

Pradeep Kumar Singh and anr. Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Nov-11-2008

Reported in : 2009CriLJ770; 2009(1)MPHT269

Judge : A.K. Shrivastava and ;K.S. Chauhan, JJ.

Appellant : Pradeep Kumar Singh and anr.

Respondent : State of Madhya Pradesh

Disposition : Appeal allowed

Judgement :

A.K. Shrivastava, J.

1. Feeling aggrieved by the judgment of conviction and order of sentence dated 5-5-2000 passed by learned Fifth Additional Sessions Judge, Rewa, in Sessions Trial No. 192/99, convicting the appellants under Sections 394, 302/34 and 201 of IPC and thereby sentencing them to suffer R.I. for ten years and fine of Rs. 1000/- each, in default of payment of fine RI for three months each; life imprisonment and fine of Rs. 5000/- each, in default of payment of fine RI for one year each; and RI of five years and fine of Rs. 500/- each, in default of payment of fine RI for one month each, respectively with a further stipulation that all the sentences shall run concurrently, this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 has been preferred by them.

2. In brief the case of prosecution is that Subhash Dwivedi lodged a report in Police Station, Sohagi on 11-3-1999 that a dead-body of unknown person is lying nearby the culvert of Jhiria Lad. On the basis of the said information, a Merg was registered and for inquiry of the said Merg report Investigating Officer J.P.N. Singh went to the place of occurrence. During the course of investigation, Panchayatnama of the dead body was prepared and on visualizing right hand of deceased, it was found that name 'Sharad' was embossed and the dead body was identified as that of Sharad (hereinafter referred to as 'the deceased'). Neck of the deceased was found to be chopped. Dead body was sent for post-mortem.

3. In furtherance to its investigation, the investigating agency found that a blood stained knife was lying nearby the dead body and on search of the dead body toll tax receipts and some cash memos of purchasing petrol etc. were found in the pocket of the deceased. These incriminating articles were seized and spot map was also prepared. On examining the papers took out from the different pockets of the clothes which were being worn by the deceased it was found that one Manoj Salonkhe of Maharashtra was the owner of Maruti Van MH 05/H-2942 as a result of which Manoj Salonkhe was called to Police Station, Sohagi where photographs of the deceased were shown to him and said Manoj Salonkhe identified the deceased to be his driver Sharad. During the course of investigation since evidence was found against the appellants they were formally arrested as they were in Central Jail, Rewa in connection with Crime No. 133/99.

4. The appellants were put to test identification on 13th August, 1999 but they were not identified by Manoj Salonkhe who is the owner of Maruti Van. Later on, said Manoj Salonkhe submitted an application to Investigating Officer that again test identification parade be conducted in order to ascertain who are the real culprits as a result of which second test identification parade was conducted on 16-8-1999 in which Manoj Salonkhe correctly identified the appellants. Thereafter, on the basis of memorandum statement of appellant Pradeep leading to recovery, a gold chain was seized from his house on 18-8-1999. This gold chain was also put for test identification and Vilas Sakharam Chouhan, who is the brother of the deceased rightly identified the gold chain.

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

6. Learned Trial Judge on the basis of allegations made against the appellants in the charge-sheet framed charges punishable under Sections 394, 302/34 and 201 of IPC against them which they denied and requested for trial.

7. In order to prove the charges, prosecution examined as many as 17 witnesses and placed Exhs. P-1 to P-34, the documents on record.

8. The defence of the appellants is of false implication and the same defence they set-forth in their statement recorded under Section 313, Cr.PC. However, they did not choose to examine any witness in support of their defence.

9. Learned Trial Judge on the basis of oral and documentary evidence placed on record came to hold that the appellants did commit the offences for which they were charged and eventually convicted them and passed the sentences which we have mentioned hereinabove.

10. In this manner the appellants have preferred this appeal assailing the impugned judgment of conviction and order of sentence passed by learned Trial Court.

