

\$~R-12

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: February 01, 2016*

+ **CRL.APPEAL 413/2000**

VISHAL

..... Appellant

Represented by: Mr.Harsh Prabhakar, Amicus Curiae
with Mr.Dhruv Chaudhary and
Mr.Anirudh Tanwar, Advocates

versus

THE STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. Vide judgment dated February 26, 2000 the appellant has been convicted for the offence punishable under Section 302 IPC and vide order on sentence dated February 29, 2000 he has been awarded the punishment to undergo imprisonment for life and pay fine in sum of ₹5,000/-; in default of which to undergo simple imprisonment for a period of one year.

2. At the outset we may notice that the other accused arrayed at the trial, namely - Nasir @ Zero and Babu Lal have been acquitted of the charge of murder but Madan @ Vikrant has been held guilty for the offence punishable under Section 201 IPC and sentenced to the period already undergone by him in custody. Therefore we are to decide the fate of the appellant alone in this appeal.

3. Concerning the appellant, the finding of guilt has been arrived at by the learned Trial Judge in view of the evidence of being last seen in the company of Saleem (hereinafter referred as the 'deceased') emerging from the testimony of Raseeda PW-3 Mohd.Anish @ Ajju PW-4 and Sayyed Ahmed @ Gajju PW-5 coupled with the circumstance of recovery of a dagger and clothes stained with human blood at his instance from the tenanted premises of co-accused Madan @ Vikrant. Dr.Ashok Jaiswal PW-7 opined that the said dagger could have been used to inflict the injuries found upon the body of the deceased. Furthermore, the learned Trial Judge held that the motive stood established in view of the statement made by Raseeda during cross-examination that there existed disputes between the deceased and the accused persons over distribution of money.

4. The facts germane to the adjudication of the present appeal lie within a narrow compass and may be taken note of pithily to avoid prolixity, while eschewing unnecessary reference to the circumstances/evidence qua the co-accused who are not before us in appeal and the State has also not preferred appeal against their acquittal.

5. Criminal justice machinery was set into motion on October 11, 1997 when telephonic information was received at P.S Shakarpur from the Police Control Room that an unidentified dead body had been found at Yamuna Pushta Road, Thokar No.8, Laxmi Nagar Chungi. The said information was reduced into writing and consequently D.D No.3A was recorded at 07:42 A.M. Copy of the said D.D was transmitted to S.I Sher Singh PW-16 through Ct.S.P.Nair PW-11 for necessary further action.

6. Around 7:50 A.M, SI Sher Singh along with Ct.S.P.Nair reached the spot. SI Sher Singh prepared the *rukka* by making an endorsement/*tehrir*

beneath the copy of D.D No 3A [Ex. PW 16/A] and sent the same to the Police Station at 09:30 A.M through Ct. S.P.Nair for registration of F.I.R. It was recorded in the *tehrir* that many persons had collected at the spot however no eye-witness could be found and the identity of the deceased could also not be ascertained.

7. Consequently, S.I Kusum PW-2 deputed as Duty Officer at P.S-Shakarapur registered F.I.R No. 528/97 U/s 302 I.P.C [Ex. PW 2/A] at 09:45 A.M.

8. Ct. S.P.Nair returned to the spot at around 10:30 A.M along with a copy of the F.I.R and the original *rukka*. The Crime Team reached the spot. Ct.Arun Kumar PW- 8 took photographs of the dead body and the spot from different angles. Eleven negatives were produced in Court [Ex. P.1-P.11] and nine photograph prints form part of judicial record [Ex. P.12-P.20]. SI Sher Singh conducted spot-investigation. He collected samples of earth control (Ex.P.23), blood stained soil (Ex.P.22) and blood lying at the spot (Ex.P.21) vide Seizure Memo [Ex. PW 11/B] in presence of Ct.S.P.Nair and Ct. Manoj Kumar PW-12. Three (3) plastic vials containing the said material and a cash amount of Rupees Three Hundred recovered from the personal search of deceased was deposited in the *Malkhana* by SI Sher Singh and entry to this effect was made in the *Malkhana* Register at S.No.2161 [Ex PW-10/A-1].

9. Statements of Shyam Lal and Baiju Rai(not examined during trial) were recorded by SI Sher Singh as required by section 161 Cr.P.C. at the spot. The statement of Shyam Lal revealed the participation of Babu Lal, Nasir @ Zero and the appellants - Vishal in the commission of offence in the context of the three being last seen in the company of the deceased.

