

Ravi Kumar @ Sonu and ors. Vs. State

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Court : Delhi

Decided On : May-15-2013

Judge : Reva Khetrapal

Appellant : Ravi Kumar @ Sonu and ors.

Respondent : State

Advocate for Pet/Ap. : Mr. Vivek Sood, Ms. Ritu Gauba

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + (1) CRL.A. 444/2010 RAVI KUMAR @ SONU AND ORS. Appellants Through: Mr. Vivek Sood, Advocate. versus STATE Through: + (2) Respondent Ms. Ritu Gauba, APP. CRL.A 595/2010 ASHWANI DUBEY & CHHANWA Appellant Through: Mr. Vivek Sood, Advocate. versus STATE Through: % Respondent Ms. Ritu Gauba, APP. Date of Decision : May 15, 2013 CORAM: HON'BLE MS. JUSTICE REVA KHETRAPAL HON'BLE MS. JUSTICE SUNITA GUPTA JUDGMENT : REVA KHETRAPAL, J.

1. Challenge in the aforesaid appeals is to the judgment of the learned Additional Sessions Judge dated 24th February, 2010 convicting Appellants Ashwani Dubey @ Chhanwa and Ravi Kumar @ Sonu for the offences punishable under Sections 302/201/34 IPC.

2. Shorn of unnecessary details, the prosecution case is that on 28.1.2004 at around 7.30 p.m. at Jharoda Road near Sangam Vihar, Delhi, both the accused committed robbery by taking the TSR of Sarvesh Kumar and in the commission of the robbery committed murder of Sarvesh Kumar, a TSR driver (hereinafter referred to as the deceased).

3. Initially, a rukka was lodged on the statement of PW11, Constable Sunil Kumar, who deposed that on 29.1.2004, he was posted at Police Post Jharoda, PS Timarpur and was on patrolling duty along with PW17, SI Mahavir Singh when at about 10.15 a.m. they observed one dead body lying in the bushes near the side of the road soaked with blood. The head was towards South and the legs were towards East. The body was having one extra thumb in each of the hand and they observed sharp edged injury on the neck and fingers. Crime Team was called. PW23, Inspector Bir Singh, PW15, ASI Ramesh Kumar and other staff also reached at the spot. The body was searched and from the pocket of the deceased a laminated driving license was recovered along with some visiting cards. The Investigating Officer prepared the rukka, which was sent through PW11 Constable Sunil Kumar for registration of the case. After registration of the case, he came back at the spot where the driving license and visiting cards were seized by the Investigating Officer with other articles. The dead body was shifted to the Subzi Mandi mortuary. On 30.01.2004, the legal heirs of the deceased came in the mortuary along with the IO to identify the dead body and postmortem was conducted.

4. The Investigating Officer, Inspector Bir Singh was examined as PW23, who corroborated the aforesaid version of PW11 Constable Sunil Kumar. He further testified that the dead body was shifted to the mortuary through PW11, Constable Sunil Kumar at about 4.30 p.m. PW15, ASI Ramesh Kumar along with PW14, Constable Kapil was sent at about 11.30 a.m. with photocopies of the driving license to the house of the deceased on the address mentioned in the driving license as B-1, Kartar Nagar and was also instructed to go to the Hotel Mayur and the taxi and TSR stand. At about 5.30 p.m., ASI Ramesh and Constable Kapil came alongwith Mala, wife of the deceased (PW6).

