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# Sapala Vs. State of Rajasthan

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**Court** : Rajasthan

**Decided On :** Apr-28-1983

**Reported in** : 1983WLN(UC)220

**Judge** : M.C. Jain and; S.C. Agrawal, JJ.

**Appeal No.** : D.B. Criminal Jail Appeal No. 412/1977

**Appellant** : Sapala

**Respondent** : State of Rajasthan

**Judgement** :

**S.C. Agrawal, J.**

1. Appellant Sapala has filed this appeal, from jail, against the judgment dated 27th March 1977 passed by the Sessions Judge Banswara in Sessions Trial 27/1977. In the sessions case aforesaid, the appellant was prosecuted for the murder of one Jaokha and was charged with offences Under Sections 302 and 379 LP.C. The Sessions Judge, by his judgment aforesaid, convicted the appellant of both the offences and he has sentenced to imprisonment for life and to pay a fine of Rs 200/- Under Section 302 IPC and to rigorous imprisonment for a period of three months Under Section 379 IPC. Both the sentences have been ordered to run concurrently.

2. The case of the prosecution is that on 20th April 1977 at 7.30 a.m. one Pahadsingh (P.W.

1) lodged a report (Ex P. l) at police station Kushalgarh wherein it was stated that at about 7 a.m. the informant was informed by one Kheema that the dead body of a man was lying in his field and thereupon he went to his field and found the dead body of one Adivasi lying there. On the basis of the said report a case Under Section 302 IPC was registered and Shri Moderam (P.W. 1), SHO, P.S. Kushalgarh proceeded to the spot and prepared the panchnama (Ex. P.

2) relating to the dead body. While the aforesaid panchnama was being prepeared Shri Chunnilal (P.W.

19) , Dy. S.P. Kushalgarh arrived at the scene, and he took up the investigation of the case. Shri Chunnilal prepared the site plan and memo of site inspection (Ex. P. 3)and also seized the clothes and other articles found on the dead body vide seizure memo (Ex. P

4) one slip of paper containing the name Jaokha son of Khatara was found near the dead body. The dead body was identified as that of Jaokha by his son Kalia (PW

8) and his brother Amra. The post mortem examination of the dead body was conducted by Dr. Kanakmal Jain (P W.

13) vide post mortem report (Ex. P 11). The appellant was arrested on 1st May 1977 vide memo of arrest (Ex. P. 14). After his arrest the appellart gave information vide memo (Ex. P

15) dated 1st May,-1977 about his having concealed a Kulhari and his haveing sold a 'Kara' removed from the person of Jaokha deceased to one Ramnarain. On the basis of the said information a Kulhari (Article

1) was recovered vide recovery memo (Ex P.

13) from the house of the appellant 'Kara' (Article

2) was recovered from the possession of Ramnarain (P.W.9) vide recovery memo (Ex P.5). On 6th May, 1.977 the appellant gave further information vide memo (Ex P.

18) with regard to his having sold four silver 'Murkis' belonging to the deceased to one Sunar at Kushalgarh and on the basis of the said information four silver Murkis (Article

3) were recovered from the possession of Bhagwati Prasad (P.W.

10) vide recovery memo (Ex P. 6). The silver 'Kara' (Article

2) and the 'Murkis'(Article 3)were put up for test identification at a test identification parade conducted on 24th May, 1977 by Shri Babulal Goyal (P.W. 12), Munsif and Judicial Magistrate, Kushalgarh and the 'Kara' (Article 2 ) was identified as belonging to the deceased by his wife, Smt. Sama (P.W.

6) and his son Kalia (P.W. 8). In so far as the 'Murkis' (Article

3) are concerned all the four were identified as belonging to the deceased by Kalia (PW

8) but Smt. Sama (PW

6) was able to identify two out of the four Murkis. The Kulhari (Article

1) was sent to the State Forensic Science Laboratory, Rajasthan and the report (Ex P.

