.2011 and order dated 3.06.2011 of the Additional Sessions Judge, in S.C. No. 32/2008. They were convicted of the offence punishable under Section 302/34 and are sentenced to life imprisonment and fine of ` 5,000. In default of payment of fine, the convict would have to further undergo imprisonment for 6 months..

2. The prosecution alleged that on the night intervening 10th and 11th January, 2008, Rohit Dhingra and Ashish@ Ashu (hereafter "Appellants") committed the murder of Mahesh Nagar (hereafter "the deceased") by clobbering his head with a stone; one Amit too was a conspirator. The crime is said to have been committed at 2nd Pushta near Dharma Kanta Pushta, Sonia Vihar, Delhi where the body of

the Crl.A.926/2011 Page 1 deceased was found on the morning of 11th January, 2008. The prosecution had based its case against the Appellants principally on the "last seen" circumstance, to allege that they were perpetrators of the crime. On the basis of recoveries made, and statements recorded during the investigation, the Appellants were charged for committing the murder of Mahesh Nagar. They pleaded not guilty, and claimed trial. The prosecution relied on the evidence of 22 witnesses; principally, the testimonies of PW-3 and PW-5. After considering all these, as well as the submissions of the parties, the Trial Court convicted the Appellants, and sentenced them to prison terms, in the manner described above..

3. The Appellant's counsel argued that the impugned judgment of conviction is unsustainable, because it is based on shaky and tenuous evidence. Emphasizing this aspect, it was argued that PW-3 and PW-5, the witnesses to the circumstance of the accused being "last seen" in the company of the deceased, contradicted each other. Counsel said that whereas PW-3 said that he saw Rohit at 8:30 in the evening, (a fact admitted to in cross examination), PW-5 deposed to having seen the deceased Mahesh at 8 PM 10-1-2008. There was thus, no positive evidence that the Appellants Rohit and Ashish were seen together with Mahesh Nagar, when he was last seen alive. It was urged that the entire "last seen" theory was built around the alleged confessional statement said to have been recorded in the police station by the accused, said to have been witnessed by PW-5. This statement was hit by Section 25 of the Evidence Act, and no part of it could be admissible, even on an application of Section.

27. 4. It was next submitted that the impugned judgment is unsustainable because far too much importance has been given to the mobile call details produced in Court. It was submitted that the ownership of the mobile, allegedly seized from Crl.A.926/2011 Page 2 Rohit Dhingra could not be established. Further, the calls said to be connected with the other two accused, between the period 08.00 PM to 10.00 PM did not establish anything. The Trial Court heavily surmised - without any factual basis- that all the accused were in the vicinity of Sonia Vihar where the body was subsequently found. Apart from the fact that the mobile call details could only establish that conversation had taken place, the presence or otherwise of those possessing the mobile phones, could never be fixed with accuracy as was

done by the Trial Court. The finding of the Court in this regard was, therefore, entirely conjectural..

5. Learned counsel next submitted that the other public witnesses relied upon by the prosecution, i.e. PWs-6 and 7 completely resiled during their depositions before the Trial Court. While PW-6 claims to have seen the deceased with the accused, he completely turned hostile and denied having recorded his statement during the investigation. Similarly, PW-7, the paan Shop owner, who the police alleged, had seen the accused with the deceased after 10.00 PM disclaimed any such knowledge or fact. Despite permission being given to the prosecution to cross-examine and put leading questions to him, nothing could be gained. Therefore, the testimony of these two witnesses who turned hostile and held on to their view despite the prosecution's cross-examination and the shaky "last seen" evidence given by PW-3, who stated that Rohit Dhingra had gone to the shop/McDonald outlet at 08.30 PM alone, there was no question of any witness actually having testified to the "last seen" circumstance. Learned counsel emphasized that apart from this serious infirmity, the Post Mortem Report in this case also threw serious doubt on the appellants' involvement. The Post-mortem was started at 11.00 AM on 12.01.2008. The report, Ex. PW-13/A stated that the time since death was about 1 days prior to the commencement of the Crl.A.926/2011 Page 3 postmortem. If that were the correct position, the death would have occurred around 11.00 PM, which completely contradicted the testimony of the witnesses and even the prosecution case..