5. Rajinder (PW5) and his wife Usha (PW7) along with one person, namely, Azad (PW9) went to the mortuary, who identified the dead body of Sarvesh Kumar, the deceased. Azad (PW9) was the driver of the TSR in which they had come. The case property was deposited in the malkhana after he had recorded the statements of the aforesaid persons. On the following day, i.e., on 30.1.2004, the duty officer handed over to him copy of DD No.6, which was received from PS Seelam Pur (Ex.PW23/C), by which it was informed that two persons, namely, Ravi Kumar and Ashwani Dubey had been arrested in case FIR No.33/04, PS Welcome under Section 411 IPC and they had disclosed their involvement in this case also. Thereafter, he (PW23) alongwith SI Mahavir Singh (PW17), PP Jharoda went to the mortuary Subzi Mandi and moved the application for conducting the postmortem. After postmortem, dead body was handed over to the legal heirs, and he (PW23), SI Mahavir, ASI Ramesh, Constable Azad, Constable Hawa Singh and Constable Sunil went to PS Welcome, where they met ASI Aashiq Ali (PW10) and collected copy of FIR No.33/04 (Ex.PW2/A), copy of the seizure memo of TSR not DL1R G 873.(Ex.PW10/A), copy of the disclosure statement of accused Ravi Kumar and Ashwani Dubey (Ex.PW8/A and Ex.PW8/B), the documents of arrest recording the arrest of both the accused (Ex.PW8/C to F) and the seizure memo of clothes of the accused (Ex.PW4/C and Ex.PW7/B). On instructions, ASI Ramesh (PW15) collected the sealed parcels deposited in the malkhana in connection with case FIR No.33/04, PS Welcome along with TSR. These items were also deposited in the malkhana of PS Timar Pur. Both the accused were formally arrested vide arrest memos Ex.PW15/A and Ex.PW15/B and produced in the concerned Court at Karkardooma. The file of case FIR No.33/04 was collected and the case was got cancelled. Accused Ashwani Dubey got recovered one knife after taking it out from the bushes near Jagat Pur Road, Sangam Vihar, Delhi. The knife was having blood stains. The sketch of the knife was prepared (Ex.PW15/D) and the knife seized vide seizure memo (Ex.PW15/H). Accused Ravi @ Sonu also got recovered one knife. The sketch of the said knife (Ex.PW15/G) was also prepared and the knife seized vide seizure memo (Ex.PW15/E). Accused also pointed out the scene of crime vide memos Ex.PW15/F & I.

6. The further case of the prosecution as deposed by the Investigating Officer Bir Singh (PW23) is that on 17.1.2004, both the sealed parcels containing knives

bearing the seal of BS were taken out from the malkhana along with the postmortem report and produced before PW18, Dr. Kulbhushan Goyal, who examined the knives and gave the opinion Ex.PW18/D. Both the knives were thereafter resealed and deposited in the malkhana. On 20.2.2004, all the exhibits were sent to FSL, Rohini through Constable Sushil and the FSL result obtained (Ex.PW23/H & I). On 27.2.2004, an application for conducting TIP was moved (Ex.PW21/A). Both the accused refused to participate in the TIP (Ex.PW21/B & D). He stated that on 12th March, 2004, the accused were produced for judicial remand and on that day PW9 Azad identified them.

7. On the aforesaid facts as delineated in the charge-sheet, charge was framed against the both accused persons under Section 392/397/302/34 IPC, to which the accused pleaded not guilty.

8. In order to substantiate the aforesaid charge, the prosecution examined 23 witnesses, including four public witnesses, being PW5 Rajinder, PW6 Mala, PW7 Usha and PW9 Azad Singh. PW5, PW6 and PW7 claimed to have seen the deceased while he was taking the TSR on 28.1.2004. PW9 Azad is the last seen witness, who had seen both the accused persons in the company of the deceased Sarvesh.

9. The remaining prosecution witnesses were police officials of Police Station Timarpur and Police Station Welcome except PW22 Deepak Uppal and PW9 Shakil Ahmed who were witnesses relating to the ownership of the scooter driven by the deceased.

10. PW10 ASI Aashiq Ali and PW4 Hari Shankar, as per the prosecution case, had apprehended both the accused persons along with TSR at Loha Mandi along with Constable Bhagat Singh PW8 on receipt of secret information, at about 5.20 p.m., while on patrolling, that two boys were standing with the TSR in Loha Mandi and trying to sell the said TSR bearing not DL1R G 873.parked there. At about 5.30 p.m., the patrolling party apprehended both the accused persons with the TSR, seized the blood-stained clothes of the accused persons with the driving license of the deceased and other documents relating to the TSR. Rukka Ex.PW10/A was prepared and the case got registered through PW4, Constable Hari Shankar being

case FIR No.33/04 (Ex.PW10/B). Site plan was prepared (Ex.PW10/C); the accused persons were arrested (vide memos Ex.PW8/C and Ex. PW8/D) and their disclosure statements recorded (Ex.PW8/A and 8/B). The case property was deposited in the malkhana of Police Station Welcome.

11. On the medical evidence, the prosecution examined PW18, Dr. Kulbhushan Goyal, who on 30.1.2004 conducted the postmortem of the dead body of the deceased Sarvesh and opined the cause of death as combined effect of haemorrhagic shock as a result of injuries to neck vessels and asphyxia consequent upon choking of airway (trachea) by blood clots due to cut throat injury. Death was homicidal. All the injuries were ante mortem in nature. Injury No.1, 2 and 4 were caused by sharp cutting flat weapon. Injury No.3 and 5 were caused by blunt force impact. Cut throat injury No.1 was sufficient to cause death in ordinary course of nature. Time since death was 40-42 hours.

