

A.F.R.

Court No. - 49

Case :- JAIL APPEAL No. - 7441 of 2008

Appellant :- Shaki

Respondent :- State

Counsel for Appellant :- From Jail, Amit Daga A/C, Ashok Kumar Pandey A/C

Counsel for Respondent :- A.G.A.

Hon'ble Siddhartha Varma,J.

Hon'ble Umesh Chandra Sharma,J.

(Per: Umesh Chandra Sharma,J.)

Heard Sri Amit Daga (Amicus Curiae) assisted by the Sri Abhishek Kumar Jaiswal learned counsel for the appellant and Sri Vikas Goswami learned Government Advocate.

This jail appeal has been filed against the judgement and order dated 20.3.2008 passed by the Additional Sessions Judge, Court No. 6, Muzaffarnagar, in Session Trial No. 854 of 2007 arising out of Case Crime No. 7 of 2007, under Section 302 and 201 IPC, Thana – Bhaunrakala, District – Muzaffarnagar, wherein the appellant – Shaki- was tried and punished for the offences under Sections 302 and 201 IPC. Under Section 302 IPC, the appellant was awarded life sentence and a fine of Rs. 10,000/-. In the event of non-deposit of fine, the appellant was to undergo further two years' of rigorous imprisonment and under Section 201 IPC, the appellant was to undergo three years of rigorous imprisonment and a fine of

Rs. 2,000/- was also imposed. In the event of non-deposit of fine, the appellant was to undergo a further rigorous imprisonment of three months. All the punishments were directed to run concurrently.

The father of the deceased Shiva had lodged a first information report on 24.1.2007 alleging that his son Shiva, aged about five years, on the previous day i.e. 23.1.2007, at around 4-5pm, was seen with the appellant – Shaki s/o Somdatt Harijan. It has been alleged in the first information report that when the son of the first informant had not returned, then the first informant tried to search for his son and when the son of the first informant and the accused were not found till the morning of the next day, a first information report was lodged. It has been stated in the F.I.R. that the first informant along with other villagers had commenced a search in the adjoining jungle and then in the sugar cane field of one Satendra s/o Kitepal, the dead body of his son was found buried in a pit which was covered with mud. However, his legs were protruding out. In the first information report itself, the first informant had alleged that the accused had a motive to kill the son of the appellant as earlier the appellant had done some dirty work with Deepak, another son of the first informant who was elder to the one who had died. Since the first informant had, two or three days prior, threatened the appellant with dire consequences, the

appellant had taken a revenge. He had also stated in the F.I.R. that when the appellant had taken away his son Shiva, his brother Satyaveer and certain other villagers had also seen the appellant taking the boy with him. He stated that the body of his child Shiva had been exhumed from where the accused-appellant had buried him and the dead body was lying over there. He, therefore, had prayed that the State might proceed against the accused-appellant and take action for the commission of the crime. Thereafter, when the first information report was lodged on 24.1.2007, the police started the investigation. Amongst other investigations, postmortem was also done on the body of the deceased. Thereafter, the Police submitted a charge sheet and upon the submission of the charge sheet, the Court of District and Sessions Judge, Court No. 6, Muzaffarnagar, framed charges against the accused-appellant under Sections 302 read with Section 201 of the IPC. The accused pleaded not guilty and demanded a trial.

From the side of the prosecution, P.W. - 1, i.e. the first informant, was examined, Satyaveer, the brother of the first informant was examined as P.W. - 2, the Doctor who had conducted the postmortem was examined as P.W.- 3, the P.W. - 4 Vijendra Singh was the signatory on the Punchnama, the P.W. - 5 & 6 were the investigating officers who had conducted the investigation and the P.W. 7 was the chik writer who was produced to prove the chik.

