Narender Singh Vs State NCT of Delhi

Court: Delhi High Court

Date of Decision: Aug. 26, 2014

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 100, 100(5), 161, 313
Evidence Act, 1872 â€" Section 106, 114, 27
Penal Code, 1860 (IPC) â€" Section 201, 302, 34, 364, 365

Citation: (2014) 145 DRJ 81

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

Bench: Division Bench

Advocate: D.K. Sharma, O.S. Soran, Meena Chaudhary Sharma, Hirein Sharma and B.S. Tomar, Advocate for the Appellant; Aashaa Tiwari, APP, T.R. Mongia, Retd. ACP, I.O., Jai Prakash, Insp., I.O. and Praveen Attri, SI, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Mukta Gupta, J.
Narender Singh and Neeraj assail the judgment dated December 21, 2012 convicting them for robbery, kidnapping and

murder of Ishwar, Son of Narayan Singh and the order on sentence dated February 26, 2013 directing them to undergo imprisonment for life and

to pay a fine of Rs. 8000/- each and in default of payment of fine to undergo simple imprisonment for 1 year for offence punishable u/s 302/34

IPC; to undergo rigorous imprisonment for a period of 7 years and to pay a fine of Rs. 3000 each and in default of payment of fine to undergo 3

months simple imprisonment for offence punishable u/s 392/34 IPC; and rigorous imprisonment for 10 years and a fine of Rs. 5000/- each and in

default of which to undergo 6 months simple imprisonment for offence punishable u/s 364/34 IPC.

2. Learned counsel for Neeraj assails the judgment on the ground that the only evidence with the prosecution to connect Neeraj with the offences

committed is the alleged recovery of the shirt and mobile phone of the deceased at his instance, which do not inspire confidence and are required

to be discarded. It is urged that the recovery of the telephone under broken condition was from an open place being precincts of Jal Board where

number of people used to visit regularly and is thus not admissible u/s 27 of the Indian Evidence Act. No TIP of the mobile phone was got

conducted nor any public witness or witness of the Jal Board was associated with the seizure though employees are found working at the Jal

Board throughout the day and night. Though the alleged disclosure was made on August 10, 2004, however recovery was made on August 11,

2004 i.e. after 24 hours though 3 days Police custody remand was given. The place from where recovery was made was known to all including the

parents of the deceased and body was recovered from the nearby spot. The place was not guarded and thus could have been tempered with by

any public person. There are contradictions in the testimony of the witnesses regarding the colour of the phone and the shirt recovered. The father

of the deceased gave a different colour and pattern of the shirt. Further the TIP of the shirt was also not got conducted in a proper manner as it is

not clear whether the shirt was mixed with 3 or 4 similar shirts. The shirt was allegedly recovered from open bushes and being rainy season it could

not be said that the shirt belonged to the deceased. Further PW-24 SI Sudama admitted that while going for the Test Identification Parade of the

mobile phone and of the articles recovered, the father of the deceased accompanied him and he does not say that he did not show the articles to

the father of the deceased. The person who allegedly gave the information to the father has not been examined. Further, call details of the father of

the deceased have not been proved to show who informed him and gave the names of the appellants. No finger prints from the mobile phone have

been lifted. The recovery could at best impute knowledge but not that the crime was committed by the appellants. There is no explanation in the

prosecution case as to where the deceased had drunk before being murdered as the post-mortem report shows presence of alcohol. In the crime

team report there is no mention about articles missing from the body of the deceased or his personal affects. Para 9 of the crime report clearly

states that there is nothing stolen. For the first time in the witness box the post-mortem doctor opined that the cause of death was due to injuries on

the testicles though the charge against the appellants was drowning the deceased in the drain after tying the legs. In view of the material

discrepancies it is urged that Neeraj be acquitted.

