

CASE NO.:
Appeal (crl.) 871 of 2005

PETITIONER:
Sunny Kapoor

RESPONDENT:
State (UT of Chandigarh)

DATE OF JUDGMENT: 05/05/2006

BENCH:
S.B. SINHA & P.P. NAOLEKAR

JUDGMENT:
J U D G M E N T

WITH
CRIMINAL APPEAL NO. 872 OF 2005
Ram Asre

\005. Appellant

Vs.

State of U.T., Chandigarh

\005. Respondent

CRIMINAL APPEAL NO. 1699 OF 2005

WITH

Sanjay

\005. Appellant

Vs.

State of U.T., Chandigarh

\005. Respondent

S.B. SINHA, J. :

These appeals arising out of the same judgment were taken up for hearing together and are being disposed of by this common judgment.

The appellants are rickshaw pullers. They were charged for committing murder of one Satish Kumar Mehra. He was a businessman. He used to run a proprietary firm known as M/s. Kala Udyog, Chandni Chowk, Delhi. The firm used to supply saris and other garments to the shopkeepers. He on or about 18.9.1999 came to Chandigarh to collect his dues from the businessmen to whom he had supplied saris. He visited the shop of one Pankaj Gulati in Sector 22-C, Chandigarh at about 7.30 p.m. on the same day. He allegedly prior thereto had collected a sum of Rs. 25,000/- in cash and a cheque amounting to Rs.40,000/- from M/s. Amarsons Shop situated in Sector 22, Chandigarh and also diverse sums from others including Praveen Gulati and Satish Kumar Gulati. He left for the bus stand to board a bus to reach Delhi. Praveen Gulati and Satish Kumar Gulatii, however, received a telephone call from Nirmal Mehra, brother of Satish Kumar Mehra, at about 11.30 a.m. that he had not reached Delhi. Praveen Gulati enquired about him from other dealers. When he was informed that Satish Kumar Mehra had not reached Delhi, he was requested to make a report in that behalf to police, pursuant where to a report was made by him which was recorded as DDR No. 23 at about 7.20 p.m. on 19.9.1999. The SHO of the police station received a wireless message in the morning of 20.9.1999 that a dead body had been noticed behind the boundary wall of Udyog Bhawan, near the road of Sector 17/18. The Investigating Officer along with SI Janak Singh, ASI Hira Lal, ASI Harinder Singh, ASI Parmjit Kaur, Constable Pawan Kumar 161, Constable Paramjit Singh 439, Constable Jai Bhagwan 1556 reached the spot. It was found that the dead body of one person was lying in the ditch of water and his articles were seen nearby. The articles

consisted of driving licence on which photo and address of the deceased Satish Kumar Mehra was noticed whereupon Praveen Gulati who had lodged the DDR No. 23 dated 19.9.1999 was sent for. Praveen Gulati identified the dead body as that of Satish Kumar Mehra. A First Information Report was thereupon lodged as against unknown for commission of an offence under Section 302/34 of the Indian Penal Code (IPC). The brother of the deceased Nirmal Mehra also reached Chandigarh. He is also said to have identified the dead body of Satish Kumar Mehra.

The appellants allegedly approached one Chander Prakash (PW-11) who is said to be a social worker. They had already told PW-11 that they believed that the police was on the look-out for them. According to him, they came in a rickshaw and sought for his help. While they were being taken to the police station by PW-11, the police party met them. They were arrested as they were said to have made extra-judicial confessions about their involvement in the crime before PW-11. They made confessions while they were in the police custody. They are said to have made further confession which led to the alleged recovery of two rickshaws. The appellants were on the aforementioned basis put to trial.

Before the learned Sessions Judge, apart from the traders from whom the deceased had collected the amount, the first informant and the brother of the deceased, inter alia three other witnesses were examined on behalf of the prosecution.

PW-19 was one Ramanand who was working with one Gian Chand who was running a 'rehri'. The rickshaw pullers and the passengers of the bus stand allegedly used to take their meals there. He was examined in court on 19.2.2002. He was illiterate. According to him, about two-and-a-half years back at about 9.30 p.m. one person had come at his rehri for taking dinner. The said person was said to be under the influence of liquor. After taking his meals, he paid a sum of Rs. 20/-. Allegedly at some distance, a rickshaw puller took him from there. He identified the deceased upon seeing his photograph in the driving licence. He identified one of the appellants herein, namely, Ram Asre who also used to go to the said 'rehri' for taking his meals.

