(2014) 08 DEL CK 0181

Delhi High Court

Case No: Crl.A. 1440/2012

Ganesh Kumar		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Aug. 28, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 100, 100(5), 161, 162, 313
- Evidence Act, 1872 - Section 106, 114, 27, 9
- Penal Code, 1860 (IPC) - Section 201, 302, 365, 392, 419

Hon'ble Judges: Pradeep Nandrajog, J; Mukta Gupta, J

Bench: Division Bench

Advocate: Deepak Vohra, Advocate for the Appellant; Aashaa Tiwari, APP, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Mukta Gupta, J.
Ganesh is convicted for offences punishable under Sections 302/419/392/201 IPC vide the impugned judgment dated February 24, 2012 and vide order dated February 28, 2012 directed to undergo imprisonment for life and fine of "10,000/- for offence u/s 302 IPC; rigorous imprisonment for 2 years for offence punishable u/s 419 IPC; rigorous imprisonment for 3 years and fine of "5000/- each on both the counts i.e. Section 392 and Section 201 IPC.

2. Ganesh assails the judgment on the ground that the only evidence with the prosecution is of Rakesh PW-1 the complainant who is not a trustworthy witness in view of the material contradictions in his complaint and the statement before Court. No incriminating article was recovered at his instance and the so-called recovery was not subjected to Test Identification Parade and is thus not reliable. While affecting the alleged recovery of articles at the instance of Ganesh neither any public witness nor any Police official of Uttar Pradesh was associated. The version of Rakesh that he had spoken to Hari

Darshan is falsified by the fact that at the relevant time Hari Darshan was in judicial custody. Rakesh himself stated that after the recovery of camera and the stand at the instance of Paramjeet they went to Delhi and hence there was no occasion for recovery at the instance of Ganesh. Despite Rakesh having all the phone numbers and details as to where Kaushal had gone he made no efforts to search him. There is no investigation as to whom the numbers allegedly given by Ganesh to Rakesh belong to. Rajender Prasad PW-4 from whose Paddy fields it is alleged that the dead body of Kaushal was recovered has not stated that he saw the appellant. No identification of the dead body was done as no photographs were shown to Rakesh. The recovery of articles at the instance of Ganesh has been disbelieved by the learned Trial Court. Thus, merely on the evidence of Rakesh who stated that Kaushal deceased had gone with Ganesh, Ganesh cannot be convicted of the offences as held by the learned Trial Court.

3. The defence of Ganesh is false implication. No defence evidence has been led and in reply to question "Do you want to say anything else?" it is stated:

Ans. I was running a wielding shop at Ganga Nagar area at Meerut City. On 28.01.2007 Police reached at the house of my in-laws at Mamepur. My in-laws called me there. Delhi Police from there took me to PS Incholi. They inquired from me about Ganesh and I told them that I know Ganesh as he is from my village. From there, I was brought to Delhi. I was illegally detained for 3-4 days and was produced in Court on 02.02.07. I do not Kamal.

4. A complaint dated January 14, 2007 for the kidnapping of his cousin brother Kaushal Sharma signed by Rakesh PW-1was received at PS Pandav Nagar. On the same day vide DD No. 14A FIR No. 23/2007 u/s 365 IPC was registered at PS Pandav Nagar. In the complaint it was stated by Rakesh Kumar that he was running Sanjeevani Studio for editing and recording and along with him his cousin brother Kaushal Sharma, son of Rambrij Sharma was working as a photographer. On January 06, 2007 a person who told his name as Rajneesh came to his studio and asked for a camera on rent for the purpose of shooting. According to the said Rajneesh the shooting was to take place from January 07, 2007 to January 12, 2007 at Bara Mandir, Hastinapur, Meerut, UP. Rakesh asked for a reference from Rajneesh who took the name of one Hari Darshan, Director GM Films, Meerut and gave his phone number 09837236464 and told that the said phone belongs to his brother Sriniwas on which he can talk to him as well as Kaushal. Believing Rajneesh, as Hari Darshan had earlier also taken camera on rent, he gave the camera to Rajneesh and sent Kaushal Sharma along with Rajneesh on January 06, 2007 at 7.00 PM. Since Kaushal did not make any call till January 10, 2007 on January 11, 2007 Rakesh made a phone call on mobile No. 09837236464 on which the person who received the call said that he was Sriniwas but he did not know either Rajneesh or Kaushal. Sriniwas gave his address of Bulland Shehar. On January 12, 2007 he discussed about Rajneesh to Hari Darshan on which he stated as to why he had given the camera to Rajneesh. On this Rakesh replied that because he had dealt with him i.e. Hari Darshan 5-6 times and Rajneesh made reference to Hari Darshan. On January 13, 2007 he went to Meerut along