6. It was argued that the recovery of the beer bottles and the Kurkure wrapper, which greatly impressed the Trial Court, in recording conviction, is suspect. Here, counsel submitted that PW-8 and PW-22 were the first to visit the spot, after the body was discovered on 11.01.2008. They were silent in their deposition about these articles. On the other hand, the witness, PW-21 allegedly claims to have recovered the articles from the site. Counsel relied on the two crime scene reports, PW-18/A and PW-21/A which mentioned that the police had visited the scene of occurrence on 11.01.2008 and later on 13.01.2008. The so-called incriminating articles were, however, seized on 13.01.2008. Here, learned counsel argued that the recovery of these incriminating articles from an open area, two days after the

body was found, was improbable and highly suspicious. In view of these facts, emphasized learned counsel, the finger print, report, Ex. 17/A is of no consequence since the lifting of the alleged finger prints was highly suspect. It was urged that under these circumstances, the report claims that the palm prints of the accused matched with what was found on the beer bottles, yet the prosecution did not establish when and who precisely took the specimen prints for matching purposes. In the absence of such evidence, the Trial Court could not have concluded the appellant's finger or palm prints found on the beer bottle, which was an incriminating circumstance..

7. Learned counsel argued that in every circumstantial evidence-based prosecution, the burden of proving all facts is heavy. The prosecution has to prove all circumstances conclusively and that each link in the entire chain of Crl.A.926/2011 Page 4 circumstances is beyond reasonable doubt. Furthermore, the prosecution is under an onus to prove that the accused alone and no one else was the offender and that every hypothesis of his innocence is ruled-out. It is submitted that the discrepancy in the time highlighted by the Post-mortem Report - which showed the time of death to be 11.00 PM on 10.01.2008, was at variance with the ocular evidence whereby the witnesses gave conflicting versions and also as to whether Rohit and other accused were seen by them. Furthermore, there was no consistency about the accused having been in fact last seen with the accused. On the basis of these shaky and tenuous testimonies, the appellant's guilt could not have been concluded as was done by the Trial Court in the impugned judgment..

8. Sh. M.N. Dudeja, learned APP argued that the impugned judgment is based on sound reasoning and does not call for interference. He submitted that the testimony of PW-3 is sufficient to prove "last seen circumstances". It is submitted that what is important is the quality and not the quantity of the evidence; despite PWs-6 and 7 having turned hostile, if the Court believed the testimony of the other witnesses regarding the last seen evidence, that would be incriminating as in this case. It is submitted that the Viscera Report dated 06.07.2008 in this case was received much later; that in fact proved the confession of Rohit which was recorded on 12.01.2008 after his arrest. In the said statement, Rohit, the appellant

confessed to the police that Mahesh, the deceased had been given beer. The Viscera Report confirmed the presence of ethyl alcohol. This was a very strong circumstantial piece of evidence and a "fact discovered" within the meaning of the term under Section 27 of the Evidence Act. It clearly linked the knowledge of consumption of ethyl alcohol by the deceased, which is before his death, for which Rohit had no explanation. Crl.A.926/2011 Page 5.

9. Learned counsel submitted that the appellants cannot take advantage of the minor discrepancies. It is submitted that soon after the body was discovered at 08.00 AM on 11.01.2008, the Crime Team had searched the place at 10.30 AM. The report, Ex. PW-21/A mentions about this and about the beer bottles and the Kurkure wrapper. That these articles were seized later, i.e. on 13.01.2008 could not be fatal to the prosecution. Furthermore, these articles were not found in an isolated place and there was a direct link with the crime. The finger and palm prints of Rohit and Ashish were found - subsequently confirmed in the report of the finger print expert, PW-17, in the document, Ex. PW-17/A..

