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Surender Prashad Vs. State

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Court : Delhi

Decided On : Jan-17-2014

Judge : Kailash Gambhir

Appellant : Surender Prashad

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on: January 17, 2014 + CRL.A. 245/2002 SURENDER PRASHAD Through: ..... Appellant Mr. Sumeet Verma, Advocate versus STATE Through: ..... Respondent Mr. Sunil Sharma, Additional Public Prosecutor for the State CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT
KAILASH GAMBHIR, J.

1. By this appeal filed under Section 374 Criminal Procedure Code, 1973 (hereinafter referred to as CrP.C), the appellant seeks to challenge the judgment dated 12.04.2001 whereby the appellant has been convicted for committing an offence punishable under Sections 302/363/364/201 Indian Penal Code Code, 1860 (hereinafter referred to as IPC) and vide order on sentence dated 16.04.2001, he has been sentenced to undergo imprisonment for life and payment of fine of Rs. 1000/- and in default thereof to further undergo rigorous

imprisonment of three months under section 302 IPC; imprisonment for life and payment of fine of Rs. 1000/and in default thereof to further undergo rigorous imprisonment of three months under section 364 IPC; rigorous imprisonment to 7 years and to payment of fine of Rs. 1000/- and in default thereof to further undergo rigorous imprisonment of three months under section 363 IPC and rigorous imprisonment of 3 years and payment of fine of Rs. 1000/- and in default thereof to further undergo rigorous imprisonment of three months under section 201 IPC.

2. The case of the prosecution as set out in the charge sheet can be summarised as under:

On 19.01.1999, at about 8 p.m. Rahul, son of PW-3 went to neighbourhood to watch Jagran. He did not return. PW-3 tried to search his son but he could not trace him out. Ultimately, PW-3 lodged a report with the police on 20.01.1999 at about 12:45 p.m. was lying behind the bushes near railway line and Mahamai Mandir. PW-3 went there and found the dead body of his child lying there.

3. To prove its case, prosecution had in all examined 20 witnesses. After evidence of prosecution, the accused was examined under Section 313 Cr. P.C., wherein he denied the prosecution case and pleaded innocence. He specifically denied that Suresh Yadav (PW-3), father of the deceased owed any money to him. He also denied that he stopped going to the factory of Pankaj Jain since 19th January, 1999. In fact, he explained in his statement under Section 313 Cr. P.C., that he attended the factory till the evening of 12th January, 1999. No witness was however examined by the accused in his defence.

4. The charges were also framed against the other co-accused, Vijay Yadav, for the same offence, however, the learned Trial Court found the evidence against him to be of frail character, not inspiring any confidence and thus acquitted him after giving him benefit of doubt. As against the present appellant, Surender Prashad, the learned Trial Court found the evidence of the prosecution cogent and clinching, clearly manifesting his guilt in the commission of offences punishable under Sections 363/364/302/201 of IPC.

5. Representing the case of the appellant, Mr. Sumeet Verma, Advocate laid challenge to the finding arrived at by the learned Trial Court which as per the counsel, were totally perverse and against the well settled principles of law.

6. Refuting the arguments of counsel for appellant, Mr. Sunil Sharma, Additional Public Prosecutor for state, advanced his argument in support of the findings arrived at by the learned Trial Court.

7. We have heard learned counsel for the parties at considerable length and given our thoughtful consideration to the arguments advanced by them. We have also perused the record of this case and closely scrutinised the evidence led by both the parties.

8. In the present case a boy of 6 years of age had gone to participate in a jagran being held in the neighbourhood on 19.01.1999 at 8:00 p.m. Suresh Yadav, PW-3, is the father of the deceased. PW-3 returned back to his home at about 8:30 p.m. and when his son did not return back till 10:00 p.m., he came out of his house to search his son. However, after failing to find any clue about the whereabouts of his child, he went to police station and lodged a complaint on the following day, i.e., on 20th January 1999 at about 12.45 p.m. After two days of lodging the complaint i.e. on 22nd January, 1999 he learnt about the death of his son from Mr. Raju (PW-16), however by that time he had no clue as to who was behind the murder of his son. On 23.1.1999, it is Ajay (PW-1) who disclosed him and the police that before leaving for Ludhiana, he had personally seen the accused holding the hand of deceased, Rahul and taking him away from a shop, near the place of jagran. This information of PW-1 led to arrest of appellant, Surender Prashad. The name of the other accused Vijay Yadav was disclosed by appellant in his disclosure statement and on identification of PW-3 only, co-accused Vijay Yadav, was apprehended by the police on 1st February 1999. One maroon color jersey belonging to the deceased was recovered from the co-accused Vijay Yadav and this jersey was duly identified by PW-3, to be the Jersey, which was worn by the deceased when he left for attending the jagran.