11. The contention of Shri S.C. Datt, learned Senior Counsel is that in the present case there is no direct evidence and the prosecution has based its case purely on circumstantial evidence. According to learned Senior Counsel prosecution has failed to collect the incriminating material against the appellants and the circumstantial evidence which has been collected by the prosecution does not form a complete chain unerringly pointing out the guilt towards the appellants and hence learned Trial Court erred in convicting the appellants.

12. By putting deep dent on the veracity of the test identification parade, it has been contended by learned Senior Counsel that in first test identification parade held on 13-8-1999 vide Exh. P-14, Manoj Salonkhe did not identify any of the appellants. However, on application (Exh. P-22) being submitted by him, another

test identification parade (Exh. P-15) was arranged on 16-8-1999 in which appellants were correctly identified by said Manoj Salonkhe. According to the prosecution case Manoj Salonkhe was the owner of the Maruti Van which was being used as taxi and appellants came to the work place of Manoj Salonkhe to hire the said taxi. But, if testimony of Manoj Salonkhe (P.W. 8) specially Para 9, is considered in proper perspective, it would be difficult to hold that this witness properly saw the appellants and, therefore, he did not identify them in the first test identification parade which was held on 13-8-1999.

13. By hammering the authenticity of second test identification parade, it has been vehemently contended by learned Senior Counsel that what was the occasion for Manoj Salonkhe to submit application (Exh. P-22) to the Investigating Officer requesting him to arrange second test identification parade and, therefore, identifying the appellants by Manoj Salonkhe (P.W. 8) in second test identification parade held on 16-8-1999 is nothing but concoction. By challenging the authenticity of second test identification parade (Exh. P-15) it has also been contended by learned Senior Counsel that first of all appellants were taken out from the total number of persons and they were shown to Manoj Salonkhe (P.W. 8) and, therefore, such type of test identification parade cannot be placed any reliance and it would be hazardous to rely on such type of test identification parade.

14. So far as recovery of gold chain from appellant Pradeep is concerned, learned Senior Counsel has submitted that this article was not confronted to Vilas Sakharam Chouhan (P.W. 6) in Court and he has not identified it in the Court, therefore, no reliance can be placed on the recovery of said chain from appellant Pradeep. By putting deep dent on the recovery of gold chain vide seizure memo (Exh. P-17), dated 19-8-1999 it has been argued that witnesses to seizure memo have not supported the case of prosecution and they were declared hostile. The Investigating Officer has also not proved the recovery of gold chain. In this context, he has invited our attention to the testimony of Investigating Officer, A.M. Pandey (P.W. 14). Learned Senior Counsel has also placed reliance on three decisions of this Court, they are Bhagirath and Ors. v. State of Madhya Pradesh 1958 J LJ 900, Babulal v. State 1962 MPU SN 251 and Dadulla and Ors. v. State 1961 J LJ 1250

(Paras 11 and 12). On these premised submissions, it has been argued by learned Senior Counsel that by allowing this appeal the appellants be acquitted and the impugned judgment of conviction and order of sentence be set aside.

15. Combating the aforesaid submissions of learned Senior Counsel, it has been argued by Shri T.K. Modh, learned Dy. Advocate General that learned Trial Judge has assigned cogent reasonings while convicting the appellants and for no rhyme or reason those reasonings should be set aside. Learned State Counsel further submits that appellants were rightly identified by Manoj Salonkhe in test identification parade held on 16-8-1999 vide Exh. P-15. Further, it has been argued by learned State Counsel that appellants were rightly identified in Court which is a substantive piece of evidence. In this context, he has placed heavy reliance on two decisions of the Supreme Court, they are Jameel v. State of Maharashtra : 2007 CriLJ1425 and Amitsingh Bhikamsing Thakur v. State of Maharashtra : 2007 CriLJ1168 . It has also been put-forth by learned State Counsel that gold chain was also recovered from appellant Pradeep on the basis of his memorandum statement (Exh. P-16), dated 18-8-1999 leading to recovery of said chain vide Exh. P-17, dated 19- 8-1999 and, therefore, learned Trial Court rightly convicted the appellants and hence it has been prayed that this appeal be dismissed.