10. Learned APP refuted the appellant's submission with regard to the discrepancies in the time of death. Here it was submitted that the postmortem was conducted almost two days after the incident. The time of death was approximately 1 days prior to the time postmortem proceedings started. This time of death could not be an invariable one and there was an element of flexibility, having regard to its being conducted more than 24 hours after the crime. In these circumstances, whether death occurred before 11.00 PM on 12.01.2008 or even later was not of much importance..

11. As is evident from the above discussion, the prosecution had alleged that the Appellants Rohit, Amit and Ashish were responsible for the murder of Mahesh Nagar. It was alleged - in the charge sheet, that the motive for the crime was increased proximity between Rohit's girlfriend, and Mahesh; it was Rohit who had introduced the two. The prosecution had alleged that Rohit left the MacDonald's outlet in Connaught Place (Regal) at about 8:30 or so, with the deceased and two other accused, took him to the scene of crime, and killed him with a stone. The Crl.A.926/2011 Page 6 Trial Court acquitted Amit, holding that there was

insufficient evidence to link him to the crime..

12. PW3 deposed in his examination in chief that he had met Mahesh, Rohit and another person outside the McDonalds. He mentioned having left the Macdonald's outlet after finishing his shift, being joined by Rohit, Ashish, and first having seen Mahesh. However he deposed in his cross examination that he only met Rohit outside the office at 8:30 PM. He also deposed that PW-5 was his manager. The witness was declared hostile, and cross examined on account of variation between what he had allegedly stated during investigation, and what he deposed in court. Now, PW-5's testimony is that he joined duties at 7 PM, and that after a while the deceased Mahesh had gone to the outlet, and wished to keep his bag, since he wanted to go to a party. He could not remember what time Mahesh went there. He did not see Mahesh with Rohit; much later, around 12:30 AM (of 11-01-2008) Rohit went to the outlet, and ordered some food. A careful reading of these two witnesses' testimony would reveal that while PW-3 mentioned having seen Rohit and Mahesh together, and even gone together with them for some time (after finishing his shift) he does not mention he first went in there. PW-5 was also in the outlet, from 07:00 PM; yet he does not mention that Rohit went there any time before 12:30 AM. He also does not mention that Mahesh went with Rohit, and PW-3. PW-3 also mentioned that both Rohit and Mahesh were friends, and used to work together. The evidence also discloses that the police apparently suspected many people, including PW-2 who was made to sit in the police station, the entire day on 12-01-2008. If PW-5 had seen Mahesh after 7 PM alone, and later, Rohit alone, again at 12:30 after midnight, he cannot be a witness to the "last seen" theory. PW-3 was cross-examined by the prosecution with permission of Court. He did not support the prosecution about the version recorded by him regarding CrI.A.926/2011 Page 7 having seen the other two co-accused, together with the deceased and the appellant..

13. As far as the recovery of the four beer cans and the finger prints found on them are concerned, though the finger print expert's report appears to be clinching, a detailed analysis would reveal that PW-8 and PW-22, who were the first policemen to reach the spot, on the morning of 11-01-2008, did not mention about such articles, seized later. The prosecution case is that they were seized

two days later, on 13-01-2008. Now, two crime scene reports were prepared on 13-01-2008; Ex. PW-18/A and Ex. PW-21/A - both mention the beer bottles and the wrapper. One of these reports states that the scene was investigated on 11-01-2008 itself, when these articles were observed. Yet, they were not seized, and the evidence of the prosecution witnesses is that they were left at the scene, in the open. This completely renders the prosecution version improbable, both as to seizure, as well as the finger prints on the bottles. Besides, the appellants' argument about credibility of the fingerprint expert's report, has substance because none of the prosecution witness deposed about when and how, the specimen finger prints and palm prints were secured from the accused. Therefore, it would be unsafe to rely on Ex. PW-17/A, the finger print expert's report..