9. To drive home the guilt of the accused, the learned Trial Court gave due credence to the testimony of Ajay (PW-1) who was an independent witness and

has no grouse to falsely implicate the present appellant. Learned Trial Court also found that his visit to Ludhiana and his allegation that he saw the accused in the company of the deceased could not be shattered by the defence during his cross-examination. Learned Trial Court further held that the mere fact that Ajay (PW-1) was an employee of Suresh Yadav was not enough to discard the testimony of this witness. Learned Trial Court further took a view that the accused, Surender Prashad had been given ample opportunity to explain his position of being lastly seen in the company of the deceased, but instead of giving any explanation, he took refuge under simplicitor denials. Learned Trial Court thus held that silence on the part of the accused was pernicious and had deleterious effect on his case. Learned Trial Court also found that the evidence of PW-7, had an aura of dependability, as he was the employer of accused, Surender Prashad. There was no reason for him to give any false evidence against the accused by deposing that accused never attended his duties from 22nd January 1999. Learned Trial Court also found that the prosecution succeeded in sufficiently proving the motive on the part of Surender Prashad to kill the deceased, Rahul. The father of the deceased, PW-3 owed an amount of Rs. 2000/- to the accused, Surender Prasad, which he was not returning and therefore the accused had a grouse against PW-3 and in order to take revenge, he murdered the son of PW-3, Rahul.

10. It would be thus seen that the conviction of the appellant was based mainly on the last seen evidence of Ajay (PW-1) supported by the absenteeism of the accused, Surender Prashad, from his duty since 22nd January, 1999 and his motive to kill the child of PW-3 because of the reluctance on the part of PW-3 to return back his money.

11. On the last seen evidence, the submission of Mr.Sumeet Verma, counsel for the appellant, was that the evidence of last seen only, by itself is a weak piece of evidence and therefore it may not be safe for the court to base the conviction of the accused on such an evidence solitarily, unsupported by any other circumstantial evidence, unerringly pointing out to the guilt of the accused totally inconsistent with his innocence. Counsel for the appellant further argued that the last seen evidence must qualify two primary tests being test of proximity of time and test of proximity of distance and in the present case, the prosecution blatantly

failed on both the counts. Contention raised by counsel for the appellant was that as per Ajay (PW-1) the accused was seen in the company of the deceased at 8.30 p.m. on 19th January, 1999 and as per the post mortem report, which was conducted on 22.1.1999 at 1:15 p.m., the time of the death opined by the doctor, PW-21, was 37 hours back which would mean that the death of the child, Rahul might have taken place on 22.01.1999 at around 12:05 a.m.. Thus, there was a clear gap of around 51 hours 45 minutes since the time when the deceased and the accused were last seen in the company of each other by PW-1 and the time when the deceased was murdered by some person. Similarly, the counsel for the appellant also pointed out that even the place of death was far away from the place where the jagran was taking place, although this distance was not proved by the prosecution on record. Learned counsel for the appellant also argued that the time gap between the alleged incident and the last seen evidence was so wide that the possibility cannot be ruled out that in between anybody could meet the deceased to accomplish his plans and simply because the accused was seen in the company of the deceased, that too at a place near jagran, where the deceased could have been seen in company of many other persons, it will be hazardous to convict the accused on the basis of such a week piece of evidence.

12. Counsel for the appellant also laid strong attack on the version of Ajay (PW-1). The counsel for the appellant contended that PW-1 left for Ludhiana on the evening of 20th January, 1999 and returned back on 23rd January, 1999. Contention raised by the counsel for the appellant was that in his cross-examination, Ajay (PW-1) deposed that he left Ludhiana at about 3.30 a.m. on 23rd January, 1999 and reached Delhi at 4.30 p.m., which would mean that it took him nearly 13 hours from Ludhiana to reach Delhi, while distance from Ludhiana to Delhi can be easily covered within maximum six hours.