17) of the Director, Stat; Ferensic Laboratory was that it was stained with blood and the report (Ex P

18) of the Serologist and Chemical Examiner to the Govt. of India was that blood found on the Kulhari was human blood. After completing the investigation, the police filed a charge sheet against the appellant in the court of Judicial Magistrate, Kushalgarh and the appellant was committed for trial to the court of Sessions.

3. The appellant pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 18 witnesses. The appellant, in his statement recorded Under Section 313 Cr.P.G stated that he had been falsely implicated. He admitted that the Kara (Article 2) and the Murkis (Article 3) were recovered from the possession of Ramnarayan (PW 9) and Bhagwati Prasad (PW 10) respectively but stated that the 'Murkis' belonged to him which he had sold to Bhagwati prasad and the 'Kara' belonged to his brother and it was sold to Ramnarain. The appellant examined two witnesses viz- Hakra (DW 1) and Rama (DW 2). The Sessions Judge held that the prosecution had suceeded in establishing the guilt of the appellant beyond reasonable doubt. In this connection the Sessions Judge has placed reliance on the txtra judicial confession made by the appellant, the recovery for the 'Kara' and 'Murkis' belonging to the deceased at the instance of the appellant and the recovery of the blood statined Kulhari from the possession of the appellant In view of the findings aforesaid the Sessions Judge convicted the appellant for the offences Under Section 302 and 379 IPC and sentenced him as stated above. Hence this appeal.

4. We have heard Shri Doongarsingh, learned Counsel for the appellant and Shri M.C. Bhati, learned public prosecutor for the State.

5. From the medical evidence viz. Statement of Dr. Kanakmal Jain (PW 13),who had conducted the post mortem examination of the dead body of the deceased and nas provec the post mortem report (Ex P 11), it is established that there were five injuries on the person of the deceased. There were two incised wounds, one contusion, one lacerated wound and one abrasion. According to Dr. Kanakmal Jain (PW 13) all the injuries were ante- mortem and injury No. 1 viz., the contsion 8 cm x 6 cm on the right parietal region was dangerous to life, and the death had occurred as a result of coma from injuries to the vital organ (brain) and intra cranial haemorrhage. Thus from the medical evidence it is established that the death of Jaokha was homicidal and the question which needs determination in this appeal is whether the appellant can be held responsible for causing the injuries which resulted in the death of Jaokha.

6. There is no direct evidence to connect the appellant with the crime and the complicity of the appellant with the crime is sought to be established on the basis of the following circumstances:-(1) extra judicial confession, (2) recovery of a silver 'Kara' (article 2) and silver 'Murkis' (article 3) belonging to the deceased at the instance of the appellant, and (5) recovery of a Kulhari (article 1) which was stained with human blood.

7. In order to prove the extra judicial confession the prosecution has examined five witnesses viz., Lalji. (PW 2) , Galiya (PW 3), Badru (PW 4), Mansingh (P W 5) and Kalsingh (PW 7). All these witnesses belong to village Nirnawar and they have stated that two days prior to 'Akha Teej' they had all gone to village Jakria for work and while returning from there they arrived at Kushalgarh at about 8.9 p m At Kushalgarh Mansingh (PW 5) purchased Bidis from a pan shop. The appellant was at the pan shop at that tine and he purchased a packet of cigarettes. He was armed with a Kulhari. After Mansingh had purchased bidis the witnesses proceeded further and the appellant came behind them. When they reached near the houses of Kumhars. the appellant told them that he had killed one person with his kulhari. When the witnesses asked him the reason for doing so the appellant replied that he had borrowed matches from him which he refused and thereupon he killed him. The witnesses have further stated that they asked the appellant about the place where he had killed that person and he said that it was in the field of Thakur and he also pointed out the dead body from the road. The witnesses have stated that the appellant went near the dead body and they went to their houses. They have also stated that the appellant had threatened them that if they disclosed this fact to anybody he would kill them in the same manner as he had killed that person.

