

AFR
Reserved on : 03.04.2019
Delivered on : 11.09.2019

Court No. - 34

Case :- JAIL APPEAL No. - 4771 of 2017

Appellant :- Mukesh @ Murari

Respondent :- State Of U.P.

Counsel for Appellant :- From Jail, Ashok Kumar Yadav (A.C.)

Counsel for Respondent :- Syed Ali Murtaza (A.G.A.)

Hon'ble Sudhir Agarwal, J.

Hon'ble Rajendra Kumar-IV, J.

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This jail appeal has been filed by accused-appellant, Mukesh @ Murari through Superintendent of District Jail, Kannauj against impugned judgment and order dated 30.11.2016 passed by Smt. Preeti Srivastava, Additional District and Sessions Judge, Court No.2, Kannauj in Session Trial No. 340 of 2008, (State v. Mukesh and others), arising out of Case Crime No. 1020 of 2008, Police Station Kannauj, District Kannauj, under Sections 302 read with 34 IPC. By impugned judgment, accused-appellant has been convicted and sentenced under Section 302 read with 34 IPC for life imprisonment along-with fine of Rs.5,000/-. In the event of default of payment of fine, he has to undergo further two years simple Imprisonment.

2. Prosecution story, in brief, is that on 21.07.2008, PW-3 Kishori Lal submitted a written report Ex.Ka-2 in Police Station, Kannauj, stating therein that on 21.07.2008 at about 10:00 AM, he was informed by villagers that one dead body of an unknown person was lying in the filed of one Shovran Lal son of Pitam Singh , resident of Haibatpur Katra, Police Station Kannauj, District Kannauj.

3. PW-7 Sub Inspector R.V. Singh Chauhan, on the said information held inquest over the dead body of unknown person after nominating

punch witnesses and prepared inquest report Ex.Ka-6 and other relevant papers thereto; sealed dead body and sent for postmortem, got prepared photographs of dead body. He also collected one towel, one shirt of deceased, one pants of light blue colour, one under wear, one set of plastic sleeper and prepared fard Ex.Ka-1 thereof.

4. PW-5 Dr. Nanhoomal conducted postmortem over the dead body of unknown person aged about 25 years and found one ligature mark 32 x 4 cm around the neck as ante mortem injury. Doctor further opined that death was possible due to shock asphyxia as a result of strangulation on account of ante mortem ligature mark and three days prior to postmortem. He prepared postmortem report Ex.Ka-4.

5. PW-6 C.P. Rajkumar Srivastava converted the matter at crime no.1020 of 2008, under Section 302 IPC against unknown person on the basis of postmortem report dated 22.07.2008 and entry of the case was made in General Diary, copy whereof is Ex.Ka-5.

6. PW-8, Dayanand Singh the then Inspector In-charge of Police Station Kannauj, District Kannauj, on 22.07.2008 under took investigation of case crime no.1020 of 2008, under Section 302 IPC and commenced investigation, recorded statement of witnesses, visited spot and prepared site plan Ex.Ka-11. On 28.07.2008 he tried to know about the deceased.

7. On 05.08.2008, PW-1 Munnii Devi submitted a written report Ex.Ka-1 in Police Station Kannauj stating that his son Sunder Lal was taken by accused Mukesh @ Murari in the morning of 19.07.2008 from her house and since then he is missing. She came to know that a dead body of unknown person was found in the Village Haibatpur Katra and prayed that she may be permitted to see the clothes of dead body, so as to know where about of her son. She was shown photographs and clothes of deceased whereupon it was recognized to be of Sunder Lal.

8. PW-8 SI Dayanand Singh further recorded statement of PW-1 Smt.

Munni Devi, PW-4 Smt. Suman; Rajesh, Smt. Sarojini and Babu Ram (not examined); arrested accused Mukesh @ Murari and Shera, recorded their statements and after completing entire formalities of investigation, submitted charge-sheet against Moolchand, Shera and accused-appellant Mukesh @ Murari.