3. Learned counsel for Narender while adopting the arguments made on behalf of Neeraj further states that the statement implicating the appellants

by the father of the deceased was clearly an afterthought and made belatedly. No public person was associated with the recovery. Two persons

who were cited as witnesses to the recovery have not been brought to the witness box. It is alleged that at the instance of Narender a gold chain

and ring of the deceased were recovered. Neither any receipt of the chain or the ring has been produced nor any other documentary proof brought

to show that the same belonged to the deceased. Even in the PCR call made names of the accused were not disclosed. The PCR call recorded

belatedly only states that 3 boys have taken away the deceased after beating. When the dead body was recovered the same was not tied nor there

were any marks of tying the legs as per the post-mortem report. The alleged recoveries do not inspire confidence. Police officials from the PCR

have not been examined, thus casting a serious doubt on the case of prosecution.

4. Heard learned counsel for the parties. The Police machinery was set into motion on the intervening night of July 25, 2004 and July 26, 2004 by

a call received at 12.15 AM through wireless that one Raj Kumar from Mittal Property dealers has informed that his brother is missing and his

scooter was found parked there and Police be sent, which was exhibited vide Ex.PW- 18/A. SI Jay Prakash PW-12 recorded the statement of

PW-7 Narayan Singh father of Ishwar stating that he has three sons and two daughters and his eldest son Ishwar was aged 34 years. Ishwar was

running property dealer business from B-8/37, Sector 11, Rohini. On July 25, 2004 at about 6.00 PM Ishwar went to the office of Pradeep

Property dealer at A-1/21-22, Sector 11, Rohini Delhi. At about 12.00 AM mid-night he received phone call from one property dealer named

Gandhi inquiring whether Ishwar had reached the home. When he replied that he had not come, he informed that Narender and other two boys

had taken away Ishwar in their van after giving him severe beatings. When complainant reached in front of A-1/21-22, Sector 11, Rohini he found

none. A PCR call was made and he along with the Police made search of Ishwar but they could not find him. On the statement of Narayan Singh

Ex.PW-7/A rukka was sent and FIR u/s 365/34 IPC was registered.

5. In the meantime on July 27, 2004 an information regarding a dead body found in a drain flowing between Sector-11 and Sector-25, Rohini and

DD No.18 Ex.PW-10/A was recorded in this regard. The dead body was identified to be that of Ishwar. One leather belt, one banyan, pant and

underwear were found on the dead body. The dead body was taken out of a drain with the help of private driver and Sections 364/302/201/34

IPC were also invoked. During investigation it was revealed that deceased Ishwar when left the house was wearing one cream colour shirt having

green strips, one gold ring, one leather purse, one wrist watch make Titan Sonata, one gold chain and one mobile phone make Nokia 3610 which

were not found on his dead body. The scooter of the deceased bearing No. DL-6SL- 3848 make Bajaj Chetak was found by his brother Raj

Kumar PW-5 parked outside shop No. A-1/22, Sector 11, Rohini and was seized on August 02, 2004.

6. The post-mortem of the dead body was done by Dr. L.C.Gupta PW-32 who opined that external injuries could not be appreciated properly

because of the advance stage of putrefaction but blackish colour undefined haematomas were present on both side calf, face, right shoulder and

the same extended into the muscle tissues underneath. He found sub-scalp haematoma at the right side occipital region which was blackish in

colour. Brain matter was however semi liquefied. The opinion as to cause of death was deferred awaiting the chemical analysis report of the

viscera; however possibility of knock down after death could not be ruled out at that stage. The time since death was opined to be 36-48 hours

prior to post-mortem examination. He exhibited the post-mortem report Ex.PW-32/A. On receipt of the report of the viscera which gave presence

of full alcohol in the stomach, intestine and organs and in view of the collection of haematoma on the left side scrotum along with the testicles etc.,

multiple overlapping blunt injuries on both sides calf, face, shoulder etc. it was opined that the cause of death was ""shock"" resulting from direct

trauma to testicles (scrotum) by use of blunt force/ impact which was sufficient to cause death in the ordinary course of nature. Vide opinion

Ex.PW-32/B it was also stated that the post- mortem findings were consistent with ante-mortem beatings and post-mortem knock down in the

nala/drain. This witness was not cross- examined.

