

Sudesh Alias Suresh Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Jan-05-1999

Reported in : 1999CriLJ2602

Judge : D.P.S. Chauhan and ;R.P. Gupta, JJ.

Acts : Evidence Act - Sections 27 and 114; [Indian Penal Code \(IPC\), 1860](#) - Sections 376, 394 and 411; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 1021 of 1988

Appellant : Sudesh Alias Suresh

Respondent : State of M.P.

Advocate for Def. : B.P. Athya, P.L.

Advocate for Pet/Ap. : S.C. Dutt and ;S. Dutt, Advs.

Disposition : Appeal dismissed

Judgement :

R.P. Gupta, J.

1. The appellant has been convicted by Additional Sessions Judge, Mudwara in Session Trial No. 90/87 vide his judgment Dt. 5-10-1988 for offence punishable under Section 302 as well as under Section 394, I.P.C. He has been; sentenced to

life imprisonment under both counts. However, he was acquitted of charge under Section 376, I.P.C.

2. The trial Court has found that on 10-2- 1987, in village Tola Har, this accused murdered Vimla Bai wife of Imrat (P.W. 3) and looted her silver TODARS from her legs weighing about 965 grams. He threw her body in a JHIRIA (small pond) in the field of Bakhta Chamar. Vimla Bai went out in the morning from her house to her field to do some work in the field i.e. to pick up AGREE grass. She, however, did not return in the village and a search made by family members discovered her body in the JHIRIA of field of Bakhta Chamar. Her TODARS were missing from her legs. The matter was reported by Ramsujan, elder brother of Imrat vide first information report Ex. P/1 on the same night at about 2 a.m. There was no eye-witness to the incident.

3. The Police had got the post-mortem examination effected from Dr. D.K. Chourasia (P.W. 11) who found the following injuries on her body :

(1) Lacerated wound 2 1/2' x 1' x 1/2' on left side of chin;

(2) Contusion with multiple abrasions 4' x 9' on the right side of the neck and chin;

(3) Multiple contusions on the anterior lateral upper part of neck size about 6' x 4' in area;

(4) Multiple nail marks on the lateral and anterior part of neck. It was found that the death was caused due to asphyxia, syncope and coma resulting from these injuries. The police had interrogated this accused on 12th February, 1987 and he made disclosure statement that he had kept TODARS of the deceased in his house under the paddy chaff. He then led to the recovery of looted TODARS and brought out the same from inside the BHOOSA in the presence of PW 8 Lalla Kotwar and PW 17 Durjan Singh. The police recovered it. The police had prepared memorandum of disclosure vide Ex. PW 14 and seizure memo vide Ex. P/16 on the same day. The TODARS were identified by family members of the deceased namely PW 1 Tulsa Bai, PW 2 Mulayam Bai who are the sisters-in-law (JETHANIES) of the deceased as also by Pyarelal (PW 5), the father-in-law of the

deceased, who had got these TODARS prepared from PW 14 Pradip @ Chunna vide receipt Ex. P/22. The identification proceedings were taken by Naib Tehsildar PW 13 S.S. Thakur. One axe was also recovered at the instance of the accused, but, no blood-stain was found on it.

4. The trial Court has relied upon the evidence of PW 1 and PW 2 and PW 3 for the fact that the deceased was wearing TODARS when she went out of the house in the morning and on the evidence of Payarelal (PW 5), the father-in-law, regarding identification of the TODARS as being those which he got prepared for the deceased and the deceased was wearing when she went out of the house. For this purpose, reliance was also placed on the testimony of Naib Tehsildar Shri S.S. Thakur (PW 13). For the purpose of basing finding of disclosure of this accused and the recovery at his instance, reliance was placed on the testimony of PW 8 Lalla Kotwar and PW 17 Durjan Singh who are witnesses to these facts. However, the Investigating Officer who effected the recovery and had prepared these documents Ex. P/14 and Ex. P/16 i.e. Y.K. Tiwari, I.O. was not examined as a witness before the trial Court. Thus, the main reliance of the trial Court in convicting the accused was on the following circumstances:

(1) that the deceased had gone out of the house wearing TODARS i.e. Article A-1 and A-2;

(2) third day after the death of the lady this accused disclosed about the concealment of these TODARS;

(3) he led to recovery of these TODARS which belong to the deceased and which she was wearing last when she left the house. These were recovered from a place of concealment below paddy chaff;

(4) these TODARS were got prepared for her by her father-in-law Shri Pyarelal (PW 5) from PW 14 Pradip vide receipt Ex. P/22.

