IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved On : 11.01.2012
Decided On : 27.02.2012

\+ **CRL.A. No. 1505 /2011 & Crl.M.(Bail)2140/2011**

MAHESH & ANR. ….. Appellants

Through : Ms. Anu Narula, Advocate

Versus

THE STATE OF NCT OF DELHI ….. Respondent

Through : Ms. Richa Kapoor, APP for the State

CORAM:

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S. P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. The appellants, Mahesh and Bhura impugn a judgment and order of the Additional Sessions Judge dated 27.08.2011 in SC No.13/2002. The impugned judgment convicted the appellants for the offences punishable under Sections 392/302/34 IPC and also sentenced them to undergo imprisonment for life together with other sentences. All the sentences were directed to run concurrently. It was alleged that on 28.08.2002 at around 1.15 PM intimation was received in Police Station Keshavpuram with regard to murder of someone at A-1/4 Keshavpuram. Police personnel were deployed; they broke open the lock and found one Ram Chander lying face downwards, clothed only in his under-garments. The police

noted 39 knife injuries on his body; the blood had dried and congealed. A vegetable knife with its blunted blade and handle separate were lying near the body. The deceased's daughter Kaushalya was near the crime scene; her statement was recorded. She had five brothers and used to live with them in Trinagar with her mother. The deceased had an estranged relationship with the family and used to live separately in A-1/4 Keshavpuram where he also carried on the business of restaurant "Sangam Restaurant". Kaushalya, PW-1 went to her father around 12.30 PM on that day to get some money. She noticed that the channel gate of the restaurant was locked but the inside door was open. Upon peeping in, she saw that her father was lying in a face downward knee bent condition with blood stained vest. She went back home and told about what she saw to her mother and brothers and returned to the restaurant with them. By then somebody informed the police who went to the spot, broke open the lock and found her father's dead body smeared with blood and with several injuries. The intimation (PW-16/A) was received at 1.15 PM on 28.08.2002; the statement of PW-1 was recorded and dispatched at 02:45 PM (Ex. PW1/A). Thereafter the police registered the FIR (Ex. PW-16/C).

2. The police subsequently investigated and recorded the statements of other witnesses. Ram Chander's body was sent for post mortem examination. Apparently some chance prints were recovered along with other articles from the spot. Mahesh was arrested on 04.09.2002; (his arrest memo was produced as Ex. PW 30/D); Bhura on the other hand was arrested on 07.09.2002; (his arrest memo was produced as Ex. PW19/A). After completing investigation the accused were charged with committing the offence. They pleaded not guilty and claimed trial. During the trial, the prosecution relied on the testimonies of 32 witnesses as well as several material exhibits. After considering these materials and the submissions

made on behalf of the parties, the trial court convicted the accused and sentenced them to undergo imprisonment for the terms mentioned previously.

3. Counsel for the appellants argues that the conviction based on the testimony of PW-1, cannot be sustained. The trial court fell into an error in giving credence to the testimonies of PW-1, PW-2 and PW-6 for holding that the "*last seen circumstances*" had been established. In this regard, it was urged that the testimonies of PW-1 and PW-6 clearly showed that the deceased was not living with his family on account of some differences. He was apparently carrying on the business of running a small so called restaurant which according to PW-5 was frequented by couples and had a dubious reputation. The evidence of PW-6, to the effect that he saw both the accused last with the deceased was shaky and unreliable. At one stage he deposed to having gone away after the accused left the deceased in the premises. Much later after recall, he improved upon his previous statement.

4. It was argued that the testimony of PW-2 with regard to the "*last seen"* circumstance was totally unbelievable. Learned counsel emphasized that this witness perhaps was the cause for the rift between the deceased and the members of his family. Though she claimed that the deceased treated her like her daughter, there was considerable intimacy and they used to be in touch. Counsel also urged that the evidence suggested that often PW-2 would go away with the deceased. She had been married earlier according to her own admission to one Narain who passed away during the intervening period between her first deposition and subsequent recall for further clarifications of the Court; *suo motu* 8 years after the deposition was recorded.

