Reserved

Case :- CRIMINAL APPEAL No. - 4209 of 2013
Appellant :- Mustqeem
Respondent :- State of U.P.
Counsel for Appellant :- Rajesh Pathik,Mukesh Joshi
Counsel for Respondent :- Govt. Advocate

And

Case :- CRIMINAL APPEAL No. - 4003 of 2013
Appellant :- Smt. Khurseeda
Respondent :- State of U.P.
Counsel for Appellant :- Rajesh Pathik,Manish Joshi,Mukesh Joshi,S.K.A.Rizvi,S.M. Iqbal Hasan
Counsel for Respondent :- Govt. Advocate

Hon'ble Ashwani Kumar Mishra,J.
Hon'ble Rajnish Kumar, J.

(Per Ashwani Kumar Mishra, J.)

1. Appellants in these two appeals are the parents of deceased, who have been convicted for murdering their only daughter Rehana, under Section 302 read with Section 34 IPC vide judgment and order dated 12.8.2013, passed by the Additional District and Sessions Judge, Court No.6, Moradabad, in Sessions Trial No.439 of 2011 (State Vs. Mustqeem & Khursheeda) arising out of Case Crime No.538 of 2010, Police Station Asmauli, District Moradabad and sentenced to imprisonment for life alongwith fine of Rs.15,000/- each and to undergo three months' additional imprisonment on failure to deposit the fine.

2. Sharafat (PW-1) the Village Chowkidar of Village Mawai Thakuran informed the Station House Officer of Police Station Asmauli on 24.11.2010, by means of a written report (Exhibit Ka-1), that Rehana, aged about 15 years (hereinafter referred to as 'deceased'), daughter of Mustqeem son of Hameed Teli (hereinafter referred to as 'appellant no.1') has died due to

unknown reasons in the night of 23/24 November, 2010 and her dead body is lying in her house. Aforementioned report further states that he (PW-1) heard in the village that deceased had gone to her relatives place in Village Shahpur Sirpuda from where she returned alongwith a resident of the village namely Bhoora (PW-5), son of Mewaram Prajapati (PW-2), and was at her home and that matter is suspicious. Accordingly, necessary action be taken. The written information was entered in GD of concerned police station and is recorded as GD entry No.5 at 5.30 a.m. The scribe of the written report is Pooran Singh, the Village Pradhan (DW-2). On the basis of aforementioned information the inquest of the deceased was conducted.

3. Sub-Inspector Laxmi Shankar on receiving the aforesaid information reached the spot and found relatives of deceased alongwith other villagers to be present at the house of appellants. He thereafter proceeded to get the inquest (panchayatnama) of the deceased conducted. At the time of inquest certain injuries were found on the body of the deceased. However, no opinion could be given by panch witnesses regarding the nature of death i.e. whether the same is homicidal or suicidal. The concerned Sub-Inspector thereafter prepared the inquest report (Exhibit Ka-6) at 6.30 a.m. on 24.11.2010 at Village Mawai Thakuran itself. Having completed the aforesaid formality Sub-Inspector prepared the detailed report and dispatched the dead body for postmortem.

4. The postmortem report is Exhibit Ka-2. According to the autopsy surgeon the cause of death of deceased is asphyxia due to throttling. Age of deceased as per medical opinion was found to be 15 years. The autopsy surgeon found following four

ante-mortem injuries on the body of the deceased:-

> "(1) Multiple abraded contusion (3cm x 2cm Rt. side and 4 cm x 3cm Lt. side) just below the angle of mandible on both side of neck.
>
> (2) Multiple abraded contusion (3cm x 2cm) in the front of neck 6 cm above the sternal notch.
>
> (3) Abraded contusion 1cm x ½cm on the dorsum of Lt. wrist joint.
>
> (4) Abraded contusion 4cm x 1cm on the mid of front of Rt. leg."