5. The trial Court has found that unless this accused had committed the murder and robbery, he could not be in possession of the TODARS of the deceased and the identity of the TODARS was fully established. Since the accused had taken

these TODARS from the deceased, it amounts to robbery.

6. Learned counsel for the appellant has urged that the evidence of recovery of these TODARS at the instance of the accused or disclosure about their whereabouts is lacking in credibility particularly when the Investigating Officer, who interrogated the accused and effected the recovery, has not been examined. Secondly, it is urged that there is insufficient evidence that the recovered TODARS are the same which the deceased was last wearing when she left the house as no question about their identity were put to the two sisters-in-law, or the husband of the deceased namely; PW 1 Tulsa Bai, PW 2 Mulayam Bai and PW 3 Imrat. Thus, the only narration about the identity by father-in-law of the deceased i.e. PW 5 Pyarelal, should be considered insufficient as he is not expected, ordinarily, to be seeing his daughter-in-law wearing ornaments as accustomed in the society. It is also urged that so far as PW 14 Pradip is concerned, although he proved that he prepared the set of TODARS for Pyarelal weighing 965 grams, he does not say that TODARS for Articles A-1 and A-2 are the same. So he does not establish the identity. Lastly, learned counsel urges that assuming that the recovery was made on the disclosure and at the instance of this accused and the TODARS are the same which the deceased was wearing when she last left the house of her Husband for the field, the inference to be taken is not that of murder and robbery against the appellant, the inference could be of receiving or keeping stolen property knowing it to be stolen property i.e. punishable under Section 411, I.P.C.

7. Learned counsel has placed before us, in detail, the testimony of the aforementioned witnesses as also the exhibits including the disclosure statement, seizure memo, receipt Ex. P/22, the report of the autopsy surgeon. He has argued that the accused has been prejudiced in his defence because of the non-production of the Investigating Officer who was the recovery officer as also the interrogating officer of the accused as the accused was deprived of putting him to necessary cross-examination to disprove fairness in the process of the recovery. It is also urged that the testimony of PW 8 Lalla Kotwar and PW 17 Durjan are too weak to lead to a definite conclusion about disclosure of accused or recovery at his instance. Reliance has been put by the learned counsel on a part of testimony of Durjan PW 17. In cross-examination this witness says that it appeared that the

accused had been closed in lockup and his one hand has been tied and it appeared that he had been beaten. However, he stressed that in his presence the accused was questioned and he had disclosed about TODARS kept in the house. He witnessed the disclosure memo as also the recovery memo which according to him, in cross-examination, were prepared after the recovery.

8. Learned counsel raised one more argument on this aspect that in the disclosure statement Ex. P/14 it is not mentioned by the accused that he had concealed the ornaments in active voice, and that it is recorded in passive voice that the ornaments were concealed in the house and the word 'concealed' had not been used by these PWs, and they only used the word 'kept' so far as his testimony is concerned. Learned counsel has cited a pronouncement of the Supreme Court in case of Eradu v. State of Hyderabad AIR 1956 SC 316 : 1956 Cri LJ 559 where some distinction was drawn in respect of disclosure statement wherein the accused had not used the word T in the recorded disclosure statement and it was slated that merely saying that articles were kept in particular place does not show that the accused kept them there.

9. Learned State counsel urged that although the Investigating Officer has not appeared for reasons which are not clear from the record of the trial Court, the evidence of PW 8 Lalla Kotwar and PW 17 Durjan sufficiently establishes that this accused had possessed the TODARS of the deceased. On 12th February he disclosed about them to the police before these witnesses and he led the police party and these witnesses to get them recovered from the paddy chaff which was a place of concealment.

