

Nathu Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Feb-05-2002

Reported in : 2002(5)MPHT24

Judge : N.K. Jain and ;S.L. Kochar, JJ.

Acts : Evidence Act - Sections 27; Indian Penal Code (IPC) - Sections 302, 394 and 414; Code of Criminal Procedure (CrPC) - Sections 154 and 174

Appeal No. : Criminal Appeal Nos. 840/94 and 198/95

Appellant : Nathu

Respondent : State of M.P.

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

Advocate for Pet/Ap. : S.S. Swami and ;L.R. Bhatnagar, Advs. in Cr. A. No. 198/95 and ;Sanjay Sharma, Adv. in Cr. A. No. 840/94

Disposition : Appeal allowed

Judgement :

S.L. Kochar, J.

1. Both these appeals are arising out of judgment and order dated 18-11-1994 passed by 4th Addl. Sessions Judge, Ratlam in S.T. No. 185/93 convicting and

sentencing the appellant No. 1 Nathu for the offences under Sections 302 and 394, IPC, sentence to RI for life with fine of Rs. 1,000/- (Rupees one thousand) in default of payment of fine further RI for 1 year. He was also sentenced to 10 year's RI with fine of Rs. 1,000/- (Rupees one thousand) in default of payment of fine one year RI respectively. Appellants Rajesh and Sohan were convicted for the offence under Section 414 of IPC, each sentenced to RI for 2 years with fine of Rs. 1,000/- (Rupees one thousand) in default of payment of fine RI for six months.

2. Briefly stated the prosecution case before the Trial Court was that Ahmed Husain (P.W. 1) was at his field on 1-4-1993 at 7 p.m. he was informed by Ranjeet (P.W. 3) about murder of his tenant Ayodhya Bai. On this information, he came to the house and while peeping inside the house saw that light was on, the door was bolted from outside and deceased was lying on bed. He lodged the report Ex. P-1 in the police station on which merg No. 14/93 under Section 174, Cr.PC was registered. Police reached on the scene of occurrence and dead body was sent for post mortem. Dr. Arun Purohit (P.W. 5) performed post mortem. His report is Ex. P-10. According to medical report the deceased met homicidal death due to strangulation. After usual investigation charge-sheet was filed on the basis of circumstantial evidence against the appellants and trial ended into conviction of the appellants.

3. The conviction of the appellant No. 1 is based on evidence of last seen together and thereafter his abscontion and recovery of golden Suleye (ear rings) and silver Kade at his instance. Appellants Rajesh and Sohar have been convicted for assisting the appellant No. 1/Nathu for disposing the stolen property.

4. We have heard the learned Counsel for the parties and also perused the entire record. Counsel for the appellant Nathu submitted that by reading the statements of Ramsingh (P.W. 2) and Bhanwar Kunwar (P.W. 6) together, the fact of last seen together of the appellant with the deceased prior to her death is not established beyond all reasonable doubt. These are only two witnesses relied upon by the Trial Court for this circumstance.

5. Ramsingh (P.W. 2) deposed in his statement that deceased was residing in front of his house and the appellant Nathu who was in relation of the deceased, 3-

4 days prior to her death used to come to her house in the evening and leaving her house on the next day morning. For about 3 days this witness had seen the appellant and after the death of the deceased, the appellant was not seen. In Paragraph 3 of his deposition this witness has stated that lastly he had seen the appellant sitting with the deceased Ayodhya Bai in the morning at 7 a.m. thereafter this witness had gone to his field. On returning back on the next day, received information about death of deceased.

6. Bhanwar Kunwar (P.W. 6) has deposed that the appellant was the nephew (brother's son of the deceased) and used to come to the house of the deceased in the evening and after staying in the night he used to go somewhere in the morning. He was seen by this witness for about 4 days thereafter on 5th day early in the morning this witness was washing her face, saw the appellant going with water container for answering the call of nature after chaining the door from outside.

7. In Paragraph 12, this witness has stated that she saw the appellant going, after chaining the door from outside, did not see the appellant returning back and also did not see him in Village Salikhedi. In Paragraph 5 she has stated that when the appellant did not come back in the evening as per his regular schedule and he saw the door in the same bolted condition, she had some doubt in her mind and she disclosed this fact to Ranjeet (P.W. 3), thereafter Ranjeet (P.W. 3) opened the door and found the deceased lying on bed. Ranjeet went to inform Ahmed Husain (P.W. 1) thereafter the police party reached the village in the night.