From the defence side, no one was produced. However, the appellant was confronted with certain questions and situations under Section 313 Cr.P.C., which questions were, however, denied by the accused-appellant on 12.11.2007. Thereafter, the Trial Court, after assessing all the evidence and after hearing all the parties passed the judgement and order dated 20.3.2008 convicting the accused-appellant under Section 302 IPC for life imprisonment. A fine of Rs. 10,000/- was also imposed (in the event of non-deposit of fine, the accused-appellant was to undergo a further rigorous imprisonment of two years). He was also convicted under Section 201 IPC for three years of rigorous imprisonment and a fine of Rs. 2,000/- was also imposed (in the event of non-deposit of fine, the accused-appellant was to undergo a further three months of rigorous imprisonment).

It has been contended by the learned counsel for the accused-appellant that appellant was innocent and had been wrongly convicted as the assessment of evidence was not done properly by the Trial Court. The following were the arguments advanced by the learned counsel for the accused-appellant:-

- I. The appellant was seen with the victim by the first informant at around 4 – 5pm on 23.1.2007 and, thereafter, the dead-body was found on the next day i.e. on 24.1.2007 at around 12:30pm. There is

absolutely no connecting evidence to suggest that the appellant alone was guilty of murdering the child Shiva.

Learned counsel for the accused-appellant, therefore, submitted that the evidence on the basis of which the punishment had taken place was circumstantial in nature and the circumstances from which the conclusion of guilt was drawn were not such by which, at the first instance, it could be fully established that the accused-appellant was guilty of the crime. He further submitted that the circumstances should have been of such a nature and tendency that they should have excluded every other hypothesis but the one proposed to be proved by the prosecution.

He submits that even otherwise, there ought to have been a chain of evidence so 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 within human probability that the act must have been done by the accused-appellant alone and no one else. He further submits that conviction could have been possible only if the prosecution, after it had led its evidence, would have connected the chain of circumstances in such a manner that the circumstances would have led to no other conclusion other than the conclusion that the accused-appellant was guilty.

Learned counsel for the accused-appellant, therefore, submits that after the first informant had seen the accused with the deceased

at around 4 - 5 pm in the evening of 23.1.2007, there was absolutely no other evidence which could lead to the conclusion that the accused and the accused alone had killed the deceased and had buried him in the sugar cane field of Satendra s/o Kitepal.

Learned counsel for the accused-appellant submitted that there is no clear and specific evidence that the place where the body of the deceased was recovered was accessible only to the accused and no one else. He, therefore, submits that there was absolute lack of evidence with regard to the fact that the accused was last seen with the deceased and furthermore there was no connection with the evidence of the fact that even if the accused was last seen with the victim he had in fact perpetrated the crime. Learned counsel, therefore, submits that it would be very unsafe to conclude that the appellant was guilty of the murder.

Learned counsel for the accused-appellant to bolster his argument relied upon **A.I.R. 1952 SC 343 : Hanumant Govind Nargundkar and another vs. State of Madhya Pradesh, 1984 (4) SCC 116 : Sharad Birdhichand Sarda vs. State of Maharashtra, 2006 (13) SCC 116 : Bablu alias Mubarik Hussain vs. State of Rajasthan, 2015 (12) SCC 644 : Vijay Shankar vs. State of Haryana, 2017 (100) ACC 913 : Anjan Kumar Sharma and others vs. State of Assam, 2016 (1) SCC 501 : State of Karnataka vs. Chand Basha, 2015 (9) SCC 44 : State of Uttar**

Pradesh vs. Satveer and others, 2012 (79) ACC 713 : Baliya @ Bal Krishan vs. State of M.P. and the Criminal Appeal No. 5824 of 2010 (Satish Sharma and another vs. State of U.P.).

Learned counsel for the accused-appellant, therefore, submitted that the chain of evidence from the time the appellant was last seen with the deceased and till the body of the deceased was found was definitely not complete and, therefore, it could definitely not be said that the evidence was such which could make the prosecution to reach the only conclusion that the appellant was the perpetrator of the crime.