5. Learned counsel submitted that neither PW-1 nor PW-2 identified either of the accused. Serious exception was taken to the conduct of the proceedings by the trial court in this respect. It was urged that even though in the first instance PW-1 had deposed lack of knowledge to identify either accused and had not done so the Judge who recorded the statement subsequently *suo motu* after hearing the arguments and reserving the matter for judgment, took great pains in putting leading questions to the witnesses in order to elicit a favorable reply. This, argued learned counsel, lead to complete miscarriage of justice and the trial court, through the impugned judgment erroneously concluded that PW-1 and PW-2 not only knew the accused (appellants) but were able to identify them and that PW-2 had heard the accused speaking to the accused when she telephoned him on the night of 27.08.2002.

6. It was urged that similarly, the deposition of PW-6 could not have been relied on. He had, in the examination and cross examination conducted in 2003 itself, contradicted his earlier version. When he first deposed, he admitted seeing the accused outside the premises, in the marketplace at 9:30 PM**,** and did not say that he saw them with the deceased. Two months later, he deposed – again in the examination in chief, that the accused had stayed back with the deceased, when the witness left, and that he saw the deceased bolting the door from inside. Yet again, when he was recalled and examined 8 years later, the witness admitted to going to the premises at 11.00 AM in the morning, and that the police had been informed – all of which were contrary to the basic prosecution case. The witness was, according to the counsel, clearly introduced with a view to somehow implicate the Appellants as the offenders. It was further argued that the testimony did not explain why the accused had gone to buy subzi; more importantly, according to counsel, there was no explanation why the police did not use the key- which had

admittedly been thrown near the bushes, to open the locked premises, and why it had to be forced open, by breaking the lock.

7. It was urged that the Trial Court's reliance on the finger prints, and other so-called recoveries was misplaced. Here it was argued that the deceased's relatives had not mentioned that any money was missing; further, even according to the prosecution story, the accused were working in the premises. Therefore, that some prints were found, could not be considered an incriminating circumstance. Also, counsel urged that apart from the testimony of one police witness, who mentioned about his allegedly lifting chance prints, no evidence was led to establish as to when, and who took them to the FSL for the finger-print expert's opinion.

8. Counsel for the Appellants also argued that the Trial Court further erred in not noticing that the so-called intimidating letters, produced by the prosecution during the trial, were fabrications. The prosecution's effort to connect those documents with the accused was unsuccessful, since the handwriting expert clearly gave an opinion that the sample writings of the Appellants did not match with the handwriting in the letters.

9. The learned APP argued that the last seen evidence of PW-6 was natural, and there were no contradictions, or material discrepancies between his testimony and that of the others. It was submitted that even if the testimony of PW-2 were to be discarded, the fact remained that PW-6's credibility could not be impeached in any significant manner, during his cross examination. It was argued that even if the court were not to look into the testimony recorded during the re-examination of this witness 8 years later, the circumstance that he did not state everything on the first date of his examination in chief could not be fatal. Elaborating on this, the APP argued that as the son of the deceased, the witness was emotionally overwhelmed – a fact recorded during the Trial Court proceeding, and his

examination in chief was deferred. On the subsequent date, he clearly deposed having seen the accused staying back with the deceased, when the witness left for home. He also deposed to having seen the deceased shutting the main door of the restaurant premises, where he lived, and the accused staying back with him. At that time, he even noticed that one of the accused had some liquor bottle with him. It was submitted that this witnesses' testimony was proved by documentary evidence, regarding PCR intimation to the police, the arrival of the crime team, forcing open the lock, and lifting of finger prints.

10. The learned APP submitted that the prosecution proved the involvement of the accused, because after their arrest, recoveries of the deceased's belongings, such as a mobile phone and a gold ring, were made, which were seized and produced during the trial. These articles were within the special knowledge of the accused Bhure, who led the police to the place where they were hidden, i.e village Mahbhawati ka Pura, in Agra District of UP. The seizure memo, Ex. PW-14/D, was duly proved.

11. Learned counsel also submitted that the prosecution had proved that the accused's finger prints were lifted from the spot; the testimonies of PW-26 and PW-29 together with the report, Ex. PW-29/A proved that the accused Bhure's prints matched with what was found at the spot. Having regard to the seizure of stolen articles, the recovery of the knife, which according to the doctor, was sufficient to cause the injuries found on the deceased, it was argued, that the findings of the Trial Court could not be impeached.

