

RazuddIn @ Raju and Another Vs. State of the Nct of Delhi

RazuddIn @ Raju and Another Vs. State of the Nct of Delhi

SooperKanoon Citation : sooperkanoon.com/948566

Court : Delhi

Decided On : Apr-12-2012

Judge : S. Ravindra Bhat & S.P. Garg

Appeal No. : CRL.A. 102 & 345 OF 2011, Crl. M. (Bail) 592 OF 2012

Appellant : RazuddIn @ Raju and Another

Respondent : State of the Nct of Delhi

Judgement :

S.RAVINDRA BHAT (OPEN COURT)

1. The present judgment will dispose of two appeals, preferred against a judgment and order of the learned Additional Sessions Judge, dated 2-11-2010, in SC No. 68/2008. The appellants are aggrieved by the said judgment, which recorded their conviction for the offence punishable under Sections 302/34 IPC and sentenced them to undergo imprisonment for life.

2. The brief facts of the case are that the prosecution alleges that on 29-12- 2007, at about 11.25 AM, PS Bhati Mines, within the jurisdiction of Police Station Mehrauli, thus Police was informed about a dead body lying near Jheel Khurd Mandir, Deara Gaon. PW-15 and PW-21, two policemen, went to see the place; the IO, PW-22 also reached the spot. The body had a ligature mark on the neck; however, the identity of the deceased could not be established. The IO seized two slips, which were exhibited during the trial. One of those slips had two telephone

numbers, one of Ashwini and other of Mukesh Shah Pura. The second slip was a receipt for purchase of diesel from Shanthi Service Station, Mathura Road, Madan Pur Khader, dated 27-12-2007. Formal intimation about these was furnished to the police station by Ex. PW-22/A; this was the basis for the registration of F I R, Ex-19/A. The prosecution alleges that the leads obtained through the slips recovered from the spot were pursued as a result of which the IO met PW-04 and PW-05; they identified the dead body as that of Manbir (hereafter "the deceased") who used to work as a driver on a Dumper bearing No. HR-38N 1654 owned by Rana Pratap, who used to supply building materials. PW-5 Rana Pratap, the owner of the Dumper said that he had received a call on 27-12-2007 through his Munshi (clerk) from one Gafura (also arrayed as a co-accused, but sent up for trial before the Juvenile Justice Board, due to his age) who worked as a helper to the deceased, that Manbir the deceased had left the truck with ` 15,000/- which was with him and that the deceased had not returned for 03-04 hours. The IO made inquiries from Gafura, who made a disclosure statement, in which he implicated the present appellants as his co-conspirators. They had together hatched a plan- after PW-4 had given the deceased ` 15,000/-, to rob the deceased, and kill him. The appellants boarded the vehicle, along with the deceased and Gafura; when they reached the shop of Farooq Mula, they decided the details to go ahead with their plan. It was alleged that after the deceased had driven the vehicle for a while, the appellants, who were sitting at the back of the truck, put a muffler around his neck and strangled him. It is further alleged that the deceased was robbed; the vehicle was turned around and both the appellants brought down the body of the deceased and threw it in the forest. They all started again towards Palli Chowk; on the way the gamcha or the muffler used as the murder weapon was concealed by Allay; they split the loot amongst themselves, and again went back to Chhabra Hotel from where Allay and Razauddin went towards Delhi, and he (Gafura) called up PW-5.

3. The prosecution alleged that pursuant to the disclosure statement made by the juvenile accused, the appellants were arrested. The disclosure statement of Allay led to the recovery of ` 5,300/- from his possession in a steel box wrapped in a handkerchief which was his share of the loot. It is also alleged that the muffler was recovered at the instance of the same accused on 02-01-2008. After completion of

investigation, a chargesheet was filed against the present appellants charging them for having committed offences under Sections 302/397/412/34 IPC. The accused pleaded not guilty and claimed trial. During the course of proceedings before the Trial Court, the prosecution relied on the testimony of 22 witnesses besides other materials such as exhibits, forensic reports and medical reports. Upon an overall consideration of all the circumstances and materials, the Trial Court found that the prosecution had proved the allegations against the accused beyond reasonable doubt. It, accordingly, through the impugned judgment and order, held them guilty as charged and sentenced them in the manner described above.

4. It is urged on behalf of the appellants that the Trial Court fell into grave error in concluding that the appellants were guilty as charged. Counsel emphasized that the entire prosecution case against them hinged on the "last seen" circumstance or theory alleged against them. In this regard, the Counsel pointed out that the two material witnesses who were stated to have proved the circumstance, were PW- 4 and PW- 5. Learned Counsel stressed that the former witness never categorically or clearly stated that the deceased was seen last in the company of the present appellants. All that the testimony of PW- 04 summed up was a mere surmise that the present appellants stood near the deceased when he had occasion to observe the latter (i.e. the deceased). In the absence of a clear cut testimony that the deceased was in fact engaging in conversation or had any connection with the two appellants in this case, the Trial Court could not have assumed that they were all together and that no other individual could have been behind the crime.

