

**AFR****RESERVED****COURT NO.48****JAIL APPEAL No. 24 of 2019**Raj Kumar ----- **Appellant**

versus

State of Uttar Pradesh ----- **Respondent**

For Appellant : Ms. Mary Puncha (Sheeb Jose), Amicus**For Respondent/State** : Mr. Amit Sinha, AGA

Hon'ble Pritinker Diwaker, J.**Hon'ble Shekhar Kumar Yadav, J.****(Per: Shekhar Kumar Yadav, J.)**

1. This jail appeal arises out of impugned judgment and order dated 31.10.2005 passed by Additional Sessions Judge/F.T.C., Court No.2, Gorakhpur in Sessions Trial No.76 of 2004, convicting the appellant under Sections 364, 302/34 and 201 of IPC and sentencing him to undergo ten years rigorous imprisonment under Section 364 of IPC, with a fine of Rs.1,000/-; imprisonment for life under Section 302/34 of IPC, with a fine of Rs.5,000/-; and five years rigorous imprisonment under Section 201 of IPC, with a fine of Rs.1,000/-, in default thereof, one years' simple imprisonment. All sentences shall run concurrently.

2. The facts, in brief, are that on 23.09.2003, complainant Sri Ram Chandar submitted a written report (Ex. Ka.1) at Police Station Campiyar Ganj, Gorakhpur. The contents of the written report read as under:

“Humbly informed that the applicant Ram Chandar Kevat S/o Hansraj is the resident of Vill-Laxmi (page torn) La-Patarki, P.S.-Campiyar Ganj, Dist: Gorukhpur. The applicant was married around 6 years ago with Dhanpati @ Jhinki D/o Sheshman S/o Vindhyachal, Vill-Dharampur, Tola-Sikandarpur, P.S.-Campiyar Ganj, Dist: Gorukhpur, who was blind with both eyes. Around 2 months ago, I left my wife and both sons in my in-law's house. A day before yesterday, when I went to my in-law's house, my father-in-law told that 'Your elder son was not well, your wife Dhanpati, in order to get him treated, went along with Kawalwasi W/o Raj Kumar R/o Janakpur Tola-Karathari with both sons who were aged around 5 years and 1 year respectively' to Ramchaura around 15-20 days ago, and have not come back to home till date. Then I started looking for them. But nothing could be find out till now. My Sadhuvain (sister-in-law) Kawalwasi is of unsound mind. I have apprehension that Kawalwasi may have killed my wife and both sons. My report may kindly be lodged and legal action be taken up.”

(English translation by Court)

3. On the basis of aforesaid written report, a First Information Report (Ex. Ka.3) was registered as Crime No.298 of 2003 contemplating offences punishable under Section 364 of IPC against co-accused Smt. Kawalwasi w/o Raj Kumar and during investigation, accused Raj Kumar came in light and they have made confessional statement about the death of deceased persons, therefore, Sections 302 and 201 of IPC were added.
4. Immediately after registration of the F.I.R., the investigation was undertaken by Sub Inspector Sri Ramayan Giri

(PW-13). Thereafter, the investigation was transferred to Sub Inspector Sri Atul Narayan Singh (PW-14), who sought permission from the concerned Magistrate; proceeded to recover the incriminating articles; and at the instance of accused-appellant, the police got recovered the cloths (Ex. Ka-2) of Dhanpati @ Jhinki and her two sons, which were hidden under soil. The accused persons confessed their guilt and said that they had killed Dhanpati @ Jhinki and her two sons by drowning them in Rapti River. The recovered cloths of the deceased persons were seized by the police. Police also tried to get out the dead bodies from the river, but they could not succeed since the dead bodies had been floated away in river stream.

5. The Investigating Officer after completing the investigation, submitted a charge sheet (Ex Ka-5) against both the accused persons under Sections 364, 302 and 201 of IPC on 31.01.2004.

6. The case, being a Sessions Triable, was committed to the Court of Sessions Judge. On 29.05.2004, the Sessions Judge heard the arguments and after considering the entire material available on record, has framed charge against appellant Raj Kumar and co-accused Smt. Kawalwasi under Sections 364, 302/34 and 201 of IPC. The aforesaid charges were read over and also explained to both the accused persons. On denial of the same, trial commenced.