9. After taking cognizance of the offences, case being exclusively triable by Court of Sessions was committed to Sessions Court, where from it was transferred to Additional District and Sessions Judge, Court No.2, Kannauj for disposal according to law.

10. Trial Court framed charges on 06.12.2008 against accused persons Mukesh , Moolchand and Shera, under Sections 302 read with 34 IPC, which reads as under :-

"मैं बृजेश कुमार अपर सत्र न्यायाधीश कक्ष सं० २ कन्नौज में आप अभियुक्तगण मुकेश, मूलचन्द व शेरा को निम्न आरोप से आरोपित करता हूँ:-

यह कि दि. 19.7.08 की सुबह 20.7.08 की रात्रि तक किसी समय व स्थान हैबतपुर कचरा अन्तर्गत थाना कन्नौज जिला कन्नौज में आप लोगों ने एक राय होकर वादिनी श्रीमती मुन्नी देवी के पुत्र सुन्दरलाल की हत्या करने के सामान्य आशय के अग्रसरण में उसकी हत्या विपासन द्वारा की। इस प्रकार आप लोगों ने भा.द.सं. की धारा 302 सपठित धारा 34 के अधीन दण्डनीय अपराध कारित किया जो मेरे संज्ञान में है।

एतद्द्वारा मैं यह निर्देश देता हूँ कि उक्त आरोप में आप अभियुक्तगण का विचारण इस न्यायालय द्वारा किया जायेगा।"

"I, Brijesh Kumar, Additional Sessions Judge, Room No. 02, Kannauj charge you accused persons Mukesh, Moolchand and Shera with the following charges :-

01. That, from the morning of 19.07.08 to the night of 20.07.08, at some time and place Haibatpur Katra falling under Police Station- Kannauj, District- Kannauj; you people, with a consensus, in furtherance of your common intention of committing the murder of Sunderlal son of Shrimati Munni Devi- the complainant, committed his murder by Vipasan. In this manner you people committed an offence punishable under Section 302 I.P.C. read with Section 34 I.P.C., which is in my cognizance.

I, hereby direct that the trial of you accused persons for the aforementioned charge shall be conducted by this court. "

(English Translation by Court)

11. Accused persons denied the charge levelled against them, claimed false implication, pleaded not guilty and claimed trial.

12. Other accused persons, namely, Moolchand and Shere died during trial and their case stood abated as mentioned in para 8 of the judgement of Court below.

13. In order to substantiate its case, prosecution examined as many as eight witnesses, out of whom PWs 1, 2 and 4 are witnesses of fact and rest are formal witnesses.

14. PW-1 is mother of deceased Sunder Lal, she proved last seen theory and written report Ex.Ka-1 which was submitted by her in Police Station concerned. PW-2 Gauri and PW-4 Smt. Suman, sisters of deceased Sunder Lal also proved last seen theory. PW-3 is a Village Chaukidar who submitted report Ex.Ka-2 informing Police about the dead body. PW-5 is Doctor who conducted postmortem over the dead body of unknown person, later identified as Sunder Lal and prepared postmortem report Ex.Ka-4. PW-6 C.P. Raj Kumar converted case under Section 302 IPC against unknown person on the basis of postmortem report. PW-7 SI R.V.

Singh Chauhan held inquest report over the dead body of deceased and prepared inquest report and other relevant papers. PW-8 Dayanand Singh, the then Inspector In-charge of Police Station Kannauj conducted investigation and submitted charge-sheet.

15. Subsequent to closure of prosecution evidence, statement of accused under Section 313 Cr.P.C. was recorded by Trial Court, explaining entire evidence and other incriminating circumstances. In the statement, accused-appellant gave an usual answer by submitting that entire story of prosecution was wrong; statement of witnesses are wrong and he desired to lead evidence. Further in response of question no.15, he stated that he is a labour, his parents are old and he was implicaed falsely in the present case by Police because one day he refused to work of Police without money.