12. Before discussing the merits of the appeal, and the rival contentions of the parties, this court considers it essential to deal with a disturbing issue. The incident which was the subject matter of the prosecution occurred on 28.08.2002. The charges were framed, and the trial commenced in 2003. By that year end, the

testimonies of 11 prosecution witnesses were recorded. The records reveal that on innumerable dates, the prosecution could not produce witnesses, or the prosecutors appointed to conduct the proceedings were absent. On some occasions, the presiding officers were not present. The case was transferred and assigned (for unknown reasons – presumably administrative, on account of transfers of presiding judicial officers) at least on three occasions. As on 03-08-2005, 19 witnesses' statements had been recorded. For almost two years, there appeared to be a lull; on 23-07-2007, the testimony of PW-21 was recorded by the Court. By then, the accused appear to have exhausted their financial resources; an *amicus curae* was appointed to assist them. Also, twice their request for bail was rejected. The case was again transferred to the District Judge, Rohini, on 03-12-2007. By then, 2 more prosecution witnesses' testimony had been recorded. In all 23 witnesses' depositions were recorded by the court, till end 2007. In 2008, on three dates, police witnesses, who were members of the Delhi Police, were not present. A doctor, cited as witness, had left his employment. On 20-10-2008, the testimony of PW-28 was recorded. After the Court had concluded recording testimonies of all witnesses, an application was filed for introducing a finger print expert, as a witness. Though it was opposed, the court granted it, on 28-03-2009. The accused had moved an application for recall and cross examination of PW-4, PW-18, PW-19 and PW-29. That application too was allowed, and they were cross-examined and discharged on 05-12-2009. The prosecution yet again sought for the examination of two medical and expert witnesses who had been "inadvertently" left out earlier. The Trial Court allowed the application on 25-01-2010. Arguments were later heard, after the examination of witnesses. The court, by its order dated 19-01-2011, felt that some clarifications were necessary from PW-1 and PW-2; according to it, the latter was a material witness. After they were summoned, their additional statements were recorded on 28-02-2011.

13. We felt it necessary to recount facts mentioned above, because they reveal the extent of delay which occurred in conclusion of the trial. The prosecution lackadaisically pursued the case; on four occasions the case was transferred to a different court or presiding judicial officer. As if these were not enough, the prosecution sought to introduce witnesses even after 7 years of the incident, and more than 4 years after the trial commenced. The court not only allowed this request, it chose to recall witnesses, for "clarification" almost 9 years after the crime had occurred. All these contributed immensely in delaying the trial. The accused continued in custody for nearly 9 years; the judgment was delivered on 27-08-2011, exactly 9 years after the incident.

14. PW-1 Kaushalya, in her deposition deposed to having returned home and not going back to the crime scene, after seeing her father's body. She was cross examined by the prosecution, with the leave of court, and she denied having gone back to her mother and brothers; she also denied any knowledge of what statement had been given by her to the police. She stated – in the reply to leading questions by the prosecution- that she and her family members felt intimidated by six letters, allegedly written by the accused. The witness, after her recall by court on 28-02-2011 (her last examination having been conducted in March, 2003) could not specifically identify the accused; she claimed having seen them frequently in her father's restaurant, though she did not know if they were employees. She also deposed about having gone to her father's restaurant at night; her deposition also showed that the deceased seldom left the restaurant, and used to go home, where his family lived, only to collect rent from the tenants to whom portions of the premises were let out. The public prosecutor confronted her with the previous statements, made during investigation. In this regard, the aspects on which she was confronted was whether she went back with her relatives, to the scene of crime,

after seeing the body of her father, whether the door had been forced open, and whether she went to her father's place at 12:30 PM that day. The important fact which emerges from her testimony is that she never mentioned the accused, in her deposition of March, 2003; she did not even identify them, nor was asked to do so, in the leading questions put to her by the prosecution, with the permission of court.