8. Shri Doongarsingh, learned Counsel for the appellant has submitted that no reliance can be placed on the testimony of these witnesses. In this regard Shri Doongar Singh has pointed out that even though, according to the witnesses, the extra judicial confession was made on the same day on which the incident had taken place, on 19th April, 1977, the statements of the witnesses were recorded by the police only on 29th April 1977 and there was a considerable delay in recording their statements. Shri Doongarsingh has also pointed out that the

statements of these witnesses were also recorded Under Section 164 Cr.P.C. before the Magistrate. Shri Doongar Singh has also submitted that during the course of cross examination Man Singh (PW 5) has stated that he was kept in police custody for three days and was threatened that appellant was also in police custody at that time. Shri Doongarsingh has also pointed out that the evidence of these witnesses about the extra judicial confession should not be accepted also for the reason that the story given by them is highly unnatural in as much as there was no reason why the appellant should make a confession before these witnesses and further that the evidence of these witnesses that the appellant went near the dead body is highly improbable. According to Shri Doongarsingh merely because of the five witnesses have given the same version does not mean that the version given by them should be accepted as true because quantity cannot be a substituted for quality In this regard Shri Doongar Singh has also pointed out that on 23rd May 1977 the appellant was produced before the Judicial Magistrate I Class Kushalgarh for the purpose of recording a confessional statement and that the appellant did not make any confessional statement and during the course of preliminary examination by the Judicial Magistrate, stated that while he was in police custody he was beaten and electric current was also passed through his body. Shri Doongarsingh has submitted that this unsuccessful attempt on the part of the Investigating Officer to get the confession of the appellant recorded by a Magsitrate undermines the credibilty of the extra judicial confession.

9. We find considerable force in the aforesaid submissions of Shri Doongar Singh. With regard to extra judicial confession. The law is well settled that before acting upon an extra judicial confession the court must consider the circumstances in which the confession was made. The manner in which it was made the person to whom it was made along with two rules of caution (i) whether the evidence of confession is reliable; and (ii) whether it finds corroboration (See: Vakil Nayak v. State of Bihar, 1972 SCC (Cr.)9). In the instant case the confession is stated to have been made to 5 persons at the same time on a public thoroughfare. It has not been stated by the witnesses who belong to a different village that they had any particular closeness and familiarity with the appellant so as to inspire the appellant to make confession of a serious crime like murder. It is also highly improbable that after having committed that murder the appellant would again go

near the dead body because the normal instinct of a person who has committed the crime is to be away from the scens of crime so as to avoid detection. Apart from the circumstances referred to above we find that the evidence of PWs. 2,3,4,5, and 6 is not such as to inspire confidence. Although the confession was made to them on the date of the incident, i.e.on 19th April, 1977 their statements Under Section 161 Cr PC were recorded on 29th April, 1977, i.e. after 10 days and they have stated that even though they met number of persons during this period they did not disclose this fact to any body. All of them have stated that the appellant was present at the time their statement was recorded by the police. Mansingh (PW. 5) and Kalsingh (PW.7) have stated that the appellant was under arrest and he was also beaten. Mansingh (PW 5) has also stated that they were called by the police three days after the dead body had been found and they were kept in police custody for three days and were also threatened. Similarly Babu (PVV.4) has stated that the police kept them for three days. The statements of all these witnesses were also recorded Under Section 164 Cr. PC. It would thus appear that these witnesses were kept in police custody and were also threatened before their statements were recorded Under Section 161 Cr PC and in order to ensure that they do not depart from their statements, the statements of these witnesses were also got recorded before the Magistrate Under Section 164 Cr PC . In this context it is also necessary to mention that the appellant was produced before the Judicial Magistrate, Kushalgarh on 23rd May 1977 for the purpose of recording his confessional statement Under Section 164 Cr PC , but after preliminary examination by the Judicial Magistrate he did not make the confessional statement and during the course of preliminary examination he stated that while in police custody he was beaten by the police and electric current was also passed through his body. This would show that there was anxiety on the part of the Investigating Officer to procure this type of evidence and this is a suspicious circumstance which also surrounds the evidence with regard to extrajudicial confession said to have been made to PWs 2,3,4,5 and 7. Reference may, in this connection, be made to the decision of the Supreme Court in State of Maharshtra v. K.T. Shirde : 1977 CriLJ198 wherein the accused had been produced before the Magistrate for getting his make confessional statement recorded but he refused to make a confessional statement and the Supreme Court held that this was a