13. Other contention raised by counsel for the appellant was that Ajay (PW-1) in his cross-examination, showed his ignorance with regard to the address of his brother with whom he resides in Ludhiana. Counsel for the appellant also argued that the appellant had attended his duty on 20 th and 21st January, 1999 as per the deposition of PW-7 and this testimony of PW-7 also goes in favour of the appellant as had the deceased been in the company of the appellant or he would

have been murdered at the hands of the appellant on 22.1.1999 at 12:05 a.m., then the appellant would not have attended his duties on 20th and 21st January, 1999. Counsel for the appellant also argued that 19th January, 1999 was a holiday and therefore the appellant did not attend his duty that day and thus his absence on 19th January, 1999 cannot be taken as adverse against him.

14. Counsel for the appellant also argued that it is a blind murder case and the appellant had been unnecessarily roped in merely because of the failure of the police to solve the case. Counsel for the appellant also argued that the appellant was arrested on 24th January, 1999 as per the deposition of PW-3 but his arrest has been shown by the police on 30th January, 1999 so as to make full proof case against the appellant in the meanwhile. Counsel for the appellant also invited attention of this court to the statement made by PW-3 at three places where he referred to the arrest of the appellant by the police on 24th January, 1999 at about 12.00 noon. Counsel for the appellant also argued that the police did not prove the arrest memo of the accused, Surender Prashad and this fact further substantiates the argument, that the accused was not arrested on 30th January, 1999.

15. Counsel for the appellant also argued that there was no recovery of any kind effected at the instance of the appellant. Counsel for the appellant also argued on motive, that the case of the prosecution had no legs to stand, as for mere non return of such a paltry amount of Rs. 2000/-, nobody can be expected to carry out the murder of child of the borrower.

16. Last seen evidence is one of the species of circumstantial evidence. Last seen evidence as per Part III, Section 7 of the Indian Evidence Act, 1872, is relevant evidence against the accused. For proving this evidence it is essential for the prosecution to prove two things, being that the accused was seen alone in the company of the deceased and at a place where no other person is expected to interfere. Once this is proved the burden of proof under section 106, Indian Evidence Act, 1872, falls upon the accused to prove his innocence. It is pertinent to mention that the first burden of proof is on the prosecution to prove the above said elements and it is only after the prosecution successfully proves them that the burden shifts on the accused to prove his defence.

17. Last seen evidence does not by itself necessarily leads to an inference that the accused committed the crime unless the same is duly supported by other links in the chain of circumstantial evidence unerringly pointing out the guilt of the accused. The theory of last seen together evidence is thus held to be not of universal application based on which the conviction of accused can be sustained. It shall also be noted that the last seen evidence is only a relevant evidence to complete the chain of circumstantial evidence; however the conviction cannot be solely based on this piece of evidence. Dealing with the principle of last seen evidence, the Honble Apex Court in very recent case of Rishi Pal V. State of Uttarakhand,reported in 2013 (2) ACR147 held as under:

16. In Mohibur Rahman and Anr. v. State of Assam, (2002) 6 SCC715 this Court held that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. Similarly in Arjun Marik and Ors. v. State of Bihar:

1994. Supp (2) SCC372 this Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded. So also in Godabarish Mishra v. Kuntala Mishra and Anr. : (1996) 11 SCC264 this Court declared that the theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. In Bharat v. State of M.P. : (2003) 3 SCC106 two circumstances on the basis whereof the Appellant had been convicted were (i) the Appellant having been last seen with the deceased and (ii) Recovery of ornaments made at his instance. This Court held: ... Mere non-explanation cannot lead to the proof of guilt against the Appellant. The prosecution has to prove its

case against the Appellant beyond reasonable doubt The chain of circumstances, in our opinion, is not complete so as to sustain the conviction of the Appellant....

20. Suffice it to say that even if we take the most charitable liberal view in favour of the prosecution, all that we get is a suspicion against the Appellant and no more. The High Court was in that view justified in setting aside the order passed by the trial Court and acquitting the Appellant of the offence of murder under Section 302 Indian Penal Code. The order passed by the High Court deserves to be affirmed giving to the Appellant the benefit of doubt. We accordingly dismiss the appeal filed by the Appellant and discharge the notice of show-cause issued to him.