7. The case of the prosecution thus rest on circumstantial evidence veracity whereof has been challenged by the appellants. Though the last seen

evidence of the prosecution case rested on the testimony of Surender Kumar PW-1, Praveen Mittal PW-2, and Pradeep Gandhi PW-3 and

Ashwani PW-9, however all these witnesses turned hostile in their depositions before the Court and the only fact which stand proved from their

testimony is that the deceased Ishwar had come to the office of Malik Properties and Mittal properties at A-1/22, Sector-11, Rohini. The fact that

the deceased had gone to the office of PW-1, PW-2, PW-3 and PW-9 is also evident from the scooter of the deceased being found parked near

A-1/22, Sector 11, Rohini opposite Mittal properties. However, none of these witnesses have deposed that the deceased was taken away by the

appellants.

8. The prosecution in the present case has also proved recovery of gold chain and gold ring of the deceased at the instance of Narender and

recovery of shirt and mobile phone of the deceased at the instance of appellant Neeraj, though the sanctity of the same have been challenged.

9. Assailing the fact that stolen properties of the deceased were recovered from the appellants, learned counsels have stated that the crime team

report Ex.PW-27/A notes in Clause 9 that no property has been stolen, however this is factually incorrect. Column 7 related to place of offence,

date and time and Column 8 to modus operandi and Column 9 to property stolen; however entry in column 7 continues till column 9 and there is

no mention that no property of the deceased has been stolen. Ex.PW-24/G is the pointing out and seizure memo regarding the ring and gold chain

recovered at the instance of Narender pursuant to his disclosure statement Ex.PW-24/F. The said recovery has been witnessed by SI Sudama

Sharma PW-24 and Constable Vivek PW-25.

10. According to SI Sudama Sharma on December 22, 2004 he along with HC Gajender, Constable Jitender and Constable Vivek took

Narender to Modi Nagar and from there to Gulaothi, Bulandshahar, UP. There Narender got recovered one ring and one gold chain from a

polythene bag dug in the soil from Dhera Jhal Road, going towards Mansuri from Gulaothi by the river to the side of Mansuri near the fields.

11. The contention of the learned counsel for the appellants that public witnesses were not joined when recoveries pursuant to disclosure statement

were made deserves to be rejected. There is nothing on record to discredit the Police witnesses. While dealing with 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 made 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.

12. The TIP of the ring and the chain was conducted by Shri Mukesh Kumar Gupta, MM PW-35 who deposed that IO appeared before him with

the complainant and the case property was sealed with the seal of `SS''. He exhibited his TIP proceedings vide Ex.PW-35/B. According to him

Narain Singh, the complainant and father of the deceased correctly identified the case property which was duly mixed with similar chain with gold

rings. This witness was not cross-examined. Thus, the contention now being raised with regard to the challenge to TIP is unwarranted. Non-

production of the cash receipt of the chain or ring would not discredit the version of the complainant, as nobody can be expected to keep receipts

of the purchase of every item used in day-to-day routine. Further, the case property when produced before the learned Metropolitan Magistrate in

the TIP was duly sealed with the seal of `SS'' and there is no allegation that the seals were tampered with. The only suggestion given to Narain

Singh was that the shirt has been shown to him at the Police Station who denied the same and stated that the shirt of his son was mixed with other

4 shirts for being identified.

13. As regards the recovery of shirt and mobile phone of the deceased from appellant Neeraj is concerned, the same was done vide memo

Ex.PW- 20/C and PW-20/D pursuant to disclosure statement of appellant Neeraj @ Nikhil vide Ex.PW-24/C. The shirt was on the opposite side

of the wall of the Jal Board lying in the bushes. Thus, the contention that the Police had already raided the place and the place of recovery was in

their knowledge is unwarranted. The dead body was recovered from the Nala on the other side of the wall of the Jal Board and without the

knowledge of any incriminating articles lying there, there was no occasion for the Police to have searched the entire bushes. This recovery was

made by Inspector Ram Mehar Singh PW- 30 the then SHO which was witnessed by Constable Sanjeev Kumar PW-20 and Constable Ashok

Kumar PW-22.