12. PW21, Ms. Archana Sinha, Metropolitan Magistrate conducted the TIP of the accused persons ON 9.3.2004. She deposed that both the accused persons refused to participate in the TIP on the ground that the police had taken their photographs.

13. After completion of the prosecution evidence, the statements of the accused were recorded under Section 313 Cr.PC. No defence evidence was adduced.

14. We have carefully scrutinized the records and heard Mr. Vivek Sood, learned counsel for both the Appellants and Ms. Ritu Gauba, learned APP for the State.

15. Mr. Vivek Sood assailed the judgment of the learned trial court principally on the following grounds:(i) The prosecution case is entirely based on and sustained by the testimony of PW9 Azad Singh, who is the last seen witness. The testimony of this witness that he had seen the accused person boarding the TSR of the deceased lacks credence, and even otherwise the long gap of time between the time when PW9 allegedly saw the accused persons in the company of the deceased and the recovery of the dead body altogether negates the last seen theory. (ii) The story of the prosecution that both the accused were caught in the Loha Mandi while selling the auto is a false and concocted one for the reason that

the evidence on record cumulatively indicates that the TSR was recovered much prior to the apprehension of the accused persons. (iii) It is highly improbable that the accused persons after murdering the deceased would roam around in blood stained clothes in a TSR which was also blood stained in full public view and that too around 10 hours after the commission of the offence. (iv) The accused persons have not been properly identified as is borne out by the evidence on record as well as the prosecutions admission that the supplementary statement of PW9 identifying the accused persons was recorded after considerable delay, i.e., on 12th March, 2004, when the accused were produced before the Tis Hazari Court for judicial record. (v) The application for Test Identification Parade was filed highly belatedly on 1.3.2004 and it was only when TIP was refused by the accused persons that the supplementary statement of PW9 was recorded on 12th March, 2004 with regard to identification to cover up the lacuna in the prosecution case. (vi) The alleged recovery of blood stained knives at the instance of the accused persons becomes meaningless if the prosecution story with regard to the apprehension of the accused persons from Kabadi Market is not believed. In any event, the recovery of blood stained knives is of no avail to the prosecution as the prosecution has deliberately chosen not to match the blood found on the knives with the blood of the deceased. (vii) No public witness was joined by the investigating agency at any stage and the non-joining of any independent public witness casts a shadow of doubt on the manner in which the entire investigation was conducted.

16. Elaborating on the aforesaid aspects, it was contended by Mr. Sood that the law is well established that great care must be taken by the Court in evaluating circumstantial evidence and whereas in the instant case, the circumstance relied upon for fastening guilt upon the accused is the last seen evidence, even greater care needs to be exercised. The application of the last seen theory postulates that the time gap between the point of time when the deceased was last seen alive in the company of the accused and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible to contemplate. Where a possibility of another person coming in between exists, the last seen theory cannot be applied. In other words, it would be hazardous to hold the accused guilty where there is a long gap between the

accused and the deceased having been spotted together and the time the deceased was discovered to be dead.

17. In order to buttress his aforesaid contention, reliance was placed by Mr. Sood on the decisions rendered by this court in Tahir and Others vs. State, 87 (2000) DLT 20.(DB), Chander Pal and Anr. vs. State, 75 (1998) DLT 46.(DB), Virender Kumar Yadav and Mukhtiar Yadav @ Mukho Yadav @ Raju vs. State, 1995 JCC 64.and Ramreddy Rajesh Khanna Reddy and Anr. vs. State of A.P., (2006) 10 SCC 172.

18. Ms. Ritu Gauba contended that a clever smoke screen was sought to be created by the Appellants counsel in order to cast doubt on the prosecution case. In fact, the last seen evidence of PW9 Azad Singh, the testimony of the police officials of Police Station Welcome and Police Station Timar Pur and the recovery of the stolen property from the possession of the accused after the murder, incriminated the accused and provided clinching evidence of their guilt. According to her, there was no merit in the contention of the Appellants counsel that the accused persons had not been properly identified nor there was any substance in his contention that non-joining of public witnesses was fatal to the prosecution case. She further contended that the non-determination of blood stains too was of no avail to the defence nor anything had emerged on record to disbelieve the prosecution witnesses. A stray sentence in the evidence of a witness could not be read so as to efface his entire testimony. She placed reliance upon the decisions rendered by the Honble Supreme Court in the case of Amitava Banerjee alias Amit alias Bappa Banerjee vs. State of West Bengal, (2011) 12 SCC 554. Shyamal Ghosh vs. State of West Bengal, (2012) 7 SCC 646.