18. It is also a settled legal position that where the time gap between the point of time when the accused and deceased were last seen together and when the deceased was found dead is so small that there can be no possibility of any person other than the accused, becomes impossible, the court should look for some other corroboration taking such last seen evidence as an important evidence in the whole chain of circumstantial evidence. However, where in a case there is a long gap and possibility of any other person coming in between exists, the reliability itself on this piece of evidence becomes difficult and before placing any reliance the court must satisfy itself by other positive evidence to conclude that there was no possibility of any other person entering into such a gap.

19. Applying the aforesaid legal principles to the facts of the present case, the position which emerges is that the deceased child had gone to attend the jagran on 19.01.1997 at 8:00 p.m. and at about 8.30 p.m. he was seen in the company of the accused, when the accused was holding his hand near a shop, at the place of jagran. As per the post mortem report, death of the child had taken place at 12:05 a.m. on 22.01.1999 and therefore, there was a clear gap of 51 hours and 45 minutes between the time when he was last seen in the company of the accused and the time of his death. This time gap is too wide and therefore we are not persuaded to place much reliance on this piece of evidence for conviction of the appellant.

20. We also cannot be oblivious to the fact that at the place where the jagran was taking place, the presence of many people is quite usual and as per the

prosecution case, the accused knew the family of the deceased; and therefore it was not unusual for the accused to be seen in the company of the child. There being a wide gap in the last seen evidence and the time of death of the child, we need not attach much importance to the aspect whether Ajay (PW-1) had gone to Ludhiana on 20th January, 1999 and returned back on 23rd January, 1999 or not. Although we are surprised that the person who had gone to Ludhiana to reside with his brother would not even know the address of his brother. The testimony of PW-7 employer of the appellant, rather supported the case of the defence when he said that the appellant attended his duties on 20th and 21st January, 1999. Certainly the absenteeism of the appellant on 20 th and 21st January, 1999 in the absence of any explanation could have gone against him.

21. On the aspect of motive also, we find no merit in the reasoning given by the learned Trial Court that the appellant had carried out murder of the child of Suresh Yadav (PW-3) as he owed a large amount to the accused and not returning of the same led to murder of his child. As per his own deposition, PW-3 deposed that only an amount of Rs. 2,000/was deposited by the appellant with him and out of which he had returned Rs.800/- to him and the remaining amount to his father. It is highly improbable, in the absence of any other strong reasons, to believe that merely not retuning a paltry amount of Rs. 2000/- would result in the murder of child of the borrower. There is no history of any quarrel between the accused and Suresh Yadav or any police complaint with regard to not returning the money by Suresh Yadav or of any kind of threats extended by the accused to Suresh Yadav or of demanding the said money, which could have provoked the accused to commit such a criminal act. It is also not fathomable that the accused instead of causing harm to the borrower would carry out murder of child of the borrower. It is not the case of the prosecution that any ransom demand was raised by somebody before carrying out murder of the child. The story of the prosecution is totally uninspiring and not credible.

22. The present case is based on circumstantial evidence and as per the settled legal position in a case based on circumstantial evidence, all the incriminating circumstances must be supported by reliable and clinching evidence and the circumstances proved must form a chain of events so complete as would permit

no conclusion other than one of guilt of the accused.

23. The tests applicable to cases based on circumstantial evidence are fairly well-known. The decisions of the Apex Court and various other High Courts recognizing and applying those tests to varied fact situation are a legion. In the landmark judgment of Sharad Birdhichand Sarda v. State of Maharashtra reported in 1984 (4) SCC116 the Apex Court declared that a case based on circumstantial evidence must satisfy, the following tests:

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

24. In the present case, we find that the prosecution has blatantly failed to prove the offence against the accused beyond reasonable doubt. Only on the basis of last seen evidence the accused cannot be convicted for the offence of murder.

25. After taking all the facts and circumstances in consideration we donot find ourselves in conformity with the findings arrived at by the Learned trial court. Accordingly, the appeal filed by the appellant is allowed and the judgment dated 12.04.2001 convicting the appellant for committing an offence punishable under Sections 302/363/364/201 Indian Penal Code Code, 1860 and and order on sentence dated 16.04.2001 are set aside. The appellant is on bail. His bail bond is discharged.

26. Copy of this order be sent to the Jail Superintendent for information and necessary compliance. KAILASH GAMBHIR, J.

SUNITA GUPTA, J.

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