

**Shahabuddin Vs. the State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** Jul-11-1972

**Reported in :** 1973CriLJ723; 1972()WLN648

**Judge :** L.S. Mehta, J.

**Appellant :** Shahabuddin

**Respondent :** The State of Rajasthan

**Judgement :**

**L.S. Mehta, J.**

1. The prosecution story, in brief, is that on November 29, 1970, Zahurddin Chippe, resident of Khinvsar, lodged a report with the police station, Bhawanda, to the effect that during the night of November 28, 1970, at about 11.30 accused Shahbuddin broke open a window of his house. He entered his house and inflicted a 'Gupti' blow to the abdomen of his wife Mst. Hazran, Mst. Hazran raised shrieks. Which attracted neighbours as also the informant. Mst. Hazran was first, taken to Khinvsar Dispensary and then to Nagaur Hospital. On her way to Nagaur she breathed her last. On receipt of the first information report filed by Zahurddin. a case was registered against Shahbuddin under Section 302, I.P.C. The police took over investigation and after its conclusion it presented a charge-sheet to the Court of Munsiff Magistrate. Nagaur, Learned Munsiff Magistrate conducted preliminary inquiry and committed accused Shahbuddin to the Court of Sessions Judge,

Merta. The accused was indicted of the offence under Section 302/457, I.P.C. to which he pleaded not guilty. The prosecution examined 15 witnesses in support of its case. In his statement, recorded under Section 342, Cr.P.C., the accused denied the prosecution version. He pleaded alibi and stated that on November 28, 1970, he had gone to Jodhpur. He did not produce any evidence in his defence. Learned Sessions Judge, Merta, acquitted Shahbuddin of the crime under Section 302, I.P.C. but convicted him under Section 304(1), I.P.C. and sentenced him to suffer ten years' rigorous imprisonment and to pay a fine of Rs. 500/-, in default of Payment of which to undergo further rigorous imprisonment for five months.

2. Dissatisfied by the above verdict, the accused has taken this appeal. The contention of learned Counsel for the appellant is that in this case there is no direct proof, connecting the accused with the crime. The entire case hinges around the following three pieces of evidence:

(1) that some of the prosecution witnesses heard the cries of Mst. Hazran at the time of the actual occurrence that it was Shahbuddin, who had inflicted injuries to her;

(2) that some prosecution witnesses saw accused Shahbuddin going out of the residence of Mst. Hazran after the perpetration of the crime; and

(3) that some prosecution witnesses have stated that Mst. Hazran made dying declaration wherein she had implicated the accused.

3. The above three pieces of evidence, learned Counsel urges, have not been properly appreciated by the trial Court and therefore, the conviction of the appellant should be set aside. Learned Deputy Government Advocate supports the judgment of the Court below.

4. The post-mortem examination of the dead body of Mst. Hazran was conducted by P.W. 14 Dr. Krishna Dass of Khinvsar Dispensary on November 29, 1970, at 1.10 P.M. The following external injuries were found on her dead body:

1. Punctured wound on the left side of abdomen 5' above umbilicus and 6' below the left nipple; size 1' long 1/5 broad (wound of entry);

2. one punctured wound on the back left side 5' above that left iliac crest and 2' above from the left vertebral column. Size ' 1/5' (wound of exit).

In the opinion of the Doctor injuries Nos. 1 and 2 were collectively sufficient to cause the death of the deceased in the ordinary course of nature. The duration of the injuries was not less than 12 hours. From the medical evidence there is no manner of doubt that Mst. Hazran met with homicidal death.

5. The only question that survives for consideration is as to whether the prosecution has succeeded in proving that it was appellant Shahbuddin. who caused the two punctured wounds to Mst. Hazran.

\* \* \* \*

Paras 6 to 12: After considering the evidence, the Judge proceeded: Ed.

13. Coming now to the legal aspect of the matter, learned Counsel for the appellant submitted that in this case there is no direct evidence. The entire case hinges upon circumstantial evidence. The circumstantial evidence in this case does not inspire confidence. In this connection it may be stated that the legitimate effect of the circumstantial evidence should be to inspire salutary caution in its reception and estimate, though such evidence, although not invariably so, is frequently superior to the average strength of direct evidence: vide pages 512 and 513 Wills on Circumstantial Evidence 7th Edition. When a number of circumstances are combined, they may result in irresistible conclusion of guilt. Circumstantial evidence is indeed, sometimes more reliable than direct evidence, but it should be of conclusive character and must point unerringly to guilt: see Underhill on Evidence Fifth Edition, Volume 1. In order to avoid unjustified conclusion, circumstantial evidence is to be received and scrutinised by the Court with caution. In an effort to guard against improper verdict, it is commonly stated that in determining the sufficiency of circumstantial evidence: (1) all the essential facts must be consistent with the hypothesis of guilt; (2) the facts must exclude over other reasonable theory or hypothesis except that of guilt; and (3) the facts must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that the accused is the one who committed the