8. Reading the statements of Ramsingh (P.W. 2) and Bhanwar Kunwar (P.W. 6) together the story of appellant's last seen together, in the morning with the deceased is not reconcilable because P.W. 2 has stated that he had seen the deceased and appellant sitting at 7 a.m. whereas Bhanwar Kunwar (P.W. 6) has stated that at 6 a.m. early in the morning even there was darkness the appellant had left the house for answering the call of nature after bolting the door from outside and thereafter did not come back. Because of this glaring defect we are unable to accept the evidence of appellant's last seen together with the deceased. Further about the presence of the appellant with the deceased in the night from 4-

5 days of her death is not mentioned in the FIR which is recorded as a merg intimation Ex. P-I lodged by Ahmed Husain (P.W. 1) who was given information by Ranjeet. Nothing is mentioned about the presence of the appellant with the deceased since last 4-5 days as stated in the Court statement by Ahmed Husain (P.W. 1), Ramsingh (P.W. 2) and Bhanwar Kunwar (P.W. 6) [who is daughter of Ramsingh (P.W. 2)]. These witnesses have stated so many things about the appellant presence from 4-5 days of the death of the deceased but failed to mention such an important fact in the FIR. Ahmed Husain has also stated this fact Ramsingh (P.W. 2) who is the witness of last seen was confronted with his case diary statement Ex. D-2 in Paragraph 21, he did not disclose the fact about his seeing the appellant in the morning alongwith the deceased Ayodhya Bai. He was not able to give proper explanation. For this omissions of such an important fact in his case diary statement, makes his statement doubtful for the purposes of establishing the fact that the appellant was lastly seen in the company of deceased.

9. Ex. P-14 FIR recorded as per the provision under Section 154, Cr.PC and in this FIR also there is absolutely no mention of fact that appellant used to come to the house of the deceased in the evening, residing with her for whole night and leaving her house in the morning after break fast. Police party reached in the same night of recording of merg intimation report Ex. P-I and had meeting with P.W. 1, P.W. 2, P.W. 3 as well as P.W. 6 even then did not get this information that the appellant was the person last seen with the company of the deceased. This FIR P-14 is also not disclosing the fact of interrogation of these witnesses. FIR is disclosing about interrogation of Ramsingh, Chandan Bai, Nathi Bai and Ramibai. Out of these persons Ramsingh has been examined as P.W. 2 as witness of last seen but, in his case diary statement this fact is not mentioned and same is not mentioned in the FIR Ex. P-14. It appears that the story of appellant's presence with the deceased has been cooked up later on otherwise these witnesses would not have failed to mention immediately in the merg intimation report Ex. P-I and thereafter by police officer recording FIR Ex. P-14. These facts are making the prosecution story of last seen of the appellant with the deceased doubtful.

Supreme Court has laid down the principle of appreciation of evidence in the case of Kedarnath Bajoriya v. West Bengal (AIR 1954 SC 660) based on circumstantial evidence:--

Before a person could be found guilty on the basis of circumstantial evidence, each of the circumstance relied upon must be clearly established and the proved circumstances taken together must be such as reasonably to exclude the probability of innocence.

Supreme Court further reiterated in detail about appreciation of circumstantial evidence in a case of Padlaveera Reddy v. State of Andhra Pradesh (AIR 1990 SC 79) :--

When a case rests upon circumstantial evidence such evidence must satisfy the following tests :--

(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.

10. Now the another circumstance relied upon by the Trial Court, i.e., recovery of golden sulewe (ear rings), as per disclosure statement under Section 27 made by the appellant vide Ex. P-16 recorded on 23-8-1993. According to FIR Ex. P-14 the incident had taken place in the intervening night of 31-3-1993 - 1-4-1993. The merger intimation report was recorded at the instance of Ahmed Husain (P.W. 1) on

1-4-1993 at 9 p.m. whereas the crime was registered on 2-4-1993 at 4.25 p.m.

11. In the merged intimation report there is no mention of fact that deceased was wearing golden ear rings and silver Kade. For the first time this fact has come in the FIR Ex. P-14 recorded on 2-4-1993 but the prosecution has not examined the witnesses who have given this information about wearing of these ornaments by the deceased, i.e., Chandan Bai, Nathi Bai and Rami Bai. These women were the close relatives of the deceased.

12. Ramsingh (P.W. 2) has not disclosed the fact in his case diary statement Ex. D-2 about wearing of golden ear rings and silver Kade by the deceased prior to her death. Defence has confronted with his case diary statement in Paragraph 38 of his Court statement in which he was not able to give any reasonable and plausible explanation. Same is the position with Bhanwar Kunwar (P.W. 6) she has not disclosed this fact in her case diary statement Ex. D-5 and she was also confronted in Court statement Paragraph 36, she has shown her ignorance as to why this fact is not mentioned in her case diary statement.

13. In view of this state of affair we have no hesitation to come to the conclusion that the prosecution has utterly failed to prove this fact that prior to the death of the deceased Ayodhya Bai, she was wearing golden ear rings and silver Kade on her person.

