A RAJ KUMAR @ RAJU

v.

STATE (NCT OF DELHI)

(Criminal Appeal No.1460 of 2011)

B JANUARY 20, 2017

[RANJAN GOGOI AND ASHOK BHUSHAN, JJ.]

Penal Code, 1860: s.302 r/w s.34, s.411 – Conviction based on circumstantial evidence – Last seen theory – On the fateful C *afternoon, the deceased was found dead and her ornaments were missing – Appellant and other accused were present in the house of the deceased in the morning – Prosecution witnesses deposed that on the same day, appellant and other accused were seen moving around in the neighbourhood looking perplexed – Appellant was apprehended after few days and ornaments belonging to deceased* D *were recovered from him – Conviction of appellant u/s.302 and 392 – Held: The circumstance that the accused persons were seen in the vicinity of the neighbourhood of the crime little before the same was committed, by itself, would not lead to any conclusion consistent with the guilt of the accused – The said circumstance, if coupled* E *with the recovery of the ornaments of the deceased from the possession of the accused, at best, create a highly suspicious situation; but beyond a strong suspicion nothing else in the absence of any other circumstances to suggest the involvement of the accused in the offences alleged – Even with the aid of the presumption u/s.114 of the Evidence Act, the charge of murder cannot be brought home* F *unless there is some evidence to show that the robbery and the murder occurred at the same time i.e. in the course of the same transaction – Courts below erred in holding the accused guilty for the said offence – However, on the basis of the presumption permissible under Illustration (a) of s.114 of the Evidence Act,* G *conviction of appellant u/s.392 is well founded – Conviction u/s.392 is upheld while conviction u/s.302 is set aside – Evidence Act, 1872 – s.114, Illustration (a).*

Partly allowing the appeal, the Court

HELD: 1.1 There are two material circumstances which H **were proved by the prosecution. Firstly, that in the night prior to**

the incident i.e. on 11th September, 1991, the accused were present in the house; and secondly that on 16th September, 1991 from the possession of the accused persons recovery of gold ornaments was made which belonged to the deceased. Such possession was not explained by the accused. Even if the court is to accept the evidence of P.W.12 that in the morning of the day of the incident the witness had seen the accused in the neighbourhood in a perplexed state, notwithstanding the contradictions and inconsistencies in the said evidence at the highest, another circumstance could be added to the above two, namely, that the accused persons were seen in the neighbourhood in the morning of the incident. In this regard, P.W.5 and P.W.7 deposed that they had last seen the accused person in the early morning of the date of the occurrence and that they were going away to some other place. Even if the evidence of P.W.12 is to be accepted, all it can be said is that the evidence of the said witness read with the evidence of P.W.5 and P.W.7 disclose that the accused persons were seen in the vicinity of the neighbourhood of the crime little before the same was committed. By itself, the said circumstance cannot lead to any conclusion consistent with the guilt of the accused. [Paras 9, 11] [466-E-F; 467-F-G]

1.2 The said circumstance, if coupled with the recovery of the ornaments of the deceased from the possession of the accused, at best, create a highly suspicious situation; but beyond a strong suspicion nothing else would follow in the absence of any other circumstance(s) which could suggest the involvement of the accused in the offence/offences alleged. Even with the aid of the presumption under Section 114 of the Evidence Act, the charge of murder cannot be brought home unless there is some evidence to show that the robbery and the murder occurred at the same time i.e. in the course of the same transaction. No such evidence is forthcoming. However, on the basis of the presumption permissible under Illustration (a) of Section 114 of the Evidence Act, it has to be held that the conviction of the accused appellant under Section 392 IPC is well founded. Consequently, the prosecution failed to bring home the charge under Section 302 IPC against the accused and he is acquitted of the said offence. [Paras 12, 13] [467-G-H; 468-A-B, D]

A *Sanwat Khan and Anr. v. State of Rajasthan* **AIR 1956 SC 54 – relied on.**

Case Law Reference

AIR 1956 SC 54	**relied on**	**Para 10**

B CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1460 of 2011.

From the Order dated 30.10.2009 by the High Court of Delhi in Criminal Appeal No. 645 of 2001.

Ms. Sangeeta Kumar, Adv. for the Appellant.

