REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.132 OF 2002

State of U.P. ...Appellant

Versus

Ram Balak and Anr. ...Respondents

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. The State of U.P. is in appeal questioning the correctness of judgment of a Division Bench of the Allahabad High Court which directed acquittal of the respondents. The learned 5th Additional Sessions Judge found the respondents guilty of offence punishable under Sections 376, 302 and 201 of the Indian Penal Code, 1860 (in short the 'IPC'). Each was sentenced to death sentence for the offence relatable to Section 302 IPC, life imprisonment for the offence relatable to Section 376 IPC and 7 years for the offence relatable to Section 201 IPC. The appellants preferred appeal before the High Court and a reference was made by the Trial Court under Section 366 of the Code of Criminal Procedure, 1973 (in short the 'Code') for confirmation of the death sentence. The High Court by the impugned judgment found that the accusations have not been established by the prosecution and therefore directed acquittal. Capital reference was rejected.

2. The prosecution version as unfolded during trial is as follows:

According to prosecution, murder and rape was committed by the respondents on 17-11-1992 at about 7.00 A.M. in the morning when Kumari Suneeta, the deceased victim aged about 14 years had gone to ease herself in the nearby open field in village Jamal Nagar Police Station Safipur District Unnao. When on 17-11-1992 at about 7.00 A.M. Kumari Suneeta had gone to attend the call of nature in the nearby open field, both the accused followed her and after catching hold of her committed rape upon her and thereafter killed her by strangulation. They thereafter concealed the dead body of Kumari Suneeta by throwing it in the nearby Patawar. When she did not return back to her home, the family members of Kumari Suneeta started searching for her and ultimately at about 2.00 p.m. the dead body of the Kumari Suneeta was found in the Patawar. After recovery of the dead body of Kumari Suneeta, Radhey Lal (PW.1), brother of the deceased lodged a report about the incident at Police Station Safipur District Unnao at 3.45 P.M. on the same day. The distance of Police Station is 6 miles from the place of the incident. Sheo Harsh Tewari (C.W.2), Sub Inspector was present at the Police Station at the time when the report was lodged, therefore, he immediately proceeded to the place of the incident and reached there in the evening. He prepared inquest report at about 4.30 P.M. and other relevant papers Ext. Ka. 6

to Ka. 10 and sent the dead body to Mortuary for post-mortem examination. The Investigating Officer thereafter prepared Site-plan Ext. Ka.14 and recovered bali, Lutia, Chappal, Chaddhi etc. from the place of the incident. The investigating Officer also recovered Salwar and Frock which were found to be wrapped on the neck of the deceased. It is further said that thereafter the Investigating Officer called the Dog Squad and on the request of the Investigating Officer, Dog Squad reached there on 18-l1-1992 at about 12.45 p.m. It is said that the dogs after smelling the foot-print of the accused from the place of the incident reached the house of Shiv Balak. On 2.12.1992, the Investigating Officer arrested Ram Balak and recovered one lutia of Shiv Balak from the place of the incident on the pointing out of accused Ram Balak. Shiv Balak subsequently surrendered in Court. The autopsy on the dead body of the deceased was conducted on 18-11-1992 by Dr. Satya Prakash, Medical Officer District Hospital, Unnao. Ram Balak accused after the incident visited the house of Iqbal Ahmad (CW-1) and confessed his guilt. After completing the investigation the Investigating Officer submitted charge-sheet against the accused persons.

Since the accused persons pleaded innocence trial was held. Seven witnesses were examined by the prosecution to prove the version which rested on circumstantial evidence.

The learned Trial Judge after scrutinizing the evidence on record came to the conclusion that the prosecution has successfully proved the guilt of the accused beyond reasonable doubt and therefore he convicted and sentenced the respondents as mentioned above.

The respondents feeling aggrieved from the judgment and order passed by the trial Court, filed the Criminal Appeal before the High Court challenging their conviction and sentence as aforesaid.

The stand before the High Court was that there is no evidence at all against the present respondents and the learned Court below committed an error in holding that the prosecution by means of circumstantial evidence has proved the guilt of the respondents beyond doubt.

In the instant case there is no eye witness account. The conviction of the respondents is based only on circumstantial evidence. The learned Trial Judge while convicting the respondents relied upon five circumstances, namely, (i) the motive behind the crime was teasing of the deceased by the accused persons and thereafter they were scolded by the deceased, (ii) the accused persons were seen on the date and time of the incident near the place of the incident which led to their involvement, (iii) the police Dog Squad proved the guilt of the accused persons, (iv) the witnesses had no reason to implicate the accused persons falsely and (v) there is no missing link in the prosecution story.