15. PW-2 Mamta claimed, in her first deposition, to have been close to the deceased; she used to telephone him, frequently; he too used to call her. She deposed to having heard voices, on the night of the incident (27-8-2002) when she thought that the deceased's sons were with him in the restaurant. However, she also deposed that the voices were that of the accused. She deposed to having telephoned again in the morning of 28-08-2002, and that it was not attended by the deceased, but by some policeman. She claimed that she had a mobile phone, from which she used to place calls to the deceased. However, she was unable to recall its number. After her recall by the court, and re-examination, 8 years later, she deposed to having been married to one Narain, who was an alcoholic, and who used to beat her; she lived separately from him. Narain died some 4-5 months after the incident (the death of Ramchander). She disclaimed to knowing or being acquainted with the deceased, and later clarified that she had known him 2-3 years before his death. This contradicted her statement that she had known him for one year before his death. In her statement made in court, during re-examination, she mentioned for the first time that Narain objected to her going to the deceased's hotel; he also apparently objected to Bhura visiting her once, and she deposed that Narain had beaten her for that. She also deposed having told the court previously that when the deceased called her, she could:

> *"hear voices from the other side. The said voice was of his son who used to sit on the restaurant. I asked Ram Chander whose voices it was, he said it was of Bhura and Mahesh though I thought the voice was of his son who*

used to sit in the restaurant since I heard his voice when I used to go to the restaurant. When I asked him further the phone got disconnected. I did not called again. I have never heard the voice of Mahesh previously but I had heard the voice of Bhura previously since he had even come to my house."

In cross examination, she admitted that the deceased used to share his personal problems with her, and confided about his sons fighting with him over property, and suspecting him of having a relationship with her. The Trial Court also recorded as follows:

> *"**On court question** There was no dispute between uncleji and his sons in so far as affairs of the restaurant were concern, the dispute was only with regard to the house. It was only when there was some dispute between uncleji and his sons that he used to say that his sons want him to die so that they can get the property earlier.*
>
> *It is correct that uncleji was so much harassed by his sons that he used to reside separately in the restaurant itself. He never told me that the accused Bhura and Mahesh ever troubled him or had any dispute with him.*
>
> *It is correct that I cannot certainly say if the voice of Bhura was also heard on the telephone since there were large number of voices and the phone was disconnected. Vol. the voice of the younger son I could identify. I had mentioned that the voice of Bhura was also heard because it appeared to me that one of the voices was of Bhura. Vol. But I am not sure."*

16. PW-5 testified that his office was near that of the deceased. He stated that the deceased's restaurant mostly sold cold drinks, and was frequented by couples and that it had a dubious reputation. He also deposed that the deceased did not have cordial relationship with his sons, and that PW-2 Mamta appeared to be close to him.

17. PW-6 was the most crucial witness to the prosecution's "last seen" theory. He claimed to be an unemployed son of the deceased; initially, in the examination in chief on 26-09-2003, he deposed having gone to the restaurant, and being told

by the deceased that Mahesh and Bhura had gone to get *"subzi"* from the market. According to him, Mahesh came back, and inquired about Bhura; later Mahesh left. The witness too, left, and later saw Mahesh and Bhura near the A-1 block. The Trial Court records would reveal that this witness was not examined on the next date, i.e. 21-10-2003; instead the examination in chief of PW-7 was recorded. The examination in chief of the witness PW-6, was continued two months later on 07.11.2003; he then claimed having seen both the accused with the deceased, at the time he left the premises, and that the deceased shut the restaurant door from inside; at that time, the accused were with him. Again the further examination of this witness was deferred. Finally, it was concluded on 21-12-2003. He deposed that the deceased had told that he was expecting payments from someone, and that the jewelry and other valuables were kept in the premises. He says that when he went back the next day, the door was locked from outside and the key was thrown near the bushes. He was cross examined about the recovery, by the prosecution, with court's permission; during that he denied that blood stained clothes were recovered from Mahesh's possession. The mobile phone, said to have been recovered, too could not be produced in court. He deposed in cross examination, that:

> *"I was at my house in the morning hours on 28-8-2002. On 28-8-2002 my brother Nirmal met me at the residence and informed about the death of my father. I alongwith my mother and Nirmal (brother) went to the restaurant at about 11 AM on 28-8-2002. There was no response by my father despite repeated calls. Many persons from the neighbour hood had collected at the restaurant. My brother Nirmal had given a phone call to the police.*

He deposed that:

> *"I had disclosed to the police that accused Bhura was working at Japanese Park, Rohini, Sec 10, and the accused Bhura arrested on this information.*

> *After 2/3 days of the murder of my father I was taken by the police officials at Keshav Puram (PS) and I was beaten by the policemen accusing me of murder. The accused Bhura and Mahesh were present in the PS at the time when I was taken to the PS. The accused were beaten at the PS and they acknowledged that they had committed the murder. I had identified both the accused at the police station."*

The prosecution was allowed to put leading questions to this witness; he deposed not having witnessed the recovery of blood stained clothes from Mahesh's premises, pursuant to his disclosure statement.