14. The trial court relied upon, among other materials, the disclosure statement by the present appellant Rohit Dhingra which was produced as Ex. PW5/E and on that basis, in the judgment (at para 24 (k)) held that the mobile phone bearing no. 9210000966 had been recovered and that its call details - produced as Ex. PW-16/C and PW-16/D revealed that the instrument was used somewhere in Sonia Vihar II. The court also reasoned that the calls were placed from that number to another mobile phone no 9211168796 recovered from Ashu @ Ashish who was Crl.A.926/2011 Page 8 also in the vicinity. The prosecution was unable to establish or connect the mobile phones with the accused; consequently the court took upon itself the task of summoning two individuals i.e. Harish Kumar and Ajay Abraham who were examined as CW-1 and CW-2. Harish Kumar stated that he had handed over the mobile phone 9211168796 to accused Ashish whereas Ajay Abraham deposed that he had never purchased the phone No. 9210000966; but he admitted that it was obtained on the basis of a photocopy of his driving license and that the application contained his photograph. The Trial Court reasoned on the basis of this material and the other documents i.e. Ex. PW16/C and Ex.PW-16/D - the call details-, that the prosecution had proved that Ashu @ Ashish and Rohit Dhingra were in the vicinity where the murder took place and had telephonically conversed with each other between 8.30 and 10.00 PM on that day of the incident. The court further stated that the failure to question the witnesses on this or lead any independent evidence was a circumstance to be considered against the accused..

15. As noticed earlier the prosecution had relied upon the testimonies of PW-3, PW-5, PW-6 and PW-7 to say that the deceased was seen last with the appellants. PW-6 and PW-7 turned hostile entirely and did not support the prosecution version. PW-5 the Manager of McDonald outlet deposed that the deceased Mahesh Nagar visited the outlet sometime after 7.00 PM. He did not mention having seen any of the accused. He went on to say that Rohit Dhingra came to the outlet between 12.00 AM and 1.00 AM on the intervening night of the question and ordered some food. PW-3, the prime witness for the prosecution deposed in his examination-in-chief having gone out with Mahesh Nagar around 8/8.30 PM on 10.01.2008 and that Rohit Dhingra had met them. He also specifically stated that one other individual was with Rohit Dhingra and that he saw him for the first time. According to him all the four went to Shivaji Stadium; at A Block, the CrI.A.926/2011 Page 9 witness turned towards Metro Station and went home. In cross-examination PW-3 specifically denied having told the police that he had met Rohit Dhingra, Mahesh Nagar and two others namely Ashish and Amit outside the store; he was consistent on this aspect. Clearly therefore this witness did not support the prosecution regarding the involvement of Ashish and Amit. Likewise, in the case of PW-5 only evidence of his having seen Rohit Dhingra and Ashish was later at around 12.00 midnight on 11.01.2008; they were not with the deceased. The time of death according to the post mortem report, works out to be roughly 11.00 PM on 10.01.2008..

16. Several judgments of the Supreme Court (Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh, AIR 1952 SC 343; Sharad Birdhichand Sarda v. State of Maharashtra, (1984)4 SCC116; and Ashish Batham v. State of Madhya Pradesh, 2002 (7) SCC 317) have held that the standard of evidence required in a case which is solely based on circumstantial evidence. The law is well settled that the circumstances from which the inference of guilt is to be drawn should be fully established; the circumstances should be of conclusive nature; the facts established should be consistent only with the hypothesis of the guilt of the accused; the circumstances established should be incompatible with the innocence of the accused and the chain of evidence should be complete so as to show that in all probability the act must have been done by the accused. Cases where the prosecution relies on evidence of the deceased having been last seen

in the company of the accused, too, are a species of circumstantial evidence cases. In such prosecution, the court has to additionally be aware that apart from proof of all the circumstances, and the equally rigorous rule for proof of link of the chain of circumstances, the last seen theory comes into play only when the time gap between the Appellant and the deceased being last seen together alive and the time of death is so small that the possibility of anyone else being the author of the crime is impossible. Reliance is placed on State of U.P. v. Satish, AIR 2005 SC 1000; Malleshappa v. State of Karnataka, AIR 2008 SC.