The High Court held that the circumstances do not make a complete chain of circumstances. There was no evidence to show that

the accused were last seen in the company of the deceased. Merely because they were seen near the place of incidence, that cannot be a ground to show their involvement. The High Court noted that though there was some reference to the alleged extra judicial confession before CW-1 by the accused Ram Bali, the said confessional statement was not confronted to the accused while the statement of accused Ram Balak was recorded under Section 313 of the Code of the Criminal Procedure, 1973 (in short 'the Code'). The High Court also found that the evidence of this witness was not believable. Accordingly, the High Court directed acquittal.

3. In support of the appeal, learned counsel for the appellant submitted that there is a complete chain of circumstances and therefore the High Court ought to have upheld the conviction as recorded by the trial Court.

4. It has been consistently laid down by this Court that 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. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). 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. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

5. We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus:

> "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....".

6. In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC 79), it was laid down that 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;
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> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
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> (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
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> (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.

7. In State of U.P. v. Ashok Kumar Srivastava, (1992 Crl.LJ 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

8. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (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".

9. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

10. In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

> "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."

11. A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They 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;
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> (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;
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> (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.

12. These aspects were highlighted in State of Rajasthan v. Rajaram (2003 (8) SCC 180), State of Haryana v. Jagbir Singh and Anr. (2003 (11) SCC 261).

13. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this court. In State of U.P. v. Satish [2005 (3) SCC 114] it was noted as follows:

"22. 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. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."

14. In Ramreddy Rajesh Khanna Reddy v. State of A.P. [2006 (10) SCC 172] it was noted as follows:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and 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. Even in such a case the courts should look for some corroboration".

(See also *Bodhraj* v. *State of J&K (2002(8) SCC 45)*.)

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15. A similar view was also taken in Jaswant Gir v. State of Punjab [2005(12) SCC 438]. Factual position in the present case is almost similar, so far as time gap is concerned.

16. Out of the circumstances highlighted above really none is of any significance. Learned counsel for the appellant-State highlighted that the extra judicial confession itself was sufficient to record the conviction. On a reading of the evidence of CW-1 it is noticed that accused Ram Balak did not a say a word about his own involvement. On the contrary he said that he did not do anything and made some statements about the alleged act of co-accused. Additionally, in his examination under Section 313 of Code, no question was put to him regarding his so called extra judicial confession. To add to the vulnerability, his statement is to the effect that after about 11 days of the incidence the extra judicial confession was made. Strangely he stated that he told the police after three days of the incidence about the extra judicial confession. It is inconceivable that a person would tell the police after three days of the incidence about the purported extra judicial confession which according to the witness himself was made after eleven days.

17. Learned counsel for the State submitted that there may be some confusion. But it is seen that not at one place, but at different places this has been repeated by the witness.

18. Learned counsel for the appellant also refers to a judgment of this Court in Abdul Razak Murtaza Dafadar v. State of Maharashtra (AIR 1970 SC 283) more particularly para 11 that the Dog Squad had proved the guilt of the accused persons. In this context it is relevant to take note of what has been stated in para 11 which reads as follows:

> "11. It was lastly urged on behalf of the appellant that the lower courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and in Scotland it has been admitted. But in the United States there are conflicting decisions:
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> > There have been considerable uncertainty in the minds of the Courts as to the reliability of dogs in identifying criminals and much conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases however, reveals that most Courts in which the question of the admissibility of evidence of trailing by blood-hounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime. Pare 378, Am. Juris. 2nd edn. Vol. 29, p. 429.
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> There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog's human companion must go into the box and report the dog's evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value. In R. v. Montgomery, 1866 NI 160 a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards

> the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behaviour of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog's reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument'' and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog's evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight."

19. It is submitted by learned counsel for the appellant that in the said case this Court had upheld the conviction. Though in the said case the conviction was upheld, but that was done after excluding the evidence of Dog Squad. This Court found that the rest of the prosecution evidence proved the charges for which the appellants therein had been convicted.

20. Above being the position, there is no merit in this appeal which is accordingly dismissed.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(HARJIT SINGH BEDI)

New Delhi
October 3, 2008