

Kalu Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Oct-17-2005

Reported in : 2006CriLJ1506; I(2006)DMC436

Judge : Abhay K. Gohil and ;Chandresh Bhushan, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 374; [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Criminal Appeal No. 161 of 1998

Appellant : Kalu

Respondent : State of Madhya Pradesh

Advocate for Def. : M.P.S. Bhadoriya, Public Prosecutor

Advocate for Pet/Ap. : A.K. Barua, Sr. Adv. and ;Vinay Sharma, Adv.

Disposition : Appeal allowed

Judgement :

Abhay K. Gohil, J.

1. In this criminal appeal filed under Section 374 of the Code of Criminal Procedure, appellant has challenged his conviction under Section 302, I.P.C. and sentence of life imprisonment with fine of Rs. 1,000; in default of payment of fine,

to further undergo rigorous imprisonment of three months; vide judgment dated 23.1.1998 passed by First Additional Judge to the Court of Sessions Judge, Guna in Sessions Trial No. 198/97.

2. Brief facts giving rise to the present appeal are that the appellant was prosecuted for the murder of his own wife. Harnarain (P.W. 2) is the owner of one agricultural field along with tubewell thereon. The appellant along with his wife was his Bataidar in the field. They were residing on the said field. The field is situated at village Barodiya. The appellant was resident of village Dumavan under Police Station, Bamori, District Guna. His brother-in-law (wife's brother) was also resident of village Bamori. As per prosecution version on 4.1.1997 at about 10 a.m. Harnarain (P.W. 2) received information from one Harilal that the motor of his tubewell is not functioning. Thereafter he went on the tubewell and had seen the door of hut closed. He thought that the appellant might have gone to his village. Thereafter he went to village Dumavan, enquired about the appellant from his father Roopsingh, whereupon his father replied that he had not come to the village. He is residing only on the Tapra (hut). Thereafter he along with father of the appellant Roopsingh, Khumansingh, Prema, Makhan and Besta came on the tubewell and had found the dead body of the deceased in the hut. Blood was also found on the head of the deceased and one handle of the axe stained with blood was also lying nearby the dead body. FIR was lodged by Kalu (P.W. 1), brother of the deceased. It was mentioned in the FIR that he is having suspicion that it is the appellant, who has killed his wife. On the basis of the aforesaid report crime was registered, matter was investigated; spot map was prepared, Safina form was issued, Panchayatnama lash was prepared, plain and bloodstained soil was also seized from the spot including the blood-stained handle of axe and dead body of deceased Kamlibai was referred for post-mortem. From the post-mortem report it was found that it was a case of homicidal death. Next day clothes of the deceased were seized and third day some pieces of broken bangles were also seized from the spot. Appellant remained absconding. Absconsion Panchnama was prepared and ultimately he was arrested on 13.7.1997 from village Bamori. The seized articles were referred for chemical examination and after completing the investigation, charge-sheet was filed.

3. The appellant was put to trial. During trial, appellant abjured his guilt and took a defence that 15 days before the death of deceased he had gone to his native place at Jhabua and when he returned back, he himself surrendered before the Police Station. The prosecution examined as many as 9 witnesses and thereafter Trial Court found the appellant guilty of the commission of crime, convicted and sentenced him as aforesaid; against which he has filed this appeal.

4. Mr. A.K. Barua, learned Senior Advocate vehemently argued and submitted that there is no evidence against the appellant. Prosecution has failed to prove the circumstances and their chain is also not complete. There is no evidence of last seen and thus prayed for the acquittal of the appellant. In reply, Mr. M.P.S. Bhadoriya, learned Public Prosecutor for the respondent-State supported the judgment and prayed for dismissal of the appeal.

5. We have heard learned Counsel for the parties and perused the evidence on record. In this case, out of nine witnesses examined by the prosecution Gopal (P.W. 3), who is the younger brother of Harnarain, Khema (P.W. 4), who had seen the appellant beating his wife, Pooran (P.W. 5), who is the owner of adjoining field, and Madanlal (P.W. 6) have not supported the prosecution story and they have been declared hostile.

6. Kalu (P.W. 1), who is the brother-in-law of the appellant and brother of the deceased, has stated that the appellant is the resident of village Dumavan. He was residing in the Tapra along with his sister at the tubewell of Harnarain (P.W. 2). His sister used to tell him that the appellant was in habit to quarrel with her on account of non-paying the issues. Eight days before his sister had come to him for demanding Rs. 200 to go to Panna. Kalu is absconding from the day when she was found dead in the Tapra. He has stated that the appellant has committed murder of his sister Kamli and thereafter had absconded. In the cross-examination he has admitted that the marriage of his sister took place 5 years before and she was not having any issue and on that ground the appellant used to quarrel with her but why the police has not mentioned this fact in his case-diary statement Ex. D1, he cannot give any reason. On the day when his sister was found dead, he was at village Dumavan and after receiving information from the police he had come to

the place of incident. Therefore, from his evidence, it is clear that Kalu(P.W. 1) is not the eyewitness of the incident. Even he is not the witness of last seen. He has only stated that the appellant was absconding from the day of death of his sister and according to him, it is the appellant who has committed the murder of his sister.