19. After carefully scanning the evidence on record, we are not inclined to agree with the findings of the learned trial court for more than one reason. The genesis of the prosecution case is the recovery of the stolen property from the Loha Mandi on receipt of secret information between 5.00 and 5.30 p.m. on 29.01.2004, which property, it is stated, was deposited in the malkhana of Police Station Welcome after registration of the First Information Report (FIR No.33 of 2004) at 7.00 p.m. and the arrest of both the accused persons at 10.00 p.m., meaning thereby that

the stolen property, i.e., the TSR in question was deposited in the malkhana along with the blood stained clothes of the deceased and other incriminating material late in the night of 29th January, 2004. Yet, PW1 Head Constable Mahender Singh, the Malkhana Moharrer has stated that the case property was deposited in the malkhana around 10.00 a.m. on 29.01.2004. This creates a doubt with regard to the entire story of the prosecution about the apprehension of the accused with the stolen property after 5.30 p.m. on the same day. What makes the matter worse is though PW4 Constable Hari Shankar, PW10 ASI Aashiq Ali and PW8 Constable Bhagat Singh categorically stated in their respective statements that they were on patrolling duty on 29.1.2004 when, near Asha Ram Bapu Mandir near Dhobi Ghat at about 5.00/5.30 p.m. PW10, ASI Aashiq Ali received information that two young boys were present in the iron scrap market and were about to sell one TSR, per contra, the public witnesses, namely, PW5 Rajinder, PW6 Mala, wife of the deceased, PW7 Usha, wife of Rajinder and PW9 Azad Singh, have categorically stated that they had seen the TSR allegedly recovered after 5.30 p.m. outside Police Station Welcome in the morning hours, around 11.00 a.m. or thereabout, much before they came to know of the homicidal death of Sarvesh Kumar and much before they identified his dead body at the Subzi Mandi Mortuary. A look, now, at the testimonies of the public witnesses.

20. PW5 Rajinder in his testimony stated that he used to ply the autorickshaw bearing No. 8733 during the day and that the deceased used to ply the autorickshaw during night and when on the fatal day the deceased did not return around 4.00 or 5.00 a.m., he went to Old Delhi Railway Station to find out what was the matter. He waited there till noon and around 12.00 or 12.30 a.m., one police wala came and showed him a photograph. The photograph was faint and he could not identify the person concerned. Some driver informed him that his auto was in PS Welcome. Some policeman from PP Jharoda also arrived at the Railway Station. He then went to PP Jharoda and from there he was taken to the mortuary Subzi Mandi where he identified the dead body of the deceased.

21. PW6 Mala, wife of the deceased in her testimony categorically stated that she had been informed by one Azad that the TSR was lying at the Police Station Seelampur (later clarified by her as PS Welcome). She went to the Police Station

and saw that the TSR was there. Thereafter, she came to the Old Delhi Railway Station and it was at the Railway Station that she met one police person who showed copy of the driving license of her husband having his photograph on it. From there, she went to Village Jharoda and thereafter to the mortuary at Subzi Mandi to identify the dead body of her deceased husband. Though re-examined by the APP, she vehemently denied the suggestion that she never went to Police Station Welcome along with Usha and Azad where the TSR was parked. In cross-examination, she stated that she had gone to the Old Delhi Railway Station at 2.00/2.30 p.m. and to Jharoda around 4.00 p.m.

22. PW7 Usha, wife of Rajinder (PW5), also gave a similar version and in her testimony stated that she came to know about the TSR lying at Police Station Welcome through one person Azad, who knew that the TSR number was of her husband Rajinder. She further stated that they came to the Police Station Welcome and found the TSR parked there. All three of them then reached Old Delhi Railway Station in the TSR of PW9, Azad. As per her, PW9 Azad had visited her house at about 4.00 p.m. to inform her about the TSR but did not tell her since how long the TSR was standing at PS Welcome. PW7 though re-examined by the APP denied the suggestion that neither she nor PW6 Mala nor PW9 Azad Singh made a visit to PS Welcome. PW9 Azad Singh, a TSR driver in his testimony deposed as follows: I came to know about the recovery of the TSR on 29.1.04 when I was getting repaired my TSR outside PS Welcome at the shop of Mubarak Mistri. It might (sic.) the time of 11.00 a.m. At that time, TSR was parked outside the PS Welcome. That was the same TSR as of Survesh. I have not seen anyone sitting in TSR or near the same. I remained at the shop of Mubarak Mistri for about one hour or more. I did not see any blood stains or any other articles kept in that TSR of Survesh. The TSR was parked outside the wall of PS adjoining the main gate. I left the shop of Mubarak Mistri at about 11.15 a.m. And from there I came to the house of Rajender. In the house of Rajender, his wife met me. Rajender was not in the house. I had a talk about the TSR of Survesh with the Wife of Rajender. I informed her that TSR was parked outside PS Welcome. Wife of Survesh was informed by wife of Rajender that his scooter was parked at PS Welcome. Earlier I was driving TSR of Rajender about 8-10 years back. We all three then came to PS Welcome from the house of Rajender ..