The prosecution examined one Vinod Kumar as PW-24. He was a tea vendor at Sector 17. On 18.9.1999 at about 10.30 p.m., he is said to have seen the accused along with another 'boy' coming from the side of Sector 17 whereafter they allegedly went towards one Neelam. He came to know about the murder of a person on the next day in the morning. According to him, the deceased was the same person who was seen along with the accused on 18.9.1999 at about 10.30 p.m. In his cross-examination, he admitted that except the said date he did not remember any other date when he had met any other person. He had stated that all of them had come in one rickshaw which was being pulled by Ram Asre and others were sitting therein. Allegedly all of them had come to have tea at his shop at about 5.30 p.m. on that date. He stated : "But I do not remember whether the fact regarding the visit of deceased along with the accused at my shop on that evening was found mentioned or not. I did not know of the name of the deceased. Nor I recorded the same in my statement. I came to know about the murder on the next morning. I had a talk with ASI Prithi Singh Tiger on 20.9.99 about this fact. I had not discussed with anybody in that regard on 19.9.99. It is wrong to suggest that the accused persons never came to my shop nor they were known to me."

Inter alia relying on or on the basis of the said evidence brought on record, the appellants were found to be guilty for commission of an offence under Section 302/34, IPC. They were sentenced to imprisonment for life. An appeal preferred thereagainst by the each of the appellant was dismissed by the High Court.

The learned counsel appearing on behalf of the appellants in support of the appeals had raised the following contentions :

(1) The recovery of the dead body on 20.9.1999 could not be said to have been proved as Nirmal Mehra (PW-3), the brother of the deceased, categorically stated that he had reached Chandigarh on 19th evening itself and identified the dead body in the night whereas according to the prosecution the dead body was found in the morning of 20th September,

1999.

(2) The evidence of Chander Prakash (PW-11) is not trustworthy, inasmuch as he had neither stated nor reproduced the exact words in which the appellants are said to have made their extra-judicial confessions.

(3) Although both Ramanand (PW-19) and Vinod Kumar (PW-24) categorically stated that the deceased was drunk, the same does not stand corroborated by the post-mortem report.

(4) The appellants having not been charged under Section 397, IPC and thereon no cash or any other article having been recovered from them, the prosecution must be held to have failed to prove the charges against the appellants.

Ms. Kamini Jaiswal, the learned counsel appearing on behalf of the respondent, on the other hand, contended that the learned Sessions Judge must be held to have committed a mistake, while taking down the deposition of PW-3 as regards the date of recovery of the dead body as also the identification of the deceased by PW-3. In any event, the learned counsel would contend that the judgment of the learned Sessions Judge as also of the High Court can be upheld on the basis of the extra-judicial confessions made by the appellants before PW-11.

The specific case of the prosecution is that the DDR No. 23 was registered at 7.20 p.m. on 19.9.1999 at the instance of Praveen Gulati (PW-16). The death of the deceased Satish Kumar Mehra evidently had occurred in the night of 18th September, 1999. From the evidence of the Investigating Officer-Inspector Moti Ram (PW-25), it appears that he received a wireless message at about 9.10 a.m. on 20.9.1999 that a dead body was seen lying near Udyog Bhavan, Sector 17, Chandigarh. He reached there along with other police officers. The articles belonging to the deceased were found scattered near the dead body. The articles included one driving licence. From the driving licence, he came to know of the name of the deceased and other details relating to his identification. Praveen Gulati thereafter was summoned at about 10.15 a.m. at the said place and he identified the dead body. A photographer was sent for who came and took the photographs of the deceased at about 12 o'clock. According to him, he remained at the place of occurrence upto 3.30 p.m. Before that, he must have sent the dead body for post-mortem examination. Dr. S.P. Sharma (PW-1) conducted the post-mortem on the dead body of the said deceased Satish Kumar Mehra at about 4.30 p.m. on 20.9.1999. The cause of death was said to be 'aspaxia'. According to him, the possibility of the deceased dying 10 to 12 hours before conducting the autopsy cannot be ruled out.