However, the said witness did not toe the case of the prosecution in Court and was declared hostile. It may be observed that no arrests were effected by the investigation agency despite the fact that jhuggi of Babu Lal was in the proximate vicinity of the spot of occurrence as unraveled by Shyam Lal and Baiju Rai in their statements made to the police on October 11, 1997. Thereafter, visual site plan without scale [Ex.PW-16/B] was prepared by SI Sher Singh. The body of the deceased was sent to the Subzi Mandi Mortuary for preservation through Ct. S.P.Nair and Ct.Manoj Kumar.

10. We may note that the application/request dated October 11, 1997 for conducting Post-Mortem (not proved during trial but forming part of the Lower Court Record) contains the name of the deceased and the fact that his body is identified by his brothers, namely Mohd.Anish @ Ajju and Sayyad Ahmad @ Gajju, even though the investigating agency categorically claims that the identity of the body of the deceased and his relatives were traced only on October 12, 1997. To the same effect, incongruous to the version of the investigation agency, the Death-Report/Inquest dated October 11, 1997 contains the name of the deceased and the fact that his body is identified by his brothers, Mohd. Anish @ Ajju and Sayyad Ahmad @ Gajju. The said circumstance strikes a discordant note with the positive case propounded by the prosecution and reflects adversely upon the probity of investigation.

11. On October 12, 1997 at around 09:00 A.M SI Sher Singh handed over the investigation of the case to Insp.R.K.Sharma PW-19 - Additional S.H.O P.S. Shakarpur. Insp. R.K.Sharma gathered that the unidentified dead body was of one Saleem, who was a Bad Character of P.S. Gandhi Nagar. He claims to have obtained the address of the deceased from P.S. Gandhi Nagar and thereafter proceeded to visit the said address. He met the mother of the

deceased Smt.Raseeda and his brothers Mohd.Anish @ Ajjuand and Sayyad Ahmad @ Gajju. He claims that upon being directed by him to identify the dead body at the Subzi Mandi Mortuary, Mohd.Anish @ Ajju and Sayyad Ahmad @ Gajju identified the dead body vide identification statements Ex.PW-4/A and Ex.PW-5/A respectively. Insp.R.K.Sharma recorded the statements of Smt.Raseeda, Mohd. Anish @Ajju and Sayyad Ahmad @ Gajju. It was stated therein that on October 10, 1997 at around 5:00-6:00 P.M the appellant–Vishal along with co-accused-Nasir @ Zero visited the house of the deceased located at 104, Gali No.3 Kardam Puri-Delhi and after taking tea the two along with the deceased left at around 08:00 P.M on the pretext of some urgent work to be attended to.

12. On October 13, 1997 at around 8:00 A.M, upon receiving information from secret informer, Insp.R.K.Sharma along with ASI Chander Pal PW-14, H.C.Rambir (not examined during trial), Ct.Pawan Kumar (not examined during trial), Ct. Devender Kumar (not examined during trial) and Ct.Ravinder Nath (not examined during trial) went to Cycle Market, Esplanade Road (near Red Fort) and apprehended the appellant-Vishal. The appellant was brought to the Police Station at around 9:00 A.M and was formally arrested. His personal search was taken vide Personal Search Memo [Ex. PW 14/B]. He is stated to have made a disclosure volunteering to get recovered the weapon used in commission of offence (dagger) and the clothes worn by him at the said time that were smeared with blood. The said statement was reduced into writing and has been proved at the trial as Ex.PW-14/A. At around 10:00 A.M, as alleged by the prosecution, the appellant took the police personnel to the scene of crime and pointed out the place of occurrence vide Pointing Out Memo [Ex. PW 14/C] in presence of

ASI Chander Pal. Thereafter, when the police personnel were taking the appellant to the place where the appellant had hidden the weapon of offence (dagger) and the blood stained clothes worn by him on the day of commission of offence, Sayyad Ahmad @ Gajju while returning from the Police Station, near Radhey Cinema fortuitously saw the appellant in police custody being taken away in a vehicle on the road. He was also associated with the investigation and accompanied the police personnel. According to the prosecution the appellant took the police personnel along with Sayyad Ahmad @ Gajju to the tenanted premises of his friend—Madan @ Vikrant situated at 1/6174 Gali No.2, East Rohtash Nagar, Shahadra. Upon search of the room, a Dagger [Ex. P.1], Shirt [Ex. P.2], Yellow Baniyan [Ex. P.3] and Pant [Ex. P.4] allegedly belonging to the appellant are stated to have been recovered at his instance. Pointing Out-cum-Seizure Memo [Ex. PW 5/B] was prepared in the presence of Sayyed Ahmed @ Gajju, Deepak Goyal PW-6 and ASI Chander Pal. The sketch Ex.PW-5/C of the dagger was also prepared in the presence of the said witnesses. The length of the blade was found to be ad-measuring 22.5 cm and the length of the handle was 16 cm. The total length of the dagger was 38.5 cm.