Time when the body of the deceased was recovered

18. The PCR recording, which is the earliest about reporting of the crime in this case, concededly was at 1:15 PM. However, apart from that objective fact, there is considerable variation in the testimonies of the witnesses. PW 1 first deposed that she went to Sangam Restauarant at night. However, she later clarified that she went at 12.30 in the afternoon. This witness had originally stated that she had not returned with her brothers and mother to the crime scene the day the body was discovered. She later stated however, that she had returned with them.

19. PW 7's version is inconsistent with that of PW 1. This witness deposed that they entered the premises at about 10.30 AM. PW 7 also stated that they immediately contacted the police. PW 9 testified, however, that the call came only at 1.14 PM; this was supported by PW 16. Accordingly, PW 4 received the wireless flash message at 2 PM, to which PW 4 testifies. Thus, there is incongruity as regards the chronology of events. PW 1 resiled from her original statement that she went at night. Even if the timing she subsequently deposed to were to be accepted, it is inconsistent with PW 7's statement. The Trial Court has not appreciated this inconsistency.

20. Now, the crime team report undoubtedly mentions that inspection of the site took place till 02:45 PM on 28-08-2002. However, despite apparently recording the statements of PW-6 and PW-1, as well as other material witnesses, and despite identification of the body, a request for post-mortem was made only on 29-08-2002. Most importantly, there is no evidence to suggest that compliance with the mandatory procedure indicated under Section 157 Cr. PC was resorted to in this case at all. All these aspects would not have had any impact, but for the conflicting evidence as to when the body was first seen; the different times indicated by prosecution witnesses, PW-1, PW-6 and PW-9, i.e. 10:30AM, 11:00 AM, and 12:30 PM, and the prevarications by these witnesses, as well as *inter se* conflicts between their testimonies, give rise to the suspicion that the body was sighted in the morning and the crime was reported much later. It is to avoid such circumstances that Parliament has mandated the police to intimate about such crimes, at the earliest point in time.

21. It is no doubt a fact that failure to comply with Section 157 would not by itself constitute a fatal infirmity to the prosecution case. Yet, one cannot but admit that this casts some suspicion on its story, and compels the court to exercise caution in dealing with the other materials, because the possibility of introducing witnesses, or materials, or otherwise tampering the investigation, cannot be entirely ruled out. In this case, the lack of explanation as to when the special report was sent to the magistrate, has to be seen in the context of the reporting of the incident; concededly the body was found, at around 10.30 or 11.00 AM; the information, however, was given about two hours later. This is also strange and curious, because PW-7 was a constable employed in the Delhi Police; he claims to have informed the police by telephone, after being told about the discovery of the body, by PW-1, his sister.

The last seen circumstance

22. PW 6 testified that both the accused were employees engaged by the deceased. However, on 28.08.2002, PW-6 also disclosed to the police that the accused Bhura was working at another location (Japanese Park, Rohini, Sector 10). This led to Bhura's arrest. PW-2 also testified that both accused were employed at Sangam Restaurant, though she could not identify Mahesh and only identified Bhura because he had been to her house previously. On being questioned as to the purpose of the visit, she was unable to furnish any reason ("*just like that*"). It is highly improbable that PW-2, who claims to have been visiting the restaurant regularly, could not recognize the employees of the restaurant itself. This is a strong circumstance, because the accused, according to the prosecution were working in the restaurant, and there could not have been any confusion about their identity. Similarly, PW-1 was unsure about the identity of the accused, when she was examined, in 2003. The record does not reveal that she identified either of them. PW 17 testified that Mahesh was a tenant in his room at Rs. 1000/- PM, along with his family. He also testified that Bhura used to stay with Mahesh in the said room.

23. PW 5, a resident of the locality, however, has testified that the restaurant sold only cold drinks. This is inconsistent with the version that the accused were employees, and corroborates PW 17.

