

IN THE HIGH COURT OF HIMACHAL PRADESH  
SHIMLA

Cr. Appeal No. 444 of 2008

Judgment reserved on: 14.11.2013

Date of Decision: November 29, 2013

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Tek Chand

...Appellant.

Versus

State of H.P.

..Respondent.

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*Coram:*

*The Hon'ble Mr. Justice Sanjay Karol, Judge.*

*The Hon'ble Mr. Justice Rajiv Sharma, Judge.*

*Whether approved for reporting?<sup>1</sup> Yes.*

For the Petitioner: Mr. K.B. Khajuria, Advocate.

For the Respondents: Mr. D.C. Pathik, Addl. Advocate General  
with Mr. Ramesh Thakur, Asstt. A.G.

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Sanjay Karol, J.

In this appeal filed under Section 374 of the Code of Criminal Procedure, convict Tek Chand has assailed the judgment of conviction and sentence dated 26.06.2008, passed by learned Sessions Judge Chamba, Division Chamba, H.P., in Sessions Trial No.61 of 2007. The appellant stands convicted for having committed an offence punishable under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and pay fine of ₹10,000/- and in

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<sup>1</sup> Whether reporters of the local papers may be allowed to see the judgment?

default thereof to further undergo simple imprisonment for a period of three months.

2. It is the case of prosecution that convict Tek Chand son of Bishani was having animosity with deceased Tej Lal son of Chetu, a resident of Village Guwari. Deceased had two brothers, namely, Puran, who was also residing in the same Village and complainant Dev Raj (PW.1), who was residing in Village Satloga. On 01.04.2007, Tej Lal had gone to Tarela Mandir with Hari Lal (not examined). Thereafter, Tek Chand accused, Tej Lal deceased and Tek Singh (not examined) went to the house of Sh. Sahab Singh (PW.3) in Village Satloga, where they consumed liquor. After sometime, Tek Chand and Tej Lal proceeded for their Village and Tek Singh went to his house. In the morning of 02.04.2007, body of Tej Lal was found lying in the fields of Hari Lal (not examined). Police was informed and Inspector Hem Singh Saklani (PW.10) arrived at the spot where statements (Ex.PA) of Dev Raj (PW.1), Fattu Ram (PW.2) and Puran Chand (not examined) were recorded. FIR No. 31 of 2007 (Ex.PW.7/A), dated 04.04.2007 was registered by Head Constable Arvind Kumar at Police Station Tissa, District Chamba, under the provisions of Section 302 of the Indian Penal Code. Inquest report dated 02.04.2007 (Ex.PW.10/A) was prepared. The dead body was sent for postmortem, which was conducted by Doctor Dipesh (PW.4) on 02.04.2007, who issued MLC

(Ex.PW.4/D), based on the report (Ex.PW.4/C) of the Chemical Analyst. The deceased had died due to strangulation. The police visited the spot again on 04.04.2007, prepared site plan (Ex.PW.10/B), where statements of other witnesses were recorded under Section 161 Cr.PC. On the basis of suspicion, accused who was arrested on 05.04.2007, made a disclosure statement (Ex.PW.2/C) in the presence of Fattu Ram (PW.2), on the basis of which his blood stained clothes were recovered. Investigation revealed that it was the accused who had murdered the deceased. With the completion of investigation, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under Section 302 IPC to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as ten witnesses and statement of the accused under Section 313 Cr.P.C. was also recorded, in which he took up a defence of innocence and false implication. No evidence was led in defence.

5. As already observed, trial Court has convicted the accused of the charged offence and sentenced him to suffer imprisonment and pay fine. Hence the present appeal.