16. Having heard learned Counsel for the parties, we are of the view that this appeal deserves to be allowed.

17. In the present case, there is no direct evidence and the prosecution has based its case purely on circumstantial evidence. The law in regard to the circumstantial evidence is well settled and the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but all the circumstances so established should be of conclusive nature and consistent with the hypothesis of the guilt of the accused and, therefore, all the established circumstances should be complete and there should be no gap in the chain of evidence. In this regard, decisions of Supreme Court in Sukhram v. State of Maharashtra (2007) 7 SCC 502 and K.T. Palanisamy v. State of Tamil Nadu AIR 2008 SC 1095 may be seen. Yet there is another decision of Supreme Court in Gagan Kanojia and Anr. v. State

of Punjab (2006) 13 SCC 516, in which the Supreme Court has almost repeated the same tests which were earlier reiterated by the Apex Court in catena of decisions, one of the decision in Ashish Batham v. State of Madhya Pradesh AIR 2002 SC 3206. In Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622, the Supreme Court has laid down the following tests:

- (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.

18. So far as evidence of 'last seen' is concerned, appellants were not known to Manoj Salonkhe (P.W. 8) earlier to the incident. According to this witness, appellants came to his work place and they hired a taxi. When Manoj Salonkhe appeared in Court as P.W. 8 he stated that the appellants are the persons who came to his work place to hire taxi, but in the same breath immediately he has stated that because he had seen the appellants 9-10 months ago with certainly he cannot say that they are the same persons who came to his work place to hire taxi although it has been stated by him that two persons having similar appearance to that of present appellants came to his work place to hire taxi. Thus, on the basis of such weak type of evidence of identification of appellants of last seen, it is difficult, rather it would be hazardous to hold that appellants are acquainted to Manoj Salonkhe (P.W. 8) and they are the same persons who came to the work place of

P.W. 8 to hire a taxi.

19. The another circumstance on which the prosecution is placing reliance is test identification parade. According to us hallmark of test identification parade also poses a big question mark and no authenticity could be attributed to the test identification parade. As per prosecution's own case first test identification parade was conducted on 13-8-1999, vide Exh. P-14 in which Manoj Salonkhe (P.W. 8) did not identify any of the appellants. Thereafter, according to the prosecution, an application (Exh. P-22) was submitted by Manoj Salonkhe on the same date to the Investigating Officer to re-arrange second test identification parade. Eventually, second test identification parade was held on 16-8-1999, vide Exh. P-15. In the second test identification parade which was held on 16-8-1999 Manoj Salonkhe (P.W. 8) rightly identified the appellants. Here the question would now arise that what was the occasion for Manoj Salonkhe to submit application to Investigating Officer to re-arrange second test identification parade when he already did not identify the appellants in first test identification parade held on 13-8-1999 vide Exh. P-14. Hence, at this juncture we should keep in our mind the warning addressed by Baron Alderson to the jury in *Reg. v. Hodge* (1838) 2 Lewin 227, which has been placed reliance in *Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh* AIR 1952 SC 343, we would like to quote said passage which reads thus:

In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore, it is right to recall the warning addressed by Baron Alderson to the jury in *Reg. v. Hodge* (1838) 2 Lewin 227, where he said:

The mind was apt to take a pleasure in adopting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for wanted some fact consistence with its previous theories and necessary to render them complete. It is well to remember

that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In spite of the forceful arguments addressed to us by the learned Advocate General on behalf of the State we have not been able to discover any such evidence either intrinsic within Exh. P-3A or outside and we are constrained to observe that the Courts below have just fallen into the error against which warning was uttered by Baron Alderson in the above mentioned case.

Thus, even if second test identification parade was conducted on 16-8-1999 in which Manoj Salonkhe (P.W. 8) rightly identified the appellants, according to us, the same has no authenticity and it would be hazardous to place reliance on second test identification parade looking to the facts and circumstances and the evidence placed on record and if we accept the second test identification parade it would mean that we have permitted conjectures and surmises to take place of strict proof which would be de hors to the warning of Baron Alderson.