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Y. P. Adhyaru, Sr. Adv., P. K. Dey, Ms. Sushma Verma, Ajay Kumar Singh, B. K. Prasad, Advs. for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. The accused appellant had been D convicted by the learned trial Court for the offence punishable under Section 302 read with Section 34 IPC and has been sentenced to undergo rigorous imprisonment for life and a fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for a period of two months more. He has also been convicted under Section 411 IPC and sentenced to undergo rigorous imprisonment for one year. Both the sentences were directed E to run concurrently. In appeal, while the conviction under Section 302 IPC has been maintained along with sentence imposed, the conviction under Section 411 IPC has been set aside. Instead, the accused appellant has been convicted for commission of offence punishable under Section 392 IPC and sentenced to undergo rigorous imprisonment for one year F for commission of the said offence. Aggrieved, this appeal has been filed.

2. We have heard the learned counsels for the parties.

3. The entire case of the prosecution is based on circumstantial evidence. P.W.5 – Ombir Singh, the husband of the deceased in his G deposition has stated that he resides with his wife, three children, his sister Raj Bala (P.W.9) and niece Sarvesh (P.W.21). Accused Raj Nirmal Gautam @ Raju (since deceased) was a tenant in one of the two rooms in their house. On 11th September, 1991 at around 9.00 p.m. accused Raj Nirmal Gautam along with the present appellant Raj Kumar and one

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more person named Dharmender alias Babloo came to his house and together they played a game of cards. After some time he went to his room and slept. Raj Nirmal, Raj Kumar (appellant herein) and Dharmender stayed in the room for the night and left early next morning at about 6.30 a.m. While leaving, accused Raj Nirmal told P.W. 5 that he was going to his village and may not return for the night. At around 7.30 a.m., his sister Raj Bala (P.W.9) who used to reside with him, his niece Sarvesh and the children left for school. He also left for his workplace at around 7.35 a.m. According to P.W. 5, at about 2.30 p.m. he received a telephone call in his office informing him that his wife had met with an accident. He, therefore, reached home by 3.30 p.m. and found the dead body of his wife. The almirah was found unlocked and all the goods therein lying scattered. A number of jewellery items including gold ornaments were found missing.

4. The accused Raj Nirmal Gautam and Raj Kumar (appellant herein) were apprehended on 16th September, 1991 when they were alighting from a bus. On their personal search, various jewellery items were recovered from them which were duly seized by seizure memos Ex.PW-14/C and Ex.PW-14/D. The jewellery items so recovered from the possession of the accused were identified by P.W.5 (Ombir Singh) to be belonging to his wife. The accused had no reasonable explanation to offer for their possession of the jewellery items. They however claimed that they were not guilty.

5. P.W. 21 – Sarvesh deposed that at around 10.15 a.m. she had come back to the house for lunch and at that time she found the accused persons present in the house and were playing cards. Her aunt gave her lunch and after that she again left for school. When she returned at 1.00 p.m. she saw her aunt Suman lying in the kitchen. P.W. 21 was, however, disbelieved by the learned trial Court as she was found to have falsely implicated accused Jagpal who has been acquitted by the learned trial court.

6. P.W.9 – Raj Bala, sister of P.W.5, in her evidence had deposed that in the night of 11.09.1991 the accused persons were in the room and they had left early in the morning of the next day. She has further deposed that she is a teacher in the school and had accompanied P.W.21 and the two children of P.W.5 to school in the morning at about 7.30 a.m. She has also deposed that at about 12.00–12.30 p.m. she had sent the two

A children of P.W.5 back home with an *Aaya* and on being informed by the *Aaya* that her sister-in-law (deceased) was not available in the house, she came home to find her sister-in-law lying dead in the kitchen.

7. P.W.12 – Dhani Ram had deposed that he had seen the accused persons moving around in the neighbourhood looking perplexed. An B attempt was made to discredit the said witness in view of his further deposition that he had seen the accused in police custody on 13th September, 1991 whereas, according to the prosecution, accused were arrested on 16th September, 1991 when they were alighting from a bus. The said contention was negatived by the High Court on the ground that the aforesaid discrepancy is on account of wrong recapitulation and C confusion over the specific dates.

8. P.W. 15 – Raj Kumar, a TSR driver, also deposed that he had occasion to take the three persons including appellant Raj Kumar in his TSR at about 11.00 a.m. on 12th September, 1991 and in the course of their conversation he had overheard them discussing as to whether they D should have killed "her" or not. P.W. was disbelieved by the High Court on the ground that the conversation attributed by him to the accused is opposed to normal human behavior and conduct.