5. Investigation was concluded and ultimately chargesheet No.37 of 2011 was submitted. Appellants (parents of the deceased) were arrested on the charge of murdering their daughter. After submission of chargesheet cognizance was taken by the court concerned. The case was committed to the court of sessions as offence was triable by the court of sessions. The then Additional Sessions Judge, Court No.6, Moradabad charged the appellants with murder of their daughter, as a result of honour killing, under Section 302/34 IPC, vide order dated 5.5.2011. The appellants denied the charge and demanded trial.

6. Prosecution in order to bring home the charge so framed adduced documentary evidence i.e. written report (Exhibit Ka-1), postmortem report (Exhibit Ka-2), panchayatnama (Exhibit Ka-6), chargesheet (Exhibit Ka-5). The prosecution has also adduced Sharafat (PW-1), Mewaram (PW-2), Dr. Ramvir Singh (PW-3), Harendra Singh (PW-4) and Bhoora as PW-5. Sub-Inspector Dayachand Sharma appeared as PW-6, while previous Investigating Officer Ravi Kumar was produced as PW-7. The accused appellants were then examined under Section 313 Cr.P.C. Raeesuddin and Pooran Singh have also been adduced as defence witnesses on behalf of accused, whereafter

the trial was concluded. The Sessions Court has found the accused appellants guilty of committing offence under Section 302/34 IPC vide judgment dated 12.9.2013, whereafter the present appeals have been filed.

7. Records reveal that prosecution case is not based on any eye witnesses account but the charge of murder against the appellants is attempted to be proved on the basis of circumstantial evidence.

8. Before adverting to the evidence adduced by the prosecution to establish the guilt of appellants beyond reasonable doubt, we would like to be reminded of the words of wisdom expressed by the Supreme Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116*, which has consistently been followed since then. The Court reiterated its earlier decision in *Hanumant Vs. Madhya Pradesh, AIR 1952 SC 343*, which held that for proving a case based purely on circumstantial evidence the 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. In paragraphs 152 to 154, the Supreme Court in Sharad Birdhichand Sarda (supra) observed as under:-

> "152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. The State of Madhya Pradesh.(1) This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh(2) and Ramgopal v. Stat of Maharashtra(3). It may be useful to

extract what Mahajan, J. has laid down in Hanumant's case (supra):

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the 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. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground far a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

9. It is in the light of above principles that this Court has to examine the question as to whether the prosecution has discharged its burden of proving the guilt of accused appellants of committing offence under Section 302/34 IPC beyond reasonable doubt.

10. Apart from the documentary evidence, referred to above, the prosecution has adduced seven witnesses i.e. PW-1 Sharafat Ali (Chowkidar), who first saw the dead body; PW-2 Mewaram, the father of Bhoora with whom the deceased is said to have returned in the evening/night to her village; PW-3 Dr. Ramvir Singh, who had conducted the postmortem of the deceased; PW-4 Constable Harendra Singh, who was working as Clerk in Police Station Asmauli and has verified GD Entries containing the information with regard to suspicious death of Rehana; PW-5 Bhoora, who is said to have taken the deceased to the village and was later reportedly beaten by the father of the deceased Mustqeem alongwith his associates; PW-6 Dayachand Sharma, who had partly conducted the investigation after transfer of the previous Investigating Officer. PW-7 Ravi Kumar, who was the Station House Officer on the date when the intimation of the incident was received at the police station concerned. PW-1 Sharafat Ali; PW-2 Mewaram and PW-5 Bhoora, who are the witnesses of fact have turned hostile.

11. PW-1 Sharafat has admitted that on 24.11.2010 a Tehrir (written report) was written on his instructions by Pooran Singh, the Village Pradhan. He, however, has denied any knowledge of the person with whom the deceased returned to her village. He claims to have gone to the house of deceased at about 3.00-4.00 a.m. and has proved the written report, which

contains his thumb impression. He has however denied having informed the Investigating Officer about return of deceased alongwith Bhoora or staying of deceased and Bhoora in the village school or the factum of appellants having brought the deceased to her house. He has also denied having informed the Investigating Officer about the appellants having murdered the deceased. This witness was subsequently declared hostile.