- II. Learned counsel for the accused-appellant has submitted that in the first information report the father of the deceased, Sri Karan Singh had stated that the appellant had a motive to kill his son on account of the fact that the first informant had threatened the appellant with dire consequences because of the fact that he had a few days earlier done some dirty work with another son of his, namely, Deepak.

Learned counsel for the appellant submits that the attribution of this motive to the appellant was absolutely misplaced as the learned counsel for the accused-appellant submitted that if the appellant had done any dirty work on the person of the son of the first informant then upon seeing the deceased/victim with the appellant, the father/first informant would definitely have reprimanded both his child and also appellant for being together.

Learned counsel for the appellant submitted that no father in his proper senses would allow any child of his to be with a person who had on an earlier occasion tried to do something dirty on the person of any one of his children and, therefore, learned counsel for the appellant submits that the first informant had for no reason whatsoever tried to implicate the appellant.

- III. Learned counsel for the accused-appellant submitted that there were many contradiction in the statements made by the prosecution witnesses. He submits that P.W.-1 i.e. the first informant had stated in the F.I.R. that the witnesses of fact were he himself and Satyaveer. However, in his cross-examination, he has stated that along with him Satyaveer, his brother and one Surendra had also seen the appellant taking away the child. Here, by Surendra he had meant Surendra s/o Rahtu Harijan which name finds place in the list of witnesses in the charge sheet.

Learned counsel for the accused-appellant submits that while at one place in his testimony, he has stated that he himself, his brother Satyaveer and Surendra s/o Rahtu had seen the child being taking away at around 4-5pm, in his cross-examination he had stated that he, Surendra s/o Shree pal and Kripal s/o Kadam had also seen the child being taking away by the appellant on 23.1.2007. Learned counsel states that the father in his cross-examination has further stated that on that date both Surendra and

Kripal had come back from work after 6:30 pm in the evening after it was dark. Learned counsel, therefore, states that there is a contradiction in what the first informant says in the F.I.R. from what he says in the examination in chief and further he has taken a different stand in the cross-examination.

Learned counsel for the accused-appellant further submitted that even though the first informant had stated in the first information report that after 4 to 5 pm when the appellant was last seen with the child the accused was not seen thereafter till his arrest but P.W. -2 i.e. that the brother of the first informant Satyaveer in his statement had stated that Shiva's body was found at around 12:30pm and the first person to find the body of the deceased was Shaki, that is the accused along with four other boys, namely, Vipin, Sonu, Pradeep and Ankit. Learned counsel for the accused-appellant, therefore, submits that, in fact, Shaki as per the statement of P.W. -2 was throughout searching for the child Shiva. Since learned counsel for the appellant had heavily relied upon this part of the statement of P.W. 2, the same is being reproduced here as under:- "शिवा की लाश करीब साढ़े बारह बजे दिन में मिली थी। सबसे पहले लाश के पास शाकी अभि० चार लडको को लेकर जिनमें अंकित, विपिन, सोनू व प्रदीप थे तलाश कराने ले गया था। उन लडकों को ही शाकी ने बताया था शिवा की लाश गन्ने के खेत में है। उसके बाद ये पांचों

गांव में गये थे। और फिर गांव वाले इनके साथ गये थे। साकी यह बात बताकर गांव से फरार हो गया था।”

Learned counsel for the accused-appellant further submitted that to disprove the fact that Shaki had seen the dead body along with his four friends, namely, Ankit, Vipin, Sonu and Pradeep the four friends were never produced in the witness box.

In this case, the accused-appellant has not absconded and his conduct was not suspicious but was bonafide as he was also searching the deceased along with other boys. Absconding may lead to suspicion against the person who is suspected and has absconded after occurrence but in this case it is not so.

‘Absconding’ is a telltale circumstance of a guilty mind, unless the accused can offer a reasonable explanation for his absence for several days at his normal place of residence or work or at places where he would normally be expected to be found. It is only one link in the chain of evidence and not the determining link. Hiding in his own house may be absconding. It is hiding to evade process of law. In *Thimma vs. State of Mysore, AIR 1971 SC 1871* the Supreme Court held that even innocent persons may, when suspected of grave crimes, be tempted to evade arrest. Unnatural conduct of accused can strengthen prosecution version.