with his friends. On phone when Hari Darshan was contacted he said he was busy in shooting and he should come to his office at Pallavi Tower, Meerut where his friends were sitting and he could go and meet them. When he reached the office at Pallavi Tower he asked number of persons to accompany him to Bara Mandir, Hastinapur, Meerut, UP, however they said that there was no shooting going on there. He went to Tejgarhi Chowk to find out Rajneesh however he could not get any clue and thus he made complaint on the basis of which FIR was registered.

5. On January 31, 2007 he received a call from Police officials of Garh Mukteshwar that they had caught hold of one Rajneesh whose actual name was Ganesh. Thus, he along with his friend went to Garh Mukteshwar and identified the appellant who impersonated himself as Ganesh. He came back to Delhi and informed the facts to Delhi Police. After January 31, 2007 the exact date which he did not know he accompanied Delhi Police to village Amehra near Garh Mukteshwar. Thereafter along with Delhi Police he went back to village Amehra near Garh Mukteshwar. One camera stand (track board) which was kept on the reck inside the house of Paramjeet was seized.

6. In the month of February 2007 he was called by Delhi Police and shown the photograph of the deceased and he identified the same to be of his brother Kaushal Sharma. On the arrest of Ganesh one black coloured pant, one sky blue full sleeve shirt, one check T-shirt having colours, one shawl light green colour, one badami underwear, one head phone, one battery charger, SLR wire of blue colour, one RC wire with three pins, one plastic tape of white colour and one camera remote were recovered. He identified these articles and exhibited them.

7. The case of the prosecution is that on arrest Ganesh disclosed the place where he had thrown the dead body and from there it was revealed that on January 07, 2007 a dead body was recovered from the paddy fields of Rajender Prasad PW-4 on the basis of which another FIR was registered at Garh Mukteshwar. The post-mortem of Kaushal Sharma was done as an unidentified body by Dr. Vikram Singh PW-3 who exhibited his post- mortem report as Ex.PW-3/A. According to him the cause of death was due to shock and haemorrhage as a result of ante-mortem injuries. He handed over the clothes of the deceased, Janeu and Pendal to police officer of Garh Mukteshwar. He noticed the following injuries on the body of the deceased:

1. I.W. measuring 9.0 x 3.0 cm x 2.0 cm deep front of neck. 6.0 cm below from chin. 8.5 cm below from (left) ear, 5.0 cm below from (right) ear. Major vessels cut through along with Trachea at level of cervical vertebrae No. 5th.

2. I.W. measuring 2.0 cm x 0.5 cm (Right) side neck 1.0 cm below from injury No. (1).

3. Stab wound (Ins) 1.0 x 1.0 cm x 0.5 cm front of chest, 8.0 cm CA medial to (right) nipple.

4. I.W. measuring 2.0 x 0.5 cm x 0.5 cm (Right) side chest, 9.0 cm below from injury no. (3).

5. I.W. measuring 4.0 x 1.0 x 0.5 cm (right) side abdomen 11.0 cm below and lateral to injury No.4.

6. I.W. measuring 5.0 x 2.0 cm abdominal cavity deep 5.0 cm above from (right) ant. Superior iliac crest loop or intestine coming out.

7. I.W. measuring 5.0 x 2.0 cm x abdominal cavity deep 9.0 cm. (set aspect) lateral and above umbilicus loop of intestine coming out of wound stomach small intestine lacerated.