suspicious circumstance which surrounds his evidence about extra judicial confession. Having considered the evidence of lalji PW 2 , Galia (PW 3), Badru (PW 4), Mansingh (PW 5) and Kalsingh (PW 7) in the light of the circumstances in which the confession is said to have been made, the manner in which it was made and the persons to whom it was made, we are of the opinion that no reliance can be placed on the evidence of these witnesses and the extra judicial confession said to have been made by the appellant to these witnesses cannot be acted upon.

10. As regards the recovery of the silver 'kara' (article 2) the prosecution had relied upon the information (Ex P 15) given by the appellant about his having sold the 'Kara' belonging to the deceased to Ramnarayan Sunar and the recovery memo (Ex P 5) relating to the recovery of the silver 'Kara' (article 2) from the possession of Ramnarayan (PW 5). The said recovery of the silver Kara' (article 2) from the possession of Ramnarayan is proved by Ramnarayan (PW 9), similarly with regard to the silver 'Murkis' (article 3) there is the information (Ex P 16) given by the appellant a out his having sold the Murkis to one Sunar in Kushalgarh and the recovery of the 'Murkis' (Article 3) from the possession of Bhagwati Prasad (PW 10) vide recovery memo (Ex P 6) and the said recovery is proved by Bhagwati Prasad (PW 10). In view of the evidence aforesaid it must be held that the silver 'Kara' (article 2) and the four silver Murkis (article 3) were recovered from the possess on of Ram Narayan and Bhagwati Prasad prospectively and the said 'Kara and Murkis were delivered to those persons by the appellant. The appellant, in his statement recorded Under Section 313 Cr.PC, has also not disputed this fact. He has, however, claimed that the 'Kara' (article 2) belongs to his brother and the 'Murkis (article 3) belongs to him and that he had sold these articles to those persons. The question which therefore, needs determination is whether 'Kara' (article 2) and the Murkis (Article 3) belonged to the deceased as claimed the prosecution or the appellant and his brother. In order to establish that the 'Kara' and the 'Murkis' belonged to the deceased, the prosecution has examined Smt. Sama (PW 6) the wife of the deceased, and Kalia (PW 8) son of the deceased. Smt. Sama has deposed that the deceased was wearing the 'Kara' and the four 'Murkis' when he left the house and she has identified the said articles as belonging to the deceased Similarly, Kalia (PW 8) has stated that his father was

wearing the 'Kara' as well as the 'Murkis' when he had left and the same were not found on the body when he was called to identify the dead body. He has identified the said articles as belonging to the deceased. A test identification parade for the identification of these articles was conducted by Shri Babulal (PW 12) Munsif and Judicial Magistrate, Kushal-garh on 24th May, 1977 and a memo (Ex P/8) of the proceedings of the said test identification have been prepared by the said witness. From the evidence of Shri Babulal (PW 12) and the memo (ExP.8) it appears that Smt. Sama (PW 6) and Kalia (PW 8) had correctly identified the 'Kara' (Article 2) as belolging to the deceased. But in so far as the 'Murkis' (article 3) are concerned, while Kalia (P W. 8) identified all the 'Murkis' correctly, Smt. Sama (PW. 5) could identify only two 'Murkis', and she could not identify correctly the other two 'Murkis' Shri Doongar Singh has submitted that no reliance can betplaced on the testimony of Smt. Sama (PW 6) and Kalia (PW-8) with regard to the identification of these articles, in view of the statement made by Smt. Sama during the course of cross examination that the said articles were shown to her at the Police Station. Shri Doongarsingh has urged that since Smt. Sama has admitted that the articles were shown to her at the Police Station before she was required to identify them at the identification parade, no reliance should be placed on the testimony of Kalia also. We are unable to agree. It is true that Smt. Sama during the course of cross examination, has stated that the articles had been shown to her once and she has also stated that she had seen them first at the Police Station and thereafter in the court, meaning there by that before she was required to identify the articles at the test identification parade the articles were shown to her at the Police Station. In view of the aforesaid statement of Smt. Sama we are of the opinion that reliance can not be placed on her testimony about her having identified the 'Kara' and two 'Murkis' at the test identification parade which was held as 24th May, 1977. Does the aforesaid admission by Smt. Sama about the articles having been shown to her at the Police Station also affect the testimony of Kalia (PW 8)? In our opinion the said question must be answered in the negative. No suggesion was made to Kalia (PW 8) during the course of cross examination that the articles were shown to him prior to his being required to identify them at the test identification parade. He has made a categorical statement during examination in chief that after the death of his father and before