offence. (See Article 980 Wharton's Criminal Evidence, 12th Edition. Volume III). These principles have been approved by their Lordships of the Supreme Court in *Awadhi Yadav v. The State of Bihar* : 1971 CriLJ23 . In that case His Lordship Hegde J. has observed that before a person can be convicted on the strength of circumstantial evidence, the circumstances in question must be satisfactorily established and the proved circumstance must bring home the offence to the accused beyond reasonable doubt. If this circumstance or some of them can be explained by any other reasonable hypothesis then the accused must have the benefit of that hypothesis. Similar observations have been made in another recent decision of the Supreme Court, reported in *Bakshish Singh v. State of Punjab* : 1971 CriLJ1452 . In the instant case, the prosecution has failed to establish the chain of evidence so as to leave no reasonable ground for conclusion consistent with the innocence of the accused and to show that within all human probabilities the act must have been done by the accused.

14. The next legal point emphasised by learned Counsel for the appellant is that the trial Court went wrong in relying upon dying declaration of the deceased Mst. Hazran. In so far as the dying declaration is concerned, it may be stated that though a dying declaration when deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, is entitled to great weight, it should always be recollected that the accused has not the power of cross-examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be, and that, where a witness has not a deep sense of accountability to the maker, feelings of anger or revenge, or in the case of mutual conflict, the natural desire of screening his or her own misconduct, may affect the accuracy of his/her statement, and give a false colour to the whole transaction: vide Article 722. Taylor on Evidence. 12th Edition pages 462-463, Volume I. It may also be stated here that when the declaration is oral, it must appear by independent evidence that the declarant was mentally conscious, realised his or her dying condition, and possessed memory, consciousness and intelligence, sufficient to know what he or she was doing and saying: See Underhill's Criminal Evidence. 5th Edition. Article 297, Vol. II.

15. In the present case there is no evidence worth the name on record that the declarant was mentally conscious and that she had realised her dying condition or that she possessed memory, consciousness or intelligence sufficient to understand what she was doing or saying. Prosecution witness Ibrahim (P.W. 4) has categorically stated that when he visited deceased Mst. Hazran, she was semi-conscious and in his police statement Ex. D. 7 he had deposed that she had been lying unconscious. In that circumstance it is very doubtful whether Mst. Hazran at all made any dying declaration realising fully well as to what she had been doing. As the dying declaration of Mst. Hazran was not tested, by cross-examination, the trial Court ought to have put itself on its guard by imposing on it an obligation to scrutinise all the relevant circumstances: vide *Tapinder Singh v. State of Punjab* : 1970 CriLJ1415 . In the instant case the dying declaration when closely scrutinised is not acceptable as truthful and it would be hazardous to act upon it and convict the accused.

16. Lastly, learned Counsel for the appellant submitted that in this case the prosecution has not elicited any motive. It is in the evidence of P.W. 1 Noor Mohammed and P.W. 2 Zahuruddin that they did not know what the motive of the crime was. I agree with learned Deputy Government Advocate that, when there is clear cogent and direct evidence, Court need not consider the question of motive: see *Gurcharar Singh v. State of Punjab* : 1956 CriLJ827 . When there is circumstantial evidence, motive is a factor to be reckoned with. In this connection a reference is made to Article 166. Wharton's Criminal Evidence, 12th Edition, Volume I. The relevant passage runs as under:

The absence of a motive or the presence of a motive may raise or remove a reasonable doubt as to the guilt of the accused. The absence of motive or of all apparent inducement to commit the crime is a strong circumstance in favour of the accused, particularly in cases depending on circumstantial evidence.

17. A reference may also usefully be made to *Ramgopal v. State of Maharashtra* : 1972 CriLJ473 . In that case it has been observed by their Lordships of the Supreme Court that if in a criminal case motive as a circumstance is put forward, it must be fully established like any other incriminating circumstance. In the instant

case no motive whatever has been proved.

18. In the light of the foregoing discussion. I must say that accused Shahbuddin has wrongly been convicted by learned Sessions Judge, Merta. I therefore, allow the appeal, and set aside the conviction and sentence. He shall be released forthwith if not required in any other case.

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