8. I.W. measuring 4.5 cm x 2.0 cm x 0.5 cm (right) side lower back 3.0 cm midline and 11.0 cm lateral to injury no. (6).

9. I.W. measuring 6.5 cm x 2.5 cm x 0.5 cm (left) side middle part of thighs lateral aspect 16.0 cm above from (left) knee joint.

10. I.W. 3.0 x 1.5 x 1.0 cm lateral aspect of (left) knee joint.

8. SI Prem Babu Sharma, PW-15 is the Police officer who recovered the dead body of Kaushal Sharma on January 07, 2007 and got lodged FIR u/s 302/201 IPC at PS Incholi Jila Meerut. SI Prem Babu Sharma has deposed that on January 07, 2007 Rajender Prasad PW-4 resident of Lal Kurti came to Police Station and gave in writing that a dead body of unknown person was lying in his fields in village Sikhaera. He along with the staff reached the spot and found dead body of a male aged 25 years lying in the field. The throat of the deceased was cut and there were stab wounds on abdomen. The dead body could not be identified. It was got photographed and the post-mortem was done after preserving the dead body for 3 days for identification. Thereafter, the dead body was cremated.

9. Inspector Vijay Nagar, PW-17 the investigating officer of the case deposed that on January 31, 2007 he along with ASI Vijender Singh, HC Yashpal and other police officials reached Garh Mukteshwar. There they met Sri Nivas, Advocate and Ram Nivas. Ram Nivas produced Ganesh and he was taken to PS Garh Mukteshwar. The complainant was called who identified Ganesh as the same person who had come to him telling his name as Rajneesh and has taken his brother Kaushal for Meerut for shooting of the picture with video camera. Ganesh was arrested. He made a disclosure statement Ex.PW-6/C. Ganesh led to the arrest of Paramjit and Kamal (discharged). All the three accused were brought to Delhi . On the next day, P/C remand of all the three accused were taken. On February 02, 2007 the accused were taken to PS Incholi, who pointed out the place where Kaushal''s murder was done. At the instance of Paramjit, from the house of his in-laws a stand of camera kept in a jute bag was recovered with words Manfroot written on it. Thereafter, Ganesh from the roof, beneath a heap of wood and brick got recovered a bag containing leads of camera, remote and tape of camera, black pant,

sky-blue shirt and camel colour underwear and one Chadar belonging to the deceased. He identified Ex.P-1 to Ex.P-12. This witness has admitted that till January 31, 2007 when Ganesh was arrested they had no clue that Kaushal had been murdered. Thus, it is on the disclosure statement of Ganesh that the factum of murder of Kaushal and thereafter tracing of the FIR registered and photos of the dead body which was criminated as unidentified were identified by Rakesh.

10. Thus, the prosecution case primarily rest on the testimony of Rakesh Kumar before whom Ganesh impersonated as Rajneesh, took Kaushal Sharma and the recovery of the articles belonging to the deceased at the instance of Ganesh.

11. As regards the testimony of Rakesh Sharma is concerned, except pointing out minor variations in the testimony no material aspect has been shown which would reflect that before the Court the deposition of Rakesh Kumar was materially different from what he stated in his complaint. It is stated that in the testimony before Court Rakesh Kumar had stated that he had obtained the residential address and the name of the father of Rajneesh who noted it down as Amarpal Singh, Gali No.6, Tejgarhi Chowraha, District Meerut, UP, however this is not stated in the complaint. Further in the complaint it is stated that he had earlier also given camera to Hari Darshan, however no such fact has been stated by Rakesh Kumar in his testimony before the Court. The fact that Rakesh Kumar noted the father''s name and address of Rajneesh is only to highlight that after Kaushal Sharma did not return back he tried to contact on the number given but he could not contact him. Further the statement that Rajneesh hired an Auto and his cousin brother Kaushal Sharma along with Rajneesh and one other boy sat in the TSR is also not a material improvement from his complaint. These are minor blemishes which are bound to take place every time a person makes a narration of the sequence of events. In nutshell, from the cross- examination of Rakesh Kumar. the appellant has not been able to elicit anything to show that Ganesh did not impersonate as Rajneesh and took Kaushal Sharma and camera with him on the evening of January 06, 2007.