Nirmal Mehra (PW-3), brother of the deceased, in his deposition, categorically stated that he reached Chandigarh at 7.00 p.m. on 19.9.1999. At about 10.30 p.m. on the said date he came to know about a dead body lying near Udyog Bhavan, Sector 17, Chandigarh. He with his friends reached there. The police officers were already present at the said spot. He thereafter identified the dead body. His sister-in-law, i.e., wife of the deceased allegedly had disclosed to him that the articles which were on the person of the deceased like watch and gold ring, had been missing. He also testified that one cheque and the driving licence were found near the dead body. According to him, he identified the dead body of the deceased before the post-mortem examination was conducted.

Tea vendor Vinod Kumar (PW-24), it is significant to note, also allegedly saw the accused and the deceased on 18.9.1999 at 10.30 p.m. According to him, the person accompanying the accused persons was a boy. He came to learn about the recovery of the dead body on the next day in the morning, i.e. on 19.9.1999. Although he did not testify that he had gone to the place where the dead body was found or identified him as the person who had come to his shop at 10.30 p.m., on the day previous thereto, i.e. on 18.9.1999, he made a statement that he had seen the deceased accompanied by the accused on 18.9.1999 at about 10.30 p.m. If his statement is to be believed, the dead body was recovered on 19th morning itself. Even in the post-mortem report, we have noticed hereinbefore, according to Dr. S.P. Sharma (PW-1) the death of the deceased might have taken place 10 to 12 hours before conducting the autopsy. On the aforementioned premise, it is

difficult to believe the prosecution case.

We may now notice the evidence of Chander Prakash (PW-11). His statements before the trial Judge were as under :

"On 29.9.99 Sunny, Sanjay and Ram Asre came to my house in village Badheri. All the three accused are present in the Court today. All the three accused persons told me that we all are plying rickshaw. They also stated that on 18.9.99 we saw a person aged about 50 years in a drunkard condition. We took that person into the rickshaw of Ram Asra and Sunny Kapoor caught hold of the person. Sanjay accused present in the Court sat in the rickshaw of fourth person whose name I do not remember. Thereafter, they told that they took him in near the round about of Sector 16 and 17 (light point) and in the abandoned place where the light was not available. That person was having a bag which was containing valuables. On seeing that bag they told that they became dishonest. So, he was murdered by them by strangulation with the hands. They also told that they had distributed booty among themselves. They also told that the dead body was thrown into a ditch of water near abandoned place of the Sector 16/17. The accused also told that the fourth culprit was sent by them to his village with the direction that he should return after the matter was cooled down. The accused sought my help, I being social worker by saying that the police was after them. On this I accompanied all the three accused present in the Court to the police station Sector 17, Chd. However, on the way Inspector Moti Ram SHO P.S. 17, met us near the chowk of Sector 22/23. 35/36 Chd. I told him the entire story as narrated to me by the accused. Inspector Moti Ram then recorded my statement\005.."

However, in the cross-examination he stated as under:

"The accused present in the Court today came to me for the first time on 29.9.99 at about 3/4 pm. They told me that the police have doubt on them regarding some murder and they seek my help. The police party met me on the way in Sector 22 near Kisan Bhawan. Inspector Moti Ram knew me before this case I being a social worker. I have never been a witness in any criminal case. The further culprit did not come to me and only accused present in the Court had come to me. The rickshaw belonged to the accused persons. The accused accompanied me on their rickshaw while I was on my cycle when we started to go to the police station. We were going together when the police party met us. The police party took the accused along with the rickshaw from Sector 22, where the police party met us and I left for my other work from there."

According to him, thus, the accused came to him for the first time on 29.9.1999. Why they would come for help, was not disclosed. They only wanted his help because the police had cast some doubts upon them regarding some murder. It was on that basis alone that the appellants were allegedly being taken to the police station. PW-11 did not disclose as to how the appellants knew him. He did not remember the name of the fourth person.