10. First we take up the objection that the disclosure is not as if the accused concealed these articles, if it be taken on its face value. The statement of PW 8 and PW 17 has been believed by the trial Court, as shown in the light of Ex. P/ 14, that this accused had concealed the articles and got them recovered. On close examination of the testimony of PW 8 we find that he had asserted that in his presence the interrogation of the accused was made by the police and accused disclosed that the TODARS were 'lying in his house', and further that the accused took the party to his house and from the paddy chaff he brought out two TODARS,

so memorandum Exs. P/14 and P/16 were prepared about the same. He has explained in cross-examination that the TODARS were found in the chaff. This testimony is supported by PW 17 Durjan in its substance. Of course, he said that it appeared as if the accused had been beaten, but, he never said that the accused was beaten in his presence. How he inferred this beating has not been explained by him except that he found the accused kept closed (BAND KARKE RAKHA THA) and his one hand was tied. The disclosure which is admissible under Section 27 of the Evidence Act presupposes that the accused was in police custody. So merely because one hand was tied or he was kept closed in some place, is not a violation of condition of Section 27 of the Evidence Act. The rest of statement of Durjan is presumptive regarding beating of the accused. Durjan and Lalla both were present when the accused was interrogated, even Durjan has specifically stated that the accused had brought out the set of TODARS from the paddy chaff from depth of about one BITTA, which is equal to 9'. We are of the view that the trial Court has rightly found that in the presence of these witnesses the accused had made disclosure to the police on interrogation about the TODARS and he led to recovery of these TODARS. The disclosure was recorded vide Ex. P/14 and seizure memo was recorded as Ex. P/16. 11. The other question is whether this disclosure and recovery can be taken as leading to the inference that this accused was in possession of the TODARS or he had concealed them. If we go by the tenor of Ex. P/14 the disclosure statement starts with word 'MAIN' i.e. T. There are certain portions which have to be excluded from the evidence being completely incriminating in nature about the guilt, but, continuity of T in the disclosure is not broken or cut off. It was not necessary for the recording officer to again and again write the word T. The Courts have to admit only that part of the disclosure which is not confessional and which leads to discovery of fact. No doubt, the word 'concealed' has been used in Ex. P/14 the memorandum of disclosure, but, not in the testimony of PW 8 Lalla Kotwar and PW 17 Durjan. The real evidence, as to what was disclosed, is the evidence of the witnesses and not the contents of a document which at best could be used for refreshing memory. However, the evidence of the witnesses in Court must be evaluated from two factors; (1) what the accused said; (2) how he conducted himself in leading to recovery, and (3) where from he produced the articles as that is what happened in this case and that

is the fact discovered. According to this witness he said that he had kept the TODARS in his house, and thereafter he led the police party and the witnesses to his house and produced the TODARS from below 9' deep paddy chaff. This was believed by trial Court. We also believe this to have happened. If so, he produced TODARS from the place of concealment. So the concealment of the TODARS is established and he is producing them from the place. His saying that the TODARS were in his house and then producing them, leads to inference of concealment by him as he has nothing else to explain in his statement under Section 313, Cr. P. C. If we go by the use of the language in Ex. P/14, then his having concealed the same is expressly mentioned as word 'I' is used in the beginning of the disclosure statement. Even if we ignore that aspect as we are doing it, the nature of any disclosure made by him followed by his conduct in leading to the recovery of these TODARS from concealed place in the house, in the absence of any explanation by him, leads to the only inference that he was in possession of the same and he was the author of the concealment in that BHOOSA (paddy chaff). 12. Finding that these conclusions arise from the evidence beyond doubt, we proceed to consider whether the identity of these TODARS as belonging to the deceased and worn by her last when she went out of the house is established or not. We find in the evidence of Pyarelal (PW 5) that he is father-in-law of the deceased, he got these TODARS prepared from PW 17 Pradip vide receipt Ex. P/22, which gave the weight of TODARS 965 grams of silver. We do not find any weakness in the testimony of these witnesses in cross-examination or otherwise inherently to discard their testimony or even to doubt it regarding identity of TODARS. Pyarelal (PW 5) was expected to have got these TODARS prepared for his daughter-in-law, so that his testimony is natural. These were got prepared according to receipt Ex. P/22 on 4-1-1984 i.e. 3 years before this incident. TODAR is worn in the leg, which is heavy ornament, so it is not on the concealed part of the body, it will be visible to members of the family. We do not find in any manner unnatural for the father-in-law to be able to identify these leg ornament of his daughter-in-law, particularly when he got them prepared from PW 14 Pradip. We cannot reject the testimony. The fact that the lady was wearing the TODARS when she started from home, is fully established from the evidence of PW 1, PW 2 and PW 3 i.e. sisters-in-law and the husband. These TODARS were missing when the body was found