24. PW 6 testified that he had taken *chapattis* and pickle to the deceased's restaurant at 9.30 PM. Subsequently, the deceased went out to purchase *subzi*. PW-6 left only after the arrival of the deceased from the market and testified that the deceased and the two accused were locked inside at the time of his departure. However, PW-2 and the deceased spoke to her on the phone at 10 PM. It is unclear whether the deceased could have gone to the market and returned, and PW-6 could

have left in a short interval of 30 minutes. There is some absence of clarity here, as PW 6's earlier testimony also indicates that he *left* the premises at 9.30 PM. Further, PW-2 stated that she telephoned the deceased in the morning, when the call was received by a police officer. However, the mobile phone of the deceased was apparently recovered from the house of the accused Bhura.

25. PW-6 consistently deposed that the reason for his visit on 27-08-2002 to his father, was to give him food, as he used to live separately from the family. Yet, inexplicably, the deceased wished to send the accused to get *subzi.* On the first date of his examination in chief, this witness ended his deposition by saying that he left the restaurant around 09:30 PM, and that when he left, he saw the accused near the A Block junction. He did not depose having seen them in the deceased's company; he did not also say that they used to sleep in the premises. Two months, and after two adjournments, this witness stated that when he left the restaurant, at 11:00 PM, the accused were in the premises, and that the main door was bolted by the deceased; apparently the witness had seen one of the accused with a liquor bottle. He became aware of his father's death the next morning. He noticed the key to the restaurant premises, near the bushes. This witnesses' silence to mention that the accused were present with the deceased, and that he last saw them, and his recollection in this regard, throw some doubt as to the veracity of his deposition. If one were to view this in the context of his statement during cross examination about having gone to the restaurant the next morning at 11.00 AM after being told by PW-7 about his father's death, and that a large number of people were gathered there, the matter assumes some seriousness.

26. The witness clearly stated, in the cross examination, that he was detained by the police, and that then, he saw the accused in the police station. This is at variance with the prosecution story about the arrest of Mahesh, on 04-09-2002, and

the arrest of Bhura, on 07-09-2002. Further, none of the prosecution witness deposed having recorded the statement of this witness. Inspector Om Prakash, whose name finds frequent mention, in the deposition of several witnesses, apparently had recorded this witness's statement; he too was not examined. Lastly, the witness did not support the prosecution version regarding recovery of blood stained clothes, at the behest of the accused Mahesh.

27. It has been repeatedly held that the "last seen" circumstance can be relied on by the prosecution, when the witnesses are credible about that fact, and the time gap between that circumstance, and the death in the given case, is so small as to rule out the possibility of anyone else's involvement. When the prosecution relies on evidence of the deceased having been last seen in the company of the accused, such cases are a *species* of circumstantial evidence based prosecutions. In such "last seen" prosecutions, the court has to additionally be aware that apart from proof of all the circumstances, and the equally rigorous rule for proof of link of the chain of circumstances, this theory comes into play only when the time gap between the Appellant and the deceased being last seen together alive and the time of death is so small that the possibility of anyone else being the author of the crime is impossible (Ref *State of U.P. v. Satish*, AIR 2005 SC 1000; *Malleshappa v. State of Karnataka*, AIR 2008 SC 69).

28. This court is of opinion that the Trial Court rather uncritically accepted the prosecution's version of the last seen theory. The lack of proof of having forwarded the special report under Section 157, Cr PC to the magistrate, the tenuous evidence of PW-6, regarding the last seen circumstance itself (earlier not stating about having seen the deceased with the accused, and two months later improving on that omission, stating – contrary to the record about having been made aware about the father's murder in the morning, and that PW-7 reported it)

and the further statement about his having been detained under suspicion, by the police, do not inspire confidence in his testimony.

29. The case of the prosecution, thus, is not proved beyond reasonable doubt by reliance on the last seen theory. The last seen theory is that '*no third person excepting the accused*' could have committed the crime, which '*inescapably lead[s] to the conclusion that in all human probability, it was the accused and no one else*' who committed the crime *Prabhakar Jasappa Kanguni v. State of Maharashtra*, AIR 1982 SC 1217). In any case, the last seen theory does not justify a finding of guilt by itself (*State of UP v. Dr. Ravindra Prakash Mittal*, AIR 1992 SC 2045). We therefore hold that the Trial Court erred in holding that the last seen circumstance was proved in this case.