12. The next round of attack is the alleged recoveries of the clothes and other articles of deceased at the instance of Ganesh. It is stated that no TIP of the recoveries has been done. Further, no public witness or local police has been associated for recovery pursuant to the alleged disclosure statement. Moreover, the recovery of the clothes etc. has already been disbelieved by the learned Trial Court. The fact that the recovery of these clothes of the deceased and camera accessories at the instance of Ganesh has been disbelieved by the learned Trial Court is not binding on this Court and this Court is required to appreciate the facts and the law involved in the present case independently. The learned Trial Court has disbelieved the recoveries of the clothes of the deceased and the camera accessories at the instance of the appellant on the ground that no proper identification of the same were got conducted and they were first time identified in the Court. Test identification Parade is only an aid in investigation. Rakesh Kumar has deposed that in the month of February 2007 he was called by the Police and he was shown the photograph and clothes of the deceased and camera accessories which he

identified. Though TIP of camera and camera stand was done, however the bag containing the clothes of the deceased and the accessories of the camera were not got identified in the judicial TIP. The deceased was a cousin brother of Rakesh Kumar and was working with him. Thus, the two being too close and intimate he would obviously know about each other''s clothes and the camera accessories which were taken from the shop of Rakesh Kumar itself. Hence he was in a condition to duly identify the same. Even in the absence of Test Identification of these articles we are inclined to rely upon these recoveries.

13. In the decision reported as Munshi Singh Gautam (D) and Others Vs. State of M.P., it was held:

17. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant u/s 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad Vs. Delhi Administration, , Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh, , Budhsen and Another Vs. State of U.P., and Rameshwar Singh Vs. State of Jammu and Kashmir,).

14. The second ground to assail the recoveries is that no public witness or Police official of the local Police Station was associated with the recovery pursuant to the alleged disclosure by Ganesh. Mere non-association of a public witness at the time of recovery pursuant to disclosure u/s 27 of the Indian Evidence Act does not vitiate the recoveries made and can still be relied upon. While dealing with this issue the Supreme Court in State, Govt. of NCT of Delhi Vs. Sunil and Another, . laid down the distinction between recovery pursuant to disclosure statement u/s 27 Indian Evidence Act and search u/s 100 Cr.P.C. It was held:

18. Recovery of the knicker is evidenced by the seizure memo Ext. PW 10/G. It was signed by PW 10 Sharda besides its author PW 17 Investigating Officer. The Division Bench of the High Court declined to place any weight on the said circumstance purely on the ground that no other independent witness had signed the memo but it was signed only by "highly interested persons". The observation of the Division Bench in that regard is extracted below:

It need hardly be said that in order to lend assurance that the investigation has been proceeding in a fair and honest manner, it would be necessary for the investigating officer to take independent witnesses to the discovery u/s 27 of the Indian Evidence Act; and without taking independent witnesses and taking highly interested persons and the police officers as the witnesses to the discovery would render the discovery, at least, not free from doubt.

19. In this context we may point out that there is no requirement either u/s 27 of the Evidence Act or u/s 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person "and signed by such witnesses". It must be remembered that a search is made to find out a thing or document about which the searching officer has no prior idea as to where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guesswork that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts the search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. This Court has indicated the difference between the two processes in the The Transport Commissioner, Andhra Pradesh, Hyderabad and Another Vs. S. Sardar ali, Bus Owner, Hyderabad and Others, . Following observations of Chinnappa Reddy, J. can be used to support the said legal proposition: (SCC p. 254, para 8)

Section 100 of the Criminal Procedure Code to which reference was made by the counsel deals with searches and not seizures. In the very nature of things when property is seized and not recovered during a search, it is not possible to comply with the provisions of sub-sections (4) and (5) of Section 100 of the Criminal Procedure Code. In the case of a seizure under the Motor Vehicles Act, there is no provision for preparing a list of the

things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself.