14. According to PW-20 Ct. Sanjeev Kumar, Neeraj got recovered a shirt from the bushes behind the boundary of Rithala Water Works. The

said shirt was of white and green check having six white colour buttons. He also deposed that Neeraj also pointed out towards the western and

northern boundary wall of Rithala Water Works towards Gandanala where he had thrown the mobile phone of Ishwar whose battery had been

taken out and the mobile phone was broken by hitting with wall. The said broken mobile phone was taken out from the dead grass and was

without battery. The IMEI number of aforesaid mobile phone was noted which tallied with and the phone was found to be of Nokia, model 3610

colour white with a yellow colour Idea Sim Card.

15. Much stress has been laid by the learned counsel for the appellant on the fact that witnesses have given different colour and pattern of shirt.

The colour of the shirt being stated as cream and green, and white and green would be immaterial. Further, any difference between the check or

stripes would also not be material going to the root of the recovery and discrediting the same.

16. PW-22 Constable Ashok Kumar also corroborated the facts stated by Constable Sanjeev Kumar about the recovery and concealment of

white shirt having red strips. The difference in the colour and strips being stated by the witnesses was but natural as they were deposing after a

lapse of time.

17. Learned counsel for the appellant has urged that mobile was broken. However, it may be noted that IMEI number of the mobile was intact and

from the call details of the mobile phone used by the deceased Ex.PW- 14/A1 to A15 shows the same IMEI number 350884407347980 which

tallied with that of the broken mobile recovered at the instance of Neeraj with IMEI number 350884407347981.

18. Learned counsel for the appellant has also assailed the recovery at the instance of Neeraj on the ground that though the disclosure statement

was made on August 10, 2004, however the recovery was affected on August 11, 2004. On this aspect cross-examination of the witnesses ought

to have been conducted by the defence which has not been conducted. Neeraj was arrested at 3.00 PM on August 10, 2004 vide arrest memo

Ex.PW-24/A and thereafter his disclosure statement was recorded. Thus, the recoveries being postponed for the next day to be done in the

sunlight cannot be said to vitiate the recoveries made.

19. From the circumstantial evidence of recoveries of the articles of the deceased at the instance of the appellants herein, the onus shifts on them

u/s 114 Illustration (a) and Section 106 of the Evidence Act to explain as to how they came in possession of the articles of the deceased

immediately after the occurrence. This onus has not been discharged by the accused who have taken the plea in the statement u/s 313 Cr.P.C. that

they are not innocent and have been falsely implicated.

20. 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.

21. 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.

22. Narender has taken the plea that he was residing at Modi Nagar, UP and had left Delhi much prior to the alleged offence because of

disconnection of electric supply at his residence and closing of his business of welding and he was staying with his brother at Modi Nagar. He has

examined himself as DW-1. In support of his evidence he has produced the ration card, however he admitted that the ration card produced in the

Court vide Ex.DW-1/A was a duplicate one and the original was lost. He did not even produce the NCR or the FIR regarding the missing of the

original ration card. Further the Election ID card also exhibited vide Ex.DW-1/B was issued on November 04, 2008 i.e. after the incident. Even

DW-2 Kalu who stated that Narender was residing in his house at 2003 has admitted that he had not issued any rent receipt to Narender nor any

rent agreement was entered between the parties.

23. Accused Narender has taken the plea that he was innocent and has been falsely implicated and had no concern with the alleged offence. He

examined DW-3 Vijay who only stated that the father of the deceased Narain Singh requested him to accompany him to PS Prashant Vihar as the

Police had arrested Neeraj for the murder of his son Ishwar Singh. Though he stated that Narain Singh brought one shirt and a mobile phone and

gave it to SHO PS Prashant Vihar, however no such suggestion has been given to the complainant PW-7 Narain Singh, though it has been given to

the Investigating Officer PW-30. Thus, this defence is a belated defence to overcome the evidence appearing against the appellants.

24. In view of the non-discharge of the onus by the appellants u/s 114 Illustration (a) and Section 106 of the Evidence Act, we are of the

considered opinion that the prosecution has proved the offence of kidnapping and murder of the deceased Ishwar Singh against the appellants

beyond reasonable doubt. Consequently, the judgment of conviction and order on sentence are upheld. Appeals are dismissed.

25. T.C.R. be returned.

26. Three copies of the judgment be sent to the Superintendent Central Jail Tihar one for his record and the rest to be handed over to the

appellants.