12. PW-2 Mewaram has also denied any knowledge about the death of deceased or the appellants having killed her. He has, however, admitted that appellant no.1 Mustqeem had come to his house. This witness was also declared hostile. PW-2 has been cross-examined by the Government Counsel and has deposed that he had heard in the village that the appellants had murdered their daughter. He has denied having seen the appellants committing the murder. He has specifically stated that his son Bhoora was taken by appellant no.1 and his relatives to Village Shahpur Sirpuda and that the appellant no.1 alongwith his relatives came to his house in the night and took Bhoora, who was also beaten. The act of taking Bhoora from his house is alleged to be between 12.00-1.00 a.m. in the night by appellant no.1 and four others, whereafter this fact was informed to the police, whereafter the police reached the house of appellant no.1 and her dead body was found. He has denied any affair of deceased with his son but has stated that his son was taken by the appellant no.1 alongwith others.

13. PW-3 Dr. Ramvir Singh is the autopsy surgeon, who has proved the postmortem report. PW-4 Constable Harendra Singh was clerk in the police station and has entered the written report in the General Diary. PW-5 Bhoora has also not

supported the prosecution story and was declared hostile. He has, however, denied the suggestion that on account of his affair with deceased she was done to death by appellants. In his cross-examination he has complained of him being beaten by appellant no.1 and four others. He has also testified that he was taken on a bike but was saved by the villagers and relatives of the appellants. The statement about his having been beaten is not substantiated by producing any injury report etc. nor any complaint in that regard is shown to have been lodged. PW-6 Sub-Inspector Dayachand Sharma was the Investigating Officer of the case.

14. PW-7 Ravi Kumar is the Station House Officer, who states that information about the incident was received from PW-1 at about 5.30 a.m. on 24.11.2010 and he had instructed the Sub-Inspector to prepare the inquest etc.

15. The appellants have been examined under Section 313 Cr.P.C. and have stated that they have been falsely implicated.

16. The accused appellants have produced Raeesuddin as DW-1, who has alleged that the appellants stayed at his house on 23.11.2010 night and at about 5.00 in the morning on 24.11.2010 the information about murder of deceased was received, whereafter the appellants left his house. According to him the Baraat had returned on 23.11.2010 in the evening and that the deceased or her mother had not gone with the marriage party. He has denied the version that the deceased was seen going with PW-5 Bhoora. DW-2 is the scribe, who has proved the written report.

17. The trial court on the basis of aforesaid averments has

come to the conclusion that the appellants have strangulated their daughter and her death is due to honour killing.

18. The prosecution case apparently is that the deceased had left village Shahpur Sirpuda alongwith Bhoora without any knowledge of the parents. Having returned from Barat (marriage procession of the relative), the appellants rushed to their Village Mawai Thakuran and while Bhoora was beaten for having brought appellants' daughter, the deceased was done to death as the appellants suspected of her having affair with Bhoora. Since Bhoora and Rehana belong to different religion, as such, the appellants took it as an act which would bring disrepute to the family and accordingly Rehana was done to death. The parents (appellants) suspected affair between deceased and Bhoora and that was the cause for the honour killing of their daughter.

19. There are only three witnesses of fact i.e. PW-1, PW-2 and PW-5 all of whom have turned hostile. None of the witnesses of fact have disclosed anywhere that the deceased was having an affair with Bhoora. Although in statement under Section 161 Cr.P.C., PW-1 had asserted that the deceased returned to her Village alongwith Bhoora, but in his statement before the Court he has categorically stated that he has no knowledge as to with whom she returned to her village. He has denied the suggestion that any disclosure was made by him in his statement under Section 161 Cr.P.C. regarding return of deceased with Bhoora.

20. PW-2 also has denied having any knowledge about the murder of deceased. He has merely stated that Mustqeem had

come to his house and he had heard in the village that the appellants for the fear of bad name had killed the deceased. He has also asserted the fact that Bhoora was taken in the night and was beaten by Mustqeem and his relative. PW-2, however, has specifically denied any affair between deceased and his son Bhoora.