5. It was next contended that the testimony of PW- 5 is only to the extent that his clerk (munshi) had received a telephone call from the juvenile accused Gafura, alleging that the deceased had gone missing with ` 15,000/-. The clerk Akhilesh was not examined to corroborate this aspect, nor was any effort made by the investigating agency to corroborate this aspect by placing the call details in that regard. It was argued that the suspicion of this witness was sought to be built upon by the prosecution because he deposed that the Allay, used to work earlier for him and he also claimed to have seen the second appellant Rajuddin sometime. There was in fact no basis for these assertions.

6. It was submitted that apart from these serious infirmities, the findings of the Trial Court were also untenable because the materials on record pointed to an unexplained and inordinate time gap between the time when the deceased was seen last allegedly with the appellants and the time of his death. Here it was emphasized that arguendo even if it were assumed that PW-4 had seen the deceased with the appellants on 27-12-2007, that was around 8-9 PM. The deceased's body was discovered on 29-12-2007; the post-mortem report mentioned that the time of death was around three days before the commencement of the post-mortem proceedings. The post-mortem proceedings, according to the report Ex. PW- 16/A started at 12:30 PM. Thus the probable time of death was 12:30 PM on 28-12- 2007. Elaborating on this argument, it was submitted that the "last seen" theory comes into play only when the time gap between the deceased's presence along with the accused and the time of death is a narrow one. If the time gap is large, the prosecution is under a greater duty to establish that the circumstances were such that the deceased must have been only with the accused and that there was no possibility of his being in the company of anyone else. Such a burden, it was urged, was not discharged in this case.

7. The learned APP submitted that the appellants have not made out a case for interference with the Trial Court's judgment; there are no substantial or compelling reasons for the Court to exercise its discretion and upset the well reasoned findings of the Trial Court. It was urged that before the arrest of Gafura, the police had no clue about the probable offenders. The slips found on the dead body, led the police to PW-4 and PW-5. From the latter, it was found that Gafura had contacted his clerk. Therefore, first Gafura was arrested; he led the police to the other accused. The disclosure statement of Allay led to the recovery of the gamcha, which was hidden in the forest, and of which only he and the other accused had peculiar knowledge. The police could not have known about it. Therefore, the recovery of that article, as well as the sum of ` 5,300/- clearly implicated the accused. The accused had no explanation on this score.

8. It was next submitted that a conjoint reading of the testimonies of PW-4 and PW-5 clearly revealed that the latter, who owned the Dumper, knew the two appellants; one of them even worked with him earlier. It was neither unnatural nor

improbable therefore, for PW-4 to have noticed them, and to be in a position to identify them in the Court, since he had regular dealings with PW-5. It was also argued that PW-4 was an independent witness, who had no axe to grind against the appellants, and therefore was unlikely to falsely implicate them. His testimony about noticing the deceased in the company of the appellants, therefore, could not be lightly discarded.

9. The learned APP argued that too much emphasis on the time factor cannot be given, having regard to the facts of the case. It was submitted that a well known phenomenon in medical jurisprudence is that the probable time given in a post mortem report is broadly indicative, and it tends to veer towards greater inaccuracy, with passage of time. Therefore, even if the post mortem report, in this case mentioned that the time of death was 12:30 PM, if a margin of around 8-10 hours were given, since the procedure was conducted about 3 days after the death, the time gap between the last seen circumstance and the probable time of death would narrow down considerably.

10. It is apparent from the above discussion that the prosecution case mainly hinges on the "last seen" circumstance alleged against the present appellants. Interestingly PW- 4 says this:

“On 27-12-07, I alongwith driver namely Manvir and helper Gafura, were coming from NOIDA and going towards Pali, Haryana to purchase the building material. The above said dumper was having some mechanic problem and not working properly and the same was parked at shop of mechanic Mulla Mistri at Badar Pur border. Mulla Mistri told us that the fault is minor like a short-circuit of the wire in the dumper. When I was present at the shop of Mulla Mistri, both accused namely Allay and Rajuddin were standing there. Witness correctly identified both the accused persons present in the Court today.

After giving instructions to Manvir and Gafura to bring the building material, I left the shop of Mulla Mistri and after crossing the road I stood on the footpath opposite side of the shop of Mulla Mistri. After 05-07 minutes, I saw that my driver Manvir and helper Gafura and both the accused present in the Court today, boarded the said dumper and left the shop of Mulla Mistri....”