23. Although re-examined by learned Additional Public Prosecutor, PW9 Azad Singh categorically denied that the TSR was not seen by him at Police Station Welcome on 29.1.2004 before identifying the dead body. Interestingly, the testimony of the aforesaid witnesses, who, by any yardstick are independent witnesses, that the scooter was parked outside Police Station Welcome is corroborated by the testimony of PW10, ASI Aashiq Ali to the extent that PW10 Aashiq Ali stated that the TSR was parked outside the gate of Police Station as there was no space inside to park the TSR at the Police Station. Even otherwise, there does not appear to us to be any reason to doubt the testimony of PW9 Azad Singh in this regard which is corroborated by the testimonies of the wife of the deceased PW7 Mala, the TSR driver, PW5 Rajinder and his wife Usha (PW7) that they had seen the scooter parked outside PS Welcome much prior to their coming to know of the homicidal death of Sarvesh Kumar. Though there appears to be a slight variation in the time given by the aforesaid witnesses, this, to our mind, further lends authenticity to their statements.

24. It also appears to us to be highly improbable that both the accused persons would, after committing murder at night, without washing themselves and changing their clothes, proceed to the Loha Mandi in blood stained clothes and in a blood stained TSR on the following evening and attempt to dispose of the TSR in the crowded Kabadi Market situated there. Then again, the prosecution would have us believe that accused Ravi who was found seated on the back seat of the TSR was carrying a rexin bag with blood stained clothes, viz., two pants, a shirt and underwear in the early hours of the evening at around 5.00 p.m. The prosecution would also have us believe that the clothes of accused Ashwani Kumar and Ravi Kumar which too were blood-stained were got changed by them in the Loha Mandi itself. PW4 Hari Shankar in his cross-examination stated that a private person had brought the change of clothes. The said private person has been neither named nor examined by the prosecution nor, in fact, has any public witness been joined in the recovery proceedings. This, despite the fact that admittedly the Kabadi Market was teeming with public persons and shopkeepers. A look at the testimony of PW10 ASI Aashiq Ali shows that none of the shopkeepers was even asked to join the recovery proceedings. In his examination-in-chief, PW10 states that he had asked five or ten passers by to join the investigation. None accepted.

Thereafter, they along with the informer reached the corner of Loha Mandi. He does not state that at the Loha Mandi any attempt was made to join any shopkeeper or other public person to lend credibility to the prosecution story.

25. In the aforesaid circumstances, we are unable to hold that the evidence on record lends credence to the prosecution story of recovery of the blood stained TSR and clothes of the accused persons from the Kabadi Market in the evening hours of 29.1.2004. The fact that no public witness was joined at any stage of the investigation though the accused were apprehended and the recovery made from the crowded Loha Mandi further impels us to hold that the prosecution version lacks authenticity. Reliance in this context placed by the Appellants counsel on the decisions rendered in *Dinesh Kumar vs. State*, 1998 (1) JCC (Delhi) 173, *Salim Akhtar alias Mota vs. State of U.P.*, (2003) 5 SCC 499, *State (Govt. of NCT of Delhi) vs. Naresh and Anr.*, 2012 (2) JCC 83, and *Mohan Singh vs. State of Haryana*, (1995) 3 SCC 19, is apposite. In the last mentioned case, the alleged incident took place in the waiting hall of a railway station. Police officials deliberately avoided to join any public witness or railway officials though available at the time when the Appellant was apprehended. In such circumstances, the conviction of the Appellant was held to be unsustainable. In the remaining three cases, both disclosure statements and recovery of the weapon of offence were held to be doubtful as no public witness was joined at the time of the alleged recovery. Per contra, the reliance placed by learned APP on the decisions of the Supreme Court in *Sandeep vs. State of Uttar Pradesh*, (2012) 6 SCC 10, is inapposite. In the said case, conviction was based on the deposition of the police party which apprehended accused red handed soon after he had thrown acid on the face of his paramour inside a car and also rescued the deceased from the Appellants clutches before she died and recorded the dying declaration of the deceased. The incident took place at 9.30 p.m. on a non-busy road on which some labourers were working at a distance of about 100 yards away, but none came near the scene of the crime. In such circumstances, it was held that the police evidence could not be thrown out merely because of nonavailability of independent evidence. In the instant case, the recovery has been allegedly effected from a crowded Kabadi Market at 5.30 p.m and the Investigating Officer in his testimony has not even stated that any attempt was made to join public witnesses even

though secret information had been received.