his examination in the Court, he had seen the ornaments only once. The aforesaid statement made by Kalia during examination in chief was not challenged during the cross examination. In the circumstances we are unable to hold that the articles were shown to Kalia (PW 8) before he was required to identify the same at the test identification parade held on 24th May, 1977. At the test identification parade Kalia had correctly idntified the silver 'Kara' (article 2) as well as the four 'Murkis' (article 3) as belonging to the deceased No infirmity has been pointed out in the aforesaid identification proceedings The appellant has examined his brothers HAKRA (D.W. 1) and Rama (DW 2) to prove that the 'Kara' belongs to Hakra PW 1 and the 'Murkis' (article 3) belong to the appellant. Hakra (DW 1) has claimed that he had purchased the 'Kara' (article 2) from Balaram Suna of Kushalgarh 3 to 4 years back and that it had been seized from his possession by the police. He has denied that the 'Kara' had been sold to Ram Narayan. The evidence of this witness goes contrary to the statement of the appellant Under Section 313 Cr.P.C wherein he has admitted that he had sold the 'kara' to Ramnarayan (PW 9) and it was recovered from his possession. The evidence of Hakra (DW 1) is belied by the testimony of Ram Narayan (PW 9) who has stated that the 'Kara' (Article 2) was sold to him by the appellant and that it was recovered from his possession by the police. Moreover, Bala-ram Sunar, who is said 1o have sold the 'Kara' to Hakra (DW 1) has also not been examined. As regards the 'Murkis' (Article 3) Hakra (DW 1) has deposed that the same were presented to the appellant by his wife's relatives but nobody has been examined amongst their relatives to prove this fact, In the circumstances we are of the opinion that no reliance can be placed on the testimony of Hakra (DW 1) and Rama (DW 2), who are interested in the appellant being his brothers, that the 'Kara' (Article 2) belongs to Hakra (DW 1)and the 'Murkis' (Article 3) belongs to the appellant. In our view, therefore, the evidence of Kalia (PW 8) that the silver 'kara' (article 2) and 'Murkis' (article 3) belonged to the deceased must be accepted and it must be held that the silver 'Kara' (article 2) belonging to the deceased was sold the appellant to Ramnarayan (PW 9) and the 'Murkis' (article 3) belonging to the deceased were sold by the appellant to Bhagwati Prasad (PW 10) and the said 'Kara' and 'Murkis' were recovered from the possession of Ramnarayan and Bhagwati Prasad respectively on the basis of the information given by the appellant.

