

State of Madhya Pradesh Vs. Ramesh Kumar

State of Madhya Pradesh Vs. Ramesh Kumar

SooperKanoon Citation : sooperkanoon.com/505983

Court : Madhya Pradesh

Decided On : Jul-06-2004

Reported in : 2004(4)MPHT106; 2004(4)MPLJ102

Judge : S.P. Khare and ; A.K. Shrivastava, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 201, 302 and 364; Code of Criminal Procedure (CrPC) , 1974 - Sections 366(1); [Evidence Act, 1872](#) - Sections 3, 8, 24 and 27

Appeal No. : Criminal Reference No. 3 of 2004 and Criminal Appeal No. 699 of 2004

Appellant : State of Madhya Pradesh

Respondent : Ramesh Kumar

Advocate for Def. : Narendra Nikhare and ;P. Parikh, Advs. in Criminal Reference No. 3/2004 and ;R.S. Patel, Additional Adv. General in Criminal Appeal No. 699/2004

Advocate for Pet/Ap. : R.S. Patel, Additional Adv. General in Criminal Reference No. 3/2004, ; Narendra Nikhare and ; P. Parikh, Advs. in Criminal Appeal No. 699/2004

Judgement :

A.K. Shrivastava, J.

1. The learned Second Additional Sessions Judge, Shahdol has referred this death reference under Section 366(1) of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), is heard along with Criminal Appeal No. 699 of 2004 filed by appellant Ramesh Kumar against his conviction and order of sentence of death under Section 302 of Indian Penal Code (for brevity 'the IPC) passed by learned Trial Judge vide impugned judgment dated 8th April, 2004 passed in Sessions Trial No. 160 of 1999. The accused/appellant has also challenged his conviction under Sections 364 and 201, IPC.

2. In brief the case of prosecution is that on 5-1-1999 Amit Kumar (hereinafter referred to as 'the deceased') went to market to purchase some articles of household, but when he did not turn up a missing report was lodged at Police Chowki, Rajnagar. It is said that on 14-1-1999 in the dawn hours one Sindhi s/o Becrshah Kol went to discharge excreta nearby the Nala situated near cremation ground, at some distance he found dogs were quarrelling and one dog was eating the human skull. Thereafter, he went to that place and found that some human bones were lying here and there and at some distance he found a shirt and a Baniyan of a boy in between the age of 10-12 years. The sleeve of the shirt was found to be stained with blood. Similarly, the Sando Baniyan was also stained with blood. He also noticed a trouser lying besmeared in the mud. At 3 P.M., when his duty became off, he went to the police station and lodged a report on 14-1-1999 which was registered as Merg report.

3. On the basis of merg intimation report, the Station Officer Incharge Shri Vijay Pratap Singh arrived at the spot, seized the skeleton, head, clothes (trouser, shirt, baniyan etc.) and issued notices to Leeladhar Sharma, Inder Chand, Pacho Lal, Ashok Mishra and Gynendra Singh and they identified the clothes to be of the deceased who was killed by unknown person. The investigating officer Shri Vijay Pratap Singh sent the skeleton to Community Health Centre, Bijuri where on examination by Dr. D.K. Kori the bones were found to be of human. Dr. Kori advised to send the skeleton to expert.

4. During the course of merg enquiry by Investigating Officer Vijay Pratap Singh, statement of Inder Chand Jain, Patel Chouhan, Kanhaiya, Manish, Guddi alias Amrit. Preetam Yadav etc., were recorded. On the basis of the statement of these witnesses, it was found that accused persons Raju and Ramesh went to the house of one Amrita and asked her to give pick-axe and spade and thereafter, after half an hour returned it to her. During the investigation, it was also found that accused persons confessed their guilt to Rath Kumar by way of extra judicial confession. On the disclosure of fact under Section 27 of the Evidence Act, mattress, quilt and a bottle of oil which were used for the commission of the offence under Section 377, IPC were also seized. On the basis of the material collected by Investigating Officer during the merg enquiry, a case under Sections 302, 377, 364 and 201, IPC was registered against the accused persons.

5. In furtherance to his investigation, the Investigating Officer recorded the statement of Laxman from whose shop the rope was purchased by accused Raju and Ramesh, the Investigating Officer further collected the document from Higher Secondary School where accused/appellant Ramesh Kumar was serving as Assistant Teacher. He also seized a certificate from Hari Narain Soni, Manager, Central Bank who gave the loan of Rs. 75,000/- to appellant/accused Ramesh to open a shop of provision store under the head of Pradhan Mantri Berojgar Yojana and at the instance of accused persons the Investigating Officer seized socks of deceased from the house of appellant Ramesh. The socks were subjected to identification, which was conducted by Tehsildar Bihari Lal. The human skeleton was sent to Director, Forensic Medicine Medico Legal Institute at Gandhi Medical College, Bhopal where Dr. Sathpathy after applying scientific tests found the skeleton of a child having age of 10-11 years. However, the doctor was unable to give any opinion about the sex of the deceased.