16. He examined Smt. Ram Sarojini wife of Sher Singh @ Shera as DW-1. She deposed that she has contested an election of Member of Block Development Council in 2005. Rakesh son of Radhey Shyam contested against her but she won the election, due to which Rakesh had grudge with her. At that time Constable Raj Bahadur used to visited the house of Rakesh. Her husband was taken to Police Station by Constable Raj Bahadur stating that some inquiry is to be made whereupon she also went to Police Station with her husband. Her husband was detained in Police Station saying that he would be free by evening but he was kept about four days and falsely challaned thereafter.

17. Trial Court, after hearing learned counsel for both the parties and considering entire evidence (oral and documentary) led by prosecution, found accused-appellant guilty of committing an offence of murder of Sunder Lal punishable under Section 302 IPC, convicted and sentenced, as stated above.

18. We have heard Sri Ashok Kumar Yadav, learned Amicus Curiae for

appellant and Sri Syed Ali Murtuza, learned AGA for State and travelled through record with valuable assistance of learned counsel for parties.

19. Learned counsel for accused-appellant assailed impugned judgement and order of conviction and sentence, took us through the record and advanced following submissions :-

- i. No body has seen accused-appellant committing murder of Sunder Lal.
- ii. Case rests on circumstantial evidence. PWs 1, 2 and 4 are the member of same family and related to deceased. They are only witnesses of last seen.
- iii. There is no other evidence direct or circumstantial to connect accused-appellant with the present crime.
- iv. There is no motive to accused-appellant to commit murder of Sunder Lal.
- v. As per prosecution case, dead body of Sunder Lal was allegedly lying in the field of one Shovran Lal resident of Haibatpur Katra, Police Station Kannauj. There is no missing report of victim. Body of deceased was identified after two weeks from his murder by PW-1 on the basis of photographs and his clothes along-with other articles.
- vi. There is no complete chain of circumstantial evidence leading to guilt of accused-appellant.
- vii. There are major contradiction in the statement of witnesses rendering prosecution case doubtful and unreliable.
- viii. Prosecution failed to establish its case beyond reasonable doubtful and accused-appellant is entitled to benefit of doubt.

20. Learned AGA opposed the submissions and submitted that there is no reason to prosecution to falsely implicate or connect accused-appellant with the present crime like murder; deceased Sunder Lal was identified by her mother by seeing his clothes and other articles; PWs 1, 2 and 4 established last seen theory that they have seen victim last in the association of accused-appellant; it is only the accused-appellant who can offer explanation what happened with the victim and who murdered him; accused-appellant has not offered any proper explanation; accused-appellant is only and only person who committed murder of Sunder Lal; hence Trial Court has rightly convicted accused-appellant.

21. Although murder of Sunder Lal could not be disputed from the side of defence but according to his Advocate for accused-appellant, he is not responsible for the death of Sunder Lal. Evidence of PW-3 Kishori Lal, PW-7 SI R.V. Singh Chauhan and PW-5 Dr. Nanhoomal established that dead body of unknown person, later on identified as Sunder Lal was found in the field of one Shovran resident of Haibatpur Katra and he was assassinated by some one by compressing his neck and ante mortem ligature mark was found on his neck.

22. Thus the only question remains for consideration is "whether accused-appellant has committed murder of Sunder Lal or not and Trial Court has rightly convicted him as stated above or not?"

23. It would be appropriate for us to consider, briefly, statements of witnesses of prosecution as well as the rival submissions of learned Counsel for parties.

24. PW-1 Munni Devi deposed that on the fateful day at about 08:00 AM, she was present in her house along-with her daughter Gauri and her son Sunder Lal; accused-appellant Mukesh came and took her son Sunder Lal on the pretext of work (majdoori); when her son refused to go with him, accused-appellant assured to come after some time and accused-

appellant and her son went together; thereafter victim did not come back to his house; in the morning, she contacted accused Mukesh and asked about her son Sunder Lal (victim), who answered that he left him (victim) near Phoolmati Mandir; Mukesh disappeared thereafter; after three days, she came to know that one dead body was found in the field in Haibatpur Katra; she identified dead body as her son Sunder Lal in Police Station on seeing photographs and his clothes; and she admitted in her cross-examination that there was no enmity between both.