In the cross-examination, this witness stated that when he reached the shop of Mulla Mistri, it was about 04:30 PM and at that time some vehicles were parked for repairs. According to the testimony of PW- 5, his clerk received a telephone call from Gafura, around 09:00 P.M. on 27-12-2007. These, in the opinion of the Court are important circumstances, because they push back the time when the deceased was allegedly seen last with the Appellants to around 4:30 PM on 27-12- 2007. If that is the correct position-as the testimony of the witnesses seems to suggest - the time between the "last seen" circumstance and the probable time of death lengthens to about 20 hours. This injects a great deal of uncertainty into the case because the authorities are clear that this theory can be used to convict an accused if the time gap between the time of last seen and the time of death is so small as to rule out the complicity of anyone other than the accused. This was explained in the following manner, in *Ramreddy Rajesh Khanna Reddy v. State of A.P.* [2006 (10) SCC 172]:

“27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the Courts should look for some corroboration”

(Ref, further, to *Jaswant Gir v. State of Punjab* 2005 (12) SCC 438; *State of UP v Satish* 2005 (3) SCC 114 and *Bodhraj v. State of JandK* (2002(8) SCC 45). While this Court can certainly give some leeway about the accuracy of the post-mortem report about the probable time of death, having regard to the fact that the procedure itself was conducted three days after the death, the spectrum of inaccuracy, if one were to use that expression cannot exceed 4 to 5 hours. This would in turn mean that the time of death probably was around 09:00 A.M. or so on 28-12-2007. That still leaves the time gap between that hour and the time when the accused and the deceased were last seen together, around 16 hours or so. Having regard to the settled principles governing the "last seen" circumstance, the time gap as well as the time (4:30 PM, being the last seen time) is too slender a thread for a Court to conclusively find that the accused and none else could have been the perpetrators of the crime since no other individual had the opportunity or

access to the deceased, to commit the offence.

11. There are, besides the above glaring factor-which casts grave doubt about the acceptability of the "last seen" circumstance-other inconsistencies and irreconcilable aspects in the prosecution case which bear close scrutiny. For instance the omission to examine PW- 5's clerk or munshi, Akhilesh, is not explained by the prosecution. If in fact he had heard Gafura make a call to the witness, nothing prevented the prosecution from producing him during the trial and also corroborating that fact with call details which could have been got or obtained from the concerned service provider. This failure too goes to the root of the prosecution story and undermines its credibility. Another curious aspect is that indeed if Gafura had in fact telephoned PW-5's clerk as was alleged by the prosecution, there is no indication that he made an attempt to flee. On the contrary, the testimony of PW- 05 reveals that this accused was arrested on 31-12-2007. The materials on record suggest that the said accused was with his employer right through. The employer made no effort to find the whereabouts of the deceased, who had according to the accounts then available, run away with a considerable amount of cash. Logically the needle of suspicion would have pointed to the juvenile accused Gafura; however PW- 5 does not appear to have taken any steps to inform the police either about the stolen money or complained against the missing driver. Another important aspect which ought to have alerted the Trial Court in this case was the fact that no money was recovered from Gafura; the sum of ` 5300/- was recovered allegedly from Allay and the sum of ` 9000/- was recovered from Rajuddin. If in fact the crime had been committed in the manner described by the accused, some share of the booty would have fallen to Gafura. However his disclosure did not lead to recovery of any amount.

12. It is settled law that recovery of commonplace articles - a gamcha undoubtedly being one, in the absence of any distinctive feature - is an inherently weak piece of evidence, and cannot by itself be considered sufficiently incriminating to support conviction of an accused.

13. This Court notes that the "last seen" circumstance is but a species of circumstantial evidence based cases, which requires a Court to satisfy itself about

various elements, primarily that all circumstances must be conclusively proved; that the link between each circumstance should also be proved in a like manner; that the proof so adduced must rule out the possibility of the accused's innocence, and also establish that he and none else was the author of the crime. This was emphasized in the following decision of the Supreme Court, in State of U.P. Vs. Ashok Kumar Srivastava (AIR 1992 SC 840):

"This Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negated on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise."

14. On a careful and overall scrutiny of the materials on record, we are convinced that the Trial Court acted more on the hunches and suspicions of the prosecution, which could not muster materials to prove the role of the accused/Appellants beyond reasonable doubt. Furthermore, all the links in the chain which had to, of necessity, be proved, were not established in the manner required by law. The findings of the Trial Court therefore, are unsustainable. The impugned judgment and order of sentence are accordingly set aside. The appellants are directed to be released forthwith, unless required in any other case. The Jail Superintendent shall take necessary steps in this regard. The appeals, CrI. A. 102/2011, and Cr. A. No. 345/2011 are allowed.