Mohd. Rahis Khan Vs State

Court: Delhi High Court

Date of Decision: Sept. 15, 2009

Acts Referred: Evidence Act, 1872 â€" Section 27, 8

Hon'ble Judges: Pradeep Nandrajog, J; Indermeet Kaur, J

Bench: Division Bench

Advocate: Bhupesh Narula, for the Appellant; Richa Kapoor, for the Respondent

Final Decision: Allowed

Judgement

Pradeep Nandrajog, J.
In a judgment which is not clearly worded, one is not too sure whether the learned Trial Judge has convicted the

appellant for the reasons noted in para 16 and para 19 of the impugned decision or for the reasons noted only in para 19 of the impugned decision.

2. Thus, we shall be dealing with the reasons noted by the learned Trial Judge in both the paragraphs.

3. Four accused, Mohd. Rahis Khan, the appellant; Mukesh Bharti @ Nanhe Gopal @ Baba and Smt. Shobha were sent to trial for having

murdered Sunil Kumar Rastogi the husband of accused Shobha.

4. Mukesh Bharti, Gopal and Smt. Shobha have been acquitted vide judgment and order dated 13.8.2001. The appellant has been convicted.

5. In para 16 of the impugned decision the learned Trial Judge has held that the appellant, after he was arrested, pointed out the place where the

offence was committed to Inspector Satya Pal PW-29 as also pointed out the spot where the police had recovered a brick with which the

deceased was murdered. He led them to a naala where he threw clothes worn by him when the crime was committed which had got stained with

blood.

6. The way the judgment is written, it is not clear whether the Judge has held that the brick which was recovered by the police at the pointing out of

the appellant is evidence of conduct admissible u/s 8 of the Evidence Act or is proved to be the weapon of offence. We note that the learned Trial

Judge has referred to a judgment pertaining to Section 27 of the Evidence Act and the only recovery at the instance of the appellant is of the brick

in question.

7. Under both circumstances, we fail to understand as to what is the incriminating nature of the evidence. The brick in question has not been found

to be stained with blood, much less human blood. How does that brick get linked to the crime is a mystery. Probably, the learned Trial Judge has

been influenced by the fact that a blunt hard object was the weapon of offence.

8. We may only note that the brick was recovered from an open place and after three days of the offence. We hold that the recovery of the brick,

which is an ordinary brick, in the absence of the same being found to be stained with blood and the recovery being from an open place accessible

to all is no incriminating evidence against the appellant.

9. Similarly, we fail to understand as to how the pointing out of a place from where nothing is recovered would be incriminating evidence of

conduct. The place where the appellant ostensibly took the investigating officer i.e. the naala and pointed out a spot, stating that he threw his

clothes there, and no clothes being recovered, is again no incriminating evidence. The place where the deceased was murdered was in the

knowledge of the police on 6.1.1998 i.e. 3 days prior to the date when the appellant was arrested. Thus pointing out said place by the appellant is

irrelevant.

10. This takes care of what has been noted by the learned Trial Judge in para 16 of the decision.

11. Pertaining to the findings returned in para 19 of the decision we find that the learned Trial Judge has held that the evidence establishes that the

deceased was last seen in the company of the appellant when both of them visited the residence of the father of the deceased at Janta Garden

Patparganj and remained there till around 9:00 PM on 5.1.1998. The dead body of the deceased was found at 8:00 AM the next day i.e. on

6.1.1998. Thus, on the last seen evidence, the appellant has been convicted as also for the reason that the brick was recovered at the instance of

the appellant.

12. Pertaining to the brick, the learned Trial Judge has referred to the same in para 16 of the decision as well. We have dealt with this issue in the

preceding paras and have held the same to be inconsequential.

13. Thus, the only issue which needs to be considered is whether the deceased was in the company of the appellant till around 9:00 PM on

5.1.1998 and what is the effect thereof?

14. From the testimony of PW-3, PW-4, PW-6 who are the brothers of the deceased and the testimony of PW-5 who is the father of the

deceased, it stands established that the deceased was in the company of the appellant at the residence of Ram Kumar Rastogi PW-5 being E-

19/B, Janta Garden, Pandav Nagar, Delhi. Learned Counsel for the appellant did not seriously dispute the said fact.

15. The post-mortem report Ex.PW-8/A of the deceased shows semi-digested food in the stomach. The probable time of death of the deceased,

as per the post-mortem report, is around 11:00 PM on 5.1.1998.

16. Thus, the time gap between the deceased seen in the company of the appellant and his dying is about two hours. Indeed, the time is fairly

proximate.

17. The place where the dead body was found is Valmiki Mohalla at a distance of about 2 km from Janta Garden, Patparganj.

18. The dead body of the deceased was noticed/found near a naala. In the house of the deceased i.e. 227, Valmiki Mohalla, blood of the

deceased was lifted. It is apparent that the deceased was killed in his house. Proximity of the distance is failing.

19. There is no eye-witness to prove that the appellant came to the house of the deceased. We note that as per PW-5, his son told him that he

would be returning to his house with the appellant and that the co-accused Nanhe and Baba as also one Sunil Kumar would be having food with

him.

20. But, there is no evidence that the appellant went to the house of the deceased.

21. Last seen evidence assumes significance when there is proximity of time and place of last seen keeping in view the attendant circumstances,

which rule out the possibility of a third person accessing the deceased.