13. It would be relevant to highlight that upon reaching the said premises, personal search of Madan @ Vikrant was also conducted by the investigation agency and one button actuated knife was found on his person. The said knife was seized and a separate case under Arms Act was registered. *Rukka* of the said case was dispatched from the spot at 11:50 A.M and the time of search is indicated therein to be 11:10 A.M. The said *rukka* forms part of the Lower Court Record although it has not been formally proved during trial of the present case.

14. Thereafter, according to the prosecution the appellant and co-accused Madan @ Vikrant accompanied the police personnel to the Jhuggi of co-accused Babu Lal situated at C-214 Thokkar No.8, Laxmi Nagar from where Babu Lal was arrested. His personal search was conducted vide Personal Search Memo [Ex.PW-14/D]. As highlighted by us in the preceding paragraphs, no efforts were made by the investigation agency earlier to apprehend accused Babu Lal even though Shyam Lal and Baiju Rai in their statements to the police recorded on 11-10-1997 had allegedly revealed the involvement of Babu Lal, *inter alia*, and the fact that his jhuggi was situated near the spot of occurrence.

15. Perusal of testimony of Insp.R.K.Sharma reveals that the police personnel along with the arrested accused reached P.S. Shakarpur at around 2.30 P.M and thereafter the Dagger [Ex.P-1] was handed over to SI Sher Singh for being taken to the doctor conducting Post-Mortem for opinion. Insp.R.K.Sharma submitted an application Ex.PW-19/A seeking opinion regarding weapon of offence.

16. Dr. Ashok Jaiswal PW-7 conducted the post mortem and opined that all injuries were ante-mortem in nature caused by sharp edged weapon(s) and injury No.1-4 were individually/collectively sufficient to cause death. Time since death was opined to be 2½ days. Cause of death was stated to be hemorrhagic shock consequent to the injuries. Pertinently, it was also opined that the Dagger (Ex.P-1) sent for opinion could have been used to inflict the injuries found on the body of the deceased. The Post mortem report along with opinion regarding weapon of offence was proved at trial as Ex.PW-7/A. Blood sample of the deceased was also collected by the doctor, for further tests to ascertain blood grouping and alcohol content, if any. The said

sample of blood along with clothes of the deceased (pant Ex. P.5; underwear Ex.P.6; shirt Ex.P.7; socks Ex.P.8-9; shoes Ex.P.10-11) and the Dagger (Ex. P.1) were taken into possession by the investigation agency vide Seizure Memo [Ex.PW-11/A]. The said articles were deposited in the Malkhana and entry Ex.PW-10/A1-A3 at S.No. 2162 was made to this effect. After autopsy the body of the deceased was released to his brothers Mohd.Anish @ Ajju and Sayyad Ahmad @ Gajju.

17. At this juncture we may observe that the Post-Mortem Report [Ex.PW- 7/A] reveals that the autopsy commenced at 11:30 A.M on October 13, 1997 by which time the Dagger [Ex.P-1] was already in possession of the doctor conducting the same as he was also required to tender his opinion on the aspect if it was the possible weapon of offence. However, this fact completely goes against the grain of the prosecution case according to which the said Dagger [Ex.P-1] was recovered at the instance of the appellant around noon and was consequently sent for examination by the doctor sometime after 2:30 P.M through SI Sher Singh.

18. On November 07, 1997 Ct.Sonu Kaushik PW-13 Assistant Draftsman, Crime Branch visited the scene of crime and prepared notes on the pointing out of S.I Sher Singh. In furtherance thereof, he prepared the scaled site plan [Ex.PW-13/A] on December 15, 1997.

19. On November 18, 1997 six (6) parcels in connection with the present case were deposited in the Office of Forensic Science Laboratory, Malviya Nagar by Ct.Bhim Singh PW-15.

20. The F.S.L. report Ex.PW-17/A and Ex.PW- 17/B dated December 31, 1998 indicated presence of human blood on the Dagger (group not detected), clothes worn by the deceased (group 'A') and the pant (group 'A') allegedly

got recovered at the instance of the appellant. Blood was not detected on the loose lumps of earth described as blood stained earth, shirt and baniyan allegedly recovered at the instance of the appellant.

21. Armed with the said material Final-Report was submitted before the competent Court and the accused were arrayed for trial. The prosecution examined nineteen witnesses in support of charges. Upon conclusion of trial the learned Trial Court held the appellant guilty for the offence punishable under section 302 IPC. As highlighted earlier, co-accused, Nasir @ Zero and Babu Lal have been acquitted of the respective charges framed against them by the learned Trial Judge. Madan @ Vikrant has been held guilty for the offence punishable under Section 201 IPC and sentenced to the period already undergone by him in custody.