6. The trial Court convicted the accused, finding that the chain in circumstances, leading to the conclusion of his

guilt was complete. To this effect, the Court culled out the following circumstances:-

- “ i) That the accused and the deceased who were well known to each other have consumed liquor together on 1.4.2007 at about 5 PM in the house of PW.3 in the company of one Tek Singh;
- (ii) At that time, accused threatened the deceased by saying that he would be so beaten that he would remember the beatings;
- (iii) Both accused and deceased left the house of PW.3 Sahab Singh at 9 PM;
- (iv) Deceased was lastly seen alive in the company of the accused at about 9 PM on 1.4.2007;
- (v) Accused returned to the house of PW.3 at 4 AM on 2.4.2007 and slept there and left his house in the morning;
- (vi) On 2.4.2007 at about 7.30 AM, dead body of deceased Tej Lal was found lying in the fields of Hari Singh;
- (vii) Deceased died due to throttling as per version of PW.4 Dr. Dipesh and injuries were found on his neck and upper part of his chest;
- (viii) The accused had not gone to the house of PW.1 to mourn the death of the deceased nor attended the funeral ceremonies; and
- (ix) The motive of the crime has been proved as discussed above.”

7. It further found that the accused, who was last seen in the company of the deceased, had failed to offer any explanation with regard to the time and place of parting company of the deceased, after leaving the house of Sahab Singh, who had no reason to falsely implicate the accused.

Also “possibility” of the accused being in the company of the deceased, from 9.00 PM to 4.00 AM could not be “ruled out”. By invoking provisions of Section 8 of the Indian Evidence Act, 1872, in the absence of any explanation forthcoming from the accused for not having participated in the funeral of the deceased, the Court “presumed” “the conduct of the accused” to be “suspicious”. Contradictions in the testimonies of the witnesses, were found not to be fatal.

8. Having heard learned counsel for the parties as also perused the record, in our considered view, the trial Court totally mis-directed itself in correctly and completely appreciating the evidence, including the testimonies of the witnesses in its entirety. To say the least, trial Court moved on the basis of mere “suspicion” and “presumption”, which is contrary to the cardinal and settled principles of criminal jurisprudence. Presumption or suspicion howsoever strong, cannot be a ground to convict the accused and that too in a case of a murder, particularly when there is no direct evidence.

9. Law with regard to circumstantial evidence is now well settled. It is a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must

be conclusive in nature, to fully connect the accused with crime. All the links in the chain of circumstances, must be established beyond reasonable doubt, and the proved circumstances should be consistent only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [ See: *Pudhu Raja and another Versus State Represented by Inspector of Police*, (2012) 11 SCC 196; *Madhu Versus State of Kerala*, (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat*, (2010) 15 SCC 622, *Mulakh Raj and others Versus Satish Kumar and others*, (1992) 3 SCC 43; and *Sharad Birdhichand Sarda Versus State of Maharashtra*, (1984) 4 SCC 116.]

10. At the threshold, we record that the manner in which police has investigated the matter speaks volumes about the efficiency and efficacy of the Police Department of the State. The very genesis and foundation of the prosecution story, of the guilt of the accused, in the instant case, is missing. The substratum is no where to be found.

11. According to Dev Raj (PW.1), upon receiving information about the death of his brother, he reached the spot where dead body was lying. Police came, took possession of the body and recorded his statement (Ex.PA). Now this fact

stands corroborated by the investigating officer Inspector Hem Singh Saklani (PW.10), who states that on 02.04.2007, on the spot where dead body was lying, he recorded the statement of Dev Raj. But on record, there is no such statement Ex.PA. There is only one statement of Dev Raj, which is Ex.PW.1/A. The error in exhibiting the statement as Ex.PA may be on the part of the Court. But it is seen that this statement (Ex.PW.1/A) recorded under Section 154 Cr.PC is dated 04.04.2007. Now according to Head Constable Ashok Kumar (PW.9), on 04.04.2007, PW.10 handed over the file to him as till that time, proceedings under Section 174 Cr.PC were going on. Significantly apart from his statement, on record, there is nothing to establish about initiation or conduct of any such proceedings. There is neither any report made to the nearest Magistrate nor there is any document on record to show as to why police had commenced and continued investigation under these provisions till 04.04.2007. So initially accused was not a suspect.

12. Statement (Ex.PW.1/A) is dated 04.04.2007. But significantly Dev Raj himself states that on 02.04.2007 itself, he had disclosed to the police, about complicity of the accused in the crime. Now if this were so, then why is it that police did not record any FIR prior to 04.04.2007. After all place of occurrence was just at a distance of 25 kms. from the Police Station. On the basis of statement (Ex.PW.1/A), FIR

(Ex.PW.7/A) dated 04.04.2007 was recorded at Police Station, Tissa, at 05.15 PM and copy thereof was sent to the Magistrate concerned only on 05.04.2007 and that too at 12.05 PM. The delay in not only recording of the FIR but also sending it promptly to the concerned Magistrate, only renders the prosecution case to be extremely doubtful.