Learned counsel for the appellant further submitted that if the P.W. 1 i.e. the first informant was of the view that Shaki, the

accused and the deceased were together after they were last seen on 23.1.2007 in between 4-5pm till the incident had occurred then the first informant should have got at least some report registered with the Police with regard to the fact that his son was not being found.

- IV. Learned counsel for the accused-appellant still further has argued that if the post mortem report was seen then there was no sign of any dirty work (as mentioned in Section 377 IPC) having been done on the body of the deceased. He specifically pointed out to column 4 of the postmortem report which is to the effect that there was no abrasion and laceration wound around the anus and, therefore, learned counsel for the appellant submitted that for no reason the appellant was implicated and, thereafter, punished.

Learned counsel for the appellant while assailing the judgement of the Trial Court submits that the trial court had only presumed on the basis of suspicion that the deceased was taken away by the appellant after he was last seen on 23.1.2007 at around 4 to 5 pm and he submitted that suspicion cannot take the place of proof. He submits that just because there was an enmity it could not be said that it had to be concluded that the appellant had killed the son of the first informant.

Learned counsel for the accused-appellant, thereafter, has also pointed out to the delay in the filing of the first information report. He has drawn the attention of the Court to the statements

made by other witnesses wherein it was evident that they had seen the child till very late in the evening much after 4 to 5 pm. It is noteworthy that the presence of the finger prints on the neck of the deceased with the fingers of the accused was not matched. Similarly, the footprints of the actual accused may have been present on the spot, but those footprints were not matched with the footprints of the accused.

Learned Additional Government Advocate Sri Vikas Goswami, however, in his reply has submitted that when the appellant was last seen with the deceased at around 4 to 5 pm and, thereafter, when the body was found around 12:30 pm on the next date i.e. 24.1.2007, the prosecution could come to only one conclusion and that was that the appellant had taken away the child and had killed him and buried him in the sugar cane fields. Thus, it was established that the deceased was seen with the accused before the death and, therefore, he was responsible for the death.

Learned AGA further submitted that minor discrepancies in the statements of various witnesses with regard to seeing the child playing with the appellant were of no consequence and they should be ignored.

Learned AGA submits that the P.W. -1 & 2 were rustic witnesses and if there were certain contradictions in their statements then they were of no value and should be ignored. He

vehemently submitted that the hyoid bone of the child was fractured and, therefore, the only conclusion was that the child was murdered by strangulation by the appellant, with whom he was last seen.

Learned AGA also tried to fix the time of occurrence by drawing the attention of the Court to the rigour mortis which had set in and he submitted that the stage of rigour mortis was such that it definitely suggested that the child had been murdered on the previous evening at around 4 to 5 pm and, therefore, when the appellant was seen last at around 4 to 5 pm i.e. around the time when the child was killed it could be safely concluded that the appellant alone had killed the child. The Hon'ble Supreme Court has opined in various cases that no doctor can determine the exact time of death as there can be a variation of six hours on both sides.

In the case of **State of U.P. vs. Mohd. Iqram** reported in **(2011) 3 SCC (Cri) 354**, the Hon'ble Supreme Court has held that *“the post mortem report is not a substantive piece of evidence. Substantive piece of evidence is that statement which is given by witness in Court. If the post mortem is proved but that does not meant that its each and every content thereof also proved or can be held admissible.”*

The decision passed in the case of **Kunju Mohammad v. State of Kerala** reported in **2004 SCC (Cri) 1425** is relevant in

respect of rigor mortis and its evidence for ascertaining the time of death. It has been observed that “ *according to the prosecution the incident took place at 8.15 on 03.11.1991. Post Mortem of the deceased was conducted at 13.30 on the same day. Doctor opined in P.M.R. that rigor mortis was present all over the body. Doctor in his evidence stated that rigor mortis sets in 4 to 7 hours after death. The Supreme Court on the basis of rigor mortis observed that the death in question must have occurred before 6.30 am on 03.11.1991 not at 8.15 a.m. as per prosecution.* ”

The time of occurrence can be determined by some other means also such as food found while conducting post mortem.