6. After completing the investigation, a charge-sheet was submitted in the Competent Court, which on its turn committed the case to the Court of Session and from where it was received by the Trial Court for trial.

7. The learned Trial Judge on perusal of the charge-sheet framed charges punishable under Sections 364, 302 and 201, IPC. Needless to emphasize the

appellant refuted the charges. The defence of the accused/appellant is that he along with the students of the school was making demonstration to remove the liquor shop nearby the school, as a result of which the police persons became annoyed to him and as such he has been falsely implicated. Three accused persons, namely, Raju Uike, Manohar and appellant Ramesh were tried, however, on going through the judgment of the Trial Court, it is found that accused Raju Uike absconded before his statement under Section 313, Cr.PC could be recorded and similarly accused Manohar absconded at the time of final hearing. These two accused persons were declared absconded accused under Section 299, Cr.PC.

8. In order to prove charges, the prosecution examined as many as 21 witnesses and placed Ex. P-1 to P-42, the documents on record. The learned Trial Judge after considering the entire evidence placed on record came to hold that the appellant did commit the offences for which he was charged and eventually convicted him and passed the death sentence. Hence this appeal.

9. The contention of Shri Nikhare, learned Counsel for the accused is that the prosecution has utterly failed to prove its case beyond all possible doubt. According to him, the circumstances which are placed on record by the prosecution does not form a complete chain in order to point out the guilt against the accused. It has also been put forth by him that much stress has been given by the Trial Court to the testimony of Rath Kumar (P.W. 7) to whom it is said that accused/appellant made extra judicial confession. It has also been proposed by learned Counsel that the nature of the evidence of extra judicial confession is a weak type of evidence and, therefore, the case of the prosecution can not be stretched up to the extent so that a person can be convicted on its basis. Shri P. Parikh, Advocate has submitted the written submission.

10. On the other hand Shri R.S. Patel, learned Additional Advocate General argued in support of the impugned judgment and has contended that there is no infirmity in the judgment of Trial Court and the death reference be accepted by dismissing the appeal.

11. After having heard learned Counsel for the parties, we are of the considered view that this appeal deserves to be allowed.

12. In the present case, there is no direct evidence against the appellant and the prosecution has based its case on the basis of circumstantial evidence. If the prosecution has based its case on circumstantial evidence, the Supreme Court has laid down certain norms for convicting the accused. In the case of Sharad v. State of Maharashtra, AIR 1984 SC 1622, the Apex Court has laid down the test which should pre-exist before the conviction could be accorded. 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;

(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.

13. The same principle was reiterated by the Apex Court in later decisions in the case of K.C. Chaku alias Kunju v. State of Kerala, (2001) 9 SCC 277 and Ashish Batham v. State of Madhya Pradesh, 2003(1) M.P.H.T. 1 (SC) = 2002(2) J.L.J. 273.

14. Apart from the aforesaid decisions of the Apex Court in a recent judgment, the Supreme Court in the case of State of Rajasthan v. Raja Ram, (2003) 8 SCC 180, has reiterated the same law regarding circumstantial evidence. We would like to re-write Para 9 wherein the Apex Court has held thus:--

'9. 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*, *Eradu v. State of Hyderabad*, *Earabhadrapa v. State of Karnataka*, *State of U.P. v. Shkhbasi*, *Balwinder Singh v. State of Punjab* and *Ashok Kumar Chaterjee v. State of M.P.*). 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*, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

15. In Para 10 the Apex Court in the case of *Padala Veera Reddy v. State of Andhra Pradesh and Ors.*, (1989) Supp 2 SCC 706 by placing reliance to its earlier decisions, has laid down the tests when a case rests upon circumstantial evidence and they are :--

(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. (See *Gambhir v. State of Maharashtra*).