22. We have endowed careful consideration to the rival submissions advanced at the bar by Shri Harsh Prabhakar, learned Amicus-Curiae appearing on behalf of the appellant and Shri Varun Goswami, learned Additional Public Prosecutor. Synopsis of Submissions submitted by the learned Amicus during course of hearing has also been taken on record.

23. While advertng to the factual conspectus of the case at hand in the preceding paragraphs we have taken note of the glaring discrepancies in the case of the prosecution on the aspect of recoveries alleged to have been effected at the instance of the appellant. Conjoint reading of the testimony of police witnesses , namely Insp.R.K.Sharma, SI Sher Singh, ASI Chander Pal Singh and H.C Naresh Kumar reveals that the Dagger [Ex.P-1] alleged to have been recovered at the instance of the appellant was sent for examination by the doctor conducting the post-mortem sometime after 02:30 P.M on October 13, 1997 after reaching the Police Station whereas the Post-

Mortem Report [Ex. PW- 7/A] prepared at 11:30 A.M indicates that the said Dagger [Ex.P.1] was already produced before the doctor for eliciting his opinion on the aspect of it being the possible weapon used in commission of offence. Furthermore, the contemporaneous document forming part of the Lower Court Record i.e. the *rukka* with regard to the separate Arms Act case registered against Madan @ Vikrant that was prepared at the place of recovery also improbabilises the possibility of the dagger alleged to have been recovered at the instance of the appellant to have been sent to the doctor conducting autopsy before 11: 30 A.M as the said *rukka* demonstrates that the police personnel were present at the place of recovery even at 11:50 A.M. No explanation has been adduced before us to reconcile this vital incongruity that stems within the case of the prosecution and stands exposed before us. In view thereof, we are persuaded to jettison the evidence of recoveries from the judicial calculus as it is riddled in suspicion.

24. On the aspect of motive, we feel that the learned Trial Court erred by placing implicit reliance on the assertion of Raseeda that there existed disputes between the accused persons and her deceased son over distribution of money. It may be observed that the said assertion was never made at the stage of investigation or during her examination-in-chief before Court but for the first time in response to a question during cross-examination. Such vital information having bearing on the case could not have eluded the memory of the said witness all this while. Furthermore, if the relevant portion of the testimony of this witness is carefully analysed it is revealed that at the first instance the said witness denied existence of any disputes and thereafter, turned complete *volte face* and proceeded to state that there existed disputes over distribution of money. It would also be pertinent to

observe that the appellant has not been specifically questioned by the learned Trial Court with regard to the said circumstance while being examined in terms of section 313 Cr.P.C. Even otherwise, the brothers of the deceased Mohd. Anish @ Aju and Sayyad Ahmad @ Gaju have not whispered about the existence of any dispute between the deceased and the accused persons. Thus, it would not be safe to act upon the belated and solitary assertion of Raseeda to hold that the motive behind commission of offence stands established.

25. The only subsisting circumstance indicting the appellant is the evidence of being last-seen in the company of the deceased emerging from the testimony of Raseeda, Mohd.Anish @ Aju and Sayyed Ahmed @ Gaju.

26. Last-seen is a specie of circumstantial evidence. The foundation of last-seen theory is based on principles of probability and cause and connection. Where a fact has occurred with a series of acts, preceding or accompanying it, it can safely be presumed that the fact was possible as a direct cause of the preceding or accompanying acts, unless there exists a fact which breaks the chain upon which the inference depends.

27. A Division Bench of this Court, of which one of us; Pradeep Nandrajog, J. was a member of, had occasion to analyse various decisions of the Supreme Court on the principles of last-seen evidence. The decision dated August 10, 2009; deciding a batch of four Criminal Appeals, lead matter being Criminal Appeal No.362/2001 Arvind @ Chhotu v. State reported as 2009 SCC On Line Del 2332 expounded upon the law in that regard. It was observed therein 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 of a

nature and of a kind that the possibility of the accused being the author of the crime is of the highest degree and there is no possibility of a third party being the author of the crime. The decision highlighted that the attending circumstances enwombing the evidence of last-seen are of utmost importance and need to be factored while considering the testimony of a witness who deposes on the aspect of last-seen.