7. During the course of trial, the prosecution supported its case with the aid of fourteen witnesses. After completing the prosecution evidence, the accused persons were examined under

Section 313 Cr.P.C. in which they have pleaded their innocence and false implication and claimed trial.

8. Learned trial Court, relying upon the statements of PWs, recorded the conviction of the accused persons for the offence punishable under Sections 364, 302/34 and 201 of IPC and sentenced them, as mentioned in paragraph no.1 of this judgment. Hence, this appeal.

9. In appeal, the argument advanced by Ms. Mary Punch (Sheeb Jose), learned Amicus, is as under:

(i) that the appellant has been convicted solely on the basis of weak circumstantial evidence, and the nature of circumstantial evidence is not as such, which can be made basis for his conviction.

(ii) that there is no independent eye witness account to the incident.

(iii) that the other piece of evidence against the appellant is the recovery of cloths of the deceased at his instance.

10. On the other hand, learned A.G.A, in support of the impugned judgment, inter-alia, submitted that the conviction of the appellant is strictly in accordance with law. He further submitted that the trial Court has rightly passed the impugned order after due and proper consideration of the evidence available on record; hence, the order impugned does not warrant any interference.

11. We have heard learned counsel for the respective parties

and perused the material on record.

12. Before we proceed to deal with the merits of the instant case, it would be appropriate to have a glance at the statements of the prosecution witnesses for better appreciation of the evidence adduced by the prosecution.

13. Ram Chander (PW-1), is the husband of Dhanpati @ Jhinki. He supported the prosecution version and has stated that he married to Dhanpati @ Jhinki around 6 years before the incident. Jhinki was daughter of Sheshmani, who belonged to Mouza-Dharampur, Tola-Sikandarpu, P.S.-Campiyar Ganj. He states that Jhinki was blind with both eyes and he had dropped his wife and both sons, namely, Shrawan Kumar and Avneesh at his in-law's house two months before the incident. He has further stated that two days before lodging this case, i.e. on 23.09.2000, he went to his in-law's house; his father-in-law informed him that "your elder son Shrawan Kumar is not well and that Smt. Kawalwasi W/o Raj Kumar took Dhanpati @ Jhinki alongwith both sons to Ramchaura. They have been taken for treatment around 15-20 days back and have not come back after the treatment". He has further stated that then he started searching his family, but nothing could be found. He has further stated that my *sadhuain* (sister-in-law) is of unsound mind and she and her husband Raj Kumar may kill his wife and sons.

14. Smt. Sonarwasi Devi (PW-2), is the sister of Dhanpati @ Jhinki. She deposed that she live with her father in Dharampur; she has 5-6 sisters; her younger sister, namely, Dhanpati @ Jhinki was blind with both eyes and she had two sons, namely,

Shravan and Avneesh. Sharavan was 5 years old and Avneesh was 1 year old. She states that Ram Chandar (her brother-in-law) had dropped his wife Dhanpati @ Jhinki to her father's house. Thereafter, Jhinki's elder son Shravan got sick, and in order to treat him, Kawalwasi took my sister Jhinki and her children to Ramchaura for treatment of Shravan. Since then, they have not come back to my father's house and she made efforts to search them alongwith her father, but in vain. She states that she and her father went to Ram Chaukasi and Naat Baat also, but no whereabouts of anyone could be found. She further states that Kawalwasi's husband Raj Kumar works in a tea-stall in Pipiganj and we also searched them, but Raj Kumar and Kawalwasi could not be found. Thereafter, my *bahnoi* (brother-in-law) Ram Chandar came to my father's house to find the whereabouts of his family and we told him about the incident. She states that she has apprehended that Kawalwasi and his husband Raj Kumar might have killed Jhinki and her two children.

15. Sheshmani (PW-3), is the father of accused Kawalwasi as well as deceased Dhanpati @ Jhinki. He supported the prosecution version. He has stated that he has 6 daughters, namely, Ishrawati, Kawalwasi, Jhina, Manmati, Sonwarsi and Dhanpati @ Jhinki. All are married. Around 2 ½ years have passed since his wife died; his daughter cooks food and serves him; his daughters used to visit him and look after his farms also; he has around 2 ¾ acres of farms; he has 6 *beegha* of farms in Dharmpur and 3 *beeghas* in Rasoolpur, Maharajganj.

