

Dev Prakash Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Nov-11-2003

Reported in : 2004(2)MPHT121; 2004(2)MPLJ343

Judge : S.L. Kochar and ;Ashok Kumar Tiwari, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; [Evidence Act, 1872](#) - Sections 3, 8 and 27

Appeal No. : Criminal Appeal No. 309/95

Appellant : Dev Prakash

Respondent : State of M.P.

Advocate for Def. : G. Desai, Dy. Adv. General

Advocate for Pet/Ap. : Jaisingh, Sr. Adv. and ;Vivek Singh, Adv.

Disposition : Appeal allowed

Judgement :

S.L. Kochar, J.

1. The appellant has filed this appeal dissatisfied with the judgment passed on 7-4-1995 rendered in S.T. No. 210/89 by learned 1st Addl. Sessions Judge, Mhow, District Indore, whereby convicted the appellant under Section 302, IPC and

sentenced to undergo R.I. for life and fine of Rs. 500/-; in default of payment of fine to undergo one month R.I.

2. The prosecution case as put forth before the Trial Court was that on 27-4-1989 in the night, during patrolling, police received information near Bherugarh from Jeet (P.W. 3) about a dead body lying in a nala. On this information, merg No. 6/89 (Ex. P-1) was registered. For protection of the dead body one chowkidar was deputed and on 28-4-1989 inquest of the dead body vide Ex. P-2 was prepared. Map (Ex. P-3) was also prepared on the same day. Police has seized blood stained earth, stone and controlled earth and stone. From the spot one blue colour chappal, white glass, broken soda bottle, small button and other articles were seized through Ex. P-27. Upto that time body was not identified by anybody. It was the body of unknown person. From the grip of the deceased certain hairs were also seized. These hairs were sent for examination to the expert. But no such report was filed by the prosecution. Post-mortem was performed of the unidentified body on 28-4-1989. Post-mortem report is (Ex. P-15). On 30-4-1989 in presence of Munna s/o Baburam, copper ring having white stone was seized. Pant, shirt and chappals were also seized from the body of the deceased. On the basis of clothes, slipper and copper ring, the body was identified by Yakub s/o Stu Demelo aged 24 years, resident of Chotti Khajrani, No. 1158, M.I.G. Colony, Indore. After identification of the dead body police interrogated the relations of the deceased and according to them deceased went alongwith acquitted co-accused Mahesh and present appellant from his house on 26-4-1989, thereafter did not come back. Yakub, the brother of the deceased had lodged gumshudgi report in M.I.G. Police Station. On the basis of this, the M.I.G. Police has,registered Merg No. 19/89. The acquitted accused Mahesh and appellant Dev Prakash were called in the P.S. for investigation. From their possession, on their disclosure statement under Section 27 of the Evidence Act, the clothes and luna scooter were seized. Vide seizure memo (Ex. P-9) pant and bushirt were seized from the possession of the appellant Dev Prakash. These articles were sent to Forensic Science Laboratory and according to Laboratory report (Ex. P-31), Pant -Article one and Shirt - Article two were containing blood. But Serologist report was not filed and there is no evidence adduced by the prosecution whether it was the human blood or blood tallying with the blood group of deceased. The appellant and the acquitted co-accused Mahesh

were arrested.

3. After due investigation, the charge-sheet was filed. The learned Trial Court framed the charges under Sections 302 and 302/34 of IPC against the appellant and acquitted co-accused. Their defence was one of denial and they claimed for trial. After trial, the co-accused Mahesh has been acquitted and the present appellant is convicted as mentioned above.

4. We have heard Shri Jaisingh, learned Sr. Counsel instructed by Shri Vivek Singh for the appellant and Shri G. Desai, learned Dy. Advocate General for respondent-State.

5. The conviction of the appellant is mainly based on the testimony of Rozy (P.W. 1) and Stu Demelo (P.W. 2); the sister and father of the deceased, respectively as well as Forensic Science Laboratory Report (Ex. P-31), disclosing the presence of blood on the pant and shirt of the appellant. The learned Trial Court has given finding in Paragraph 22 of the judgment that prosecution failed to establish any motive for commission of crime.