69. 17. In this case the solitary circumstance which the prosecution could be said to have established is that Rohit Dhingra was seen by PW-3, along with Mahesh Nagar around 8/8.30 PM when the two went out. Interestingly PW-3 did not identify the other two accused; he did not support his previous statement on this aspect. The other witness PW-5 mentions about a later event when Rohit Dhingra and Ashish went to the outlet around 12 - 12.30 AM on 11.01.2008. At the highest the prosecution can be said to have shown that Rohit Dhingra and Mahesh Nagar left the outlet with PW-3 around 8/8.30 PM on 10.01.2008. It is however, not as if the prosecution relied only on this solitary circumstance. It had also relied on the recoveries such as the beer cans containing the finger prints of the accused. This court has previously discussed that this evidence is untrustworthy, as the beer cans were recovered from an open area two days after they were noticed and seen by the crime team itself. There is a strong possibility of their introduction into the investigation since concededly both the crime reports were prepared on the same day i.e. 31.01.2008. There is also a material discrepancy between this circumstance and the testimony of PW-8 and PW-22 who never mentioned having seen these articles..

18. This court had noticed that the law relating to "last seen theory" must also stand the test of credibility in the same manner as the other circumstantial evidence based cases. When the entire prosecution story hinged on the testimonies of witnesses, some of whom turned hostile (such as PW-6 and PW-7) and one of whom, i.e. PW-5, could not even mention having seen the accused last with the deceased, it would be unsafe to convict the

accused, on the evidence of PW-3. That witness is no doubt consistent as regards his account of having seen Rohit Dhingra. At the same time the Court has to be mindful of the circumstance that he did not support the prosecution in regard to having seen the other two accused i.e. Ashish and Amit. He did not identify them or so stated to the police in the statement under Section 161 Cr.P.C. While consistency is one indicator to the credibility of a witness, the Court at the same time has to be mindful of the over all probability of the prosecution case and the truthfulness of the witness..

19. This Court is of the opinion that the reliance placed upon the mobile call details produced as Ex. PW-16/C and Ex. PW-16/D, an incriminating circumstance as against Rohit Dhingra and Ashish was not appropriate. The recovery of mobile phone from Rohit Dhingra was not witnessed by any member of the public. Furthermore CW-2 the ostensible owner did not deny that his driving licence and photograph was fixed on the application form, with the service provider. It is also important to notice that said witness was a court witness summoned at the behest of the court. The further inference drawn by the trial court was that neither of the accused could disprove their presence. It was therefore, deduced that the prosecution had proved the possibility of their being near the crime scene between 8.30 and 10.00 PM on the night of the incident i.e. 10.01.2008. The inference drawn on the basis of mobile tower details in the documents (Ex. PW16/C and Ex. PW-16/D) could not have been held against them. That someone could have been present in the vicinity of scene of crime is a matter of probability. However, for the Court to conclude that he was actually present, the prosecution had to establish - by application of the only relevant rule of evidence in this case i.e. that only the CrI.A.926/2011 Page 12 accused and none else was present at the scene of crime. In other words, in the absence of positive material proving beyond reasonable doubt that the accused was at the scene of occurrence, the Trial Court could not have concluded that the appellants were so present in this case and then shifted the burden (not merely the onus) of proving that they were not at that place at the time when offence was committed..

20. For the above reasons, we are of the opinion that the appeal is entitled to succeed; the impugned judgment and order is accordingly set aside. The

appellants are directed to be released forthwith. The Crl.A.No.926/2011 is accordingly allowed. All pending applications also stand disposed of. (S.RAVINDRA BHAT) JUDGE 3rd February, 2012 (PRATIBHA RANI) JUDGE Crl.A.926/2011 Page 13

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