In the instant case, 400ml liquid food was found in the stomach. The autopsy was conducted on 25.1.2007 at 2:30pm. According to the prosecution case, the deceased was killed in the night of 23/24.1.2007. Thus, the post mortem had been conducted after about two days from the time of probable death.

According to P.W.-3, Dr. Ashwani Kumar Sharma, who did the post mortem has opined that there is possibility that the deceased was killed in between the evening of 23.1.2007 at 4:00pm to 12:00am. The deceased was killed between 4:00pm to 12:00am of night of 23.1.2007 and 24.1.2007.

In the cross-examination, the P.W. - 3, has opined that food remains in the stomach of alive person can be there for six to eight

hours. He deposed that the deceased died after 6 to 8 hours after taking the food. He has agreed that there is a possibility of variation of around 6 to 8 hours about the time of death. The hon'ble Supreme Court in the case of **Pattipati Venkaiah vs. State of A.P.** reported in **1985 4 SCC 80** has observed that *“the medical science is not yet so perfect as to determine the exact time of death, nor can the same be determined in a computerized or mathematical fashion so as to the last record. The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of occurrence, because that would be matter of speculation. The time required for digestion may depend upon the nature of the food, digestive capacity of a person, and quality and quantity of food and atmospheres and condition etc.* So argument raised on behalf of appellant rejected.”

Having heard Sri Amit Daga (Amicus Curiae) assisted by the Sri Abhishek Kumar Jaiswal learned counsel for the appellant and Sri Vikas Goswami learned Government Advocate, we are of the view that the order of conviction which was passed by the Additional Sessions Judge, Court No. 6, Muzaffarnagar, was erroneously passed. The judgement and order dated 20.3.2008 was passed on the testimony of various prosecution witnesses. After the examination-in-chief and the cross-examination of the P.W. - 1 i.e. the first informant is perused, the Court finds that it could be said

that the first informant had seen the appellant along with the first informant's son Shiva at around 4 to 5 pm. As per the P.W. -1, the brother of the P.W. -1 who was produced as P.W. -2 and one Surendra son of Rahtu Harijan had also seen the appellant playing with the deceased at around 4 to 5 pm on 23.1.2007. Thereafter, they were not to be found. As per the P.W. - 1 both the appellant and the deceased had absolutely disappeared after they were last seen and the child after being killed was found buried at 12:30pm on the next date on 24.1.2007. In the cross-examination, we find that the P.W. -1 has also stated that it was Surendra son of Shree Pal who had actually seen the child playing with the appellant. This prosecution witness (P.W.-1) has not been able to, with any certainty, come up with any evidence which would lead one to reach a conclusion that the appellant and the appellant alone had murdered the child. His statement of fact that the appellant was not to be found after he was seen last at 4 to 5 pm was in direct contradiction to the statement made by P.W. - 2 that the appellant himself was searching for the missing child Shiva and the appellant along with 4 other boys, namely, Ankit, Vipin, Sonu and Pradeep had found the dead body. This not only makes the statement of the P.W. - 1 unreliable but in fact a suspicion is raised in the mind of the Court that the first informant was trying to falsely implicate the appellant. The P.W. - 1 has also not tried to disprove the statement of the P.W. - 2 by producing the four boys, namely, Ankit, Sonu,

Vipin and Pradeep. He has also not questioned the P.W. - 2 with regard to the fact as to whether he had actually seen the appellant Shaki searching for the missing child. The Court, therefore, finds that conviction on the basis of the fact that the appellant was last seen with the deceased has no ground to stand as there are many missing links between the time the first informant (P.W.-1), the P.W. - 2 and Surendra had seen the appellant last with the child and the time when the body of the deceased was found.