that very day and these TODARS were found from the possession of this accused on third day. So we find it fully established that these were the TODARS which the accused possessed after the murder and which the deceased was wearing before her death. The identity is fully established.

13. The third question is what inference is to be drawn i.e. whether only inference of offence under Section 411, I.P.C. arises or inference of serious offences such as robbery and murder also arises. There can be no doubt that robbery and murder were part of same transaction in this case. The important fact in this case is that within two days of the murder, the ornaments were found in possession of this accused and he had simply denied it rather than explaining how he came by them. There is no suggestion either in cross-examination of witnesses or in his statement under Section 313, Cr. P. C. If possession of stolen property is removed in terms of time from the transaction of robbery, some benefit is given to the accused to take inference of lesser crime. But, when the possession is soon after robbery and the two are not separable, or there is no material on record to suggest that the two are separable, the natural inference would be that a person who is in possession of looted ornaments, was a looter. Section 114(a) of the Evidence Act permits two inference; either that the possessor is, thief or receiver of the stolen property. Learned counsel for the State has brought to our notice, AIR 1983 SC 446 : 1983 Cri LJ 846 (Earabhadrapa v. State of Karnataka) where the Supreme Court observed that 'The nature of presumption under illustration (a) to Section 114 must depend upon the nature of the evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession of stolen property sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. Where the accused was charged for murder and robbery, mere fact that a period of one year had lapsed between the commission of offence and discovery of stolen article would not lead to the presumption that the accused was only a receiver of stolen property and had not committed murder, particularly when accused was absconding during that period.

14. As against this, learned counsel for the appellant relied on AIR 1980 SC 1753 : 1980 Cri LJ 1270 (Nagappa Dondiba Kalal v. State of Karnataka) wherein stolen ornaments were recovered three days after the incident of murder of a lady, whose ornaments had been looted from her body. The Court said that taking the evidence as it stands, there was nothing to connect the appellant with the murder of the deceased or even with any assault the accused may have committed on the deceased or having robbed her of her ornaments. So inference of offence under Section 411, I.P.C. was taken against the accused.

15. In our case there is testimony of Tulsa Bai (PW 1) that when Vimla did not return for quite some time she went to look for her and at a distance across BADIYA she had seen the accused going away. She could not find Vimla. Again PW 4 Panchmlal narrated that the day when Vimla died he had noticed this accused working on the MEIND. He knew accused since before. He had seen a lady picking AGREE grass. PW 5 Pyarelal had noticed this accused went towards one side on his bicycle on one corner of his BADIYA. He (PW 3) had noticed the body of Vimla in that JHIRIA. These aspects have not been challenged in cross-examination of these witnesses. So the accused has been noticed nearby the spot where Vimla Bai was found dead, that day.

16. It appears to us clear from evidence on record, as has been found by the trial Court, that murder and removal of ornaments from the body of the deceased are part of the same transaction and not separable. Heavy TODARS of silver are such ornaments which will not pass hands imperceptibly from one to the other. When this is so, the inference as taken by the Supreme Court in case of Earabhadrapa v. State of Karnataka AIR 1983 SC 446 : 1983 Cri LJ 846 are essential and short gap of time between single transaction of murder and loot on one hand, and the recovery from possession of accused, on the other Hand is not so material. We are of the view that the trial Court has taken right inference in holding that this accused committed loot as also the murder, the two being the part of the same transaction. We find that the appellant has been rightly convicted for the offence as aforementioned and the sentence is also proper, ofcourse, the two sentences of life imprisonment are to run concurrently. We, therefore, find no merit in this appeal. The same is dismissed. The appellant shall undergo the sentence.