26. The only other incriminating evidence against the Appellants is the last evidence of PW9 Azad, which is heavily relied upon by the prosecution to sustain the conviction. The Appellants counsel on the other hand contends that the time lag between the last seen evidence and the recovery of the dead body makes the last seen theory wholly inapplicable to the present case. As noted above, the deceased was alleged to have been seen in the company of the accused persons who, according to PW9 Azad, boarded the TSR of the deceased at about 7.30 p.m. The dead body was recovered by the police officials of P.P. Jharoda at about 10.15 a.m. i.e on the following morning at Jharoda Pushta Road, Opposite Gali No.3, Sangam Vihar, Delhi, i.e., after a gap of about 15 hours or so. According to the postmortem report, the postmortem took place on 30th January, 2004 at 1.15 p.m. as testified by PW18 Dr. K. Goyal and time since death was about 40 to 42 hours, meaning thereby that death occurred between 7.15 p.m. and 9.15 p.m. on the night of 28th January, 2004.

27. We may note at this juncture the contention of Appellants counsel that the time of death by itself cannot be conclusively determined and it is impossible to fix the exact time of death, more so in the absence of any sufficient reason assigned in the post-mortem report and the reliance placed by him upon the decisions rendered in Ramreddy Rajesh Khanna Reddy and Anr. vs. State of A.P., (2006) 10 SCC 172. Rakesh and Anr. vs. State of Madhya Pradesh, (2011) 9 SCC 69. and Dasari Siva Prasad Reddy vs. Public Prosecutor, High Court of A.P., (2004) 11 SCC 282). We do not, however, propose to dwell on the said aspect for the reason that in our opinion the testimony of PW9 Azad Singh is even otherwise not worthy of credence with regard to the identification of the accused persons, and in any event the last seen theory is not applicable because of the time gap. We say so for the reason in his initial statement recorded under Section 161 Cr.P.C. on 29.1.2004 PW9 Azad merely stated that two boys in the age group of 20-21 years had boarded the TSR of the deceased Sarvesh and asked him to proceed to some destination Nahi pata kahan gaye, but in his subsequent statement recorded almost two months after the incident, i.e on 12.3.2004, he stated that two boys Ashwani Dubey @ Chhanwa, son of Pardeep Dubey and Ravi Kumar @ Sonu,

son of Anil Kumar, both residents of Village Mahipalpura, Thana Bankewar, Zila Itawah, U.P., whose names had been revealed after investigation, were the same boys who had boarded the TSR of the deceased on 28.1.2004 from Old Delhi Railway Station to Jharoda. We further note that whereas in the initial statement only the physical description of two boys had been given by him and it was stated by him that they had boarded the TSR of the deceased at about 7.30 p.m. and asked him to proceed to some unknown destination, in his supplementary statement recorded on 12th March, 2004 by the IO the name, parentage and address of the two boys was disclosed by PW9 as well as their destination, stated to be Jharoda. Significantly also, this statement was recorded in Tis Hazari Courts when the accused persons were produced in court unmuffled, they having refused TIP earlier, that is, on 1.9.2004 on the ground that their photographs had been taken by the police prior to the conduct of the TIP proceedings.

28. A look at the statement of PW9 Azad Singh made in court is also warranted. He, in his testimony, stated that he had worked as a driver of the TSR belonging to PW5, Rajinder. The deceased was also a TSR driver of TSR bearing not DL1R G 8733A, belonging to PW5, Rajinder. The deceased was plying the TSR in the night time and Rajinder was plying the TSR during day time. He had seen the deceased last time on 28.1.2004 at Meter Gauge Railway Station, Delhi Main. In his examination-in-chief, he nowhere stated that he had seen the accused persons boarding the TSR of the deceased. In cross-examination, however, the witness stated that he had seen accused Ashwani along with his associate (not named) boarding the TSR of the deceased from a distance of five or six steps. Importantly, the witness nowhere stated that the accused persons had asked the deceased to take them to Jharoda. In the course of further crossexamination, PW9 Azad stated: I do not know the name of accused persons. I came to know about the name of accused persons only while coming to the Court when the case was called and also from the summons received by me where the name of the accused has been mentioned as Ashwani as title. I also came to know about the name of other accused in the Court. I cannot say how did I come to know his name. Smt.Meera the mother of accused who is present in the court today had told me the name of other accused and disclosed his name as Sonu. None else has told me the name of accused. I did not tell to the IO in my initial statement that these

two accused present in the court had boarded the TSR of Survesh when he left Delhi main railway station. (APP submits that this fact is mentioned in supplementary statement dated 12.3.04).