7. Harnarain (P.W. 2) has only deposed that the appellant and his wife both were residing at his tubewell in a Tapra and they used to work at his field. When he went to the field, he had seen the dead body but Kalu was not present there and in the cross-examination he has stated that he used to visit the field at the interval of 5-7 days. He had gone on the Tapra 5-7 days before and he had not seen the appellant on the day of incident and also 5-7 days prior to it.

8. Though Gopal (P. W. 3), who is a hostile witness, has also admitted that the appellant and Kamli were residing on the field and father of the appellant is residing in village Dumavan and Kalu was crying, but thereafter he became hostile and has not supported the prosecution story and in the cross-examination he has stated that he had not seen them quarrelling at any time. The same is the version of other hostile witnesses Khema(P.W. 4) and Pooran (P. W. 5). Madanlal (P. W. 6) though was also declared hostile but he has even denied that the appellant was residing at the field of Harnarain and also the fact of absconsion.

9. Dr. Sitaram Singh Raghuvanshi (P. W. 7) had performed the autopsy of the dead body. He found one lacerated wound of 2x2cm.x3/4cm. on the right side of the face over maxillary region and also found 4 contusions on the head, face, jaw and chest and one abrasion on neck. On internal examination he found fracture on sixth to ninth rib and liver was also punctured. All the injuries were ante-mortem. He has confirmed that all the injuries were sufficient to cause death in the ordinary course of nature and cause of death was due to haemorrhagic shock as a result of injury to liver.

10. Indersingh Solanki, Sub-Inspector (P.W. 8) and M.K. Gautam, Sub-Inspector (P.W. 9) are the witnesses of all the prosecution documents and investigation.

11. On scrutiny of the aforesaid prosecution evidence it is clear that the appellant is the husband of deceased Kamlibai. Their marriage took place five years before. She was not having any issue. She was residing in a Tapra of the tubewell of Harnarain along with the appellant who is her husband and both were working in the field of Harnarain. It has also been found proved that the appellant is the resident of village Dumavan and not that of District Jhabua. There is evidence that 5-7 days before they were seen residing together. As per post-mortem report, duration of death was within 24 to 48 hours. Post-mortem took place on 5.1.1997 at 4 p.m. whereas the report of the incident was lodged on 4.1.1997 at 4 p.m. and as per post-mortem report (Ex. P/4) the incident took place between intervening night of 3.1.1997 to 4.1.1997 and she died because of homicidal death. The prosecution has not produced any evidence that on the earlier night of 3.1.1997 the appellant was present on his field, therefore, the evidence of last seen is not available on record. From the evidence of Kalu (P.W. 1), who is the brother of the deceased, though he has not stated that he had seen both of them before the incident but he has only stated that the appellant was absconding from the date of incident and it is the appellant, who has committed murder of Kamlibai. This may be possible that the appellant might have committed murder of his wife and his defence has not been found proved that he had gone to his native place Jhabaua 15 days before the incident as he was the resident of village Dhumavan. This has also been found proved but the finger of suspicion can only be raised against the appellant as he was absconding and he was arrested on 13.7.1997 after near about 6 months. So, this fact is clear that from the date of incident the appellant remained absconding. Therefore, strong evidence of his absconsion is available against appellant. Investigating Officer has also prepared three seizure memos dated 18.1.1997, 17.5.1997 and 31.5.1997 (Exs. P/16 to P/18) about absconding but the prosecution has not examined any independent witness to prove those seizure memos relating to absconsion of the appellant. As per these documents appellant was only searched at village Dumavan and he was not searched anywhere else in any other village. Even if we consider that the only strong evidence of absconsion is available against the appellant, the question would be whether only on the basis of suspicion of Kalu (P.W. 1) and on the basis of his absconsion the conviction of the appellant can be affirmed.

12. In the case of *Matru @ Girish Chandra v. The State of U.P.* AIR 1971 SC 1050, it has been held that the act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Generally the Courts consider it as a very small item in the evidence for sustaining conviction. It cannot certainly be held as a determining link in completing the chain of circumstantial evidence consistent only with the hypothesis of the guilt of the accused.

13. In the case of *Rahman v. The State of U.P.* 1972 Cr. L.J. 23, the Court has held that absconding by itself is not conclusive either of guilt or of a guilty conscience. For, a person may abscond on account of fear of being involved in the offence or for any other allied reason.

14. In the case of *Rajinder Singh @ Kada v. State of Punjab I* : 1992 CriLJ2320 , it has been held that the abscondence of the accused is of no consequence. In the first place it is not a determining factor and not one which could outweigh the other material appearing on the record. It by itself does not establish the guilt of the appellant beyond reasonable doubt.

15. In the case of *Tanviben Pankajkumar Divetia v. State of Gujarat* (1997) CCR 57 (SC) : 1997 SCC (Cri) 1004, the Hon'ble Apex Court has considered the value of such kind of evidence, and has explained that suspicion cannot take the place of legal proof, and there is difference between 'may be true' and 'must be true' and has summerized the law as under:

The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the

other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions.