16. On the basis of above said principles of law laid down by the Apex Court, let us now examine the present case. Broadly the prosecution has placed following

circumstances accusing the appellant and which are also relied by the Trial Court in the impugned judgment and on its basis the conviction has been accorded. They are :--

- (i) conspiracy between the accused persons to kidnap the deceased;
- (ii) evidence that accused persons took pick-axe and spade from Guddi (P.W. 2);
- (iii) extra judicial confession of the guilt by the accused/appellant made to Rath Kumar (P.W. 7);
- (iv) seizure of socks from the house of the accused; and
- (v) the motive as accused took loan from the Bank and he received notice from the bank for re-payment.

We shall now examine and test the evidence of prosecution in order to ascertain whether above said circumstances are proved or not.

(i) Conspiracy between the accused persons to kidnap the deceased :-- (a) The prosecution has examined Patel Chouhan (P.W. 1) in order to prove that accused persons conspired to kidnap the deceased. According to this witness the accused persons were sitting on the stage of Gopal Pandal and they were talking to each other that they would kidnap Amit (deceased) and thereafter they would ask for ransom from his father. This witness was hearing the conversation behind the wall of the stage where he was hidden. Thereafter, this witness came back to his house. It be seen that stage of Gopal Pandal is situated in the heart of the city of Rajnagar and is surrounded by several shops. This witness is acquainted with the accused/appellant by name also and the accused is not a stranger to him. According to us the evidence of this witness can not be relied for the following reasons :--

- (i) after hearing the conversation of conspiracy to kidnap the deceased, he did not inform to police;
- (ii) this witness even did not inform the police when the deceased was kidnapped;

(iii) he did not inform the police even when it came to know that the deceased had died;

(iv) he remained silent and did not narrate to the police till the accused persons were arrested;

(v) he did not inform police even when the accused persons were making announcement on loud-speaker in the city and were appealing to the public at large to search the deceased;

(vi) the police persons were patrolling to search the deceased and this witness met Station Officer Incharge Vijay Pratap Singh even then he did not narrate to him;

(vii) the accused persons were conspiring and were talking in high tone so that even if a person standing 8-10 paces ahead from them may hear their talk, this is highly improbable;

(viii) no prudent man would digest that in a public place and that too in the heart of the city (Gopal Pandal), the accused persons would make plan to kidnap the deceased and would talk in high tone so that other persons may also hear their talk;

(ix) when there was announcement in the city about the kidnap of the deceased, he did not narrate to the family members of the deceased that accused persons were making plan to kidnap the deceased. This witness happens to take the grocery items from the shop of deceased's father even then he did not narrate to him that accused persons were making plan to kidnap the deceased.

(b) On the basis of aforesaid premised reasons, we can safely say that the evidence of this witness can not be relied upon and it would be highly unsafe to convict the appellant by placing reliance on this witness. Thus, it is not proved that the appellant was making plan to kidnap the deceased. One important fact which can not be marginalized and blinked away is that on 5-1-1999 incident took place as the deceased was not found and he was kidnapped. If the appellant would have kidnapped him then why ransom was not asked by him. There is no material and evidence on record that accused/appellant sent any letter to the family members of

the deceased or they ever received any telephonic message in that regard. Thus, it is not proved that the deceased was kidnapped by the appellant.

(ii) Evidence that accused persons took pick-axe and spade from Guddi (P.W. 2) :- The next circumstance which has been relied by the prosecution and on the basis of which the Trial Court has passed the impugned judgment is that appellant took pick-axe and spade from Guddi (P.W. 2). In that context, we have gone through the statement of the said witness. According to her, accused Raju and Ramesh came to her house in the evening at 7.00 and took the pick-axe and Belcha from her, however, since spade was not with her, she did not give it. Thereafter, after half an hour the pick-axe and Belcha were returned to her. On going through the evidence of this witness, it is gathered that to dig the plinth, pick-axe and Belcha were taken and they were returned back only after half an hour. The evidence of this witness is not sufficient in order to hold that the appellant committed the offence. Even if, the pick-axe and Belcha was obtained from this witness, it is not the case of the prosecution that the day on which the deceased was kidnapped, on the same day he was killed. We are saying so, because, this witness has said that the day on which the deceased missed, on the same day the appellant asked for pick-axe and Belcha from this witness. At this juncture, it would be relevant to mention that the bones which were seized by the investigating agency from the spot were sent for scientific examination to the Director of Medical Institute, Gandhi Medical College, Bhopal. After examining the bones, Dr. D.K. Sathpathy (P.W. 20) gave report which is Ex. P-38. According to doctor, the bones were of a single person having age of 11 years with one year variation. The doctor could not opine the cause of death and find any injury on the bones. The doctor was unable to ascertain the sex of the deceased person and was also unable to opine the duration of death. In the case of *Balwinder Singh v. State of Punjab*, 1996 SCC (Cri) 59, the Apex Court while dealing with a case of circumstantial evidence in which the deceased child was 2-21 years held that since the sex of the child could not be established from the bones, it was difficult to connect the seizure of bones with the deceased. In the present case also since the doctor could not opine the sex of the person of which the bones were sent to him for examination, according to us, by placing reliance on the decision of the Apex Court in *Balwinder Singh* (supra), it raises a serious doubt that the bones are of

the deceased.