According to the appellants, they formed common intention to murder only after seeing the bag. If the prosecution case is to be believed, the deceased must be carrying the bag from the very beginning. There was thus no question of noticing the said bag by the appellants soon before the occurrence for the first time. If they had formed common intention to commit a crime, the same must be for committing robbery by relieving the deceased of the bag. Who had strangled the deceased is not known. It is well known that to establish the common intention of several persons so to attract the mischief of Section 34, IPC, the following two fundamental facts have to be established; (i) common intention to commit an offence, and (ii) participation of the accused in commission of the offences. If the above two ingredients are satisfied, even overt act on the part of some of the persons sharing the common intention was held to be not necessary. A finding that the assailant concerned had a common intention with the other accused, is

necessary for taking resort to Section 34. In a recent decision in Munna Chanda vs. State of Assam, JT 2006 (3) SC 366 [(2006) 3 SCC 752], this Court observed as under:

"The concept of common object, it is well known, is different from common intention. It is true that so far as common object is concerned no prior concert is required. Common object can be formed at the spur of the moment. Course of conduct adopted by the members of the assembly, however, is a relevant factor. At what point of time the common object of the unlawful assembly was formed would depend upon the facts and circumstances of each case.

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It is, thus, essential to prove that the person sought to be charged with an offence with the aid of Section 149 was a member of the unlawful assembly at the time the offence was committed.

\005\005The deceased was being chased not only by the appellants herein but by many others. He was found dead next morning. There is, however, nothing to show as to what role the appellants either conjointly or separately played. It is also not known as to whether if one or all of the appellants were present, when the last blow was given. Who are those, who had assaulted the deceased is not known. At whose hands he received injuries is again a mystery. Neither Section 34 nor Section 149 of the Indian Penal Code is, therefore, attracted."

It is really a matter of great surprise that even though the appellants had allegedly confessed their guilt, they would willingly be accompanying PW-11 to the police station. It is again a matter of surprise that they would be meeting the Investigating Officer on the way. We wonder as to how the said Chander Prakash (PW-11) could know that Inspector Moti Ram (PW-25) was the Investigating Officer of the case. He did not say that the appellants gave a vivid description of the deceased so as to enable the said Chander Prakash to make a guess that the case related to the murder of Satish Kumar Mehra. It is also significant to note that as to what statements were made by the appellants by way of extra-judicial confessions had not been disclosed. It is wholly unlikely that all the three appellants would make a joint statement. PW-11 did not disclose as to whether any of the appellants made the statements before him or all of them gave statements one after the other.

It is wholly unlikely that the accused would make extra-judicial confession to a person whom they never knew. It also appears to be wholly improbable that unknown persons would come to seek his help unless he was known to be close to the police officers. His statements, thus, do not even otherwise inspire confidence.

While considering the question of value of extra-judicial confession of an accused, this Court in Jaswant Gir vs. State of Punjab, (2005) 12 SCC 438, observed as under:

"The first and foremost aspect which needs to be taken note of is that PW 9 is not a person who had intimate relations or friendship with the appellant. PW 9 says that he knew the appellant "to some extent" meaning thereby that he had only acquaintance with him. In cross-examination, he stated that he did not visit his house earlier and that he met the appellant once or twice at the bus-stand. There is no earthly reason why he should go to PW 9 and confide to him as to what he had done. According to PW 9, the appellant wanted to surrender himself to the police. But there is no explanation from PW 9 as to why he did not take him to the police station. He merely stated that the appellant did not turn up thereafter. The circumstances in which PW 9 went to the police station and got his statement recorded by the police on 14-11-1997 are also not forthcoming. In this context the statement of PW 9 towards the close of the cross-examination assumes some importance. He stated that he had some cases pending in the courts and that he was seeking the help of the police in

connection with those cases and he was often going to Police Station Julkan. Thus, he could be a convenient witness for the prosecution. That apart, the alleged confession made by the appellant, as narrated by PW 9, is not in conformity with the prosecution case. According to the prosecution, all the three accused were involved and PW 9 stated so before the police and as per the statement made by PW 9 to the police, all the three accused made the confession before him but he gave a different version in the court and that is why he was treated as hostile witness and leading questions were put to him by the prosecution. Thus, the credibility of this witness is in doubt. One more point to be noted is that the alleged statement of the appellant that the deceased was in a drunken condition cannot be correct as the doctor found no evidence of consumption of alcohol by the deceased.

Having regard to these features, we do not find assurance from all angles that the alleged confession attributed to the appellant by PW 9 is correct. It is not safe to base the conviction on the doubtful testimony of PW 9 who gave different versions before the police and the Court. The High Court omitted to critically evaluate the evidence of PW 9 and failed to take into account the doubtful features of the evidence."