Further, we find substance in the argument of the learned counsel for the accused-appellant that if only a few days back the appellant had done some dirty work with the elder son of the first informant who was named Deepak then it was a natural behaviour of any father not to trust the younger son of his with that person.

We have earlier already found that this case is totally based on circumstantial evidence and not on direct evidence. In the case of State of U.P. vs. Satish reported in 2005 (3) SCC 114, the Supreme Court has held that *“there is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back in 1952.”*

Further, in the case of **Sharad Birdichand Sarda vs. State of Maharashtra** reported in **AIR 1984 SC 1622**, the Supreme Court has held that “before conviction could be based on

circumstantial evidence the following conditions must be fully established and they are:

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.
2. The fact so established should be consistent only with the hypothesis of the guilt of the accused.
3. The circumstances should be of conclusive nature and tendency.
4. They should exclude every possible hypothesis except one to be proved.
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.

These conditions have been called as the ‘Five golden principles’ or to say’ constitute the panchsheel of the proof of a case based on circumstantial evidence.’

Recently, in **Nathiya vs. State Rep. By Inspector of Police, Bagayam Police Station, Vellore, (Crim. Appeal No. 1015 of 2010, date of judgement 08.11.2016)**, the Hon’ble Court has approvingly referred to **Sujit Biswas vs. State of Assam, (2013) 12 SCC 406** and **Raja @ Rajednra vs. State of Haryana (2015) 11 SCC 43**. The proposition laid down is to the effect that in scrutinising circumstantial evidence, a court is required to evaluate

it to ensure that the chain of events is established clearly and completely, to rule out any reasonable likelihood of the innocence of the accused. Whether the chain is complete or not would depend on facts of each case emanating from the evidence and no universal yardstick should ever be attempted.

More recently in **Ganpat Singh vs. State of Madhya Pradesh (2018) 2 SCC (Cri) 159**, it has been reiterated that circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. 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 accused and they should be incapable of explanation on any hypothesis other than that of guilt of accused and inconsistent with his innocence.”

Where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (**Raju vs. State, by Inspector of Police, AIR 2009 SC 2171**). Onus is on the prosecution to prove that the chain is complete and false defence or plea cannot cure the infirmity or lacuna in the prosecution case. If the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. (**Vithal E Adlinge**

vs. State of Maharashtra, AIR 2009 SC 2067). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances (**Krishna Ghose vs. State of W.B., AIR 2009 SC 2279**).

In **Dev Kanya Tiwari vs. State of U.P., (2018) 5 SCC 734**, it has been held that when there is no eye witness to an incident and the case is entirely based upon circumstantial evidence, then court is expected to be more careful and cautious while analyzing the evidence and while convicting the accused. In other words, in all probabilities chain of circumstances should lead to an irresistible conclusion that the accused participated in the commission of the crime and committed the offence.

In the instant case, if the first informant had in his mind the dirty work which was done by the appellant with Deepak his elder son then he would definitely not have allowed the appellant to play with the child of the first informant who was later on murdered. On these grounds we, therefore, conclude that the appeal deserves to be allowed and the appellant deserves to be acquitted.

The appeal is, therefore, allowed and the judgement and order dated 20.3.2008 passed by the Additional Sessions Judge, Court No. 6, Muzaffarnagar, in Session Trial No. 854 of 2007

arising out of Case Crime No. 7 of 2007, under Section 302 and 201 IPC, Thana – Bhaunrakala, District – Muzaffarnagar, is quashed and is set aside.

Since the appellant is reported to be in jail, he be set free forthwith, if he is not required in any other case.

We appreciate the hard work which has been put in by the Amicus Curiae and quantify the fee to be Rs. 35,000/- which may be paid to him.

Order Date :- 26.5.2022
PK

(Umesh Chandra Sharma,J.)

(Siddhartha Varma,J.)