29. In his subsequent cross-examination, PW9 Azad stated that he did not see these two boys (the accused) after the incident in the month of January, February and March, 2004 and also in April and May, 2004 falsifying the version of the prosecution that his supplementary statement was recorded on 12th March, 2004 in the Court itself where he had identified the accused persons. He admitted that he never told the names of accused to the police as the same was (were) not known to him.

30. It deserves to be highlighted at this juncture that as per PW23 Inspector Bir Singh it was on 12.3.2004, when the accused were produced for judicial remand in Karkardooma Court, that PW9 Azad identified them. But PW9 Azad states that he did not see the persons who had boarded the TSR in the subsequent months, including the month of March. PW23, the Investigating Officer then goes on to state that he had recorded the statement of PW9 Azad Singh in his own handwriting on 12.3.2004 in the Court Complex in front of Room No.292 and at that time Azad Singh was present. He further states PW9 Azad Singh was not knowing the names of the accused persons and for the first time he came to know the names of the accused persons on 12.3.2004 in the Court when their names were called out by the peon. In the course of his cross-examination recorded on 3.1.2009, however, he took a complete somersault and stated: I cannot say as to at about which time for the first time PW9 Azad Singh had met me on 29.01.04 and at which place. Vol. I had already mentioned time in my chief and also my cross examination. I cannot tell at about which time I had written the statement of Azad Singh u/s 161 Cr.P.C. and at which place. I cannot say whether these statements are in my hand or in the hand writing of SI Mahabir Singh. To be noted at this stage that PW 1.SI Mahabir Singh in his testimony, though delineated the entire course of investigation, nowhere referred to the last seen evidence of PW9 Azad. In such circumstances, in our opinion, to place reliance upon the last seen evidence of PW9 Azad would be hazardous to say the least.

31. We are buttressed in coming to the aforesaid conclusion from the fact that the dead body was recovered nearly 15 hours from the time when the accused persons allegedly boarded the TSR of the deceased. Time and again, it has been reiterated that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead, is so small that the possibility of any other person than the accused being the author of the crime becomes impossible. Reference in this context may usefully be made to the the judgment rendered in Tahir and Others vs. State (supra). In the said case, the deceased had gone to his factory on 14.3.1988 at 8.30 p.m. but had not come back to the house. On 16.3.1988 at 12.30 p.m., the father of the deceased informed the police that he had got foul smell from inside the factory of his son and the dead body was found. It transpired that on 14.3.1988 the brother of the deceased (PW4) had seen all the accused persons in the factory before he left at 9.00 p.m. and PW5 had seen the accused persons standing outside the factory at 11.45 p.m. As the case rested on circumstantial evidence, the aforesaid circumstances were held by the trial Court and the High Court to be sufficient to prove the guilt of the accused. The Supreme Court held that the evidence rendered by the prosecution fell short of the requirement to bring home the accusations as it was difficult to positively establish that the deceased was last seen with the accused in view of the long gap and the possibility of other persons coming in between existed.

32. To the same effect are the decisions rendered in Chander Pal and Anr. vs. State and Virender Kumar Yadav and Mukhtiar Yadav @ Mukho Yadav @ Raju vs. State (supra) relied upon by the Appellants counsel, and the decision of the Supreme Court in Ramreddy Rajesh Khanna Reddy and Anr. vs. State of A.P. (supra). In the said decision for the first time it was held by the Supreme Court with reference to last seen evidence that where last seen evidence is the solitary evidence, the Court should look for some corroboration. In para 27 of the decision, the Supreme Court observed as follows: 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.

33. In the aforesaid case, the last seen evidence pertained to the accused and the deceased being last seen together in the night of 14.6.1998 at 10.30 p.m. The evidence was that the accused had gone to the house of the deceased and requested him to accompany him to repair his jeep. The deceased did not return home that night. The dead body was found at 5.30 a.m. on the following day from a public street abutting the house of PW4. The Honble Supreme Court setting aside a finding of conviction affirmed by the High Court held that in the facts and circumstances of the case it could not be said that the evidence unerringly pointed towards the guilt of the accused and ruled out his innocence.