6. Rozy (P.W. 1) has deposed that three years prior to the date of her examination in Court, in summer days in the night at 11.00 p.m. she and her brother Pascal was in the house. The appellant and the acquitted co-accused Mahesh came to her house and took Pascal on their Luna motor cycle. She objected the going of her brother with them. According to her, on the next day she went to M.I.G. Police Station when her brother did not come back to home, for lodging the report, but her report was not written by the police. She tried to search at her level best but did not found her brother. After three days, she came to know that her brother had died. She had seen the dead body of Pascal in M.Y. Hospital. The face was not in identifiable condition. She identified the dead body on the basis of clothes, chappal and ring. She identified the clothes in the Court also. In cross-examination, she was contradicted with her case diary statement (Ex. D-1) regarding not allowing her brother to go with the appellant and acquitted co-accused Mahesh and regarding the fact that she turned out appellant thrice from her house and did not allow her brother to go with them. She was not able to explain this contradiction by giving any cogent and reliable explanation. In her case diary statement (Ex. D-1)

she has deposed that deceased told her that the appellant and, co-accused Mahesh were his friends and she has denied her this statement. The fact of forcible taking of Pascal by the appellant is also missing in her previous statement (Ex. D-1). In Paragraph 10 she has stated that after three days, her brother Yakub has informed her about murder of her brother Pascal and before identifying the dead body she came to know about arrest of two persons for murder of her brother.

7. At this juncture, the learned Counsel for appellant invited attention of this Court towards the statement of Dr. Amar Singh (P.W. 11) who performed the autopsy. In Paragraph 10 he has stated that on 28-4-1989 clothes of the deceased were sealed and the packet was handed over to the police. Ring was also handed over to the police.

8. In this view of the matter, the statement of Ro/y (P.W. 1) regarding identification of the deceased on the basis of the clothes after three days found to be incorrect because post-mortem was performed on 28-4-1989 whereas she had seen the body after three days. But no identification memo was prepared at the instance of Rozy (P.W. 1) or father Stu Demelo (P.W. 2). The identification of the dead body was got done by four witnesses; Ashok, Munna, Vishwanath and Yakub. Yakub is the brother of the deceased. All these four witnesses have not been examined by the prosecution to prove identification memo (Ex. P-25). This memo was got proved by Chetan Singh Tanwar (P.W. 19), the Investigating Officer. Looking to these state of affairs, the prosecution has failed to establish the identity of the dead body beyond all reasonable doubt.

9. The another witness Stu Demelo (P.W. 2) has deposed that in ^ the night appellant and the acquitted co-accused Mahesh came to their house and alongwith them the deceased Pascal went on Luna.

10. Now we have to consider whether in fact both these witnesses were the witnesses of evidence of last seen together or not. Statement of Rozy (P.W. 1) was recorded on 30-4-1989 and statement of Stu Demelo was recorded on 22-5-1989. Why their statements were not recorded immediately on the next day when the dead body was found and why both these witnesses had not gone to the police

disclosing the fact that deceased went along with them in the night from their house on Luna. These important questions have not been answered by the prosecution through the witnesses examined in Court. On the contrary, Stu Demelo (P.W. 2), in paragraph five has stated that at the first instance he was not knowing the accused persons. Thereafter he named the present appellant and identified on the basis of the fact that he was selling banana in that area. But again he has stated that he was not knowing the name of the present appellant. In this para, he has also deposed that T.I. of M.I.G. Police Station came to his house and suggested him to lodge a report against the present appellant and Mahesh and he lodged the report as suggested by the T.I. and again in the same breathing he has deposed that he sent his daughter Rozy and son Yakub to lodge the report in the police station. But no such report is filed in the case.

11. There is no dispute that apart from the evidence of last seen together and blood stained clothes of the appellant, there is no other evidence available on the record. The evidence of last seen together is inherently a weak kind of evidence and the same require strong corroboration by independent material particulars which is not available in the present case. The blood stained clothes is of no consequence because there is no report that the clothes were containing human blood tallying with the blood group of deceased.

12. The conviction of the appellant is based on circumstantial evidence and the rule of circumstantial evidence is that prosecution is required to prove beyond all reasonable doubt each circumstances independently forming chain pointing towards the guilt of the accused excluding all reasonable hypothesis of his innocence in his favour. Here in the present case, there is absolutely no motive for the appellant to commit murder of the deceased and there is also no chain of circumstances to establish that the appellant was the person who committed murder of deceased. See *Kansa Behera v. State of Orissa*, (AIR 1987 SC 1507).

13. In view of the above said factual and legal discussion, the appeal is allowed. The conviction and sentence of the appellant is set aside. The appellant is on bail. His bail bond and surety bond are discharged.