15. In view of the fact that the prosecution has been able to prove by the evidence of Rakesh Kumar that appellant was the person along with whom deceased Kaushal Sharma had gone at 7.00 O''clock in the evening and had taken the camera and other accessories, on January 07, 2007 his dead body was found in the paddy fields of Rajender Prasad PW-4, there was recovery of clothes of the deceased and camera accessories at the instance of Ganesh which were duly identified by Rakesh Kumar and on the pointing of Ganesh of the place where dead body was thrown leading to the discovery of the identity of the dead body to be of Kaushal Sharma, we are of the considered opinion that the prosecution has proved its case beyond reasonable doubt.

16. Further after the prosecution has proved its case, the onus shifted on Ganesh u/s 114 Illustration (a) and Section 106 of the Evidence Act to explain as to how he came in possession of the articles of the deceased. This onus has not been discharged by the accused who has taken the plea in the statement u/s 313 Cr.P.C. that he has been falsely implicated.

17. In the decision reported as Ronny @ Ronald James Alwaris Etc. Vs. State Of Maharashtra, it was held:

30. Apropos the recovery of articles belonging to the Ohols family from the possession of the appellants soon after the robbery and the murder of the deceased (Mr. Mohan Ohol, Mrs. Ruhi Ohol and Mr. Rohan Ohol) which possession has remained unexplained by the appellants, so the presumption under Illustration (a) of Section 114 of the Evidence Act will be attracted. It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion would, therefore, be that the appellants and no one else had committed three murders and the robbery.

18. In Sanjay @ Kaka Vs. The State (NCC.T. of Delhi), it was held:

28. Besides Section 27, the courts can draw presumptions u/s 114, Illustrations (a) and Section 106 of the Evidence Act. In Gulab Chand Vs. State of Madhya Pradesh, where ornaments of the deceased were recovered from the possession of the accused immediately after the occurrence, this Court held:

"It is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced. It has been indicated by this Court in Sanwat Khan and Another Vs. State of Rajasthan, that no hard and fast rule can be laid down as to what inference should be drawn from certain circumstances. It has also been indicated that where only evidence against the accused is recovery of stolen properties,

then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. A note of caution has been given by this Court by indicating that suspicion should not take the place of proof. It appears that the High Court in passing the impugned judgment has taken note of the said decision of this Court. But as rightly indicated by the High Court, the said decision is not applicable in the facts and circumstances of the present case. The High Court has placed reliance on the other decision of this Court rendered in Tulsiram Kanu Vs. The State, . In the said decision, this court has indicated that the presumption permitted to be drawn u/s 114, Illustration (a) of the Evidence Act has to be drawn under the "important time factor". If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case. In the instant case, it has been established that immediately on the next day of the murder, the accused Gulab Chand had sold some of the ornaments belonging to the deceased and within 3-4 days the recovery of the said stolen articles was made from his house at the instance of the accused. Such close proximity of the recovery, which has been indicated by this Court as an "important time factor", should not be lost sight of in deciding the present case. It may be indicated here that in a latter decision of this Court in Earabhadrappa Vs. State of Karnataka, , this Court has held that the nature of the presumption and Illustration (a) u/s 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time-limit can be laid down to determine whether possession in the recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. In our view, it has been rightly held by the High Court that the accused was not affluent enough to possess the said ornaments and from the nature of the evidence adduced in this case and from the recovery of the said articles from his possession and his dealing with the ornaments of the deceased immediately after the murder and robbery a reasonable inference of the commission of the said offence can be drawn against the appellant. Excepting an assertion that the ornaments belonged to the family of the accused which claim has been rightly discarded, no plausible explanation for lawful possession of the said ornaments immediately after the murder has been given by the accused. In the facts of this case, it appears to us that murder and robbery have been proved to have been integral parts of the same transaction and therefore the presumption arising under Illustration (a) of Section 114 Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments."

19. In view of the aforesaid discussion we uphold the conviction of Ganesh for offences punishable u/s 302/419/392/201 IPC and the order on sentence. The appeal is

accordingly dismissed. The appellant who is in custody will suffer the remaining sentence.

20. T.C.R. be returned.

21. Two copies of the judgment be sent to the Superintendent Central Jail Tihar one for his record and the other to be handed over to the appellant.