25. PW-2 Gauri, happens to be sister of deceased, deposed that on the day of incident at about 08:AM, she (Gauri), her mother (PW-1 Munni Devi) and victim (Sunder Lal) were in the house; accused-appellant Mukesh came to her house and took victim with him on the pretext of work (majdoori); when he did not come back, she and her mother searched him every where but after a drastic search victim was not found; in the same night and next morning, he asked accused-appellant Mukesh about his brother but he answered that he had left victim near Phoolmati Mandir; three days after, she came to know that a dead body was found in Haibatpur Katra, she went to Police Station and saw photographs, and Jeans pants, green shirt and black sleeper of her brother and recognized them to be of his brother Sunder Lal; Police told him that legs of body were tied with one towel which was shown to him, and she recognized it to be that of Mukesh.

26. PW-3 Kishori Lal, Chaukidar of Village Haibatpur, deposed that he has submitted a written report Ex.Ka-2 stating that a dead body was one unknown person was lying in the field of one Shovran situated at Haibatpur Katra.

27. PW-4 Smt. Suman, sister of deceased Sunder Lal, deposed that she was living along-with her husband and children in the house of her mother; deceased Sunder Lal was her brother; on the fateful day at about 07:30 AM, accused-appellant Mukesh took his brother on the pretext of

work (majdoori) in his presence; at that time her mother, sister Gauri and Sita were also present in the house; when his brother Sunder Lal did not return to his house in the evening, her mother went to the house of accused-appellant Mukesh but neither he (Mukesh) nor his brother (Sunder Lal) was found there; third day when she came to Saraimeer, she saw accused Moolchand near water tank; about 15 or 16 day, after the incident, she came to know that a dead body of unknown person was found in Haibatpur Katra, then she, her sister Gauri and her mother went to Police Station along-with Santosh and Babu, and seeing the photographs and clothes of her brother; they identified it to be of victim Sunder Lal.

28. PWs 1, 2 and 4 are the witnesses of last seen, who have seen the victim last in the company of accused-appellant. There is no other evidence to connect accused-appellant with the present crime. Evidently from the date, victim is said to have been taken by accused-appellant on the pretext of work (majdoori). PW-1 appeared in Police Station first time after two weeks of incident while PWs 2 and 4 stated that they came to know about the dead body of one person in Haibatpur Katra after two or three days.

29. In a case, which rests on circumstantial evidence, law postulates, twin requirements to be satisfied. First, every link in chain of circumstances, necessary to establish the guilt of accused, must be established by prosecution beyond reasonable doubt; and second, all circumstances must be consistent only with guilt of accused.

30. In the case in hand there is no eye witness of occurrence and case of prosecution rests on circumstantial evidence. There cannot be any dispute as to the well settled proposition that the circumstances from which the conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established. The facts so

established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

31. In **Hanumant v. The State of Madhya Pradesh, AIR 1952 SC 343**, as long back as in 1952, Hon'ble Mahajan, J. expounded various concomitant of proof of a case based purely on circumstantial evidence and said:

*"... circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved..... it must be such as to show that **within all human probability the act must have been done by the accused.**"*

(emphasis added)"

32. In **Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063**, Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person.

33. In **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622**, Court while dealing with a case based on circumstantial evidence, held, that onus is on prosecution to prove that chain is complete. Infirmary or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

*"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The **circumstances concerned 'must or should' and not 'may be' established.***

*(2) the facts so established should be consistent only with the **hypothesis of the guilt of the accused**, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

*(5) there must be a **chain of evidence so complete as not to leave any reasonable ground** for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

(emphasis added)

34. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh**, AIR 1989 SC 1890, Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

*(1) the **circumstances** from which an inference of guilt is sought to be drawn, **must be cogently and firmly established;***

*(2) those circumstances should be of a **definite tendency unerringly pointing towards guilt of the accused;***