21. Bhoora (PW-5) has denied that he was called by deceased or that both of them came on a tempo to Asmauli or that the deceased had refused to go with her parents and stayed at the school of Rakesh in the village. He has also denied the appellants having made inquiries about the deceased from him and he was declared hostile. He has further denied the suggestion that the deceased was killed on account of love affair between him and the deceased.

22. None of the witnesses of fact have supported the premise of affair between deceased and Bhoora. Specific suggestions made in that regard to PW-2 and PW-5 have been denied. No other independent witness has been adduced by the prosecution to support the plea of love affair between deceased and Bhoora. Only statement supporting the prosecution version is the statement of PW-2 that he had heard in the village that the appellants had killed their daughter. This part of the statement is a hearsay statement and neither it has been disclosed as to from whom it was heard nor the persons alleged of having said so are produced as evidence.

23. The prosecution version that the deceased returned alongwith Bhoora has also not been proved by the prosecution. PW-1 has denied his disclosure allegedly made to the

investigating officer of Bhoora having brought the deceased to the Village. He has clearly denied that he saw Bhoora and Rehana returning to village from Shahpur Sirpuda or the information that Rehana stayed in School of Rakesh in the village and that the appellants brought the deceased to their home from the School.

24. In light of the above, it is apparent that neither the plea of affair between deceased and Bhoora is proved by any evidence, nor the story that she was brought by Bhoora to the village is supported with any evidence.

25. Sri Rahul Saxena for the appellants submits that it is a case of no evidence and the judgment of conviction under challenge is without any basis or evidence and is entirely based on conjectures and surmises.

26. In a case of circumstantial evidence the circumstance, from which the conclusion of guilt is to be drawn, must be fully established. The primary circumstance relied upon by the prosecution of there being a love affair between deceased and Bhoora; Bhoora having brought deceased to the village and the deceased staying in school of Rakesh in the village is not proved, at all. This is the prime motive attributed to the appellants for honour killing of their daughter. In the absence of any cogent evidence brought on record to support the plea of affair or any improper act on part of the deceased which may bring bad name to the family, we are not impressed by the alleged motive of honour killing.

27. The only circumstance which has been established by the prosecution is the fact that appellant Mustqeem came in the

night and took Bhoora and he was physically assaulted. This version of PW-2 and PW-5, however, is not supported by any medical evidence to suggest that Bhoora was physically assaulted, nor any police report etc. has been produced which may go to show that any complaint was made with regard to Bhoora having been forcibly taken by appellant and inflicting him injuries. This statement in itself is not strong enough to infer that the deceased had a love affair with Bhoora and her murder was a case of honour killing.

28. There is another aspect important enough to warrant deliberation at this stage. It remains undisputed that the dead body of the deceased was found in the house of appellant Mustqeem and, therefore, the onus was upon him to explain the circumstance in which the dead body was found at early hours in the day in his house.

29. Admittedly, Mustqeem is the owner of the house and by virtue of Section 106 of the Evidence Act, the appellant Mustqeem had the burden to prove the fact which is specially within his knowledge. However, we find that in the examination of the accused under Section 313 Cr.P.C., he has not been confronted with the circumstance of dead body appearing in his house or the fact that he was expected to prove the fact specially within his knowledge. Failure of the prosecution to confront the accused on this aspect under Section 313 Cr.P.C. would have to necessarily exclude this aspect of the matter from consideration. Paragraphs 143 to 145 of the judgment of the Supreme Court in Sharad Birdhichand Sarda (supra) are relevant in this regard and are reproduced hereinafter:-

"143. Apart from the aforesaid comments there is one vital defect

> in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4,5,6,8,9,11,12,13,16, and 17. As these circumstances were not put to the appellant in his statement under 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Fateh Singh Bhagat Singh v. State of Madhya Pradesh this Court held that any circumstance in respect of which an accused was not examined under 342 of the Criminal procedure code cannot be used against him ever since this decision. there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under s.342 of the or s.313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra(2) this Court held thus:
>
> "The fact that the appellant was said to be absconding not having been put to him under section 342, Criminal Procedure Code, could not be used against him."
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> 144. To the same effect is another decision of this Court in Harijan Megha Jesha v. State of Gujarat (3) where the following observation were made:
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> "In the first place, he stated that on the personal search of the appellant, a chadi was found which was blood stained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant.':
>
> 145. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decision of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under s.313 of the Criminal Procedure Code have to be completely excluded from consideration.”