11. The only other circumstance which remains to be considered is the recovery of the Kulhari (article 1). The case of the prosecution is that on 1st May 1977 the appellant gave an information vide memo (Ex P.15) about his having concealed the Kulhari. In his house and on the basis of the aforesaid information the Kulhari (article 1) was recovered from the house of the appellant vide recovery memo (ExP. 13). According to the prosecution after the recovery of the said Kulhari it was sealed and was kept at Police Station Kushalgarh and from there it was sent to the S.P. Office, Banswara on 5th May, 1977 and from the S.P. Office it was sent to the Forensic Science Laboratory, Rajasthan Jaipur on 10th May, 1977. The report (Ex P. 17) of the Director State Forensic Science Laboratory shows that the Kulhari was stained with blood and the report (Ex P. 18) of the Assisant Serelogist and Chemical Examiner to the Govt. of India shows that it was stained with human blood. In order to prove the recovery of the Kulhari the prosecution has examined Amarji (PW. 14), the attesting witness of the recovery memo (Ex P.13). Shri Doongarsingh has submitted that no reliance ran be placed on the aforesaid recovery in as much as the prosecution has failed to establish that the Kulbari (article 1) was recovered from the exclusive possession of the appellant. In this regard Shri Doongarsingh has pointed out that in the recovery memo (Ex P. 213) it is stated that the recovery was made in the presence of Hakra s/o Jokha who is the brother of the appellant and stays in the house with the appellant. Shri Doongarsingh has also pointed out that the Kulhari was recovered from a place between the wall and the Kelus ( roof slabs ) in the house and that anybody could have placed it there and that it cannot be said that the kulhari was lying concealed and was in exclusive possession of the appellant. Another contention that was urged by Shri Doongarsingh was that after Kulhari had been recovered was kept at police station Kushalgarh upto 5-5-1977 but the prosecution had not adduced any evidence to show that seals of the Kulhari remained in tact during the period from 1st May, 1977 and 5th May, 1977 and that in the absence of such evidence on reliance could be placed on the report of the Chemical examiner well as the Serologist about the presence of blood stains on the Kulhari. In our opinion there is considerable force in the submission of Shri Doongarsingh that the Kulhari cannot be said to have been recovered from the exclusive possession of the appellant in view of the fact that according to the recovery memo (Ex P. 13) the

house from which it was recovered was in the joint possession of the appellant and his brother Hakra and the Kulhari was found to be lying on the space between the wall the 'Kelus' (brick tiles for roofing) which was accessible to all the occupants of the house. It cannot, therefore, be said that the Kulhari (article 1) was recovered from the exclusive possession of the appellant and in our opinion no reliance can be placed on the recovery of the kulhari. Since we are of the opinion that the kulhari cannot be said to have been recovered from the exclusive possession of the appellant we do not consider it necessary to deal with the other submission of Shri Doongarsingh about the failure of the prosecution to prove that the seals of the packet containing the kulhari remained intact during the period from 1-5-1977 to 5-5-1977.

12. Thus out of the circumstances that have been relied upon by the prosecution to establish the guilt of the appellart the only circumstance that can be said to have been established is that the silver Kara (article 2) and the four silver 'Murkis' (article 3) belonging to the deceased were recovered from the possession of Ramnarayan (PW 9) and Bhagwati Prasad (PW 10) to whom the said articles had been sold by the appellant. In our view the aforesaid circumstance by itself cannot lead to the inference that the appellant was the person who had committed the murder of the deceased or had committed the theft of the said articles. All that can be said is that the appellant was receiver of the property belonging to the deceased knowing or having reason to believe that it was stolen property for the reason that after the murder of the deceased the appellant was found in possession of the 'Kara' (article 2) and the 'Murkis' (article 3) belonging to the deceased and he sold the 'Kara' (article 2) to Ramnarayan (PW 9) and the 'Murkis' (article 3) to Bhagwati Prasad (PW 10) and the explanation afforded by the appellant for his possession and sale of these articles has not been found to be true. In our view, therefore, conviction of the appellant for the offence Under Section 302 and 379 IPC cannot be sustained. The appellant is, however, guilty of the offence Under Section 411 IPC.

13. In the result the appeal is partly allowed. The conviction of the appellant for the offence Under Sections 302 and 379 IPC and the sentences imposed on him for the said offences are set aside. Taking into account the valuation of the property

as well as the sentence that was awarded by the Sessions Judge for the offence Under Section 379 IPC to impose a sentence of three months RI for the offence Under Section 411 IPC. The appellant he remained in custody for a period of more than three months. He is, therefore, entitled to be released. He may be released forth with if not required in connection with any other offence.

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