*(3) the circumstances, taken cumulatively; should form a **chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;** and,*

*(4) the **circumstantial evidence** in order to sustain conviction must be **complete and incapable of explanation** of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

(emphasis added)

35. In **C. Chenga Reddy and Others v. State of Andhra Pradesh**,

1996(10) SCC 193, Court said:

*"In a case based on circumstantial evidence, the settled law is that the circumstances from which the **conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature.** Moreover, all the circumstances should be complete and there should be **no gap left** in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. "* (emphasis added)

36. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45** Court quoted from Sir Alfred Wills, "Wills' Circumstantial Evidence" (Chapter VI) and in para 15 of judgment said:

"(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt,

(5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."

(emphasis added)

37. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in **Shivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713** and **Tomaso Bruno v. State of U.P., 2015(7) SCC 178.**

38. In **State of U.P. vs. Satish, 2005(3) SCC 114**, Court said :-

"The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when 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. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

39. In **Jaswant Gir v. State of Punjab, 2005(12) SCC 438**, Court also said that in absence of any other links in chain of circumstantial evidence, it is not possible to convict appellant solely on the basis of last seen evidence, even if, version of witnesses of fact in this regard is believed.

40. It is settled that it is not prudent to base conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of prosecution in its entirety and keeping in mind circumstances that precede and follow the point of being so last seen.

41. In the present case, only evidence against the accused-appellant to connect him with the present crime is last seen theory as set forth by PWs 1, 2 and 4. There is no evidence or any other link circumstantial leading to guilt of accused-appellant. Evidence of PWs 1, 2 and 4 also inspires no confidence for the reasons that there are major contradiction in their evidence. PWs 1 and 2 talk of knowledge of dead body in Haibatpur Katra after three days of his disappearance while PW-4 deposed that after 14-15 days from disappearance of his brother, she came to know that one dead body was found in Haibatpur Katra thereupon she along-with her mother and sister went to Police Station and recognized photographs and other articles belonged his brother Sunder Lal. Evidently PW-1 went to Police Station concerned two weeks after disappearance of her son and submitted written report Ex.Ka-1. There is no plausible explanation as to why missing report of victim was not got registered in Police Station earlier. Other links of circumstantial evidence are completely missing.

42. Considering the entire evidence of last seen theory and legal proposition discussed above. In our view, complete chain of

circumstantial evidence could not be established. Other point raised by learned Counsel for accused-appellant need not be discussed.

43. In our considered opinion, we are of the view that prosecution could not prove complete links of circumstantial evidence beyond reasonable doubt against the accused-appellant and Trial Court committed an error in holding accused-appellant guilty under Section 302/34 IPC ignoring the missing link of circumstantial evidence and material contradiction in the statement of PWs.

44. In view of aforesaid discussion and legal preposition, **present jail appeal is hereby allowed.** Impugned judgment and order dated 30.11.2016 passed by Smt. Preeti Srivastava, Additional District and Sessions Judge, Court No.2, Kannauj in Session Trial No. 340 of 2008, (State v. Mukesh and others), arising out of Case Crime No. 1020 of 2008, Police Station Kannauj, District Kannauj, under Sections 302 read with 34 IPC is set aside.

45. Accused-appellant is acquitted of charged levelled against him. He shall be released forthwith, if not wanted in any other crime.

46. Keeping in view provisions of Section 437-A Cr.P.C., appellant is directed to furnish a personal bond and two sureties before Trial Court to its satisfaction, which shall be effective for a period of six months, along with an undertaking that in event of filing of Special Leave Petition against instant judgment or for grant of leave, appellant on receipt of notice thereof shall appear before Hon'ble Supreme Court.

47. Lower Court record along-with a copy of this judgment be sent back immediately to District Court concerned and also copy of this judgment be sent to Superintendent Jail concerned through District Judge concerned for immediate compliance and further necessary action.

48. Before parting, we provide that Sri Ashok Kumar Yadav, Advocate,

who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

Order Date :- 11.09.2019
I.A. Siddiqui