9. This is the sum total of the evidence on record. From the above, it transpires that there are two material circumstances which E have been proved by the prosecution. Firstly, that in the night prior to the incident i.e. on 11th September, 1991 the accused were present in the house; and secondly that on 16th September, 1991 from the possession of the accused persons recovery of gold ornaments was made which belonged to the deceased. Such possession has not been explained by F the accused. Even if the court is to accept the evidence of P.W.12 that in the morning of the day of the incident the witness had seen the accused in the neighbourhood in a perplexed state, notwithstanding the contradictions and inconsistencies in the said evidence as already noticed, at the highest, another circumstance could be added to the above two, namely, that the accused persons were seen in the neighbourhood in the G morning of the incident. The question that confronts the court is whether on the basis of the aforesaid circumstances the case of the prosecution can be taken to have been proved beyond all reasonable doubts.

10. Learned counsel for the appellant would contend that the aforesaid circumstances do not conclusively point to the involvement of

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the accused appellant in the crime. The chain leading to the sole conclusion that it is the accused persons and nobody else who had committed the crime is not established by the three circumstances set forth above, even if all of such circumstances are assumed to be proved against the accused. Reliance has also been placed on the decision of this Court in the case of Sanwat Khan and Anr. vs. State of Rajasthan[1], wherein this Court had taken the view that recovery of ornaments of the deceased from the accused or production of the same by the accused in the course of investigation, howsoever suspicious, cannot be conclusive of the question of the accused having committed the offence. As per Illustration (a) to Section 114 of the Evidence Act, 1872 though recovery of the ornaments can lead to presumption that the accused had committed robbery or received stolen property, unless there are circumstances to show that the theft/robbery and the murder took place in the same transaction, the accused would not be liable for the offence under Section 302 IPC.

11. The facts in Sanwant Khan (supra) bear a striking resemblance to the facts that confront us in the present appeal. If the evidence of P.W.12 is to be discarded on the ground that such evidence is vague, (there is no mention of the date on which P.W.12 had seen the accused person in the neighbourhood and also as the said testimony runs counter to the prosecution case about arrest of the accused on 16.09.1991) the last seen theory built up on the evidence of P.W.5 and P.W.7 leaves a significant margin of time during which the crime could have been committed by somebody other than the accused. The said fact must go to the benefit of the accused. In this regard, it may be recollected that P.W.5 and P.W.7 have deposed that they had last seen the accused person in the early morning of the date of the occurrence i.e. 12.09.1991 and that they were going away to some other place. Even if the evidence of P.W.12 is to be accepted, all it can be said is that the evidence of the said witness read with the evidence of P.W.5 and P.W.7 disclose that the accused persons were seen in the vicinity of the neighbourhood of the crime little before the same was committed. By itself, the said circumstance cannot lead to any conclusion consistent with the guilt of the accused.

12. The above circumstance, if coupled with the recovery of the ornaments of the deceased from the possession of the accused, at best,

[1] AIR 1956 SC 54

A create a highly suspicious situation; but beyond a strong suspicion nothing else would follow in the absence of any other circumstance(s) which could suggest the involvement of the accused in the offence/offences alleged. Even with the aid of the presumption under Section 114 of the Evidence Act, the charge of murder cannot be brought home unless there is some evidence to show that the robbery and the murder occurred B at the same time i.e. in the course of the same transaction. No such evidence is forthcoming.

13. In view of what has been found above, we do not see as to how the charge against the accused/appellant under Section 302 IPC can be held to be proved. The learned trial court as well as the High C Court, therefore, seems to be erred in holding the accused guilty for the said offence. However, on the basis of the presumption permissible under Illustration (a) of Section 114 of the Evidence Act, it has to be held that the conviction of the accused appellant under Section 392 IPC is well founded. Consequently, we hold that the prosecution has failed to bring D home the charge under Section 302 IPC against the accused and he is acquitted of the said offence. The conviction under Section 392 IPC is upheld. As the accused appellant, who is presently in custody, had already served the sentence awarded to him under Section 392 IPC, we direct that he be set at liberty forthwith.

E 14. The appeal, consequently, is partly allowed in terms of the above.

Devika Gujral Appeal partly allowed.