13. There is yet another contradiction on record, which in our considered view is fatal to the prosecution case. Sh. Hem Singh Saklani (PW.10) states that statement of Dev Raj (PW.1) was recorded on 02.04.2007, but PW.1 states that his statement was recorded on 04.04.2007. From the statement of PW.2, it appears that this statement was recorded on 02.04.2007. He specifically states that “his” “statement” was recorded on 02.04.2007. Both PW.1 and PW.2 also state that PW.3 had disclosed to them that threats were given by the accused to the deceased who committed the murder. If this were so, then either testimony of PW.1 is false/incorrect with regard to the date of recording of his statement or police has done some padding as it remains unexplained as to what transpired between the time of recovery of the body on 2.04.2007 and recording of the FIR on 04.04.2007.

14. Further, Sh. Dev Raj (PW.1) does not state as to who informed him about the death of his brother. He only states that Tek Chand SPO informed the police. Sh. Hem



Singh Saklani (PW.10) also states that on 02.04.2007, Tek Chand SPO telephonically informed that a dead body was lying in village Baira. According to Fattu Ram (PW.2), Hari Singh, owner of the fields, where dead body was found lying came and informed him about this fact. Thereafter Fattu “alongwith others” went to the spot and saw the dead body. He sent Naresh to inform Dev Raj about the same. Now significantly, neither Hari Singh nor SPO Tek Chand, who were the first persons to have seen the dead body, have been examined in Court. Why so? has not been explained. Who were these “others” who went to the spot have not been disclosed or associated by the police during investigation. Naresh has also not been examined in Court. Their non examination in Court or association by the police during investigation has rendered the prosecution story to be further doubtful. This we say so for the reason, as we would discuss hereinafter, that testimonies of the star prosecution witnesses namely Dev Raj (PW.1) and Sahab Singh (PW.3) are shaky, uninspiring in confidence and totally unbelievable.

15. To establish prior animosity between the accused and the deceased, prosecution has referred to and relied upon testimonies of PW.1 and PW.3.

16. No doubt, in his examination-in-chief, PW.1 states that accused harboured ill-will and earlier gave beatings to the deceased, but when cross-examined, he could not disclose

the date, month and the year when such beatings were given. He also admits that this matter was not reported either to the police or the Panchayat. Most significantly, he states that “I cannot state as to why Tek Chand was having grudge against the deceased and my family. Self stated, he was having grudge against us from the time of our parents”. At this juncture, it be only observed that deceased was having two brothers, PW.1 and Sh. Puran Chand who in fact used to reside in the village of the deceased. Neither did police associate Puran Chand during investigation nor was he examined in Court by the prosecution. Why so? has not been explained. His testimony, in the absence of any other material on record, to prove the factum of prior animosity was absolutely necessary. PW.2, who is Up-Pradhan states that “there was no litigation pending between the accused and the deceased in Panchayat”. In view of vague testimony of PW.1, we do not find that this witness has been able to establish prior animosity or grudge, continuing over a long period of time.

17. PW.3 does state in his uncontroverted testimony that the time when alcohol was consumed, accused had threatened the deceased, that today he would give him such beatings which he would remember. But from closer examination, we find testimony of this witness to be absolutely unbelievable. He states that on 01.04.2007

accused, deceased and Tek Singh had come to his house, where they consumed liquor. At that time, deceased threatened the accused. After consuming liquor, all three left his house. Accused and the deceased proceeded towards their village and Tek Singh went to his quarter. At about 4.00 AM, accused came back, slept and left only in the morning of 02.04.2007. He learnt that accused had killed the deceased whose dead body was lying in the fields of Hari Singh. He went to the spot. Accused did not visit the spot. Surprisingly this witness remained silent for two days and did not disclose to anyone, the events, which took place on 01.04.2007, or the fact that he had learnt about the accused having killed the deceased. This version of his stands contradicted by the other witnesses. He admits that accused and the deceased had left his house on 01.04.2007 at 9.00 PM. He admits that his wife and children who live with him, were present at the time when liquor was consumed. Now why is it that he remained silent for two days? It is not the case of prosecution that this witness was under any threat or apprehension. Was he a suspect? Why is it that Tek Singh, in whose presence alleged threats were given, has not been associated by the police either during investigation or examined by the prosecution in Court? Why is it that wife of this witness has not been examined? Now all these questions are left un-answered by the prosecution. Except for statement of this witness, we