22. In our decision dated 10.8.2009, disposing of four appeals, lead appeal being Crl. Appeal No. 362/2001 Arvind v. State, we had extensively

discussed the law of last seen and in respect to the relationship of the place where the dead body was recovered and the place of last seen, had

noted two decisions of the Supreme Court to highlight the circumstance relatable to the place where the crime was committed. In paragraphs 46 to

51 and paragraphs 83 to 90, we had noted as under:

46. The next authority cited is 1993 SCC (Cri) 520 Anant Bhujangrao Kulkarni v. State of Maharashtra. The said decision has been relied upon

by Mr. Sumeet Verma, learned Counsel for the appellants. Learned Counsel drew our attention to para 12 of the decision and urged that the only

circumstance which was established at the end of the trial, as noted by the Supreme Court, was of the deceased being last seen alive in the

company of the appellant at 6:00 PM on 13.10.1975 and the dead body being found the next morning i.e. on 14.10.1975. It was held that said

evidence was insufficient to hold that the appellant was guilty.

47. A perusal of the decision shows that the prosecution was predicating its case on two incriminating circumstances; being, the deceased being

last seen alive with the accused at 5:30 PM on 13.10.1975 and the dead body being noted in the early hours of the morning of 14.10.1975 and

the fact that the dead body of the deceased was found in a ladni adjacent to a ladni occupied by the accused.

48. Pertaining to the ladni in which the dead body was found and the ladni in which the accused resided, it was noted by the Supreme Court that

there was a huge complex called Wada, consisting of various ladnis, one of which was the residence of the accused. The fact that the dead body of

the deceased was found in the other ladni adjacent to the ladni occupied by the accused was specifically noted in para 7 of the decision.

49. It is apparent that what has weighed with the Supreme Court is the circumstance relatable to the place where the dead body was found. The

place was not linked, being in the possession of the accused and there was no evidence that the accused was seen at the place where the deceased

was found dead. Meaning thereby, anybody could have accessed the ladni where the deceased was killed; it being evident that somebody had

accessed the ladni by the very factum of the deceased being killed in the ladni.

50. We may note that in said case, as noted in para 3 of the decision, the accused explained having parted company with the deceased after 6:00

PM and having heard the deceased shouting "melo Ã¯Â¿Â½ melo" from near the ladni opposite his house i.e. ladni in which the dead body of the

deceased was ultimately found.

51. The principle applied by the Supreme Court is evident. The place where the dead body of the deceased was noted and the time lag between

the time of last seen and dead body noted did not rule out that a third person could not possibly be involved.

x x x

83. The 11th decision referred to is reported as Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh,

84. The last-seen evidence pertains to the accused and the deceased being last seen together at 10.30 in the night of 14.6.1998. The evidence was

that the accused had come to the house of the deceased and requested him to accompany him to repair his jeep i.e. the jeep of the accused. The

deceased did not return home. The dead body was noted at 5.30 AM the following day. The place where the dead body was found was a public

street abutting the house of PW-4.

85. Reversing a finding of conviction affirmed by the High Court, the Supreme Court held that applying the last-seen theory in the facts and

circumstances of the said case it could not be said that the evidence unerringly pointed only towards the guilt of the accused and ruled out his

innocence. In para 28 of the decision, the Supreme Court observed as under:

28. 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 courts should look for some corroboration.

86. The submission of learned Counsel for the appellants is that instant decision, for the first time, categorically holds that pertaining to last-seen

evidence being the solitary evidence, the court should look for some corroboration.

87. It is true, that with reference to the last-seen theory, the concluding sentence of para 28 of the decision does record that even in such cases

(last- seen theory) court should look for some corroboration. But, it has to be noted that the preceding decisions hereinbefore referred to by us

which have sustained conviction on the last-seen theory, have not been noted in the said decision.

88. The last sentence of para 28 in Ramreddy"s case (supra) has to be understood with reference to the circumstances of last-seen evidence led in

the said case as also the observations of the court in para 14 pertaining to a taint in the testimony of PW-2.

89. Eschewing reference to the taint found in the testimony of PW-1, with reference to the applicability of the last-seen theory, suffice would it be

to state that the circumstance of two people being last seen; the reason of their departure and the place where the deceased is found dead assumes

importance. Indeed, in Ramreddy"s case (supra) the same assumed importance, in that, the likely possibility of a third person intervening could not

be ruled out.

90. As against a case of a husband and wife leaving together and expected to either reach their destination together or return back together, two

friends on a common mission would not be expected to return back together. As in Ramreddy"s case (supra), where two friends leave to repair a

vehicle there is every possibility that after some time they parted company and somebody else accessed the deceased and killed him, in a case of

husband and wife same is inapplicable. As in Ramreddy"s case, where the place the deceased is found killed is a public street, it assumes

importance to consider where any person on the public street could have done so. The timings in Ramreddy"s case are of importance. The

deceased and the accused left the house of the deceased at around 10.30 in the night. The place where the deceased died was a public street.

23. In the instant case there is a time lag of two hours when the deceased left the house of his father in the company of the appellant and the time of

his death. As per the father, the deceased was to take food in his house. Indeed, the deceased had taken his dinner evidenced by semi-digested

food found in his stomach. We don''t know whether the deceased ate food in his house or elsewhere. We note that the witness of the prosecution

to prove that the deceased had food with the appellant i.e. PW-10 has turned hostile.

24. The proximity of place of last seen vis-Ã¯Â¿Â½-vis the place of murder having snapped in the instant case, we are of the opinion that in the facts of

this case, it would be unsafe to conclude against the guilt of the appellant on the solitary circumstance of his seen in the company of the deceased in

the house of the father of the deceased which house is at a distance of about 2 km from the place where the deceased died.

25. The appeal is allowed. The impugned judgment and order dated 13.8.2001 convicting the appellant is set aside. The appellant is acquitted of

the charges framed against him. The appellant is on bail. The bail bond and the surety bonds furnished by the appellant are discharged.