14. Recovery of silver Kade has not been made because the same was melted by its purchaser Shantilal (P.W. 9) and golden ear rings were shown to be recovered after lapse of more than 4 and half months and this recovery was not from exclusive possession of the appellant but as per his statement he got both the ornaments disposed of through co-accused Rajesh and Sohan, For proving the memo Ex. P-16, the prosecution has examined Rajesh (P.W. 8). At the first instance he did not support the prosecution case thereafter he was declared hostile and then in cross-examination he was refreshed his memory by reading over the memorandum statement Ex. P-16, thereafter he admitted the contents of the memorandum. This witness has nowhere stated that after seizure of golden ear rings, the same were duly sealed and signed by investigation officer as well as himself. The seizure memo Ex. P-21 about seizure of two golden ear rings is also

not mentioning the fact of sealing and thereafter signing the same by investigation officer, accused persons and witnesses. Since both these articles have not been sealed at the time of seizure the same would lose all sanctity for the purposes of putting their test identification because prior to their test identification the possibility of showing these articles to witnesses cannot be ruled out.

15. In the test identification of these articles Ex. P~7 the proper numbers of similar articles were not mixed up and this memo of test identification of Ex. P-7 is also not disclosing the fact that articles were given to Naib Tehsildar who held test identification parade in a sealed packet and he broke the seal thereafter mixed up the same with other similar kind of articles and thereafter put the same for test identification. In view of these facts, the prosecution has utterly failed to prove that the deceased was wearing the golden ear rings and silver kade on her person at the time of her death and the golden ear rings shown to be seized from Bhanwar Lal shop man at the instance of appellant Rajesh after statement under Section 27 of Evidence Act given by the appellant Nathu.

16. Golden ear rings were also not put for identification by some close relatives of the deceased whose names were mentioned in the FIR, i.e., Chandan Bai, Nathi Bai and Rami Bai. These articles were identified during test identification parade by Ahmed Husain who was neither residing in that village nor related to the deceased. Ahmed Husain was residing at Ratlam other witnesses, i.e., Ramsingh (P.W. 2), Ranjeet (P.W. 3) and Bhanwar Bai (P.W. 6) were not the relatives of the deceased and identification by them is not very much reliable because they have not given any mark of identification in their police statement as well as in the Court. All these witnesses have admitted that these ear rings were easily available in the market and anybody could purchase the same. The appellant Rajesh has claimed these ear rings and examined in defence her mother Bhanwar Bai (D.W. 1). According to accused Rajesh he pledged both the ear rings with Bhanwar Seth. The same statement has been given by his mother Bhanwari Bai (D.W. 1). The seized ear rings were bearing red stones but in the seizure memo and identification memo this specific mark of identification is not mentioned. Witnesses were also not given this as mark of identification whereas Bhanwari Bai (D.W. 1) has specifically stated that she had pledged these ear rings with Bhanwar Lal

(P.W. 10). The statement of this witness Bhanwar Lal (P.W. 10) clearly establishes that appellants Rajesh, Sohan and their mother Bhanwari Bai were having business transaction in his shop and oftenly used to pledge golden and silver ornaments. The Kade was not recovered but in its place melted silver was recovered that could not be identified. Its recovery will not give any benefit to the prosecution. The golden ear rings Article G were duly claimed by the appellant Rajesh. For appreciation of defence evidence, Supreme Court in a recent judgment *Munshi Prasad and Anr. v. State of Bihar*, reported in (2002) 1 SCC 351, has held as under :--

The evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution a lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutor's witnesses.

Reference can also be made of these judgments. *Bhagwan Singh and Anr. v. State of Madhya Pradesh* (AIR 1980 SC 1750) and *Dudh Nath Pandey v. State of U.P.* (AIR 1981 SC 911).

17. In the wake of the aforesaid discussion, we are of the opinion that the prosecution has utterly failed to prove the circumstances against the appellant No. 1, i.e., he was last seen in the company of the deceased and deceased was wearing on her person silver Kade and golden ear rings and the same were missing and were recovered as per the memorandum statement given by the appellant No. 1 and thereafter got recovered by appellant Nos. 2 and 3 from the witnesses Shantilal and Bhanwar Lal. The prosecution has failed to prove the circumstances beyond all reasonable doubt independently and the same are forming chain pointing out unerringly towards the guilt of the appellants excluding all reasonable hypothesis of innocence in their favour. The appellants are entitled for benefit of doubt. Consequently, both the aforesaid appeals are allowed the impugned judgments, orders of convictions are set aside and appellants are

acquitted of the charges. Appellant Nathu is directed to be released from jail forthwith if not required in any other case. Appellants Rajesh and Sohan are on bail their bail bonds shall stand cancelled.

The seized golden ear rings are directed to be returned to appellant Rajesh.

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