(iii) Extra-judicial confession of the guilt by the accused/appellant give to Rath Kumar (P.W, 7):-- (a) The most important factor which has been given weightage by the prosecution and accepted by the Trial Court is the extra-judicial confession. The prosecution examined Rath Kumar (P.W. 7) in that regard. This witness is cousin brother of the appellant. According to him, on 19-1-1999 the appellant stated to him that he along with other accused persons kidnapped the deceased and thereafter killed him. The statement of this witness was recorded under Section 161, Cr.PC by the investigating agency on 8-2-1999 and on the next day, i.e., 9-2-1999 his statement under Section 164, Cr.PC was recorded by the Magistrate. Immediately after recording the examination-in-chief, this witness was cross-examined up to certain length on behalf of co-accused Raju. However, for the reasons stated in the deposition-sheet, the Counsel of co-accused Raju put his inability to cross-examine this witness further, thereafter the learned Trial Judge asked the Counsel of appellant to cross-examine but he said that after the completion of cross-examination on behalf of co-accused Raju, he would cross-examine. Thereafter Counsel of third accused Manohar was asked to cross-examine and he cross-examined the witness. In Para 17 of his cross-examination, this witness has specifically said that on account of missing of the deceased, there was demonstration by the public in the city and there was heavy pressure on the police, as a result of which a case against the accused persons was manufactured by the police. We would like to re-write that part of the statement of this witness.

^^vfer ds xqeus ij jktuxj esa vke turk }kjkvkanksyu fd;k x;k Fkka vkanksyu ds dkj.k iqfyl ds ij dkQh izs'kj Fkka ;g lghgS fd jktuxj esa tu vkanksyu c<+ jgk Fkka blfy, iqfyl dks eqfYteksa dks fxjrkjdj is'k djuk Fkka ;g dguk Hkh lgh gS fd iqfyl }kjk fdLh Hkh rjg eqdnek cukdjvfhk;qx.k dks fxjrkj dj eqdnek cuk fn;k x;kA**

(b) Again a question was put to this witness that why he incorrectly stated in foregoing paragraph. In answer to this question, he said that there was pressure of police on him and, therefore, on account of fear he gave incorrect statement.

(c) We have mentioned the demeanor of this witness for the reason that the learned Trial Judge in Para 40 of his judgment has placed reliance on this witness

on the ground that the Counsel of accused Ramesh and Raju declined to cross-examine this witness after cross-examining him at certain length and thereafter they again cross-examined this witness. According to learned Trial Judge in between, this witness was won over. The argument appears to be quite attractive but on deeper scrutiny found devoid of any substance. True, the Counsel for accused Raju after cross-examining this witness at certain length put his inability to cross-examine because the statement was not being reproduced in writing in the manner the witness was stating. This fact can be gathered from Para 13 of the deposition of this witness. However, immediately thereafter, on being asked by the Court to the Counsel of co-accused Manohar, this witness was cross-examined by the said Counsel and thereafter in Para 17 the witness gave statement which is fatal to the prosecution. Thus, it can not be said that this witness was won over by the accused persons. Later on, this witness was cross-examined on behalf of accused/appellant, and he specifically stated that the police persons were pressurising him to depose according to their sweet will otherwise he would be in trouble and would be terminated from his services. He further said that for the whole night, he remained in police station on the insistence of police persons and they were showering filthy abuses to him. He further stated that when he was being cross-examined on 1-4-2000, Constable Ram Karan and Head Constable Ravindra Tiwari were sitting in the Court-room. He specifically stated that on the insistence of police, as he was pressurised by them, he gave statement under Section 161, Cr.PC to the police as well as to the Magistrate under Section 164, Cr.PC.

(d) In view of above, it would be hazardous to rely the testimony of this witness and to uphold the conviction. True in examination-in-chief, this witness has said that the accused persons made extra-judicial confession to him but in the cross-examination he has stated that on account of heavy pressure of police his statement was recorded. Thus, here there raises a serious doubt regarding the truthfulness of the testimony of this witness and no credence could be given to the statement of this witness. Even otherwise, the evidence of extra-judicial confession is a weak type of evidence and it would be unsafe to convict a person solely on the basis of this evidence without any corroborative piece of evidence. In this regard, we may place reliance on the decision of the Apex Court in the case of

Makhan Singh v. State of Punjab, 1988 (Supp) SCC 526.