notice that there is no corroborative evidence to establish the fact that accused and the deceased had in fact visited his house and consumed liquor. Police recorded statement of this witness only on 05.04.2007, this is despite the fact that police visited the spot of crime both on 02.04.2007 and 04.04.2007. Significantly the witness admits that at that time he was there. This witness admits that there are houses of other persons in close vicinity of his house and people in the village can hear each other. None from the village has been examined in Court, to even remotely establish, presence of the accused in the house of Sahab Singh on 01.04.2007. Significantly Dev Raj was also residing in village Satloga, where PW.3 resides. Had the accused threatened the deceased he would have straightaway gone to the house of Dev Raj. At this juncture, we may observe that though Fattu (PW.2) admits that Sahab Singh (PW.3) had told him about the deceased having consumed liquor in his house alongwith the accused, yet he did not disclose such fact to the police either on 02.04.2007 or on 04.04.2007 when admittedly his statement was recorded.

18. Prosecution has established, through the testimony of Dr. Dipesh (PW.4), who proved MLC (Ex.PW.4/B), Chemical Examiner's report (Ex.PW.4/C) and his final opinion (Ex.PW.4/D) that deceased, who had consumed liquor, died on account of "throttling". Also

injuries were found on various parts of his body. Blood was found outside the nostrils. According to this witness, injuries were sustained, less than two hours prior to death, which on estimation took place 24-48 hours before the postmortem examination was conducted. Now as per report (Ex.PW.4/B), postmortem was conducted on 02.04.2007 at 04.30 PM, which means that death should have taken place at least 24 hours prior thereto. One may not draw a conclusive opinion with regard to the time of death from this report, thus proving the innocence of accused, but then it only renders the testimony of PW.3 of accused having left in the company of the deceased from his house on 01.04.2007 at 9.00 PM to be doubtful. According to PW.3, at 4.00 AM accused came back and slept in the house of the witness, which means that death should have taken place in the night intervening 01.04.2007 and 02.04.2007, sometime between 09.00 PM and 04.00 AM, which is only 12 hours prior to postmortem examination by the doctor.

19. Tek Chand was the best person to have disclosed the events, which took place in the house of PW.3 or the fact that accused had in fact left, after consuming the liquor in the company of deceased. Thus, last seen theory propounded by the prosecution, in the absence of inspiring testimony of PW.3, cannot be said to be worthy of credence.

20. It is a settled principle of law that last seen theory comes into play when gap between the point of time of the accused and the deceased seen last together and knowledge of death is so small that possibility of any other person, other than the accused being author of the crime becomes impossible. In a case of long gap of time, unless there is other corroborative material and the possibility of other persons coming in between is not ruled out, it would be difficult to convict the accused solely on this point. In such circumstances, there must be some more tangible evidence, establishing connectivity between the accused and crime. [See: *Manthuri Laxmi Narsaiah Versus State of Andhra Pradesh*, (2011) 14 SCC 117; *Arabindra Mukherjee Versus State of West Bengal*, (2011) 14 SCC 352; *Ramesh Versus State by Madhugiri Police*, (2010) 15 SCC 49; *Madho Singh Versus State of Rajasthan*, (2010) 15 SCC 588, *Shivaji alias Dadya Shankar Alhat Versus State of Maharashtra*, (2008) 15 SCC 269; *Ramreddy Rajesh Khanna Reddy and another Versus State of A.P.*, (2006) 10 SCC 172; *State of U.P. Versus Satish*, (2005) 3 SCC 114; *Mohibur Rahman and another Versus State of Assam*, (2002) 6 SCC 715 and *Joseph s/o Kooveli Poulo Versus State of Kerala*, (2000) 5 SCC 197.