Dhanpati @ Jhinki was married with Ram Chandar R/o village-Patarki, P.S.-Campiyar Ganj; she had two sons, namely, Shravan aged 5 years and second Avneesh aged 1 year. He states that Kawalwasi is my another daughter and was married with Raj Kumar. He has further stated that around 14 months ago from today, Dhanpati @ Jhinki disappeared and around 15 days before her disappearance, she came to my house with her two sons. Her husband after dropping her at my house, went back immediately. When Dhanpati came to my house, Kawalwasi was already here in my house with her children; and at that time, Kawalwasi had two daughters and one son. Almost 14 months ago when Dhanpati's son Shravan fell ill, Kawalwasi, in order to get Dhanpati's son Shravan treated, took Dhanpati, Shravan and Avneesh to Ramchaura and, thereafter, neither Dhanpati, Kawalwasi nor two kids came back. After waiting for 2-3 days, he went here and there to find out their location, but nothing could be found. He has further stated that after 12-15 days, Dhanpati's husband Ram Chandar came to my house and asked about welfare of Dhanpati and he narrated him the entire incident. He also tried to search them, but in vain. Then he went to the police station and lodged a case.

16. Dinesh Kumar (PW-4) son of Ram Ashrey; Ram Nayan Sharma (PW-5) son of late Bhagwati Sharma; Bechan Yadav (PW-8) son of Sri Dulare Yadav; Suresh Kumar Chaudhary (PW-9) son of Shahdev Chaudhary; and Vijay Prakash (PW-9) son of Kedarnath, were examined and have been declared hostile.

17. Adalat (PW-6), is the son of Rajai, who had lastly seen the

accused persons and deceased persons. He stated that he had seen one man along with two women out of which, one was blind along with five children, who were going towards Ramkola village and since he remained standing at Bhagwa Chauraha till evening, he saw that the man came back, but the blind women and two children were not with him rather one woman and three children had accompanied them. Subsequently, he came to know from the newspaper that blind lady and two children were kidnapped by her sister and brother-in-law. He identified Kawalwasi and her husband Raj Kumar and stated that he had seen them at Bhagva Chauraha. In his cross-examination, he remained firm.

18. Sri Ram (PW-7) son of Kishun has stated that about 12-13 months ago, Kawalwasi and Raj Kumar came to his house and called him for help since police was chasing them. They accepted their guilt of commission of murder of wife of Ram Chandra and her two children. However, in cross-examination, he did not support such version.

19. Sakshi Tapsi Singh (PW-11) daughter of Chumman Singh, has been examined and she denied of having any knowledge of the incident.

20. Shiv Shankar Tiwari (PW12), Ramayan Giri (PW-13) and Sri Atul Narayan Singh (PW-14) were the formal witnesses, who had been the police officers, had certified their steps at the several stages from the stage of lodging FIR till filing of charge sheet.

21. Admittedly, there is no direct evidence against the appellant to prove his complicity in commission of crime and his conviction rests upon weak circumstantial evidence i.e. recovery of cloths at his instance.

22. In the present case, there is no eye witness to the occurrence and it is only based on circumstantial evidence. Before moving further, it would be appropriate to refer to the law regarding reliability of circumstantial evidence to acquit or convict an accused. The law regarding circumstantial evidence was aptly dealt with in ***Padala Veera Reddy vs. State of Andhra Pradesh and others***¹, wherein the Court has observed as under:-

“10. x x x x (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 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.”

23. In the matter of ***Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra***², the Supreme Court, while dealing with

¹ 1989 Sup. 2 SCC 706

² (2008) 3 SCC 210

circumstantial evidence, observed as under:

“11. In Hanumant Govind Nargundkar v. State of M.P. [AIR 1952 SC 343], which is one of the earliest decisions on the subject, this court observed as under:

“10. 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 be 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 for 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.”