20. Apart from what we have held hereinabove, on scanning Para 9 of the testimony of Manoj Salonkhe (P.W. 8) we find that he has specifically admitted that he could not identify the appellants because at the time when appellants came to book taxi he could not see them properly. Further he has admitted that he did not notice and did not pay any heed to their appearance. If last four lines of Para 9 of the testimony of this witness is taken into consideration, it somersaults the entire case of prosecution. It has been admitted by this witness in these lines that after holding first test identification parade he was told by taking out two persons from the total number of persons with a pacification that he should identify these two persons and thereafter again appellants were put for test identification. According to us, the quality of the evidence which the investigating agency has

collected and the manner and fashion in which the second test identification parade has been conducted it has lost its sanctity and on the basis of second test identification parade appellants cannot be convicted and because appellants were already shown to Manoj Salonkhe (P.W. 8), no reliance can be placed on such type of test identification parade.

21. In the present case entire case of prosecution is silent on the motive part and there is no evidence in this regard. Though in order to prove charge under Section 302, IPC, motive part is insignificant when the case of prosecution is based on direct evidence, however, if the case is based on circumstantial evidence motive part assumes great significance inasmuch as its existence is an enlightening factor in a process of presumptive reasoning. In this regard we may profitably place reliance on two decisions of Supreme Court, they are Tarseem Kumar v. The Delhi Administration AIR 1994 SC 2585 and Sukhram v. State of Maharashtra (2007) 7 SCC 502. The given case in hand which is purely based on circumstantial evidence since there is no evidence of prosecution in respect of motive part, for this additional reason also we are unable to uphold the conviction of appellants under Section 302/34, IPC as well as under Section 201, IPC. It will be highly improbable to hold that in order to commit robbery of gold chain these two appellants who are resident of Rewa (M.P.) would go to Amravati (Maharashtra) to hire taxi with knowledge that only deceased would be the driver of the taxi which they will hire and thereafter they will snatch his gold chain and therefore it cannot be said that there was a motive to kill the deceased so that his gold chain may be snatched.

22. We do not find any substance in the submission of learned State Counsel that in Court appellants were identified by Manoj Salonkhe (P.W. 8) which is a substantive piece of evidence and therefore appellants are rightly convicted. We have already put our emphasis on the note which has been written by learned Trial Judge in examination-in-chief of P.W. 8. Firstly, this witness rightly identified the appellants in the dock, but immediately he says that firmly he cannot say that they are the same persons who came to his work place to hire taxi. According to us, on such type of dock identification no reliance can be placed.

23. So far as recovery part of the gold chain from appellant Pradeep is concerned, according to us, no reliance can be placed on it for two reasons. The first reason is that the said gold chain was not produced in the Court and was not confronted to Vilas Sakham Chouhan (P.W. 6), who is the brother of the deceased as well as Sharmila Sharad Chouhan (P.W. 5) who is the wife of the deceased. The another reason is that vide recovery memo (Exh. P-17), dated 19-8-1999 gold chain has been recovered at the instance of appellant Pradeep from his house. However, witnesses to this recovery memo, namely, Onkar Nath Chaturvedi (P.W. 11) and Dharmendra Kumar Yadav (P.W. 13) have not supported the case of prosecution and they were declared hostile. So far as testimony of Investigating Officer, A.M. Pandey (P.W. 14) is concerned, according to us, recovery of golden chain at the instance of appellant Pradeep from his house vide Exh. P-17 is not proved because simply it has been so stated by the Investigating Officer that at the instance of appellant Pradeep golden chain was seized vide seizure memo (Exh. P-17). According to us, this piece of evidence would not prove the recovery. In this context, we may profitably place reliance on the decision of Supreme Court in *Mujeeb and Anr. v. State of Kerala* AIR 2000 SC 591 (Para 19). The Supreme Court in similar facts and circumstances did not find the recovery to be proved on the basis of evidence of Investigating Officer, because in the evidence of Investigating Officer actual words in verbatim leading to recovery were not recorded by the Investigating Officer. In the present case, also the actual words which have been stated in Exh. P-16 have not been stated in verbatim by the Investigating Officer. The statement which has been given by the Investigating Officer in order to prove recovery of chain from appellant No. 1-Pradeep Kumar Singh is as under:

fnukad 18&8&99 dks vkjksih iznhi dk eseksjs.Me dFku iz-ih- 16 mlds crk;s vuqlkj fy[kk Fkk] vkjksih us c ls c dk va'k eq>s fn;k Fkk A vkjksih ds lkFk tkdj mlds nwljs fnu lqcg mlds }kjk fudkydj fn;s tkus ij ,d lksus dh pSu tlr fd;k Fkk tlrh i=d iz-ih- 16 cuk;k FkkA

To us, by this type of the evidence of Investigating Officer the recovery of chain is not at all proved from appellant-Pradeep. There is vast difference between 'producing the article from a particular place by appellant', and 'I have kept the

gold chain in the house'. In the former the appellant had mere knowledge or he acquired the knowledge from other source and the latter connotes that appellant had exclusive possession of the said article.

24. The Single Bench of this Court long back in the year 1958 in the case of Bhagirath (supra), laid down same principle and it would be condign to quote Para 13 of the said decision which reads thus:

13. It is contended by the learned Government Advocate that in the instant case all the memos of discovery or the Panchnamas exhibited do recite the words 'I kept the ornaments in such and such place'. In my opinion, this is not sufficient. There seems to be a general impression among the subordinate Courts and the Public Prosecutors that lists of discoveries or memoranda or Panchnamas exhibited in criminal cases are themselves evidence. This is an erroneous view of the law. These lists or memoranda or Panchnamas can only be used by persons who signed them or prepared them to refresh their memory within the meaning of Section 159 of the Evidence Act. Whatever statement is attributed to an accused person in police custody giving information leading to the discovery must be proved by witnesses like any other fact. The evidence relating to the preparation of a Panchnama or a list of discovery or a memorandum should not be allowed to depend on the ingenuity of a police officer who may or may not like to write the statement in the exact words of the accused. A little change in his words may prove fatal to his defence. The difference between 'I have kept the ornaments inside that bush' and 'the ornaments are kept or will be found inside that bush' can well be realised. While the first sentence connotes that the accused had exclusive possession of the ornaments, at least for some time, after the theft, so that he was in a position to keep those ornaments inside 'that bush'; the second sentence would only imply that the accused person somehow acquired the knowledge about their whereabouts and his case will then come within the dictum laid down in Para 6 of *Trimbak v. State of M.P.* (1) and the discovery would not be regarded as conclusive proof that the accused was ever in possession of those ornaments. It is for this reason that a Division Bench of the Lahore High Court in *Harnam Singh v. Emperor* (2) laid down that the information given by the accused should be proved in the precise terms in which it was given. In the seven Judges Full Bench case,

Sukhan v. The Crown (3) Sir Shadilal, C.J., delivering the leading judgment, however, observed at pages 296-297:

The information received from an accused person is usually proved by quoting the words used by him, and this is certainly desirable in order to ensure accuracy. But it is not always possible to observe the salutary rule. If the witness to whom the statement was made has not reduced it to writing and does not remember the exact words used by the accused he can depose to it only in his own language.

This view is justified on the ground that Section 27 uses the word 'information' and not the word 'statement' which is used in all sections (Sections 17 to 31) of this group (see Monir, Vol I, p. 197).

Later on same principle has been reiterated by this Court in Dadulla (supra) and Babulal (supra). Hence, according to us, recovery of gold chain at the instance of appellant-Pradeep is not at all proved from the evidence of Investigating Officer.

25. For the reasons stated hereinabove, we are unable to uphold the impugned judgment of conviction and order of sentence passed by learned Trial Court. Accordingly this appeal succeeds and is hereby allowed. The judgment of conviction and order of sentence passed by learned Trial Court convicting the appellants under Sections 394, 302/34 and 201 of IPC is hereby set aside and appellants are acquitted from all the charges. The appellants are in jail, they be set at liberty forthwith if not required in any other case.

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