34. The aforesaid decision was sought to be applied in subsequent decisions, viz., *Vikramjit Singh @ Vicky vs. State of Punjab*, (2006) 12 SCALE 32 and *State of Goa vs. Sanjay Thakran and Anr.*, (2007) 3 SCALE 740 In both the aforesaid cases, it was held that where there has been sufficient time gap between the instances when the accused persons were last seen together with the deceased; and in the absence of any other corroborative piece of evidence to complete the chain of circumstances, the accused were entitled to the benefit of doubt.

35. The crucial question which arises in the instant case therefore is whether there is a possibility of any person other than the accused persons being the author of the crime in the facts and circumstances of the case. It cannot be lost sight of that the deceased was a TSR driver who drove TSR during the night shift. It stands to reason that many a person boarded his TSR at different hours of the night. If the testimony of the prosecution witnesses is to be believed, he (the deceased) invariably reached his house in the early hours of the morning. Thus, even assuming that PW9 Azad had seen the accused persons boarding his TSR at 7.30 p.m., it cannot be said with any degree of certainty that they were the last persons to see the deceased alive and the deceased met with his end at their hands. The possibility cannot be ruled out that in the course of the night other persons would have boarded the TSR of the deceased. No enmity has been ascribed to the accused persons as the motive for the crime. In fact, the deceased was not known to the accused at all or even to PW9 Azad Singh, who admittedly was unable to

even name the accused. The prosecutions case is that it was with the intent of robbery that the accused persons had boarded the TSR of the deceased but this, as noted above, does not stand the test of scrutiny as the prosecution witnesses practically in one voice have stated that the TSR was seen by them at the Police Station much prior to the arrest of the accused persons.

36. The only other circumstance relied upon by the prosecution for fastening guilt upon the accused persons is the recovery of the two knives from the bushes at Main Jharoda Road, near Y Point towards the east of the road. But the recovery becomes meaningless if the story of the apprehension of the accused from Kabadi Market is not believed. The evidence on record shows that disclosure statements of the accused were not recorded by the Investigating Officer, Inspector Bir Singh. PW10 ASI Aashiq Ali of Police Station Welcome states that it was he who had recorded the said disclosure statements. PW23 Inspector Bir Singh of Police Station Timar Pur states that after obtaining police remand, it was he who had led the accused persons to the place of recovery, being the bushes on the Main Jharoda Road. Admittedly, no public witness was joined in the recovery or even at the time of the recording of the disclosure statements. Allegedly, the recovered knives were blood stained. The Investigating Officer, Bir Singh states that blood was oozing from the mouth of the deceased when the dead body was found. Yet the prosecution did not choose to match the blood group of the deceased with the blood found on the knives or the blood found on the blood stained clothes of the accused persons and the rexin of the TSR stated to be blood stained. The seriological report (Exhibit PW23/I) opines that human blood was present on the weapons of offence. This by itself is not sufficient to inculcate the accused. The exhibits appear to have been sent to the FSL after almost a month of the incident, i.e., on 20.2.2004. No explanation is forthcoming as to the delay in sending the exhibits for examination or as to the reason why no steps were taken for the matching of the blood group of the deceased with the blood stains found on the weapons of offence and the clothes of the accused persons. True, lapses on the part of the investigation cannot be used by the accused to their advantage but in a case wholly based on circumstantial evidence, which even otherwise lacks credibility, the lacunae left by the investigating agency must necessarily operate to the benefit of the accused.

37. We, therefore, hold that the chain of circumstances to bring home the guilt of the accused is not so complete that the finger of accusation unerringly points towards the guilt of the accused. The circumstance relatable to the place where the deceased was last seen in the company of the accused as also the circumstance of the place where the dead body was found does not rule out the possibility of the deceased being assaulted by a third person. In the absence of there being any other evidence to inculcate them, we hold the Appellants entitled to the benefit of doubt.

38. CRL.A. 444/2010 and CRL.A 595/2010 are accordingly allowed. The impugned judgment and order dated 24th February, 2010 is set aside. Appellants Ashwani Dubey @ Chhanwa and Ravi Kumar @ Sonu are acquitted of the charges framed against them.

39. Both the Appellants are in judicial custody and are ordered to be released forthwith, if not wanted in any other case. REVA KHETRAPAL JUDGE SUNITA GUPTA JUDGE May 15, 2013 km

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