24. In ***Padala Veera Reddy (supra)***, the court further held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

“(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.”

25. In ***Sharad Birdhichand Sarda vs. State of Maharashtra***³, it was held that the onus was on the prosecution to prove that the chain is complete and falsity of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These are:

*“(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.”*

26. Recently, the Hon'ble Apex Court in the case of ***Navaneethakrishnan vs The State By Inspector of Police***⁴ the Court has observed as follows:

“The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion

³ (1984) 4 SCC 116

⁴ (2018) 16 SCC 161

about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove."

27. The next thing, which is to be seen is whether the evidence of recovery of cloths of the deceased at the instance of appellant, is credible and could be relied on for proving the charge of culpable homicide against the appellant. The recovery of cloths of the deceased cannot be the only ground to prove the guilt of the accused-appellant. The recovery of cloths is said to have been shown on 18.12.2003, i.e. after three months of the incident. Thus, the case of the accused-appellant being based on

circumstantial evidence, needs the complete chain to establish the guilt of the accused, whereas in the present case, none of the witnesses had deposed that after taking over the deceased and her children for treatment of her elder son, the accused had proceeded to commit the offence.

28. Undisputedly, the place from which cloths are said to have been recovered is an open place. So far as recovery of incriminating article, i.e. cloths at the instance of the appellant, is concerned, the witnesses to memorandum and seizure have not fully supported the prosecution case. Adalat (PW-6), in his deposition, stated that he had disclosed this evidence when the police had interrogated him after about three and half months. Except him, no other witness had deposed about the last seen evidence. The contents of the impugned FIR do not satisfy the ingredients of the provisions of Section 364 of IPC. The incident had taken place between 01.09.2003 to 07.09.2003, whereas the recovery of cloths was shown on 18.12.2003, i.e. after three months of the incident. The accused had taken away deceased Dhanpati @ Jhinki and her two children for treatment of her elder son. The FIR was lodged on 23.09.2003, which discloses that informant had left her wife and two children in his in-laws house about two months ago and about 15 to 20 days ago, co-accused Kawalwasi had taken away the deceased to Ramchaura, but thereafter, she had not turned up. Ram Chander (PW-1), who is the husband of Dhanpati @ Jhinki, has stated that the cloths were not stained with blood. He had identified those cloths of his wife.

29. Except the recovery of cloths of the deceased, there was no other incriminating evidence to arrive at a conclusion that the deceased were murdered by the accused persons, therefore, we are of the view that unless the direct connection of the accused persons for commission of murder of the deceased is established beyond reasonable doubt, the appellant cannot be held guilty only on the ground that at his instance, the cloths of the deceased were recovered.

30. Keeping in view the aforesaid principle of law relating to circumstantial evidence, if we examine the facts and evidence of the present case, it emerges that there is no legally admissible evidence against the appellant connecting him with the crime in question, except last seen of evidence of Adalat (PW-6). However, statement of PW-6 is not corroborated with other evidence. There is no other incriminating evidence except the recovery of cloths of the deceased to complete the chain of circumstance that it is the accused, who had taken away the deceased persons for committing their murder and, therefore, it cannot be said that the accused had murdered the deceased.

31. Thus, considering the overall facts and circumstances of the case, in particular, the nature and quality of evidence adduced by the prosecution, in light of the aforesaid principle of law, we are of the considered opinion that the prosecution has failed to prove the guilt of the appellant. This being the position, benefit of doubt must be credited to the appellant and he deserves to be acquitted of the charges leveled against him.

32. Accordingly, the appeal is allowed. Conviction and

sentence awarded to the appellant under Sections 364, 302/34 and 201 of IPC is hereby set aside.

33. The appellant is acquitted of all the charges. He is reported to be in jail, he be released forthwith, if not required in any other case.

34. We appreciate the assistance rendered by Ms. Mary Punch (Sheeb Jose), learned Amicus and we direct the State Government to pay Rs.10,000/- as her remuneration.

35. Let a certified copy of this order alongwith lower court record be sent to the Court concerned for information and necessary compliance.

Order Date:17.03.2020

Ajeet

(Shekhar Kumar Yadav,J) (Pritinker Diwaker,J)