If there was any common intention to commit any crime, evidently the same was to loot the valuables belonging to the deceased. Curiously enough, the appellants had not been charged under Section 397, IPC. No recovery was made from them. In the absence of having been charged under Section 397, IPC, it is difficult to hold the appellants guilty of commission of murder, inasmuch as it has not been proved as to who amongst the appellants or actually the fourth person had strangled the deceased. In absence of any evidence that all of them were present at the time when the deceased was strangled, a charge under Section 302/34 could not have been brought home. Even Ramanand (PW-19), it may be noted, in his evidence, did not say that the deceased was last seen in the company of the appellants. According to him, he had merely seen the deceased taking dinner at about 9.30 p.m. On that day, he merely saw Ram Asre. He did not say that the deceased left the bus stand in the rickshaw of Ram Asre. He furthermore did not disclose that even other appellants were present. How he could identify the deceased or any other passenger who had taken meals at his rehri, is not known. It is thus difficult to rely on his statements. He could remember and identify the deceased from the photograph, which was appearing in the driving licence, is difficult to accept. This Court in *Jaswant Gir vs. State of Punjab*, (supra) observed that :

"\005\005 Without probing further into the correctness of the "last seen" version emanating from PW 14's evidence, even assuming that the deceased did accompany the accused in their vehicle, this circumstance by itself does not lead to the irresistible conclusion that the appellant and his companion had killed him and thrown the dead body in the culvert. It cannot be presumed that the appellant and his companions were responsible for the murder, though grave suspicion arises against the accused. There is considerable time-gap between the deceased boarding the vehicle of the appellant and the time when PW 11 found the dead body. In the absence of any other links in the chain of circumstantial evidence, it is not possible to convict the appellant solely on the basis of the "last-seen" evidence, even if the version of PW 14 in this regard is believed. In view of this, the evidence of PW 9 as regards the alleged confession made to him by the appellant assumes importance."

The appellants have been convicted on the basis of circumstantial evidence. It is now well settled by a catena of decisions of this Court that for proving the guilt of commission of an offence under Section 302 IPC, the prosecution must lead evidence to connect all links in the chain so as to clearly point the guilt of the accused alone and nobody else. Recently in *Ramreddy Rajeshkhanna Reddy & Anr. Vs. State of Andhra Pradesh*, 2006

(3) SCALE 452, this Court has held as under:

"It is now well-settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well-settled that suspicion, however, grave may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. \005.

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."

According to the prosecution, another person was involved whose name never figured during investigation. He had not been arrested. According to the prosecution, it was that person who had ran away with the entire belongings of the deceased. We have also noticed two glaring discrepancies in regard to the date and time of recovery of the dead body. The evidence of Ramanand (PW-19) and Vinod Kumar (PW-24) who had allegedly last seen the deceased in the company of appellant Ram Asre is not at all trustworthy. It is furthermore difficult to accept the statement of PW-24 that the deceased would come to his shop from the side of Sector 17 kacha rasta for having tea along with all the appellants. A businessman would not ordinarily go to a small tea shop to take his tea. It is wholly unlikely that he would take tea together with a rickshaw puller. It would be absurd to suggest that he would go to a shop to take tea with all the appellants together, who are all rickshaw pullers. He was a resident of Delhi. There was hardly any likelihood that he would personally know the appellants herein. Even if it be assumed that he had been moving from place to place in a rickshaw, the prosecution should have brought some evidence to show that he had hired the rickshaw of either Ram Asre or any other appellant. The prosecution witnesses stated about the recovery of two rickshaws. Who was the owner of the other rickshaw has not been established. Ram Asre's rickshaw belonged to one Maharaj Deen S/o Jhalu (PW-7) who had given his rickshaw to Ram Asre on rent, as stated by him in his evidence. He identified his rickshaw in the police station. It is not expected that the appellant had hired both the rickshaws. Even no charge of conspiracy in terms of Section 120-B had also been framed against them.

For the aforesaid reasons, we are of the opinion on the basis of such evidence, it would not be safe to uphold the judgment of conviction and sentence passed against the appellants herein. We set aside the impugned judgment. The appeals are allowed. The appellants are directed to be set at liberty forthwith unless required in connection with any other case.