(e) So far as statement of above said witness under Section 164 (Ex. D-6) is concerned, suffice it to say that the statement recorded under Section 164, Cr.PC is not a substantive piece of evidence. It can be used either for contradiction or for corroboration. From the very fact that the statement of Rath Kumar was recorded under Section 164, Cr.PC, it is evident that at one stage of investigation prosecution doubled the veracity and credibility of this witness and, therefore, this witness can not be relied. In this context, we may profitably rely the Division Bench decision of this Court in the case of Lallu Singh v. State of M.P., 1996 (1) Vidhi Bhasvar 269, and another Division Bench decision in the case of Chhagan v. State of M.P., 1995 (II) MPWN 150. A Single Bench decision of this Court in the case of Shambhu Singh and Ors. v. State of M.P., 1991 JLJ 53 is also quite relevant to the point. On these premised reasons, it is not proved that accused/appellant made any extra judicial confession to Rath Kumar (P.W. 7) and no conviction could be accorded on its basis.

(iv) Seizure of socks from the house of the accused:-- To prove this circumstance, the prosecution examined Manish Kumar Jain (P.W. 16). It be seen that the deceased is the son of the sister of this witness. This witness happens to sit in the provision store of the father of the deceased. According to this witness on 15-1-1999 in the evening at 5.00 the deceased came to the shop and he took away a pair of red coloured socks of Varun Company and some other articles from the shop. In cross- examination, he has said that he can not say that to how many persons similar type of socks he had sold. He has further stated that other shop-keepers also happens to sell similar type of socks of Varun Company. The prosecution examined Inder Chand Jain (P.W. 15) before whom appellant from his house took out a pair of brand new red coloured socks from a suit-case, the seizure memo is Ex. P-19. The memorandum of appellant under Section 27 of the Evidence Act is Ex. P-15 and Ex. P-19 is the seizure of socks. Since a pair of socks which has been seized is a new one and Inder Chand Jain (P.W. 15) has stated that he could not say that to how many persons he sold this type of socks and that this type of socks is being sold by other shop-keepers also, it can not be said that it is the same pair of socks which was taken away by the deceased and,

therefore, no reliance can be placed on this circumstance.

(v) The motive as accused took loan from the Bank and he received notice from the Bank for re-payment of loan :-- To prove this circumstance, the prosecution examined, Hari Narain Soni (P.W. 12) who at the relevant point of time was serving as Branch Manager of Central Bank, Rajnagar Branch. According to him, accused/appellant took a loan of Rs. 75,000/- in the year 1997-98 under the Scheme of Pradhanmantri Rojgar Yojana. Appellant deposited a sum of Rs. 3750/- as margin money and he was required to pay a sum of Rs. 74,743.00 upto 20-2-1999 for the realization of which a notice was issued to him on 30-7-1998. It be seen that the investigating agency did not seize copy of the notice dated 30-7-98 alleged to have been sent to the accused/appellant. This witness during his examination did not file any such notice. This witness has further admitted that what amount is required to be paid can be ascertained only from the ledger, but, neither the ledger was seized by the police nor relevant entry of it was produced by this witness during his examination. Therefore, no credence and weightage could be given to the letter (Ex. P-10) issued by this witness to the Station Officer Incharge. Even if, it is taken into account that a notice was sent to the appellant on 30-7-98 by the Bank, it can not be said that after a lapse of six months just to re-pay the loan amount, he would kidnap the deceased. We have already discussed hereinabove, that there is no evidence on record that any ransom was demanded by the accused/appellant or by any other person from the family members of the deceased and, therefore, it can not be said and it is not proved that to re-pay the loan amount of the Bank, the deceased was kidnapped and killed. Thus, the evidence regarding this circumstance would also not help the prosecution.

17. On the basis of aforesaid reasons, we are unable to uphold the conviction of the accused/appellant recorded by the Trial Court and the same is hereby set aside.

18. Resultantly, the appeal succeeds and is hereby allowed, the conviction of appellant under Sections 364, 302 and 201, IPC is hereby set aside. As we have allowed the appeal filed by the appellant and has acquitted him, the death reference referred to us by learned Trial Judge under Section 366(1), Cr.PC is

hereby rejected. The appellant is in custody, he be set at liberty forthwith, if not required in any other case.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com