30. Learned AGA has stressed that the statement of appellant supported by DW-1 that Mustqeem stayed with his relatives at Shahpur Sirpuda on the night of 23.11.2010 and came only next morning to his village is inconceivable and against natural conduct of a father of not making any attempt to trace his missing daughter. Though the argument in that regard appears to be weighty, and would render the defence version weak but merely for such reason the lacuna on part of prosecution in failing to establish the charge, based on circumstantial

evidence, cannot be made good.

31. Law is settled that any weakness in the defence case would not obviate the prosecution from establishing the charge based on circumstantial evidence. For a charge of murder to be proved on the basis of circumstantial evidence, the evidence must be conclusive. Failure of prosecution to adduce evidence in that regard cannot be made good by the plea of falsity of defence case in that regard.

32. The five golden principles enumerated in paragraph 153 of the judgment in Sharad Birdhichand Sarda (supra), once are applied on the facts of the present case, it would leave no room of doubt for the Court that the prosecution has failed to discharge its burden of proving the guilt of the accused appellants beyond any reasonable doubt. The circumstances from which the conclusion of guilt is to be drawn is not established. The evidence available on record is not consistent with the hypothesis of the guilt of the accused. The chain of evidence to prove the guilt of accused is clearly broken and the possibility of an alternative hypothesis, except the one, putforth by the prosecution, cannot be ruled out.

33. The plea of learned AGA that it being a case of honour killing the parents must be dealt with severally does not appeal to us. It is settled aspect of criminal jurisprudence that a case can be said to be proved only when there is explicit evidence and no person can be punished for moral conviction.

34. In light of the above deliberations and upon minute examination of the evidence brought on record, we find that the prosecution has miserably failed to establish the charge

framed against the appellants of murdering their only daughter. Many aspects in the admitted facts of the case are left unexplained that is how the deceased returned to her village; whether she returned alone or somebody came with her, who killed her; what has been the motive to kill her. The appellants cannot be held guilty of the charge of murder unless the prosecution by adducing cogent evidence discharges the burden of proving their guilt beyond reasonable doubt.

35. The trial court on the basis of above evidence appears to have drawn its finding of guilt against the appellants wholly on assumptions. Even in the absence of any evidence of affair between the deceased and PW-5 or the deceased having been brought by PW-5 etc., it proceeded to hold that the charge of murdering the deceased on account of honour killing has been proved. We cannot approve of the conclusions drawn by trial court after minutely examining the evidence on record. We find that none of the ingredients of proving the charge by way of circumstantial evidence existed and, therefore, the findings of guilt returned by the trial court will have to be held as based only on assumptions. Doubt or suspicion howsoever strong against the accused cannot be a substitute for the charge to be proved against the accused in a criminal trial.

36. In such circumstances, we are of the considered opinion that the judgment and order dated 12.8.2013, passed by the Additional District and Sessions Judge, Court No.6, Moradabad, in Sessions Trial No.439 of 2011 (State Vs. Mustqeem & Khursheeda) arising out of Case Crime No.538 of 2010, under Section 302/34 IPC, Police Station Asmauli, District Moradabad cannot be sustained and is liable to be set aside. The

prosecution has failed to prove the charge of murder against the appellants beyond reasonable doubt and, therefore, the sentence and conviction of accused appellants is set aside. The appellants are acquitted from the charges of offence under section 302 read with 34 IPC and they shall be set at liberty forthwith, if they are not wanted in any other case.

37. The appeals are, accordingly, allowed. No order is passed as to costs.

Order Date :- 24.5.2022
Anil

(Rajnish Kumar, J.) (Ashwani Kumar Mishra, J.)