28. In the present case according to the evidence led by the prosecution, the deceased left his residence i.e.104, Gali No.3 Kardam Puri-Delhi in company of the appellant and co-accused Nasir @ Zero on October 10, 1997 at 8:00 P.M. The body of the deceased was found the next morning at around 7:42 A.M at Yamuna Pushta Road, Thokar No.8, Laxmi Nagar Chungi. It assumes significance that the prosecution has failed to adduce any evidence with regard to the distance between the place of occurrence and the residence of the deceased where he was last seen in the company of the appellant and the co-accused Nasir @ Zero. In similar circumstances a division-bench of this Court, of which one of us; Pradeep Nandrajog, J. was a member of, in its decision reported as 2012 SCC On Line Del 371 Deepak Chadha v. State, took into consideration the fact that the prosecution led no evidence throwing light at the distance between the house of the deceased and the place where the deceased was found injured and thus the element of 'proximity of place', *inter-alia*, was found lacking.

29. Furthermore, the Post-Mortem conducted on October 13, 1997 at 11:30 A.M opines the probable time since death to be 2½ days. This would imply that Saleem was probably murdered in the intervening night of October 10-11, 1997. The gap between time of last-seen and probable time of death is four hours. In the decision reported as (2007) 3 SCC 755 State of

Goa v. Sanjay Thakran & Anr. it was observed 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 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. In the said case after elaborately discussing the attending circumstances enwombing the incident the Supreme Court refused to interfere against the acquittal of the accused. The Court held that where the place of last-seen and the place where the dead body is found are at a distance or if the place was the same but there was a considerable time lag between when the accused and the deceased were last seen at the place and when the deceased was found dead, the evidence of last seen in both circumstances would lose its incriminatory character if the place was a public place for the reason that in both the circumstances the possibility of somebody else being the assailant could not be ruled out. In the said case, the time gap between the deceased-1 being last-seen in the company of the accused-1 and his dead body being found at the beach was observed to be 2¼ hour.

30. We cannot lose sight of the fact that in the case at hand the place of occurrence is not a spot in exclusive possession of the appellant or for that matter the prosecution has also not been able to establish that the place of occurrence is located near the residence of the appellant. The place of occurrence is a public place located on the Yamuna pushta and in vicinity of a jhuggi cluster. It has emerged in evidence that the deceased was a bad-character and it is not beyond realm of reasonable possibility that any person other than the appellant could have had unhindered access to the said spot and have eliminated Saleem owing to myriad reasons including rancour or

rivalry. Significantly, the nature of relationship shared between the deceased and the appellant as friends was not such that they are not expected in ordinary course of nature to part company as in the case of a husband and wife; who are usually expected to return back together.

31. Thus, in view of the factual backdrop delineated above we feel that the solitary circumstance of last-seen in the present case is not of such nature and intrinsic quality so as to persuade a rational human mind to arrive at the conclusion that none other than the appellant could have eliminated the deceased.

32. In the decision reported as (2007) 3 SCC 755 Ram Reddy Rajesh Khanna Reddy & Anr. v. State of A.P and Sanjay Thakran's case (Supra) the Supreme Court sounded a note of caution that in cases premised on last-seen evidence the Courts should seek some corroboration, and we may only add that this would be to satisfy the judicial conscience and in some cases the nature of last-seen evidence and the circumstances enwombing the last-seen evidence may be of a kind where corroboration may not be needed, but these cases would be a rarity and of the kind noted by this Court in Arvind's case (supra).

33. In the facts of the present case wherein the investigation has been found to be fraught with glaring discrepancies on material aspects as highlighted by us in extensio in the preceding paragraphs, the requirement of seeking corroboration cannot be lightly dispensed with even though it is a rule of prudence that has not attained the un-abrogable altar as a rule of law.

34. The evidence of recovery and motive having already been excluded by us for weighty reasons expressed in the preceding paragraphs of the judgment.

35. Incidentally we may note that the learned Trial Judge acquitted the co-accused Nasir @ Zero as it was not persuaded to arrive at finding of guilt qua him on the solitary premise of last-seen evidence that emerged in the present case. Nothing more than the circumstance of last-seen survives against the present appellant as well and as observed by us earlier it is not of such nature and intrinsic quality so as to persuade a rational human mind to arrive at the conclusion that none other than the appellant could have eliminated the deceased.

36. For the foregoing reasons the appeal is allowed. The impugned judgment of conviction dated February 26, 2000 and order on sentence dated February 29, 2000 passed by the learned Additional Sessions Judge-Shahadra, Delhi is set aside. The appellant is acquitted. The appellant is on bail. Bail bonds and Surety bonds are discharged.

37. TCR be returned.

38. Copy of this decision be sent to the Superintendent Central Jail Tihar for updation of the jail record.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

FEBRUARY 01, 2016

mamta