More the suspicious circumstances, more care and caution is required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the Court even though the suspicious circumstances had not been clearly established by clinching and reliable evidence.

The falsity of the defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed, A false plea may be considered as an additional circumstance if other circumstances proved and established point out the guilt of the accused.

16. Recently, in the case of Narendra Singh and Anr. v. State of M.P. II (2004) CCR 269 (SC) : AIR 2004 SC 3249, the Apex Court has held that it is now well settled that benefit of doubt belonged to the accused. It is further trite that suspicion, however, grave may be cannot take place of a proof. It is equally well-settled that there is a long distance between 'may be' and 'must be'. Further it is well known that all links in the chain must be proved in a case based on circumstantial evidence. In a case based on circumstantial evidence if a vital link of the chain is missing, the benefit will go to the accused.

17. If we consider the facts of this case in the backdrop of the aforesaid principle of law, the conviction of the appellant cannot be upheld because this chain is missing that the appellant was present on spot just before or at the time of commission of offence. Prosecution has not produced any evidence to this effect in the case. There is only evidence of Kalu (P.W. 1) who has stated that from the day of the offence the appellant was found missing and it is the appellant, who has committed murder of his own wife. This may be his assumption on the basis of this fact that they both were residing together but Kalu (P.W. 1) has not stated that he had seen them in the last day or night living together. Even otherwise, non of the

prosecution witnesses says so. Therefore, it may be said that according to Kalu, appellant might have committed murder of his own wife but this by itself is not a legal proof. It is no doubt, a strong finger of suspicion is against the appellant but the appellant cannot be convicted only on the basis of this strong suspicion. It is well settled that the suspicion, however grave or strong may be, but it cannot take the form of legal proof. There is long distance between 'may be' and 'must be'. It is also true that there is a strong circumstance against the appellant because he remained absconding for around six months and this may also be one of the important circumstance but this by itself cannot be treated as the evidence of guilt. Even if the plea of alibi is taken by the appellant and could not be found to be proved, this may be treated as an additional circumstance but this also by itself cannot be a proof of guilt. It is also well known that even in a case where a plea of alibi is raised, the burden of proof remains on prosecution. Presumption of innocence is a basic right and even on the basis of the aforesaid false plea of alibi the prosecution cannot be absolved from its burden of proving the case by producing the evidence beyond reasonable doubt. Reasonable doubt is available in this case and there is no evidence on record that it is the appellant who has committed murder of his own wife.

18. Though the following circumstances are available against the appellant that, (a) he is the husband of the deceased; (b) their relations may be strained; (c) they were residing in a 'Tapra' and working at the field; (d) the dead body of the deceased was found on the said place where they both were residing; and (e) after the death appellant was found absconding for six months, but these circumstances alone are not sufficient to form the chain of circumstances to prove his guilt. Two important circumstances are missing in the link. One is of last seen i.e., a day earlier or before the commission of crime, the appellant was not seen on spot in the company of the deceased and another about motive for commission of crime. Normally, it is expected that husband shall remain present at home in the company of wife, but that has to be proved by cogent evidence that he was actually present in the hut on the field just before or at the time of incident, and if it is not proved, it cannot be held that he was present. This is the difference between 'may be' and 'must be'. There may be various circumstances under which he might have not remained present at the time of commission of crime or he might have

absconded for various reasons also. Gopal (P.W. 3) though was declared hostile but in his statement he has deposed that he had not seen anything and he had told the police that Kalu was crying but he has denied rest of the statement. He was cross-examined and except the statement that father of Kalu is also residing at Domavan, he has not stated anything in his statement which may support the prosecution case. This isolated sentence that Kalu was crying also does not support the prosecution case. There is nothing to connect that why he was crying and what was the reason. If he himself has committed the murder of his wife then why he was crying? This evidence of this witness does not help the prosecution to complete the chain of circumstances. In the case of *Sharad v. State of Maharashtra* : 1984 CriLJ1738 , the Hon'ble Apex Court has formulated following five golden principles which have been described as principles of 'Panchsheel' proof of a case based on circumstantial evidence. The following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established:

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

A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. In case of *Kali Ram v.*

State of Himachal Pradesh : 1974 CriLJ1 , it is held that:

Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.

19. The conditions laid down in the form of five golden principles enunciated by the Apex Court have not been satisfied in the instant case and the prosecution has not fulfilled the essential requirements of a criminal case which rests purely on circumstantial evidence. No conclusion can be drawn that the guilt of the appellant has been established. The circumstances are not of conclusive nature and they also do not exclude every other possible hypothesis and the chain of the circumstances is also not complete. In such circumstances, it appears that the Trial Court has not correctly appreciated the evidence. The prosecution has miserably failed to prove that the appellant was present at the place of occurrence at the time of commission of offence or just before it. The conviction of the appellant is not based on legal evidence and, therefore, is not maintainable in law as the prosecution has failed to prove the charges against the appellant by producing evidence or chain of circumstances beyond reasonable doubt. Therefore, the appellant is entitled for benefit of doubt.

20. Consequently, the appeal is allowed. The judgment passed by the Trial Court is set aside and the appellant is acquitted from the charges. He is in jail. He be released forthwith if not required in any other case.

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