Recovery of mobile phone and a gold ring

30. The original *rukka* in this case, did not contain any information about a missing mobile phone or gold ring – borne out by the testimony of PW 3 Constable Raghunath Parsad. A police party was led by Bhura to his sister's house. The prosecution alleged that the gold ring and the deceased's mobile phone were recovered there, in the presence of an independent witness PW 25. Subsequently, however, PW 25 (Ram Babu) stated that he was bed-ridden and was made to sign on a blank paper by the police on a threat he would lose his Government job. PW 27 (Constable Ajay Singh) and PW 14 (Constable Dharam Datt) were in the police party and they corroborated the case of the prosecution. However, the accused, in their Section 313 statements, have stated that the phone was taken by the police, and was planted. Indeed, no evidence of the missing phone or golden ring was provided earlier, till *before* its discovery.

31. Apart from these factors, the Court notices that the prosecution apparently had other suspicions- evidenced by the production of call details regarding the

mobile phone of the deceased. These were produced by PW-18, and marked as Ex. PW-18/A. There is no discussion of this document; it did not yield any pointers about the involvement of anyone. Interestingly, the relatives of the deceased had not furnished any details regarding the IMEI number of the mobile phone which was ultimately seized; no date of its acquisition, nor any documentary proof such as bill, or invoice, to prove that the mobile phone seized belonged to the deceased, was brought on the record. Even the make or model of the mobile phone (a Nokia phone instrument) was not shown, or recorded during evidence. Similarly, the gold ring, which was allegedly recovered, was not shown to have any distinctive mark to distinguish it from other such articles.

30. The absence of any independent witnesses, and in fact, the allegations by PW 25 that he was threatened, and the other features discussed above, make such recoveries unreliable.

Chance Prints found at the site

31. Chance fingerprints were taken from the scene of the crime. These matched the fingerprints of both the accused. However, the prosecution case is that the accused used to work at the restaurant; in such a case, retrieval of fingerprints from such a routine place is not incriminatory. Further, no finger prints from the murder weapon were taken. It was later explained that the blade and handle of the murder weapon had blood, thereby rendering it impossible to take samples. This fact, however, does not find mention in any statement recorded earlier. Instead, the presence of blood on the blade only was mentioned. Further, the evidentiary burden would lie on the prosecution to demonstrate that blood was present on the knife so as to make it impossible to retrieve finger print samples.

32. In view of the above discussion, we are of the opinion that the Trial Court could not have concluded that the recovery of chance prints from the crime scene was an incriminatory circumstance, in this case.

Other factors taken into consideration by the Trial Court

33. The Trial Court has relied on *Padala Veera Reddy v. State of Andhra Pradesh & Ors.*, 1989 (Supp) 2 SCC 706, and similar cases to reiterate established principles of conviction on circumstantial evidence. The Trial Court also cited a catena of cases for the proposition that a fake explanation forms the missing link for prosecution case. The Trial court then noted that the accused have not provided any explanation as to the cause of death, or the identity of the killers. This, however, amounts to a reversal of evidentiary burden. Only in instances where the Prosecution has established a fact to certainty, so as to invoke Section 106, Evidence Act, and *then* the accused is unable to explain the circumstances, can such an inference be drawn. Adverse inferences from the silence of the accused are not permissible. Further, the Court has stated discrepancies in the testimonies are only '*minor*'. However, these discrepancies and absence of corroboration highlight inconsistencies in the prosecution case as to the time of discovery of the body, the manner of its finding, the discovery of allegedly stolen items etc.

34. In the judgment of the Supreme Court, reported as *Gulab Chand vs. State of M.P.*, AIR 1995 SC 1598 where ornaments of the deceased were recovered from the possession of the accused immediately after the occurrence, it was held:

> *"It is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced. It has been indicated by this Court in Sanwat Khan vs. State of Rajasthan, AIR 1956 SC 54 that no hard and fast rule can be laid*

down as to what inference should be drawn from certain circumstances. It has also been indicated that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. A note of caution has been given by this Court by indicating that suspicion should not take the place of proof. It appears that the High Court in passing the impugned judgment has taken note of the said decision of this Court. But as rightly indicated by the High Court, the said decision is not applicable in the facts and circumstances of the present case. The High Court has placed reliance on the other decision of this Court rendered in Tulsiram Kanu vs. State, AIR 1954 SC 1. In the said decision, this court has indicated that the presumption permitted to be drawn under Section 114, Illustration (a) of the Evidence Act has to be drawn under the 'important time factor'. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case. In the instant case, it has been established that immediately on the next day of the murder, the accused Gulab Chand had sold some of the ornaments belonging to the deceased and within 3-4 days the recovery of the said stolen articles was made from his house at the instance of the accused. Such close proximity of the recovery, which has been indicated by this Court as an important time factor', should not be lost sight of in deciding the present case. It may be indicated here that in a latter decision of this Court in Earabhadrappa vs. State of Karnataka [1983 (2) SCC 330] (AIR 1983 SC 446), this Court has held that the nature of the presumption and Illustration (a) under Section 114 of the Evidence Act must depend upon the the nature of evidence adduced. No fixed time-limit can be laid down to determine whether possession in the recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand."

In the present case, apart from the lack of any particulars furnished to the police by the deceased's relatives, about the allegedly stolen articles, we also notice that the TIP was conducted after a considerable length of time, on 14-11-2002. The

prosecution had alleged that these were recovered on 12-09-2002, through seizure memo Ex. PW-14/D. There is no explanation as to why the TIP was conducted after a delay of two months. Furthermore, the articles allegedly stolen did not - as discussed earlier- bear any distinguishing mark or feature, nor were shown to be so valuable, as to be connected with the deceased. Therefore, the recoveries in this case could not have been given the kind of weightage that was accorded by the Trial Court.

34. So far as recovery of blood stained clothes from the accused's premises are concerned, all that the FSL report stated was that blood stains of a particular group could be discerned in the samples furnished to it. However, no attempt to connect the blood found, with the deceased's blood was made. The matching of blood grouping itself cannot be a decisive factor, because the prosecution had to lead further evidence in the form of the accused's blood group, and the deceased's blood group. This was concededly not done.

35. Before parting with this appeal, we note with anguish the manner in which the trial was conducted by one of the judicial officers, Dr. Kamini Lao. When the case was assigned to her court, after going through the records, the learned judge felt that even though prosecution witnesses' depositions had been closed, some of them had to be recalled, for clarification. Whilst this power of the court and the discretion exercised by the judge cannot be questioned – nor indeed are we doing so, since the Judge presiding over a trial has the authority to recall witnesses if the occasion warrants- what pains us is the tone and manner in which the examination of those witnesses was undertaken. For instance, on 28-02-2011, the learned judge asked PW-1, after her recall, whether she had seen any of the deceased's

employees; she pointed out to Bhura often, and even asked her if she had seen Mahesh, whom she pointed at. Earlier, she had not identified these two. Similarly, PW-2 was shown to PW-1 and was asked whether she could identify her. On 28-2-2011, again, during the course of PW-2's re-examination, by the court, as part of the clarifications sought by it, she was asked to identify the accused. She could not do so, despite going near where they were sitting. The court thereupon directed the accused to get up, and the witness was asked to specifically identify them. Such proceedings are not consistent with canons of a fair trial.

36. This court is conscious that the role of a judge in a criminal trial often requires the presiding officer to exercise vigilance in ensuring that the proceedings are fair, and the objective of arriving at the truth may occasionally call for an active approach. Courts involved in the criminal justice delivery system therefore, have to be sensitive to attempts to filibuster proceedings, or threats given to witnesses, and stamp out such practices. Equally, in the anxiety to do justice, the court should not fall prey to being seen as partisan, or as desiring a particular result. Public confidence and legitimacy in the judicial system depends on the assurance that the judge is an impartial arbiter, and indeed lives up to her (or his) oath to do justice without fear or favour. Therefore, the delicate balance between striving to do justice and not appearing anxious for a particular result – a phenomenon which undermines the perception of impartiality has to be maintained. We entertain no doubt that the judge in this case was impelled by all good reasons for acting in the manner that she did. Yet, in our view the line was strayed from, and the record would seem that the clarifications sought appeared to indicate a certain predisposition.

37. In view of the above discussion, this court is of the opinion that the impugned judgment of the Trial Court has to be set aside. The appeal therefore, succeeds, and is allowed. The Appellants shall be released forthwith, if not required in any other case.

(S.RAVINDRA BHAT)
JUDGE

February 27, 2012

(S.P. GARG)
JUDGE