21. We find statement of PW.3 to be uninspiring in confidence as he states that police did not visit the spot prior to 04.04.2007, which version *ex facie* is false.

22. Hence it cannot be said that prosecution could prove prior animosity, threats or the presence of the accused and deceased in the house of Sahab Singh.

23. To establish the guilt of the accused, prosecution has heavily relied upon the disclosure statement (Ex.PW.6/B) made by the accused in the presence of Praveen Kumar (PW.6), a police official. Accused made a statement to the effect that he had concealed his blood stained pant and shirt in the roof of the verandah of his house. These clothes were recovered by the police and sent for chemical analysis. The report of the expert does not link the accused to the crime. That apart, we find that there is material contradiction even on the question of alleged disclosure statement, which is not proved or corroborated by any independent witness. PW.6 states that accused had made a statement in his "local dialect i.e. Churahi language". Whereas, according to PW.10, in whose presence such statement was recorded, accused made a disclosure statement in "Hindi". Statement (Ex.PW.6/B) is witnessed by Jagat Ram, who has not been examined in Court.

24. It has come on record through the testimonies of PW.1, PW.2 and PW.3 that accused did not attend the funeral ceremony or come to mourn the death of the deceased. It is true that accused has not explained this conduct, though in his statement recorded under Section 313 Cr.P.C. he has

denied this fact. But then can it be said that this circumstance alone would conclusively establish the guilt of the accused beyond reasonable doubt. In our considered opinion, no.

25. The trial Court erred in invoking the provisions of Section 8 of the Evidence Act to draw a presumption against the accused. Can it be said that this conduct is relevant to the fact in issue. No. Conduct of an accused must have a nexus with the crime committed. It must form part of the offence as regards his conduct either preceding, during or after commission of offence. [See: *Vikramjit Singh alias Vicky Versus State of Punjab*, (2006) 12 SCC 306 and *Shyamal Ghosh Versus State of West Bengal*, (2012) 7 SCC 646].

26. It is also well settled principle of law that absconding of an accused, by itself would not prove his guilt. A person may run away due to fear of false implication or arrest. Prosecution must stand on its own feet. It cannot draw support from the weakness of the case of the prosecution if it has not proved its case beyond reasonable doubt. [ See: *Sunil Kundu and another Versus State of Jharkhand*, (2013) 4 SCC 422.

27. Since we find that testimonies of PW 1 to 3 do not inspire confidence, in our considered view, it cannot be said that prosecution has been able to establish the conduct of the accused. There was no strong suspicion against the accused



till the time statement (Ex.PW.1/A) of PW.1 was recorded on 04.04.2007 by which time dead body already stood cremated.

28. In our considered view, the Court convicted the accused on the ground of mere suspicion and presumption. Simply because the witnesses had no animosity against the accused, that fact itself, would not be a ground to accept their testimony as a gospel truth. The accused and the victim may have been known to each other, but then this fact alone cannot be a ground for raising a suspicion or doubt about any meeting or threats given to the deceased. There is also no credible evidence on record to establish that the accused came and slept in the house of Sahab Singh (PW.3). In the absence of any proven motive, the accused also cannot be held guilty of crime.

29. For all the above reasons, we do not find that findings of conviction and sentence returned by the trial Court are based on correct and complete appreciation of evidence. Thus, it can be said that conviction of the accused has resulted into miscarriage and travesty of justice; causing serious prejudice to the accused. All the links in the chain of circumstances, cannot be said to have been established beyond reasonable doubt, consistent only with the hypothesis of guilt of the accused and not inconsistent with his innocence.

30. Hence for all the aforesaid reasons, present appeal is allowed and the judgment of the conviction and sentence passed by the trial Court is set aside and the accused is acquitted of the charged offence. Fine amount, if deposited, be refunded to the accused. Accused be released forthwith if not required in any other case. Release warrants be prepared and issued accordingly. The Registrar General of this Court is directed to take all necessary and consequential actions immediately.

Appeal stands disposed of, so also the pending application(s), if any.

( Sanjay Karol),  
Judge.

November 29, 2013.  
(Purohit)

( Rajiv Sharma ),  
Judge.